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

AGRICULTURE DECISIONS

AGRICULTURE DECISIONS is an official publication by the Secretary of Agriculture consisting of decisions and orders issued in formal adjudicatory administrative proceedings conducted for the Department under various statues 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.

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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.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

ANDERSHOCK'S FRUITLAND, INC., AND JAMES A. ANDERSHOCK v. UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 96-4238.
Decided August 10, 1998.

(Cite as 151 F.3d 735)

Perishable agricultural commodities — Failure to pay — Sanction — License revocation.

The United States Court of Appeals for the Seventh Circuit held that the Judicial Officer's revocation of the license of a dealer regulated under the Perishable Agricultural Commodities Act (PACA) for repeated failures to pay for produce over an extended period of time, was proper. The court stated that relevance is a matter of substantive policy and that it is within the agency's power to decide that the reasons for a PACA licensee's repeated failures to pay for produce are not relevant to sanction.

United States Court of Appeals
Seventh Circuit

Before FLAUM, EASTERBROOK, and KANNE, Circuit Judges.

EASTERBROOK, Circuit Judge.

Dealers regulated by the Perishable Agricultural Commodities Act must "truly and correctly . . . account and make full payment promptly in respect of any transaction". 7 U.S.C. § 499b(4). The Secretary of Agriculture has defined "promptly" as "within 10 days after the day on which the produce is accepted". 7 C.F.R. § 46.2(aa)(5). Section 8(a) of the PACA, 7 U.S.C. § 499h(a), authorizes the Secretary to revoke the license of any dealer who commits "flagrant or repeated" violations of § 499b. Between May 1994 and May 1995 Andershock's Fruitland failed to pay the agreed purchase prices of 113 lots of agricultural commodities, a total of more than $245,000. It did not finish paying these sums until 1997, almost a year after the administrative hearing, and the bulk of repayment was accomplished by giving Thomas Produce, its biggest creditor, an equity interest in the dealership in lieu of cash. The Secretary revoked its license under the Department's rule that "repeated failures to pay a substantial amount of money over an extended period of time" lead to revocation rather than a lesser sanction. *Caito Produce Co.*, 48 Agric. Dec. 602, 611-13 (1989).

Andershock's Fruitland argued in the administrative proceedings that revocation of its license would be an excessive sanction because nonpayment was attributable to its inability to collect from some of its own customers, rather than to an effort to exploit its suppliers. It contended that for the decade before it encountered cash-flow problems it had been a model dealer. The administrative law judge thought that these were mitigating circumstances and gave Andershock's Fruitland a year from the date of his decision to cover the debt; if it did so, there would be no sanction, but otherwise its license would be revoked. This effectively allowed Andershock's Fruitland to withhold payment for two and a half years (the earliest debts arose in May 1994, and a year from the ALJ's decision was mid-December 1996). The Judicial Officer of the Department of Agriculture, acting as the Secretary's delegate, thought this incompatible with established norms: "The Department's policy is to revoke the PACA license of any Respondent that has not made full payment promptly . . . and fails to make such payments by the time of the hearing." *Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1216 (1996) (collecting authority). In an extensive opinion the Judicial Officer explained that prompt payment in earlier years, good-faith efforts to pay suppliers, and the effects of revocation on employees and suppliers are not relevant to the choice of sanction.

Andershock's Fruitland contends that in reaching this conclusion the Department disregarded the "sanctions policy" of *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991). Before *S.S. Farms Linn County* the Department took the view that any substantial failure to follow the requirements of the PACA led to loss of license. *S.S. Farms Linn County* announced that, when devising sanctions to carry out the statutes under its administration, the Department would consider "all relevant circumstances". Andershock's Fruitland maintains that it proffered evidence in mitigation that the Judicial Officer ignored despite its relevance to the sanction. Because an agency must follow its own rules and doctrines until it changes them explicitly, see *Allentown Mack Sales & Service, Inc. v. NLRB*, ___ U.S. ___, ___-___, 118 S.Ct. 818, 826-29, 139 L.Ed.2d 797 (1998), Andershock's Fruitland insists that it is entitled to reinstatement of the ALJ's decision.

But of course "we consider all relevant evidence" does not mean or imply that "all evidence is relevant." Relevance is a matter of substantive policy. So if in a bank robbery prosecution the defendant said that he was poor and needed the money to feed his family, the court would deem this irrelevant—not because it played no role in the causal chain, but because poverty is not a defense to crime. Poverty *could* be relevant; the Sentencing Guidelines could make the offender's wealth a factor in sentencing; but it would need more than the appearance of the

word "relevant" in a formula to make it so. It would need a substantive decision.

S.S. Farms Linn County establishes a norm for a portfolio of statutes, such as the Packers and Stockyards Act, the Animal Quarantine Act, the Animal Welfare Act (the statute involved in *S.S. Farms Linn County* itself), and the Perishable Agricultural Commodities Act. A rational decisionmaker may conclude that a particular offense (say, extended nonpayment under the PACA) requires a specific response even if a latitudinarian approach suffices for most. So our initial question is whether the Department of Agriculture has in other nonpayment cases deemed "relevant" circumstances such as the failure of a licensee's customers to pay the licensee. The Judicial Officer said that it has not—that whenever a licensee fails to pay a substantial amount of money over an extended period of time, the license will be revoked. Andershock's Fruitland contends that *S.S. Farms Linn County* displaced this rule, of which *Caito Produce* is a leading exemplar. Yet since *S.S. Farms Linn County* the Department has repeatedly applied *Caito Produce* to nonpayment under the PACA. E.g., *Allred's Produce*, 56 Agric. Dec. 1488 (1997); *Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 946-48 (1997); *Lloyd Myers Co.*, 51 Agric. Dec. 747, 764-65 (1992). Several decisions are explicit that the approach *Caito Produce* announces for "no-pay" cases is unaffected by *S.S. Farms Linn County*. E.g., *Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 931-32 (1996); *Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996), *affirmed*, 136 F.3d 89 (2d Cir. 1997); *Moreno Bros.*, 54 Agric. Dec. 1425 (1995); *Potato Sales Co.*, 54 Agric. Dec. 1409 (1995); *Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239 (1995); *Atlantic Produce Co.*, 54 Agric. Dec. 701, 715 (1995). And *Havana Potatoes of New York*, the only judicial decision that has squarely addressed the question whether as a matter of administrative law *S.S. Farms Linn County* requires the Department to abandon *Caito Produce*, has held that it does not.

Caito Produce today acts as an exception to *S.S. Farms Linn County*. Andershock's Fruitland appears to believe that all provisos and exceptions are forbidden as "inconsistent" with the norms that otherwise would apply, but that can't be so. Statutes and opinions (judicial and administrative) teem with reservations, exceptions, provisos, and unless clauses. If these violate the consistency requirement that has been read into the Administrative Procedure Act, the Executive Branch of government might as well go on holiday. But just as the Department could develop the approach of *S.S. Farms Linn County* in common-law fashion, so it may use future cases to develop exceptions to its approach. Exceptions differ from inconsistency, so the only real issue is whether it is within the Department's power to decide that the reasons for nonpayment don't matter if "there have been flagrant or repeated failures to pay a substantial amount of money

over an extended period of time." And *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973), answers that question in the affirmative.

The Department has applied a consistent sanctions policy in PACA nonpayment cases since *S.S. Farms Linn County*. Twenty-three cases in volumes 54, 55, and 56 of the Agriculture Decisions, covering 1995 through 1997, cite both *S.S. Farms Linn County* and *Caito Produce*, and the Judicial Officer regularly draws a distinction between "willful, flagrant and repeated violations" that lead to revocation without further ado and less serious violations for which extenuating circumstances are relevant. Far from disregarding *S.S. Farms Linn County*, the Judicial Officer regularly remarks on the limited application of that opinion to nonpayment cases. The Judicial Officer (and thus the Department) believes that *S.S. Farms Linn County* did not displace *Caito Produce* for the class of "willful, flagrant and repeated violations" under the PACA. This distinction suffuses the Agriculture Decisions. Here's an illustrative passage from *Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 632-33 (1996):

> 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.

This is the Judicial Officer's routine treatment of "repeated failures to pay a substantial amount of money over an extended period of time".

S.S. Farms Linn County was issued by Judicial Officer Donald A. Campbell. The current Judicial Officer, and the author of *Andershock's Fruitland*, is William G. Jenson. But we do not have a situation in which one adjudicator, dissatisfied with a predecessor's decision but unwilling to repudiate it openly, has undermined it by stealth. Of the 13 cases decided before June 1996 that treat both *Caito Produce* and *S.S. Farms Linn County* as authoritative, 10 were issued by Campbell and only one—*Andershock's Fruitland*—by Jenson. Obviously the author of *S.S. Farms Linn County* sees no inconsistency. Nor do we have the sort of drunken--sailor's walk that multi-member bodies may produce. See Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* 257-471 (1997). At any moment there is only one decisionmaker, who can be (and has been) self-consistent.

Glover Livestock reminded the courts of appeals that "mere unevenness in the application of the sanction does not render its application in a particular case `unwarranted in law'." 411 U.S. at 188, 93 S.Ct. 1455. That adjuration may have been forgotten by the judges in two cases on which Andershock's Fruitland relies. See *ABL Produce, Inc. v. Department of Agriculture*, 25 F.3d 641 (8th Cir. 1994); *Conforti v. United States*, 74 F.3d 838 (8th Cir. 1996). In each of these cases the court of appeals substituted its judgment for the Judicial Officer's about the appropriate sanction. But neither *ABL Produce* nor *Conforti* is a nonpayment case under the PACA, so neither case leads us to question the propriety of the Judicial Officer's conclusion that *S.S. Farms Linn County* and *Caito Produce* can live side-by-side, the former as rule and the latter as exception. Appellate courts have on occasion questioned the Department's handling of this reconciliation. Both *Norinsberg Corp. v. Department of Agriculture*, 47 F.3d 1224 (D.C. Cir. 1995), and *Frank Tambone, Inc. v. Department of Agriculture*, 50 F.3d 52 (D.C. Cir. 1995), upbraided the Judicial Officer for applying *Caito Produce* to a nonpayment case without citing *S.S. Farms Linn County*. But both of these opinions enforced the Department's orders nonetheless, thus recognizing—as the second circuit reiterated in *Havana Potatoes of New York*—that the two lines of administrative precedent are compatible. Even if, as the court of appeals thought in *Norinsberg* and *Frank Tambone*, the Department of Agriculture did not do a very good job at the outset in explaining how *S.S. Farms Linn County* applies to no-pay cases, it has done so since. *Hogan Distributing* is one example; the opinion in *Andershock's Fruitland* is another. In *Havana Potatoes of New York* the second

circuit understood the Judicial Officer's opinion in *Andershock's Fruitland* as the definitive statement of the Department's current sanctions policy. And the court suggested that any different approach might itself offend the statute:

> To be sure, isolated failures to pay within ten days or even substantial delays in payments fully cured after a temporary period of financial difficulty might justify mitigation. However, PACA simply cannot be read to allow the continued licensing of a produce buyer in the face of its persistent failures to comply with the statute's terms because of the produce buyer's long-standing financial difficulties. Persistent violations indicate willfulness in the sense that a persistent violator must know when placing orders for produce that some or all will not be paid for in a timely fashion under PACA. Moreover, financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of an ongoing lack of funds.

136 F.3d at 94. We need not endorse this view to conclude that the Department's current position is a rational implementation of the PACA, and no more is required.

Andershock's Fruitland maintains that the Department can have *S.S. Farms Linn County*, or the flagrant-and-repeated-nonpayment policy, but not both. Forcing the Department to elect between the positions (rather than to use a rule-and-exception approach) would be substantive review of the Department's choice of sanctions, meddling forbidden by *Glover Livestock*. Sand in the gears could be a good thing. Most industries get along nicely without a governmental agency that penalizes deadbeats. Probability of payment is just one of many dimensions along which firms compete; businesses willingly put money at risk in exchange for other benefits, such as better service. But the PACA reflects a different approach, which the Department is entitled to implement.

The petition for review is **DENIED**.

STEVEN J. RODGERS v. DEPARTMENT OF AGRICULTURE AND UNITED STATES OF AMERICA.
No. 98-1057.
Decided October 19, 1998.

(Cite as 1998 WL 794851 (D.C. Cir.))

United States Court of Appeals
District of Columbia Circuit.

Before SILBERMAN, HENDERSON, and TATEL, Circuit Judges.

JUDGMENT

PER CURIAM

This petition for review of an order of the United States Department of Agriculture was considered on the briefs, including the submission under Federal Rule of Appellate Procedure 28(j), and the appendix filed by the parties. The court has determined that the issues presented occasion no need for an opinion. See D.C. Cir. Rule 36(b). It is

ORDERED and ADJUDGED that the petition for review of the Decision and Order of the Judicial Officer, United States Department of Agriculture, filed on December 12, 1997, be denied. Substantial evidence in the record supports the determination of the Judicial Officer that petitioner was "responsibly connected" to the licensee. See 7 U.S.C. § 499a(b)(9); *Veg-Mix Inc. v. United States Dep't of Agriculture*, 832 F.2d 601, 611-12 (D.C. Cir. 1987).

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 41.

MICHAEL NORINSBERG v. UNITED STATES DEPARTMENT OF AGRICULTURE AND UNITED STATES OF AMERICA.

No. 98-1065.
Decided December 22, 1998.

(Cite as 162 F.3d 1194 (D.C. Cir.)

Responsibly connected — Actively involved.

The Circuit Court granted petitioner's petition for review of the Judicial Officer's (JO) decision, in which the JO held, based on the JO's determination that petitioner was actively involved in the activities resulting in violations of the PACA, that petitioner was responsibly connected with a Perishable Agricultural Commodities Act (PACA) licensee at the time that the licensee violated the PACA. The Court held that the term "actively involved" in 7 U.S.C. § 499a(b)(9) is not unambiguous; held that the JO did not articulate a standard for determining whether a person is "actively involved"; and remanded the case to the JO to articulate a standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA.

United States Court of Appeals,
District of Columbia Circuit.

Before: WALD, WILLIAMS and HENDERSON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LeCRAFT HENDERSON, *Circuit Judge*

Michael Norinsberg (Michael or petitioner) petitions for review of the determination by the United States Department of Agriculture (Agriculture or Agency) that he was "responsibly connected" with the Norinsberg Corporation (Corporation) at the time it violated the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a *et seq.* (PACA or Act), challenging Agriculture's interpretation of the term "actively involved" as used in 7 U.S.C. § 499a(b)(9). Because Agriculture inadequately articulated the factors relevant in interpreting "actively involved," we grant the petition for review and remand the case for further explanation.

I.

A. Statutory Background

In 1934 the Congress amended PACA to provide that the Agriculture Secretary could with notice revoke the license of any "commission merchant, dealer, or

broker" that employed an individual "who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked within one year of the date prior to such notice." Pub. L. No. 73-159, ch. 120, § 5, 48 Stat. 586.[1] The Congress, however, did not at that time define "responsibly connected." In 1962, however, concerned about "possible confusion" regarding the interpretation of "responsibly connected," *see* Amendments to the Perishable Agricultural Commodities Act, 1930, H.R. Rep. No. 87-1546, at 4 (1962), the Congress amended the Act to define "responsibly connected" to mean "affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association." Pub. L. No. 87-725, § 2, 76 Stat. 673 (codified as amended at 7 U.S.C. § 499a(b)(9)).

Over time courts adopted one of two approaches in interpreting "responsibly connected." Most adopted a per se rule, finding an individual responsibly connected if he fit one of the statutory categories. *See, e.g.*, *Faour v. United States Dep't of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) ("The statute does not contemplate a defense that allows a person to show that even though he fits into one of the three categories, he never had enough actual authority to be considered truly responsibly connected."); *Pupillo v. United States*, 755 F.2d 638, 643-44 (8th Cir. 1985) ("In sum, we find that a per se analysis of Section 499a(9) better accomplishes Congress' objective."); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966) ("Obviously, as interpreted by the Department, the 1962 amendment was intended to establish `per se' exclusionary standards. . . . We agree with the Department."); *see also Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.) (citing per se standard with approval), *cert. denied*, 389 U.S. 835 (1967). On the other hand, this circuit adopted a rebuttable presumption test. *See Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975). In *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), we noted two sets of circumstances in which a person could rebut the presumption that he was responsibly connected if he fell into one of the

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[1]The employment ban that began with the 1934 amendment currently provides in part:

> 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(b)

section 499a(b)(9) categories:

> The first involves cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as "to negate its separate personality." Thus, in *Quinn*, we indicated that an officer might meet this test by showing that the sole stockholder of the corporation "'effectively retained the decision making power in all aspects of corporate decision making'" so that the company was not really a corporation within the meaning of 7 U.S.C. § 499a(9), but rather a sole proprietorship. . . .
>
> The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could establish by proving that he lacked "an actual, significant nexus with the violating company." Where responsibility was not based on the individual's "personal fault" it would have to be based at least on his "failure to 'counteract or obviate the fault of others.'"

Id. at 1201 (citations omitted).

The circuit split existed until 1995 when the Congress amended the definition of responsibly connected to "permit individuals who are responsibly connected . . . the opportunity to demonstrate that they were not responsible for the specific violation," Perishable Agriculture Commodities Act Amendments of 1995, H.R. Rep. No. 104-207, at 11 (1995). The 1995 amendment added the following:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not *actively involved* in the activities resulting in a violation of this chapter *and* that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9) (emphasis added). According to the amendment, Agriculture must first determine if an individual falls within one of the three statutory classifications. If so, the burden shifts to the individual to demonstrate that he was not actively involved and that he was either only a nominal officer or

not an owner of a licensee within the meaning of the statute.[2]

B. Factual Background

Robert Norinsberg, the petitioner's father, became the president of the Corporation in 1974, succeeding the petitioner's grandfather. Between April 1991 and February 1992, the Corporation "failed to make full payment promptly to 10 sellers of the agreed purchase prices of 46 lots of perishable agricultural commodities, in the total amount of $424,913.75." Joint Appendix (JA) 26. Agriculture found that this conduct constituted "willful, flagrant, and repeated violations of section 2(4) of the PACA,"[3] JA 26, and, accordingly, in 1993 it revoked the Corporation's PACA license. On review we denied the Corporation's petition. *Norinsberg Corp. v. Department of Agric.*, 47 F.3d 1224, 1230 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995).

Michael had earlier entered the family business upon his college graduation in 1986. While Robert Norinsberg anticipated that Michael would eventually succeed him, Michael started as an assistant to the Corporation's sales manager and earned between $25,000 and $27,000 annually. Also in 1986, the Corporation issued Michael 150 shares of common stock, which represented 15 per cent of the outstanding shares of common stock. Robert Norinsberg retained the remaining common stock (850 shares).[4] Eventually Robert Norinsberg appointed Michael secretary and treasurer of the Corporation for "administrative convenience" because he "wanted corporate checks and other documents signed with the Norinsberg name and [Michael] was available." JA 50. Nevertheless Michael's salary remained at the $25-27,000 level. Between May 1991 and February 1992, Michael signed nine of 929 checks from one account and seven of 267 from a second account. Twelve checks, totaling $51,369.60, were payable to Robert

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[2]A licensee includes any "individual[], partnership[], corporation[] [or] association[]," 7 U.S.C. § 499a(b)(1), "carrying on the business of a commission merchant, dealer, or broker," *id.* § 499c(a).

[3]Section 2(4) of PACA makes it unlawful to "fail or refuse truly and correctly to make full payment promptly." 7 U.S.C. § 499b(4). The applicable regulations define "promptly" to mean "within 10 days after the day on which the produce is accepted." 7 C.F.R. § 46.2(aa)(5). The violation must be "willful" to support revocation. 5 U.S.C. § 558(c).

[4]Of the 4,035 shares of preferred stock issued by the Corporation, Michael's grandfather's estate owned 2,535 shares and Susan Norinsberg, Michael's grandmother, owned the remaining 1,500 shares. When all of the stock was tallied, then, Michael owned less than three per cent. *In re Norinsberg*, PACA-APP Docket No.96-0009 (Decision and Order Oct. 21, 1997), JA 27.

Norinsberg; one check for $5,359 was payable to Susan Norinsberg; one check for $3,000 was payable to Robert Norinsberg's housekeeper; and two checks totaling $115,966.27 were issued to the Shoreham Cooperative, a company partially owned by Robert Norinsberg, for produce sold to the Corporation. JA 31. At the time he signed the checks, Michael admitted that he knew that the Corporation was not making full and prompt payment to its suppliers. Although Michael also admitted that signing the checks troubled him, he did not refuse to sign. JA 235.

Using Michael's position as an officer and shareholder as the basis for his determination, Agriculture's PACA Branch Chief, Fruit and Vegetable Division (Branch Chief), issued an initial determination that Michael was responsibly connected with the Corporation at the time it violated PACA. JA 66-67. Michael sought review by an administrative law judge (ALJ). After a hearing, the ALJ, applying the amended definition of responsibly connected, concluded that the Congress had adopted this circuit's rebuttable presumption test and under that test Michael was not responsibly connected because, in his view, both the statute and this circuit contemplated "active participation at a managerial level in decision making activities that resulted in the violation." *In re Norinsberg*, PACA-APP Docket No. 96-0009 (Decision and Order May 6, 1998), JA 64.[5] The ALJ therefore reversed the Branch Chief s finding that Michael was responsibly connected to the Corporation.

The Branch Chief appealed the ALJ's determination to a judicial officer (JO), arguing that the ALJ had misapplied this circuit's test. The JO disagreed with the ALJ, finding that neither the statute nor the relevant legislative history contemplated managerial decision making. JA 43. In doing so, the JO expressly concluded that the amendment did not codify this circuit's law. JA 42-43.[6] The

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[5]The ALJ concluded that Michael had established both that he was not actively involved and that he was only a nominal officer.

[6]The JO stated:

> While [the 1995 amendment] generally incorporated the rebuttable presumption standard followed by the United States Court of Appeals for the District of Columbia circuit into the definition of responsibly connected . . . District of Columbia circuit case law does not premise responsible connection with a PACA violator on active involvement . . . Instead the United States Court of Appeals for the District of Columbia cases decided prior to the enactment of [the 1995 amendment] premise responsible connection with a PACA violator upon personal fault or the failure to counteract or obviate the fault of others. Thus, I do not rely on District of Columbia circuit case law regarding the issue of Petitioner's active involvement.

JA 40-41.

JO first noted that the checks Michael signed had already been filled out when they were presented to him for signature and that he signed the checks only when "Robert M. Norinsberg was unavailable and at Robert M. Norinsberg's direction." JA 42. The JO also noted that the "Petitioner knew at the time that he signed [the checks] that The Norinsberg Corporation was not making full payment promptly to produce creditors, and Petitioner was troubled by his signing the checks." *Id.* Without further elaboration, the JO concluded that Michael was "actively involved" within the meaning of the statute because "the act of signing checks is active involvement in an activity, and in this instance, the activity resulted in The Norinsberg Corporation's violations of PACA." JA 44. As Michael conceded that he was an officer, albeit a nominal one, the JO found Michael responsibly connected with the Corporation because, as an "actively involved" officer, Michael had failed to demonstrate by a preponderance of the evidence that he was not responsibly connected with the Corporation at the time it violated PACA.

Michael petitioned for reconsideration, arguing that the JO had retroactively applied the amended statute to him. The JO denied the petition on the ground that Michael had failed to object timely. *In re Norinsberg*, PACA-APP Docket No. 96-0009 (Order Denying Petition for Reconsideration Jan. 26, 1998), JA 15. Michael then petitioned this court for review.

II.

We review the Agency's interpretation of PACA under the familiar framework described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, we determine if "Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If it has, our inquiry is at an end. "If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's [interpretation] is based on a permissible construction of the statute." Id. at 943. We cannot, however, "exercise [our] duty of review unless [we] are advised of the considerations underlying the action under review," *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). In cases where "'we are at a loss to know what kind of standard [the agency] is applying or how it is applying that standard to this record,'" *Checkosky v. SEC (Checkosky II)*, 139 F.3d 221, 225 (D.C. Cir. 1998) (quoting *United Food & Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1435-36 (D.C. Cir. 1989)), but where the "agency's failure to state its reasoning or to adopt an intelligible decisional standard is [not] so glaring that we can declare with confidence that the agency" erred, *Checkosky v. SEC (Checkosky I)*, 23 F.3d 452, 463 (D.C. Cir. 1993) (Silberman, J., concurring), *appeal after*

remand, 139 F.3d 221 (D.C. Cir. 1998), the proper course is to remand to the agency for it to enunciate the standard. *See, e.g.*, *id.* at 462 (Silberman, J., concurring) ("Absent such clarity, the proper course, one that we follow today, is to remand so as to afford the agency an opportunity to set forth its view in a manner that would permit reasoned judicial review."); *United Food & Commercial Workers*, 880 F.2d at 1436 (remanding because "the decision in its current form fails to reflect the reasoned decisionmaking required of administrative agencies"), *appeal after remand*, 1 F.3d 24 (D.C. Cir. 1993), *and cert. granted*, 511 U.S. 1016, and *cert. dismissed*, 511 U.S. 1016. We believe that this case requires such treatment.

As often happens, each party contends that the Congress has spoken and resolved the question in its favor. *See, e.g.*, *Alabama Power Co. v. FERC*, 160 F.3d 7, 1998 WL 785622 at *4 (D.C. Cir. Nov.13, 1998). Contrary to Agriculture's position, however, the term "actively involved" does not have an unambiguous meaning. The lack of clarity is amply demonstrated not only by the agency officials' conflicting views on whether or not "actively involved" requires "managerial decision making," JA 43, but also by their lack of agreement over whether the amendment codified this circuit's precedent of "personal fault" or even what our precedent required. On the other hand the petitioner is wrong in asserting that the Congress "clearly" intended to adopt our precedent as set forth in our opinions in *Quinn*, 510 F.2d at 752-56, *Minotto v. United States Dep't of Agriculture*, 711 F.2d 406, 408-09 (D.C. Cir. 1983), and *Bell*, 39 F.3d at 1201-05. First, the statutory language does not expressly so state. While we agree with the petitioner that his burden of demonstrating that he "either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners" mirrors part of our test, *see Maldonado v. Department of Agric.*, 154 F.3d 1086, 1088 (9th Cir. 1998), it is far from clear that, by using the term "actively involved," the Congress also intended to incorporate our "personal fault" requirement.[7] Had the Congress intended to do so, it could have done so expressly. *Cf. Oneida Tribe of Indians v. Wisconsin*, 951 F.2d 757, 762 (7th Cir. 1991) (noting that Congress's different wording from past indicates intent that new word has different meaning). Nor does the limited legislative history address the issue. Congressional desire that "individuals who

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[7]The personal fault factor requires an "'actual and significant nexus with the violating company,'" *Bell*, 39 F.3d at 1201 (quoting *Minotto*, 711 F.2d at 409), to support a "responsibly connected" determination. "Where responsibility was not based on the individual's 'personal fault,'" it must "be based at least on his 'failure to "counteract or obviate the fault of others."'" *Id.* (citations omitted)

are not responsibly connected" have "the opportunity to demonstrate that they were not responsible for the specific violation," H.R. Rep. No. 104-207, at 11, does not necessarily demonstrate such an intent. As the Congress has not spoken to the precise question, we must take the second *Chevron* step and determine if Agriculture's interpretation is reasonable.

The JO's opinion provides virtually no standard for us to examine. Agriculture's argument that each case requires a fact-specific determination does not excuse its failure to provide any standard. *See Philadelphia Gas Works v. FERC*, 989 F.2d 1246, 1251 (D.C. Cir. 1993) ("For [the agency] to utter the words 'unique facts and circumstances' and 'equity' as it did here, as a wand waved over undifferentiated porridge of facts, leaves regulated parties and a reviewing court completely in the dark."). The JO makes only two points in interpreting "actively involved." We know only that "active participation in managerial decision making" is not required and that writing checks standing alone *may* be sufficient.[8] JA 42-44. At oral argument, Agriculture suggested that, while signing checks was sufficient, mailing them was not. The JO, however, provides no principled way to distinguish the two. Both could amount to "active involvement in an activity" that resulted in the violation. JA 44. Moreover, the JO's opinion does not indicate clearly whether a scienter requirement exists. For example, its language that Michael signed the checks and was therefore actively involved does not necessarily suggest a scienter requirement. In another part of his opinion, however, he indicates that an individual must *knowingly* participate in the PACA violation to be responsibly connected. For example, the JO specifically notes Michael's knowledge of the Corporation's financial problems and the fact that Michael was troubled by signing the checks--both irrelevant if uninformed check signing alone constitutes active involvement.[9] JA 42.

As we are unable to determine what, if any, standard the JO applied, we cannot determine if Agriculture's interpretation is a permissible one. Accordingly, we must remand to Agriculture to articulate a standard we can review in an informed

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[8]The Ninth Circuit has held that check writing alone is insufficient to constitute active involvement. *Maldonado*, 154 F.3d at 1088.

[9] Petitioner *knew* at the time that he signed these 14 checks that The Norinsberg Corporation was not making full payment promptly to produce creditors. and Petitioner was troubled by his signing checks made payable to Robert M. Norinsberg . . .

JA 42 (emphasis added)

manner. In doing so, we express no opinion on the merits of the case.[10] While retroactivity issues may arise depending on whether, and how, the enunciated standard may differ from our precedent, any retroactivity analysis is premature because we do not know now what standard Agriculture will adopt. This issue is properly addressed, if at all, on remand in accordance with the holdings in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994), and *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997). We therefore grant the petition for review and remand to the Agency for it to explain its decision.

So ordered.

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[10]We can, and do, however, uphold Agriculture's conclusion that Michael was only a nominal officer.

DEPARTMENTAL DECISIONS

In re: LAWRENCE D. SALINS.
PACA-APP Docket No. 96-0010.
Decision and Order filed February 26, 1998.

Responsibly connected — Active involvement in violations — Officer of company — Rebuttable presumption standard.

The Judicial Officer reversed Judge Hunt's (ALJ) decision that Petitioner had rebutted by a preponderance of the evidence the presumption that, as an officer of Sol Salins, Inc., Petitioner was responsibly connected with Sol Salins, Inc., during the time that Sol Salins, Inc., violated the PACA. The definition of *responsibly connected* in section 1(b)(9) of PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)) establishes a rebuttable presumption, which provides as pertinent in the proceeding that: Petitioner, even though a corporate officer, is not deemed responsibly connected if Petitioner proves by a preponderance of the evidence *both* (1) that Petitioner was not actively involved in the activities resulting in Sol Salins, Inc.'s violations *and* (2) that Petitioner either was only nominally an officer of Sol Salins, Inc., or was not an owner of Sol Salins, Inc., which was the alter ego of its owners. However, Respondent proved by a preponderance of the evidence that Petitioner was actively involved in corporate decision making, which resulted in Sol Salins, Inc.'s violations, *e.g.*, that Petitioner attended and participated in weekly corporate staff meetings as secretary-treasurer; that Petitioner handled payroll, taxes, and financial documents; that Petitioner was the only corporate signatory and issued large numbers of checks for large amounts every month; and that Petitioner decided which suppliers to pay in order to keep produce coming to stay in business. Respondent also proved that Petitioner was not merely a nominal officer of Sol Salins, Inc., because of Petitioner's access to corporate records; knowledge of Sol Salins, Inc.'s financial troubles; familiarity and close relations with unpaid creditors; check writing responsibilities; responsibility for signing corporate documents; and salary. Although Petitioner did not argue that Petitioner was not an owner of Sol Salins, Inc., which was the alter ego of its owners, the argument would have failed because, even though Petitioner was not an owner, there was no evidence that Sol Salins, Inc., was the alter ego of its owners. Petitioner thus having failed by a preponderance of the evidence to rebut the presumption, as an officer of a violating licensee, Petitioner is deemed to be responsibly connected to Sol Salins, Inc.

Timothy A. Morris, for Respondent.
Petitioner, Pro se.
Initial decision issued by James W. Hunt, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

I. INTRODUCTION

Lawrence D. Salins [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Petition For Review on September 11, 1996.

The Petition challenges the August 15, 1996, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was *responsibly connected* with Sol Salins, Inc., during the period of time that Sol Salins, Inc., violated the PACA,[1] in that Petitioner was secretary and treasurer of Sol Salins, Inc., and active in the business activities of Sol Salins, Inc.

On June 3, 1997, Administrative Law Judge James W. Hunt [hereinafter ALJ] conducted an oral hearing in Washington, D.C. Mr. Steven P. McCarron, Esq., of McCarron & Associates, Washington, D.C., represented Petitioner.[2] Mr. Timothy A. Morris, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On August 1, 1997, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law, and Respondent filed Respondent's Proposed Findings of Fact, Conclusions, and Order [hereinafter Respondent's Brief], respectively.

On September 26, 1997, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ reversed "[t]he September 20, 1996, determination by Respondent, Chief, PACA Branch, Fruit and Vegetable Division, that Lawrence D. Salins was responsibly connected with Sol Salins, Inc. . . ." (Initial Decision and Order at 8.) On October 28, 1997, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in adjudication proceedings which are subject to the

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[1]During the period September 1995 through March 1996, Sol Salins, Inc., purchased, received, and accepted in interstate or foreign commerce 784 lots of perishable agricultural commodities from 107 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of $1,198,992.31. Sol Salins, Inc.'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)). *See In re Sol Salins, Inc.*, 56 Agric. Dec. 1797, 1798-99 (ALJ's June 3, 1997, Bench Decision and Order, filed June 25, 1997).

[2]On December 22, 1997, Mr. Stephen P. McCarron of McCarron & Associates filed Notice of Withdrawal of Appearance stating "[p]lease note that Stephen P. McCarron and McCarron & Associates hereby withdraw as attorney for petitioner in the above-captioned case." The caption of the case in the Notice of Withdrawal of Appearance is "In the matter of Lawrence D. Salins, PACA RC 96-1017." The hearing clerk has no case captioned "In the matter of Lawrence D. Salins, PACA RC 96-1017," and after Mr. McCarron filed the Notice of Withdrawal of Appearance, the hearing clerk placed the Notice of Withdrawal of Appearance in the record of this proceeding. On February 24, 1998, I contacted Mr. McCarron, and Mr. McCarron confirmed that he intended that the Notice of Withdrawal of Appearance operate as a withdrawal of appearance on behalf of Petitioner in this proceeding.

Rules of Practice (7 C.F.R. § 2.35).[3] On December 16, 1997, Petitioner filed Response to Respondent's Appeal Petition, and on December 17, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the evidence in the record, I reverse the ALJ's conclusion that Petitioner was not responsibly connected to Sol Salins, Inc. However, my disagreement is with the ALJ's interpretation of the facts and not, for the most part, with the analysis and the facts found by the ALJ. Therefore, the Initial Decision and Order is modified and adopted as the final Decision and Order, with additions or changes shown by brackets, deletions shown by dots, and minor editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's discussion.

Petitioner's exhibits are designated by the letters "PX"; Respondent's exhibits are designated by the letters "RX"; and transcript references are designated by "Tr."

II. PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. *Short title and definitions*

. . . .

(b) Definitions

For purposes of this chapter:

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

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

7 U.S.C. § 499a(b)(9) (Supp. I 1995).

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

A. Preliminary Statement

In this proceeding, Petitioner, Lawrence D. Salins, challenges the determination of Respondent, Chief, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, that, under section 1[(b)](9) of the PACA (7 U.S.C. § 499a[(b)](9)), Petitioner was "responsibly connected" as an officer with Sol Salins, Inc., a company that was found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) [*See In re Sol Salins, Inc.*, 56 Agric. Dec. 1797, 1798-99 (ALJ's June 3, 1997, Bench Decision and Order, filed June 25, 1997).]

. . . .

B. Statement of the Facts

Sol Salins, Inc., founded in 1936, was a PACA-licensed wholesale produce dealer. In 1990, Lee and Leonard Salins, grandsons of the founder, took over the daily operation of the company and did the buying and selling. However, in 1992, their uncle, Richard Salins, a retired part-owner of the company, returned to the business to control its overall operations. Richard's other two nephews, Lawrence Salins and Lane Salins, also worked for the company.

Lawrence Salins, the Petitioner in this proceeding, had started working for the company as a clerk in 1981 at the age of 18. [Petitioner's] job included writing

invoices, cashiering, routing trucks, and preparing loads for delivery. [Petitioner] was later assigned accounts payable and receivable and in 1992 [Petitioner] was given the responsibility for processing the company's payroll. These duties consisted of matching purchase orders with invoices from produce suppliers and paying them for the merchandise. [Petitioner,] however, had . . . discretion as to which suppliers were paid. The company's policy was to pay according to the age of the invoice and [Petitioner] [w]ould make a payment only after receiving the express approval of the buyer who had made the purchase[, in that the buyer would check to see that the invoice had the quantity and quality that the buyer was promised at the price agreed with the supplier]. [Petitioner] would then make the payment out of the company's operations account. [Petitioner] had no control over or access to the company's investment or pension accounts which were under the direct control of [Petitioner's] uncle, Richard, who spent little time at the company but made all the major decisions.

In 1988, [Petitioner] was made assistant treasurer when [Petitioner], together with three others, were given check signing authority on the operations account. [Petitioner] moved up to treasurer about 1993, but with no additional duties, and in January 1995, [Petitioner] was designated the company's secretary when his brother, Lee, left the company. [Petitioner] signed various reports for the company relating to such matters as unemployment compensation, tax withholding, income tax, PACA licensing, and answers to reparation complaints. [Petitioner] signed some reports because [Petitioner] was responsible for the payroll, while [Petitioner] signed others as the secretary at the direction of the company's accountant or attorney who had prepared the forms and reports. [Petitioner's] salary was $89,000 a year, but his compensation in 1994 was $124,683, which included a bonus and vacation pay for 1993. [Petitioner] owned no stock in the company and was not a director. [Petitioner] never bought or sold produce . . . [but was actively involved in] business or policy decisions for the company.

In January 1995, Lee and Leonard Salins left the company. Two new buyers, Chris Horner and Rick Thomas, were hired and, as before, . . . [the buyers approved the quantity and quality on] invoices. In September 1995, Richard Salins hired Jerry Cristiano as a general manager to run the company's day-to-day operations. Cristiano consulted with Richard about running the business. [Petitioner] had no authority over Cristiano.

[Petitioner] knew from seeing the company's monthly financial statements that the company was having problems with its cash flow. The statements were prepared by the company's accountant from information provided by an employee named "Sophia." Sophia, who reported to the accountant and Richard Salins, maintained the company's general ledger and recorded its cash receipts.

[Petitioner] testified that [Petitioner] attended weekly "staff" meetings with [Petitioner's] uncle, Richard, at the office of the company's lawyer, Howard Silberberg. However, Cristiano, the general manager, did not name [Petitioner] as one of those present at these meetings.

> [BY MR. CRISTIANO:]
>
> At the meeting was [sic] the CPA, D.H. Scarborough, Howard Silberberg, Dicky [Richard Salins], and myself, and go [sic] over different operational problems that were happening, some of the things that I thought they should do, and get directions from where he wanted to go.
>
> [BY MR. McCARRON:]
>
> Q. Now, during this period of time, what was Larry [Lawrence Salins] doing?
>
> A. Really, accounts payable, accounts receivable, signing the checks. He handled the money.
>
> Q. Did he have any control over what you were doing and over running the business?
>
> A. No, he never had any time.
>
> Q. Did his role change at all during the period of time you were there?
>
> A. No.

Tr. 65.

Cristiano said [Petitioner] did not make any management decisions for the company and that when a line of credit was being considered he asked [Petitioner] for the names of the banks the company dealt with but that [Petitioner] had nothing to do with the line of credit itself. (Tr. 65[, 73].)

[Petitioner] testified that "when requested" [Petitioner] offered information and suggestions at the meetings. [Petitioner] said that "major problems or issues" were brought to Richard Salins' attention and that "he would tell us what he thought we should do, or Howard [Silberberg] would interject his opinion." [Petitioner] said that Richard made the decision to continue buying produce even though the

company lacked the finances to pay for them. (Tr. 50, 97, 104.)

Richard transferred some money from the investment account to the operations account to help pay the suppliers. [Petitioner] said [Petitioner] believed there was a "large amount of money" in the investment account, but that [Petitioner] did not have access to the account and that its records were kept by Sophia and the accountant (Tr. 98).

In 1995 and 1996, [Petitioner] began receiving calls from unpaid sellers requesting payment. One of these suppliers, Kevin Keany, said he called [Petitioner] because he had been dealing with members of the Salins family for years and that [Petitioner] was the only member of the family he knew who was still at the company (Tr. 108). On some occasions [Petitioner] would pay a supplier "on the spot" in order to obtain produce when "the buyer would come to me, Sol Salins' buyer, and say, we need to pay such and such. Can't we get a check out today? . . . It depends on the circumstance. It depends on the money that we received that day. Many times we were going to do a check run on the computer later in the afternoon and this would be earlier in the day, and the person would need a check number. So, in order to give them a check number, we would have to write the check by hand." (Tr. 59-60.) "[B]asically, if the money was in the account, I could write the check." (Tr. 50.)

Sol Salins, Inc., reached the point where it could not pay its suppliers and it went out of business in March 1996. Its failure to pay its creditors resulted in the order finding that it violated the PACA. Respondent also determined that [Petitioner], as an officer of the company, was responsibly connected to Sol Salins, Inc. [Petitioner] denies that he was responsibly connected.

. . . .

C. **Discussion**

As the company's secretary-treasurer, [Petitioner] was an officer of Sol Salins, Inc. However, [Petitioner] contends that he was only nominally an officer and was not actively involved in the activities resulting in a violation of the PACA.

A dictionary definition of "nominal" is "existing in name only and not in reality." (Webster's II, New Riverside University Dictionary [798] (1984). . . . [N]amed as a corporate officer, [Petitioner] had . . . [some] say in the operation of the company and he had limited authority. [Petitioner] was not involved in the company's day-to-day management except for paying the suppliers when a buyer approved and when there were sufficient funds in the operations account to make a payment. Although [Petitioner] maintained the operations account, and could write checks on that account, [Petitioner] was not entrusted with the company's

cash receipts, general ledger, or its investment and pension accounts. [Petitioner] was not involved in seeking a line of credit . . . [but had] discretion in deciding whether to pay creditors. [Petitioner] signed forms and reports for the corporation . . . [which] had been prepared by the company's accountant and lawyer. . . . I find that his actions as a corporate officer . . . [showed active involvement in the activities of the company resulting in the payment violations and] that he was . . . [more than] the nominal secretary-treasurer of the company.

[Petitioner's] involvement with the company's day-to-day operations was likewise limited. [Petitioner] was well paid[, earning $124,683 in 1994 and $89,000 in 1995,] but [claimed that Petitioner] made no policy or business decisions. [However, Petitioner made] . . . decisions concerning produce purchases, which is the type of activity that could directly lead to a company's violation of the PACA (i.e., making purchases when there were insufficient funds to pay for them). [Petitioner] signed checks to pay suppliers, . . . [had] . . . discretion, and could make a payment . . . if there were sufficient funds in the operations account. There is no evidence that [Petitioner] failed to make any authorized payment when funds were available to [Petitioner] to make payments. [Petitioner] had no control over the company's investment account or other assets, which might have helped pay the creditors. [Petitioner] also had no supervision over the activities of the general manager who ran the company on a day-to-day basis or over those who purchased produce.

[Petitioner] was present at meetings with [Petitioner's] uncle, the general manager, and the company's accountant and lawyer. However, [Petitioner] lacked the clout of a corporate director or shareholder . . . [but could] influence . . . decisions at these meetings. . . . Richard Salins . . . made all the major decisions for the business, including the critical decision to continue buying produce when Richard knew from his accountant's financial statements that the company lacked the money to pay for its purchases, a decision that directly resulted in the company's violation of the PACA. [Petitioner was actively involved, as well, in deciding which creditors would get paid and which creditors would not be paid.]

Considering all these circumstances, . . . [Petitioner] was . . . actively involved in the activities resulting in the violation of the PACA by Sol Salins, Inc.

D. **Findings of Fact**

1. Petitioner, Lawrence D. Salins, was secretary-treasurer of Sol Salins, Inc.
2. Petitioner's duties and responsibilities as secretary-treasurer were significant. . . .
3. Petitioner was . . . [much more than just] nominally an officer of Sol Salins,

Inc.

4. Petitioner was . . . actively involved in the activities resulting in the violation of the PACA by Sol Salins, Inc.

E. Conclusion of Law

Petitioner, Lawrence D. Salins, was . . . responsibly connected with Sol Salins, Inc., [as defined in 7 U.S.C. § 499a(b)(9) (Supp. I 1995)].

IV. ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

A. Background

A review of a *responsibly connected* proceeding necessarily entails an understanding of changes in the PACA. As originally enacted in 1930, section 8 of the PACA empowered the Secretary of Agriculture to suspend or revoke the PACA license of any commission merchant, dealer, or broker who violated section 2 of the PACA, but the Secretary of Agriculture had no authority to impose any employment restrictions on individuals who were responsibly connected with the violator and actively involved in the activities resulting in the violation.[4] Amendments to the PACA in 1934 empowered the Secretary of Agriculture to revoke the PACA license of any commission merchant, dealer, or broker, who, after notice, continued to employ an individual who had been *responsibly connected* with any firm, partnership, association, or corporation whose license had been revoked,[5] and the 1956 amendments to the PACA authorized the

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[4]The Perishable Agricultural Commodities Act, 1930, Pub. L. No. 325, ch. 436, § 8, 46 Stat. 535, provides:

> Sec. 8. Whenever the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, he 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 a flagrant or repeated violation of such provisions, the Secretary may, by order, revoke the license of the offender.

[5]The Act of April 13, 1934, Pub. L. No. 159, ch. 120, § 5, 48 Stat. 586, provides:

> Sec. 5. That a new paragraph lettered (c) and reading as follows is hereby added to section 4 of the Perishable Agricultural Commodities Act, 1930:
>
> "(c) The Secretary may, after thirty days' notice and an opportunity for a hearing,

(continued...)

Secretary of Agriculture to suspend or revoke the PACA license of any commission merchant, dealer, or broker who, after notice, continued to employ an individual who had been *responsibly connected* with any firm, partnership, association, or corporation whose license had been suspended or revoked.[6] However, until 1962, the PACA did not define the term *responsibly connected.* In order to give the term *responsibly connected* "specific meaning" and avoid "possible confusion as to interpretations,"[7] section 1 of the PACA (7 U.S.C. § 499a) was amended by adding a definition of the term *responsibly connected* to read as follows:

> The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the

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[5](...continued)
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 within one year prior to the date of such notice. 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 or other satisfactory assurance that its business will be conducted in accordance with the provisions of [the PACA.]"

[6]The Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 5, 70 Stat. 727, provides:

Sec. 5. Section 8(b) of [the PACA] (7 U.S.C., sec. 499h(b)) is amended to read as follows:

"(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 [the PACA.]"

[7]H.R. Rep. No. 87-1546, at 4 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2751; S. Rep. No. 87-750, at 2 (1961).

> outstanding stock of a corporation or association[.]

Act of October 1, 1962, Pub. L. No. 87-725, § 2, 76 Stat. 673.

The applicable House of Representatives Report and Senate Report each state that the definition of the term *responsibly connected* "[i]mprove[s] and clarif[ies] provisions dealing with the eligibility for license, or for employment by licensees, of persons guilty of specified acts and persons affiliated with them[.]"[8] Further, both reports state that:

> Responsible connection by the applicant (or one of the applicant's officers, directors, or members, or a holder of more than 10 percent of the applicant's stock) with a person guilty of the specified conduct would require a refusal of a license, without showing (as is now required) that the applicant, officer, director, or member was responsible in whole or in part for such conduct.

H.R. Rep. No. 87-1546, at 6 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2753; S. Rep. No. 87-750, at 5 (1961).

Until 1975, an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was considered *per se* responsibly connected and subject to the licensing and employment restrictions in the PACA.

The *per se* standard was first enunciated in *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966). The court held that the 1962 amendment to the PACA adding a definition of the term *responsibly connected* was intended to establish a *per se* exclusionary standard whereby an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation would be subject to the Secretary of Agriculture's authority to prohibit employment under section 8(b) of the PACA (7 U.S.C. § 499h(b)) and that no defense, such as lack of real authority within the corporation or partnership, would be available to individuals who fell within the definition of the term *responsibly connected.*

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[8]H.R. Rep. No. 87-1546, at 2 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2750; S. Rep. No. 87-750, at 1 (1961).

This *per se* exclusionary rule was followed in other circuits.[9] However, in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), a court determined, for the first time, that the presumption that an individual who was a partner in a partnership, or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was responsibly connected is a rebuttable presumption. The court found that an individual who held the title of vice president was not *responsibly connected* to a corporation that had committed flagrant and repeated violations of the PACA because he neither participated in the management of the corporation nor had the power to participate.

The United States Court of Appeals for the District of Columbia Circuit continued to adhere to the doctrine that a partner in a partnership, or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation could rebut the presumption that he or she was *responsibly connected* as defined in section 1 of the PACA (7 U.S.C. § 499a).[10]

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[9]*See Conforti v. United States*, 74 F.3d 838, 841 (8th Cir.) (stating that the court applies a *per se* rule to the definition of the term *responsibly connected* in section 1 of the PACA; actual responsibilities or interests are irrelevant to the question of responsible connection to a PACA violator), *cert. denied*, 117 S. Ct. 49 (1996); *Hawkins v. Agricultural Marketing Service*, 10 F.3d 1125, 1130 (5th Cir. 1993) (holding that the definition of *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) commands the application of a *per se* rule); *Faour v. United States Dep't of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) (holding that if a person is an officer, director, or holds over 10 per centum of the outstanding stock of a corporation that has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b, that person is considered *responsibly connected* and subject to sanctions under the PACA; PACA does not contemplate a defense that allows a person to show that even though he fits into one of the three categories, he never had enough actual authority to be considered truly responsibly connected); *Pupillo v. United States*, 755 F.2d 638, 644 (8th Cir. 1985) (stating that a *per se* analysis of the definition of *responsibly connected* in section 1 of the PACA accomplishes Congress' objective of providing a clear definition of *responsibly connected*, and that Congress did not intend to require proof of personal fault to penalize a person associated with a PACA violator). *See also Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.) (citing with approval the *per se* approach taken by the court in *Birkenfield*), *cert. denied*, 389 U.S. 835 (1967).

[10]*See Hart v. Department of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997) (stating that this court has held that the presumption that an officer, director, or holder of more than 10 per centum of the stock of a corporation is responsibly connected is a rebuttable presumption); *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating that this circuit has consistently read 7 U.S.C. § 499a and 499h(b) as establishing only a rebuttable presumption that an officer, director, or major shareholder of a PACA violator is responsibly connected with the violator; and that a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or major shareholder if: (1) the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality; or (2) the petitioner proves that at the time of the violations he was only a nominal officer, director, or shareholder); *Siegel v. Lyng*, 851 F.2d 412, 416 (D.C. Cir. 1988) (stating that, as construed by this court, characterization as *responsibly connected*, as defined in the PACA, is

(continued...)

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended by adding a rebuttable presumption standard which explicitly allows an individual who is a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation to rebut his or her status as responsibly connected with a violator. Specifically, section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter PACAA-1995] amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)) by adding a sentence to the definition, which reads, as follows:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [the PACA] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The applicable House of Representatives Report states that purpose of the 1995 amendment to the definition of *responsibly connected* is "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation."[11] The House Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would "allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or

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[10](...continued)
rebuttable, not absolute); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating that the definition of the term *responsibly connected* in section 1 of the PACA establishes only a rebuttable presumption that an officer, director, or large shareholder of a PACA violator is responsibly connected); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1413 (D.C. Cir. 1986) (stating that PACA's provisions on responsible connection establish, not an incontrovertible rule, but rather a rebuttable presumption); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983) (stating that the court had established in *Quinn* that being a director, officer, or 10 percent stockholder is only prima facie evidence that one is *responsibly connected* to a company that has violated the PACA and that a finding of liability under 7 U.S.C. § 499h must be premised upon personal fault or failure to counteract or obviate the fault of others).

[11]H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

shareholders and that they were uninvolved in the violation."[12]

In the proceeding, *sub judice*, Petitioner does not deny that he was the secretary-treasurer of Sol Salins, Inc., at all times material to this proceeding. Therefore, as an officer of Sol Salins, Inc., Petitioner falls within the statutory categories of responsibly connected. Thus, Petitioner is deemed to be responsibly connected, unless Petitioner demonstrates by a preponderance of the evidence *both* that Petitioner was not actively involved in the activities resulting in a violation of the PACA *and* either that Petitioner was *only nominally an officer* of Sol Salins, Inc., or that Petitioner was *not an owner* of Sol Salins Inc., which was the alter ego of its owners.

The ALJ held that Petitioner carried his burden of proof by the requisite preponderance of the evidence; that Petitioner showed that Petitioner was not actively involved in the activities which caused the violations; that Petitioner was only nominally an officer; that Petitioner was not responsibly connected to Sol Salins, Inc., and that the Chief of the PACA Branch's determination that Petitioner was responsibly connected is reversed.

B. Respondent's Appeal Petition

Respondent appeals the ALJ's reversal of Respondent's determination that Petitioner was responsibly connected to Sol Salins, Inc. Respondent's argument is correct that section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)) provides that "responsibly connected" means an officer of the corporation, and it is uncontested that Petitioner was an officer of Sol Salins, Inc., serving as both secretary and treasurer, during the entire violations period of September 1995 through March 1996 (Respondent's Appeal Petition at 8-9). I agree with Respondent's argument that the ALJ erroneously found that Petitioner rebutted the statutory presumption that Petitioner was responsibly connected, as explained below.

C. A Two-Prong Test for Rebutting the Presumption of *Responsibly Connected* Under the PACA

In framing the appeal, Respondent is correct that there is a two-prong test for rebutting the presumption when a person meets the definition of *responsibly*

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[12]H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

connected in the first part of the statute: the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners (Respondent's Appeal Petition at 7). The record shows that Petitioner was not an owner of Sol Salins, Inc., but there is no evidence that Sol Salins, Inc., was the alter ego of its owners. Therefore, Petitioner would have to show by a preponderance of the evidence two things: (1) Petitioner was not actively involved in the activities at Sol Salins, Inc., which resulted in a violation of the PACA, and (2) even if an officer of Sol Salins, Inc., Petitioner was an officer in name only.

1. First Prong of the Test: Petitioner Was Actively Involved in Activities Resulting in PACA Violations

Regarding the first prong of the test, Respondent makes two arguments for the proposition that the ALJ erred by ignoring the substantial evidence in the record that Petitioner was actively involved in the activities resulting in the PACA violations of Sol Salins, Inc.

a. Petitioner's Role in Corporate Decision Making

First, Respondent argues that the ALJ erred by discounting Petitioner's role in corporate decision making (Respondent's Appeal Petition at 10-11). Respondent argues that the ALJ erroneously found that Petitioner was not actively involved, because the ALJ concluded that purchasing produce when there are insufficient funds directly leads to PACA payment violations, but the ALJ found that Petitioner made no decisions concerning produce purchases. The ALJ is correct that purchasing produce when there are insufficient funds leads directly to PACA payment violations, but I agree with Respondent that the ALJ's conclusion erroneously assumes that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of PACA. The ALJ gives no authority for this assumption and I do not believe such a conclusion can be supported.

On the contrary, I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce. Petitioner attended weekly staff management meetings, in which meetings Petitioner participated in the formal corporate decision making process as an officer of the company. Thus, corporate decisions were well known to Petitioner and Petitioner could affect those decisions. Moreover, I agree with Respondent that Petitioner issued large numbers of checks each month, in some instances choosing which past due bills would be paid to selected suppliers in order to keep produce coming. Respondent argues that Petitioner's admitted activities show that Petitioner was actively involved in the activities, which resulted in the violations of PACA by Sol Salins, Inc. I agree.

Next, Respondent argues (Respondent's Appeal at 12) that the ALJ erroneously relied on the proposition that Petitioner was not actively involved because Petitioner "made no policy or business decisions" (Initial Decision and Order at 6). Such language is another way of saying that to be actively involved, the activity must be on the managerial level. I agree with Respondent's argument, which is supported by the *Michael Norinsberg* decision, in which I specifically addressed and disposed of this "managerial level" argument, as follows:

> The ALJ appears to have based his decision that Petitioner was not actively involved in activities that resulted in The Norinsberg Corporation's violations of the PACA on the fact that Petitioner did not actively participate at a managerial level in decision making activities that resulted in The Norinsberg Corporation's violations of the PACA as follows:
>
> > As to the criterion as to whether or not Petitioner was "actively involved in the activities resulting in the violation" of the PACA, what is contemplated is an active participation at a managerial level in decision making activities that resulted in the violation. The weight of the evidence shows that Petitioner did not serve in such a role in connection with his duties as an employee. The evidence is that he did what he was directed to do. His father was the decision-making authority in the business and to a lesser extent the corporation's comptroller and sales manager, who were paid more than twice what Petitioner was paid, exercised authority. Petitioner appeared to sign checks or sign his name only when he was told to do such. Therefore, I conclude that Michael Norinsberg's activity

> in the business was limited to following orders of others and he was not an active participant in the corporation's violations of the PACA. [Citation omitted.]
>
> I disagree with the ALJ's conclusion that an individual is not actively involved in activities resulting in a violation of the PACA unless that individual actively participated at a managerial level in decision making activities that resulted in the violation. I find nothing in section 12(a) of the PACAA-1995 or the applicable legislative history to indicate that Congress intended to limit active involvement in activities resulting in a violation of the PACA to "active participation at a managerial level in decision making activities that resulted in the violation." [Citation omitted.]

In re Michael Norinsberg, 56 Agric. Dec. 1840, 1857-58 (1997).

In this case, *sub judice*, Petitioner was actively involved in activities resulting in violations of the PACA on both the managerial level and a working level.

Finally, Respondent argues that the ALJ erred in concluding that Petitioner's long-term and frequent participation in Sol Salins, Inc.'s formal decision making process was insufficient to qualify as active involvement (Respondent's Appeal Petition at 13). As *Michael Norinsberg, supra*, makes clear, it is not necessary under the PACA for a petitioner to participate actively in managerial level decision making activities for that petitioner to qualify as being actively involved in activities resulting in the violations. Nevertheless, I agree with Respondent that Petitioner's long-term, substantial involvement in weekly management meetings, where Petitioner admitted to commenting on policy, offering suggestions, recommending courses of action, and providing financial information to assist in the decision making process (Tr. 29-30, 76, 96-97) proves Petitioner's active involvement in activities resulting in violations of the PACA on a managerial level.

b. Petitioner's Role in Payments Made on Behalf of Sol Salins, Inc.

Second, Respondent argues that the ALJ erroneously concluded that Petitioner was not actively involved in the activities resulting in the violations of the PACA because Petitioner could make a payment only when approved by a Sol Salins, Inc., buyer, and even then only if there were sufficient funds in the account (Respondent's Appeal Petition at 14). I agree with Respondent, both that

Petitioner was not constrained by the decisions of Sol Salins, Inc.'s produce buyers, and that the check-writing function is a very important indicator of responsibly connected status.

The ALJ's conclusion that Petitioner's freedom to write checks on the corporate account was dependent on the approval of the company's buyers is not supported in the record. For example, Petitioner testified that some suppliers would not send any more loads of produce until paid, and Petitioner would "accommodate that to be able to receive merchandise." (Tr. 40.) Petitioner also testified that he discussed payment with suppliers, but that Petitioner would not call it his "discretion" when he decided whom to pay first, but rather, Petitioner "would call it a cash flow problem." (Tr. 50.) Finally, Petitioner testified that "I had a number of people that we owed and the decision was based on making sure we could still get product, and the buyers would tell me who we needed to pay." (Tr. 59.) Petitioner is engaging in semantics; Petitioner's testimony is conclusive that Petitioner would choose which produce sellers to pay in order to keep Sol Salins, Inc.'s business going. Petitioner was therefore actively involved in Sol Salins, Inc.'s failure to pay produce sellers in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Next, Respondent argues that it is well settled that the act of writing checks is a very important determinant of responsible connection. Respondent quotes from the *Rodgers* case for "[t]he fact that a person signs corporate checks should be considered one of the strongest indications of that person's close involvement in the financial affairs of the corporation." *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1944-45 (1997). Also, Respondent cites cases decided prior to the PACAA-1995 for the same point (Respondent's Appeal at 15-16). I agree with Respondent that writing checks for the corporation is a salient fact in determining responsibly connected status.

I also agree with Respondent's other points in support of responsible connection (Respondent's Appeal Petition at 16), including that Petitioner was the only signatory of the operations account at Sol Salins, Inc., during the entire period in which the violations occurred (Tr. 91-92); that Petitioner signed every corporate check during the pertinent period (Tr. 41, 54-55); and that Petitioner testified that Petitioner signed hundreds of checks each month (Tr. 92-93). Further, Respondent is correct that it strains credulity for Petitioner to portray himself as puppet-like, always under orders from others, when the record shows a 16-year career of active participation in the financial affairs of Sol Salins, Inc., including signing checks for payroll and important corporate documents, and having access to accounts payable, accounts receivable, invoices, and monthly financial statements (Tr. 53-54). Petitioner's activities made Petitioner fully

cognizant of Sol Salins, Inc.'s precarious financial situation, but Petitioner's active involvement facilitated and perpetuated the continued late payment and failure to pay violations. Petitioner testified that with his inside knowledge of company financial statements he knew in the early 1990s that the company was failing (Tr. 54, 76, 96-97).

Based upon this record, there is little question but that Petitioner was actively involved in the activities resulting in the violations by Sol Salins, Inc., and I so find. Petitioner fails the first prong of the test, active involvement in the activities resulting in Sol Salins, Inc.'s violations of the PACA. Therefore, Petitioner should not have been considered by the ALJ to have rebutted the statutory presumption of responsible connection. Nevertheless, I will address the second prong of the test for being responsibly connected.

2. Second Prong of the Test: Petitioner Was Not a Nominal Corporate Officer of Sol Salins, Inc.

The second prong of the test in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)) only operates when Petitioner meets the requirements of the first prong of the test, which I find Petitioner did not actually meet. Nevertheless, since a reviewing court may disagree with me, I will assume for purposes of review that Petitioner met this requirement.[13] Respondent cites pre-PACAA-1995 cases in support of Respondent's definition of the term "nominal," where certain individuals and their situations were examined. These cases are illustrative and helpful, but they pre-date the 1995 change in the law. Respondent makes seven arguments to support the proposition that Petitioner was not a nominal officer of Sol Salins, Inc.

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[13]However, this review's analysis need only address the first part of the second prong of the test (whether Petitioner was a nominal officer of Sol Salins, Inc.), because there is no record evidence that Sol Salins, Inc., was the alter ego of its owners, as required by the second part of the second prong of the test (whether Petitioner was not an owner of a violating licensee that was the alter ego of its owners). The record is conclusive that Petitioner was not an owner of Sol Salins, Inc., but non-owner status would only help Petitioner fulfill the second part of the second prong of the test if the context is that Sol Salins, Inc., was the alter ego of its owners. But, Petitioner did not even argue that Sol Salins, Inc., was the alter ego of its owners, except to state that Petitioner's uncle, Richard Salins, was president and controlled the company (Tr. 8). Respondent addressed this inchoate issue by arguing that Richard Salins' non-majority, 40 percent share did not allow control (RX 1 at 1); that former employees John Edward and Petitioner established that Richard Salins was rarely at Sol Salins, Inc. (Tr. 51, 56-57, 114-15); that Petitioner and General Manager Jerry Cristiano were very frustrated that Richard Salins was not involved in the day-to-day operations (Tr. 61); and that PACA Branch investigator, Basil Coale, testified that Petitioner stated that Petitioner and Jerald Cristiano were running the company (Tr. 133). Therefore, the second part of the second prong of the test is not available to Petitioner. (Respondent's Brief at 26-27.)

a. **Petitioner's Access to Corporate Records**

Respondent argues that it was error for the ALJ not to consider Petitioner's access to important corporate records in determining whether Petitioner was a nominal officer of Sol Salins, Inc. (Respondent's Appeal Petition at 19). Further, Respondent argues that the record shows that Petitioner received detailed monthly financial statements (Tr. 54); that Petitioner's check-writing authority afforded Petitioner full and complete access to accounts receivable, accounts payable, invoices, and related corporate documents (Tr. 52-53); and that Petitioner was able to locate and provide all requested pertinent documents to agency investigator, Basil Coale, during the 4-day investigation of Sol Salins, Inc., beginning March 18, 1996 (Tr. 131-33). I agree with Respondent that Petitioner's degree of access, use, and familiarity with corporate records indicate that Petitioner was not a nominal officer of Sol Salins, Inc.

b. **Petitioner's Knowledge of Sol Salins, Inc.'s Financial Troubles**

Respondent argues that relevant "nominal officer" cases decided before the 1995 amendments to the PACA found it significant whether the individual was aware of the company's wrongdoing. Petitioner admitted that Petitioner was aware of Sol Salins, Inc.'s financial woes in the early 1990s (Tr. 54); that Petitioner discussed all aspects of the company's failing health, including unpaid creditors, at the weekly management meetings (Tr. 76, 96); and that Petitioner got financial statements from Sol Salins, Inc.'s certified public accountant (Tr. 54, 102). I agree that the ALJ should have considered the sophisticated level of information provided to Petitioner in the ALJ's determination of Petitioner's nominal status. I conclude that Petitioner's level of knowledge about Sol Salins, Inc.'s financial woes and subsequent PACA payment violations are not consistent with Petitioner being only a nominal officer of Sol Salins, Inc.

c. **Petitioner's Relations With Unpaid Creditors**

In determining nominal status, Respondent argues that it is significant that unpaid creditors would try to contact the "nominal" officer of a company for payment. Although pre-PACAA-1995 cases considered an officer's relationship with unpaid creditors a factor in determining nominal status, Respondent argues that the ALJ erroneously failed to consider in the Initial Decision and Order Petitioner's relationship with creditors. Respondent argues that Petitioner was the last remaining family-name member of this generations-old company, which

meant unpaid produce creditors looked to Petitioner for payment (Tr. 107-08); that a former employee of Sol Salins, Inc., testified that he witnessed a phone conversation during the pertinent violations period, where an unpaid creditor demanded Petitioner pay and Petitioner promised to send a check (Tr. 116-17); that agency investigator, Basil Coale, heard a recorded phone message left for Petitioner from an angry unpaid creditor specifically asking Petitioner for payment (Tr. 134-35); and that, as Petitioner was the last Salins in the Salins' family business on a day-to-day basis, Petitioner had a de facto responsibility to work with produce sellers on resolving unpaid bills (Tr. 59-60, 107-08, 116-17). I agree with Respondent that Petitioner's relationship with unpaid creditors, as shown in the record, is inconsistent with Petitioner being only a nominal officer. Therefore, Respondent is correct that the ALJ erroneously failed to consider the level to which Petitioner was responsible to produce creditors in determining Petitioner's nominal status.

d. **Petitioner's Active Participation in Corporate Decision Making**

I have already addressed Petitioner's active participation in corporate decision making in the section on the first prong of the statutory test in this Decision and Order, *supra*, where I conclude that Petitioner was involved in both managerial and working level decision making. I agree with Respondent that the ALJ erred by concluding that Petitioner could not influence corporate decisions unless Petitioner was a director or shareholder. Petitioner's level of active participation shows that Petitioner was not merely a nominal officer of Sol Salins, Inc.

e. **Petitioner's Check-Writing Responsibilities**

Respondent argues that the ALJ erred by diminishing the significance of Petitioner's "extraordinary check writing responsibilities" while emphasizing other responsibilities not Petitioner's (Respondent's Appeal at 22-23). Respondent makes the same arguments with which I agreed in the analysis of Petitioner's check writing in the first prong of the statutory test in this Decision and Order, *supra*, and there is no purpose to be served in doing the analysis twice. I find that Petitioner's check-writing responsibilities vastly exceed anything an officer might do and still be considered an officer in name only. In fact, based upon this record, Petitioner could be considered the only indispensable officer at Sol Salins, Inc., at the time pertinent to this case.

f. **Petitioner's Responsibility for Signing Corporate Documents**

Respondent argues that the ALJ should have placed more weight on the fact that Petitioner signed corporate documents for Sol Salins, Inc., rather than the ALJ ascribing the importance to the lawyer or accountant who prepared the corporate documents for Petitioner's signature, in Petitioner's capacity as either treasurer or secretary of the corporation (Respondent's Appeal at 24-25). I agree with Respondent that the documents signed by Petitioner go far beyond anything a nominal officer would sign, and include PACA licenses, answers to reparations complaints, State wage reports, State tax withholding reports, and State corporate annual reports (Respondent's Appeal at 25).

g. **Petitioner's Salary**

Respondent argues that Petitioner's salary belies the Petitioner's claim that Petitioner was only a nominal officer of Sol Salins, Inc. (Respondent's Appeal at 25). Petitioner was paid $124,683 in compensation for 1994, which was the most anyone was paid that year at Sol Salins, Inc. (RX 13 at 3; Tr. 94-95). Petitioner testified that this amount consisted of a base annual salary of $89,000, plus a week's vacation pay taken in cash, and a 1993 bonus paid in 1994. If 52 weeks of the year is divided into $89,000, a week's pay is about $1,710. Since Petitioner was paid almost $125,000 in 1994, that means Petitioner's 1993 bonus was over $33,000. Petitioner was paid $89,000 in 1995.

I find it not credible that a produce clerk, as Petitioner describes Petitioner's job, could command a salary of $89,000. Moreover, I am incredulous that a clerk would receive almost $125,000 in salary, bonuses, and vacation pay to become the highest paid person in the company. Petitioner was neither an owner nor a shareholder of Sol Salins, Inc.; therefore, there were no dividends or other payouts to Petitioner to explain this high compensation. As for "bonuses" as Petitioner's explanation for the high salary, Petitioner testified that Petitioner knew that the company was in financial trouble in the early 1990s, but Petitioner does not explain why Petitioner was getting a bonus when the company was in financial trouble. I conclude that a reasonable explanation for Petitioner's bonus is that Petitioner was much more than a nominal officer, and in fact had become over the years almost indispensable to Sol Salins, Inc.

Respondent has shown that Petitioner was much more than a nominal officer of Sol Salins, Inc., and, as explained in footnote 13, *supra*, the second part of the second prong of the test is not available to Petitioner because, even though Petitioner was not an owner of Sol Salins, Inc., there is no evidence that Sol

Salins, Inc., was the alter ego of its owners.

D. Petitioner's Response to Respondent's Appeal Petition

Petitioner urges that the ALJ's decision be affirmed, and argues that there is no evidence to suggest that Petitioner was actively involved in the activities resulting in Sol Salins, Inc.'s PACA violations; that record testimony states that Petitioner was only named an officer of Sol Salins, Inc., for the convenience of the owners; that Petitioner was never involved in buying or selling produce; that the ALJ noted that two new buyers and a general manager were hired to run day-to-day operations under the direction of Richard Salins; that Respondent's allegation that Petitioner's attendance at weekly management meetings was active participation in the corporate decision making, which resulted in payment violations, is pure speculation, without an evidentiary basis; that Petitioner's involvement in the weekly staff meetings was only to bring information; that Petitioner's job was under the supervision of Richard Salins, who gave authority over company operations to the buyers; that Petitioner's job did not change when family members, Lenny and Lee Salins, were replaced as buyers by Chris Horner and Rick Thomas, and Jerry Cristiano was hired to run Sol Salins, Inc., under Richard Salins; that Respondent is wrong when Respondent claims that Petitioner knowingly delayed payment to some unpaid creditors in order to place new orders that the company would not be able to pay for when due; that Respondent fails to recognize that Petitioner had no control over payments, because the buyers, under the supervision of Richard Salins, directed which payments were to be made, if there were funds available; that Petitioner believed that all creditors would be paid and all outstanding debt paid, either from a management-promised new line of credit to help cash flow or from an over-funded company pension plan Petitioner believed existed; that the pension plan was handled by company attorney, Howard Silberberg, but Petitioner was not a trustee of that plan and had no information that Petitioner's beliefs were not true; that Respondent's statements that Petitioner perpetuated the company's late payments and failed to take action to make the payments suggests that Petitioner get personal loans to solve the company's problems; that Petitioner's job, however, was done when Petitioner provided financial information to the owners; that Petitioner had neither control over company assets nor authority to negotiate with lending institutions; that the owners had full knowledge of the company's financial situation; and that the facts of this case show that the situation was totally out of Petitioner's control, which means that the ALJ's decision that Petitioner was not responsibly connected is correct and is the only decision that can be made on the facts of this case

(Response to Respondent's Appeal Petition).

E. **Judicial Officer's Conclusions**

I have reviewed the entire record in this proceeding, and I find that the ALJ erroneously found that Petitioner rebutted the presumption that Petitioner is responsibly connected. Petitioner freely admitted to being an officer of the violating licensee, thus, Petitioner is statutorily deemed to be responsibly connected (7 U.S.C. § 499a(b)(9) (Supp. I 1995)). As pertinent here, the statute has a two-prong test: (1) a petitioner must show that, as an officer of the violating licensee, the petitioner was not actively involved in the activities resulting in the licensee's violations, *and* (2) that petitioner was only a nominal officer of the violating licensee or not an owner of the violating licensee, which was the alter ego of its owners. I find that Petitioner has not met the first prong of the statutory test because Petitioner has not demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in Sol Salins, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). In fact, as discussed in this Decision and Order, *supra*, the evidence clearly establishes that Petitioner was actively involved in the activities resulting in Sol Salins, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These findings alone are sufficient to conclude that Petitioner was responsibly connected with Sol Salins, Inc. *See In re Michael Norinsberg*, 56 Agric. Dec. 1840, 1850 (1997). Petitioner at all times material to this proceeding was responsibly connected with Sol Salins, Inc., within the meaning of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. I 1995)).

Petitioner fails the first prong of the statutory test. The statute is in the conjunctive, therefore, the second-prong issue is moot. However, to assist in possible court review, I address the issue of whether Petitioner was only nominally an officer of Sol Salins, Inc. Petitioner admits that he was an officer of Sol Salins, Inc., but argues that he was only nominal. However, as discussed in this Decision and Order, *supra*, Petitioner was actively involved in activities much beyond anything a nominal officer, an officer in name only, would be doing. Therefore, I disagree with and reverse the ALJ's finding that Petitioner proved by a preponderance of the evidence that he was only nominally an officer of Sol Salins, Inc., because the evidence clearly establishes that Petitioner was much more than a nominal officer of Sol Salins, Inc.

Petitioner would also have failed the second part of the two-prong test if Petitioner had argued it, even though Petitioner is not an owner of Sol Salins, Inc. (See note 13, *supra*).

Petitioner having thus failed by a preponderance of the evidence to rebut the presumption in 7 U.S.C. § 499a(b)(9), as an officer of a violating licensee, Petitioner is presumed to be responsibly connected to the violating licensee.

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

V. ORDER

The determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with Sol Salins, Inc., during the period of time that Sol Salins, Inc., violated the PACA, is affirmed. This Order shall become effective 61 days after service of this Order on Petitioner.

In re: COLONIAL PRODUCE ENTERPRISES, INC.
PACA Docket No. D-95-0534.
Decision and Order filed March 30, 1998.

Suspension of license — Civil penalties — Employment restrictions — Responsibly connected — Failure to pay.

The Judicial Officer affirmed Chief Judge Palmer's (Chief ALJ) decision assessing Respondent a civil penalty of $15,000 or in lieu thereof imposing a 45-day suspension of Respondent's PACA license. The record supports the conclusion that Respondent willfully violated 7 U.S.C. § 499h(b) by neither terminating, nor posting a USDA-approved surety bond for, the employment of an individual responsibly connected to a corporation which had repeatedly and flagrantly violated failure to pay requirements (7 U.S.C. § 499b(4)) within the 30-day time period given by certified letter dated May 5, 1994. Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. I 1995)) authorizes the assessment of a civil penalty in lieu of a license suspension or license revocation. When determining the amount of the civil penalty, due consideration must be given to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Complainant's sole argument on appeal is that any alternative civil penalty in lieu of a 45-day suspension is not appropriate. Complainant is not persuasive that the Chief ALJ did not consider the factors under section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. I 1995)).

JoAnn Waterfield, Esq., for Complainant.
Jerome Cooper, Esq., and Robert E. Coleman, Esq., of Lynbrook, New York, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary proceeding pursuant to the Perishable Agricultural Commodities

Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on August 17, 1995.

The Complaint alleges that Colonial Produce Enterprises, Inc. [hereinafter Respondent], willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) in that Respondent was notified by certified letter dated May 5, 1994, served May 10, 1994, that 30 days after service, Respondent must either terminate Mr. Alvin Schepps' employment or post a USDA approved surety bond, because Mr. Schepps was subject to PACA employment restrictions for being responsibly connected with North American Produce Corporation, which had repeatedly and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); but, Respondent continued Mr. Alvin Schepps' employment beyond June 9, 1994, without posting a USDA approved surety bond (Compl. at 3-4).

On September 20, 1995, Respondent filed an Answer denying that Respondent willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)). Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing conducted in New York, New York, on May 21-22, 1996, and Miami, Florida, on November 18-19, 1996. JoAnn Waterfield, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant, and Jerome Cooper, Esq., and Robert E. Coleman, Esq., of Lynbrook, New York, represented Respondent (except Mr. Coleman did not appear at the segment of the hearing conducted in Miami, Florida).

On April 25, 1997, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order [hereinafter Complainant's Brief]; on June 24, 1997, Respondent filed Respondent's Proposed Findings of Fact, Conclusions and Order [hereinafter Respondent's Brief]; and on July 3, 1997, Complainant filed Complainant's Reply Brief.

The Chief ALJ filed a Decision and Order [hereinafter Initial Decision and Order] on July 8, 1997, in which the Chief ALJ concluded that Respondent willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)), and assessed Respondent a civil penalty of $15,000 in lieu of suspending Respondent's PACA license for 45 days.

On September 30, 1997, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final

deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On December 22, 1997, Respondent filed Respondent's Reply Brief, and on December 24, 1997, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record, and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), the Chief ALJ's Initial Decision and Order is adopted as the final Decision and Order in this proceeding. Changes in the Chief ALJ's Initial Decision and Order are shown by brackets, deletions shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the conclusions of the Chief ALJ.

Complainant's exhibits are designated by the letters "CX" and Respondent's exhibits are designated by the letters "RX." The portion of the transcript that relates to that segment of the hearing conducted on May 21-22, 1996, is in two volumes, but the pages are consecutively numbered 1 through 413. The portion of the transcript that relates to that segment of the hearing conducted on November 18-19, 1996, is in two volumes, but the pages are consecutively numbered 1 through 235. Therefore, references in this Decision and Order to "Tr. I" are to the volumes of the transcript that relate to the May 21-22, 1996, segment of the hearing and references in this Decision and Order to "Tr. II" are to the volumes of the transcript that relate to the November 18-19, 1996, segment of the hearing.

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

. . . .

The findings proposed by the parties have been either adopted or incorporated as part of the findings that follow, or rejected as not being in accord with the relevant evidence. Upon considering the record evidence and the arguments of the parties, an Order is entered assessing a civil penalty of $15,000

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

in lieu of a 45-day suspension for Respondent's willful violation of the PACA.

Pertinent Statutory Provisions

7 U.S.C.

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(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.

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the

license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

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

. . . .

(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 at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. . . . The Secretary 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.

. . . .

(e) Alternative civil penalties

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

7 U.S.C. §§ 499a(b)(10), 499h(a), (b)(2) (1994); 7 U.S.C. § 499h(e) (Supp. I 1995).

. . . Findings of Fact

1. Respondent, Colonial Produce Enterprises, Inc., is a corporation whose business and mailing address is 150 Broadhollow Road, Melville, New York 11747 (CX 1 [at 14, 18, CX 15], CX 16 [at 1]).

2. Pursuant to the licensing provisions of the PACA, license number 93105[0] was issued to Respondent on April 2[2], 1993. This license has been renewed annually, is presently in effect, and is subject to renewal on or before April 2[2], 1998 (CX 1, CX 16).

3. [Nicholas A.] Penachio was the original sole officer and director of Colonial Produce Enterprises, Inc. [(CX 1 at 2)], and transferred his ownership of stock and his position as officer and director to Frank Mandera who became the 100% stock owner and sole officer and director of Colonial Produce Enterprises, Inc., [on June 10,] 1993) [(CX 1 at 5, 14, CX 2 at 16-18, CX 14 at 1)].

4. Frank Mandera was not under an employment restriction during the period relevant to this proceeding.

5. Respondent's main operations are conducted in a New York office,

and a small office in Florida is maintained [(CX 1 at 14)] for the use of Frank Mandera or [Joseph] Mirando [(CX 10 at 1, 8)]. The Florida office is also used by Scott Schneider for the transaction of business for Tropical Sensations [(CX 10 at 1)]. Sometimes Alvin Schepps aided Scott Schneider in his business . . . [(Tr. I at 79-82, 193; CX 5 at 8)].

6. Alvin Schepps had been responsibly connected with North American Produce Corporation, which, by a decision and order effective May 11, 1993, was found to have committed repeated and flagrant violations of the PACA for failing to make full and prompt payment for produce. *In re North American Produce Corp.*, 52 Agric. Dec. 804 (1993). For that reason, Alvin Schepps was subject to employment restrictions under the PACA for the period May 11, 1993, to May 11, 1995, wherein he could not be employed, on any basis, by a PACA licensee from May 11, 1993, to May 11, 1994, and could be employed during the period May 11, 1994, to May 11, 1995, only if [the employing PACA licensee furnishes and maintains] a surety bond in [form and] amount [satisfactory to the Secretary] (7 U.S.C. § 499h(b)).

7. On May 10, 1994, Respondent received a certified letter[, article number P 512 602 021,] from USDA dated May 5, 1994, advising . . . of Alvin Schepps' responsible connection with North American Produce Corporation, and the fact that he was barred for that reason from employment by Respondent unless Respondent posted a surety bond in an amount satisfactory to the Secretary (CX 5 [at 1-3]).

8. The . . . period relevant to this proceeding is June 10, 1994, through May 11, 1995, in that the notice by USDA to Respondent that a surety bond would be required for Mr. Schepps to be employed or affiliated with Respondent, became effective on June 10, 1994, 30 days after [Respondent received the notice], and ended on May 11, 1995, when the statutory restriction on Mr. Schepps' employment terminated.

9. On June 2, 1994, Respondent advised USDA that it did not presently employ Mr. Schepps, but that it was considering hiring him as a part-time office clerk in its Florida office, at his residence, at a salary of $7,000 per year (CX 5 [at 4, 6, 8]).

10. USDA also notified Respondent [by certified letter dated May 13, 1993, article number P 512 601 760,] that a surety bond was needed for its employment of [Joseph] Mirando [(CX 2 at 12-14)]. In response to the notice, Respondent obtained a surety bond in the amount of $175,000 for [Joseph] Mirando, and his employment was approved by USDA [(CX 2 at 37)].

11. Subsequent to the May 5, 1994, letter, USDA sent Respondent five

[certified] letters dated June 6, 1994[, article number P 512 601 573]; June 9, 1994[, article number P 512 597 595]; July 6, 1994[, article number P 512 597 613]; August 17, 1994[, article number P 512 602 116]; and September 21, 1994[, article number P 512 597 694], and engaged in a telephone conversation with Respondent's president on June 2, 1994, [which is memorialized in the June 6, 1994, letter. In each of these letters and during the telephone conversation,] the bonding obligation and the possible sanctions if Respondent employed Mr. Schepps [without a bond were reiterated] (CX 5 [at 9-12, 13-15, 17-19, 20-22, 23, 27]). Respondent was advised that a $100,000 surety bond was required (CX 5 [at 17]).

12. Mr. Schepps was employed by Respondent subsequent to June 10, 1994, during the period of the restrictions on his employment under the PACA, and the record evidence establishes that he maintained an affiliation with the business operations of Respondent from June 10, 1994, through November 1994.

Conclusions

1. Respondent, Colonial Produce Enterprises, Inc., willfully violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) by failing to [furnish and maintain] a $100,000 surety bond for Alvin Schepps, who was employed by, and affiliated with, Respondent during the period June 10, 1994, through November 1994, after Respondent had been given notice that Mr. Schepps could not be employed [by] or affiliated with [Respondent] during that period unless an approved surety bond was [furnished and maintained].

2. A civil penalty of $15,000 in lieu of a 45-day suspension is the appropriate sanction to be imposed on Respondent for its willful violation[].

Discussion

In a letter dated May 5, 1994, Respondent was given official notice that [Respondent] could not continue to employ Alvin Schepps after 30 days from the letter's receipt unless [Respondent] posted a surety bond in an amount satisfactory to the Secretary (CX 5 at 1, 2). This [restriction on Mr. Schepps' employment by Respondent was imposed] because Mr. Schepps had been responsibly connected with another PACA licensee, North American Produce Corporation, which had been found to have committed repeated and flagrant violations of section 2 of the PACA. The PACA precludes all employment by PACA licensees of responsibly connected persons for one year after such a

finding has been made and only permits employment during the second year after the finding when the PACA licensed employer [furnishes and maintains] a surety bond [in a form and an amount satisfactory to the Secretary] (7 U.S.C. § 499h(b)).

The certified receipt card[, article number P 512 602 021,] for the [May 5, 1994,] letter shows it was received on May 10, 1994 (CX 5 at 3). Accordingly, Respondent's employment of Mr. Schepps without an approved surety bond was prohibited from June 10, 1994 (the thirtieth day after [Respondent received] the letter [dated May 5, 1994]), until May 11, 1995 (the end of two years from the May 11, 1993, finding entered against North American Produce Corporation).

On June 2, 1994, Respondent replied to the [May 5, 1994,] letter, stating that it intended to hire Mr. Schepps as a part-time office clerk at a salary of $7,000 per year (CX 5 at 4, 6). By letter dated June 9, 1994, a USDA official reminded Respondent that its employment of Alvin Schepps or Joseph T. Mirando (for whom Respondent did eventually [furnish] a bond) was prohibited unless bonds were posted and USDA approval was obtained (CX 5 at 13, 14). On August 17, 1994, the same USDA official referenced a letter of July 6, 1994, advising Respondent that a $100,000 surety bond was needed for Mr. Schepps' employment and asked Respondent to state its intentions (CX 5 at 20). The letter, paraphrasing the PACA (7 U.S.C. § 499a(b)(10)), further advised Respondent that:

> The terms "employ" and "employment" are defined under the Act as any affiliation of any person with the business operation of a licensee, with or without compensation, including ownership or self-employment.

CX 5 at 20.

The USDA official wrote to Respondent again on September 21, 1994, and stated that since he had received neither a $100,000 surety bond nor a written reply, it was assumed that Respondent had no intention of posting the bond, and reminded Respondent that it could not employ Mr. Schepps without a surety bond until after May 11, 1995 (CX 5 at 23).

Despite these warnings, information came to USDA's attention that Mr. Schepps was conducting business for Colonial Produce Enterprises, Inc. An investigator, Scott C. Sharer, went to the docks of Port Everglades in Florida. While there, Mr. Sharer obtained sworn statements from Pablo Alejandro,

Provision Master, and Harold Markt, Executive Chef, for Commodore Cruise Lines (CX 8 at 1-3).

In his affidavit of December 3, 1994, Mr. Alejandro states he had been employed as Provision Master for the Crown Jewel and Crown Dynasty ships since November 19, 1994, and that:

> When we receive the products from the "Colonial Productes" [sic], I allway's [sic] deal with Alvin Stheeps [sic] who represents himself as "Colonial Productes" [sic]. If some times problems with the product's [sic] I tell "Alvin St.", face to face, to haven [sic] correct's [sic] the problem with the deliverys [sic] inmedietly [sic]. Alvin is my contact with "Colonial Productes [sic]".

CX 8 at 3.

Executive Chef Harold Markt of the Crown Jewel swore that he had been with Cunard Crown for 7 months prior to his affidavit of December 3, 1994, and during this time:

> . . . I now [sic] Mr. Alvin Schepps as the Dock-side representative from Coloniel [sic] Produce. During the unloading of the produkts [sic], he is the contact person for any complaints regarding quality and quantytiy [sic] problems for the products.
>
> I meet him allmost [sic] every Sathurday [sic] since April 94 at the pier for the quality check as a representative of Coloniel [sic] Produce . . . .

CX 8 at 1.

Mr. Markt gave the address and telephone numbers for Colonial Produce Enterprises, Inc., and stated that he had identified Mr. Schepps from the Photo ID Mr. Sharer had shown him.

Neither Mr. Alejandro nor Mr. Markt testified at the hearing. Therefore, although their affidavits were received under the liberal evidentiary rules applicable in administrative hearings, the fact that Respondent's attorney was unable to cross-examine them . . . limits the evidentiary weight to be given either affidavit standing alone.

However, another witness was interviewed by Mr. Sharer who did testify.

Mr. Angel Louis Sanabria Marties, who regularly delivered ice to ships at the Port Everglades dock, was formerly an employee of North American Produce Corporation, prior to its going into bankruptcy. [Mr. Sanabria] (the shortened, American version of his name) had worked for Alvin Schepps at North American [Produce Corporation]. In [Mr. Sanabria's] affidavit (CX 9), [Mr. Sanabria] identified Mr. Schepps as being present when [Respondent] made deliveries to the ships as [Respondent's] representative correcting problems for ship personnel with the shipments. At the hearing, Mr. Sanabria stated that he observed Mr. Schepps acting as the apparent representative of [Respondent] in 1993 and on two occasions in October 1994 (Tr. II at 119-21, 123-25). Mr. Sanabria also testified that while he was talking to Mr. Sharer on December 3, 1994, Mr. Schepps saw Mr. Sanabria and [Mr. Schepps] turned around in his car and left (Tr. II at 105). Although Mr. Sanabria was unhappy about the fact that he was not fully paid his earned wages when North American Produce Corporation went into bankruptcy, I do not believe his testimony was motivated by revenge. I find [Mr. Sanabria] to be a credible witness whose testimony is reliable and corroborates the affidavits of the cruise line employees. Based on this evidence, I have concluded that despite the need for Mr. Schepps to be bonded after June 10, 1994, Respondent did not obtain the surety bond, but instead allowed Mr. Schepps to continue to be employed and affiliated with Respondent while unbonded for over 5 months, through November 1994.

Respondent's argument that Mr. Schepps was not on [Respondent's] payroll is unavailing. The PACA definition of "employment" is extremely broad and includes any affiliation with a licensee with or without compensation and indicates on its face that the term is to be given a broad reading (7 U.S.C. § 499a(b)(10)). *See Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 165 (D.C. Cir. 1987). *See also Bama Tomato Co. v. United States Dep't of Agric.*, 112 F.3d 1542, 1545 (11th Cir. 1997).

Respondent received multiple letters from USDA advising it of the need to obtain a $100,000 surety bond, if Mr. Schepps was to be employed by or affiliated with [Respondent], but did not do so while employing Mr. Schepps through November 1994, more than 5 months after the surety bond became required. Under these circumstances, Respondent's violation of the PACA must be construed as willful.

Complainant's request that Respondent's license be suspended for 90 days would cause 15 to 20 employees to be out of work for at least 3 months and could result in a permanent shut-down due to irreversible losses of customers and suppliers who would necessarily shift their business elsewhere. . . .

The Departmental decision in *In re Ruma Fruit & Produce Co.*, 56 Agric. Dec. [902 (1997), *dismissed*, No. 97-1192 (D.C. Cir. Sept. 9, 1997)], imposed a $12,400 penalty in lieu of a 45-day license suspension. In assessing that amount, consideration was given to the fact that the licensee employed six full-time employees and two part-time employees to 15 employees; was a small to medium-small business; and had continued to employ a person under PACA employment restriction for 105 days.

In this case, Respondent employs 15 or 20 employees (Tr. II at 170). It has sales of less than 5 million dollars a year, which USDA considers to be "a pretty small firm in the produce industry" (Tr. II at 171). Respondent continued to employ a person under PACA employment restriction for 172 days. The circumstances of the violations in the instant case and *Ruma* are . . . comparable. Both involve small businesses with equivalent numbers of employees. Both concern serious violations arising out of the employment of persons subject to PACA employment restrictions. However, the employment continued in this case after notice was received that either a surety bond should be posted or the employment terminated, for 67 days more than in *Ruma*. Therefore, it is appropriate to [assess] a somewhat higher civil penalty than was [assessed] in *Ruma* in lieu of a 45-day license suspension.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The only issue on appeal is that Complainant disagrees with the Chief ALJ's assessment of a civil penalty in lieu of a 45-day suspension of Respondent's PACA license:

> The only issue appealed herein is the appropriateness of the sanction imposed by Chief Administrative Law Judge Victor W. Palmer. After finding that Respondent unlawfully employed Alvin Schepps despite receiving seven notices from the Agency that such employment was unlawful, Judge Palmer imposed a 45 day license suspension with the provision that respondent be allowed to pay a $15,000.00 civil penalty in lieu of the suspension. The Agency appeals the portion of the sanction that assesses the $15,000.00 civil penalty in lieu of the 45 day license suspension.

Complainant's Appeal at 5-6.

Complainant initially sought revocation of Respondent's PACA license

(Compl. at 5). Subsequently, Complainant reduced the recommended sanction to a 90-day suspension of Respondent's PACA license (Complainant's Brief at 29). On appeal, Complainant now agrees with the Chief ALJ that Respondent deserves only a 45-day suspension, but Complainant disagrees with the Chief ALJ that the Respondent should be allowed to pay a civil penalty in lieu of a 45-day suspension (Complainant's Appeal at 21).

Yet, even though Complainant argues that the $15,000 civil penalty chosen by the Chief ALJ "seriously undervalued the appropriate amount to assess to provide the same deterrent effect that a 45 day license suspension would achieve," Complainant does not seek to substitute an "appropriate amount" for the Chief ALJ's $15,000 civil penalty in lieu of the 45-day suspension (Complainant's Appeal at 13.) On the contrary, Complainant argues that the facts of this case only support a 45-day suspension, but no alternative civil penalty. Therefore, the narrow issue in this appeal is whether the Chief ALJ inappropriately assessed a civil penalty (of any amount) in lieu of a 45-day suspension.

Complainant's first argument is that the Chief ALJ erred by not using a "two-step" process for determining the sanction, as follows:

> Once Judge Palmer determined that respondent violated section 8(b) of the Act by unlawfully employing Mr. Schepps, he was required to undergo a two step process in determining the appropriate sanction. First, applying the Judicial Officer's sanction policy, Judge Palmer had to determine whether the appropriate sanction included an "in lieu of" civil penalty; second, if an "in lieu of" civil penalty was appropriate, Judge Palmer, considering the statute's criteria, had to determine the amount of the civil penalty. Judge Palmer, however, failed to apply the Judicial Officer's sanction policy to determine whether a civil penalty was appropriate and, further, failed to consider all of the statute's criteria to determine the amount of the civil penalty to assess.
>
> In this case, Judge Palmer sanctioned respondent by suspending its license for 45 days with a provision allowing respondent to pay a civil penalty of $15,000.00 in lieu of the license suspension. In sanctioning respondent, Judge Palmer failed to apply the Judicial Officer's sanction policy to determined [sic] whether a civil penalty was appropriate; instead, in order to determine whether a civil penalty was appropriate, Judge Palmer considered some of the Act's criteria for determining the

amount of a civil penalty.

Complainant's Appeal at 7.

I reject Complainant's argument that there is a "required" two-step process for the Chief ALJ's analysis. Complainant cites no authority for Complainant's view of the interrelation between the Department's sanction policy[2] and the PACA's alternative civil penalties under 7 U.S.C. § 499h(e) (Supp. I 1995), and there is no statutory language in 7 U.S.C. § 499h requiring a "two-step" process.

The Initial Decision and Order indicates that the Chief ALJ applied the Department's sanction policy both to determine the type of sanction to be imposed (license revocation, license suspension, or civil penalty) and to determine the amount of the civil penalty to be assessed. Moreover, the Initial Decision and Order reveals that the Chief ALJ considered the size of the business, the number of employees, and the seriousness, nature, and amount of the violation, as required by 7 U.S.C. § 499h(e) (Supp. I 1995), when determining the amount of the civil penalty to be assessed against Respondent.

Further, the Chief ALJ has achieved the purpose of the PACA as amended by the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter PACAA-1995] to allow civil penalties in lieu of suspension or revocation. 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

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[2]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:

> [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.

> 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. 104-207, at 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

> MR. HATAMIYA. . . .
>
> . . . .
>
> 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. 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. 106 (1995) (statement of Lon Hatamiya, Administrator, AMS, USDA).

I find that the Chief ALJ has correctly addressed the requirements of the Department's sanction policy and 7 U.S.C. § 499h(e) (Supp. I 1995). Thus, I disagree with Complainant's argument that the Chief ALJ did not examine "relevant circumstances of this particular case and the Agency's recommendation" when determining the type of sanction to be imposed and the amount of the civil penalty to be assessed (Complainant's Appeal at 8).

Complainant also disagrees with the Chief ALJ's conclusion that this case is comparable to *Ruma, supra*, and Complainant makes six arguments that the two cases involve completely different circumstances (Complainant's Appeal at 15-19).

First, and Complainant argues, foremost, is that Complainant in *Ruma* recommended the civil penalty in lieu of a 45-day suspension, based upon the Agricultural Marketing Service's calculation of Ruma Fruit & Produce Co.'s costs for a 45-day suspension; but, in this case, Complainant recommended license suspension without any provision for a civil penalty in lieu of a suspension, because of the intentional nature of the violation, the violation's impact on the industry, and the history of violations by Respondent's affiliates

(Complainant's Appeal at 15-16). The difference, Complainant argues, is that the administrative law judge in *Ruma* considered Complainant's recommendation and gave it weight; whereas, in this case, Complainant did not recommend a civil penalty, and the Chief ALJ gave Complainant's recommendation no weight (Complainant's Appeal at 16).

The Chief ALJ did consider the sanction recommendation of agency officials (Initial Decision and Order at 10-11). The recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[3] The Chief ALJ does not indicate that he gave no weight to the agency's sanction recommendation, as Complainant contends. Instead, the Chief ALJ states that he rejects Complainant's sanction recommendation and sets forth his reasons for his rejection of Complainant's sanction recommendation. I do not find, as Complainant contends, that the Chief ALJ gave no weight to the agency's sanction recommendation.

Second, Complainant argues that the employee in the *Ruma* case was restricted in employment because the employee was responsibly connected to an employer which failed to pay a reparations award; whereas, here, Mr. Alvin Schepps was responsibly connected to a previous employer which committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Complainant's sanction witness testified that the Agricultural Marketing Service is less likely to recommend civil penalties in a case in which the employed individual has been responsibly connected with a firm that has committed repeated and flagrant failure to pay violations than it is in a case in which the employed individual has been responsibly connected with a firm that has failed to pay a reparations award. However, neither the Department's sanction policy nor 7 U.S.C. § 499h(e) (Supp. I 1995) make a distinction between the employment of an individual responsibly connected with a firm that failed to pay a reparations award and the employment of an individual responsibly connected with a firm that failed to make full payment promptly in accordance with section 2(4) of the PACA.

Third, Complainant argues that the cases are different because the violation in this proceeding is much more serious than the *Ruma* violation. In *Ruma*,

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[3]*In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 573-74 (1998); *appeal dismissed*, No. 98-3296 (8th Cir. Oct. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

Complainant based the recommended sanction on the good business reputation of, and no other violations committed by, Respondent. Complainant argues that Respondent's violation in this proceeding is much more serious than in *Ruma*, because the long history of PACA violations committed by firms with whom individuals associated with Respondent were involved aggravates the seriousness of Respondent's violation (Complainant's Appeal at 16).

However, the Complaint only alleges that Respondent violated section 8(b) of the PACA (7 U.S.C. § 499h(b)) based on its employment of Mr. Alvin Schepps after June 9, 1994. Respondent's "business reputation" is not relevant to the sanction to be imposed. Further, the history of PACA violations committed by firms with whom individuals (other than Mr. Schepps) affiliated with Respondent were involved is not relevant to the sanction to be imposed in this proceeding, unless those individuals are shown to be affiliated with Respondent in violation of section 8(b) of the PACA (7 U.S.C. § 499h(b)). If Respondent has committed violations of section 8(b) of the PACA (7 U.S.C. § 499h(b)) which were not alleged in the Complaint filed in this proceeding, a new proceeding should be instituted, and if any violations are found in this new proceeding, the violation which I find in this proceeding will be considered when determining the sanction to be imposed at the conclusion of the new proceeding.

Fourth, Complainant argues that "the respondent in *Ruma* terminated its employment of the restricted individual. (Citation omitted.) Respondent, here, failed to take any steps to investigate why the Agency believed it employed Mr. Schepps (citation omitted) or to terminate any affiliation with Mr. Schepps." (Complainant's Appeal at 17.) However, the record establishes that, while Respondent continued to employ Mr. Schepps in violation of section 8(b) of the PACA (7 U.S.C. § 499h(b)) for 172 days, Respondent did terminate employment of Mr. Schepps in November 1994.

Fifth, Complainant argues that in *Ruma* the civil penalty was based on the "articulable calculation" of the "net profits that Ruma would lose if it were to serve the 45 day suspension" and the "calculation was used to replicate the deterrent effect of the suspension if Ruma chose to pay the civil penalty in lieu of serving the suspension." (Complainant's Appeal at 17-18.) Complainant argues that the Chief ALJ did not provide an articulable calculation for the $15,000 civil penalty, in lieu of the 45-day suspension, assessed by the Chief ALJ. I reject this argument because neither the Department's sanction policy nor 7 U.S.C. § 499h(e) (Supp. I 1995) requires an "articulable calculation" for setting the amount of a civil penalty. The civil penalty authorized by PACAA-1995 is discretionary and requires that certain factors be considered when setting

the amount of the civil penalty. I find that the Chief ALJ considered all of the factors he was required to consider to determine the amount of the civil penalty to assess against Respondent.

Sixth, Complainant argues that the Chief ALJ did not give due consideration to the criteria in the statute by only comparing the facts and circumstances of this case with the *Ruma* case; and that as a consequence the Chief ALJ's $15,000 civil penalty in lieu of a 45-day suspension is contrary to the mandate of Congress because the Chief ALJ failed to consider the size of the business, and the seriousness, nature, and the amount of the violation. I reject this argument because it is factually wrong. While it is true that the Chief ALJ compared this case to *Ruma*, it certainly is not error to compare these very similar cases. Further, the record establishes that the Chief ALJ based his decision to assess Respondent a civil penalty of $15,000 in lieu of a 45-day suspension for its violation of section 8(b) of the PACA (7 U.S.C. § 499h(b)) on these factors: 1) the size of the business is a small business of less than 5 million dollars in sales annually; 2) the number of employees is 15 to 20; 3) the seriousness of the violations is that the violations are serious; 4) the nature of the violations is that Respondent continued to employ a person subject to PACA employment restrictions without securing a surety bond after notice of the requirement for a surety bond; and 5) the amount is that the violative employment continued for 172 days. (Initial Decision and Order at 10-11.) The Chief ALJ has fulfilled all requirements for imposing an alternative civil penalty under the Department's sanction policy and under 7 U.S.C. § 499h(e) (Supp. I 1995).

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

Order

Respondent, Colonial Produce Enterprises, Inc., is assessed a civil penalty of $15,000, which shall be paid by a certified check or money order, made payable to the Treasurer of the United States, and forwarded to, and received by: James Frazier, United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch, Room 2095-South Building, 1400 Independence Avenue, S.W., Washington, DC 20250, within 60 days after the date of service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. D-95-534. In the event the PACA Branch does not receive a certified check or money order in accordance with this Order, a 45-day suspension of Respondent's PACA license shall take effect, beginning 61 days

after the date of service of this Order on Respondent.

In re: JOSEPH T. KOCOT.
PACA-APP Docket No. 97-0006.
Decision and Order filed August 10, 1998.

Responsibly connected — Active involvement in violations — Officer, director, and shareholder — Alter ego — Nominal — Rebuttable presumption standard.

The Judicial Officer affirmed Judge Baker's (ALJ) decision that Joseph T. Kocot (Petitioner) was responsibly connected with Caito & Mascari, Inc., during the time that Caito & Mascari, Inc., violated the PACA. Petitioner admits that he was the president, a director, and a holder of 38 per centum of the outstanding stock of Caito & Mascari, Inc., during the time that Caito & Mascari, Inc., violated the PACA. The definition of *responsibly connected* in section 1(b)(9) of PACA (7 U.S.C. § 499a(b)(9) (Supp. II 1996)) establishes a rebuttable presumption, which provides that: a petitioner, even though a corporate officer, director, or holder of more than 10 per centum of the stock of a violating corporation is not deemed responsibly connected if the petitioner proves by a preponderance of the evidence *both* (1) that petitioner was not actively involved in the activities resulting in the violations *and* (2) that the petitioner either was only nominally an officer, director, and shareholder of the violating corporation or was not an owner of the violating corporation which was the alter ego of its owners. Petitioner failed to prove that he was not actively involved in activities that resulted in Caito & Mascari, Inc.'s violations of the PACA or that his positions with Caito & Mascari were merely nominal. Instead, the evidence reveals that Petitioner was intimately involved with the formulation of policies concerning Caito & Mascari, Inc.'s finances and Caito & Mascari, Inc.'s day-to-day operations. Petitioner knew of Caito & Mascari, Inc.'s violations of the PACA; issued checks to persons other than produce sellers, thereby reducing Caito & Mascari, Inc.'s ability to pay produce sellers in accordance with the PACA; and allowed the continuation of a scheme designed to prevent detection of Caito & Mascari, Inc.'s violations. Since Petitioner admits that he was a holder of 38 per centum of the stock of Caito & Mascari, Inc., he is an owner of Caito & Mascari, Inc., and the defense that Caito & Mascari, Inc., was the alter ego of others, is not available to Petitioner.

Stephen P. McCarron, Washington, D.C., for Petitioner.
JoAnn Waterfield, for Respondent.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Joseph T. Kocot [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Petition for Review (With Oral Hearing) [hereinafter Petition] on March 14, 1997. The Petition challenges the determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was

responsibly connected, as defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Caito & Mascari, Inc., during a period in which Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent informed Petitioner's counsel, Mr. Stephen P. McCarron, Esq., in letters dated February 14, 1997, that a complaint had been filed by the United States Department of Agriculture [hereinafter USDA] against Caito & Mascari, Inc., alleging that during the period September 1995 through May 1996, Caito & Mascari, Inc., failed to make full payment promptly to 77 sellers for 295 lots of perishable agricultural commodities totaling $997,652.91 and that PACA Branch records indicate that Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, Joseph T. Kocot, and Magdalina M. Mascari [hereinafter Petitioners] each had taken an active role as an officer, director, and/or shareholder in Caito & Mascari, Inc., during the period in which the alleged violations of the PACA occurred and that Petitioners were accordingly determined to be responsibly connected with Caito & Mascari, Inc., during the period that Caito & Mascari, Inc., is alleged to have violated the PACA.

Petitioners challenged the February 14, 1997, determination by Respondent that they were responsibly connected with Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated the PACA. On March 28, 1997, Respondent filed documents with the Hearing Clerk that comprise the record upon which Respondent based his determinations that Petitioners were responsibly connected with Caito & Mascari, Inc.

On May 19, 1997, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] consolidated for oral hearing the disciplinary proceeding instituted against Caito & Mascari, Inc., for alleged violations of section 2(4) of the PACA (7 U.S.C. § 499b(4))[1] with proceedings instituted by Petitioners challenging Respondent's determinations that they were responsibly connected with Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4))[2] (Memorandum of Prehearing

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[1]The disciplinary proceeding instituted against Caito & Mascari, Inc., is captioned, *In re Caito & Mascari, Inc.*, PACA Docket No. D-97-0008.

[2]The responsibly connected proceedings instituted by Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, Joseph T. Kocot, and Magdalina M. Mascari challenging Respondent's determinations that they were responsibly connected with Caito & Mascari, Inc., during the period that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) are captioned respectively, as follows: (1) *In re Anthony A. Caito*, PACA-APP Docket No. 97-0002; (2) *In re Joseph A. Caito, Sr.*, PACA-APP Docket No. 97-0003; (3) *In re Joseph A. Caito, Jr.*, PACA-APP Docket No. 97-0004; (4) *In*

(continued...)

Conference Call and Designation of Oral Hearing Date, filed May 19, 1997).

On August 26, 1997, the ALJ conducted an oral hearing in Indianapolis, Indiana. Mr. Stephen P. McCarron, Esq., of McCarron & Associates, Washington, D.C., represented Petitioners. Mr. Timothy A. Morris, Esq., of the Office of the General Counsel, USDA, Washington, D.C., represented Respondent.[3] At the close of the disciplinary proceeding, the ALJ issued a bench decision in which the ALJ: (1) found that during the period September 1995 through May 1996, Caito & Mascari, Inc., failed to make full payment promptly to 77 sellers of the agreed purchase prices, or balances thereof, in the total amount of $997,652.91 for 295 lots of perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce; (2) found that, as of August 8, 1997, Caito & Mascari, Inc., had not paid at least $169,896.92 to 30 of the 77 sellers whose transactions account for $736,359.20 of the $997,652.91; (3) found that, as of August 8, 1997, Caito & Mascari, Inc., failed to make full payment promptly to six of the 30 sellers for an additional $116,657.71 of perishable agricultural commodities purchased, received, and accepted after May 1996; (4) concluded that Caito & Mascari, Inc.'s failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) ordered publication of the conclusion that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Caito & Mascari, Inc.*, 56 Agric. Dec. 1837 (1997). Caito & Mascari, Inc., did not appeal the ALJ's decision, and the ALJ's decision became final September 30, 1997, and effective October 14, 1997. *In re Caito & Mascari, Inc., supra*, 56 Agric. Dec. at 1840.

On October 30, 1997, Petitioners filed Brief of Petitioners and Respondent filed Respondent's Proposed Findings of Fact, Conclusions, and Order. On February 26, 1998, the ALJ issued Decisions and Orders [hereinafter Initial Decision and Order] in which the ALJ: (1) found that Petitioners were responsibly connected with Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) affirmed Respondent's determination that Petitioners were responsibly

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[2](...continued)
re Thomas A. Caito, PACA-APP Docket No. 97-0005; (5) *In re Joseph T. Kocot*, PACA-APP Docket No. 97-0006; and (6) *In re Magdalina M. Mascari*, PACA-APP Docket No. 97-0007.

[3]On May 6, 1998, Ms. JoAnn Waterfield, Esq., Office of the General Counsel, USDA, Washington D.C., advised that Mr. Morris no longer represents Respondent and entered her appearance on behalf of Respondent (Notice of Appearance, filed May 6, 1998).

connected with Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) concluded that Petitioners are subject to the licensing restrictions provided under section 4(b) of the PACA and the employment restrictions provided under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) (Initial Decision and Order at 12, 18, 21, 34-35, 39, 55, 58, 70, 75, 94-95, 111-12).

On March 25, 1998, Petitioners requested an extension of time, to April 30, 1998, within which to file an appeal petition (Motion for Extension of Time to File Appeal Petition, filed March 25, 1998), which I granted on March 30, 1998 (Informal Order, filed March 30, 1998).

On April 30, 1998, Petitioner appealed[4] to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in adjudication proceedings which are subject to the Rules of Practice (7 C.F.R. § 2.35).[5] On July 24, 1998, Respondent filed Respondent's Response to Petitioner's Appeal Petition, and the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

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

Respondent's exhibits are designated by the letters "AX"; documents upon which Respondent relied for his February 14, 1997, determination that Petitioner was responsibly connected are designated by the letters "REC"; and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

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[4]Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, and Magdalina M. Mascari did not file appeal petitions by April 30, 1998. Therefore, the ALJ's Initial Decision and Order, as it relates to Anthony A. Caito, Joseph A. Caito, Sr., Joseph A. Caito, Jr., Thomas A. Caito, and Magdalina M. Mascari became effective at close of business April 30, 1998.

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

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

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

(10) The term "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.

. . . .

§ 499d. Issuance of license

. . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering

the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

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

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

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

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

The Secretary may approve such employment at any time following

nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9)-(10), 499d(b)(A)-(B), (c), 499h(b) (Supp. II 1996).

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

. . . .

DISCUSSION OF STATUTORY PROVISIONS

. . . [The Secretary is required to refuse a license to an applicant who was responsibly connected to an entity that, within 2 years of the date of the responsibly connected person's application, has been found to have flagrantly or repeatedly violated section 2 of the PACA. 7 U.S.C. § 499d(b). PACA licensees may not employ persons who have been found to have been responsibly

connected with an entity that has flagrantly or repeatedly violated section 2 of the PACA for 1 year following the finding of flagrant or repeated violations of section 2 of the PACA and may only employ the responsibly connected person in the second year following the finding of flagrant or repeated violations if the employing licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary (7 U.S.C. § 499h(b)).] Responsible connection is determined by the [relationship] of the individual[, alleged to be responsibly connected, with] the violating entity. The PACA provides that [a person is responsibly connected with an entity if that person] is a partner, officer, director, or [a holder of] more than 10 per centum [of the outstanding stock] of the violating entity. . . .

. . . [Until 1975, courts consistently held that an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was considered *per se* responsibly connected and subject to the licensing and employment restrictions in the PACA.

The *per se* standard was first enunciated in *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966). The court held that the 1962 amendment to the PACA adding a definition of the term *responsibly connected* was intended to establish a *per se* exclusionary standard whereby an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation would be subject to the Secretary of Agriculture's authority to prohibit employment under section 8(b) of the PACA (7 U.S.C. § 499h(b)) and that no defense, such as lack of real authority within the corporation or partnership, would be available to individuals who fell within the definition of the term *responsibly connected*.

This *per se* exclusionary rule was followed in other circuits.[6] However, i]n

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[6][*See Conforti v. United States*, 74 F.3d 838, 841 (8th Cir.) (stating that the court applies a *per se* rule to the definition of the term *responsibly connected* in section 1 of the PACA; actual responsibilities or interests are irrelevant to the question of responsible connection to a PACA violator), *cert. denied*, 117 S. Ct. 49 (1996); *Hawkins v. Agricultural Marketing Service*, 10 F.3d 1125, 1130 (5th Cir. 1993) (holding that the definition of *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) commands the application of a *per se* rule); *Faour v. United States Dep't of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) (holding that if a person is an officer, director, or holds over 10 per centum of the outstanding stock of a corporation that has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b, that person is considered *responsibly connected* and subject to sanctions under the PACA; PACA does not contemplate a defense that allows a person to show that even though he fits into one of the three categories, he never had enough actual authority to be considered truly responsibly connected); *Pupillo v. United States*, 755 F.2d 638, 644 (8th Cir. 1985) (stating that a *per se* analysis of the definition of

(continued...)

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

> Undeniably, the Perishable Agricultural Commodities Act was designed to strike at persons in authority who acquiesced in wrongdoing as well as the wrongdoers themselves. But by the Secretary's construction of Section 1(9), it also smites one who was not only unaware of the wrongdoing but also powerless to curb it.

Id. at 755 (footnotes omitted).

Further case law indicated that [the Secretary of Agriculture's] determination could be rebutted if the person could show that his title was nominal or that the [firm, which violated the PACA,] was the *alter ego* of another. *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). In addition, D.C. Circuit case law indicated there must be some "personal fault or the failure to 'counteract or obviate the fault of others'" for a finding of responsible connection. *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983).

After the *Quinn* decision, [USDA] provided a process through which

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[6](...continued)
responsibly connected in section 1 of the PACA accomplishes Congress' objective of providing a clear definition of *responsibly connected*, and that Congress did not intend to require proof of personal fault to penalize a person associated with a PACA violator). *See also Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.) (citing with approval the *per se* approach taken by the court in *Birkenfield*), *cert. denied*, 389 U.S. 835 (1967).]

individuals [(denominated "Petitioners" in the proceedings)] could contest [PACA Branch] determinations [that they were] responsibly connected [with a violating entity]. While [other] circuit [courts] held to the *per se* standard of the definition of "responsibly connected" found in the PACA,[7] the United States Court of Appeals for the District of Columbia Circuit continued to adhere to the rationale of the *Quinn* decision.[8]

Section 1[(b)](9) of the PACA, 7 U.S.C. § 499a(b)(9), defines the term *responsibly connected*. The definition was . . . amended [on November 15, 1995, with the enactment] of the Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. 104-48, 109 Stat. 424 (1995) [hereinafter the PACAA]. [Specifically, section 12(a) of the PACAA amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. II 1996))] by adding a second sentence. The definition now reads as follows:

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

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[7][See note 6.]

[8][*See Hart v. Department of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997) (stating that this court has held that the presumption that an officer, director, or holder of more than 10 per centum of the stock of a corporation is responsibly connected, is a rebuttable presumption); *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating that this circuit has consistently read 7 U.S.C. § 499a(b)(9) as establishing only a rebuttable presumption that an officer, director, or major shareholder of a PACA violator is responsibly connected with the violator; and that a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or major shareholder if: (1) the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality; or (2) the petitioner proves that at the time of the violations he was only a nominal officer, director, or shareholder); *Siegel v. Lyng*, 851 F.2d 412, 416 (D.C. Cir. 1988) (stating that, as construed by this court, characterization as *responsibly connected*, as defined in the PACA, is rebuttable, not absolute); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating that the definition of the term *responsibly connected* in section 1 of the PACA establishes only a rebuttable presumption that an officer, director, or large shareholder of a PACA violator is responsibly connected); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1413 (D.C. Cir. 1986) (stating that PACA's provisions on responsible connection establish, not an incontrovertible rule, but rather, a rebuttable presumption); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983) (stating that the court had established in *Quinn* that being a director, officer, or 10 percent stockholder is only prima facie evidence that one is *responsibly connected* to a company that has violated the PACA and that a finding that a person is *responsibly connected* must be premised upon personal fault or failure to counteract or obviate the fault of others).]

shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners.

. . . .

This provision provides two ways [by which a petitioner may] demonstrate that he [or she] is not responsibly connected. First, [the petitioner may demonstrate that he or she is not *responsibly connected*] by showing that he [or she] was not in fact [a partner in the violating partnership, or] an officer, director, or [holder of more than 10 per centum of the outstanding stock of a violating corporation or association.] Second, [the petitioner may demonstrate that he or she is not *responsibly connected*] by showing that, even though . . . a [partner in the violating partnership or] an officer, director, or [holder of more than 10 per centum of the outstanding stock of the violating corporation or association], he [or she] . . . was not actively involved in the [activities resulting in a] violation, and [either] the positions were nominal or [he or she was not an owner of the violating entity which] was . . . the *alter ego* of [its owners]. The first method of avoiding [being deemed responsibly connected with a violating entity] has been part of the PACA for many years.

To avoid a responsibly connected finding, a [petitioner] named as [a partner in a violating partnership or] as an officer, director, or [holder of more than 10 per centum of the outstanding stock in a violating corporation or association may rebut the presumption that he or she is responsibly connected by satisfying a two-prong test. The first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.]

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Findings of Fact . . .

. . . .

1. Caito & Mascari, Inc., is a corporation organized and existing under the laws of the State of Indiana. Its business and mailing address was 1341 West 29th Street, Indianapolis, Indiana 46208. Pursuant to the licensing provisions of the PACA, license number 133842 was issued to Caito & Mascari, Inc., on May 17, 1951. This license terminated on May 17, 1997, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Caito & Mascari, Inc., failed to pay the required annual renewal fee. [(REC 1 at 1, REC 6 at 1; *In re Caito & Mascari, Inc.*, 56 Agric. Dec. 1837 (1997).)]

2. [I]n [December] . . . 199[6], Caito & Mascari, Inc., filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 700-766) in the United States Bankruptcy Court for the Southern District of Indiana. This [bankruptcy] petition has been designated Case No. 96-12380-[RLB]-7. [(REC 6; *In re Caito & Mascari, Inc.*, 56 Agric. Dec. 1837 (1997).)]

3. On August 27, 1997, [the ALJ] issued a Bench Decision finding that Caito & Mascari, Inc., had committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and ordered that this finding be published. Specifically, [the ALJ] found that: (1) during the period September 1995 through May 1996, Caito & Mascari, Inc., failed to make full payment promptly to 77 sellers of the agreed purchase prices, or balances thereof, in the total amount of $997,652.91 for 295 lots of perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce; (2) as of August 8, 1997, Caito & Mascari, Inc., still had not paid at least $169,896.92 to 30 of the 77 sellers whose transactions account for $736,359.20 of the total $997,652.91 alleged in the disciplinary complaint filed . . . against Caito & Mascari, Inc., on November 7, 1996; and (3) Caito & Mascari, Inc., also failed to make full payment promptly to six of these 30 sellers for an additional $116,657.71 for perishable agricultural commodities purchased, received, and accepted after May 1996 and had not paid this amount as of August 8, 1997. [*In re Caito & Mascari, Inc.*, 56 Agric. Dec. 1837 (1997).]

. . . .

[4]. [Petitioner] is an individual whose home address is 8824 Bay Breeze Lane, Indianapolis, Indiana [(REC 1 at 23, REC 2 at 3, REC 7 at 63)]. After

working for Dole Fresh Fruit Company for 9 years as a sales manager, [Petitioner] started working as a salesman for Caito & Mascari, Inc., in May 1993 (Tr. 182). [Petitioner] has been working in the produce industry for approximately 15 years (Tr. 207). [Petitioner] has an undergraduate degree in business and a graduate degree in communications (Tr. 207).

[5]. In January 1995, Mark A. Caito and Anthony N. Caito each sold their shares of stock in Caito & Mascari, Inc., to [Petitioner] and left [Caito & Mascari, Inc.] (Tr. 145, 185[-86]). Mark A. Caito had been president, treasurer, and 18 percent shareholder, and Anthony N. Caito had been secretary and 18 percent shareholder (REC 1 at 16).

At the time he purchased the stock, [Petitioner] entered into a shareholder purchase agreement with Mark A. Caito and Anthony N. Caito in which it was represented that [Caito & Mascari, Inc.,] was in compliance with all laws and regulations (Tr. 188-89).

[6]. The board [of directors] appointed Petitioner . . . interim president in January 1995, and in March 1995, he was appointed president (Tr. 188). [Petitioner] was president, director, and 38 percent shareholder in Caito & Mascari, Inc., beginning in March 1995 through the present (REC 1 at 1, 7, 12, 20, REC 2 at 1-3, 6-9, REC 6 at 19-20, REC 7 at 56, 63, REC 15, REC 16; Tr. 202). In a letter to [the "P.A.C.A. Dept.", USDA,] dated March 13, 1995, [Petitioner] informed [USDA] that "[t]here has been a recent change in ownership at Caito & Mascari, Inc." and then proceeded to identify himself as both [Caito & Mascari, Inc.'s] president as well as a 38 percent owner [of Caito & Mascari, Inc.] (REC 1 at 22). In a letter dated February 12, 1996, from [Dale & Eke, a law firm representing] Caito & Mascari, Inc., . . . to [J.E. Servais, Head of the Trade Practices Section, Fruit and Vegetable Division, Agricultural Marketing Service, USDA,] Caito & Mascari, Inc.'s legal counsel acknowledged [that Caito & Mascari, Inc., had] problems [paying produce sellers] when due and explained that "Joseph T. Kocot was installed as the newly elected President of Caito & Mascari by the Board of Directors on January 10, 1995, and since that date he has been implementing new policies and procedures designated to improve the efficiency and productivity of Caito & Mascari" (REC 17).

[7]. [Petitioner] signed multiple documents in his capacity as president, including: (1) settlement agreements with unpaid produce [sellers] (AX 3); (2) [a] PACA license renewal form (REC 1 at 9); (3) correspondence to USDA (REC 1 at 22); (4) [a] bill of sale for the sale of the Brickyard 400 Suite (REC 5 at 1); (5) a chapter 7 bankruptcy petition filed on behalf of Caito & Mascari, Inc. (REC 6 at 2, 20); and (6) five promissory notes and security agreements in

connection with Caito & Mascari, Inc.'s borrowing $35,000 (REC 10, REC 11, REC 12, REC 13, REC 14; Tr. 223).

[8]. Petitioner dealt with and directed Caito & Mascari, Inc.'s lawyers regarding bankruptcy proceedings (REC 6 at 3).

[9]. When Caito & Mascari, Inc., needed to borrow money in November 1995, [Petitioner] advanced the corporation $10,000 of his own money (REC 14; Tr. 223).

[10]. As president, [Petitioner] had the authority to hire, as well as to suspend or terminate, individuals (REC 2 at 8). When Joseph A. Caito, Jr., resigned as both a member of the board of directors and a corporate officer on October 15, 1996, he submitted his letter of resignation to [Petitioner,] as president (REC 1 at 3).

[11]. Petitioner, as president of [Caito & Mascari, Inc.,] was responsible for dealing with unpaid [produce sellers] (AX 3; Tr. 41-43, 227, 229).

[12]. In 1995, Petitioner's salary was approximately $80,000 (Tr. 207).

1[3]. [Petitioner] was one of only three persons authorized to sign checks on Caito & Mascari, Inc.'s operations and payroll accounts after January 1995 (Tr. 170). After one of the other persons authorized to sign checks, Anthony [A.] Caito, left Caito & Mascari, Inc., on January 5, 199[6], Petitioner was one of only two remaining persons authorized to sign on the corporation's accounts . . ., and as all checks required two signatures (Tr. 170[-71]), he signed every check after that date (Tr. 226-27). Among the checks in evidence that were signed by Petitioner are a check for PACA license renewal (REC 1 at 11), at least 12 payroll checks [dated] from September 14, 1995, to February 1, 1996 (REC 9; Tr. 223), and at least 42 checks [made payable to persons who sold] produce [to] Caito & Mascari, Inc., [and dated] from November 29, 1995, to April 24, 1996 (AX 2; Tr. 225[-26]).

1[4]. As a member of Caito & Mascari, Inc.'s board of directors, Petitioner attended board [of directors] meetings beginning in March 1995, including board meetings held on March 12, 1995, July 12, 1995, and October 25, 1995 (REC 2; Tr. 214). At these board [of directors] meetings, Petitioner discussed business and financial matters affecting Caito & Mascari, Inc., made motions, seconded the motions of other board members, and voted on all business decisions that were brought to a vote (Tr. 214-16).

1[5]. At the March 12, 1995, meeting of Caito & Mascari, Inc.'s board of directors, the board members, including Petitioner, discussed business and financial matters, including: (1) amending [Caito & Mascari, Inc.'s] Articles of Incorporation and Code of By-laws; (2) convening the board of directors on a

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

1[6]. At the July 12, 1995, meeting of Caito & Mascari, Inc.'s board of directors, the board members, including Petitioner, discussed business and financial matters, including: (1) how to improve inventory control; (2) the "Financial Status of [the] Company," including discussions of cuts needed to lower [Caito & Mascari, Inc.'s] expenses; and (3) giving the president the authority to suspend or terminate individuals (REC 2 at 8).

1[7]. At the October 25, 1995, meeting of Caito & Mascari, Inc.'s board of directors, the board members, including Petitioner, discussed business and financial matters, including: (1) the decision to deny the debt, but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for [Caito & Mascari, Inc.,] by borrowing money, signing notes, and selling some corporate assets. Petitioner made the motion [to give] Caito & Mascari, Inc., "the right to raise funds by taking loans from a lender" up to $200,000 (REC 2 at 9).

1[8]. As president of Caito & Mascari, Inc., Petitioner dealt with unpaid produce [sellers] in arranging payment and negotiating settlements for partial payment (AX 3; Tr. 41-43).

1[9]. When PACA [Branch] investigator [William] Hammond concluded his investigation of Caito & Mascari, Inc., in May 1996, Petitioner met with him to discuss the findings of the investigation. Petitioner [did not dispute] Mr. Hammond['s] . . . finding . . . that Caito & Mascari, Inc., had not paid its produce [sellers] on time. . . . (Tr. 240.) Petitioner also discussed with Mr. Hammond the different ways in which [Caito & Mascari, Inc.,] was working to pay off these unpaid and past due debts to its produce [sellers] (Tr. 240-41).

[20]. Petitioner was responsibly connected with Caito & Mascari, Inc., during the time it violated [section 2(4) of] the PACA [(7 U.S.C. § 499b(4))].

Conclusions

[Respondent] has determined that Petitioner . . . was responsibly connected with Caito & Mascari, Inc., during the time it was found to have violated the PACA by failing to make full payment promptly [to 77 sellers of the agreed

purchase prices in the total amount of $997,652.91 for 295 lots of perishable agricultural commodities which Caito & Mascari, Inc., purchased, received, and accepted in interstate and foreign commerce (Letter from J.R. Frazier to Stephen P. McCarron, dated February 14, 1997)]. . . . [Petitioner] denies he was actively involved in the [activities] resulting in the violations and asserts that his role as president, director, and 38 percent shareholder of Caito & Mascari, Inc., was nominal only. [Petitioner] further asserts that Caito & Mascari, Inc., was the *alter ego* of unnamed "others" during the violations period. [(Petition; Brief of Petitioners at 25.)] However, the record indicates that [Petitioner] was actively involved in the activities resulting in [Caito & Mascari, Inc.'s] violations, that Petitioner's positions [with Caito & Mascari, Inc.,] were not nominal, and that Caito & Mascari, Inc., was not the *alter ego* of anyone. Finally, [Petitioner] also claims that he was unaware of the poor financial condition of Caito & Mascari, Inc., when he bought 38 percent of its stock [(Petition; Brief of Petitioners at 23-25)].

Specifically, [Petitioner] maintains that he was not responsibly connected because the violations of the [PACA] occurred prior to his [purchasing 38 percent of Caito & Mascari, Inc., and] assuming the positions of president and director. He argues that after he purchased shares and became president [and a director], he discovered that the former shareholders had done things that placed [Caito & Mascari, Inc.,] in [a poor financial condition] before Petitioner took over. [(Brief of Petitioners at 23-25.)] First, [Mark A. Caito] had factored the accounts receivable, requiring [Caito & Mascari, Inc., to make] large interest payments (Tr. 190). Next, [former shareholders] used insurance proceeds for destroyed refrigeration equipment as working capital and then indebted [Caito & Mascari, Inc.,] to pay for the new refrigeration equipment that was held in the name of another company which Mark A. Caito controlled (Tr. 191). As a result, [Caito & Mascari, Inc.,] had to pay $10,000 per month for refrigeration which it did not own [(Tr. 191)]. Mark A. Caito had orally promised to defer compensation to an employee, leaving [Caito & Mascari, Inc.,] with a large liability, after Mark A. Caito left [Caito & Mascari, Inc.] (Tr. 193. . .). Mark A. Caito also placed the leases for all of [Caito & Mascari, Inc.'s] equipment, including trucks, in the name of Caito Mascari Transportation, Mark A. Caito's other company, so that [Caito & Mascari, Inc.,] did not have control over its equipment. [Further,] the lease for [Caito & Mascari, Inc.'s] building premises was also in the name of Caito Mascari Transportation Company. (Tr. 194-95.)

Petitioner . . . further contends that he discovered that Caito & Mascari,

Inc., had . . . problems [paying produce sellers prior to Petitioner's employment by Caito & Mascari, Inc.,] and that Mark A. Caito instituted the procedure of writing checks to produce suppliers, but not mailing the [checks, to make it appear to the] PACA [Branch] investigators that payments were being made on time (Tr. 195-97).

Petitioner asserts that in March 1995, he discovered that there were produce sellers who had not been paid for over 6 months (Tr. 197), and he paid off the old debt incurred by the former owners [of Caito & Mascari, Inc.] (Tr. 199).

As a result of what he regarded as [fraud] by Mark A. Caito . . ., Petitioner filed a lawsuit against [him] alleging . . . [that Mark A. Caito committed] fraud [in connection with the sale of stock in Caito & Mascari, Inc., to Petitioner] (Tr. 201). However unfortunate or ill-informed [Petitioner's] business decisions may have been to buy . . . [38] per centum of [the outstanding stock of Caito & Mascari, Inc.,] and become its president and director, those decisions do not affect his liability under the PACA for those violations that occurred under his direction and control. [Petitioner] was responsibly connected with Caito & Mascari, Inc.[, during the period (September 1995 through May 1996) that Caito & Mascari, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).]

[Petitioner] Was the President, a Director, [and a Holder of More Than 10 Per Centum of the Stock] of Caito & Mascari, Inc.

Section 1[(b)](9) of the PACA [(7 U.S.C. § 499a(b)(9) (Supp. II (1996)))] provides that "responsibly connected" persons include officers, directors, and holders of more than 10 per centum of the outstanding stock of a corporation or association. A person must fit at least one of these categories if he or she is to be considered responsibly connected. [Petitioner's] role as the president, director, and [holder of] 38 per [centum of the outstanding stock] of Caito & Mascari, Inc., during the entire violations period is uncontested in this [proceeding. Petitioner] acknowledged at the hearing that he held these positions from January 1995 through the present (Tr. 202-03). In addition to the PACA license record that unequivocally designates [Petitioner] as president, a director, and a 38 percent shareholder [of Caito & Mascari, Inc.,] during that time period (REC 1 at 1, 7, 12, 20), numerous other corporate documents conclusively establish Petitioner's role within Caito & Mascari, Inc., including the corporate minutes (REC 2 at 1-3, 6-9), bankruptcy documents filed by [Petitioner] on behalf of Caito & Mascari, Inc. (REC 6 at 19), and corporate correspondence to the PACA [Branch] from [Petitioner] (REC 1 at 22). Accordingly, there is

no question that [Petitioner] was president, director, and a [holder of more] than 10 per centum [of the outstanding stock] of Caito & Mascari, Inc., during the entire 9-month violations period from September 1995 through May 1996.

[Petitioner] Was Actively Involved in Activities Resulting in PACA Violations Committed by Caito & Mascari, Inc.

. . . [S]ection 1[(b)](9) [of the PACA (7 U.S.C. § 499a(b)(9) (Supp. II (1996)))] provides a person who meets the initial criteria for responsible connection with the opportunity to rebut the presumption that he or she was responsibly connected. In order to rebut the presumption of responsible connection, a person must show that he or she "was not actively involved in the activities resulting in a violation of [the PACA] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." The record in this case reveals that [Petitioner] was actively involved in activities resulting in the payment violations committed by Caito & Mascari, Inc. Therefore, Petitioner[, who was, at all times material to this proceeding, the president, a director, and a holder of 38 per centum of the outstanding stock of Caito & Mascari, Inc., was] responsibly connected with [Caito & Mascari, Inc.].

The [PACA] . . . does not define [the term] "actively involved." However, guidance on this matter can be found in the decisions issued by the United States Court of Appeals for the District of Columbia Circuit, which originated the requirement that a person must be given the opportunity to rebut the presumption of responsible connection based solely on his [or her] position with the violating firm. While not using the "actively involved" language that appears in [section 1(b)(9) of the PACA], these decisions have addressed the degree of involvement necessary for responsible connection by requiring that a person must show that he [or she] was "without either personal fault or a realistic capacity to counteract or obviate the fault of others." *Quinn v. Butz,* 510 F.2d 743, 756 (D.C. Cir. 1975). *See also* . . . *Siegel v. Lyng,* 851 F.2d 412, 417 (D.C. Cir. 1988); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987); and *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983).

[Therefore,] one [manner by which to determine whether a petitioner has been actively involved in activities resulting in a violation of the PACA] is to examine whether the petitioner either had "personal fault" for the violation or

failed to "counteract or obviate the fault of others" for the violation. In order to constitute active involvement, personal fault is not required, although it certainly would be sufficient to establish that a petitioner was actively involved.

. . . [Petitioner's contention that he was not actively involved in activities resulting in the violations is not sustainable. Given that Petitioner performed both acts of commission and omission, which resulted in Caito & Mascari, Inc.'s violations of the PACA, he was actively involved in Caito & Mascari, Inc.'s violations of the PACA]. . . . Petitioner had knowledge of the financial status of Caito & Mascari, Inc., access to Caito & Mascari, Inc.'s books and records, knowledge of Caito & Mascari, Inc.'s failures to pay produce sellers, and extensive authority for the policies and day-to-day operations of Caito & Mascari, Inc., during the entire period in which Caito & Mascari, Inc., violated section 2(4) of the PACA.

Petitioner enjoyed wide latitude in the running of the day-to-day operations of Caito & Mascari, Inc. (Tr. 125, 129-30, 134).]

. . . .

[Petitioner] testified that[, in March 1995,] shortly after becoming president of Caito & Mascari, Inc., . . . he discovered that [Caito & Mascari, Inc.'s] longtime bookkeeping practice had been to [issue checks payable to produce sellers, but delay] mailing the [checks] in the hope that [Caito & Mascari, Inc.'s] financial records would appear to reflect current payment to its produce [sellers]. However, he admitted that after making this discovery, he permitted this practice to continue (Tr. 224). [This omission to act establishes that Petitioner was actively involved in activities resulting in violations of the PACA by Caito & Mascari, Inc., and activities designed to prevent detection of Caito & Mascari, Inc.'s violations of the PACA.]

Moreover, when asked whether he, after learning that invoices were not being paid promptly, had directed [Caito & Mascari, Inc.'s] buyers to inform prospective produce sellers of Caito & Mascari, Inc.'s payment problems, [Petitioner] replied:

> A. . . . .
>
> I'm trying to tell you that when we found that [William Hammond] was coming in, [in May 1996], virtually every person that we had dealt with was called and contacted and asked to give us extended credit terms to allow us to continue, so at that point, yes, growers were notified that we needed longer terms, that we needed more length in paying.

Tr. 232.

Of course, while [Petitioner] testified that he had learned of [Caito & Mascari, Inc.'s] inability to pay its produce [sellers in accordance with the PACA] by July 1995 (Tr. 231), [Petitioner's] testimony . . . indicates that he chose not to warn produce sellers about the problem until he learned that a PACA [Branch] investigator was about to commence an investigation. For nearly 1 year after learning about [Caito & Mascari, Inc.'s failures to pay produce sellers in accordance with the PACA, Petitioner] permitted [Caito & Mascari, Inc.'s] buyers to continue to use produce sellers as unwitting and unwilling lenders of money. [Petitioner] deliberately and knowingly contributed to [Caito & Mascari, Inc.'s] violations of the PACA.

. . . .

[Furthermore, Petitioner] was one of only three persons authorized to sign checks on Caito & Mascari, Inc.'s operations and payroll accounts (Tr. 170-71). After one of the three authorized signers for these accounts, Anthony A. Caito, left Caito & Mascari, Inc., on January 5, 1996, [Petitioner] was one of only two persons authorized to sign checks on behalf of the corporation, and as all checks written on the operations and payroll accounts required two signatures, he signed every check after that date (Tr. 170-73). Among the checks in evidence that were signed by [Petitioner] are a check for PACA license renewal (REC 1 at 11; Tr. 157), at least 12 payroll checks [dated from] September 14, 1995, [through] February 1, 1996 (REC 9; Tr. [223]), and at least 42 checks on Caito & Mascari, Inc.'s operations account to produce [sellers dated] from November 29, 1995, to April 24, 1996 (AX-2; Tr. [225-26]). [Petitioner's act of signing checks drawn on Caito & Mascari, Inc.'s operations and payroll accounts made payable to persons who were not produce sellers constitutes active involvement in an activity resulting in violations of the PACA by Caito & Mascari, Inc. Petitioner's actions enabled persons who presented these checks for payment to receive payment and resulted in the . . . reduction of resources available to Caito & Mascari, Inc., to make full payment promptly to produce sellers in accordance with the PACA.]

. . . .

Moreover, in his role as a member of Caito & Mascari, Inc.'s board of directors, Petitioner attended and actively participated in all of [Caito & Mascari, Inc.'s] board [of directors] meetings beginning March 1995. The corporate minutes from the board of directors meetings for March 12, 1995, July 12, 1995, and October 25, 1995, all confirm that [Petitioner] actively participated in all aspects of Caito & Mascari, Inc.'s formal decision making

process (REC 2). At these board [of directors] meetings, Petitioner discussed a wide range of business and financial matters affecting Caito & Mascari, Inc., made motions, seconded the motions of other board members, and voted on all business decisions that were brought to a vote (Tr. 215-16).

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

At the July 12, 1995, board [of directors] meeting, [Petitioner] again discussed such matters with the other board members. The business and financial matters discussed by Petitioner at that board [of directors] meeting included: (1) how to improve inventory control; (2) the "Financial Status of [the] Company" including discussions of cuts needed to lower [Caito & Mascari, Inc.'s] expenses; and (3) giving the president the authority to suspend or terminate individuals (REC 2 at 8; Tr. [214-16]). These discussions . . . addressed the fundamental issues of corporate financial and management policy that determined the manner in which Caito & Mascari, Inc., would [attempt to resolve] its financial problems. [Petitioner] voted in all three of the votes taken (REC 2 at 8).

At the October 25, 1995, board [of directors] meeting, [Petitioner] again discussed these types of financial issues with other board members, addressing: (1) the decision to deny the debt, but to settle a claim brought by former employee Bob Ramsier regarding money he claimed was owed him by Caito & Mascari, Inc., and (2) raising money for [Caito & Mascari, Inc.,] by borrowing money, signing notes, and selling some corporate assets. Petitioner seconded the motion to allow [Caito & Mascari, Inc.,] to take out loans (REC 2 at 9 . . .). Bob Ramsier, a former Caito & Mascari, Inc., employee, had made a claim that [Caito & Mascari, Inc.,] owed him approximately $20,000 to $30,000 for work he had allegedly performed years earlier (Tr. 94, 131, 148-49, 193). In deciding to settle this claim and to have Caito & Mascari, Inc., take out loans and sell assets in order to pay this claim, [Petitioner] consciously chose to divert the financial resources available to [Caito & Mascari, Inc.,] to pay produce [sellers

to Caito & Mascari, Inc.'s former employee].

In his role as president, director, and [holder of] 38 per centum [of the outstanding stock of Caito & Mascari, Inc., Petitioner] had every opportunity to take action to bring the corporation into compliance with the [PACA. Petitioner] may not credibly contend that he was not actively involved in violations when he knew that he was not paying [Caito & Mascari, Inc.'s produce sellers] promptly, when he was responsible for paying those accounts, and when he was actively trying to get unpaid produce [sellers] to settle for less than they were due or to extend payment times. . . .

Petitioner played an integral role in the financial affairs of [Caito & Mascari, Inc.,] and he extensively participated in the decision making process [regarding Caito & Mascari, Inc.'s finances]. However, assuming *arguendo* that he was . . . not . . . personally at fault for the activities resulting in [Caito & Mascari, Inc.'s] violations [of the PACA], he certainly had a realistic capacity to "counteract or obviate the fault of others", which he failed to exercise. *Bell v. Department of Agric., supra*, 39 F.3d at 1201. Directing the daily operations of Caito & Mascari, Inc., [participating in the policy decisions for Caito & Mascari, Inc., and] possessing the knowledge of [Caito & Mascari, Inc.'s] financial inability to pay its produce [sellers], . . . Petitioner] had not only the capacity, but the duty, to counteract the fault of the other Caito & Mascari, Inc., directors and officers in the daily operations of [Caito & Mascari, Inc.,] and in the board [of directors] meetings. Through both his acts of commission and omission, [Petitioner was actively involved in activities resulting in Caito & Mascari, Inc.'s violations of the PACA and thus] responsibly connected with Caito & Mascari, Inc.

Petitioner Was Not Merely a Nominal President, Director, and Stockholder of Caito & Mascari, Inc., and Caito & Mascari, Inc., Was Not the *Alter Ego* of Others.

[Petitioner's] failure to satisfy the requirements of the first prong of the test required to rebut the presumption of responsible connection should end the inquiry as to his responsibly connected status, as he was actively involved in the activities resulting in a violation of the PACA and was an officer, director, [and holder] of more than 10 per centum [of the outstanding stock of Caito & Mascari, Inc. Petitioner], contending that he was not actively involved [in the activities resulting] in [Caito & Mascari, Inc.'s] violations [of the PACA], . . . asserts that his role on the board of directors was merely nominal and . . . that

Caito & Mascari, Inc., was the *alter ego* of unnamed "others" (Petition ¶ 3). However, this contention is not pursued on brief and is not supported by the evidence of record.

. . . Section 1[(b)](9) of the PACA requires a petitioner who has already proven that he or she was not actively involved in the activities resulting in the violations to further demonstrate that he or she "either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." 7 U.S.C. § 499a[(b)](9) (emphasis added). It is evident from case law and the factual record that [Petitioner's] roles were not nominal, that he himself was an owner, and that Caito & Mascari, Inc., was not the *alter ego* of any person.

Petitioner Was Not a Nominal President, Director, or Shareholder of Caito & Mascari, Inc.

Although the legislative history [applicable to] the 1995 amendment [of the definition of the term *responsibly connected*] does not clarify what is meant by the term "nominal," the meaning of the term has been extensively discussed in decisions issued by the United States Court of Appeals for the District of Columbia Circuit. In . . . *Bell v. Department of Agric., supra*, the United States Court of Appeals for the District of Columbia Circuit reviewed the factors that permit a person to rebut the presumption of responsible connection with a corporation. The court stated that a person may show that he [or she] was only a nominal officer, director, or shareholder ["by proving that he lacked `an actual, significant nexus with the violating company.'" *Id.* at 1201.]

. . . .

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

First, unlike the petitioner in *Quinn*, [Petitioner] Kocot was active in policy and business decisions and participated in [Caito & Mascari, Inc.'s] formal

decision making process. He admitted that he participated in board of directors meetings in which [he and] other directors . . . made . . . decisions and policies regarding corporate finance from March 1995 through October 1996 (Tr. 215-16). Corporate records indicate that [Petitioner] attended all board [of directors] meetings after March 1995 and that he voted on each motion put to a vote (REC 2 at 6-9).

Second, unlike the petitioner in *Bell*, [Petitioner] Kocot had full access to a wide array of corporate documents as president, director, and [holder of] 38 per centum [of the outstanding stock] of Caito & Mascari, Inc. During the investigation of Caito & Mascari, Inc., [Petitioner] and Joseph Caito, Jr., provided PACA [Branch] investigator [William] Hammond with all the necessary corporate financial documents, and these documents were located in the office shared by [Petitioner] and [Caito & Mascari, Inc.'s] secretary and treasurer . . . (Tr. 237). Petitioner . . . testified extensively regarding his review of [Caito & Mascari, Inc.'s] business and financial records after becoming Caito & Mascari, Inc.'s president in January 1995 (Tr. 190-201).

Third, unlike the petitioner in *Bell*, [Petitioner] Kocot had full knowledge of [Caito & Mascari, Inc.'s] financial difficulties. The *Minotto* court also weighed the petitioner's knowledge of the company's wrongdoings in the responsibly connected decision. In that case, however, the petitioner "denied knowledge of the Company's transactions which gave rise to the underlying violations, and she asserted that such business was never discussed at Board meetings." *Minotto v. United States Dept. of Agric., supra,* 711 F.2d at 408. [Petitioner] admitted that he had full knowledge of Caito & Mascari, Inc.'s financial difficulties and inability to pay its [produce sellers] at least by July 1995 (Tr. 231). Further, . . . [Petitioner] was in charge of the daily operations of [Caito & Mascari, Inc.,] and participated in the board of directors meetings at which officers and directors discussed all aspects of [Caito & Mascari, Inc.'s] operations, including its failing financial health (REC 2). The circumstances surrounding his meeting with PACA [Branch] investigator [William] Hammond in May 1996 also strongly support the fact that [Petitioner] had full knowledge of [Caito & Mascari, Inc.'s] problems. When [Petitioner] spoke with PACA [Branch] investigator [William] Hammond at the end of the PACA investigation to discuss the results of the investigation, [Petitioner did not dispute] that the amounts found in the investigation were indeed past due, that there had been problems with payment, and that [Caito & Mascari, Inc.,] was making efforts to pay off the debts (Tr. 240-41).

[Case precedent underscores the importance of writing checks in the

determination of responsible connection. The fact that a person signs corporate checks is considered one of the strongest indications of that person's close involvement in the financial affairs of the corporation. In *Bell v. Department of Agric., supra*, the court stated that an important factor indicating that the appellant was nominal was the fact that he "never signed checks or agreements." 39 F.3d at 1200. In *Farley v. United States Dep't of Agric.*, 8 F.3d 26 (9th Cir. 1993) (Table), *reprinted in* 52 Agric. Dec. 1551 (1993), the court ruled that the appellant was responsibly connected under the rebuttable presumption standard of the District of Columbia Circuit. In citing the factors which led to this decision, the court noted that the appellant "had check-writing and borrowing authority, both of which were exercised at least once." (52 Agric. Dec. at 1553.) . . . Petitioner] was one of only three persons at Caito & Mascari, Inc., who were authorized to sign checks on both Caito & Mascari, Inc.'s operations and payroll accounts. After Anthony A. Caito left Caito & Mascari, Inc., on January 5, 1996, [Petitioner] was one of only two persons authorized to sign checks on behalf of [Caito & Mascari, Inc.,] meaning that he signed every check after that date because both accounts required two signatures. (Tr. 171-73, 226-27.) Among the checks signed by [Petitioner] are a check for PACA license renewal (REC 1 at 11), at least 1[2] payroll checks [dated] between September 14, 1995, and February 1, 1996 (REC 9; Tr. 223), and at least 42 checks on Caito & Mascari, Inc.'s operations account [made payable to persons who sold produce to Caito & Mascari, Inc., and dated] from November 29, 1995, to April 24, 1996 (AX 2; Tr. 225).

. . . Therefore, [Petitioner's] issuance of many of the checks for Caito & Mascari, Inc.'s operations and payroll checking accounts during the first 4 months of the violations period and all the checks on these accounts for the remaining 5 months of the violations period alone is sufficient to constitute an "actual, significant nexus" which establishes that his multiple positions within Caito & Mascari, Inc., were not nominal.

That Petitioner was not a nominal corporate officer is also demonstrated by his signing multiple corporate documents as president of Caito & Mascari, Inc. [Petitioner] signed corporate documents including: (1) settlement agreements with unpaid produce [sellers] (AX 3); (2) a PACA license renewal form (REC 1 at 9); (3) correspondence to PACA (REC 1 at 22); (4) a bill of sale for the sale of the Brickyard 400 Suite (REC 5 at 1); (5) a chapter 7 bankruptcy petition filed on behalf of Caito & Mascari, Inc. (REC 6 at 2, 20); and (6) five promissory notes and security agreements in connection with Caito & Mascari, Inc.'s borrowing $35,000 (REC 10; REC 11; REC 12; REC 13; REC 14; Tr. 223).

The substantial, rather than nominal, nature of [Petitioner's] positions is underscored by his background, compensation, and responsibilities for personnel matters. [Petitioner] was by no means an unskilled or untrained employee and officer. After working for Dole Fresh Fruit Company for 9 years as a sales manager, he started working for Caito & Mascari, Inc., in May 1993 (Tr. 182). He has been working in the produce industry for approximately 15 years, and he has an undergraduate degree in business and a graduate degree in communications (Tr. 207). Similarly, the fact that [Petitioner's] 1995 salary was approximately $80,000 would strongly suggest that his role as president was anything but nominal (Tr. 207).

[Petitioner] also was able to hire, fire, and suspend [Caito & Mascari, Inc.,] employees (REC 2 at 8). When Joseph Caito, Jr., resigned as both a member of the board of directors and a corporate officer on October 25, 1996, he submitted his letter of resignation to [Petitioner] as president (REC 1 at 3). When asked, "Why would a personnel matter, like someone's resignation, be directed to you?", Mr. Kocot replied, "Because I'm president." (Tr. 212.) Furthermore, [Petitioner] worked with and directed Caito & Mascari, Inc.'s attorneys (REC 6 at 3).

[Petitioner's] claim that his positions as president, director, and shareholder were nominal is further belied by the fact that when Caito & Mascari, Inc., needed to borrow money in November 1995 in order to settle a law suit brought against the corporation, [Petitioner] loaned [Caito & Mascari, Inc.,] $10,000 of his own money (REC 14; Tr. 223). [Petitioner's] personal loan of the $10,000 was made in an effort to protect his interest in Caito & Mascari, Inc. Accordingly, [Petitioner's] personal interest in financially assisting the corporation is further evidence of his substantial involvement in the corporation as an officer, director, and [holder of] 38 per centum [of the outstanding stock of Caito & Mascari, Inc].

The extensive and substantive nature of [Petitioner's] activities as a corporate officer is further supported by his activities with unpaid [produce sellers]. The *Bell* court took special notice of the fact that:

> Moreover, to the question, "Did people come to you when they were not paid?" Bell answered unequivocally "No." This clearly means suppliers did not regard Bell as having authority to bring about payment by [the violating company]; it may also suggest that he was not even on notice of serious complaints.

Bell v. Department of Agric., supra, 39 F.3d at 1204 (citation omitted). [Petitioner's] unique role in the corporation as president was recognized by produce [sellers] who specifically contacted him when they sought someone in [Caito & Mascari, Inc.,] with the authority to get them get paid for their produce. As John Schaefer, president of Jack Brown Produce, [Inc.,] testified, he went directly to [Petitioner] when Jack Brown Produce[, Inc.,] had not been paid because he wanted [to] deal with only the president of Caito & Mascari, Inc. (Tr. 41). As president of Caito & Mascari, Inc., [Petitioner] dealt with unpaid produce [sellers], such as Jack Brown Produce[, Inc.,] and Potato Services of Michigan, Inc., in arranging payment and negotiating settlements for partial payment (AX 3; Tr. 41-43). Accordingly, his role as an officer in Caito & Mascari, Inc., cannot . . . be characterized as nominal.

It is evident that [Petitioner] Kocot, unlike the petitioner in *Quinn*, was closely involved in important corporate business and policy functions, which precludes a finding that he was only nominally an officer, director, and shareholder of [Caito & Mascari, Inc.]

[Moreover, the United States Court of Appeals for the District of Columbia Circuit has stated on several occasions that ownership of approximately 20 per centum or more of the stock of a corporation is enough to support a finding of responsible connection. In *Martino v. United States Dep't of Agric.*, 801 F.2d 1410 (D.C. Cir. 1986), the court held that ownership of 22.2 per centum of the stock and the fact that the petitioner was neither enticed nor coerced into the position that rendered him responsibly connected formed a sufficient nexus to establish the petitioner's responsible connection.

In *Veg-Mix, Inc. v. United States Dep't of Agric., supra*, 832 F.2d at 611, the court, relying on its decision in *Martino*, states: "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." This principle was restated in *Siegel v. Lyng, supra*, 851 F.2d at 417, as follows: "Most clearly in *Martino*, this Court held that approximately twenty per cent stock ownership would suffice to make a person accountable for not controlling delinquent management." . . . While a petitioner who owns stock may demonstrate that he or she was only nominally a shareholder of a corporation or association, it is extremely difficult to do so when the petitioner owns a substantial per centum of the outstanding stock of the corporation or association. Petitioner does not deny that he held 38 per centum of the outstanding stock of Caito & Mascari, Inc. Petitioner's ownership of a substantial per centum of the outstanding stock of Caito & Mascari, Inc., alone is very strong evidence that he was not a nominal

shareholder,[9] and Petitioner has failed to rebut this evidence.]

The only reasonable conclusion to be drawn from the evidence in the record is that [Petitioner] had "an actual, significant nexus" with Caito & Mascari, Inc., committed acts of commission by participating in [Caito & Mascari, Inc.'s] violations of the [PACA], and further committed acts of omission by failing to counteract the fault of others who were also responsible for the corporation's violations. Thus, [Petitioner] has failed to demonstrate that he was a nominal [officer,] director[, and shareholder] of Caito & Mascari, Inc., and, that he was not responsibly connected [with Caito & Mascari, Inc.].

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

Again, assuming *arguendo* that [Petitioner] was not actively involved [in activities resulting] in violations of [the PACA by] Caito & Mascari, Inc., section 1[(b)](9) of the PACA provides that a Petitioner may rebut the presumption of responsible connection by demonstrating that he or she "was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners." . . . .

. . . .

[Petitioner] is barred from raising the *alter ego* defense due to his ownership of stock in Caito & Mascari, Inc. In *In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997), *appeal docketed*, No. 98-1065 (D.C. Cir. Feb. 13, 1998), the Judicial Officer held that "a petitioner must prove not only that the violating licensee or entity subject to the license is the *alter ego* of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license." *Id.* at 1864-65. As in that case, where the *alter ego* defense was denied to Mr. Norinsberg because of his 2.97914 percent ownership interest in the [violating corporation's] outstanding stock, it is similarly unavailable to

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[9]*See In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating that the petitioner's ownership of 33.3 per centum of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *appeal docketed*, No. 98-1057 (D.C. Cir. Feb. 5, 1998).

[Petitioner] with his 38 percent ownership interest in Caito & Mascari, Inc.[10]

[Moreover, the evidence demonstrates that, while Petitioner was given a great dealt of autonomy in running Caito & Mascari, Inc.'s day-to-day operations, the board of directors retained final approval on major decisions (REC 2; Tr. 129-30, 134). The record establishes that, at all times material to this proceeding, decision making authority within Caito & Mascari, Inc., was distributed among many individuals, and I do not find that Caito & Mascari, Inc., was the *alter ego* of "others," as Petitioner contends.]

. . . Accordingly, [Petitioner's] claim [that he is not an owner of Caito & Mascari, Inc., and that Caito & Mascari, Inc., was the *alter ego* of others] must be rejected.

[Petitioner was the president, a director, and a holder of 38 per centum of the outstanding stock of Caito & Mascari, Inc., during the time that Caito & Mascari, Inc., violated section 2(4) of the PACA. Petitioner was actively involved in the activities resulting in Caito & Mascari, Inc.'s violations of section 2(4) of the PACA. Petitioner was not a nominal officer, director, or shareholder of Caito & Mascari, Inc. Petitioner was an owner of Caito & Mascari, Inc., and Caito & Mascari, Inc., was not the *alter ego* of any other persons.]

. . . .

For the reasons set forth [in this Decision and Order, *supra*, Respondent's] determination that Petitioner . . . was responsibly connected [is] correct and is . . . affirmed.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises one issue in Petitioner's Appeal Petition, as follows:

ISSUE ON APPEAL

Whether a person, who becomes an officer, director and more than 10% shareholder of a produce company, is responsibly-connected if,

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[10][*See also In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating that the petitioner cannot avail himself of the *alter ego* defense because petitioner, at all times material to the proceeding, held 33.3 per centum of the outstanding stock of the violating entity), *appeal docketed*, No. 98-1057 (D.C. Cir. Feb. 5, 1998).]

unknown to that person, there were existing payment violations of the PACA which that person did not exacerbate and tried to correct unsuccessfully?

Appeal Pet. at 1.

The factual premises in Petitioner's issue on appeal are not supported by the record. As fully discussed by the ALJ, Petitioner was an officer, director, and holder of 38 per centum of the outstanding shares of Caito & Mascari, Inc., during the entire 9-month period (September 1995 through May 1996) of Caito & Mascari, Inc.'s violations of section 2(4) of the PACA. Moreover, Petitioner knew that Caito & Mascari, Inc., was violating section 2(4) of the PACA (7 U.S.C. § 499b(4)) no later than July 1995, and Petitioner was intimately involved with the formulation of policies concerning Caito & Mascari, Inc.'s finances and Caito & Mascari, Inc.'s day-to-day operations. While Petitioner did take some steps to correct Caito & Mascari, Inc.'s PACA violations, Petitioner was actively involved in activities resulting in Caito & Mascari, Inc.'s violations of the PACA, was not merely a nominal officer, director, and shareholder of Caito & Mascari, Inc., and, as an owner of Caito & Mascari, Inc., cannot contend that Caito & Mascari, Inc., was the alter ego of "others."

I do not find that the ALJ committed error and except for minor changes noted in this Decision and Order, *supra*, the ALJ's Initial Decision and Order is affirmed and adopted as the final Decision and Order in this proceeding.

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

Order

The determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with Caito & Mascari, Inc., during the period of time that Caito & Mascari, Inc., violated the PACA, is affirmed.

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

This Order shall become effective 60 days after service of this Order on Petitioner.

In re: LIMECO, INC.
PACA Docket No. D-97-0017.
Decision and Order filed August 18, 1998.

Misrepresentation of produce — False statements — Inaccurate records — Willful, flagrant, and repeated violations — Motive of and benefit to violator irrelevant — Agency recommendation — Uniformity of sanction not required — Civil penalty — License suspension.

The Judicial Officer affirmed the Decision by Chief Judge Palmer (Chief ALJ) concluding that Respondent willfully, flagrantly, and repeatedly violated: (1) 7 U.S.C. § 499b(5) by misrepresenting the origin of 411 cartons of limes that Respondent sold to three customers; (2) 7 U.S.C. § 499b(4) by making false statements regarding the origin of limes; and (3) 7 U.S.C. § 499i by maintaining documents which incorrectly identify the origin of limes. The Judicial Officer increased the 15-day suspension of Respondent's PACA license imposed by the Chief ALJ to 45 days. Respondent's violations were willful; therefore, a written warning, pursuant to 7 C.F.R. § 46.45(e)(5) and 5 U.S.C. § 558(c), offering Respondent an opportunity to achieve compliance, is not required. Respondent's violations were knowing, were designed to deceive, and occurred more than once; and therefore, were flagrant and repeated. The lack of evidence establishing Respondent's motive for or substantial benefits from its violations of the PACA and evidence of Respondent's cooperation with the investigation of its violations are not relevant either to a finding that Respondent violated PACA or to the sanction to be imposed for Respondent's violations. A 45-day suspension of Respondent's PACA license is not more severe than sanctions imposed in other similar cases. A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases and will be overturned only if it is unwarranted in law or without justification in fact. The Secretary of Agriculture has broad authority to fashion appropriate sanctions under the PACA, and the PACA has no requirement that sanctions imposed on violators be uniform. Respondent's financial condition is not relevant to the issue of the length of the period during which Respondent's PACA license should be suspended. The Secretary of Agriculture may choose to assess a civil penalty for a violation of 7 U.S.C. § 499b, in lieu of license revocation or suspension, but license revocation or license suspension is appropriate for egregious violations of the PACA. Each misrepresentation by Respondent constitutes a separate violation of 7 U.S.C. § 499b(5), each false and misleading statement made by Respondent for a fraudulent purpose constitutes a separate violation of 7 U.S.C. § 499b(4), and each failure by Respondent to keep accounts, records, and memoranda that fully and correctly disclose all transactions involved in its business constitutes a separate violation of 7 U.S.C. § 499i.

Andrew Y. Stanton, for Complainant.
Al Slobusky, Princeton, FL, & J. Randolph Liebler, Miami, FL, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a

Complaint on March 17, 1997.

The Complaint alleges that: (1) Limeco, Inc. [hereinafter Respondent], misrepresented the origin of 411 cartons of limes that it packed and sold to three customers in the course of interstate and foreign commerce and made false and misleading statements in connection with the misbranded limes (Compl. ¶¶ III, IV); and (2) at least during the period January 1996 through September 1996, Respondent failed to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business by failing to provide a positive means of identification to segregate the various lots of limes being handled by Respondent (Compl. ¶ V). Respondent filed Answer and Affirmative Defenses [hereinafter Answer] on April 24, 1997, denying the material allegations of the Complaint.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on December 16 and 17, 1997, in Miami, Florida. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Al Slobusky, Respondent's financial officer, represented Respondent.*

On February 3, 1998, Complainant filed Complainant's Proposed Findings of Fact and Conclusions of Law, and on February 23, 1998, Respondent filed Post Hearing Brief of Limeco. On March 25, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent willfully, flagrantly, and repeatedly violated section 2(5) of the PACA (7 U.S.C. § 499b(5)) by misrepresenting the country of origin of 411 cartons of limes that Respondent sold to three customers; (2) concluded that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making false statements regarding the country of origin of 411 cartons of limes that Respondent sold to three customers; (3) concluded that Respondent willfully, flagrantly, and repeatedly violated section 9 of the PACA (7 U.S.C. § 499i) by maintaining documents which incorrectly disclosed the country of origin of 411 cartons of limes that Respondent sold to three customers; and (4) suspended Respondent's PACA license for 15 days (Initial Decision and Order at 6-7, 17).

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*Susan H. Aprill, Esq., Holland & Knight, LLP, Miami, Florida, entered an appearance on behalf of Respondent on April 9, 1997, but filed Holland & Knight LLP's Motion to Withdraw on November 12, 1997, which was granted on November 17, 1997 (Order Granting Motion to Withdraw, filed November 17, 1997). J. Randolph Liebler, Esq., Liebler, Gonzales & Portuondo, P.A., Miami, Florida, filed Respondent's Answer Brief and Respondents [sic] Cross Appeal Petition, on behalf of Respondent on May 18, 1998, and June 5, 1998, respectively.

On April 23, 1998, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).** On May 18, 1998, Respondent filed Respondent's Answer Brief.

On June 5, 1998, Respondent filed Respondents [sic] Cross Appeal Petition, and on June 25, 1998, Complainant filed Complainant's Response to Respondent's Cross Appeal Petition. Respondents [sic] Cross Appeal Petition was not timely filed; and therefore, I have not considered Respondents [sic] Cross Appeal Petition or Complainant's Response to Respondent's Cross Appeal Petition.*** Moreover, neither Respondents [sic] Cross Appeal Petition nor Complainant's Response to Respondent's Cross Appeal Petition is part of the record of the proceeding.

On July 21, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, except with respect to the sanction imposed against Respondent by the Chief ALJ, the Initial Decision and Order is adopted as the final Decision and Order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion.

Complainant's exhibits are designated by the letters "CX," Respondent's exhibits are designated by the letters "RX," and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

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

***On April 23, 1998, Respondent requested an extension of time to June 3, 1998, for filing Respondent's appeal petition, which I granted (Informal Order, filed April 23, 1998). Therefore, Respondents [sic] Cross Appeal Petition, filed June 5, 1998, was not timely filed.

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

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

. . . .

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

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated—

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

§ 499i. Accounts, records, and memoranda; duty of licensees to keep; contents; suspension of license for violation of duty

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

7 U.S.C. §§ 499b(4)-(5), 499i (1994 & Supp. II 1996).

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

Preliminary Statement

. . . .

. . . All proposed findings, conclusions, and arguments have been considered. To the extent indicated, they have been adopted, otherwise they have been rejected as irrelevant or not supported by the record.

. . . .

Findings of Fact

1. Respondent, Limeco, Inc., is a corporation organized and existing under the laws of the State of Florida. Respondent's business address is 25251 S.W. 139th Avenue, Princeton, Florida 33092. Respondent's mailing address is P.O. Box 4061, Princeton, Florida 33092. Respondent is, and at all times material to the Complaint was, licensed under the PACA. ([Answer ¶ II;] CX 1.)

2. Respondent is an importer, grower's agent, grower, and packer specializing in limes and avocados (Tr. 18, 273). Respondent's principals are Herbert Yamamura, its president, a director, and 100 percent stockholder; Robert Yamamura, its vice-president and a director; and April Yamamura, its secretary-treasurer and a director (CX 1 at 1).

3. Respondent handles Persian seedless limes which are grown in both Florida and Mexico. A Persian seedless lime [grown in] Mexico that has just been picked . . . looks and tastes the same as a Persian seedless lime [grown in] Florida. (Tr. 338-39.)

4. Hurricane Andrew, which struck southern Florida on August 24, 1992, had a disastrous effect on the Florida lime growers (Tr. 334). The hurricane destroyed 90 percent of the 6,800 [acres of] lime trees then growing in the State of Florida . . . and less than 2,600 acres [of lime trees] have since been replanted (Tr. [334-]35). Lime trees do not immediately start producing fruit after they have been replanted (Tr. 335). Florida lime growers shipped 1.8 million bushels [of limes] annually prior to the hurricane, but[, at the time of the hearing, expected] to ship only 500,000 bushels [of limes in 1997] (Tr. 335-36). Currently, Respondent's best trees are 5 years old and produce 350 bushels [of limes] an acre . . ., which is less than the 500 bushels [of limes] an acre that must be produced before a lime grower can earn a profit (Tr. 335).

5. Because the amount of Florida limes produced and shipped after the hurricane was drastically reduced, Florida lime sellers, such as Respondent, who wished to provide limes to their buyers, were required to obtain the limes from foreign countries (Tr. 337). By 1996, the time of the transactions set forth in the Complaint, approximately 60 percent of the limes provided to buyers were grown in Florida and approximately 40 percent [of the limes provided to buyers were grown in] Mexico (Tr. 338).

6. On the days when Respondent is packing or shipping fruit, it arranges for a USDA [or state] inspector to be present (Tr. 354-55). The inspector provides a stamp, which is placed on [cartons] of Florida limes to certify their

origin (Tr. 291). Inspectors are not present at [Respondent's premises at] all times, as Respondent does not pack or ship fruit every day (Tr. 355-56).

7. Respondent receives Florida limes in bulk and stores them in bins. When Respondent packs . . . Florida limes, it removes them from the bins and packs them into cartons. (Tr. 291.) This process is observed by the inspector; however, if Respondent's bins contained Mexican limes that were placed there at a time when the inspector was not present, the inspector would have no reason to know that the limes being packed were anything but Florida limes (Tr. 357-58).

Findings Related to the Mango Plus Transaction

8. On or about August 12, 1996, Respondent received 1,056 cartons of Mexican limes from San Gabriel (CX 4 at 1, 18, 24, 25). On or about August 13, 1996, Respondent received 550 cartons of Mexican limes from London Fruit, Inc., through R&S Distributors, Inc. (CX 4 at 1, 17, 28, 29). These limes were all assigned the Mexican lot number 633 (CX 4 at 1). Of the 1,606 cartons of Mexican limes that Respondent received, 89 of the cartons purchased from London Fruit, Inc., were dumped, and the remaining 1,517 cartons were sold (CX 4 at 1, 17, 21).

9. On August 15, 1996, Respondent received an order from Mango Plus, through its broker, R&S Distributors, Inc., for 400 forty-pound cartons ("bruce cartons") of Florida limes under Respondent's "Qual-A-Key" label (CX 4 at 4).

10. On August 15, 1996, Respondent issued a manifest for shipment of 400 cartons of Qual-A-Key brand Florida limes to Mango Plus (CX 4 at 5). The limes were shipped the same day and were received by Mango Plus, in New York, New York, on August 18, 1996 (CX 5 at 1). The limes were inspected in New York on August 20, 1996. The inspection certificate shows that the limes were represented to be Florida produce (CX 5 at 3).

11. On August 16, 1996, Respondent issued an invoice to R&S Distributors, Inc., for 400 [cartons] of Qual-A-Key limes sold to Mango Plus. The [item number used on the invoice to describe 250 cartons of the limes indicates that the limes were from] lot number 633. [Lot number 633 consisted of Mexican limes.] (CX 4 at 2.)

12. Respondent's grower sales report for lot number 633 confirms that the 250 [cartons of limes sold through R&S Distributors, Inc., to Mango Plus, were] Mexican limes (CX 4 at 1).

13. The limes sold for $1.65 per [carton] (CX 4 at 2).

Findings Related to the PBA Marketing Transaction

14. On September 9, 1996, Respondent received an order from PBA Marketing, for 150 ten-pound cartons ("pony cartons") and three bruce cartons of Qual-A-Key brand Florida limes (RX 3).

15. On September 11, 1996, Respondent issued a manifest for shipment of 153 cartons of Qual-A-Key brand Florida limes to PBA Marketing in Lakemary, Florida [(CX 7 at 3)].

16. [O]n September 12, 1996, Respondent issued an invoice, billing PBA [Marketing] for 153 cartons of Qual-A-Key limes. The item number used on the invoice to describe the pony cartons [of limes] indicates that the limes were from lot number 637. (CX 7 at 2.) Lot number 637 consisted of Mexican limes (CX 7 at 1, 4, 5, 7, 12).

17. Respondent's grower sales report for lot 637 [confirms] that the 150 pony cartons sold to PBA [Marketing] were Mexican limes [(CX 7 at 2)].

18. Fifty of the pony cartons [of limes were] sold [to PBA Marketing] for $3.35 each, and the other 100 [pony cartons of limes were] sold [to PBA Marketing] for $2.85 each (CX 7 at 2).

Findings related to Carnival Fruit [Transaction]

19. On September 14, 1996, Carnival Fruit ordered 40 pony cartons and 11 bruce cartons of Qual-A-Key brand Florida limes from Respondent (CX [10] at [5]).

20. On September 16, 1996, Respondent issued a manifest for shipment of 51 cartons of Florida limes to Carnival Fruit in Miami, Florida [(CX 10 at 4)].

21. On September 16, 1996, Respondent issued an invoice to Carnival Fruit for the 51 cartons of Qual-A-Key limes [(CX 10 at 2)].

22. The item . . . number used on the invoice to describe the 11 bruce cartons [of limes] indicates that the limes were from lot number 637 (CX 10 at 2). Lot number 637 consisted of Mexican limes (CX 10 at 1, 7, 10, 15).

23. Respondent's grower sales report for lot number 637 confirms [that] the . . . 11 cartons [of limes sold] to Carnival Fruit [were Mexican limes (CX 10 at 1)].

24. [One of the] 11 cartons [of limes] sold for $22, [5 of the 11 cartons of limes sold for] $13, and [5 of the 11 cartons of limes sold for] $11 (CX 10 at 2).

Conclusions of Law

1. Respondent willfully, flagrantly, and repeatedly violated section 2(5) of the PACA [(7 U.S.C. § 499b(5))] by misrepresenting the . . . origin of 411 [cartons] of limes that it sold to three customers. Specifically, the limes, which originated in Mexico and which were received, sold, or shipped in interstate or foreign commerce, were identified by Respondent as Florida grown.

2. Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA [(7 U.S.C. § 499b(4))] by making false statements regarding the country of origin of 411 [cartons] of limes that it sold to three customers. Specifically, the limes, which originated in Mexico and which were received, sold, or shipped in interstate or foreign commerce, were identified by Respondent as Florida grown.

3. Respondent willfully, flagrantly, and repeatedly violated section 9 of the PACA [(7 U.S.C. § 499i)] by maintaining documents which incorrectly disclosed the country of origin of 411 [cartons] of limes that it sold to three customers. Specifically, the limes, which originated in Mexico and which were received, sold, or shipped in interstate or foreign commerce, were identified by Respondent as Florida grown.

Discussion

Complainant alleges that Respondent violated: (1) section 2(5) of the PACA [(7 U.S.C. § 499b(5))] by misrepresenting the country of origin when it shipped 411 [cartons] of limes to [three of Respondent's] customers [(Compl. ¶ III)]; (2) section 2(4) of the PACA [(7 U.S.C. § 499b(4))] by making false and misleading statements, for a fraudulent purpose, by issuing documentation which incorrectly listed the origin of the limes [(Compl. ¶ IV)]; and (3) section 9 of the PACA [(7 U.S.C. § 499i)] by maintaining records that incorrectly identified, or failed to accurately disclose, all the details of the transactions, with respect to the limes [(Compl. ¶ IV)].

Section 2(5) [of the PACA]

. . . .

Complainant alleges that Respondent violated section 2(5) [of the PACA (7 U.S.C. § 499b(5))] by representing that the . . . 411 [cartons] of limes [originated in] Florida, when, in fact, Respondent's grower sales [reports] and

inventory show the [limes originated in] Mexico [(CX 4 at 1, 31, 35, CX 7 at 2, 4, 5, 7, 8, CX 10 at 1, 7, 10)]. Respondent admits that all of its internal records identify the limes as Mexican grown [(Tr. 295-304). Respondent] also admits that the limes were shipped to fill orders for Florida limes, that the limes were shipped in [cartons] that identified the contents as Florida limes, and that it issued manifests that identified the fruit as Florida limes. Respondent claims, however, that there was no misrepresentation because the limes were, in fact, grown in Florida. [(Tr. 286-87.)]

Respondent claims that in each of the transactions, an order was taken for Florida limes and Florida limes were shipped [(Tr. 288-89)]. It was after shipment, that the Mexican lot numbers were supposedly assigned [to the Florida limes]. Herbert Yamamura, Respondent's owner, explained that he knew the limes that were shipped were not going to bring a good price because he had held them . . . too long; [therefore,] instead of letting the Florida growers take the loss, he assigned the limes to the Mexican pool and planned to assign Mexican limes, for which he expected a better price, to the Florida pool in exchange [(Tr. 295-304)].

Respondent's explanation is unconvincing for several reasons. First, Respondent is unable to account for the disposition of the Mexican limes, if they were not sold in the three transactions at issue. Respondent's grower sales report indicates that lot 633 consisted of 1,606 [cartons] of Mexican limes, 1,056 of which were purchased from San Gabriel and 550 of which were purchased from London Fruit[, Inc.,] through R&S [Distributors, Inc.] (CX 4 at 1). Other documents corroborate the number of [cartons of] Mexican limes listed on [Respondent's grower] sales report. Two inspection certificates, each dated August 8, 1996, indicate that San Gabriel shipped Respondent 1,056 [cartons] of Mexican limes (CX 4 at 2[4], 25); and a bill of lading from London Fruit[, Inc.,] and a memorandum from R&S Distributors[, Inc.,] both indicate that they sold Respondent 550 [cartons] of Mexican limes (CX [4 at] 28, 29).

[Respondent's grower] sales report indicates that of the 1,606 [cartons] of Mexican limes in lot 633, 250 [cartons] were sold to Mango Plus [(CX 4 at 1)]. Mr. Yamamura testified that those limes were not sold to Mango Plus; however, he could not say where the limes actually went or what price he received for them (Tr. 340-43); and Respondent presented no documentation to verify the sale of the limes to other customers. It is implausible that Respondent would not document the disposition of all 1,606 cartons of the Mexican limes that it received.

Likewise [Respondent's] grower sales report for Mexican lot number 637

indicates that Respondent sold 11 [cartons of Mexican limes] to Carnival [Fruit] on September 17, 1996, and 150 [pony] cartons [of Mexican limes] to PBA [Marketing] on September 12, 1996 (CX 7 at 1).[1] While there is documentation of the sales to Carnival [Fruit] and PBA [Marketing] indicating Florida grown limes (CX 7 at 2-3, [CX] 10 at 2-5), Respondent presented nothing to show the disposition of the Mexican limes with which they were supposedly switched on the [grower] sales report. Although the record does not contain [documents] which trace the origin of lot number 637, as it does with [lot number] 633, Respondent claims that there was a switch of lot numbers, not that the Florida limes were simply added to the Mexican pool. Accordingly, Respondent still should be able to account for the limes that were supposedly switched out of the Mexican pool and into the Florida pool.

Furthermore, Respondent's assertion that it pooled the Florida sales with Mexican lots because it knew the Florida limes would not receive a good price is belied by the fact that [of the 11 cartons of limes that Respondent sold to Carnival Fruit, one carton sold for $22, 5 cartons sold for $13, and 5 cartons sold for $11 (CX 10 at 2[; Tr. 295-304)]). When questioned about those sales, Mr. Yamamura admitted that those were good prices and stated that . . . the limes [sold to Carnival Fruit] were pooled with the Mexican lot by mistake (Tr. 3[53-54]). In addition, on the sale to PBA Marketing, [Respondent] received $3.35 [per carton for 50 pony cartons] and $2.85 [per carton for 100 pony cartons]. . . . Although there was no testimony as to whether or not those were good prices, they appear to be reasonable in light of the fact that they are consistent with prices received for the other pony [cartons] in lot 637 (CX 7 at 1).

Respondent also contends that it could not have sold Mexican limes in Florida [cartons] because the Mexican limes are imported in cartons, while Florida limes are imported in bulk and packaged under the observation of a USDA [or state] inspector, who stamps the [cartons] certifying that they contain Florida fruit ([RX 2;] Tr. [278-80,] 290-9[5, 356-57]). However, an inspector is not at [Respondent's] plant every day, only at times that fruit is being packed and shipped (Tr. 35[4-57]). Respondent, therefore, could have dumped the Mexican limes into the bins with the Florida limes at a time when an inspector was not present. When the limes were packaged, there would be no way for the

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[1][Respondent's grower] sales report also shows that PBA [Marketing] purchased 18 bruce [cartons] from lot 637 on September 17, 1996 [(CX 7 at 1)]; however, [Respondent is not alleged to have misrepresented the origin of the limes in these 18 bruce cartons.]

inspector to know the bins contained anything other than Florida limes. Respondent claims that an inspector [can distinguish Florida limes from Mexican limes] because Florida limes look "fresh and beautiful" (Tr. 295). This claim, however, is inconsistent with [Respondent's] argument that the Florida limes were added to the Mexican pool because the [Florida limes] were old, and worth less than the Mexican limes.

Respondent admits that it would be possible to combine the limes and package them all as Florida produce, but argues that such a scheme would be illogical because the cost of repackaging would diminish [Respondent's] profit. Respondent would not, however, have lost money on the transactions. Mr. Yamamura testified that there would be some profit after the cost of repacking, although not much. (Tr. 32[7-29].) Respondent relies heavily on the argument that there could be no possible motivation for going to all the trouble of repackaging the limes for only "a few dollars" profit. It is quite possible, however, that Respondent was concerned about keeping its customers happy by filling orders for Florida limes at a time when such fruit was scarce. [Respondent] may have acted out of fear of losing customers, or in the hope of gaining new ones by establishing a reputation for being able to meet demands for Florida limes.

Whatever Respondent's reasons, a preponderance of the evidence shows that Respondent sold 411 [cartons] of Mexican limes to [Mango Plus through] R&S Distributors, [Inc.,] PBA Marketing, and Carnival Fruit and that [Respondent] represented the [limes] to be Florida produce. These misrepresentations were made in violation of section 2(5) of the PACA [(7 U.S.C. § 499b(5))].

Section 2(4) [of the PACA]

. . . .

Respondent made false statements in connection with the Carnival Fruit, PBA Marketing, and Mango Plus transactions by issuing manifests that falsely identify Mexican [limes] as Florida [limes] (CX 4 at 5, [CX] 7 at 3, [CX] 10 at 4). Respondent had a fraudulent intent, as the false manifests were meant to misrepresent the true origin of the [limes]. Respondent defrauded its customers by filling orders for Florida limes with Mexican limes falsely identified as Florida limes. As such, Respondent violated section 2(4) of the PACA [(7 U.S.C. § 499b(4))].

Section 9 [of the PACA]

. . . .

Respondent's records failed to correctly disclose the nature of the transactions with Carnival [Fruit], PBA [Marketing], and R&S [Distributors, Inc.] Respondent maintained records, including manifests, which incorrectly identified Mexican limes as Florida limes (CX 4 at 5, [CX] 7 at 3, [CX] 10 at 4).

Respondent admitted that its records were incorrect, arguing only that it was the internal documents that were false, rather than the manifests [(Tr. 295-304)]. Even if Respondent's argument were accepted, [Respondent's maintenance of internal records that do not fully and correctly disclose all transactions involved in Respondent's business] would be in violation of section 9 of the PACA [(7 U.S.C. § 499i)].

Willful, Flagrant, and Repeated Violations

Respondent argues that [this proceeding to suspend its license was] improperly initiated without first issuing a warning letter and offering Respondent an opportunity to achieve compliance with the [PACA], pursuant to 7 C.F.R. § 46.45(e)(5) and 5 U.S.C. § 558(c). A written warning is not required, however, in cases of willfulness.

Willfulness is defined, for purposes of the Administrative Procedure Act, as intentionally doing an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acting with careless disregard of statutory requirements. *See, e.g., Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, [502 U.S. 860] (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re George Steinberg and Son, Inc.*, 32 Agric. Dec. 236[, 263] (1973), *aff'd*, 491 F.2d 988 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974).

Some jurisdictions follow a stricter standard, considering an act willful only if it is done intentionally, or with gross neglect. *See, e.g., 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).

Under either standard, however, Respondent's acts were willful, as they were intentionally done. Respondent mislabeled [limes] and issued false documentation with the intent to deceive [three of] its customers with respect to the actual origin of the limes. Since Respondent's violations were willful, it was

not necessary for Complainant to issue a written warning or offer an opportunity to [achieve compliance with the PACA,] pursuant to 7 C.F.R. § 46.45(e)(5) [and 5 U.S.C. § 558(c)].

Respondent next contends that Complainant improperly initiated the action because the Regulations only permit formal proceedings for violations of section 2(5) [of the PACA (7 U.S.C. § 499b(5))] in cases in which such violations are flagrant or repeated. Respondent argues that the Regulations classify the type of misbranding in which Respondent engaged as a "very serious violation," as opposed to a "flagrant violation." The Regulations, however, also state that flagrant violations are not limited to the examples given. 7 C.F.R. § 46.45(a)[(3)]. In *Potato Sales Co. v. Department of Agric., supra*, 92 F.3d at 804, the court determined that misrepresentation of the origin of produce could constitute a flagrant violation despite its classification as very serious in the Regulations:

> Examples given in PACA regulations suggest that a "flagrant" violation involves knowing conduct, whereas a "serious" or a "very serious" violation typically involves only accidental or negligent conduct. . . . Other indicia of "flagrant" rather than "serious" or "very serious" violations are a large number of transactions, committed over a period of time. . . .

Respondent's violations were knowing, not merely accidental or negligent; and although the amount of produce involved was significantly less than that in *Potato Sales*, which involved 7,5[54] cartons, Respondent's violations were more than an isolated occurrence. The misbranding encompassed three transactions [involving 411 cartons of limes] over a month's time. As such, Respondent's violations were flagrant, and the initiation of a formal proceeding [in which the sanction recommended by Complainant is] . . . suspension [of Respondent's PACA license] was appropriate.

Furthermore, the Judicial Officer in *Potato Sales* found that even the simultaneous shipment of multiple [cartons] of misbranded produce would constitute repeated violations. *In re Potato Sales Co.* (Decision as to Potato Sales Co.), 54 Agric. Dec. 1382, 1404 (1995). Since Respondent's violations not only involved [411 cartons], but also consisted of three shipments, to three different customers, on three separate occasions, [Respondent's] violations were repeated.

Sanctions

With respect to the appropriate sanction for violations of section 2(4) and (5) [of the PACA (7 U.S.C. § 499b(4), (5)), section 8 of] the PACA provides as follows:

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

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

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title . . ., 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.

7 U.S.C. § 499h[(a), (e) (1994 & Supp. II 1996]).

. . . Section 9 [of] the PACA provides that:

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business. . . . If such accounts, records, and

> memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

7 U.S.C. § 499i.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

> [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.

Complainant recommends the suspension of Respondent's [PACA] license for a period of 45 days. Complainant does not favor the imposition of a civil penalty, as it does not want to compete with creditors for Respondent's funds; however, it recommends that if a civil penalty is imposed, it should amount to $75,000.

. . . .

. . . Complainant's recommendation is entitled to a degree of deference. . . .

. . . .

Taking the [circumstances of this case] into consideration, I have concluded that a [4]5 day suspension [of Respondent's PACA license] is appropriate. . . .

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant contends in Complainant's Appeal Petition that the 15-day suspension of Respondent's PACA license imposed by the Chief ALJ is too lenient and urges the imposition of a 45-day suspension of Respondent's PACA license (Complainant's Appeal Pet. at 2).

I agree with Complainant's contention that a 15-day suspension of Respondent's PACA license is too lenient and that a 45-day license suspension is appropriate under the circumstances.

I agree with the Chief ALJ's conclusions that: (1) Respondent willfully,

flagrantly, and repeatedly violated section 2(5) of the PACA (7 U.S.C. § 499b(5)) by misrepresenting the origin of 411 cartons of limes that it sold to three customers; (2) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making false statements regarding the origin of 411 cartons of limes that it sold to three customers; and (3) Respondent willfully, flagrantly, and repeatedly violated section 9 of the PACA (7 U.S.C. § 499i) by maintaining documents which were not correct in that they did not accurately identify the origin of 411 [cartons] of limes that Respondent sold to three customers (Initial Decision and Order at 6-7).

Moreover, I agree with the Chief ALJ's description of Respondent's violations as intentional, knowing, and designed to deceive its customers, as follows:

> . . . Respondent's act were willful, as they were intentionally done. Respondent mislabeled fruit and issued false documentation with the intent to deceive its customers with respect to the actual origin of the limes. . . .
>
> . . . .
>
> Respondent's violations were knowing, not merely accidental or negligent; and although the amount of produce involved was significantly less than that in *Potato Sales*, which involved 7,500 cartons, Respondent's violations were more than an isolated occurrence. The misbranding encompassed three transactions over a month's time. As such Respondent's violations were flagrant. . . .

Initial Decision and Order at 13-14.

Respondent's intentional mislabeling of 411 cartons of limes and falsification of records in an attempt to deceive three of its customers as to the origin of perishable agricultural commodities are the kinds of practices that the PACA is designed to prevent.

Further, as indicated by the Chief ALJ, the sanction recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the PACA must be given great weight (Initial Decision and Order at 16). However, Respondent contends that Complainant failed to adequately justify the recommended 45-day suspension of Respondent's PACA license (Respondent's Answer Brief at 4-6).

I disagree with Respondent. Mr. Bruce Summers, a regional director for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, testified regarding the basis for Complainant's recommendation, as follows:

[BY MR. STANTON:]

Q. What is Complainant's view as to the nature of the violations committed by the Respondent in regard to Section 9 of the PACA?

[BY MR. SUMMERS:]

A. That the Respondent violated Section 9 in that it maintained records that incorrectly identified the -- or failed to accurately disclose all the details of the transactions with respect to these limes.

Q. Now, moving back to the alleged 2(5) violations of the PACA. Why does the Complainant consider these violations to be willful and flagrantly repeated in this case?

A. Because we believe that the 2(5) violations, the violations involving the misrepresentation of the 411 boxes that were shipped, were done intentionally in order to misrepresent to their suppliers the origin.

Q. Why would these violations then be considered repeated?

A. They were repeated because there's more than one. 411, I believe, is the allegation in the complaint.

Q. And why would they be considered flagrant?

A. Because of the intentional nature of the violations, the number of boxes, and the period of time that the violations occurred.

Q. Now, with regard to the allegations of the violations of Section 2(4) of the PACA, why would Complainant consider these actions -- Respondent's actions -- to be willful and repeated and flagrant violations of 2(4)?

A. We believe that the Respondent issued the documentation which was -- which misrepresented the origin of limes to its customers for a fraudulent purpose, which was to trick or deceive the customers as to the origin of the limes.

Q. And why does Complainant consider Respondent's actions to be willful and repeated and flagrant violations of Section 9?

A. Again, because the -- many numerous documents in the Respondent's records mischaracterized it or didn't accurately disclose the origin of the limes.

Q. Now, Mr. Summers, what is the sanction which the Complainant recommends in this case?

A. The Complainant would recommend that the administrative law judge issue a 45-day suspension of Limeco, Inc.'s PACA license.

Q. Mr. Summers, what is the basis for this 45-day suspension recommendation?

A. Well, we examined the judicial officer's recent decision involving a company called Potato Sales, and we looked at the factors that he listed there, which generally were the intentional --

Potato Sales involved the misbranding of apples. And the judicial officer decided there were four key elements in that case that were -- the intentional nature of the violations, the large number of cartons in that case, the apparent scheme or organization that went into misbranding those apples, and the misrepresenting the origin of those apples, as well as the international issues that were present in this case. And when we compared this to case to that, there are some similarities.

The Complainant believes that these violations were also intentional, that they weren't the result of a dispute with the inspector as to the condition or quality of the limes before they were shipped.

There's also the international issue, in that this is produce coming

in from outside of the United States -- Mexico, to be exact -- and the Complainant believes strongly that the Respondent's customers, and even the consumers down the line, to the extent that they cared whether or not they were buying foreign produce or Mexican limes, they have a right to rely on the information that's provided to them.

And so we compared those factors and found some similarities with Potato Sales and --

Of course, there's a larger difference here, between Potato Sales case -- where a revocation was handed out -- and this case -- where we're asking for a suspension. As in the number of cartons, there were 7500 cartons of apples in the Potato Sales case and here we're talking about 400, which is the reason for the lesser sanctions in this case.

Q. Now, as I stated in my opening statement, the Complainant's changed its sanction recommendation from the one that was alleged in the complaint, which was a 60-day license suspension. The Complainant has changed that to a 45-day license suspension. What is the reason for the change?

A. Since the filing of this complaint, there have been at least a few other misbranding cases or misrepresentation cases where complaints have been filed or settlements have been reached, and we believe that the 45-day suspension is more in line with those cases and is more appropriate than the 60-day suspension originally asked for.

Q. Now, Mr. Summers, are you aware of the case involving Western Sierra?

A. Yes, I am.

Q. In that case, do you know what the Department -- what the Complainant alleged in that case?

A. In general --

Q. Well, let me back up for a second. Do you know what kind of

violations were alleged?

A. Yeah. They were very similar to the violations in this case. It had to do with misrepresentation as to -- high grade grapefruit (phonetic), for lack of a better word. And it had to do with the variety of grapefruit. But it was a similar sort of allegation, as to the misrepresentation to the Respondent in that case, Western Sierra's customers.

Q. What was the sanction that the Complainant recommended in that case? Do you know?

A. Yes, sir. A 90-day suspension of Western Sierra's PACA license.

Q. Do you know how many cartons were involved in that case?

A. I believe in the neighborhood of 2500 cartons.

Q. Now in this case, we have 411 cartons alleged to have been misbranded, correct?

A. Correct.

Q. That's about one-sixth the number of cartons in the Western Sierra case. Would you agree?

A. Yes, sir.

Q. Now, why wouldn't the Department then -- I'm sorry, the Complainant recommend a license suspension of one-sixth the number of days that it recommended in the Western Sierra case, which would have been --

One-sixth of 90 is 15.

A. Primarily because the one-sixth, or the 15 days, the Department feels is not a serious sanction -- certainly not serious enough for the violations which we have alleged occurred here. The Department only has -- can only issue a suspension up to 90 days, which is the maximum suspension. Beyond the 90-day suspension, the only alternative is a

license revocation. So Western Sierra has been recommended for the most severe suspension possible.

In this case, we do not believe that a 15-day suspension, or one-sixth of what was offered to Western Sierra, would be sufficient. We think the 45 days is commensurate with the violations that have been alleged.

Q. In your experience, do you know whether the Department has ever alleged -- or has ever requested in a complaint or a hearing a suspension of less than 45 days?

A. Not that I'm aware of.

Tr. 202-07.

Respondent contends that the recommended sanction is severe in light of the lack of evidence of Respondent's motive for or benefit from its violations (Respondent's Answer Brief at 2-3). I agree with Respondent that the evidence does not establish Respondent's motive and the evidence indicates that the monetary benefit Respondent received for its misrepresentations was not substantial. The Chief ALJ speculated as to Respondent's motive and benefit, as follows:

Respondent admits that it would be possible to combine the limes and package them all as Florida produce, but argues that such a scheme would be illogical because the cost of repackaging would diminish its profit. Respondent would not, however, have lost money on the transactions. Mr. Yamamura testified that there would be some profit after the cost of repacking, although not much. (Tr. 329). Respondent relies heavily on the argument that there could be no possible motivation for going to all the trouble of repackaging the limes for only "a few dollars" profit. It is quite possible, however, that Respondent was concerned about keeping its customers happy by filling orders for Florida limes at a time when such fruit was scarce. It may have acted out of fear of losing customers, or in the hope of gaining new ones by establishing a reputation for being able to meet demands for Florida limes.

Initial Decision and Order at 11.

While I agree with the Chief ALJ's speculation regarding Respondent's possible motive and adopt it in this Decision and Order, *supra*, the lack of evidence establishing Respondent's motive is not relevant either to a finding that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) or to the sanction to be imposed for Respondent's violations. Further, the fact that the evidence indicates that Respondent's monetary gain from its violations of the PACA was not substantial is not relevant either to a finding that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) or to the sanction to be imposed for Respondent's violations.[2] Whatever Respondent's reasons for its violations of the PACA, a preponderance of the evidence shows that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) and that the violations were willful, flagrant, and repeated.

Respondent contends that the recommended penalty is severe when compared to the sanctions imposed in *In re Potato Sales Co.* (Decision and Order as to Potato Sales Co., Inc.), 54 Agric. Dec. 1382 (1995), *aff'd*, 92 F.3d 800 (9th Cir. 1996); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); and *In re E.J. Harrison & Son, Inc.*, 27 Agric. Dec. 1339 (1968) (Respondent's Answer Brief at 3-4).

I do not find that Complainant's recommended penalty is severe when compared to the sanctions imposed in the cases cited by Respondent. In *In re Potato Sales Co., supra*, the judicial officer revoked Potato Sales Co., Inc.'s PACA license for the misrepresentation of 7,554 cartons of Washington apples as New Zealand apples. While the number of cartons involved in *Potato Sales Co.* was significantly more than the number of cartons involved in this proceeding, Potato Sales Co., Inc., was only found to have violated section 2(5) of the PACA (7 U.S.C. § 499b(5)), whereas I find that Respondent violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i). Moreover, the revocation of Potato Sales Co., Inc.'s PACA license is a much more severe sanction than the 45-day suspension of Respondent's PACA license

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[2]*See In re Potato Sales, Co.* (Decision and Order at to Potato Sales Co.), 54 Agric. Dec. 1382, 1400 (1995) (stating that the motive for respondent's misrepresentation of the origin of 7,554 cartons of apples is a matter of pure conjecture and the profits were not large, but motive is of no real moment), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

recommended by Complainant.

In *In re Magic Valley Potato Shippers, Inc., supra*, the judicial officer suspended Magic Valley Shippers, Inc.'s PACA license for 30 days for misrepresenting the grade of nine lots of potatoes, which Magic Valley Shippers, Inc., shipped to three different buyers and destinations, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). The judicial officer found that Magic Valley Shippers, Inc., probably had no intention to mislead, but stated that if Magic Valley Shippers, Inc.'s violations had been committed with fraudulent intent, a 90-day suspension would have been imposed. *In re Magic Valley Potato Shippers, Inc., supra*, 40 Agric. Dec. at 1671 n.4. The evidence in this proceeding establishes that, unlike Magic Valley Shippers, Inc., Respondent intended to mislead.

In *In re Maine Potato Growers, Inc., supra*, the judicial officer suspended Maine Potato Growers, Inc.'s PACA license for 60 days for shipping 14 loads of misbranded potatoes over a 4-year period, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

In *In re E.J. Harrison & Son, Inc., supra*, the judicial officer suspended E.J. Harrison & Son, Inc.'s PACA license for 60 days for misrepresenting the grade of six lots of potatoes, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

Even if the sanction imposed against Respondent is more severe that the sanction imposed against offenders in similar cases, it would not render the sanction in this proceeding invalid. A sanction by an administrative agency is not rendered invalid in a particular case merely because it is more severe than sanctions imposed in other cases and will be overturned only if it is unwarranted in law or without justification in fact.[3] The Secretary of Agriculture has broad

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[3]*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-88 (1973); *FCC v. WOKO, Inc.*, 329 U.S. 223, 227-28 (1946); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order

(continued...)

authority to fashion appropriate sanctions under the PACA, and the PACA has no requirement that there be uniformity in sanctions among violators.[4] The Secretary of Agriculture is clearly authorized under the PACA to suspend Respondent's PACA license for 45 days to deter willful, flagrant, and repeated violations of the PACA, and I find that the facts in this proceeding justify the imposition of a 45-day suspension of Respondent's PACA license.

Respondent contends that the sanction is severe in light of Respondent's cooperation with the investigation of its violations of the PACA (Respondent's Answer Brief at 4). The record establishes that Respondent "gave full and complete cooperation" to PACA Branch employees during their investigation of Respondent's violations of the PACA (Tr. 185, 214). However, Respondent's cooperation with the investigation of its violations of the PACA is not relevant to the sanction to be imposed for Respondent's willful, flagrant, and repeated violations of sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i). Further, Respondent contends that its cooperation with the investigation of its violations indicates a "lack of bad faith" and "lack of intent." I do not find that Respondent's cooperation with the investigation establishes that Respondent lacked bad faith or that Respondent's violations were not intentional. To the contrary, I find that Respondent intentionally misrepresented the origin of 411 cartons of limes to deceive three of its customers.

Respondent contends that a 45-day suspension of its PACA license is severe in light of Respondent's financial condition (Respondent's Answer Brief at 6-7).

The record does establish that Respondent is "probably not" in good financial condition (Tr. 216-17). While section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. II 1996)) does require the Secretary to consider factors relating to a violator's business (the size of a violator's business and the number of a violator's employees) when determining the amount of a civil penalty to be assessed, factors related to a violator's business need not be considered with

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[3](...continued)
Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *appeal docketed*, No. 97-3603 (6th Cir. June 13, 1997).

[4]*Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981).

respect to revocation or suspension of a violator's PACA license.[5] I do not find that Respondent's financial condition is relevant to the issue of the length of the period during which Respondent's PACA license should be suspended for its willful, flagrant, and repeated violations of sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), and 499i).

Respondent contends that, in light of the 1995 amendment of the PACA providing for the assessment of civil penalties, the suspension of its PACA license is severe and that Congress intended that a civil monetary penalty would be appropriate in this type of proceeding (Respondent's Answer Brief at 7-8).

I disagree with Respondent's contention that Congress only intended assessment of a civil penalty in proceedings such as the instant proceeding. While the PACA was amended in 1995 to allow the imposition of civil penalties, the amendment does not eliminate the sanctions of license revocation and suspension. Section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 amends section 8 of the PACA by adding subsection (e), which provides that, in lieu of suspending or revoking a license for a violation of section 2 of the PACA (7 U.S.C. § 499b), the Secretary *may* assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues.

The legislative history of the Perishable Agricultural Commodities Act Amendments of 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.

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[5]*In re Allred's Produce*, 56 Agric. Dec. 1884, 1903 n.13 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1279 n.8 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1225 n.13 (1996), *aff'd*, No. 96-4238 (7th Cir. Aug. 10, 1998).

> 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. 104-207 at 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

The Administrator, Agricultural Marketing Service, Mr. Lon F. Hatamiya, testified variously during the March 16, 1995, hearing conducted on the PACA:

> MR. HATAMIYA. . . .
>
> . . . .
>
> 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.
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> . . . .
>
> 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).

The language of section 11 of the Perishable Agricultural Commodities Act Amendments of 1995 (7 U.S.C. § 499h(e) (Supp. II 1996)) and the legislative history make clear that the Secretary of Agriculture may choose to assess a civil penalty for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu of license revocation or suspension, but that license revocation or license suspension would be appropriate for "egregious violations" of the PACA.

Respondent willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) in a deliberate attempt to deceive three of its customers as to the origin of limes. The appropriate sanction under the circumstances is suspension of Respondent's PACA license.

Respondent contends that the sanction imposed must be predicated upon the issues framed in the Complaint which alleges only three transactions to be in violation of the PACA (Respondent's Answer Brief at 8-9).

The Complaint alleges that: (1) Respondent misrepresented the origin of limes and that "[t]hese misrepresentations were *in connection with*" transactions which involved 411 cartons of limes, sold to three customers, shipped to three different destinations, on three different dates (Compl. ¶ III (emphasis added)); (2) Respondent made, for a fraudulent purpose, false and misleading statements

in connection with 411 cartons of limes, sold to three customers, shipped to three different destinations, on three different dates (Compl. ¶ IV); and (3) during at least the period January 1996 through September 1996, Respondent failed to keep such accounts, records, and memoranda that fully and correctly disclose all transactions involved in its business (Compl. ¶ V). The Complaint does not in any way suggest that Respondent committed only three violations of the PACA or that Respondent made only one misrepresentation or false and misleading statement for each of the three transactions identified in paragraph III of the Complaint. Instead, the Complaint clearly alleges that Respondent's numerous misrepresentations and false and misleading statements were *in connection with* three transactions.

In *In re Potato Sales Co., supra*, 54 Agric. Dec. at 1404, the judicial officer found that each misrepresented carton, rather than each shipment, constitutes a violation of section 2(5) of the PACA, as follows:

> In the present case, Respondent misrepresented the place of origin of 7,554 cartons of apples, each of which was a separate violation. But even if we were to count thousands of violations on each shipment as only one violation per shipment (which would not be proper), Respondent prepared three different orders of misrepresented apples, and three separate violations would still be "repeated."

I find that *each* misrepresentation by Respondent of the origin of limes identified in paragraph III of the Complaint constitutes a separate violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)), *each* false and misleading statement made by Respondent for a fraudulent purpose in connection with the limes identified in paragraph III of the Complaint constitutes a violation of 2(4) of the PACA (7 U.S.C. § 499b(4)), and *each* failure by Respondent to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business constitutes a violation of section 9 of the PACA (7 U.S.C. § 499i).

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

Order

Respondent's PACA license is suspended for a period of 45 days, effective 60 days after service of this Order on Respondent.

In re: LIMECO, INC.
PACA Docket No. D-97-0017.
Stay Order filed October 26, 1998.

Andrew Y. Stanton, for Complainant.
J. Randolph Liebler, Miami, Florida, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On August 18, 1998, I issued a Decision and Order: (1) concluding that Limeco, Inc. [hereinafter Respondent], willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499b(4), (5), 499i); and (2) suspending Respondent's Perishable Agricultural Commodities Act license for 45 days, effective 60 days after service of the Order on Respondent. *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 10-11, 37 (Aug. 18, 1998). The record establishes that the Order was served on Respondent on August 24, 1998.[1] Therefore, the Order suspending Respondent's license became effective on October 23, 1998.

On October 16, 1998, Respondent filed Motion to Stay Decision and Order [hereinafter Motion for a Stay], requesting a stay of the August 18, 1998, Order pending the outcome of proceedings for judicial review. On October 23, 1998, Complainant filed Complainant's Response to Motion to Stay Decision and Order, stating that "Complainant does not oppose staying the Decision and Order until Respondent's appeal is resolved." On October 23, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for a Stay.

Respondent's Motion for a Stay is granted. The Order issued in this proceeding on August 18, 1998, *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Aug. 18, 1998), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order is issued *nunc pro tunc* and is effective October 23, 1998. This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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[1]Domestic Return Receipt for Article Number P 093 143 351.

In re: WESTERN SIERRA PACKERS, INC.
PACA Docket No. D-97-0004.
Decision and Order filed September 30, 1998.

Misrepresentation of produce — Inaccurate records — Willful and repeated violations — Agency recommendation — Civil penalty — License suspension.

The Judicial Officer reversed the Decision by Chief Judge Palmer (Chief ALJ) in which the Chief ALJ only published the facts and circumstances of Respondent's violation of 7 U.S.C. § 499i. The evidence was not sufficient to find that Respondent made the false or misleading statements for a fraudulent purpose, in violation of 7 U.S.C. § 499b(4); however, any misrepresentation of the subject matter described in 7 U.S.C. § 499b(5), even if the misrepresentation is unintentional or accidental, constitutes a violation of 7 U.S.C. § 499b(5), and the Judicial Officer found that Respondent misrepresented, by word or statement, the character or kind of at least 2,319 cartons of grapefruit, in violation of 7 U.S.C. § 499b(5). 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. Willfulness is reflected by Respondent's violations of express requirements of 7 U.S.C. §§ 499b(5) and 499i and the number of Respondent's violations. Respondent's violations are "repeated" because repeated means more than one. Each misrepresented carton of grapefruit constitutes a separate violation of 7 U.S.C. § 499b(5), and each inaccurate record constitutes a separate violation of 7 U.S.C. § 499i. Sanction recommendations of administrative officials charged with responsibility for achieving the congressional purpose of the PACA are entitled to great weight. However, sanction recommendations of administrative officials are not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials. The Judicial Officer rejected the sanction recommendation of administrative officials because it was based, in part, on the allegation that Respondent violated 7 U.S.C. § 499b(4), and the Judicial Officer did not find that Respondent violated 7 U.S.C. § 499b(4). Further, Respondent did not engage in the violations in order to deceive its customers; but rather, the violations appear to have been the result of Respondent's lack of concern for distinguishing between Oroblanco grapefruit and Melogold grapefruit. The Judicial Officer imposed a 20-day suspension of Respondent's PACA license (15 days for violations of 7 U.S.C § 499b(5) and 5 days for violations of 7 U.S.C. § 499i). In lieu of a 20-day suspension, the Judicial Officer assessed Respondent a civil penalty of $19,500 for violations of 7 U.S.C. § 499b(5) and imposed a 5-day suspension of Respondent's PACA license for violations of 7 U.S.C. § 499i.

Andrew Y. Stanton, for Complainant.
Fred V. Spallina, Porterville, California, for Respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 16, 1996.

The Complaint alleges that: (1) from approximately October 26, 1995, through November 3, 1995, Western Sierra Packers, Inc. [hereinafter Respondent], misrepresented the character or kind of 2,529 cartons of grapefruit that it packed and/or sold to two customers in the course of interstate or foreign commerce by designating the grapefruit hybrid as the Oroblanco variety, when the grapefruit was the Melogold variety (Compl. ¶ III); (2) Respondent made false and misleading statements, for a fraudulent purpose, in connection with the misbranded grapefruit (Compl. ¶ IV); and (3) Respondent failed to keep accounts, records, and memoranda that fully and correctly disclosed all transactions involved in its business in connection with the misbranded grapefruit (Compl. ¶ V). Respondent filed Answer and Request for Hearing [hereinafter Answer] on February 7, 1997, denying the material allegations of the Complaint and raising seven affirmative defenses.

Chief Administrative Law Judge Victor W. Palmer [hereinafter Chief ALJ] presided over a hearing on December 2 through December 4, 1997, in Fresno, California. Andrew Y. Stanton, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Fred V. Spallina, Esq., Spallina & Krause, Porterville, California, represented Respondent.

On March 6, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order; on April 8, 1998, Respondent filed Trial Brief of Respondent Western Sierra Packers, Inc; and on May 1, 1998, Complainant filed Complainant's Reply Brief.

On May 19, 1998, the Chief ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the Chief ALJ: (1) concluded that Respondent failed to keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in its business, in violation of section 9 of the PACA (7 U.S.C. § 499i); (2) concluded that Respondent did not make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) concluded that Respondent did not misrepresent any perishable agricultural commodity in interstate or foreign commerce, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)); and (4) ordered the publication of the facts and circumstances of Respondent's violation of section 9 of the PACA (7 U.S.C. § 499i) (Initial Decision and Order at 2, 8-9, 16).

On June 19, 1998, Complainant appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory

proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On July 10, 1998, Respondent filed Response Brief of Respondent Western Sierra Packers, Inc. [hereinafter Respondent's Response], and on July 13, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the Chief ALJ that Respondent violated section 9 of the PACA (7 U.S.C. § 499i) and that Respondent did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I disagree with the Chief ALJ's conclusion that Respondent did not violate section 2(5) of the PACA (7 U.S.C. § 499b(5)) and the sanction imposed by the Chief ALJ. Therefore, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

Complainant's exhibits are designated by the letters "CX," Respondent's exhibits are designated by the letters "RX," and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

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

. . . .

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

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

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated—

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to

correct the violation.

§ 499i. Accounts, records, and memoranda; duty of licensees to keep; contents; suspension of license for violation of duty

Every commission merchant, dealer, and broker shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. If such accounts, records, and memoranda are not so kept, the Secretary may publish the facts and circumstances and/or, by order, suspend the license of the offender for a period not to exceed ninety days.

7 U.S.C. §§ 499b(4)-(5), 499i (1994 & Supp. II 1996).

Findings of Fact

1. Respondent, Western Sierra Packers, Inc., is a corporation whose business address is 23590 95th Avenue, Terra Bella, California 93270 (CX 1).

2. Respondent was issued PACA license number 911063 on May 8, 1991, and Respondent is, and at all times material to the Complaint was, licensed under the PACA (CX 1).

3. Respondent is owned jointly by John Guidetti and Craig Nieblas. Mr. Nieblas is also the founder, president, and general manager of Respondent (CX 1; Tr. 367-68).

4. Respondent is a specialty packing house that handles subtropical citrus fruit. Respondent employs contractors to pick fruit for growers, Respondent packs the fruit, and Respondent charges growers fees for packing, state standardization, citrus research assessment, selling, picking, and hauling. (CX 10, CX 11; Tr. 397-98.)

5. Beginning in 1993, Respondent began using a sales agent, Heritage Produce Sales, Inc., to sell the fruit of some of the Respondent's growers (Tr. 400-01). When Heritage Produce Sales, Inc., sold Respondent's growers' fruit, Heritage Produce Sales, Inc., would transmit a copy of the purchase order to Respondent, and Respondent would then ship the fruit based on the purchase order. Heritage Produce Sales, Inc., would then send an invoice to the buyer of the fruit, and after Heritage Produce Sales, Inc., was paid by the buyer, Heritage Produce Sales, Inc., would pay Respondent and send Respondent a copy of the invoice. (Tr. 152-53.) For some of Respondent's growers, Respondent does not

use a sales agent, but instead packs the growers' fruit, sells the fruit, collects payment for the fruit, and remits the amounts collected, minus Respondent's charges for packing, to the growers. Respondent refers to these growers as Western Sierra growers. (Tr. 401.)

6. Respondent maintains growers files in which Respondent keeps records of the fruit picked, records of the fruit that Respondent receives, and records of the fruit that Respondent packs. Respondent maintains growers files for Sierra Victor Ranch Company, Sequoia Enterprises, Inc., and Western Sierra growers. Respondent maintains a separate accounts receivable file in which it keeps all of its invoices. (Tr. 78.)

7. During the 1995-1996 growing season, Respondent contracted with drivers to bring fruit from the growers' fields to Respondent's packing house. When the drivers brought the fruit to Respondent for packing, Respondent issued a receiving ticket, indicating the quantity and type of fruit received. One copy of the receiving ticket would be given to the driver, a copy of the receiving ticket would be attached to the appropriate grower's file, and a third copy of the receiving ticket would be filed with Respondent's master file of receiving tickets. (Tr. 80, 95.) Respondent removed the copy of the receiving ticket attached to the appropriate grower's file after the fruit was packed and attached the copy of the receiving ticket to the record that shows the fruit was packed (Tr. 80).

8. Included among the kinds of fruit Respondent handles are two varieties of hybrid grapefruit known as Melogold and Oroblanco. These hybrid varieties of grapefruit were created at the University of California, Riverside, in 1958, by cross-breeding a grapefruit with a pummelo. Seven different varieties resulted; however, only Melogold and Oroblanco were chosen for further study and propagation. Both Melogold and Oroblanco were ultimately patented; Oroblanco in 1980 and Melogold in 1987. (CX 5; Tr. 30-39.)

9. Oroblanco and Melogold are closely related varieties of grapefruit; and thus, have a similar appearance. However, there are differences by which the two varieties can be distinguished from one another. These differences become more pronounced late in the growing season, as the grapefruit ripens. Melogold tends to be larger than Oroblanco and have a more pear-like shape than Oroblanco. The average peel thickness of Melogold, as a percentage of the diameter of the grapefruit, is thinner than Oroblanco and the juice percentage of Oroblanco is slightly lower than Melogold. Oroblanco is generally considered sweeter than Melogold; however, opinions vary as to which variety of grapefruit has the preferable taste. Early in the growing season both varieties of grapefruit are green, but, as they ripen, Melogold develops a yellowish, gold color, while Oroblanco turns an off-white, light green shade. (CX 5; Tr. 43-45, 218-19, 229, 312-13, 317-

22, 504-06.)

10. Some Melogold have Oroblanco characteristics and vice versa. Even experts cannot always tell them apart. Timothy Williams, a staff research associate for the citrus breeding program at the University of California, Riverside, testified that in order to tell the difference, it is necessary to look at a large sample, such as 20 pieces of each variety of grapefruit. (Tr. 59.)

11. Mr. Nieblas, who at the time of the hearing was 43 years old, has been involved with growing citrus since he was a child. In the mid-1980's, Mr. Nieblas worked for an independent packer, Suntreat. Through the actions of Mr. Nieblas, Suntreat, working with California Citrus Specialties, became the first marketer of Oroblanco and Melogold in the San Joaquin Valley of California. Mr. Nieblas went to Japan on two occasions between 1986 and 1990 to discuss oranges and Oroblanco and Melogold. (Tr. 367-76.)

12. Oroblanco and Melogold grown in California are generally picked and sold early in the growing season, beginning in October, while they are still green (Tr. 305-08, 380-82).

13. There is virtually no domestic market for Oroblanco or Melogold. Oroblanco and Melogold are primarily sold in Japan. The Israelis aggressively market Oroblanco, which they call "Sweeties," in Japan; and hence, Sweeties dominate the Japanese market. Sweeties set the standard for Oroblanco in Japan. As Sweeties are green and sweet, California hybrid grapefruit also must be green and sweet, if it is to be accepted in Japan. (Tr. 52, 379-82.)

14. Until 1995, Sweeties did not arrive in Japan from Israel until approximately December 14 because, after harvest in Israel, Sweeties had to be kept in cold storage for 14 days to kill fruit fly larvae before they were shipped to Japan (Tr. 382, 388). However, beginning in 1995, the Israelis began using a process whereby the Sweeties were subjected to cold storage during transportation from Israel to Japan; thereby enabling the Israelis to get the Sweeties to Japan approximately 2 weeks earlier than in previous years (Tr. 389).

15. Once Sweeties arrive in Japan, it is impossible to market Oroblanco and Melogold from California in Japan (Tr. 494). As a result of the domination of the Japanese grapefruit market by Sweeties, California Oroblanco and Melogold must be shipped to Japan before the Sweeties arrive. Until 1995, the period of time between harvest of the California Oroblanco and Melogold and the time the Sweeties arrived in Japan was approximately 1 month (Tr. 382). In 1995, as a result of the Israelis subjecting the Sweeties to cold storage during transportation, the period between the harvest of the California Oroblanco and Melogold and the time the Sweeties arrived in Japan was reduced to approximately 2 weeks (Tr. 388-89).

16. In Japan, no distinction is made between California Oroblanco and Melogold, all California green grapefruit is sold together (Tr. 223, 301, 305-06, 382-83, 496-97). When grapefruit is displayed in Japanese stores, it is labeled according to origin; for example, Florida grapefruit, California grapefruit, or Israel Sweetie grapefruit (Tr. 300-01).

17. There was no price difference between California Melogold and Oroblanco shipped to Japan during the 1995 season (Tr. 325, 329).

Fresh Pacific Transaction

18. Milton and Elsie Lindner of Lemon Cove, California, owned 7 acres of Melogold trees and 5 acres of Oroblanco trees (Tr. 202). Only Melogold could be harvested from the Lindner's premises in 1995 because the Oroblanco trees had been planted in June 1995 and were not yet capable of producing grapefruit (Tr. 203).

19. Mr. Lindner arranged with Sequoia Enterprises, Inc., to sell the Lindner's Melogold during the 1995-1996 harvesting season (Tr. 209, 515-16). Mr. Lindner's primary contact at Sequoia Enterprises, Inc., was Oleah Wilson, one of the owners and officers of Sequoia Enterprises, Inc. (Tr. 89-90, 209, 513). Mr. Lindner informed Oleah Wilson that he (Mr. Lindner) only had Melogold. Marvin Wilson, Oleah Wilson's son and president of Sequoia Enterprises, Inc., also knew that Mr. Lindner's crop consisted of only Melogold. (Tr. 89-90, 209.)

20. Fresh Pacific Fruit & Vegetable, Inc., is an export company that ships approximately 30 products to Asian markets. Fresh Pacific's business includes the export of green grapefruit to Japan. (Tr. 299-300.)

21. In October 1995, Jim Abbot, who runs the field department for Fresh Pacific Fruit & Vegetable, Inc., visited between 10 and 12 California citrus groves with a Japanese buyer who was looking for green grapefruit. They visited both Oroblanco and Melogold groves. The Japanese buyer was not concerned with the variety of the grapefruit, but was interested in the taste and juice quality. (Tr. 301-03, 306.) Among the groves that Mr. Abbott visited with the Japanese buyer and Oleah and Marvin Wilson was the Lindner's grove in Lemon Cove, California. The Japanese buyer chose to purchase Melogold from the Lindners. (Tr. 303-04, 519.)

22. Sequoia Enterprises, Inc., arranged to pick and pack Mr. Lindner's Melogold (Tr. 409-11). However, the Lindner's grapefruit was too large for Sequoia Enterprises, Inc.'s machines, and Respondent agreed to pack the Lindner's grapefruit (Tr. 516). On October 24, 1995, Sequoia Enterprises, Inc., picked the Lindner's Melogold and delivered it in three loads to Respondent (CX 2 at 1-6, 11,

13, 15).

23. Respondent completed three receiving tickets for the grapefruit received from the Lindner's grove, each of which identify the Lindner's Melogold as Oroblanco (CX 2 at 10, 12, 14; Tr. 433-34).

24. Respondent prepared three picking reports for the grapefruit received from the Lindner's grove, each of which identify the Lindner's Melogold as Oroblanco (CX 2 at 16-18; Tr. 97-99).

25. Respondent prepared three sorter reports for the grapefruit received from the Lindner's grove, each of which identify the Lindner's Melogold as Oroblanco (CX 2 at 20-21, 24, 27; Tr. 100-03).

26. Respondent prepared daily shipment records on October 25, 27, and 31, 1995, reflecting repacking of the grapefruit received from the Lindner's grove. The daily shipment records dated October 25 and 31, 1995, each identify the Lindner's Melogold as Oroblanco. (CX 2 at 25, 26, 28; Tr. 104-06.) The daily shipment record dated October 27, 1995, identifies the grapefruit received from the Lindner's grove as Melogold (CX 2 at 25).

27. Respondent prepared a receiving book which states that the Melogold that it received from the Lindner's grove was Oroblanco (CX 2 at 29; Tr. 106-07).

28. Respondent packed the Lindner Melogold on October 25, 1995. The grapefruit was packed in Fresh Pacific Fruit & Vegetable, Inc.'s cartons bearing its "Super Sonic" logo. The cartons are labeled "California Citrus," and there are boxes on each carton which can be marked so as to identify the contents of the carton as either oranges, grapefruit, or lemons. (CX 2 at 18, RX 5; Tr. 311-12, 416-17.)

29. Sequoia Enterprises, Inc., issued an invoice to Fresh Pacific Fruit & Vegetable, Inc., dated October 31, 1995, for 1,092 cartons of Oroblanco. The invoice, which contains a reference to "PO #F61301," states that the grapefruit was shipped from Terra Bella, California, on October 26, 1995, and shipped to General Fruit Co., Ltd., Tokyo, Japan. (CX 2 at 30-31.)

30. Respondent's file for Sequoia Enterprises, Inc., contained a document entitled "Packer Loading Instructions" issued by Fresh Pacific Fruit & Vegetable, Inc., to Sequoia Enterprises, Inc., which shows that 1,092 cartons of Oroblanco with the Super Sonic label were loaded for transport to General Fruit Co., Ltd., on October 25 and 26, 1995. The Packer Loading Instructions contain a reference to "Order No. F61301." (CX 2 at 32-33; Tr. 108-11.)

31. Fresh Pacific Fruit & Vegetable, Inc., prepared a document entitled "Truck Loading Instructions," which shows that Three Rivers was to transport 1,092 cartons of Oroblanco under the label Super Sonic from Terra Bella, California. The Truck Loading Instructions contains a reference to "Order

F61301." (CX 2 at 34; Tr. 112.)

32. Fresh Pacific Fruit & Vegetable, Inc., prepared two documents entitled "Loading Confirmation," which show that 1,092 cartons of Oroblanco were loaded onto a ship on October 26, 1995 (CX 2 at 35, 38; Tr. 112-14). One of the Loading Confirmation documents contains a reference to "Order Number 961301" (CX 2 at 35); the other Loading Confirmation document refers to "Order Number F61301" (CX 2 at 38).

33. Fresh Pacific Fruit & Vegetable, Inc., prepared two commercial invoices which describe the fruit sold to General Fruit Co., Ltd., as 1,092 cartons of fresh Oroblanco under the Super Sonic label. Each invoice is identified with the number "F61301." (CX 2 at 36, 37; Tr. 113.)

34. Respondent's files contained a bill of lading prepared by Respondent which shows that 1,092 cartons of Oroblanco were shipped to General Fruit Co., Ltd., in Japan, on October 26, 1995. The bill of lading makes reference to "Order Number F61301." (CX 2 at 39-41; Tr. 114-16.)

35. Fresh Pacific Fruit & Vegetable, Inc., issued a check to Sequoia Enterprises, Inc., dated November 14, 1995, for $17,710.90. The check skirt makes reference to invoice number "6502/F61301-01" (CX 2 at 42; Tr. 116).

36. In response to an inquiry by Kloster, Ruddell, Hornsburg, Cochran, Stanton & Smith, a law firm representing Elsie Lindner, regarding the status of her 1995 grapefruit crop (CX 2 at 2), Sequoia Enterprises, Inc., sent a letter dated May 9, 1995, stating that 1,092 cartons of the Lindner's grapefruit had been sold for export for $17,710.90 (CX 2 at 4-6).

37. The Japanese buyers received the grapefruit they had personally selected and purchased prior to picking, packing, and shipment; and there is no evidence of any complaints about the grapefruit.

Umina Brothers Transaction

38. Umina Brothers, Inc., is an exporter of fresh fruit. Its export sales and distribution are handled by Mark Golden. Mr. Golden spends more than half of his time visiting growers and observing the products. He visits Japan approximately twice a year. (Tr. 483-84.)

39. In October 1995, Mr. Golden, along with a group of Japanese buyers, visited several California citrus groves. The Japanese buyers sampled green grapefruit from various groves and selected the grapefruit they wanted to purchase. (Tr. 486.) The Japanese buyers were not interested in whether the grapefruit was Melogold or Oroblanco, but rather were concerned with taste and color (Tr. 488).

40. The Japanese buyers selected grapefruit from three groves belonging to

John Corkins, F. Glenn McDonald, and Sierra Victor Ranch Company, respectively (CX 3a, CX 3b, CX 3c, CX 4a, CX 4b; Tr. 486). All of the grapefruit picked from Mr. Corkins' grove in 1995 was Melogold, and all of the grapefruit, except 1¼ bins of Oroblanco, picked from Mr. McDonald's grove in 1995 was Melogold (CX 3a; Tr. 216, 219, 228, 235). There was no testimony with respect to the variety of grapefruit picked at the Sierra Victor Ranch Company.[2]

41. Respondent picked Mr. Corkins' Melogold on November 1 and November 2, 1995, and transported three truck loads of Mr. Corkins' Melogold to Respondent's packing plant. Respondent completed three receiving tickets for Mr. Corkins' grapefruit, each of which identify Mr. Corkins' Melogold as Oroblanco. (CX 3a at 1-4; Tr. 118.)

42. Mr. Corkins received copies of Respondent's receiving tickets and informed Respondent that the receiving tickets erroneously described his (Mr. Corkins') grapefruit as Oroblanco, rather than Melogold. Mr. Corkins was informed by Mr. Nieblas or "someone in his operation" that "they" meant to write Melogold on the receiving tickets. (Tr. 220-22.)

43. Respondent prepared two documents entitled "Daily Packout Record" for Mr. Corkins' grapefruit which identify the grapefruit as Melogold (CX 3a at 5-6; Tr. 118-19).

44. Respondent prepared a sorter report for Mr. Corkins' grapefruit which identifies the grapefruit as Melogold (CX 3a at 7-9; Tr. 119-20).

45. Respondent's receiving book states that the grapefruit that it received from the Mr. Corkins' grove was Oroblanco (CX 3a at 11; Tr. 121-22).

46. On October 31, 1995, and November 2, 1995, Respondent picked grapefruit from Sierra Victor Ranch Company. The truck bin count sheets identify Sierra Victor Ranch Company's grapefruit as Melogold. (CX 3b at 3, 5, CX 4a at 3, 5, 7.) Respondent completed five receiving tickets for the grapefruit received from Sierra Victor Ranch Company. Lot number 4030 from Sierra Victor Ranch Company is identified as 48 bins of Melogold (CX 3b at 2), lot number 4031 from Sierra Victor Ranch Company is identified as 18½ bins of Melogold (CX 3b at 4), lot number 4015 from Sierra Victor Ranch Company is identified as 48 bins of Melogold (CX 4a at 2), lot number 4019 from Sierra Victor Ranch Company is identified as 48 bins of Melogold (CX 4a at 4), and lot number 4023 from Sierra

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[2]An affidavit, which states that Respondent packed 4,880 cartons of Sierra Victor Ranch Company's Melogold and 29 cartons of Sierra Victor Ranch Company's Oroblanco, is in evidence (CX 3b at 1). However, there is nothing in the affidavit or elsewhere to indicate the affiant's relationship to the Sierra Victor Ranch Company or the source of the affiant's knowledge. The affiant did not testify, nor did the investigator who took the affidavit. As such, the affidavit is not reliable evidence, and no weight has been given to the affidavit.

Victor Ranch Company is identified as 24½ bins of Melogold (CX 4a at 6).

47. Respondent prepared three documents entitled "Daily Packout Record" for Sierra Victor Ranch Company's grapefruit which identify Sierra Victor Ranch Company's grapefruit as Melogold (CX 3b at 6-7, 16, CX 4a at 8-9; Tr. 130, 145-47).

48. Respondent prepared sorter reports which identify Sierra Victor Ranch Company's grapefruit as Oroblanco (CX 3b at 9-10, CX 4a at 12, 15-16; Tr. 132-33, 149).

49. Respondent's receiving book states that lot numbers 4015, 4019, 4023, 4030, and 4031, which Respondent received from the Sierra Victor Ranch Company's grove, were Melogold (CX 3b at 17, CX 3c at 6, CX 4a at 18; Tr. 137, 151-52).

50. Mr. McDonald owned 6 acres of Melogold trees and 4 Oroblanco trees (Tr. 228).

51. On October 26, 1995, Respondent picked Mr. McDonald's grapefruit and transported the grapefruit to Respondent's packing house (Tr. 230-31). When the grapefruit arrived at the packing house, Respondent prepared two receiving tickets. The receiving ticket for lot number 4004 describes the grapefruit received from Mr. McDonald as 50½ bins of Melogold (CX 3c at 2; Tr. 139-40). The receiving ticket for lot number 4006 initially described the grapefruit received from Mr. McDonald as 1¼ bins of Melogold, but a line is drawn through the word "Melogold" and the word "Oroblanco" is written above the word "Melogold" (CX 3c at 1; Tr. 139-40).

52. Respondent prepared a document entitled "Daily Packout Record" for Mr. McDonald's grapefruit which identifies the grapefruit as Melogold (CX 3c at 3, CX 4b at 3; Tr. 140, 157). The Daily Packout Record contains a reference to "1007" next to a reference to 174 cartons of size 32 grapefruit and 42 cartons of size 40 grapefruit (CX 3c at 3).

53. Respondent prepared a document entitled "Daily Shipment Record" for Mr. McDonald's grapefruit which identifies the grapefruit as Melogold (CX 3c at 4; Tr. 141).

54. Respondent prepared a sorter report which identifies Mr. McDonald's grapefruit as Oroblanco (CX 3c at 5; Tr. 142).

55. Respondent's receiving book states that lot numbers 4004 and 4006, which Respondent received from the Mr. McDonald, were Oroblanco (CX 3c at 6; Tr. 142). With respect to lot number 4004, there is a line drawn through the word "Melogolds" and "oro's" is written above the word "Melogolds" (CX 3c at 6).

56. Respondent issued an invoice (invoice number 1007) to Umina Brothers, Inc., dated November 14, 1995, for 1,176 cartons of Oroblanco shipped

from Respondent to Tamagawa Trading Company, Inc., in Japan (CX 3a at 12, CX 3b at 18, CX 3c at 7).

57. Respondent prepared a bill of lading (bill of lading number 1007) which shows that 1,176 cartons of Oroblanco were shipped to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10; Tr. 139). The bill of lading states that the total charge for the 1,176 cartons of grapefruit is $14,492.45 (CX 3a at 15, CX 3b 21, CX 3c at 10). Respondent deposited a check from Umina Brothers, Inc., on December 4, 1995, in the amount of $14,492.45 (CX 3a at 16, CX 3b at 22, CX 3c at 11).

58. The number 1007 on the invoice (CX 3a at 12, CX 3b at 18, CX 3c at 7) and the bill of lading (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10) is also used on Respondent's Daily Packout Record for 295 cartons of Mr. Corkins' Melogold (CX 3a at 5), Respondent's Daily Packout Record for 115 cartons of Sierra Victor Ranch Company's Melogold (CX 3b at 6), and Respondent's Daily Packout Record for 216 cartons of Mr. McDonald's Melogold (CX 3c at 3).

59. Heritage Produce Sales, Inc., issued an invoice (invoice number HP952465) to Umina Brothers, Inc., dated November 14, 1995, for 1,176 cartons of Oroblanco shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 4a at 19, CX 4b at 7; Tr. 152-53).

60. Respondent prepared a bill of lading (bill of lading number 1008) for customer number HP952465, which shows that 1,176 cartons of Oroblanco were shipped to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 4a at 21, CX 4b at 9; Tr. 154).

61. The number 1008 on the bill of lading (CX 4a at 21, CX 4b at 9) and the number 952465, which appears on the invoice (CX 4a at 19, CX 4b at 7), are also used on Respondent's Daily Packout Record for 328 cartons of Sierra Victor Ranch Company's Melogold (CX 4a at 8), and the Daily Packout Record for 273 cartons of Mr. McDonald's Melogold (CX 4b at 3).

62. Heritage Produce Sales, Inc., issued a shipping document dated November 3, 1995, which states that 1,176 cartons of Oroblanco were sold to Umina Brothers, Inc., and shipped to Tamagawa Trading Company, Inc., in Japan. The shipping document contains a reference to HP952465 (CX 4a at 22-23, CX 4b at 10-11; Tr. 155-56).

63. All of the grapefruit was packed in cartons Respondent purchased from Sequoia Enterprises, Inc. The cartons identified the contents as "Sequoia Grapefruit" (RX 6). Mr. Golden was present while the grapefruit was packed. He inspected and approved all of the grapefruit and placed his stickers on the pallets. (Tr. 418-20, 492-93.)

64. The Japanese buyers received the grapefruit they personally selected and

purchased prior to shipment. The buyers appear to have been happy with the grapefruit, as they did not complain about the grapefruit and continued to do business with Umina Brothers, Inc. (Tr. 488-89.)

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of a perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

3. Respondent willfully and repeatedly failed to keep such records as fully and correctly disclose all transactions involved in its business, in violation of section 9 of the PACA (7 U.S.C. § 499i).

Discussion

Complainant alleges that Respondent willfully, flagrantly, and repeatedly violated sections 2(4), 2(5), and 9 of the PACA (7 U.S.C. §§ 499b(4), (5), 499i) by misrepresenting the variety of grapefruit sold to two Japanese buyers as Oroblanco, when the variety was actually Melogold, and by failing to keep accounts, records, and memoranda that fully and correctly disclosed all of the transactions involved in Respondent's business. Complainant does not dispute the fact that the cartons correctly identified the produce as "grapefruit." Respondent admits that its records contained errors with respect to the variety of the grapefruit described. The only question, therefore, is whether those errors constitute violations of the PACA.

Section 2(4) of the PACA

Complainant proved by a preponderance of the evidence that Respondent made false or misleading statements in connection with transactions involving a perishable agricultural commodity by describing Melogold grapefruit as Oroblanco grapefruit on three bills of lading and one invoice in connection with the transactions.[3] However, the record is not sufficient to find, or to infer, that

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[3]See: (1) the bill of lading (CX 2 at 39-41; Tr. 114-16), prepared by Respondent, which states that 1,092 cartons of Oroblanco were shipped to General Fruit Co., Ltd., in Japan, on October 26, 1995, when, (continued...)

Respondent made the false or misleading statements for a fraudulent purpose. Complainant states that:

> Respondent was desperate to send as much hybrid grapefruit to Japan as possible before the arrival of the Israeli Sweeties. Respondent knew that the Japanese preferred Oroblanco to Melogold. Therefore, in order to ensure that the Japanese would accept the Melogold, respondent misrepresented it as Oroblanco.

Complainant's Proposed Findings of Fact, Conclusions and Order at 31-32. The record, however, does not support this theory.

There was no need to ensure that the Japanese would accept the grapefruit since it had already been sold. The Melogold in question were visually inspected, tasted, and selected by the Japanese buyers and purchased prior to packing or shipment. Therefore, there is no apparent fraudulent purpose for Respondent's false or misleading statements regarding the variety of the grapefruit.

In addition, the uncontroverted testimony with respect to the Japanese market indicates that, as between Melogold and Oroblanco, the Japanese did not have a preference for Oroblanco and, in fact, did not even distinguish between the two. Complainant asserts that Japanese preference for the Israeli Sweetie proves a preference for Oroblanco in general. There was testimony, however, that Israel has better growing conditions for grapefruit than the United States, enabling Israelis to produce higher quality grapefruit (Tr. 330-31). Also Israel reached the Japanese market first, aggressively marketing its fruit with the name Sweetie (Tr. 52-53). Furthermore, the Japanese prefer the Sweetie to all California green

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[3](...continued)
in fact, the 1,092 cartons of grapefruit to which the bill of lading makes reference were Melogold from the Lindner's grove; (2) invoice number 1007, prepared by Respondent, which states that 1,176 cartons of Oroblanco were shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 4, 1995 (CX 3a at 12, CX 3b at 18, CX 3c at 7; Tr. 137-38), when, in fact, the 1,176 cartons of grapefruit included 295 cartons of Melogold from Mr. Corkins' grove, 216 cartons of Melogold from Mr. McDonald's grove, and 115 cartons of Melogold from Sierra Victor Ranch Company's grove; (3) bill of lading number 1007, prepared by Respondent, which states that 1,176 cartons of Oroblanco were shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10; Tr. 139), when, in fact, the 1,176 cartons of grapefruit included 295 cartons of Melogold from Mr. Corkins' grove, 216 cartons of Melogold from Mr. McDonald's grove, and 115 cartons of Melogold from Sierra Victor Ranch Company's grove; and (4) bill of lading number 1008, prepared by Respondent, which states that 1,176 cartons of Oroblanco were shipped from Respondent to Tamagawa Trading Company, Inc., in Japan, on November 3, 1995 (CX 4a at 21, CX 4b at 9; Tr. 154), when, in fact, the 1,176 cartons of grapefruit included 273 cartons of Melogold from Mr. McDonald's grove and 328 cartons of Melogold from Sierra Victor Ranch Company's grove.

grapefruit, including Oroblanco. Therefore, it appears to be name recognition and superior quality which account for the preference, not any special affinity for Oroblanco.

Finally, Respondent did not have any financial incentive to misrepresent the Melogold as Oroblanco since Respondent did not receive a commission, but rather was paid by the carton regardless of which variety of the grapefruit Respondent packed. Complainant asserts that Respondent did receive a commission and cites as proof the fact that Respondent issued accounts of sale to Mr. Corkins and Mr. McDonald (CX 10, CX 11). The documents account for all costs, including the "selling charge" to be paid to Heritage Produce Sales, Inc. Respondent's explanation that it agreed to handle the paperwork on small growers because Heritage Produce Sales, Inc., did not want to be bothered for such small amounts of acreage and that Respondent was merely collecting sales charges for Heritage Produce Sales, Inc., is credible (Tr. 478-79).

Complainant further states that it would be ludicrous to find that Respondent was not paid on a commission basis, as Respondent could not otherwise have earned a profit (Complainant's Reply Brief at 6). To the contrary, there is no reason to believe that Respondent would not make a profit by charging only for its packing services and allowing outside sales firms to handle the marketing and receive the sales commission.

Finally, even if Respondent had received a commission, prices were the same for all green grapefruit; thus, eliminating any monetary incentive for misrepresenting the Melogold as Oroblanco.

Complainant failed to prove by a preponderance of the evidence that Respondent's false or misleading statements regarding the variety of the grapefruit in question were made for a fraudulent purpose, and the record does not establish facts upon which I can base an inference that Respondent's false or misleading statements were made for a fraudulent purpose. Therefore, I do not find that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint.

Section 2(5) of the PACA

Complainant proved by a preponderance of the evidence that Respondent misrepresented, by word or statement, the character or kind of grapefruit on three bills of lading and one invoice.[4] Specifically, Respondent stated on three bills of

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[4]See note 3.

lading and one invoice that the grapefruit referenced on each of these documents was Oroblanco, when, in fact, the grapefruit was Melogold.

As originally enacted, section 2(5) of the PACA required that, in order to prove a violation of section 2(5) of the PACA, the misrepresentation had to have been made for a fraudulent purpose.[5] Section 2(5) of the PACA (7 U.S.C. § 499b(5)) has been amended numerous times,[6] and the requirement that the misrepresentation be shown to have been made for a fraudulent purpose was deleted from section 2(5) of the PACA (7 U.S.C. § 499b(5)) in 1956.[7] The Senate Report and House of Representatives Report accompanying H.R. 5337, the bill that was enacted in 1956 and amended section 2(5) of the PACA to eliminate the fraudulent purpose requirement, describe the reason for deleting the fraudulent purpose requirement, as follows:

> Section 2(5) of the Perishable Agricultural Act—as it would be amended by H.R. 5337—would, by deleting the words "for a fraudulent purpose," dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an unlawful act; evidence of bona fide misrepresentation relative to grade, quality, etc., would represent an adequate base for the declaration of illegal conduct.

S. Rep. No. 84-2507 at 4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3702; H.R. Rep. No. 84-1196 at 3 (1955).

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[5]Perishable Agricultural Commodities Act, 1930, Pub. L. No. 325, ch. 436, § 2(5), 46 Stat. 532-33, provides:

> Sec. 2. It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> . . . .
>
> (5) For any commission merchant, dealer, or broker, for a fraudulent purpose, to represent by word, act, or deed that any perishable agricultural commodity received in interstate or foreign commerce was produced in a State or in a country other than the State or country in which such commodity was actually produced[.]

[6]Act of Aug. 20, 1937, Pub. L. No. 328, ch. 719, § 2, 50 Stat. 725, 726; Act of June 29, 1940, Pub. L. No. 680, ch. 456, § 4, 54 Stat. 696; Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726; Act of Aug. 10, 1974, Pub. L. No. 93-369, 88 Stat. 423; Act of Oct. 18, 1982, Pub. L. No. 97-352, § 1, 96 Stat. 1667; Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 10, 109 Stat. 430.

[7]Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726.

Further, USDA's views regarding the elimination of the words *for a fraudulent purpose* from section 2(5) of the PACA were incorporated into the Senate Report and the House Report, as follows:

DEPARTMENTAL VIEWS

Following is the letter from the Department of Agriculture recommending enactment of the bill with certain amendments. The amendments proposed by the Department were adopted.

May 25, 1955.

HON. HAROLD D. COOLEY,
Chairman, Committee on Agriculture,
House of Representatives.

DEAR CONGRESSMAN COOLEY: This is in reply to your letter of April 20, 1955, requesting a report on H.R. 5337, a bill to amend the provisions of the Perishable Agricultural Commodities Act of 1930 relating to practices in the marketing of perishable agricultural commodities.

. . . .

Growers, shippers, and buyers are concerned about the existing extent of misbranding and misrepresentation of grade and origin of fresh fruits and vegetables. Although the proposed amendments to the Perishable Agricultural Commodities Act would not correct all malpractices in this field, they would provide significant help. Effective control of misbranding and misrepresentation of fruits and vegetables is difficult under the present statute because no authority is granted to inspect produce in the possession or control of a licensee to determine if it is misbranded unless the licensee requests or grants permission for such inspection. Also, substantial evidence must be produced that the misbranding was done deliberately with the definite intention of defrauding the buyer in order to prove that a fraudulent purpose is involved. The proposed amendments undoubtedly would expedite enforcement of the misbranding provisions of the act and provide for more effective action against licensees who violate these provisions.

. . . .

Sincerely yours,

TRUE D. MORSE,
Acting Secretary.

S. Rep. No. 84-2507 at 5-7 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3703-04; H.R. Rep. No. 84-1196 at 3-5 (1955).

During congressional hearings on H.R. 5337, held on May 26 and May 27, 1955, G.R. Grange, the Deputy Director of the Fruit and Vegetable Division, Agricultural Marketing Service, USDA, testified that the elimination of the *fraudulent purpose provision* would obviate the need to show that the alleged violator intended to mislead the produce buyer and would enable USDA to prove a misbranding violation, even if the buyer knew of, and did not object to, the misbranding, as follows:

MR. GRANGE. . . .

I have a rather brief prepared statement on the bill that has the indorsement of the Department of Agriculture, and with your permission I would like to read it.

MR. GRANT. Yes, you may proceed, sir.

MR. GRANGE. . . .

. . . .

One major purpose of the bill is to strengthen the provisions regarding misbranding or misrepresentation of grade and origin of fresh fruits and vegetables. This objective is accomplished by eliminating the necessity to prove fraudulent purpose for such actions and by authorizing the Secretary or his representatives to inspect produce held by licensees to determine if any misbranding or misrepresentation exists. Proving that a fraudulent purpose is involved in a misbranding case means that substantial evidence must be obtained to show the intent of the person committing the violation. On a practicable basis such evidence is usually exceedingly difficult to obtain because the person involved generally pleads that he acted in good faith and that the misbranding or misrepresentation was unintentional. Also, we have encountered the situation a number of times where the shipper or repacker has misbranded the produce as to grade or origin but

claims that he was not defrauding the buyer since the latter knew of, and did not object to, the misbranding.

. . . .

The foregoing statement outlines briefly the Department's recommendations for passage of this legislation and gives its interpretation of some of the major factors which would be involved in carrying out the provisions of these amendments.

That, gentlemen is a brief summary of the Department's viewpoint on these bills. We will be glad to give such further information or to answer such questions as you may have.

. . . .

MR. GRANT. . . .

. . . does not this [bill] in a way preclude legal action until the Department has failed to get the interested parties together?

. . . .

MR. GRANGE. My understanding of the misbranding provisions, referring solely to them, is that misbranding per se would be a violation of the PAC Act.

Of [sic] the moment with the necessity of proving fraudulent purpose we have to contact the second party concerned to determine how it was represented to him, did he buy it at that lower price, and was there actually an action on the part of the person doing the misbranding that would give us grounds to find that a fraudulent purpose was involved.

If it were no longer necessary to obtain evidence concerning the intent of the individual doing this misbranding, in my opinion then it would to a large extent remove the necessity of having to dig into the relationship between the two parties concerned.

Marketing of Perishable Agricultural Commodities: Hearings on H.R. 5337 and

H.R. 5818 Before the Subcomm. on Domestic Marketing of the House Comm. on Agriculture, 84th Cong., 1st Sess. 6-8, 10 (1955) (statement of G.R. Grange, Deputy Director, Fruit and Vegetable Division, AMS, USDA).

The legislative history applicable to the Act of July 30, 1956, is discussed at great length in *In re Harrisburg Daily Market, Inc.*, 20 Agric. Dec. 955 (1961), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963), as follows:

> Respondents contend that the proscribed act of misrepresenting must be willful or intentional. It is recognized that a licensee making an untrue representation may not possess guilty knowledge of wrongful intent. For example, a false or untrue representation may be made innocently, negligently, knowingly and intentionally or for a fraudulent purpose. Cf. *e.g., Jones v. United States*, 207 F.2d 563, 564 (2d Cir. 1953), *cert. denied*, 347 U.S. 921 (1954); *National Mfg. Co. v. United States*, 210 F.2d 263, 275-76 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954); *United States v. Jerome*, 115 F.Supp. 818, 822 (S.D.N.Y. 1953). See also, *e.g.*, Prosser on Torts § 87 (1941); Black's Law Dictionary (4th ed. 1951). Yet, no qualifications were legislated in section 2(5) with respect to the degree of knowledge or the intent of the commission merchant, dealer, or broker making a misrepresentation otherwise prohibited thereunder. Such omission is especially significant as the Congress, in the enactment of Public Law 842, was directly concerned with the question of the mental element required to constitute a violation of section 2(5). The purpose of the 1956 amendment was, in part, to eliminate the phrase, "for a fraudulent purpose" and, of necessity, the Congress was confronted with the effect of such delegation and the degree of culpability to be required in its stead. In interpreting section 2(5) of the act we are precluded from inserting words, such as "willfully" or "knowingly," which are not in the statute. *United States v. Great Northern Railway Co.*, 343 U.S. 562, 575 (1952); *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). It appears, therefore, that Congress did not intend to so qualify a misrepresentation defined in section 2(5) and that the act of misrepresenting by the means specified therein in connection with the subject matter there described constitutes a violation of such section irrespective of the intent of the licensee to misrepresent or even knowledge that the representation is untrue. . . .
>
> This conclusion is clearly affirmed by examination of the legislative history of the 1956 amendment to section 2(5). Prior to such amendment

and the elimination of the phrase "for a fraudulent purpose" it was necessary in order to find a violation of section 2(5) to present substantial evidence "that the misbranding was done deliberately with the definite intention of defrauding the buyer." H.R. Rep. No. 1196, 84th Cong., 1st Sess. 4 (1955). See *e.g., In re Flaten-Meberg*, 14 [Agric. Dec.] 952 (1955). It was the declared purpose, in part, of the amendment in issue to "dismiss the unwieldy necessity of proving the prevalence of fraud in misbranding or mislabeling in order to declare the existence of an unlawful act" and to substitute therefor merely "evidence of bona fide misrepresentations relative to grade, quality, etc.," as an "adequate base for the declaration of illegal conduct." H.R. Rep. No. 1196, *supra*, at p. 3. See also S. Rep. No. 2507, 84th Cong. 2d Sess. 4 (1956). The committees obviously did not use the term "bona fide" in its literal sense. Otherwise, they would be saying that a good faith misrepresentation would be illegal conduct. They evidently used the term in the sense of real, actual, material, or a matter of substance. Cf. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 384-85 (1935); *Middle Tennessee Electric Membership Corp. v. State ex rel. Adams*, 246 S.W.2d 958, 959-60 (Tenn. 1952). As thus construed, a "bona fide misrepresentation" consists of an actual representation of a material fact which representation is false.

That all subjective mental elements were removed from section 2(5) of the act is further apparent from the congressional hearings on the then proposed amendment. *Hearings before the Subcommittee on Domestic Marketing of the House Committee on Agriculture*, 84th Cong., 1st Sess. on H.R. 5337 and H.R. 5818 (1955). The principal witness and proponent of the bill so understood the effect and consequences of the change, as did other witnesses at the hearings. *Hearings, supra*, at pp. 10, 22, and 39. In addition, the reintroduction of the requirement of knowledge or intent into section 2(5) was proposed and considered. *Hearings, supra*, at pp. 19-20. It was not adopted. . . .

. . . .

. . . [C]ulpability does not depend on the licensee's lack of good faith or whether or not the misrepresentations were made intentionally, deliberately, or accidentally.

In re Harrisburg Daily Market, Inc., supra, 20 Agric. Dec. at 969-73 (footnotes omitted).

The United States Court of Appeals for the District of Columbia Circuit, in affirming the *Harrisburg* decision, stated, as follows:

> The Perishable Agricultural Commodities Act, 1930, required proof of fraudulent purpose as an element of the misrepresentation violations. 46 Stat. 533 (1930). To achieve stricter enforcement as the legislative history discloses, the act was amended in 1956 to eliminate the need to show the existence of fraudulent purpose. 70 Stat. 726 (1956), 7 U.S.C.A. § 499b(5). See H.R. Rep. No. 1196, 84th Cong., 1st Sess., 3-4; S. Rep. No. 2507, 84th Cong., 2d Sess. 4,6, U.S. Code Cong. & Adm. News 1956, p. 3699. See also, *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606 (3d Cir. 1960).

Harrisburg Daily Market, Inc. v. Freeman, 309 F.2d 646, 647 (D.C. Cir. 1962) (per curiam), *cert. denied*, 372 U.S. 976 (1963).

The legislative history applicable to the Act of July 30, 1956, makes clear that any representation of the subject matter described in section 2(5) of the PACA, which is false, even if the misrepresentation is unintentional or accidental, constitutes a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). Proof of a violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)) is not dependent on a showing: (1) that the commission merchant, dealer, or broker defrauded, or intended to defraud, the recipient or buyer of the misrepresented produce; (2) that the commission merchant, dealer, or broker intended to benefit by the misrepresentation; (3) that the commission merchant, dealer, or broker knew or believed that the recipient or buyer of the produce would rely on the misrepresentation; (4) that the recipient or buyer of the misrepresented produce relied on, or was injured by, the misrepresentation; or (5) that the recipient or buyer of the misrepresented produce was aware of the misrepresented fact.[8]

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[8]*See In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1564 (1981) (stating that respondent's contention that it did not intend to violate section 2(5) of the PACA is probably true; however, intent to defraud is irrelevant), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Robert J. Wilkinson*, 36 Agric. Dec. 454, 455-56 (1977) (stating that respondent's contention that he violated section 2(5) of the PACA, but that it was not a knowing violation, is not a defense); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 797 (1975) (stating that the record supports respondent's view that its violations of section 2(5) of the PACA were unintentional, but intent is not an element of the violations), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Harrisburg Daily Market, Inc.*, 20 Agric. Dec. 955, 973 (1961) (stating that culpability for a violation of section 2(5) of the PACA does not depend on lack of good faith or whether or not the

(continued...)

The record clearly establishes that Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of at least 2,319 cartons of grapefruit, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

Section 9 of the PACA

Numerous records kept by Respondent pertaining to the Melogold, which was shipped to General Fruit Co., Ltd., and to Tamagawa Trading Company, Inc., in Japan, incorrectly refer to the grapefruit as Oroblanco.[9] Respondent does not deny that its records were incorrect, and Mr. Nieblas admits that he did not pay close attention to the varieties of grapefruit that were recorded on Respondent's records since the specific variety of the green grapefruit was not relevant to the transactions (Tr. 435-38).

There is no evidence that the errors in Respondent's internal records had the

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[8](...continued)
misrepresentations were made intentionally, deliberately, or accidentally), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

[9]See for example: (1) three receiving tickets completed by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 10, 12, 14); (2) three picking reports prepared by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 16-18); (3) three sorter reports prepared by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 20-21, 24, 27); (4) two daily shipment records prepared by Respondent for grapefruit received from the Lindner's grove, each of which identify Lindner's Melogold as Oroblanco (CX 2 at 25-26, 28); (5) a receiving book prepared by Respondent which states that the Melogold received from the Lindner's grove was Oroblanco (CX 2 at 29); (6) packer loading instructions issued by Fresh Pacific Fruit & Vegetable, Inc., and kept by Respondent, which describe the Lindner's Melogold as Oroblanco (CX 2 at 32-33); (7) a bill of lading prepared by Respondent which describes the Lindner's Melogold as Oroblanco (CX 2 at 39-41); (8) three receiving tickets completed by Respondent for grapefruit received from Mr. Corkins' grove, each of which identify Mr. Corkins' Melogold as Oroblanco (CX 3a at 1-4); (9) a receiving book prepared by Respondent which states that the Melogold received from Mr. Corkins' grove was Oroblanco (CX 3a at 11); (10) sorter reports prepared by Respondent for grapefruit from Sierra Victor Ranch Company's grove which identify Sierra Victor Ranch Company's Melogold as Oroblanco (CX 3b at 9-10, CX 4a at 12, 15-16); (11) a sorter report prepared by Respondent for grapefruit from Mr. McDonald's grove which identifies Mr. McDonald's Melogold as Oroblanco (CX 3c at 5); (12) a receiving book prepared by Respondent which states that the Melogold received from Mr. Corkins' grove was Oroblanco (CX 3c at 6); (13) bill of lading number 1007, prepared by Respondent, which describes Mr. McDonald's, Mr. Corkins', and Sierra Victor Ranch Company's Melogold, as Oroblanco (CX 3a at 13-15, CX 3b at 19-21, CX 3c at 8-10); (14) invoice number 1007, issued by Respondent, which describes Mr. McDonald's, Mr. Corkins', and Sierra Victor Ranch Company's Melogold, as Oroblanco (CX 3a at 12, CX 3b at 18, CX 3c at 7); and (15) bill of lading number 1008, prepared by Respondent, which describes Mr. McDonald's and Sierra Victor Ranch Company's Melogold, as Oroblanco (CX 4a at 21, CX 4b at 9).

purpose or effect of deceiving anyone. The PACA, however, requires that records fully and correctly disclose all transactions, regardless of any deceptive intent or lack thereof. Therefore, I find that Respondent willfully and repeatedly failed to keep such records as fully and correctly disclose all transactions involved in its business, in violation of section 9 of the PACA (7 U.S.C. § 499i), as alleged in the Complaint.

Sanctions

Respondent's violations of sections 2(5) and 9 of the PACA (7 U.S.C. §§ 499(b)(5), 499i) were willful and repeated as a matter of law.

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.[10] Willfulness is reflected by

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[10]*See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 17 (Aug. 18, 1998); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1905-06 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for

(continued...)

Respondent's violations of express requirements of the PACA (7 U.S.C. §§ 499b(5), 499i) and the number of Respondent's violations. Respondent knew, or should have known, that the grapefruit in question was the Melogold variety. Mr. Nieblas, Respondent's founder, president, co-owner, and general manager, has had a great deal of experience with Melogold and Oroblanco and admitted that he did not pay close attention to the descriptions of the grapefruit that were recorded on Respondent's documents (Tr. 367-76, 435-38). Moreover, one of Respondent's growers, Mr. Corkins, brought to Respondent's attention that the receiving tickets Respondent prepared for Mr. Corkins' grapefruit erroneously identified Mr. Corkins' grapefruit as Oroblanco (Tr. 220-22). Nonetheless, Respondent represented at least 2,319 cartons of Melogold as Oroblanco[11] and kept numerous records[12] that did not correctly disclose the transactions involved in Respondent's business.

Respondent's violations were also repeated. Respondent's violations are "repeated" because repeated means more than one. Respondent misrepresented, by word or statement, the character or kind of at least 2,319 cartons of grapefruit. Each misrepresented carton constitutes a separate violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).[13] Respondent also kept numerous records which did not fully and correctly disclose all transactions involved in its business. Each inaccurate record constitutes a separate violation of section 9 of the PACA (7 U.S.C. § 499i).

Complainant recommends a 90-day suspension of Respondent's PACA license or, in lieu of a 90-day suspension, a $115,000 civil penalty. This case is governed by USDA's sanction policy in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which provides:

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

[11]See note 3.

[12]See note 9.

[13]*In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 35-36 (Aug. 18, 1998); *In re Potato Sales Co.*, 54 Agric. Dec. 1382, 1404 (1995), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

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

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

However, sanction recommendations of administrative officials are not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.[14] I have not adopted the sanction recommendation of administrative officials because their sanction recommendation is based, in part, on the allegation that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and, as explained in this Decision and Order, *supra*, I do not find that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Further, while Respondent's violations of sections 2(5) and 9 of the PACA (7 U.S.C. §§ 499b(5), 499i) were willful in the sense that Respondent exhibited a careless disregard of statutory requirements, I do not find that Respondent engaged in the violations in order to deceive its customers. Rather, the violations appear to have been the result of Respondent's lack of concern for distinguishing between Oroblanco grapefruit and Melogold grapefruit. Moreover, Respondent has implemented a new system to ensure that the variety of grapefruit handled by Respondent is correctly recorded on its documents in future transactions. (Tr. 415, 418-22.) Nonetheless, Respondent's violations were willful and repeated, involving at least 2,319 cartons of grapefruit and numerous incorrect records, and Respondent's violations put at risk the integrity of exports of products from the United States (Tr. 258-59).

Section 8 of the PACA provides that, if the Secretary determines that a

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[14] *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Mar. 30, 1998); *In re C.C. Baird*, 57 Agric. Dec. 127, 176-77 (1998) *appeal dismissed*, No. 98-3296 (8th Cir. Oct. 29, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 573-74 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

commission merchant, dealer, or broker has violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary may publish the facts and circumstances of the violation, suspend or revoke the license of the offender, or assess a civil penalty, as follows:

> **§ 499h. Grounds for suspension or revocation of license**
>
> **(a) Authority of Secretary**
>
> Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, . . . the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.
>
> . . . .
>
> **(e) Alternative civil penalties**
>
> In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title . . ., 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.

7 U.S.C. § 499h(a), (e) (1994 & Supp. II 1996).

No civil penalty may be assessed for a violation of section 9 of the PACA; however, section 9 does provide that the Secretary may publish the facts and circumstances of the violation or suspend the license of the offender for a period not to exceed 90 days (7 U.S.C. § 499i).

Based on the record, I find that a 20-day suspension of Respondent's PACA license (15 days for Respondent's violations of section 2(5) of the PACA and 5 days for Respondent's violations of section 9 of the PACA) would have a deterrent effect on Respondent and others in the perishable agricultural commodities

industry.

Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. II 1996)) provides that I may assess a civil penalty in lieu of the suspension of Respondent's license for its violations of section 2(5) of the PACA. In assessing the amount of the civil penalty, due consideration must be given to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. The seriousness, nature, and amount of Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) are discussed in this Decision and Order, *supra*. Respondent has between 30 and 35 employees (Tr. 296). Respondent operates a large business, and the record establishes that each day that Respondent's license is suspended would cost Respondent approximately $1,300 (Tr. 264-67). Based on these factors, I find that the assessment of a $19,500 civil penalty for Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)), in lieu of the 15-day suspension of Respondent's PACA license for Respondent's violations of section 2(5) of the PACA, would be appropriate.

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

Order

1. Respondent's PACA license is suspended for a period of 5 days and Respondent is assessed a civil penalty of $19,500, which shall be paid by certified check or money order made payable to the "Treasurer of the United States" and forwarded to: James Frazier, United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, PACA Branch, Room 2095 South Building, 1400 Independence Avenue, SW, Washington, D.C. 20250. The certified check or money order shall be received by Mr. Frazier within 60 days after service of this Order on Respondent, and Respondent shall indicate on the certified check or money order that payment is in reference to PACA Docket No. 97-0004. The 5-day suspension of Respondent's PACA license shall take effect beginning on the 61st day after service of this Order on Respondent.

2. In the event that the PACA Branch does not receive a certified check or money order in accordance with paragraph 1 of this Order, Respondent's PACA license is suspended for 20 days, and the 20-day suspension shall take effect beginning on the 62nd day after service of this Order on Respondent.

In re: MICHAEL J. MENDENHALL.
PACA-APP Docket No. 97-0008.
Decision and Order filed November 10, 1998.

Responsibly connected — Stockholder — Stock certificates — Corporate stock records — De novo proceeding.

The Judicial Officer affirmed Judge Baker's (ALJ) decision that Petitioner was responsibly connected with Mendenhall Produce, Inc., during the time that Mendenhall Produce, Inc., violated the PACA. The Judicial Officer rejected Petitioner's contention that a proceeding instituted by a petition for review is limited to review of the Chief of the PACA Branch's responsibly connected determination and held that a petition for review filed pursuant to 7 C.F.R. § 1.133(b) commences a *de novo* proceeding. The Judicial Officer found that Petitioner was a holder of 100 per centum of the outstanding stock of Mendenhall Produce, Inc., during the period that Mendenhall Produce, Inc., violated the PACA, that Petitioner was not a nominal stockholder, and that Petitioner actively participated in activities resulting in Mendenhall Produce, Inc.'s violations. The Judicial Officer rejected Petitioner's argument that he was not a stockholder because no stock certificates had been transferred to him and there was no change of ownership on the corporation's records indicating that Petitioner was a stockholder. The Judicial Officer held that a stock certificate is only evidence of stock ownership and stock ownership is determined by an examination of all the facts relevant to ownership. The Judicial Officer also held that while a corporate stock record book is evidence that the person identified as a stockholder is in fact a stockholder, that evidence may be rebutted and generally the failure to register a transfer on the records of a corporation does not affect the validity of the transfer as between the transferor and transferee, even if corporate bylaws require recordation of transfers on the books of the corporation.

Eric Paul, for Respondent.
Stephen P. McCarron, Washington, D.C., for Petitioner.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Michael J. Mendenhall [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a letter dated August 6, 1997 [hereinafter Petition], on August 11, 1997.

The Petition challenges the July 18, 1997, determination by the Acting Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was *responsibly connected* with Mendenhall Produce, Inc., during the period of time that Mendenhall Produce, Inc., violated the PACA,[1] in that

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[1]During the period August 1995 through November 1995, Mendenhall Produce, Inc., received and accepted in interstate commerce 66 lots of perishable agricultural commodities from 16 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of $219,913.17.
(continued...)

Petitioner was a 100 percent shareholder of Mendenhall Produce, Inc. (RECX-9).

On November 5, 1997, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] conducted an oral hearing in Phoenix, Arizona. Mr. Stephen P. McCarron, Esq., of McCarron & Associates, Washington, D.C., represented Petitioner. Mr. Eric Paul, Esq., of the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On February 13, 1998, Petitioner filed Petitioner's Proposed Findings of Fact, Conclusions of Law and Brief in Support; on March 20, 1998, Respondent filed Respondent's Proposed Findings of Fact, Conclusions and Order; and on April 15, 1998, Petitioner filed Petitioner's Reply Brief.

On July 17, 1998, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order]: (1) affirming Respondent's determination that Petitioner was responsibly connected with Mendenhall Produce, Inc., during the time Mendenhall Produce, Inc., was found to have violated section 2 of the PACA (7 U.S.C. § 499b); and (2) stating that Petitioner is subject to the employment and licensing restrictions in sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) (Initial Decision and Order at 39).

On September 14, 1998, Petitioner appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to the Rules of Practice (7 C.F.R. § 2.35).[2] On October 7, 1998, Respondent filed Respondent's Response to Petitioner's Appeal Petition, and the case was referred to the Judicial Officer for a decision.

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

Petitioner's exhibits are designated by the letters "PX"; Respondent's exhibits are designated by the letters "CX" and "AX"; documents which comprise the

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[1](...continued)
Mendenhall Produce, Inc.'s failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2 of the PACA (7 U.S.C. § 499b). *In re Mendenhall Produce, Inc.*, 57 Agric. Dec. 806 (1997).

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

certified agency record upon which Respondent based the July 18, 1997, responsibly connected determination are designated by the letters "RECX"; and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

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

(10) The term "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.

. . . .

§ 499d. Issuance of license

. . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

Any applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished

is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

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

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

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

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

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9)-(10), 499d(b)(A)-(B), (c), 499h(b) (1994 & Supp. II 1996).

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

. . . .

Petitioner and one additional witness testified for Petitioner and Petitioner's exhibits, PX-1 through PX-10, were accepted in evidence. Respondent presented testimony from six witnesses and Respondent's exhibits, CX-1 through CX-23 and AX-1 through AX-17, were accepted in evidence. Exhibits RECX-1 through RECX-7 were already part of the record as the certified agency record upon which [Respondent] had made [the July 18, 1997,] responsibly connected determination. However, [exhibits RECX-1 through RECX-7] were also admitted as exhibits. Two other documents contained in the [certified] agency . . . record without

identifying numbers were copies of the July 18, 1997, certified mail letter signed by J. R. Frazier which constitutes [Respondent's] determination [that the Petitioner was responsibly connected with Mendenhall Produce, Inc.,] and the August 6, 1997, letter signed by Petitioner which constitutes the Petition. . . . These documents were numbered as RECX-9 and RECX-8, respectively. . . .

Although each of the parties agrees that the issue for ultimate determination is whether or not [Petitioner] was responsibly connected with Mendenhall Produce, Inc., the parties do not agree upon the extent of evidence which may be considered with respect [to that issue].

With respect to the responsibly connected proceeding, Petitioner has timely raised . . . the extent to which evidence, other than that upon which [Respondent] relied for [the July 18, 1997, responsibly connected] determination, may be adduced and relied upon in this proceeding. Essentially, . . . Petitioner's position [is, as follows]:

> This is a review proceeding of the Chief's determination that Petitioner was responsibly connected to Mendenhall Produce, Inc. ("MPI") as the 100% shareholder of MPI. The Chief made his determination based on records which are contained in the agency record.
>
> Petitioner has the opportunity to rebut this determination in this review proceeding by offering documents and testimony. Respondent is entitled only to offer evidence in rebuttal to evidence proffered by petitioner to show that petitioner's evidence is incorrect or unworthy of belief. However, respondent's evidence in rebuttal cannot be used to uphold the Chief's determination. The Chief's determination must rise or fall based on the agency record and petitioner's evidence, subject to rebuttal. If it is determined that petitioner's evidence is successfully rebutted, then the Chief's determination must be reviewed based solely on the agency's record. Any rebuttal evidence from respondent should not be used substantively to support the Chief's determination.

Petitioner's Notice of Objection to Complainant's Exhibits and Witnesses on the Responsibly Connected Case.

Petitioner was granted a continuing objection with respect to the Respondent's reliance upon evidence that was not relied upon [by Respondent] in [the July 18, 1997, responsibly connected] determination. . . .

Petitioner maintains that inasmuch as [Respondent], in his determination letter of July 18, 1997, stated that the basis of the determination of "responsibly

connected" was that Petitioner was listed with USDA as a 100 percent shareholder of Mendenhall Produce, Inc., that is the only issue to be adjudicated in this proceeding. Namely, whether the [Respondent's] determination is correct or incorrect, premised upon Petitioner being a 100 percent shareholder of Mendenhall Produce, Inc. Petitioner argues this is not a *de novo* proceeding where other matters not considered by [Respondent] may be [introduced].

. . . Respondent [argues] first that [Petitioner] was actually a shareholder of Mendenhall Produce, Inc., or alternatively, that [Petitioner] was the *alter ego* of Mendenhall Produce, Inc. Briefly summarized, Respondent's position is that Petitioner was, from the beginning of Mendenhall Produce, Inc., the holder of a hidden major ownership interest; that Petitioner exercised his ownership interest when he held himself out to employees of Mendenhall Produce, Inc., as an owner of the business; and that when he directed the firm's produce operations and made management and policy decisions, he was acting as a *de facto* majority owner. [Respondent] . . . also argue[s] that Petitioner's *de facto* ownership interest in Mendenhall Produce, Inc., became a *de jure* ownership of the business subsequent to the resignation of Suzanne D. Mendenhall as president of Mendenhall Produce, Inc., on May 12, 1995, as a result of a marital settlement. [(Respondent's Proposed Findings of Fact, Conclusions and Order at 29-30.)] . . . .

. . . .

Under the PACA, . . . it is unlawful for any licensee to employ an individual who has been found to have been responsibly connected with an entity that has been determined to have flagrantly and repeatedly violated the PACA. Responsible connection is determined by the status of the individual in the violating entity. [Section 1(b)(9) of] the PACA [defines the term "responsibly connected" as follows:

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

7 U.S.C. § 499a(b)(9) (Supp. II 1996).

The second sentence] of the definition [of the term "responsibly connected"] was added on November 15, 1995, by the Perishable Agricultural Commodities Act Amendments of 1995 (Pub. L. No. 104-48[, 109 Stat. 424 (1995)) [hereinafter PACAA-1995]].

A person who has been determined to be responsibly connected may not be employed by a licensee under the PACA for one year in any capacity and may be employed in the second year only when the employing licensee [furnishes and maintains a surety] bond in [form and] amount satisfactory to the Secretary.

As originally enacted in 1930, section 8 of the PACA empowered the Secretary to suspend or revoke the authority of a licensee to do business subject to the PACA, but had no provisions imposing employment or licensing restrictions on [persons] who were personally involved in the violations. The PACA was amended in 1934 (Act of Apr. 13, 1934, [Pub. L. No. 159,] ch. 120, § 14, 48 Stat. 588) and 1956 (Act of July 30, 1956, [Pub. L. No. 842,] ch. 786, § 5, 70 Stat. 727) to authorize the Secretary to revoke a license when, after notice, a PACA licensee continued to employ someone whose own license had been suspended or revoked or who had been "responsibly connected" with a licensee whose license had been suspended or revoked. The [1934 and 1956] amendments to the PACA gave no direction as to who would be considered "responsibly connected" with the suspended or revoked licensee.

To [avoid any possible] confusion, the PACA was amended again in 1962 ([Act of] Oct. 1, 1962, Pub. L. No. 87-725, 76 Stat. 673) to include a definition of "responsibly connected" (7 U.S.C. § 499a[(b)](9)). The House of Representatives Report (H.R. Rep. No. 87-1546 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749-55) explains that establishing a definition of "responsibly connected" would give the term "specific meaning, thus avoiding possible confusion as to interpretations" (1962 U.S.C.C.A.N. at 2751). The [House of Representatives] Report states that such a definition would clarify the section of the PACA regarding the denial of a license to an applicant responsibly connected with a violator (7 U.S.C. § 499d(b)), as the license could be refused "without showing (as is now required) that the applicant, officer, director, or member was responsible in whole or in part for such conduct" (1962 U.S.C.C.A.N. at 2753). The House [of Representatives] Report also states that the "responsibly connected" definition was intended to "[i]mprove and clarify provisions dealing with the eligibility for license, or for employment by licensees, of persons guilty of specified acts and persons affiliated with them" (1962 U.S.C.C.A.N. at 2750).

Until 1975, the "responsibly connected" definition in section 1[(b)](9) of the PACA was given a *per se* interpretation, that is, a person who was an officer,

director, or [holder of more] than 10 per centum [of the outstanding stock] of a corporation at the time that corporation had violated the PACA was considered *per se* responsibly connected with the corporation and thus subject to the licensing and employment restrictions. The person considered responsibly connected was not given the opportunity to contest this determination. The *per se* standard was first enunciated in *Birkenfield v. United States,* 369 F.2d 491 (3d Cir. 1966), where the court found that the 1962 amendment to the PACA creating the responsibly connected definition was intended to establish a "'*per se*' exclusionary standard" whereby any person affiliated or connected with a PACA violator as an officer, director, or [holder of more] than 10 per centum [of the outstanding stock] would be subject to the Secretary of Agriculture's power to prohibit employment under 7 U.S.C. § 499h(b) without being able to establish a defense, such as lack of any real authority. The [United States Court of Appeals for the] Second Circuit, in *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.)[, *cert. denied*, 389 U.S. 835 (1967),] cited with approval the Third Circuit's *per se* approach in *Birkenfield.*

In 1975, the [United States Court of Appeals for the] District of Columbia Circuit decided in *Quinn v. Butz,* 510 F.2d 743 (D.C. Cir. 1975), that a person who appears to meet the criteria for responsible connection set forth in section 1[(b)](9) [of the PACA] must be allowed to rebut the presumption of responsible connection. The court acknowledged that the PACA "was designed to strike at persons in authority who acquiesced in wrongdoing as well as the wrongdoers themselves." [*Id.* at 755.] However, the court decided that [the individual alleged to be responsibly connected] should have the opportunity to present evidence to prove that his position [in the violating entity] was merely nominal, as he had no real power. The court also stated that [the person alleged to be responsibly connected] should be given a chance to establish that the violating [entity] was merely a fiction, being operated, in effect, as a sole proprietorship by the corporate president.

As a result of the decision in *Quinn*, [the Agricultural Marketing Service] initiated a . . . proce[dure by] which a person who wished to contest a determination that he or she was responsibly connected could do so. The proceeding took place before a presiding officer, employed by [USDA], and the burden of proof rested with the [person] challenging the responsibly connected determination. This proceeding would not occur until after resolution of the disciplinary case against the firm with which the [person] was alleged to be responsibly connected.

Subsequent to 1975, the [United States Court of Appeals for the] District of Columbia Circuit continued to follow the doctrine expressed in *Quinn.* The court found a lack of responsible connection in *Minotto v. United States Dep't of Agric.*,

711 F.2d 406 (D.C. Cir. 1983), which concerned a person who had been the bookkeeper of a corporation and who was told by its president that she would henceforth be a director, although her salary and responsibilities did not change. The court found that there was insufficient evidence that "Minotto knew or should have known of the Company's misdeeds" and stated 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.] The court concluded that Minotto was not responsibly connected because evidence was lacking "of an actual, significant nexus with the violating company." [*Id.* at 409.] The [United States Court of Appeals for the] District of Columbia Circuit next found in *Martino v. United States Dep't of Agric.*, 801 F.2d 1410 (D.C. Cir. 1986), that the petitioner[s] therein w[ere] not "enticed or coerced by an employer into the position that render [them] `responsibly connected'" and held that the fact that Martino [and Schmidt were each owners of] 22.2 [per centum of the outstanding stock] constituted the required "nexus" to warrant a finding of responsible connection. [*Id.* at 1414.] In *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601 (D.C. Cir 1987), the [court] considered three appeals taken from decisions where Veg-Mix, Inc., was found to have committed flagrant and repeated violations of section 2(4) of the PACA in a disciplinary proceeding, and petitioners therein, Kuzzens, Inc., and Charles M. Harris, were determined to be "responsibly connected" with Veg-Mix, Inc., in separate "responsibly connected" proceedings. The court approved the Secretary's taking notice of admissions of unpaid produce debt and of stock ownership and the holding of corporate office, in pleadings filed in Veg-Mix, Inc.'s bankruptcy proceeding. When considering the issue of responsible connection based upon stock ownership, the court determined that petitioner Kuzzens, Inc., became a 60 percent shareholder regardless of whether a stock certificate physically issued, since the pre-incorporation agreement and bankruptcy pleadings both listed Kuzzens, Inc., as 60 percent shareholder, and the former clearly recited the consideration of $12,000. The court found that there was a stock certificate for 12 shares of the company issued to Kuzzens, Inc., and that even if there was some technical problem with the certificate, it would not matter because the pre-incorporation agreement and the bankruptcy pleadings both listed Kuzzens, Inc., as 60 percent shareholder. . . . The court ruled that Kuzzens, Inc., a majority stockholder, was responsibly connected because [its] majority ownership constituted the necessary "nexus" set forth in *Minotto.* [*Id.* at 611.] In *Siegel v. Lyng,* 851 F.2d 412 (D.C. Cir. 1988), the court emphasized that majority ownership alone rendered Siegel responsibly connected under the standards of *Martino* and *Veg-Mix, Inc.* In *Bell v. United States Dep't of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), the court

explained that in the District of Columbia Circuit a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or major shareholder if: (1) the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality; or (2) the petitioner proves that at the time of the violations he was only a nominal officer, director, or shareholder. [*Id.* at 1201.] The court once again held that the presumption that an officer, director, or holder of more than 10 per centum of the [outstanding] stock of a corporation is responsibly connected is a rebuttable presumption in *Hart v. United States Dep't of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997).

While the [United States Court of Appeals for the] District of Columbia Circuit adhered to its rebuttable presumption standard, other circuit courts of appeals continued to apply the *per se* standard, upholding the literal definition of responsible connection found in section 1[(b)](9) of the PACA. The *per se* interpretation was utilized in the Eighth Circuit in *Conforti v. United States,* 74 F.3d 838, 841 (8th Cir.) (stating that the court applies a *per se* rule to the definition of the term responsibly connected in section 1 of the PACA; actual responsibilities or interests are irrelevant to the question of responsible connection to a PACA violator), *cert. denied,* [519 U.S. 807] (1996), and *Pupillo v. United States,* 755 F.2d 638 (8th Cir. 1985), and in the Fifth Circuit in *Hawkins v. Agricultural Marketing Service,* 10 F.3d 1125 (5th Cir. 1993), and *Faour v. United States Dep't of Agric.*, 985 F.2d 217 (5th Cir. 1993).

In November 1995, the PACA was amended . . . by the [PACAA-1995]. Section 1[(b)](9) of the PACA, which defines "responsibly connected," currently reads as follows:

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

7 U.S.C. § 499a[(b)](9) [(Supp. II 1996)] (emphasis added).

The last sentence of this definition was added by section 12(a) of PACAA-1995 in order "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation." H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458. The House of Representatives Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of "responsibly connected" would "allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation." H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

This revised definition of "responsibly connected" has been interpreted by the Secretary of Agriculture in three recent decisions decided by the . . . Judicial Officer. They are: (1) *In re Michael Norinsberg*, [56 Agric. Dec. 1840] (. . . 1997)[, *remanded*, No. 98-1065 (D.C. Cir. Dec. 22, 1998)]; . . . (2) *In re Steven J. Rodgers*, [56 Agric. Dec. 1919] (. . . 1997)[, *aff'd per curiam*, No. 98-1057 (D.C. Cir. Oct. 19, 1998)]; and (3) *In re Lawrence D. Salins*, [57 Agric. Dec. ___] (Feb. 26, 1998).

In *Michael Norinsberg,* the administrative law judge . . . had found that [Michael Norinsberg] (a secretary, treasurer, director, and stockholder of The Norinsberg Corporation) was not responsibly connected with The Norinsberg Corporation during the April 1991 through February 1992 period of time in which [The Norinsberg Corporation] . . . willful[ly], flagrant[ly], and repeat[ly violated] section 2(4) of the PACA (7 U.S.C. § 499b(4)). The firm's license was revoked in *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, [516 U.S. 974] (1995). The [administrative law judge] held [in the Initial Decision and Order in *In re Michael Norinsberg*, *supra*,] that Robert M. Norinsberg ([Michael Norinsberg's] father) was the *alter ego* of the corporation, that . . . Michael Norinsberg was only nominally a secretary, a treasurer, a director, and a stockholder, and that [Michael Norinsberg] was not actively involved in the activities resulting in the violation. . . . Respondent therein appealed, and the Judicial Officer agreed with the administrative law judge's conclusions that Robert M. Norinsberg was the *alter ego* of [T]he [Norinsberg] [C]orporation and that [Michael Norinsberg] was a nominal officer and director (but not a nominal stockholder), and held that [Michael Norinsberg] was responsibly connected because the Judicial Officer found, unlike the administrative law judge, that Petitioner's signing of . . . 14 checks . . ., totaling $59,728.60, payable to persons who were not produce creditors, constituted active

involvement in the activities, resulting in a violation. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1857-59]. The initial and final decisions differ on the proper interpretation to be given to the statutory phrase "actively involved in the activities resulting in a violation." The administrative law judge appeared to have relied upon the District of Columbia Circuit's holdings in the *Bell, Minotto,* and *Quinn* cases as establishing a requirement that a person held to be responsibly connected possess "personal fault or a realistic capacity to counteract or obviate the fault of others," and added to that [requirement] a conclusion that active participation in decision making at the *management* level is required for a petitioner who is nominally an officer, director, or stockholder. . . . The interpretation of the Secretary, as expressed by the . . . Judicial Officer, is that there is "nothing in section 12(a) of the PACAA-1995 or the applicable legislative history to indicate that Congress intended to limit active involvement in activities resulting in a violation of the PACA to `active participation at a managerial level in decision making activities that resulted in the violation.'" [*In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1858.] Interpreting the [definition of "responsibl[y] connected," as amended in 1995, the Judicial Officer found that the defense that The Norinsberg Corporation was the *alter ego* of Robert M. Norinsberg was not available to [Michael Norinsberg] because [he] held 2.97914 per centum of the outstanding stock of The Norinsberg Corporation. Therefore, [Michael Norinsberg] could not avoid responsibly connected status because he could not establish that he was not an owner of a violating licensee or entity subject to license which was the *alter ego* of its owners. [*In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1864-65. Michael Norinsberg contended in his] petition for reconsideration . . . that, under the PACA definition prior to the 1995 amendment, as interpreted by the [United States Court of Appeals for the District of Columbia] Circuit, [he] would not have been found responsibly connected, since the sole basis for the finding of responsible connection was based on the Judicial Officer's conclusion that [he (Michael Norinsberg)] was actively involved in the violations, which basis did not come into existence until the 1995 amendment. [Michael Norinsberg] claimed that, since this case arose prior to the 1995 amendment, the amendment should not have been given retroactive effect. [Michael Norinsberg's] petition for reconsideration was denied by the Judicial Officer because the ground asserted, the inapplicability of the definition of "responsibly connected" set forth in the PACAA-1995 to violations that occurred in 1991 and 1992, had not been timely raised, and, in fact, constituted a complete reversal of the position affirmatively urged by [Michael Norinsberg] at all prior stages of the proceeding. . . .

In *In re Steven J. Rodgers, supra*, the Judicial Officer found that [Steven J.

Rodgers], a vice-president and [holder of] 33.3 [per centum of the outstanding stock of World Wide Consultants, Inc.,] was actively involved in nonpayment and employment violations [of the PACA] committed by World Wide Consultants, Inc. These findings alone were . . . found sufficient to conclude that [Steven J. Rodgers] was responsibly connected with Wor[l]d Wide Consultants, Inc. . . . [T]he Judicial Officer [found] that [Steven J. Rodgers] was aware of the unlawful employment of Marvin Offutt, signed corporate checks, and played a major role in making corporate decisions. Therefore, [Steven J. Rodgers] was precluded from establishing that he was a nominal officer and stockholder. The Judicial Officer, citing the [United States Court of Appeals for the District of Columbia] Circuit decisions in *Veg-Mix, Inc., Martino,* and *Siegel* . . ., explained that it is extremely difficult to demonstrate that one is only a nominal stockholder when one owns a substantial per centum of the outstanding stock of the corporation or association. The Judicial Officer stated that [Steven J. Rodgers'] ownership of 33.3 [per centum] of the [outstanding] stock is "very strong evidence" that he is responsibly connected. [*In re Steven J. Rodgers, supra*, 56 Agric. Dec. at 1943.] In addition, the Judicial Officer concluded that even if [Steven J. Rodgers] had been able to prove that Mrs. Volpe (the [holder of] 66.6 [per centum of the outstanding stock]) was the *alter ego* of World Wide Consultants, Inc., [he] would not have been able to avoid responsibly connected status because [he] . . . was . . . an owner of the violating licensee. . . . [*In re Steven J. Rodgers, supra*, 56 Agric. Dec. at 1956.]

. . . .

In *In re Lawrence D. Salins, supra*, the Judicial Officer concluded that [Lawrence D. Salins], the admitted secretary/treasurer of Sol Salins, Inc., was deemed to be responsibly connected, unless [he] satisfied a two-prong test, demonstrating by a preponderance of the evidence both that [he] was not actively involved in the activities resulting in a violation of the PACA and either that [he] was only nominally an officer of Sol Salins, Inc., or that [he] was not an owner of Sol Salins, Inc., which was the *alter ego* of its owners. [*In re Lawrence D. Salins, supra*, slip op. at 20.] The Judicial Officer disagreed with the administrative law judge's emphasis on the fact that [Lawrence D. Salins] never purchased produce as an indicator of active involvement and concluded that [he] was actively involved because of his role in corporate decision making even though [he] did not . . . purchase . . . produce [on behalf of Sol Salins, Inc. Lawrence D. Salins'] active involvement was shown through his attendance at weekly staff management meetings, his issuance of large numbers of corporate checks each month, in some instances choosing which past due bills to pay. The Judicial Officer strongly emphasized [Lawrence D. Salins'] role in making *all* payments from the "operations" account during the period of violations. The Judicial Officer found

that [Lawrence D. Salins'] participation in making payments for produce constituted active involvement on a working level in activities resulting in violations of the PACA and that by commenting on policy, offering suggestions, recommending courses of action, and providing financial information to assist in the decision making process, [he] had also demonstrated active involvement in activities resulting in violations of the PACA on a managerial level. [*In re Lawrence D. Salins, supra*, slip op. at 20-26.] Having established that [Lawrence D. Salins] failed to satisfy the first prong of the two-prong test, [set forth in section 1(b)(9) of the PACA], and was responsibly connected, the Judicial Officer nevertheless continued the analysis of [Lawrence D. Salins'] status under the remaining prong of the definition. [The Judicial Officer] noted seven factors that weighed against [Lawrence D. Salins] being a nominal officer. The factors were [Lawrence D. Salins'] access to corporate records, knowledge of the corporation's financial troubles, relations with unpaid creditors, active participation in corporate decision making, check-writing responsibilities, responsibility for [signing] corporate documents, and salary. [*In re Lawrence D. Salins, supra*, slip op. at 26-31.] The Judicial Officer concluded that [Lawrence D. Salins] failed to meet the second prong of the test, demonstrating that he was only a nominal officer, because the range of his activities went far beyond what a nominal officer, an officer in name only, would be doing. [*In re Lawrence D. Salins, supra*, slip op. at 34.] The alternative provided in the second prong of the test (that he was not an owner of [the violating licensee which was the *alter ego* of its owners]) was not available to [Lawrence D.] Salins since [he] had not claimed that Sol Salins, Inc., was the *alter ego* of any of its owners and there was no evidence to support such a finding. [*In re Lawrence D. Salins, supra*, slip op. at 31.]

In summary, these three final decisions of the Secretary of Agriculture, issued following the PACAA-1995 revision of the definition of "responsibly connected," . . . establish that any person meeting the definition of "responsibly connected" in the first sentence of section 1[(b)](9) [of the PACA] as an officer, director, or [holder of more] than 10 per centum [of the outstanding stock] may rebut this responsibly connected status by demonstrating by a preponderance of the evidence that *both* requirements of the two-prong test have been satisfied. To satisfy the first prong, a petitioner must demonstrate that he or she was not actively involved in the activities resulting in a violation of the PACA. As the test is stated in the conjunctive, *and*, a petitioner failing to satisfy the first prong cannot successfully rebut the responsibly connected determination and does not even reach the second prong. If a petitioner satisfies the first prong, however, then he or she also must meet at least one of two alternative requirements necessary to satisfy the second prong of the test. A petitioner also must prove that he or she either (1) was only

nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or (2) was not an owner of a violating licensee or entity subject to license, which was the *alter ego* of its owners.

. . . .

Findings of Fact

1. Mendenhall Produce, Inc., . . . is a corporation organized and existing under the laws of the State of New Mexico. It was incorporated on March 7, 1994, and the Articles of Incorporation show that the initial directors were Suzanne D. Mendenhall and Kevin Martin and that the incorporator was Suzanne D. Mendenhall. The business address of Mendenhall Produce, Inc., is 31[00] Harrelson, Mesilla Park, New Mexico 88047-1438. Its mailing address is P.O. Box 1438, Mesilla Park, New Mexico 88047-1438. [(RECX-2 at 2, 4-5, PX-3 at 1, PX-4 at 1, CX-1 at 7.)]

2. The Notice of Organization Meeting of [Incorporation of] Mendenhall Produce, Inc., dated April 20, 1994, was signed by Kevin Martin as the secretary [(RECX-2 at 6)]. Both Suzanne D. Mendenhall, as incorporator, and Kevin Martin, as secretary, signed the Waiver of Notice of Organization Meeting [of Incorporation of Mendenhall Produce, Inc.,] dated April 30, 1994 [(RECX-2 at 7)].

3. According to the minutes of the first organization meeting [of incorporation of Mendenhall Produce, Inc.,] held on April 30, 1994, Suzanne D. Mendenhall was elected chairman and Kevin Martin was elected secretary for the meeting. Suzanne D. Mendenhall, as incorporator, elected herself and Kevin Martin as directors. Kevin Martin signed the minutes, as the secretary of the corporation. [(RECX-2 at 8-9.)]

4. Kevin Martin, as the secretary of the corporation, signed the Notice of Meeting of Shareholders [of Mendenhall Produce, Inc.,] and the Notice of the Organization Meeting of the Board of Directors [of Mendenhall Produce, Inc]. Both Suzanne D. Mendenhall and Kevin Martin, as directors, signed the Waiver of [Notice of] Organization Meeting of Board of Directors [of Mendenhall Produce, Inc.,] which was held April 30, 1994. [(RECX-2 at 10-11, 13.)]

5. The Minutes of Organization Meeting of First Board of Directors [of Mendenhall Produce, Inc.,] was signed by Kevin Martin, as the secretary [(RECX-2 at 14)]. According to the Organizational Resolutions Adopted by the Board of Directors [of Mendenhall Produce, Inc.,], Suzanne D. Mendenhall was elected president and Kevin Martin was elected both treasurer and secretary [of Mendenhall Produce, Inc. (RECX-2 at 15).] Suzanne D. Mendenhall remained

the president of Mendenhall Produce, Inc., until May 12, 1995, when she resigned as president and substantially terminated her involvement in the daily operations of [Mendenhall Produce, Inc. (RECX-2 at 20, 22)]. In addition, 1,000 shares of stock in [Mendenhall Produce, Inc.,] was issued to the Suzanne D. Mendenhall Irrevocable Trust for consideration of $1,000 [(RECX-2 at 15-16)].

6. PACA License No. 940906 was issued to Mendenhall Produce, Inc., on March 29, 1994, and terminated on March 29, 1996, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Mendenhall Produce, Inc., failed to pay the required annual renewal fee [(CX-1 at 1-2, 7)].

7. On May 12, 1995, Kevin Martin, as director and secretary, signed a Waiver of Notice of a Special Meeting of Board of Directors [of Mendenhall Produce, Inc. (RECX-2 at 19)]. According to the minutes of the special meeting of the board of directors, on May 12, 1995, Suzanne D. Mendenhall resigned as president of the company and the directors elected Michael J. Mendenhall as the president. The minutes were signed by Kevin Martin, as the secretary, and approved by Michael J. Mendenhall, as president. [(RECX-2 at 21-22.)]

8. On June 2[], 1995, both Suzanne D. Mendenhall and Kevin Martin, as directors, and Kevin Martin, as secretary, signed a Waiver of Notice of a Special Meeting of Board of Directors of Mendenhall Produce, Inc. [(RECX-2 at 25).] The special meeting was held on June 2, 1995, at 12:00 noon at which time Michael J. Mendenhall submitted his resignation to the board [of directors,] which accepted it. The board [of directors] then elected Kevin Martin as the president [of Mendenhall Produce, Inc. The board [of directors] also elected Margaret Nunez as the secretary of Mendenhall Produce, Inc. The minutes were signed by Margaret Nunez, as secretary, and approved by Kevin Martin, as president. [(RECX-2 at 26-27.)]

9. On July 20, 1995, Suzanne D. Mendenhall and Kevin Martin, as directors, and Rhonda Ambrose, as the secretary of [Mendenhall Produce, Inc.,] signed a Waiver of Notice of a Special Meeting [of Board of Directors of Mendenhall Produce, Inc. During the meeting of the board of directors held on July 20, 1995,] it was announced that Margaret Nunez had resigned as secretary and treasurer. On a motion made by Kevin Martin and seconded by Suzanne D. Mendenhall, Rhonda Ambrose was elected secretary and treasurer of Mendenhall Produce, Inc. [(RECX-2 at 28-29.)]

10. Rhonda Ambrose resigned on November 25, 1995, as secretary and treasurer of Mendenhall Produce, Inc., and terminated her employment with the company [(RECX-2 at 31)].

11. Section 2 of article 6 of the bylaws of Mendenhall Produce, Inc., states that to transfer shares of the corporation, there must be a transfer on the stock

transfer books [of the corporation] and "[t]he person in whose name shares stand on the books of the corporation shall be deemed by the corporation to be the owner [of the shares] for all purposes" [(RECX-2 at 41)].

12. During the period August 1995 through November 1995, Mendenhall Produce, Inc., failed to make full payment promptly to 16 sellers for the agreed purchase prices totaling $219,913.17 for 66 lots of perishable agricultural commodities which it received and accepted in interstate commerce (Tr. 25-26). The unpaid invoices in these 66 transactions were introduced into evidence as CX-[8] through CX-23. In 12 of these transactions, totaling $33,990.37, the produce was not received by Mendenhall Produce, Inc., before the November 15, 1995, amendment of the term "responsibly connected" (CX-11, CX-13, CX-14, CX-17, CX-18, CX-21, CX-22, CX-23). There were another 10 transactions totaling $27,907.65 where payment did not become due for the purchased produce until after November 15, 1995 (CX-13, CX-14, CX-20, CX-21, CX-22). In addition, Mendenhall Produce, Inc., failed to satisfy reparation orders issued to eight of these 16 [produce] sellers between May 20, 1996, and December 3, 1996, involving over $195,000 (CX-6; RECX-6; Tr. 26).

13. Before Suzanne D. Mendenhall's resignation as president [of Mendenhall Produce, Inc.,] on May 12, 1995, she regularly worked in the firm's office. She took care of accounts payable and other financial matters. She did not purchase and sell produce, and she had no prior experience in produce operations. She remained a director after her resignation. [(Tr. 52-53, 119, 231-32.)] She was replaced as president by Petitioner . . . who served as president until June 2, 1995, when his verbal resignation was accepted by the board of directors (Suzanne D. Mendenhall and Kevin Martin) and Kevin Martin was elected president (CX-2 at 30-32, 36-37). Kevin Martin retained the position of president until he terminated his employment with Mendenhall Produce, Inc., on or about November 25, 1995 (Tr. 148, 166, 289). The offices of secretary and treasurer of Mendenhall Produce, Inc., were held by Kevin Martin's fiancee and future wife, Rhonda Ambrose, who was employed as accounts manager, between July 20, 1995, and November 25, 1995 (CX-2 at 39-41).

14. Suzanne D. Mendenhall, using the signature Suzi D. Mendenhall, represented that she was the holder of 100 percent of Mendenhall Produce, Inc.'s stock when Mendenhall Produce, Inc., applied for a PACA license on March 28, 1994, and when Mendenhall Produce, Inc., applied for license renewal in 1995 (RECX-1). In reality, she was the sole beneficiary and one of three trustees (along with Petitioner's father and brother) of the Suzanne D. Mendenhall Irrevocable Trust Agreement, dated February 17, 1994 (AX-14).

15. . . . [O]n April 30, 1994, the board of directors authorized the issuance

of 1,000 shares of stock, all shares to be issued to the Suzanne D. Mendenhall Irrevocable Trust [(RECX-2 at 15-16)]. Mendenhall Produce Share Certificate No. 1 for 1,000 shares of stock was issued on the same day to "Suzanne D. Mendenhall Irrevocable Trust" (PX-1).

16. On September 26, 1995, and on September 28, 1995, respectively, Suzanne D. Mendenhall and Michael J. Mendenhall signed a "Marital Settlement Agreement" in connection with formal divorce proceedings which, in relevant part, reads:

> This Agreement is made and entered into between Suzanne D. Mendenhall, Petitioner, and Mike Mendenhall[,] Respondent. In consideration of the mutual covenants and conditions contained in this Agreement, Petitioner and Respondent hereby stipulate, contract, covenant and agree as follows:
>
> Recitals
>
> 1. The parties hereto are husband and wife, and were married on June 8, 1991. The parties are residents of New Mexico and have been for more than six months.
> 2. Petitioner and Respondent are incompatible.
> 3. Petitioner is represented by Kevin T. Riedel, Esq., and Respondent is pro se.
> 4. No children have been born of this marriage.
> 5. Respondent shall take as his sole and separate property the following described property:
> A. All shares in OMI, Inc., the primary asset of which is that certain bar/restaurant business in Creed, Colorado known as "The Old Miners Inn;"
> B. All shares in Mendenhall Produce, Inc.;
> C. All bank accounts in his name;
> D. 1995 Dodge Ram Truck;
> E. His personal items, including clothing and jewelry; and
> F. One-half of all household items not specifically referred to herein.
> 6. Petitioner shall take as her sole and separate property the following described property:
> A. All bank accounts in her name;
> B. Her personal items, including clothing and jewelry; and

C. One-half of all household items not specifically referred to herein.

7. Petitioner's interest as beneficiary of the Suzanne D. Mendenhall Irrevocable Trust Agreement dated February 17, 1994, and all assets of such trust, including without limitation residential real estate at 1280 Vista del Monte, Las Cruces, New Mexico, residential real estate at 25017½ Highway 60, South Fork, Colorado, and all furniture and artwork in both residences, are Petitioner's separate property, not subject to any right, title or claim by Respondent and therefore not subject to distribution herein. All debts associated with those properties shall be treated as debts of the Trust.

. . . .

11. Respondent shall assume as his sole and separate obligation the following community debts:

. . . .

H. All debts arising out of the acquisition and operation of OMI, Inc.

L. All debts arising out of the acquisition and operation of Mendenhall Produce, Inc.

12. The following debts have at all times been and shall continue to be the separate obligations of Respondent:

A. All debts arising out of the business S. Akins, Inc., d/b/a Big River Sales and other business activities of Respondent, including without limitation the Big River sales computer loan by Citizen's Bank personally guaranteed by Petitioner as an accommodation to Respondent; and

B. All debts, if any, related to claims made against the parties in Tri-State Chemicals, Inc. v. S. Akins Enterprises, Inc., et al. and Art Morgan Containers v. Rubinstein, et al., two civil actions pending in Dona Ana County District Court, New Mexico; and

C. All other debts incurred by Respondent without Petitioner's knowledge.

. . . .

16. Each party will execute all deeds, documents of title and other instruments necessary to transfer title to the property herein and further necessary to carry out the terms and conditions of this Agreement. Should either party fail or refuse to execute such documents within 20 days from the date of this Agreement, the noncomplying party agrees to pay

reasonable attorney's fees. . . .

. . . .

18. The foregoing division of property shall, from the execution of this Marital Settlement Agreement, operate to divest each party from any interest he/she had or may claim in the property set aside for the other.

. . . .

20. This Agreement shall be filed in the above action and each party requests the Court approve this Agreement and incorporate this Agreement into the Court's Final Decree.

RECX-3.

[17.] The Final Decree of Dissolution of Marriage that was entered expressly provides that:

IT IS . . . ORDERED, ADJUDGED AND DECREED that:

. . . .

B. The Marital Settlement Agreement between the parties, which is on file herein, is hereby ratified, incorporated and merged into this Decree as an integral and nonseparable part hereof;

C. The parties are ordered to carry out the terms and provisions of the Marital Settlement Agreement[.]

RECX-4.

1[8]. The share certificate for 1,000 shares was not produced except for a copy of the front side of [certificate number] 1, and the location of the original share certificate was not made known [(PX-1)]. No shares of stock of Mendenhall Produce, Inc., were ever transferred by way of a stock certificate to Petitioner, and the stock transfer books of Mendenhall Produce, Inc., never showed that Petitioner was a shareholder. According to the terms of the Marital Settlement Agreement, each party [to the Marital Settlement Agreement] was obligated to "execute all deeds, documents of title and other instruments necessary to transfer title to the property herein and further necessary to carry out the terms and conditions of [the] Agreement" [(RECX-3 at 4)]. [Suzanne D.] Mendenhall was legally obligated to do any and all things necessary to transfer to Petitioner "[a]ll shares in Mendenhall Produce, Inc." [(RECX-3 at 1).]

1[9]. Suzanne D. Mendenhall was the sole trustee and beneficiary of the Suzanne D. Mendenhall Irrevocable Trust at the time that she entered into the Marital Settlement Agreement, as well as later when she sold the two private residences that were titled in the trust (Tr. 244-46). Although the Irrevocable

Trust Agreement requires that there be three trustees and that replacement trustees be appointed before conducting any other business (AX-14 [at 11-12]), no replacement trustees were appointed after George Mendenhall and Bill Mendenhall resigned as trustees on May 25, 1995 (AX-15, AX-16).

[20]. In March 1994, with just over one year of experience as a produce salesman, Kevin Martin was asked by Petitioner, who was the president and owner of S. Akins Enterprises, d/b/a Big River Sales, and Martin's supervisor, to leave Big River Sales and go to Mendenhall Produce, Inc. At that time, Mr. Martin was 23 years of age. (Tr. 115-18.) Petitioner's offer was made in the context that Big River Sales was going to go out of business, and Petitioner and Kevin Martin would both be moving over to Mendenhall Produce, Inc. (Tr. 118).

2[1]. Kevin Martin became secretary and treasurer of Mendenhall Produce, Inc., while still at Big River [Sales], and Mendenhall Produce, Inc.'s initial purchases were made by Petitioner and Kevin Martin using the Big River [Sales] name because Mendenhall Produce, Inc., did not have credit upon which to buy (Tr. 119[-20]). [Kevin] Martin moved over to Mendenhall Produce, Inc.'s building first, and he was later followed by Petitioner, who did not fully sever his ties to Big River [Sales] until approximately February or March of 1995 (Tr. 12[3]-25). The salary of Kevin Martin at both Big River Sales and Mendenhall Produce, Inc., was $1,000 per week (Tr. 156-57).

2[2]. Petitioner was the boss at Mendenhall Produce, Inc., "from day one" (Tr. 119). Petitioner hired the firm's top salesman on his own (Tr. 121). Petitioner fired employees and directed Kevin Martin to fire other employees (Tr. 128-29, 145). Petitioner had the final say as to hiring, inventory, purchases, and sales (Tr. 119-21). Petitioner ran the business through Kevin Martin, who operated with limited authority, within parameters that Petitioner controlled (Tr. 300).

2[3. In June 1994,] Gary Cooper, who had 8 years' management experience as the manager of Sears catalog stores (Tr. 275), was hired as a salesman at Mendenhall Produce, Inc., by Petitioner, who identified himself as the owner of Mendenhall Produce, Inc. (Tr. 275-76, 284). Although Gary Cooper was initially employed to sell on a truck route, he was moved into the office with Petitioner and Kevin Martin by January 1995 (Tr. 277-78).

2[4]. Petitioner personally placed purchase orders for Mendenhall Produce, Inc., in the presence of both Kevin Martin and Gary Cooper (Tr. 136-37, 279), and on at least one occasion, Kevin Martin and Gary Cooper learned about a truckload purchase of lettuce arranged by Petitioner just before delivery and had to rush to find customers (Tr. 283).

2[5]. Petitioner sometimes instructed Kevin Martin to pay certain produce

suppliers before others (Tr. [303-]04), and when there were insufficient funds available, Petitioner would instruct Kevin Martin to take money from Sun Pak, the unincorporated truck brokerage business that Mac Salicos was operating at the same business location [as Mendenhall Produce, Inc.] (Tr. 14[0]-43, 2[79]-81).

2[6]. Petitioner maintained control over the daily operations of Mendenhall Produce, Inc., by making frequent telephone calls to Kevin Martin and Gary Cooper during the summer, while Petitioner and [Suzanne D.] Mendenhall resided in Colorado and Petitioner conducted his annual Colorado lettuce marketing deal. After returning to New Mexico in the fall of 1995, Petitioner took the ability to pay bills away from Kevin Martin by placing Mendenhall Produce, Inc.'s receivables in Prima Roma Sales, Inc.'s bank account and by writing checks in payment for Mendenhall Produce, Inc., purchases using Prima Roma Sales, Inc.'s checks. (Tr. 122[-23], 133, 281-8[4].)

2[7]. Petitioner ordered Mendenhall Produce, Inc., inventory transferred without invoices to M & M Produce, Inc., in El Paso, Texas (Tr. [146-47,] 286). Petitioner and Kevin Martin were two of the initial directors of M & M Produce, Inc., a Texas corporation, which was incorporated on August 1, 1995 (RECX-5 at 21-23). Petitioner . . . [used] Mendenhall Produce, Inc.'s funds to build a cooler at M & M Produce, Inc.'s facility [(Tr. 291)]. Th[e cost for this cooler] was shown on Mendenhall Produce, Inc.'s balance sheet dated July 31, 1995, as a $11,1[8]2.43 expense for "Building Improvements-El Paso" (AX-5). [Between] late September [and the] middle [of] October 1995, Petitioner ordered Kevin Martin to ship Mendenhall Produce, Inc.'s inventory having an approximate value of $50,000 to M & M Produce in El Paso[, Texas,] without the issuance of invoices (Tr. 143, 146-47). At that time, Mendenhall Produce, Inc., [was in] poor financial [condition and had] a deficit of over $100,000 in the business, and [Mendenhall Produce, Inc.'s] flash profit and loss statements . . . show[ed] a negative bank balance (Tr. 143-4[5]). [In addition,] . . . tomatoes [worth $60,000 were] sent [from Mendenhall Produce, Inc.,] to M & M Produce, Inc., . . . for shipment into Mexico pursuant to sales made by Aaron Molina of M & M Produce, Inc. (Tr. 147[-48]).

2[8]. Although Petitioner directed Kevin Martin to utilize Mendenhall Produce, Inc.'s funds and produce inventory in the start-up of M & M Produce, Inc., Petitioner did not approve, in his capacity as a director of M & M Produce, Inc., the issuance of any stock of M & M Produce, Inc., to Mendenhall Produce, Inc. Instead, Petitioner first approved a corporate resolution, as a director of M & M Produce, Inc., on August 4, 1995, that authorized the issuance of 500 shares of stock to Aaron Molina and 500 shares of stock to Prima Roma Sales, Inc. (a corporation owned by Petitioner) [(Tr. 54)], and then approved a second corporate

resolution of M & M Produce, Inc., on November 28, 1995, that authorized the issuance to Gary Cooper of the 500 shares that were to have gone to Prima Roma Sales, Inc. (CX-5 at 8-9). The share certificate naming Gary Cooper the holder of 500 shares of M & M Produce, Inc., was never issued (RECX-5; Tr. 291-93).

2[9]. The November 28, 1995, corporate resolution of M & M Produce, Inc., approved by Petitioner, as director, also accepted the resignation of Kevin Martin as an officer and director of M & M Produce, Inc., effective November 25, 1995, and approved the election of Aaron Molina as president and treasurer and Gary Cooper as vice-president and secretary [(CX-5 at 8-9)]. On December 15, 1995, a PACA license was issued to M & M Produce, Inc., pursuant to an application that showed Aaron Molina as director and 50 percent stockholder and Gary Cooper as director and 50 percent stockholder (CX-5 at 14-19).

[30]. Kevin Martin left Mendenhall Produce, Inc., after deciding not to comply with orders he received from Petitioner on November 21 or 22, 1995, to close down Mendenhall Produce, Inc., and to move everything to M & M Produce, Inc., in El Paso[, Texas] (Tr. 148-49). Following the departure of Kevin Martin from Mendenhall Produce, Inc., on or about November 25, 1995, Petitioner ordered Gary Cooper to close down Mendenhall Produce, Inc., and to transfer the inventory and equipment on hand to M & M Produce, Inc. (Tr. 286-89, 291-92). At the direction of Petitioner, Gary Cooper moved to El Paso, [Texas,] where he participated in the operation of M & M Produce, Inc., under the direction and orders of Petitioner [(Tr. 291-93)].

3[1]. Gary Cooper resigned his office and terminated his employment at M & M Produce, Inc., in January 1996, when Petitioner refused to provide him with financial control (RECX-5; Tr. 292-93). While at M & M Produce, Inc., Gary Cooper observed that $51,000 or $52,000 worth of Mendenhall Produce, Inc.'s transferred produce and a $60,000 account receivable created by the sale of tomatoes belonging to Mendenhall Produce, Inc., . . . was being carried on M & M Produce, Inc.'s computer as a payable to Petitioner instead of as a payable to Mendenhall Produce, Inc. (Tr. [147-48,] 287).

3[2]. On the day that Kevin Martin and Rhonda Ambrose left Mendenhall Produce, Inc., Kevin Martin deposited a customer check that he had picked up with Mendenhall Produce, Inc.'s mail into a Mendenhall Produce, Inc., account, and he utilized this deposit to make a payroll payment of [approximately] $10,000 in claimed back wages to Rhonda Ambrose after consulting an attorney (Tr. 151-53).

3[3]. The volume of business conducted by Mendenhall Produce, Inc., did not support the firm's high salary structure and the payments made to [Suzanne D.] Mendenhall as interest on trust funds made available to the business (AX-5;

Tr. 145, 156, 308). Although Petitioner did not receive a salary, [approximately] $6,000 a month was paid to [Suzanne D.] Mendenhall (Tr. 157, 237[, 308-09]). It was understood that Mendenhall Produce, Inc.'s credit might be adversely affected if Petitioner received a salary because of his involvement with Big River Sales and that Petitioner would have the benefit of funds paid to [Suzanne D.] Mendenhall (Tr. 157[, 162]). In addition, Petitioner obtained produce for his Old Miner's Inn restaurant in Colorado from Mendenhall Produce, Inc., without payment (Tr. 158-59, 30[8-09]).

3[4]. On April 18, 1996, well after the failure of Mendenhall Produce, Inc., and the transfer of some of its assets to M & M Produce, Inc., for the individual benefit of Petitioner, two bobtail tractors that had been used in Mendenhall Produce, Inc.'s operations were sold, and [approximately] $14,371.03 of the proceeds were paid by [H. Suzanne Delph (known prior to the Final Decree of Dissolution of Marriage as Suzanne D. Mendenhall)] to Petitioner's firm, Prima Roma Sales, Inc. ([RECX-4 at 2,] AX-17; Tr. 246-51).

3[5]. At the time of an investigation [of the payment practices of Mendenhall Produce, Inc.,] conducted by PACA Marketing Specialist Jeffrey Spradlin in August 1996, Petitioner had possession of the business records of Mendenhall Produce, Inc., at his residence in Colorado (Tr. 111-12).

3[6]. Unpaid produce suppliers [filed a complaint] in the United States District Court for the District of Arizona on March 14, 1996, captioned *Kent Northcross d/b/a Northcross Distributing, Greg Leonard Produce, Inc., O.P. Murphy Produce Co., Inc. d/b/a O.P. Murphy & Sons, ARP Trading, Inc. d/b/a AAA Produce Distributing, Liberty Strawberry Sales, Jessi Produce, Inc. and Yurosek Marketing, Inc. v. Michael J. Mendenhall, Suzanne Mendenhall, Mendenhall Produce, Inc., M & M Produce, Inc., Kevin Martin, Aaron Molina, and Gary Cooper*, No. CIV 96-0693 PHX-PGR (AX-9 . . .). On August 22, 1996, Petitioner, through attorney Barton L. Baker, without the knowledge and prior approval of [Petitioner's] former wife, who had not yet received service of the complaint (Tr. 219), filed an answer [(AX-10)], individually and on behalf of Mendenhall Produce, Inc., and M & M Produce, Inc., to [the] complaint. Petitioner admitted in paragraph 6 of the answer that he was a stockholder of Mendenhall Produce, Inc. (AX-10 [at 2]). Petitioner admitted in paragraph 38 of the answer that he and Suzanne Mendenhall owned Mendenhall Produce, Inc., but denied that they were responsibly connected with Mendenhall Produce, Inc. (AX-10 [at 5-6]). The answer filed August 22, 1996, on behalf of Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc., stated, *inter alia*:

> Deny Michael Mendenhall resides in Phoenix, Arizona, but admits Mendenhall was a stockholder of Mendenhall Produce, Inc.
>
> . . . .
>
> Admit . . . that Michael Mendenhall and Suzanne Mendenhall owned Mendenhall Produce. . . .

AX-10 ¶¶ 6, 38.

3[7]. After th[e] complaint was served [in *Northcross v. Mendenhall*, No. CIV 96-0693 PHX-PGR, attorney Barton [L.] Baker telephoned Richard Cole, one of the attorneys representing the plaintiff creditors, and represented to [Mr. Cole] that he [(Mr. Barton)] had been retained by [Michael J.] Mendenhall and would be representing [Michael J.] Mendenhall and the two entities, Mendenhall Produce, Inc., and M & M Produce, Inc. (Tr. 218).

3[8]. On July 21, 1997, Petitioner approved, . . . through attorney Barton [L.] Baker, a "Stipulation and Agreed Order Consenting to Judgment Between Plaintiffs and Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc." (AX-11). The total amount of the five judgments that Petitioner agreed to, jointly and severally, by this stipulation, was $202,478.59, including prejudgment interest. Petitioner stipulated in paragraph 2(a) of the [Stipulation and Agreed Order Consenting to Judgment Between Plaintiffs and Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc.,] that he was:

> MICHAEL J. MENDENHALL, an individual residing in Arizona, and who at all times relevant in the Plaintiffs' Complaint operated as a commission merchant, dealer, or broker in perishable agricultural commodities ("produce") in interstate commerce within the meaning of 7 U.S.C. § 499a(6), and was an owner and operator, involved in the day-to-day operations of Mendenhall Produce, Inc., and M&M Produce, Inc.

AX-11 at 2.

Petitioner stipulated in paragraph 10 of the [Stipulation and Agreed Order Consenting to Judgment Between Plaintiffs and Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc.]:

> The parties stipulate that the judgment may be immediately enforceable; however, neither party is precluded from raising the issue of dischargeability in the event Michael Mendenhall files a bankruptcy

proceeding.

[AX-11 at 3.]

3[9]. On August 12, 1997, judgment was entered, jointly and severally, against Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc., [in *Northcross v. Mendenhall*, No. CIV 96-0693 PHX-PGR,] pursuant to the [S]tipulation [and Agreed Order Consenting to Judgment Between Plaintiffs and Michael J. Mendenhall, Mendenhall Produce, Inc., and M & M Produce, Inc.,] and [A]greed [O]rder [Consenting to Judgment] entered by the court (AX-12, AX-13).

[40]. A few weeks after this judgment was entered, in early September [1997], Petitioner participated in a telephone conference call with attorneys Barton [L.] Baker and Richard Cole (Tr. 65). During this telephone conference call, Mr. Cole specifically mentioned the judgment entered against Petitioner [in *Northcross v. Mendenhall*, No. CIV 96-0693 PHX-PGR, and Petitioner] expressed no surprise and was aware of the judgment (Tr. 221-22).

4[1]. Petitioner Michael J. Mendenhall was responsibly connected with Mendenhall Produce, Inc., during the time it was found to have violated the PACA.

Discussion and Conclusions

Petitioner maintains that he was not responsibly connected [with Mendenhall Produce, Inc., during the time it was found to have violated the PACA] because he never received a stock certificate evidencing his stock ownership in Mendenhall Produce, Inc. In order to so contend, Petitioner would disregard the [M]arital [S]ettlement [A]greement reached between Petitioner and his former wife [(RECX-3)]. . . . Petitioner [contends] that the stock was not owned by Suzanne D. Mendenhall but rather by the Suzanne D. Mendenhall Irrevocable Trust and that the [Marital Settlement A]greement could not work a transfer of the stock which could only be accomplished by the actual giving of the stock and a transfer of the stock on the corporate books. These contentions of the Petitioner [are] examined [in this Decision and Order] and are found not to have merit.

Also, Petitioner raised an objection at the commencement of the hearing on November 5, 1997, to the introduction of testimony and exhibits that Respondent offered with respect to the determination of Petitioner's responsibly connected status. Petitioner argued that this is an appeal proceeding on a certified written agency record under Rules of Practice which allegedly do not authorize a full evidentiary hearing. Petitioner was granted a continuing objection. Petitioner

would limit the evidence in a proceeding of this nature to [the certified agency record upon which the Chief, PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, based a responsibly connected determination].

This proceeding was instituted [by Petitioner] . . . under section 1.133([b])(2) of the Rules of Practice (7 C.F.R. § 1.133([b])(2)), which became effective April 2[2], 1996, to review [Respondent's responsibly connected] determination. Prior to [April 22, 1996,] . . . a determination made by the Chief, PACA Branch[, Fruit and Vegetable Division, Agricultural Marketing Service, USDA,] that a person was responsibly connected with a commission merchant, dealer, or broker, as officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation would be reviewed in a hearing obtained by filing a petition with the Administrator, Agricultural Marketing Service, [USDA [hereinafter Administrator]], under . . . rules [of practice] promulgated by the Agricultural Marketing Service[, USDA] (7 C.F.R. §§ 47.[47-.68]). Full evidentiary hearings [were] routinely . . . provided in these proceedings when tried before a presiding officer appointed by the Administrator. The replacement of these agency rules of practice with amendments to the Rules of Practice promulgated by the Office of the Secretary, effective April 2[2], 1996 (7 C.F.R. §§ 1.130[-.151]), has not altered the scope of the hearing. A petition for review under the Rules of Practice is: (1) a request "to have determined the facts with respect to such responsibly connected status" (7 C.F.R. § 1.133(b)(2)); and (2) "a request for a hearing" (7 C.F.R. § 1.141(a)). The filing of a petition for review commences an administrative proceeding . . . [which] is far broader in nature than an appeal court's review of a trial court's determination made upon a full oral hearing record. The Judicial Officer has followed this line of reasoning in cases decided by him. *See In re Michael Norinsberg, [supra]*; *In re Steven J. Rodgers, [supra]*; and *In re Lawrence D. Salins, [supra]*. In these cases, the [respondent] was properly permitted to introduce relevant and material evidence at the hearing without being limited to a rebuttal of evidence presented by the petitioner therein and, this evidence could be relied upon to support the required substantive determinations.

The determination of responsibly connected was made in this case by Respondent, and he found that Petitioner was responsibly connected with Mendenhall Produce, Inc. The only basis mentioned in Respondent's determination letter of July 18, 1997, was that Petitioner was listed with USDA as a 100 percent shareholder of Mendenhall Produce, Inc. [(RECX-9).] The license records show that Suzanne D. Mendenhall was the holder of 100 percent of [the stock of Mendenhall Produce, Inc. (RECX-1)]. The information before [Respondent, at the time of his July 18, 1997, responsibly connected

determination,] showed Petitioner's ownership was actually through the [M]arital [S]ettlement [A]greement (RECX-3) and the [F]inal [D]ecree of [D]issolution of [M]arriage (RECX-4), which documents establish that Petitioner and Suzanne D. Mendenhall had formerly agreed to a change of stock ownership, effective September 28, 1995, and were subject to a final decree dated October 23, 1995, that dissolved their marriage and ordered them to carry out the agreed transfer of stock. In addition, at the time that he made [the July 18, 1997, responsibly connected determination], Respondent was aware that seven unpaid Default Orders had been entered against Mendenhall Produce, Inc., in reparation proceedings (RECX-6). The dates in which interest was assessed on these awards indicates that, in six of these [reparation proceedings], the violations occurred after the execution of the [M]arital [S]ettlement [A]greement.

Petitioner argues that, inasmuch as there was no actual stock certificate transferred and there was no change of ownership on [Mendenhall Produce, Inc.'s] books, the transfer of property as set forth in the [M]arital [S]ettlement [A]greement was not effective. [However, generally a stock certificate is only evidence of stock ownership and stock ownership is determined by an examination of all the facts relevant to ownership.[3] Further, while a corporate stock record

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[3]*See Eisner v. Macomber*, 252 U.S. 189, 208 (1920) (stating that the interest of the stockholder is a capital interest, and his certificates are but the evidence of that interest); *Richardson v. Shaw*, 209 U.S. 365, 378 (1908) (stating that the certificate of shares of stock is not the property itself, it is but evidence of property in the shares; the certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named); *Harriman v. Northern Securities Co.*, 197 U.S. 244, 294 (1905) (stating that each stock certificate is a muniment of the holder's title to a proportionate interest in the corporate estate vested in the corporation); *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1, 13 (1900) (stating that certificates are only evidence of ownership of shares); *Pacific National Bank v. Eaton*, 141 U.S. 227, 234 (1891) (stating that millions of dollars of capital stock are held without any certificate; or, if certificates are made out, without their ever being delivered; a certificate is authentic evidence of title to stock, but it is not the stock itself, nor is it necessary to the existence of stock; a certificate certifies to a fact which exists independently of itself); *Dewing v. Perdicaries*, 96 U.S. 193, 196 (1878) (stating that the stock of a corporation may be held by a valid title without a certificate; the certificate is only one indicia of title); *McAllister v. Kuhn*, 96 U.S. 87, 89 (1878) (stating that a certificate of stock is not stock itself, but is documentary evidence of title to stock); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611-12 (D.C. Cir. 1987) (stating that one can be a shareholder without a stock certificate having been physically issued, and even if there is some technical inadequacy in the stock certificate, it would matter little, since the pre-incorporation agreement and bankruptcy pleadings both list the petitioner as 60 percent shareholder); *KDI Corp. v. Former Shareholders of Labtron of America*, 536 F.2d 1146, 1148 (6th Cir. 1976) (stating that the accepted rule is that share certificates merely evidence ownership of shares and are not essential to ownership); *Bonsall v. Commissioner*, 317 F.2d 61, 63 (2d Cir. 1963) (stating that a stock certificate is merely evidence of ownership, which is an independently existing fact to be determined by inquiry into the nature of the transaction as a whole); *Swenson v. Commissioner*, 309 F.2d 672, 673-74 (8th Cir. 1962) (stating that cases considering a person's holding period for stock

(continued...)

[1](...continued)
have not required the actual issuance of stock to start or end the holding period; it has been held frequently that the holding period of corporate stock begins or ends when a purchaser acquires substantial contractual rights which will ripen into full ownership unless defeated by breach of contract by the other contracting party); *Hoppe v. Rittenhouse*, 279 F.2d 3, 8 (9th Cir. 1960) (stating that the mere mechanical act of issuing stock certificates is not necessary to constitute subscribers shareholders); *Commissioner v. Landers Corp.*, 210 F.2d 188, 192 (6th Cir. 1954) (stating that the issuance of a stock certificate is not necessary to create the status of stockholder, the certificate being merely the evidence of the relationship); *C.M. Hall Lamp Co. v. United States*, 201 F.2d 465, 468 (6th Cir. 1953) (stating that the physical issuance of a stock certificate is merely delivery of the formal paper evidencing a shareholder's interest as a stockholder); *Seiden v. Southland Chenilles', Inc.*, 195 F.2d 899, 903 (5th Cir. 1952) (stating that a stock certificate is merely evidence of property rights); *Helvering v. Kaufmann*, 136 F.2d 356, 358 (4th Cir. 1943) (stating that stock certificates are only evidence of ownership and the failure to deliver possession of certificates does not of itself prevent the passing of title to stock from an owner to an assignee, if such is the intention of the parties); *In re Penfield Distilling Co.*, 131 F.2d 694, 698 (6th Cir. 1942) (stating that a stock certificate is mere paper evidence of title to stock and not the stock itself; a stock certificate is not necessary to the existence of the stock and merely certifies to an independently existing fact; title to shares may pass without the actual delivery of stock certificates; whether a person is a stockholder is a question of fact); *Kansas, O. & G. Ry. Co. v. Helvering*, 124 F.2d 460, 463 (3d Cir. 1941) (stating that stock certificates are not property itself, but evidence of property in the shares); *FDIC v. Gunderson*, 106 F.2d 633, 634 (8th Cir. 1939) (stating that a stock certificate is merely evidence of the stockholder's ownership of shares); *Commissioner v. Scatena*, 85 F.2d 729, 732 (9th Cir. 1936) (stating that a certificate of stock is a symbol or paper evidence of ownership of shares; the certificate is not the stock itself, it is merely written evidence, and then only prima facie evidence, of the ownership); *Moore v. Panama Ice & Fish Co.*, 81 F.2d 837, 839 (5th Cir. 1936) (stating that the certificate for corporate stock is not the holder's share or interest in the corporate enterprise, but is merely evidence of ownership of such share or interest); *Blythe v. Doheny*, 73 F.2d 799, 803 (9th Cir. 1934) (stating that to effectuate an issue of stock, a certificate is not necessary); *Snyder v. Commissioner*, 73 F.2d 5, 7 (3d Cir. 1934) (stating that a certificate of stock is the symbol or paper evidence of the ownership of shares, it is not the stock itself; a stock certificate is merely written evidence, and then only prima facie evidence, of the ownership thereof by the person designated therein and a stockholder may prove his ownership of shares by evidence other than the certificate), *aff'd*, 295 U.S. 134 (1935); *Hoffman v. Commissioner*, 71 F.2d 929, 930 (2d Cir. 1934) (stating that it is well settled that nondelivery of possession of certificates does not preclude title to stock passing to the purchaser if that is the intention of the parties); *Lincoln Theaters Corp. v. Fleming*, 66 F.2d 441, 448 (4th Cir. 1933) (stating that in legal effect a person who had paid for stock is entitled to all rights of a stockholder, even though the stockholder lacked a certificate which is only evidence of ownership); *Lavien v. Norman*, 55 F.2d 91, 96 (1st Cir. 1932) (stating that certificates are only evidence of ownership of stock); *Elko Lamoille Power Co. v. Commissioner*, 50 F.2d 595, 596 (9th Cir. 1931) (stating that a stock certificate is evidence of the shares owned); *Los Angeles Fisheries, Inc. v. Crook*, 47 F.2d 1031, 1035 (9th Cir. 1931) (stating that to effectuate an issue of stock, it is not necessary that a certificate issue); *Howbert v. Penrose*, 38 F.2d 577, 579 (10th Cir. 1930) (stating that in law and fact, certificates are only evidence of the ownership of shares and a muniment of the holder's title to a proportionate interest in the corporate estate); *Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft*, 283 F. 746, 755 (2d Cir. 1922) (stating that a share of stock and the certificate of the share are two very different matters; the certificate is not the stock itself, but mere evidence of the stockholder's interest in the corporation); *Swobe v. Brictson Mfg. Co.*, 279 F. 560, 562 (8th Cir. 1922) (stating that stock certificates are only written evidence of ownership and not necessary to complete ownership of stock); *Edwards v. Wabash Ry. Co.*, 264 F. 610, 615 (2d Cir. 1920) (stating that a stock
(continued...)

book is evidence that the person identified as a stockholder is in fact a stockholder, that evidence may be rebutted, and generally the failure to register a transfer on the records of a corporation does not affect the validity of the transfer as between the transferor and transferee, even if corporate bylaws require recordation of transfers on the books of the corporation.[4] Moreover, Mendenhall Produce, Inc.,

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[3](...continued)
certificate is a document which is the evidence of the number of shares of stock which the holder of it owns); *Shaw v. Goebel Brewing Co.*, 202 F. 408, 413 (6th Cir. 1913) (stating that certificates are simply evidence of title).

[4]*See Early v. Richardson*, 280 U.S. 496, 498-99 (1930) (stating that when a buyer receives certificates indorsed by the seller, title passed and the transfer was complete between the parties although the buyer's name does not appear upon the transfer books of the bank); *Johnston v. Laflin*, 103 U.S. 800, 804 (1881) (stating that entry of a transfer of stock on the books of the bank is not required for transfer of title to the shares, but for the protection of the parties and others dealing with the bank and to enable the bank to know who are its stockholders entitled to vote at meetings and to receive dividends when declared); *Willco Kuwait (Trading) S.A.K. v. deSavary*, 843 F.2d 618, 625-26 (1st Cir. 1988) (stating that (1) the hornbook rule is that where a person's name appears upon the stock book or stock ledger of a corporation, the book is competent evidence to show that the person is a subscriber or stockholder, and is prima facie proof and raises a prima facie presumption of that fact and that, in an action against the named stockholder, the named stockholder has the burden of showing that he is not the stockholder; (2) plaintiff wishes to infer a presumption that if a name does not appear in the stock book, there is a presumption that he is not an owner; however, even if we presume that where a person's name does not appear upon the stock book of a corporation, the person is not an owner of the corporation, the presumption can be rebutted by evidence that establishes that the person is an owner); *Manbourne, Inc. v. Conrad*, 796 F.2d 884, 889 (7th Cir. 1986) (stating that despite a corporation's refusal to record a transfer of preferred stock and a conversion of the preferred stock to common stock, the stockholder owned common stock as a result of the transfer and conversion); *Swenson v. Commissioner*, 309 F.2d 672, 673-74 (8th Cir. 1962) (stating that cases considering a person's holding period for stock have not required the transfer of stock on the corporate books to start or end the holding period; it has been held frequently that the holding period of corporate stock begins or ends when a purchaser acquires substantial contractual rights which will ripen into full ownership unless defeated by breach of contract by the other contracting party); *Rule v. Commissioner*, 127 F.2d 979, 981 (10th Cir. 1942) (stating that registration of a transfer of shares on the books of the corporation is not necessary to a valid transfer; even where the charter or bylaws of a corporation, or the general law under which the corporation is organized, provide that stock shall be transferable on the books of the corporation, it is well settled that as between the parties, an unregistered transfer is valid); *Commissioner v. Southern Bell Telephone & Telegraph Co.*, 102 F.2d 397, 402 (6th Cir. 1939) (stating that delivery of stock certificates indorsed in blank to an escrow agent, to be held until payment of the remainder of the purchase price, passed equitable title to the stock without the need of transferring the stock on the books of the corporation); *Commissioner v. Scatena*, 85 F.2d 729, 732 (9th Cir. 1936) (stating that as between a seller and buyer of stock, the buyer may become a new owner though the transfer as between the new owner and the corporation is not complete until made on the books of the corporation); *Helvering v. Miller*, 75 F.2d 474, 475 (2d Cir. 1935) (stating that a stockholder's deed of his shares to himself, his wife, and his children effected a transfer of his interest in the shares without registry on the corporation's books); *Dulin v. Commissioner*, 70 F.2d 828, 831 (6th Cir. 1934) (stating that the transfer of stock on the books of the corporation is not indispensable to the validity of a gift of stock as between the donor and the donee; the
(continued...)

was incorporated in the State of New Mexico (RECX-2 at 2) and New Mexico law does not appear to be contrary to these general principles. Chapter 53 of the New Mexico Statutes provides that "shares of a corporation shall be *represented* by certificates or shall be uncertificated shares" N.M. Stat. Ann. § 53-11-23 (Michie 1996) (emphasis added), indicating that under New Mexico law, stock certificates are merely evidence of the ownership of shares of a corporation. Further, chapter 53 of the New Mexico Statutes indicates that corporate stock transfer books are only prima facie evidence of the identity of shareholders, as follows:

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[4](...continued)
requirement of a statute and corporate bylaws that transfers of stock must be recorded on the books of the corporation, as a condition precedent to effectiveness of the transfer, is for the protection of the corporation and the failure to comply with the requirement does not affect the legality of the transfer between the parties themselves); *Owen v. Commissioner*, 53 F.2d 329, 333 (9th Cir. 1931) (stating that the failure to record a transfer of stock on the books of the corporation does not prevent title from passing between the donor of shares and the donee); *Clarke v. Kelley*, 19 F.2d 920, 921 (8th Cir. 1927) (stating that the legal presumption is that the record owner of stock is the real owner, but the question whether a person is a stockholder is a question of fact); *Grissom v. Sternberger*, 10 F.2d 764, 766 (4th Cir. 1926) (stating that the North Carolina statute at issue which required the entry of transfers on the books of the corporation was only for the protection of the corporation and had no effect on the legality of the transfer as between the parties themselves); *Eubank v. Bryan County State Bank of Caddo*, 216 F. 833, 839 (8th Cir. 1914) (stating that a good-faith purchaser or pledgee of the stock of a banking corporation to whom the certificates have been assigned and delivered is the owner in equity of such stock, though the certificates have not been transferred to him upon the corporate books, as required by a bylaw of the corporation; the entry on the corporate books is not for the purpose of transferring beneficial ownership of the stock in the absence of a statute so requiring, but is for the protection of the parties dealing with the bank and to enable the bank to know who are its stockholders entitled to vote at its meetings and to receive dividends when declared; in other words, it is intended to prescribe a method of transfer which shall be deemed effectual in all matters relating to internal government and management of the corporation, rather than to prescribe a method of transfer which is to be observed between a stockholder and third parties); *O'Neil v. Wolcott Mining Co.*, 174 F. 527, 534 (8th Cir. 1909) (stating that a blank assignment and power of attorney to transfer stock upon the certificate thereof estops the transferor from claiming title to or interest in the stock against subsequent bona-fide transferees thereof, although the transfer is not recorded in the books of the corporation); *Masury v. Arkansas Nat. Bank*, 93 F. 603, 604-05 (8th Cir. 1899) (stating that a provision in a corporate charter, corporate bylaws, or in a general incorporation act that shares may only be transferred on the books of the corporation in the form the directors shall prescribe, is intended only to prescribe a method of transfer which shall be effectual as between the corporation and its stockholders in all matters relating to the internal government and management of the corporation, rather than to prescribe a method of transfer which must be observed between a stockholder and third parties); *Hubbard v. Bank of United States*, 12 F. Cas. 777, 778 (C.C.S.D.N.Y. 1840) (No. 6,815) (stating that the existence of bylaws of a bank prohibiting any transfer of stock, except on the books of the bank, affects only the corporation or individual corporators, and cannot control the rights of third parties; an assignee becomes an absolute owner of stock without a transfer on the books of the bank notwithstanding any prohibitory bylaw); *Smith v. The James Irvine Foundation*, 277 F. Supp. 774, 792 (C.D. Cal. 1967) (stating that the failure to transfer shares on the stock record book of a company is not determinative as to the respective interests of the stockholder of record and the charitable corporation named trustee of the shares by the stockholder), *aff'd*, 402 F.2d 772 (9th Cir. 1968), *cert. denied*, 394 U.S. 1000 (1969).

53-11-31. Voting list.

> The officer or agent having charge of the stock transfer books for shares of a corporation shall make . . . a complete list of the shareholders entitled to vote at the meeting or any adjournment thereof, arranged in alphabetical order, with the address of, and the number of shares held by, each, which list . . . shall be kept on file at the registered office of the corporation and shall be subject to inspection by any shareholder at any time during usual business hours. The list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any shareholder during the whole time of the meeting. *The original stock transfer books shall be prima facie evidence as to who are the shareholders entitled to examine the list or transfer books or to vote at any meeting of shareholders.*

N.M. Stat. Ann. § 53-11-31 (Michie 1996) (emphasis added).

The record establishes that Michael J. Mendenhall and Suzanne D. Mendenhall] were legally obligated to do any and all things necessary to achieve compliance with the [M]arital [S]ettlement [A]greement [(RECX-3 at 4, RECX-4 at 2). Either party could have sought] specific performance and execution on their [M]arital [S]ettlement [A]greement. The fact that there was neglect in making a . . . transfer does not render it ineffective.

The credible oral testimony of witnesses and . . . exhibits introduced into evidence at the hearing establish that . . . Petitioner was actually the person primarily responsible for the establishment of Mendenhall Produce, Inc., and that Petitioner was, from the beginning of Mendenhall Produce, Inc., the holder of a hidden major ownership interest. He exercised his ownership interest when he held himself out to employees of Mendenhall Produce, Inc., as an owner of the business and when he directed the firm's produce operations and made management and policy decisions as a *de facto* majority owner. The record also establishes that Petitioner's *de facto* ownership interest in Mendenhall Produce, Inc., became a *de jure* ownership of the business . . . and that Petitioner and Suzanne D. Mendenhall gave due recognition to this reality in their [M]arital [S]ettlement [A]greement [(RECX-3)], which became effective September 28, 1995, and was merged into the [F]inal [D]ecree of [D]issolution of [M]arriage on October 23, 1995 [(RECX-4)].

By an entirely separate set of admissions, Petitioner has further established the existence of his ownership of Mendenhall Produce, Inc., by admitting that he and his former wife were the owners of Mendenhall Produce, Inc., in [*Northcross v.*

Mendenhall, No. CIV 96-0693 PHX-PGR,] a civil action brought by unpaid produce sellers. Petitioner . . . admitted his . . . ownership interest in Mendenhall Produce, Inc., in the answer that he filed [in response] to the complaint [filed in *Northcross*] (AX-9, AX-10). Petitioner submitted this answer individually and on behalf of Mendenhall Produce, Inc., and M & M Produce, Inc., the firm to which Petitioner diverted much of Mendenhall Produce, Inc.'s assets. Eleven months after filing this answer, Petitioner confirmed his admission of shared ownership and demonstrated the controlling nature of his ownership of Mendenhall Produce, Inc., by stipulating to the judgment that made Petitioner, Mendenhall Produce, Inc., and M & M Produce, Inc., jointly and severally liable for most of Mendenhall Produce, Inc.'s debt (AX-11, AX-12). Therefore, Petitioner was *de facto* and *de jure* a [holder of] more than 10 percent [of the outstanding] stock of Mendenhall Produce, Inc., and meets the requirements of the first sentence of the definition of "responsibly connected" found in section 1[(b)](9) of the PACA [(7 U.S.C. § 499a(b)(9))].

Not only was Petitioner a stockholder of Mendenhall Produce, Inc., a licensee under the PACA, he was also actively involved in the activities that resulted in Mendenhall Produce, Inc.'s failures to make full payment for purchases of perishable agricultural commodities in repeated and flagrant violation of section 2 of the PACA (7 U.S.C. § 499b).

Petitioner's active involvement is established by credible evidence: that he personally made purchases and payments for produce for Mendenhall Produce, Inc.; that he directed the produce purchases and sales made by Kevin Martin, Gary Cooper, and other employees of Mendenhall Produce, Inc.; . . . [and that he] directed the diversion of funds, inventories, and accounts receivable that should have been utilized to pay . . . Mendenhall Produce, Inc.'s produce debt, but which were in fact utilized for the benefit of Petitioner, OMI, Inc., d/b/a The Old Miner's Inn (Petitioner's restaurant), and M & M Produce, Inc., and Prima Roma Sales, Inc., the two other produce firms in which Petitioner had direct or indirect ownership interest.

The evidence clearly and convincingly establishes that Petitioner was responsibly connected with Mendenhall Produce, Inc., during the time in which Mendenhall Produce, Inc., violated the PACA, and he is subject to the licensing and employment restrictions that flow from that relationship. Also, the evidence precludes Petitioner from arguing that he was only a nominal stockholder of a violating licensee or entity subject to license, or that Mendenhall Produce, Inc., was the *alter ego* of another person. Petitioner was the sole or controlling owner of Mendenhall Produce, Inc., during the time that Mendenhall Produce, Inc., violated the PACA. Also, there is no merit to a defense that Mendenhall Produce,

Inc., was the *alter ego* of Suzanne D. Mendenhall or some other owner.

Under the circumstances of the present case, Petitioner shared ownership of Mendenhall Produce, Inc., with his wife initially, and later acquired complete ownership, and related complete control, on or about September 28, 1995. Petitioner demonstrated that he possessed a substantial ownership interest in Mendenhall Produce, Inc., prior to September 28, 1995, by informing Gary Cooper that he was the owner of Mendenhall Produce, Inc., at the time he hired Mr. Cooper as a salesman (Tr. 284). Furthermore, Petitioner demonstrated that he possessed a substantial ownership interest in Mendenhall Produce, Inc., prior to September 28, 1995, by expending substantial amounts of time managing the affairs of the corporation, including directing Kevin Martin, Gary Cooper, and other employees (Tr. 124[-]33, . . . [277-]78).

Petitioner had previously been associated with a firm doing business as Big River Sales and as a result of this association, he became a defendant in private lawsuits arising out of the failure of Big River Sales and the claims of creditors (RECX-3 at 3; Tr. 241-42). Petitioner obtained the assistance of his wife Suzanne D. Mendenhall and his father and brother, George and Bill Mendenhall, in attempting to conceal his actual ownership interest in Mendenhall Produce, Inc., and thereby preserve the assets of Mendenhall Produce, Inc., from the reaches of litigation. Credible testimony confirms that Kevin Martin was Petitioner's front man for the buying and selling of produce, although Kevin Martin always acted under Petitioner's direction and control.

The evidence . . . establishes that Petitioner was [an] . . . owner of Mendenhall Produce, Inc., from the time of its incorporation and at all times prior to September 28, 1995. The testimony of Suzanne D. Mendenhall to the contrary is not deemed credible. Petitioner obtained complete stock ownership when he signed the [M]arital [S]ettlement [A]greement, which made Petitioner a [holder of] 100 per centum [of the outstanding] stock [of] Mendenhall Produce, Inc. Under [the Marital Settlement A]greement, Petitioner was given "[a]ll shares in Mendenhall Produce, Inc." (RECX-3 [at 1]). The physical act of transfer of shares on the books of [Mendenhall Produce, Inc.,] was an action that was fully mandated by the [Final Decree of Dissolution of Marriage issued by the Second Judicial District Court, County of Bernalillo, State of New Mexico (RECX-4),] and if not performed, should be regarded as if performed for purposes of the PACA. In addition, there was further admission by Petitioner[, through his attorney, in connection with *Northcross v. Mendenhall*, No. CIV 96-0693 PHX-PGR,] that he was a[n owner] . . . of Mendenhall Produce, Inc.'s stock. . . . Respondent's evidence clearly shows that Petitioner was actively involved in the activities resulting in the payment violations [by Mendenhall Produce, Inc.,] and that

Mendenhall Produce, Inc., was at all times a produce firm personally operated by Petitioner or by persons acting under his instructions.

Premised upon observation of demeanor at the hearing, and the weighing of the testimony thereof, little reliance has been accorded the testimony of either Petitioner or Suzanne D. Mendenhall. Both seemed to have memory lapses or disavowed knowledge of events that would have been of importance to them and which one would reasonably expect them to remember.

Petitioner was actively involved in both the purchase of perishable agricultural commodities by Mendenhall Produce, Inc., and the diversion of the inventory and proceeds obtained from these purchases to Petitioner and three other businesses, which Petitioner owned and controlled. As the owner of Mendenhall Produce, Inc., and the person who directed its operations, Petitioner possessed the power to stop Mendenhall Produce, Inc.'s purchase operations well before the transactions occurred that had gone unpaid. He had knowledge, from monthly financial statements, that Mendenhall Produce, Inc., was at the brink of financial failure (AX-5; Tr. 282), and Petitioner continued the purchase of produce while diverting assets required for payment. Petitioner restricted the parameters within which Kevin Martin operated Mendenhall Produce, Inc., under Petitioner's direction, after Petitioner returned from Colorado in September 1995. Petitioner arranged to have customers' payments deposited directly into a Prima Roma Sales, Inc.'s bank account instead of a Mendenhall Produce, Inc., bank account. Petitioner was observed making payment for some of Mendenhall Produce, Inc.'s produce debt using this Prima Roma Sales, Inc.'s checking account. Petitioner directly impeded the ability of Mendenhall Produce, Inc., to make full payment promptly for purchases of perishable agricultural commodities by these actions. Petitioner has shown a high degree of "personal fault" [with respect to violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) committed by Mendenhall Produce, Inc., during the period August 1995 through November 1995].

Petitioner was not a nominal shareholder of a violating licensee, and Petitioner was an owner of a violating licensee which was not the *alter ego* of its owners.

Petitioner was the sole or majority stockholder of Mendenhall Produce, Inc., and actively involved in all aspects of its produce operations, the management of these operations, and the financial affairs of Mendenhall Produce, Inc., during the time period in which Mendenhall Produce, Inc., engaged in willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner was responsibly connected with Mendenhall Produce, Inc., and is subject to the licensing and employment restrictions under the PACA.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner contends in Petitioner's Appeal Petition that the ALJ erred in ruling that the filing of a petition for review pursuant to section 1.133(b)(2) of the Rules of Practice (7 C.F.R. § 1.133(b)(2)) commences a *de novo* proceeding.

I disagree with Petitioner's contention that the ALJ erred in ruling that a petition for review under section 1.133(b)(2) of the Rules of Practice (7 C.F.R. § 1.133(b)(2)) commences a *de novo* proceeding. In 1975, the United States Court of Appeals for the District of Columbia Circuit decided in *Quinn v. Butz,* 510 F.2d 743 (D.C. Cir. 1975), that a person who appears to meet the criteria for responsible connection set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) must be allowed to rebut the presumption of responsible connection. In response to *Quinn*, the Agricultural Marketing Service proposed a procedure by which a person who wished to contest a determination that he or she was "responsibly connected" could do so. The notice of proposed rulemaking describes the proposed procedure, as follows:

> The Department of Agriculture is considering the promulgation of rules of practice governing the administrative determination as to whether a person is responsibly connected as defined under the [PACA]. . . .
>
> . . . .
>
> In order to provide each individual a full opportunity to challenge an initial administrative determination that he is or was responsibly connected with a licensee, the proposed rules would establish a procedure under which such person may present evidence in an oral hearing before a Presiding Officer designated to conduct such hearings for the Agricultural Marketing Service, Department of Agriculture, that his status is not that which was previously determined. The Presiding Officer would then issue a report including his proposed findings of fact. Either party to the proceeding may, within 30 days, file objections to the proposed findings of fact with the Administrator. The Administrator will issue a final decision as to whether petitioner is, or was, responsibly connected.
>
> In the event a licensee fails to satisfy a reparation order issued under the [PACA] against it, or is found to have committed flagrant or repeated violations of the [PACA], or its license is otherwise suspended or revoked, the licensee and responsibly connected persons are subject to restrictions

with respect to relicensing, or employment by another licensee.

There have been several instances where the person who has been reported to be responsibly connected with a licensee has challenged the Department's determination and records. These persons have requested formal hearings for the purpose of obtaining an official determination of their status. However, there are presently no provisions for such hearings, nor is there an established procedure to govern this type of proceeding.

It is proposed to establish rules of practice applicable only to the administrative determination of who is a responsibly connected person.

41 Fed. Reg. at 32,231-32.

The proposed rules of practice applicable to the determination as to whether a person is responsibly connected were adopted and became effective on September 21, 1976 (41 Fed. Reg. 41,075-77). The Rules Applicable to the Determination as to Whether a Person Is Responsibly Connected With a Licensee Under the Perishable Agricultural Commodities Act (7 C.F.R. §§ 47.47-.68 (1977)) [hereinafter Responsibly Connected Rules of Practice] provided a person determined to be "responsibly connected" by the Chief of the Regulatory Branch, Fruit and Vegetable Division, Agricultural Marketing Service, USDA, with an opportunity for a full evidentiary oral hearing conducted by a presiding officer assigned by the Chairman of the Board of Contract Appeals.[5] The Responsibly Connected Rules of Practice did not limit the parties to a review of the basis for the Chief of the Regulatory Branch's responsibly connected determination. Instead, the Responsibly Connected Rules of Practice provided for a full evidentiary hearing under which the presiding officer was required to admit all evidence relevant and material to the responsibly connected status of the person, except unduly repetitious evidence.[6]

The Responsibly Connected Rules of Practice were amended on four occasions between September 21, 1976, and February 1995; however, none of these revisions

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[5] 7 C.F.R. §§ 47.47(d), .49(e)-(f) (1977).

[6] 7 C.F.R. § 47.58(a) (1977).

limited the scope of the proceeding before the presiding officer.[7]

On July 3, 1995, the Office of the Secretary proposed to provide that the responsibly connected proceedings would be conducted in accordance with the Rules of Practice (60 Fed. Reg. 34,474-76 (1995)). The notice of proposed rulemaking states that the proposal is designed to provide a mechanism for consolidating hearings in disciplinary cases under the PACA and related determinations of responsibly connected status and to provide for review of the Chief of the PACA Branch's responsibly connected determinations by an administrative law judge rather than by a presiding officer.[8] The notice of proposed rulemaking further describes the differences between conducting responsibly connected proceedings under the Rules of Practice and conducting responsibly connected proceedings under the Responsibly Connected Rules of Practice and the benefits USDA expected to follow from conducting responsibly connected proceedings pursuant to the Rules of Practice, as follows:

> Instead of filing a petition for review with the Administrator of [the Agricultural Marketing Service], under the proposed procedures, the individual contesting the final determination by the Chief, PACA Branch, that he or she is responsibly connected will file a petition for review with the Office of the Hearing Clerk, and the petition will be decided by an Administrative Law Judge, after opportunity for oral hearing. Any hearing on a responsibly connected determination will be consolidated with the hearing, if any, on the disciplinary matters out of which the issue of responsibly connected status arose. Likewise, all responsibly connected hearings arising out of the relationship between more than one individual and one particular PACA licensee will be consolidated.
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> . . . .
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> USDA believes that the proposed procedures, by reducing the incidence of multiple hearings, will facilitate speedy enforcement of the PACA and will result in savings in employee time and travel expense. They will also

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[7]*See* 60 Fed. Reg. 8446-67 (1995) (authorizing hearings by audio-visual communication and telephone); 56 Fed. Reg. 173-75 (1991) (changing the method of service of documents, the time of service, and the time for filing documents); 46 Fed. Reg. 51,593-94 (1981) (providing for the designation of any person as a presiding officer); 43 Fed. Reg. 30,787-90 (1978) (providing for the designation of officials of the Packers and Stockyards Administration, Agricultural Marketing Service, USDA, as presiding officers).

[8]60 Fed. Reg. at 34,475.

> abolish the need for [the Agricultural Marketing Service] to employ individuals to act as presiding officers at responsibly connected proceedings.

60 Fed. Reg. at 34,475.

A final rule, adopting the July 3, 1995, proposed rule, was published on March 21, 1996, and became effective on April 22, 1996 (61 Fed. Reg. 11,501-04). Neither the July 3, 1995, notice of proposed rulemaking nor the March 21, 1996, final rulemaking document indicates that the purpose of the rulemaking proceeding was to limit the evidence that may be introduced in responsibly connected proceedings or to limit the scope of responsibly connected proceedings. Instead, the March 21, 1996, final rulemaking document amended section 1.133(b) of the Rules of Practice to provide that a person determined to be "responsibly connected" by the Chief of the PACA Branch could institute a proceeding to have the facts regarding responsibly connected status determined, as follows:

> **§ 1.133 Institution of proceedings.**
>
> . . . .
>
> (b) *Filing of complaint or petition for review. . . .*
>
> (2) Any person determined by the Chief, PACA Branch, pursuant to 7 CFR 47.47-47.[49] to have been responsibly connected within the meaning of 7 U.S.C. 499a[(b)](9) to a licensee who is subject or potentially subject to license suspension or revocation as a result of an alleged violation of 7 U.S.C. 499b or 499h(b) or as provided in 7 U.S.C. 499g(d) shall be entitled to institute a proceeding under this section and *to have determined the facts with respect to such responsibly connected status by filing with the Hearing Clerk a petition for review of such determination.*

7 C.F.R. § 1.133(b)(2) (emphasis added).

Moreover, the March 21, 1996, final rulemaking document amended section 1.141(a) of the Rules of Practice to provide that "[a] petition for review shall be deemed a request for a hearing" (7 C.F.R. § 1.141(a)). The Rules of Practice do not limit the parties to a review of the basis for the Chief of the PACA Branch's responsibly connected determination. Instead, section 1.141(h) of the Rules of Practice (7 C.F.R. § 1.141(h)) provides that testimony and exhibits may be introduced at the hearing and with respect to the exclusion of evidence, provides

that "[e]vidence which is immaterial, irrelevant, and unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable." 7 C.F.R. § 1.141(h)(1)(iv).

I find that a petition for review filed in accordance with section 1.133(b)(2) of the Rules of Practice (7 C.F.R. § 1.133(b)(2)) commences a *de novo* proceeding, and the Rules of Practice provide for a full evidentiary hearing under which all reliable evidence that is relevant and material to the responsibly connected status of the person, except unduly repetitious evidence, may be admitted into evidence.[9] The administrative law judge and, on appeal, the Judicial Officer, may consider all reliable relevant and material evidence properly introduced in a proceeding in order to determine whether a petitioner was responsibly connected with a PACA licensee at the time that the licensee violated the PACA.

The certified agency record upon which Respondent based the July 18, 1997, responsibly connected determination, and the other evidence introduced during this proceeding, support the ALJ's finding that Petitioner Michael J. Mendenhall was responsibly connected with Mendenhall Produce, Inc., during the time it violated the PACA, and the ALJ's conclusion in which she upheld the Respondent's July 18, 1997, responsibly connected determination.

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

Order

Petitioner Michael J. Mendenhall was responsibly connected with Mendenhall Produce, Inc., during the period of time that Mendenhall Produce, Inc., violated the PACA. Accordingly, Petitioner Michael J. Mendenhall is subject to the employment and licensing restrictions provided under sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

This Order shall become effective 65 days after service on Petitioner.

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[9]While the issue of the scope of the responsibly connected proceeding was not raised in previous responsibly connected proceedings conducted under the Rules of Practice, full evidentiary hearings, in which the respondents therein were not limited to rebuttal of evidence presented by the petitioners, were conducted. *See In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997), *remanded*, No. 98-1065 (D.C. Dec. 22, 1998); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919 (1997), *aff'd per curiam*, No. 98-1057 (D.C. Cir. Oct. 19, 1998); and *In re Lawrence D. Salins*, 57 Agric. Dec. ___ (Feb. 26, 1998).

In re: STEVEN J. RODGERS.
PACA-APP Docket No. 96-0002.
Order Lifting Stay filed December 14, 1998.

Andrew Y. Stanton, for Respondent.
Mark L. Johansen and Steven R. Block, Dallas, Texas, for Petitioner.
Order issued by William G. Jenson, Judicial Officer.

On December 12, 1997, I issued a Decision and Order affirming the determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Steven J. Rodgers [hereinafter Petitioner], was responsibly connected with World Wide Consultants, Inc., during the period of time that World Wide Consultants, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended [hereinafter the PACA]. *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1957 (1997).

On March 19, 1998, Respondent filed Motion for Stay Order stating that Petitioner had "filed a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit" and requesting "that the December 12, 1997, Decision and Order be stayed until Petitioner's appeal is resolved." On April 6, 1998, Petitioner filed Petitioner's Response to Respondent's Motion for Stay Order stating that Petitioner "joins Respondent's Motion for Stay Order and requests that the December 12, 1997, Decision and Order be stayed until Petitioner's appeal is concluded." On April 8, 1998, I granted Respondent's Motion for Stay Order. *In re Steven J. Rodgers*, 57 Agric. Dec. 804 (1998).

On December 9, 1998, Respondent filed Motion to Lift Stay Order, stating that: (1) proceedings for judicial review of *In re Steven J. Rodgers*, 56 Agric. Dec. 1919 (1997), had been concluded and the United States Court of Appeals for the District of Columbia Circuit had affirmed *In re Steven J. Rodgers*, 56 Agric. Dec. 1919 (1997); and (2) "Petitioner's counsel has informed . . . counsel for Respondent that Petitioner . . . would like the April 8, 1998, Stay Order lifted immediately so that the employment sanction resulting from Petitioner's responsibly connected status (7 U.S.C. § 499h(b)), as found by the Judicial Officer and affirmed by the Court of Appeals, will take effect as soon as possible." On December 11, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion to Lift Stay Order.

Respondent's Motion to Lift Stay Order is granted. The Stay Order issued April 8, 1998, *In re Steven J. Rodgers*, 57 Agric. Dec. 804 (1998), is lifted. The Order issued in *In re Steven J. Rodgers*, 56 Agric. Dec. 1919 (1997), affirming the determination of the Chief of the PACA Branch, Fruit and Vegetable Division,

Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with World Wide Consultants, Inc., during the period of time that World Wide Consultants, Inc., violated the PACA, is effective 14 days after service of this Order Lifting Stay, on Petitioner.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

MESA PRODUCE, INC. v. ROMNEY & ASSOCIATES, INC., d/b/a R & R DISTRIBUTORS, AND SUPER FRESH, INC.
PACA Docket No. R-97-0144.
Decision and Order filed July 17, 1998.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Mark C.H. Mandell, Annandale, NJ, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $114,979.15 in connection with twelve transactions in interstate commerce involving mixed produce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondents. Respondent Romney & Associates, Inc., filed an answer thereto denying liability to Complainant. This answer included a counterclaim arising out of the same transactions as those involved in the formal complaint, and also referred to four additional transactions. Complainant did not file a reply to the counterclaim. Respondent Super Fresh, Inc., did not file an answer, but instead, through its attorney Dennis Joy, notified the Department that "[i]n lieu of an Answer" it had filed an independent action in the United States District Court for the District of New Jersey against Complainant. Respondent Super Fresh, Inc., is therefore in default. However, it is the longstanding practice in these proceedings to not issue a default order against a co-respondent where the action continues as to the remaining Respondent. This is predicated on the possibility that facts developed by reason of the continuation of the proceeding may exonerate the Respondent who is in default.

The amount claimed in the formal complaint exceeds $30,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure

provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, none of the parties did so. None of the parties filed a brief.

On November 25, 1997, following completion of the shortened procedure, Respondent Super Fresh, Inc., through new counsel, filed a motion to reopen the proceeding to take further evidence, and to dismiss the complaint as to Super Fresh, Inc. This motion was served on Complainant, and on January 20, 1998, Complainant filed a response objecting to the motion.

On December 18, 1997, an order was issued staying this proceeding as to the complaint against Romney & Associates, Inc., due to that firm having filed a petition in bankruptcy.

Respondent Super Fresh, Inc.'s motion to reopen is well founded in that it sets forth good reason why the evidence sought to be adduced was not adduced under the shortened procedure. However, it is not well founded in that, as to the dispositive issue involving Super Fresh, Inc., it fails to show that the evidence sought to be adduced is not merely cumulative. The motion is, therefore, denied.

Findings of Fact

1. Complainant, Mesa Produce Inc., is a corporation whose address is P. O. Box 777, Mesa, Arizona. At the time of the transactions involved herein Complainant was licensed under the Act.

2. Respondent, Romney & Associates, Inc., (hereafter sometimes Romney) at the time of the transactions involved herein, was a corporation doing business as R & R Distributors, whose address was P. O. Box 2087, Mesa, Arizona. At the time of the transactions involved herein this Respondent was licensed under the Act. The complaint as against this Respondent has been stayed.

3. Respondent, Super Fresh, Inc., (hereafter sometimes Super) is a corporation whose address is 41A Dundee Avenue, Patterson, New Jersey. At the time of the transactions involved herein this Respondent was licensed under the Act.

4. Complainant sold mixed produce to Respondent Romney under the terms, conditions, and at the prices indicated below:

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

Inv. Date	Ord. Date	C's Ord. #	Purch. Ord. #	FOB	Quantity	Description	Unit Price	Extended Price
4/2?/96	4/??/96	6808	1454	origin	1,672 ctns.	5x5 Toms Ryan	$ 9.90 23.50	$16,552.80 23.50 $16,576.30
4/16/96	4/16/96	6775	1433	destin-ation	41,692 lbs.	Watermelons 4'	$ 0.22	$9,172.24
4/18/96	4/18/96	6790	1446	origin	42,516 lbs.	Watermelons	$ 0.22	$9,353.52
4/22/96	4/22/96	6795	1447	origin	42,295 lbs.	Watermelons	$ 0.18	$7,613.10
4/22/96	4/22/96	6797	1449	origin	41,797 lbs.	Watermelons	$ 0.24	$10,031.28
4/25/96	4/25/96	6806	1452	origin	40,803 lbs.	Watermelons	$ 0.235	$9,588.71
4/20/96	4/20/96	6779	1439	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/20/96	4/20/96	6784	1443	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/21/96	4/21/96	6778	1438	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/21/96	4/21/96	6780	1440	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/22/96	4/22/96	6781	1441	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/24/96	4/24/96	67812	1442	origin	1,000 ctns.	18' Cantaloupes Ryan	$ 8.75 24.00	$8,750.00 24.00 $8,774.00
4/29/96	4/29/96	6815	1462	destin-ation	1,632 ctns. 394 ctns.	12' Mangos 14' Mangos	$ 4.50 4.50	$7,344.00 1,773.00 $9,117.00
4/4/96	4/4/96	6767	1428	origin	41,537 lbs.	Watermelons	$ .20	$8,307.40
4/15/96	4/15/96	6776	1434	destin-ation	45,092 lbs.	Watermelons '4	$ .165	$7,440.18
4/27/96	4/27/96	6811	1457	origin	9,536lbs 34,774lbs	Watermelons '4 Watermelons '5	$ .185 .16	$1,764.16 5,563.84 $7,328.00

4/30/96	4/30/96	6824	1448	origin	10,275lbs	Watermelons '4	$ .185	$1,900.87
					33,675lbs	Watermelons '5	.16	5,388.00
								$7,288.87

5. The loads of produce listed in Finding of Fact 4 were shipped at the direction of Respondent Romney to Respondent Super, and accepted by Respondent Romney on arrival.

6. The informal complaint, covering the first 12 transactions listed in Finding of Fact 4, was filed on May 30, 1996, which was within nine months after the causes of action alleged therein accrued. The informal counterclaim, covering the first 13 transactions listed in Finding of Fact 4, was filed on June 26, 1996, which was within nine months after the causes of action alleged therein accrued.

Conclusions

The record shows, without question, that there was no privity of contract between Complainant and Respondent Super. However, Complainant alleges that Super Fresh, Inc., engaged in misrepresentation, constructive fraud, and unjust enrichment along with Romney. The misdeed complained of is the alleged deception by Respondents in leading Complainant to believe that the produce was going to an affiliate of A&P Markets, namely, Super Fresh Markets in Florence, New Jersey. Complainant has failed to prove by a preponderance of the evidence herein that Respondent Super participated in any way in the alleged deception. Accordingly, the complaint as against Respondent Super should be dismissed.

Respondent Romney's counterclaim alleges the sale and shipment by Complainant of 17 loads of mixed produce. These are the same loads as set forth in Finding of Fact 4. However, Romney alleges no damages as to the last 4 loads, and we are at a loss as to why the loads were listed in the counterclaim. As to the first 12 loads, Respondent Romney alleged in the counterclaim that damages in the total amount of $116,514.50 were due from Complainant. The alleged damages result from alleged breaches of warranty as to the loads, and federal inspections appear to substantiate most of these alleged breaches. The total damage figure was arrived at by assigning an alleged prevailing market price at time of arrival for conforming merchandise to each shipment, deducting the actual alleged gross proceeds, and adding a 15 percent commission, a $1.00 per carton handling fee, and the cost of the federal inspections. Assuming for the moment that there was a breach of warranty as to each load, and that the alleged gross proceeds were as claimed, there are two respects in which Respondent Romney has erroneously computed the amount claimed in its counterclaim. First, Romney's deduction of a commission and handling fee is not permitted as incidental damages under UCC

section 2 - 714(3) and 2 - 715. This is true because the proper method of computing damages, i.e., the difference between the value the goods would have had if they had been as warranted, and the value they actually had as a result of the breach, automatically credits a profit to the buyer if the market price at time of arrival would have entailed a profit, and because a purchase and sale contract does not contemplate the payment of a commission. Second, in computing the amount due, Romney did not deduct the invoice cost (which totaled $114,979.15) for the 12 loads. When we disallow the erroneously claimed commission and handling charges as to the 12 loads, the amount of Romney's claimed damages comes to $95,450.40. When we add the $4,547.20 allegedly due to Romney on the 13th transaction to the reduced damage amount of $95,450.40, and then deduct the invoice cost of the 12 loads, nothing remains of Respondent Romney's counterclaim. We conclude that the counterclaim should be dismissed.

The order of December 18, 1997, staying this proceeding as against Respondent Romney, is still in effect pending final disposition of the bankruptcy proceeding.

Order

The complaint as against Respondent Super Fresh, Inc., is dismissed.
The counterclaim is dismissed.
Copies of this order shall be served upon the parties.

ALGER FARMS, INC. v. JACKIE D. FOSTER, d/b/a FOSTER FARMS OF GEORGIA.
PACA Docket No. R-98-0045.
Decision and Order filed July 20, 1998.

Suitable Shipping Condition Warranty – Applicable only at Contract Destination – Evidence – Standard of Proof.

In an f.o.b. sale of four truckloads of sweet corn the invoices stated that the produce was to be shipped to Respondent at Bainbridge, Georgia, and the bills of lading stated the destination as Respondent without giving an address. The contract was negotiated between a grower's agent, representing Complainant, and an employee of Respondent. The parties offered no testimony as to the contractual agreement, but Complainant's representative admitted that the truck driver requested of Complainant's dock foreman that phytosanitary certificates be issued as to three of the loads because they were going to Canada. The dock foreman was unprepared for the request and the certificates were supplied later to Respondent. It was held that the contract destination was Bainbridge, Georgia.

By analogy to the judicial exception to the requirement that transportation be normal in order for the warranty of suitable shipping condition to apply, it was found that Canadian inspections could be used to attempt proof that the corn was not in suitable shipping condition. This proof would relate to the condition of the corn that would have been shown by a timely inspection following a timely arrival at the contract destination in Bainbridge, Georgia, and would have to demonstrate the breach of the warranty at that point with reasonable certainty. It was found that, although the condition factors shown by the Canadian inspections were extensive, the standard of reasonable certainty had not been met.

George S. Whitten, Presiding Officer.
Mike D. Bess, Orlando, FL, for Complainant.
Lawrence H., Meuers, Naples, 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.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $33,388.00 in connection with four transactions in interstate commerce involving sweet corn.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint exceeds $30,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however neither party did so. Both parties filed briefs. Complainant's brief consisted of the affidavit of Pete Johnson, reported elsewhere in the record to have been involved in the contract negotiations. Respondent's attorney moved that the brief be stricken from the record on the ground that briefs are to be filed after the conclusion of the presentation of evidence. Respondent's motion is denied for the reason that the brief was never a part of the record herein. The fact that a brief is sworn to by a party, and includes evidentiary matter, does not transform it into anything other than a brief. The brief filed by Complainant will be looked to for argument only, and all evidentiary matter therein will be ignored.

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

Findings of Fact

1. Complainant, Alger Farms, Inc., is a corporation whose address is P. O. Box 1253, Homestead, Florida.

2. Respondent, Jackie D. Foster, is an individual doing business as Foster Farms of Georgia whose address is P. O. Box 7251, Bainbridge, Georgia. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about March 11, 1996, Complainant sold to Respondent 1,050 containers of yellow sweet corn at $7.00 per container, or $7,350.00, plus $1.00 per container for precooling, or $1,050.00, plus 12 units of ice at $13.00, or $156.00, and one temperature recorder at $13.00, or a total for the truck load of $8,569.00. The contract destination for the load was Bainbridge, Georgia.

4. On March 11, 1996, Complainant shipped the load of sweet corn referred to in Finding of Fact 3 to Respondent in Bainbridge, Georgia, on a truck bearing license number F-41790 AL. The bill of lading stated that temperature was to be maintained at 36° F. Respondent diverted to truck to its customer, Safeway Stores, Inc., in Tracy, California, and the corn was federally inspected at that location on March 15, 1996, at 10:30 a.m., while still loaded on the truck, with the following results in relevant part:

LOT	TEMPER-ATURES	PRODUCE	BRAND/ MARKINGS	ORIGIN	LOT ID.	NO. OF CON-TAINERS	INSP. COUNT
A	37 to 40 °F	Sweet Corn	"Alger Farms"	FL		1050 Crts	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	15	%	00	%		%	Quality (12 to 20%) poorly filled	From 6¼ to 7½ inches in length
	10	%	00	%		%	Discolored Husks (8 to 1?%)	
	00	%	00	%		%	DECAY	
	25	%	00	%		%	Check Sum	

GRADE: fails to grade U.S. No. 1 account of grade defects.

REMARKS: Inspected during the process of unloading.

5. On or about March 12, 1996, Complainant sold to Respondent 1,000

containers of yellow sweet corn at $7.00 per container, or $7,000.00, plus $1.00 per container for precooling, or $1,000.00, plus 12 units of ice at $13.00, or $156.00, plus 24 pallets at $4.50, or $108.00, plus one phytosanitary certificate at $20.00, and one temperature recorder at $13.00, or a total for the truck load of $8,297.00. The contract destination for the load was Bainbridge, Georgia.

6. On March 12, 1996, Complainant shipped the load of sweet corn referred to in Finding of Fact 5 to Respondent in Bainbridge, Georgia, on a truck bearing license number 31R-329 TX. The bill of lading stated that temperature was to be maintained at 38° F. Respondent diverted the truck to its customer, MacDonalds Consolidated Div. of Canada Safeway Ltd., in Calgary, Alberta, Canada, and the corn was subjected to Canadian inspection at that location on March 19, 1996, between the hours of 8:42 and 10:23 a.m., at the applicant's warehouse, with the following results in relevant part:

PULP TEMP 1/T 6 C
PULP TEMP 2/T 8 C
WAREHOUSE 2 C

PRODUCE DESCRIPTION: 1000, Applicant's Count 40 lbs. Wooden crate florida super sweet yellow sweet corn Brand Name: ALGER FARMS

CONDITION: Decay affecting cob and silk avg 86 (illegible) range 00 to 100 Brown discoloration of the husks avg 14% range Nil to 40%

REMARKS: Clean cartons in good order, properly packed (illegible) evidence in samples inspected. Lot consists of 24 pallets total of 1000 crates.

CERTIFICATION: Inspection requested for and certificate restricted to condition only.

7. On or about March 13, 1996, Complainant sold to Respondent 1,000 containers of yellow sweet corn at $7.00 per container, or $7,000.00, plus $1.00 per container for precooling, or $1,000.00, plus 12 units of ice at $13.00, or $156.00, plus 24 pallets at $4.50, or $108.00, plus one phytosanitary certificate at $20.00. and one temperature recorder at $13.00, or a total for the truck load of $8,297.00. The contract destination for the load was Bainbridge, Georgia.

8. On March 13, 1996, Complainant shipped the load of sweet corn referred to in Finding of Fact 7 to Respondent in Bainbridge, Georgia, on a truck

bearing license number 404982 MO. The bill of lading stated that temperature was to be maintained at 38° F. Respondent diverted the truck to its customer, MacDonalds Consolidated Div. of Canada Safeway Ltd., in Calgary, Alberta, Canada, and the corn was subjected to Canadian inspection at that location on March 21, 1996, between the hours of 10:01 and 11:58 a.m., at the applicant's warehouse, with the following results in relevant part:

PULP TEMP 1/T ?5 C
PULP TEMP 2/T 5.5 C
WAREHOUSE 5 C

PRODUCE DESCRIPTION: 1000, Applicant's Count Wood wire bound crates SWEET CORN Brand Name: NO BRAND NAME
PRODUCE OF USA. FLORIDA SWEET YELLOW CORN 9 BU 8X11(?)
ALGER FARMS, HOMESTEAD, FL 33030

CONDITION: Decay which is mostly found in the kernels at the silken tassel end avg 57%, range 35% to 80%. Some specimens show dark brown wet and slimy silken tassels. In addition many specimens show brown watery discolored husks. Specimens showing BROWN WATERY DISCOLORED HUSKS ONLY avg 20%, range Nil to 30%.

PERMANENT DEFECTS: SPECIMENS SHOWING IRREGULAR AND SUNKEN ROWS OF KERNELS avg (illegible)

REMARKS: Clean containers in good order, properly packed
P.O. # 387896
24 BOARDS CONTAINING 42 W. B. CRATES EACH.

CERTIFICATION: Inspection requested for and certificate restricted to condition only.

9. On or about March 13, 1996, Complainant sold to Respondent 1,000 containers of yellow sweet corn at $7.00 per container, or $7,000.00, plus $1.00 per container for precooling, or $1,000.00, plus 12 units of ice at $13.00, or $156.00, one temperature recorder at $13.00, 8 pallets at $4.50 each, or $36.00, and one phytosanitary certificate at $20.00, or a total for the truck load of $8,225.00. The contract destination for the load was Bainbridge, Georgia.

10. On March 13, 1996, Complainant shipped the load of sweet corn

referred to in Finding of Fact 9 to Respondent in Bainbridge, Georgia, on a truck bearing license number 22259 N.D. The bill of lading stated that temperature was to be maintained at 38° F. Respondent diverted the truck to its customer, MacDonalds Consolidated Div. of Canada Safeway Ltd., in Calgary, Alberta, Canada, and the corn was subjected to Canadian inspection at that location on March 21, 1996, between the hours of 12:04 and 1:57 p.m., at the applicant's warehouse, with the following results in relevant part:

PULP TEMP 1/T 6 C
PULP TEMP 2/T 6 C
WAREHOUSE 6 C

PRODUCE DESCRIPTION: 1000, Applicant's Count. Wood wire bound crates SWEET CORN Brand Name: NO BRAND NAME PRODUCE OF USA. FLORIDA SWEET YELLOW CORN 9 BU 8X11(?) ALGER FARMS, HOMESTEAD, FL 33030

CONDITION: Decay which is mostly found affecting the kernels at the silken tassel end avg 44%, range 20% to 60%. Some specimens show dark brown wet and slimy silken tassels. In addition many specimens show brown watery discolored husks. Specimens showing BROWN WATERY DISCOLORED HUSKS ONLY avg 16%, range Nil to 35%.

PERMANENT DEFECTS: SPECIMENS SHOWING IRREGULAR AND SUNKEN ROWS OF KERNELS avg 5%, range Nil to 25%

REMARKS: Clean containers in good order, properly packed. P.O. # 387897. 24 BOARDS CONTAINING 42 W. B. CRATES EACH.

CERTIFICATION: Inspection requested for and certificate restricted to condition only.

11. The informal complaint was filed on October 10, 1996, which was within nine months after the causes of action herein accrued.

Conclusions

Both parties agree that the four loads of sweet corn were sold to Respondent

by Complainant on an f.o.b. basis. The Regulations,[2] 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,[3] 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."

Complainant's representative contended that there were no contract destinations agreed to by the parties, and that consequently the suitable shipping condition warranty does not apply to any of the transactions. Respondent's attorney asserted that the contract destination was California, as to the first load, and Vancouver, British Columbia, Canada, as to the last three loads.

The invoices all state that the loads are to be shipped to "Foster Farms of Georgia, P. O. Box 7251, Bainbridge GA 31717." The bills of lading all state that the loads are consigned to "Foster Farms," and do not give an address. However, placed next to the "Foster Farms" designation on each bill of lading is reference to a purchase order number. The purchase orders were not placed in evidence by either party, but the invoices each state the relevant purchase order number. Therefore, as far as the documentation of record shows, the destination for all the loads was Foster Farms at Bainbridge, Georgia. Why Complainant makes the contention that there was no contract destination is never stated. Even more mystifying is the contention by respondent that the loads shipped to Canada were destined for and arrived in Vancouver, British Columbia. This assertion was introduced for the first time in the reply made by Respondent's attorney to the Department's initial inquiry. So powerful was the suggestion that the Department was carried along with the misconception, and thereafter its personnel consistently gave the arrival point for the last three loads as Vancouver. Even after Complainant's representative pointed out that the inspection applicant was located in Calgary, Alberta, both the Department and Complainant's attorney continued

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[2]7 C.F.R. § 46.43(i).

[3]7 C.F.R. § 46.43(j).

to refer to the actual destination as Vancouver, British Columbia.[4]

In a recent case we pointed out that:

> . . . the suitable shipping condition warranty is applicable to the contract destination agreed upon between the parties. The destinations specified in freight contracts made by a seller or buyer with the transportation company are not what is referred to by the applicable regulation. It is true that the two will very often be the same. And, it is also true that the destination shown on a bill of lading may be taken in some factual contexts as an indication of what the parties agreed upon as a contract destination. However, the two are not the same, and it is entirely possible for a buyer to take full control of a commodity at shipping point, but for the contract destination under the f.o.b. terms to be some distant location. This is what occurs under the trade term f.o.b. acceptance. The Regulations state that:
>
> > "F.o.b. acceptance" or "Shipping point acceptance" means that the buyer accepts the produce at shipping point and has no right of rejection. The buyer has recourse against the seller, if the produce was not in suitable shipping condition . . ., providing the shipment is not rejected. The buyer's remedy under this method of purchase is by recovery of damages from the seller and not by rejection. (Footnote omitted.)[5]

In another case we attempted to set forth factors that would be considered important for making the determination as to the agreed contract destination:

> The crucial and ultimate question is what did the parties consider to be the contract destination as to the contract between themselves. Or, put another way, did they intend that the seller was to assume the obligation of shipping goods that would carry, without abnormal deterioration, to the ultimate destination, or only to the intermediate point? If we were to list the significant factors for determining intended contract destination

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[4]Complainant's representative stated: "The applicant is located in Calgary, Alberta, which is 14 hours driving time away from Vancouver. When did the corn arrive in Vancouver? Why was the corn inspected in Calgary, if the customer was in Vancouver? Did the corn go to Vancouver and then back to Calgary?"

[5]Ontario International, Inc. v. The Nunes Company, Inc., 52 Agric. Dec. 1661, 1671 (1993).

in descending order of importance they would rank as follows:

> 1). Indication in writing, such as a broker's memorandum or other contract memorandum, of the agreed contract destination.
> 2). Indication of knowledge on the part of the seller as to the ultimate destination. This might be shown by a freight contract, phytosanitary certificates, or other documents, or it might be admitted.
> 3). The absence of an intermediate point of acceptance by the buyer.[6]

In this case we are singularly without relevant testimony by the persons involved in the contract negotiations. According to Complainant's representative the contract was negotiated on Complainant's behalf by Pete Johnson of Quality First Produce, Inc., the firm which was handling all sales on Complainant's behalf. However, the sworn formal complaint is a bare bones complaint signed by John Alger, who was admittedly not involved in the contract negotiations. The sworn formal answer is signed by Jackie D. Foster, but there is no indication that Jackie Foster should be identified with the Billy Foster who is stated by Complainant's representative to have been the person with whom Pete Johnson dealt. Moreover, the answer does little more than deny that Complainant shipped the corn to Bainbridge, Georgia. Neither party thought it necessary to submit evidence under the shortened procedure.

The dominant facts of record are the destinations specified on the invoices, and bills of lading. Alongside this is the representation, which scarcely even rises to the level of hearsay, of Complainant's representative:

> Mr. Johnson a salesman at Quality First Produce Inc., received the order from respondent's Billy Foster. Mr. Foster ordered four trucklots of sweet corn, at a total FOB price of $33,388.00. Complainant placed a temperature recorder on each of the trucks, which is shown on the bill of lading and signed for by the driver. Mr. Foster never told Mr. Johnson that the three loads at issue were going into Canada.

This bare assertion at least has the virtue of being a part of the evidence in that it is a part of the Department's Report of Investigation. There is no treatment, in evidence, by Respondent of the subject. In the brief there is the assertion by

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[6]Clark Produce v. Primary Export International, Inc., 52 Agric. Dec. 1715, 1720-21 (1993).

Respondent's attorney that Complainant was informed of the Canadian destination prior to shipment, but this relates to information given by the trucker to Complainant's dock foreman, not to anything told by Billy Foster to Pete Johnson.

To be weighed against the documentation showing the contract destination as Bainbridge, Georgia, is an admission by Complainant's representative:

> For invoice no. 101428, when the truck arrived at Alger Farms packing-house, the driver advised Mr. Earl Gordon, the dock foreman, that the corn was going into Canada and that he would need a phyto certificate. Mr. Gordan notified Penny in Alger's shipping office, who ordered the Phyto. The following day on March 13, both driver's also advised that they were going to Canada. Since Respondent did not notify Mr. Johnson that the loads were going to Canada, the phytos were not done when the trucks arrived. Instead the corn was shipped without them, which is not standard procedure. The phytos are normally given to the driver along with the bill of lading.

We do not think that this admission shows that Canada was the contract destination agreed to by the parties as to the last three loads.[7] At the point that the disclosure was made the contract had already been formed. Moreover, the disclosure was made only to the dock foreman of the shipper, and was made by a third party, namely the truck driver. In addition, the contracting, as was known by Respondent, was not being handled by the shipper, but by a different firm acting as the shipper's agent. The information contained in an invoice and/or bill of lading is not necessarily conclusive evidence of the destination specified in the contract of sale. However, it is certainly substantial evidence of such destination. It is of course possible that a product might be shipped to an agreed diversion point, with only that address being specified on the invoice and bill of lading, and the intent of the parties be that the goods will thereafter be diverted to one of several contract destinations as agreed by the parties as a part of the contract. This might be established by preponderant testimony.[8] However, in the normal situation, one would expect that a "ship to" designation on the invoice which agrees with the destination specified on the bill of lading will be the contract

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[7]Even if it had been proven that "Canada" was the contract destination of the last three loads, Calgary, Alberta, Canada is some 1,500 miles further from the Florida shipping point than the nearest likely destination point in "Canada," namely Toronto.

[8]*Cf.* Anonymous, 3 Agric. Dec. 425 (1994).

destination agreed to by the parties. When it is established that a certain destination is the contract destination, the fact that it is disclosed, at the time of shipment, to personnel belonging to the shipper, that the produce is actually going to a different destination than what was agreed to as the contract destination, does not alter the contract destination to which the parties have already agreed. In such circumstances it is quite proper for the shipper to presume that the buyer in shipping the commodity to a point beyond that which has already been agreed is assuming responsibility for any condition problems resulting from the added transit period. We conclude that a preponderance of the evidence herein shows that the contract destination for all four loads was Bainbridge, Georgia.

In Magic Valley Potato Shippers, Inc. v. C. B. Marchant & Co., Inc.,[9] we said:

> The diversion of the car to a different destination than that specified in the contract would not necessarily leave respondent totally without benefit of the warranty since the condition of the commodity at that different point may be relevant in determining whether the commodity would have been abnormally deteriorated at the destination specified.

The statement was apparently based on an analogy with the judicial exception to the requirement that transportation be normal in order for the warranty of suitable shipping condition[10] to apply. This exception allows a buyer to prove a breach of

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[9]42 Agric. Dec. 1602, 1606-07 (1983).

[10]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co., 39 Agric. Dec. 703 (1980).

The case of lettuce provides an illustration of another facet of the suitable shipping condition rule which is often overlooked. The United States Standards for Grades of Lettuce (7 C.F.R. § 51.2510 *et seq.* (1995)) 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

(continued...)

the seller's warranty of suitable shipping condition, in spite of the presence of abnormal transportation, if the nature of the damage found at destination is such as could not have been caused or aggravated by the faulty transportation service. The exception has been explained as follows:

> It is a well established rule that evidence of abnormal deterioration of the commodity upon its arrival at destination is evidence of breach of the warranty of suitable shipping condition only in cases in which the transportation was normal. . . .
>
> . . . .
>
> The reason for the rule is obvious. Whether the commodity, at time of billing, was in good enough condition to travel to destination without abnormal deterioration can be determined only from the condition in which it did arrive at destination, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at time of billing. The rule does not necessarily assume that abnormal transportation service caused the damage. It merely acknowledges such possibility, and even though the possibility of unsuitable condition at time of billing remains, it bars a recovery for want of proof that the damage resulted therefrom.
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> Since this is the rational of the rule, it has been held, as an exception to the rule, that a buyer may prove breach of the seller's warranty of suitable shipping condition in spite of proof of abnormal transportation service if the nature of the damage found at destination is such as could not have been caused by or aggravated by the faulty transportation service.[11]

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[10](...continued)
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 G & S Produce v. Morris Produce, 31 Agric. Dec. 1167 (1972), and Lake Fruit Co. v. Jackson, 18 Agric. Dec. 140 (1959).

[11]Anonymous, 12 Agric. Dec. 694, 698 (1953).

The exception has also been applied where, even though the faulty transportation service would have most certainly aggravated the damage found at destination, the damage is nevertheless deemed to be so excessive that the commodity would clearly have been abnormally deteriorated even if transit service had been normal.[12]

In practice the exception is only applied when the condition found by inspection is so bad that a breach of the warranty is virtually certain to have occurred in spite of the abnormal transportation. In a recent case involving an analogous situation we enunciated the standard of proof which we think should apply to all these situations:

> The abrogation of the warranty of suitable shipping condition by the f.o.b. acceptance final terms of the contract still leaves in place the warranty of merchantability. Accordingly, if there is some way of showing that the goods, in an f.o.b.a.f. contract, were unmerchantable when shipped, a material breach may be proven, and damages for that breach may be awarded. In a similar situation we have stated that:
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> > Respondent contends that even if we find that the contract was f.o.b. acceptance final, the condition of the strawberries as revealed by the federal inspection report at destination shows that the strawberries were not merchantable at time of shipment. Respondent thus seeks to show that there was a material breach of the contract, even though the suitable shipping condition rule does not apply. See 7 CFR 46.43(m). However, the use of condition at destination to show condition at time of shipment is exactly the function of the suitable shipping condition warranty. See Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co., 39 [Agric. Dec.] 703 (1980). In this case, where the suitable shipping condition warranty is specifically negated by the terms of the contract, we

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[12] See Sharyland Corp. v. Milrose Food Brokers of New Jersey, Inc., 50 Agric. Dec. 994 (1991); Sanbon Packing Co. v. Spada Distributing Co., Inc., 28 Agric. Dec. 230 (1969). See also Tony Mista & Sons Produce v. Twin City Produce, 41 Agric. Dec. 195, 201 n.1 (1981), where we said:

> Abnormal transportation service or condition voids the warranty of suitable shipping condition applicable in f.o.b. sales . . . unless the abnormal deterioration found at destination is of such a nature or extent that it could not have been caused or substantially aggravated by the [faulty] transportation.

> would not be justified in finding a breach of the warranty of merchantability unless condition at destination, in the light of transportation history, were such as to make it self-evident and certain that the commodity was nonconforming at shipping point. [Genbroker Corporation a/t/a General Brokerage Company v. Bronia Inc. a/t/a J & J Produce, 42 Agric. Dec. 281 (1983).]

The certainty required is not certainty in some absolute sense, but reasonable certainty. [North American Produce Distributors, Inc. v. Eddie Arakelian, 41 Agric. Dec. 759 (1982)]. To understand what this means we may analogize to the reasonable doubt standard used in criminal trials. There it is commonly said that the doubt necessary for an acquittal is not a fanciful doubt, but a reasonable doubt. So here, we are seeking a certainty that is in accord with reason, not a certainty that excludes all fanciful doubt.[13]

Applying this standard to the produce shipped by Complainant we first note that sweet corn is extremely perishable. It has one of the highest respiration rates of all perishable produce.[14] The recommended transportation temperature for sweet corn is 32 degrees F.[15] The load shipped to California is easily disposed of. The 10 percent discoloration shown by the inspection in California would not indicate a breach of the suitable shipping condition warranty even if Tracy, California had been the contract destination.

The remaining loads were inspected in Calgary 6 to 8 days after shipment. Arrival in Bainbridge, Georgia, would have been on the same day as shipped, or at most the following day if shipment was commenced in the late afternoon or at night. The load shipped on March 12, 1996, was inspected in Calgary on March 19, 1996, and showed pulp temperatures at time of inspection of 43 to 46 degrees F. The temperature tape covering this load, submitted by Respondent, showed air temperatures of approximately 40 degrees during the transit period. The Canadian inspection showed an average of 86 percent decay affecting the cob and silk, and

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[13]Martori Bros. Distributors v. Houston Fruitland, Inc., 55 Agric. Dec. 1331, 1338-39 (1996).

[14]See Protection of Rail Shipments of Fruits and Vegetables, Agriculture Handbook No. 195, Agricultural Research Service, United States Department of Agriculture, p. 21 (Revised ed. 1969).

[15]Protecting Perishable Foods During Transport by Truck, Agriculture Handbook Number 669, Office of Transportation, United States Department of Agriculture, p. 40 (1987).

an average of 14 percent brown discoloration of the husks. The inspector did not note whether the decay was in early or advanced stages. In view of the temperatures and the time in transit it is impossible for us to say with certainty that this corn would not have been shown to have been in suitable shipping condition by a timely inspection following a timely arrival at the contract destination in Bainbridge, Georgia. We conclude that Respondent has not shown a breach of the warranty of suitable shipping condition as to this load. The remaining loads show similar temperatures at time of arrival, but a longer time between shipment and inspection, and somewhat less serious condition factors. As to the remaining two temperature tapes, one appears to cover a different load altogether, and both cover less than half of the transit period.[16] We also conclude that Respondent has not shown a breach of the warranty of suitable shipping condition as to these loads.

There is one remaining issue to be resolved. Respondent asserts that the amount alleged due in the formal complaint cannot be the correct amount because Complainant granted Respondent an allowance on each of the loads. In this connection we note that the informal complaint was for substantially reduced amounts as to each load, and totaled only $17,188.00. When Complainant's representative wrote to this Department on December 19, 1996,[17] he stated that in view of the fact that Respondent had filed an informal claim against Complainant arising out of the same transactions Complainant was withdrawing its "settlement offer" and amending its complaint to seek "the full amount due of $33,388.00." That a settlement offer that has not been accepted may be withdrawn is without question. However, in this case Complainant accomplished more than a settlement offer. This is shown by the copies of the invoices which were attached to the informal complaint. Each of these invoices has the original amount crossed out, and a new lesser amount written in. Three of the invoices have written across the bottoms: "Ok per John Alger," and the remaining invoice has written across the bottom: "adjustment Ok. Per John Alger." In our opinion these invoices show that adjustments were granted to Complainant which left $17,188.00 as the total amount due on the four loads.[18]

Section 5(a) of the Act requires that we award to the person or persons injured

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[16]Cf. G.D.I.C., Inc. v. Misty Shores Trading, Inc., 51 Agric. Dec. 850 (1992); and Monc's Consolidated Produce, Inc. v. A&J Produce Corp., 43 Agric. Dec. 563 (1984).

[17]See Report of Investigation, exhibit s.

[18]See UCC § 2-209(1).

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.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order Respondent shall pay to Complainant, as reparation, $17,188.00, with interest thereon at the rate of 10% per annum from April 1, 1996, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

ROMNEY & ASSOCIATES, INC., a/t/a R & R DISTRIBUTING v. SUPER FRESH, INC.
PACA Docket No. R-98-0071.
Decision and Order filed July 27, 1998.

Protection Agreements – Allowance of Profit.

"Protection," "full protection," and "protection against loss" usually have the same meaning, and should be distinguished from "market protection," or "price protection." A protection agreement is a modification of the original sale contract which leaves the original sale price as the base line price for determining whether the buyer makes a profit, or is entitled to protection. The potential for profit remains after the conclusion of the protection agreement, and this potential can only be realized in the same manner as it is realized in any sale contract, namely by the buyer reselling at prices above the original price plus expenses. Therefore, when a buyer with protection fails to resell at such favorable prices, and experiences a loss, the protection should only compensate for the loss, and should not include a profit in the form of a commission, or

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[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).

[20] See 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).

handling fee.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Mark C.H. Mandell, Annandale, NJ, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $166,374.73 in connection with a eighteen transactions in interstate commerce involving mixed perishable produce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint exceeds $30,000.00, however, the parties waived oral hearing, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable.[1] Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement, and Complainant did not file a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, Romney & Associates, Inc., is a corporation also trading as R & R Distributing, whose address is P. O. Box 2087, Mesa, Arizona.

2. Respondent, Super Fresh, Inc., is a corporation whose address is 245 Lakeview Ave., Suite 117, Clifton, New Jersey. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about April 13, 1996, Complainant (under its invoice 1433, Respondent's purchase order 10631) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

containing 640 cartons of watermelons, size 4's, 41,692 lbs., at $.23 per pound, or $9,589.16. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

416 sold @ 12.00	$ 4,992.00
64 sold @ 10.00	640.00
160 sold @ 6.00	960.00
	$ 6,592.00
Less 15% commission	$ (988.00)
Less $ .50 handling	(320.00)
Less freight	(3,200.00)
Net return	$ 1,990.20

Respondent paid Complainant $1,990.20.

4. On or about April 16, 1996, Complainant (under its invoice 1438, Respondent's purchase order 2001-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

750 sold @ 6.00	$ 4,500.00
100 sold @ 4.00	400.00
150 sold @ 2.00	300.00
	$ 5,200.00
Less 15% commission	$ (780.00)
Less $ .50 handling	(500.00)
Less freight	(3,500.00)
Net return	$ 321.00

Respondent paid Complainant $321.00.

5. On or about April 18, 1996, Complainant (under its invoice 1439, Respondent's purchase order 2002-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the

load as follows:

875 sold @ 5.00	$ 4,375.00
103 sold @ 3.00	309.00
22 sold @ 1.00	22.00
	$ 4,706.00
Less 15% commission	$ (705.90)
Less $ .50 handling	(500.00)
Less freight	(3,500.00)
Net return	$ -98.90

6. On or about April 17, 1996, Complainant (under its invoice 1440, Respondent's purchase order 2003-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

800 sold @ 5.50	$ 4,400.00
78 sold @ 5.00	390.00
122 sold @ 2.00	244.00
	$ 5,034.00
Less 15% commission	$ (755.10)
Less $ .50 handling	(500.00)
Less inspection fee	(99.00)
Less freight	(3,500.00)
Net return	$ 179.90

Respondent paid Complainant $179.90.

7. On or about April 19, 1996, Complainant (under its invoice 1441, Respondent's purchase order 2004-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

825 sold @ 6.00	$ 4,950.00
100 sold @ 5.50	550.00
75 sold @ 3.00	225.00
	$ 5,725.00
Less 15% commission	$ (858.75)
Less $ .50 handling	(500.00)
Less inspection fee	(80.50)
Less freight	(3,500.00)
Net return	$ 785.75

Respondent paid Complainant $785.75.

8. On or about April 24, 1996, Complainant (under its invoice 1442, Respondent's purchase order 2005-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

800 sold @ 5.00	$ 4,000.00
100 sold @ 4.50	450.00
75 sold @ 4.00	300.00
25 sold @ 2.00	50.00
	$ 4,800.00
Less 15% commission	$ (720.00)
Less $ .50 handling	(500.00)
Less inspection fee	(148.90)
Less freight	(3,500.00)
Net return	$ -68.90

9. On or about April 15, 1996, Complainant (under its invoice 1443, Respondent's purchase order 2806-S) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 1,000 cartons of cantaloupes, size 18's, at $9.00 per carton, or $9,000.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

97 sold @ 5.00	$ 485.00
903 sold @ 4.00	3,612.00
	$ 4,097.00
Less 15% commission	$ (614.55)
Less $ .50 handling	(500.00)
Less inspection fee	(99.00)
Less freight	(3,500.00)
Net return	$ -616.55

10. On or about April 18, 1996, Complainant (under its invoice 1446, Respondent's purchase order 11784) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 640 cartons of watermelons, size 4's, 42,516 lbs., at $.23 per pound, or $9,778.68. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

480 sold @ 8.00	$ 3,840.00
64 sold @ 6.00	384.00
60 sold @ 5.00	300.00
36 sold @ 3.00	108.00
	$ 4,632.00
Less 15% commission	$ (694.80)
Less $ .50 handling	(320.00)
Less inspection fee	(130.00)
Less freight	(3,500.00)
Net return	$ (12.80)

11. On or about April 19, 1996, Complainant (under its invoice 1447, Respondent's purchase order 11289) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 672 cartons of watermelons, size 4's, 42,296 lbs., at $.20 per pound, or $8,459.00. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

416 sold @ 14.00	$ 5,824.00
192 sold @ 12.00	2,304.00
64 sold @ 11.50	736.00
	$ 8,864.60
Less 15% commission	$(1,329.60)

Less $ .50 handling	(336.00)
Less inspection fee	(86.00)
Less freight	(3,500.00)
Net return	$ 3,612.40

Respondent has paid Complainant $3,612.40.

12. On or about April 22, 1996, Complainant (under its invoice 1449, Respondent's purchase order 12001) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 640 cartons of watermelons, size 4's, 41,797 lbs., at $.25 per pound, or $10,449.25. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

448 sold @ 10.00	$ 4,480.00
192 sold @ 8.00	1,536.00
	$ 6,016.00
Less 15% commission	$ (902.40)
Less $ .50 handling	(320.00)
Less inspection fee	(74.00)
Less freight	(3,500.00)
Net return	$ 1,219.60

Respondent has paid Complainant $1,219.60.

13. On or about April 24, 1996, Complainant (under its invoice 1454, Respondent's purchase order 139241) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,672 cartons of tomatoes, size 5x6, at $15.85 per carton, or $26,501.20, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

1,144 sold @ 4.00	$ 4,576.00
352 sold @ 3.00	1,056.00
176 sold @ 2.00	352.00
	$ 5,984.00
Less 15% commission	$ (897.60)
Less $ .50 handling	(836.00)
Less inspection fee	(111.00)
Less freight	(3,500.00)

Net return	$ 639.40

Respondent has paid Complainant $639.40.

14. On or about May 1, 1996, Complainant (under its invoice 1468, Respondent's purchase order 3035) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,936 cartons of tomatoes, size 5x5, at $6.35 per carton, or $12,293.60, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

176 sold @ 4.00	$ 704.00
1,056 sold @ 3.00	3,168.00
504 sold @ 2.00	1,008.00
200 sold @ 1.00	200.00
	$ 5,080.00
Less 15% commission	$ (762.00)
Less $ .50 handling	(968.00)
Less inspection fee	(99.00)
Less freight	(3,500.00)
Net return	$ -249.00

15. On or about May 2, 1996, Complainant (under its invoice 1471, Respondent's purchase order 3037) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,008 cartons of cantaloupes, size 18's, at $6.00 per carton, or $6,071.50, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

850 sold @ 4.00	$ 3,400.00
100 sold @ 2.00	200.00
58 sold @ 1.00	58.00
	$ 3,658.00
Less 15% commission	$ (548.70)
Less $ .50 handling	(504.00)
Less inspection fee	(99.00)
Less freight	(3,500.00)
Net return	$ -993.70

16. On or about May 3, 1996, Complainant (under its invoice 1472, Respondent's purchase order 3038) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,008 cartons of cantaloupes, size 18's, at $6.00 per carton, or $6,071.50, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection. Respondent rendered an accounting on the load as follows:

840 sold @ 3.00	$ 2,520.00
56 sold @ 2.75	154.00
112 sold @ 1.00	112.00
	$ 2,786.00
Less 15% commission	$ (417.90)
Less $ .50 handling	(504.00)
Less inspection fee	(77.40)
Less freight	(3,500.00)
Net return	$-1,713.30

17. On or about May 15, 1996, Complainant (under its invoice 1473, Respondent's purchase order 3039) sold to Respondent, and shipped from Brawley, California, to Respondent in Patterson, New Jersey, one truck load containing 1,120 cartons of cantaloupes, size 18's, at $6.00 per carton, or $6,720.00, plus $23.50 for a temperature recorder, and $50.00 for air bags. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

723 sold @ 4.75	$ 3,458.00
224 sold @ 4.25	952.00
168 sold @ 3.00	504.00
	$ 4,914.00
Less 15% commission	$ (737.10)
Less $ .50 handling	(560.00)
Less inspection fee	(129.00)
Less freight	(3,900.00)
Net return	$ -412.10

18. On or about May 15, 1996, Complainant (under its invoice 1474, Respondent's purchase order 3040) sold to Respondent, and shipped from Nogales, Arizona, to Respondent in Patterson, New Jersey, one truck load containing 1,064 cartons of cantaloupes, size 18's, at $6.00 per carton, or

$6,384.00, plus $23.50 for a temperature recorder. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

224 sold @	5.00	$ 1,120.00
56 sold @	4.75	266.00
728 sold @	3.00	2,184.00
56 sold @	1.00	56.00
		$ 3,626.00
Less 15% commission		$ (543.90)
Less $ .50 handling		(532.00)
Less inspection fee		(99.00)
Less freight		(3,500.00)
Net return		$-1,048.90

Complainant and Respondent agreed to settle the load at a net loss of $516.90 which Complainant has not paid.

19. On or about May 19, 1996, Complainant (under its invoice 1475, Respondent's purchase order 3041) sold to Respondent, and shipped from Brawley, California, to Respondent in Patterson, New Jersey, one truck load containing 1,120 cartons of cantaloupes, size 18's, at $6.00 per carton, or $6,720.00, plus $23.50 for a temperature recorder, and $50.00 for air bags. Following arrival and communication of the results of a federal inspection, Complainant agreed to grant Respondent full protection on the load. Respondent rendered an accounting on the load as follows:

75 sold @	6.00	$ 450.00
840 sold @	5.00	4,200.00
112 sold @	4.75	532.00
93 sold @	4.00	372.00
		$ 5,554.00
Less 15% commission		$ (833.10)
Less $ .50 handling		(560.00)
Less inspection fee		(62.00)
Less freight		(3,600.00)
Net return		$ 498.90

Respondent not paid Complainant the $498.90 in reported net returns.

20. On or about May 14, 1996, Complainant (under its invoice 1491,

Respondent's purchase order 3051) sold to Respondent, and shipped from Edinburgh, Texas, to Respondent in Patterson, New Jersey, one truck load containing 3,748 cartons of mangos, size 14's, at $3.25 per carton, or $12,181.80, plus $23.50 for a temperature recorder. Following arrival Respondent communicated the results of a federal inspection. Respondent rendered an accounting on the load as follows:

2,187 sold @ 2.00	$ 4,356.00
384 sold @ 1.50	576.00
1,186 sold @ 1.00	1,186.00
	$ 6,118.00
Less 15% commission	$ (917.70)
Less $ .50 handling	(1,874.00)
Less inspection fee	(123.00)
Less freight	(2,900.00)
Net return	$ 303.30

Respondent not paid Complainant the $303.30 in reported net returns.

21. An informal complaint was filed on June 15, 1996, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant seeks to recover the balance of contract prices applicable to the sale to Respondent of eighteen loads of perishable produce. The record shows, and Respondent does not dispute, that the eighteen loads were all accepted on arrival. However, the record also shows that Respondent complained about the condition of the produce on each load, and had each load inspected.

Respondent contends that the parties entered into a full protection agreement as to each of the loads, that an accounting was issued as to each load, and that under that accounting no further amounts are due from Respondent to Complainant. The record shows that, in accord with the accountings, Respondent has paid Complainant a total of $8,748.25, and has failed to pay an additional $802.20. In addition the accountings shows deficits which purport to be due from Complainant to Respondent in the total amount of $4,682.15.

Respondent has clearly shown by a preponderance of the evidence that there was an agreement for full protection as to all of the loads except one. That load, covered by Finding of Fact 18, was the subject of a settlement agreement, and the deficit due from Complainant to Respondent under that agreement is $516.90. The accountings for the remaining seventeen loads all show amounts deducted by

Respondent for a commission, and for handling fees. These deductions represent a basic misunderstanding as to the meaning of a protection agreement.

A protection agreement can apply to any type of sale of goods. "Protection," "full protection," and "protection against loss," usually are taken to mean the same thing,[2] namely, that the seller will protect the buyer against any loss resulting from the goods having arrived in poor condition, or from market decline, or both.[3] However, "price protection," and "market protection," refer to protection that is limited to protection against a drop in market price.

A protection against loss agreement is not the same as a consignment. In a consignment the goods remain the property of the seller. A party who is the beneficiary of a protection agreement is still the purchaser of the goods, and takes title to the goods as a result of the purchase. A protection agreement modifies, but does not obliterate, the original purchase and sale contract. Thus the original contract price remains the base line price.[4] The protected buyer still has the potential (though perhaps remote) to make a profit on the goods.[5] But the protected party's protection extends only to protection against loss. The potential for profit is not a right, but only a potential, and still depends upon the protected party reselling for more than the original contract price. Thus, when the protection feature of the agreement is activated by returns that are lower than contract price

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[2]In Charles Johnson Company v. Timothy Hoversen, 57 Agric. Dec. 756 (1998), a distinction was drawn between "protection," and "full protection." However, the distinction is limited to the peculiar facts of the case. There, under a contract calling for two lots of lettuce to weigh 54 and 58 pounds gross respectively, the lettuce in fact weighed an average of 50.4 pounds gross, and it was contended unsuccessfully by Complainant that the modified contract was for protection against short weight. In fact it was found that the agreement was for "full protection," but it was indicated that if the agreement had been for "'protection' from losses associated with light weight lettuce," market price would somehow be relevant to the calculation of the amount of protection due. This dicta, which is irrelevant to the actual decision, does not indicate exactly how such a calculation would be made, and we think that unless the parties specify a different method for calculation of losses, the losses flowing from short weight would most naturally be calculated in the normal manner, without any reference to market price.

[3]Samuel E. Vener Co. v. McCaffrey Bros. Co., 15 Agric. Dec. 405 (1956).

[4]In Border Fruit Co. v. Fruit Distributing Corp., 45 Agric. Dec. 2453, 2455 (1986), we said:

> A protection agreement has reference to a base price, and concerns goods that are sold, whereas in the case of a consignment there is no sale of the produce.

[5]Suppose, for instance, that the goods arrive in poor condition and the parties negotiate a protection agreement. Even though the goods are in poor condition the market might under certain circumstances rise precipitously, and the protected party might sell for double the original contract price. In such case the buyer would be liable to the seller only for the original price, and would be able to keep all the profit.

plus out of pocket expenses, the protected party is not entitled to a profit, or a commission (which is a substitute for profit in a consignment transaction), or a handling fee (which, unless explained, might be a euphemism for profit.)[6] Maintenance of the ability to accurately calculate and substantiate the loss is an implicit obligation of the agreement. Therefore, we have stated that:

> . . . it is incumbent upon a receiver who has such an agreement to keep records which substantiate its resales and losses. . . . "failure to keep such records voids the protection agreement." (citing Dave Walsh Co. v. Liberty Fruit Co., 38 Agric. Dec. 533 (1979)).[7]

The fundamental object of the protection agreement, which is to protect the buyer against any loss, requires that no monetary loss occur. Thus a buyer must be credited with the cost of any legitimate and documented reconditioning of the goods. Also, a buyer who has paid freight must be credited with the freight paid. If the gross proceeds of the buyer's resale exceed the f.o.b. contract price plus freight, then the buyer gets to keep the excess as profit, and is only liable to the seller for the contract price. On the other hand, if the gross proceeds of the resale are less than buyer's costs [f.o.b. price, plus freight, if the buyer paid the freight], then the buyer deducts freight costs from such gross proceeds and remits the balance, thus suffering no loss. If the gross proceeds are not enough to cover freight (and/or other legitimate costs) then the seller who grants protection must chip in and pay the remainder of the costs. Any attempt to leave freight out of the equation will result in a loss to the buyer and thus infringe on the protection against loss granted by the seller.[8] However, any attempt to allow a commission, or other substitute for profit, after the protection feature of the agreement cuts in, is inappropriate, because the buyer's potential for a profit was never deleted from the original contract, and depended, as in any sale contract, exclusively on resale proceeds being above costs.[9]

Since Respondent, in its accountings, deducted substantial amounts for commission and for handling fees, these amounts must be allowed to

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[6]See Samuel E. Vener Co. v. McCaffrey Bros. Co., 15 Agric. Dec. 405 (1956).

[7]DeMarco Produce Co., Inc. v. J.R. Cortes & Co., 39 Agric. Dec. 1256, 1259 (1980).

[8]See Arthur G. Manzo v. Jarson & Zerrilli Co., 9 Agric. Dec. 1230 (1950).

[9]See generally Charles Johnson Company v. Timothy Hoversen,, 57 Agric. Dec. 756 (1998).

Complainant. For the seventeen transactions which were not settled commissions and handling fees total $23,565.20. To this should be added the total of $802.20 admitted by Respondent to be due and unpaid, and from this amount should be deducted the total of $4,682.15 in deficits. This brings the total amount due from Respondent to Complainant to $19,685.25. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[10] 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.[11] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order Respondent shall pay to Complainant, as reparation, $19,685.25, with interest thereon at the rate of 10% per annum from June 1, 1996, until paid, plus the amount of $300.00.

Copies of this order shall be served upon the parties.

ROMNEY & ASSOCIATES, INC., a/t/a R & R DISTRIBUTING v. SUPER FRESH, INC.
PACA Docket No. R-98-0071.
Order on Reconsideration filed October 21, 1998.

George S. Whitten, Presiding Officer.
Complainant, Pro se.

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[10] 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).

[11] See 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).

Mark C.H. Mandell, Annandale, NJ, for Respondent.
Order issued by William J. Genson, Judicial Officer.

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), an order was issued July 27, 1998, awarding reparation to Complainant against Respondent in the amount of $19,685.25, with interest, plus the amount of $300. The order was served upon Respondent, and subsequently Respondent was granted an extension of time until September 8, 1998, in which to file a petition for reconsideration. On September 8, 1998, Respondent filed a petition for reconsideration.

Respondent's petition is in the form of an affidavit. To the extent that the affidavit contains new evidentiary matter it has been discounted.[1] Respondent asserts that each of the findings of fact contain "fundamental factual errors" in that they find that Complainant granted Respondent full protection on each load. Respondent contends that it was Respondent's understanding that it was to "'handle' the shipments with full protection," and points to a few instances when these, or similar, words were used. Respondent's contention is that a consignment was agreed to on each load. However, use of the word "handle" does not always signal a consignment.[2] In any event, Respondent did not often couple the word "handle" with the "full protection" words, and Respondent's view of the meaning of the word "handle" would render the "full protection" words superfluous and meaningless. We have reviewed Respondent's petition and find nothing therein that was not adequately considered in our decision and order of July 27, 1998. Respondent's petition is without merit, and is dismissed without service upon Complainant. The reparation awarded in our order of July 27, 1998, shall be paid within 30 days of the date of this order.

Copies of this order shall be served upon the parties.

PREMIUM VALLEY PRODUCE, INC. v. SAM WANG FOOD CORP., INC.
PACA Docket No. R-98-0153.
Decision and Order filed December 10, 1998.

Consignments - adequacy of proof of failure to perform fiduciary duties as to consigned produce.

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[1]See 7 C.F.R. § 47.24(b).

[2] Ralph Samsel v. L. Gillarde Sons Co., 19 Agric. Dec. 374 (1960).

Where produce was shown by federal inspection following arrival and acceptance to be substantially damaged, and parties agreed to change contract from one of sale to consignment, the consignor failed to prove a failure by consignee to perform its fiduciary duties even though the first sale of the produce was made nine days after the agreement was made, and most of the produce was finally dumped. The consignee proved by affidavits from the firms to which the produce was offered that the goods were offered to the trade on the first two days after the consignment agreement, and also proved that the consignor participated unsuccessfully in trying to sell the produce.

George S. Whitten, Presiding Officer.
Thomas R. Oliveri, Newport Beach, CA, for Complainant.
Robert E. Richards, Silver Spring, MD, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $15,552.00 in connection with a transaction in interstate commerce involving broccoli crowns.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint does not exceed $30,000.00, 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 filed a brief.

Findings of Fact

1. Complainant, Premium Valley Produce, Inc., is a corporation whose address is 1107-A Harkins Road, Salinas, California.

2. Respondent, Sam Wang Food Corp., Inc., is a corporation whose address is 300-A Morse St. N.E., Washington, D.C. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about January 28, 1997, Complainant sold to Respondent 1,152

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

cartons of broccoli crowns at $14.35 per carton, plus $23.50 for a temperature recorder, and $64.00 for top ice, or a total for the load of $16,618.70, f.o.b. Complainant shipped the broccoli crowns on the evening of January 28, 1997, from loading point in California, to Respondent at Washington, D.C. On arrival at destination the broccoli crowns were accepted by Respondent when Respondent unloaded them from the truck.

4. On Monday, February 3, 1997, at 1:30 p.m., the broccoli crowns were federally inspected at Respondent's warehouse in Washington, D.C., with the following results in relevant part:

LOT	TEMPER-ATURES	PRODUCE	BRAND/ MARKINGS	ORIGIN	LOT ID.	NO. OF CON-TAINERS	INSP. COUNT
A	34 to 37 °F	Broccoli Crowns	"Cools Fresh"	Ca	Net wt 20lbs	1152 Cartons	N

LOT	AVER-AGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/ DEFECT	OTHER
A	00	%	%	% No Quality defects	Crowns Generally 3½ - 6, m 4 -4½" in diameter
	17	%	%	% Yellow to brown dis-coloration (0 to 30%)	Stalks 1½ - 2 inches in length
	10	%	%	% Decay (3 to 18%) in early stages.	
	27	%	%	% Checksum	

GRADE: No established U. S. Grade Standards

5. Respondent communicated the results of the federal inspection to Complainant, and on February 3, 1997, the parties agreed that Respondent should handle the broccoli crowns for Complainant's account.

6. Respondent showed the broccoli crowns to Harry Liu of CFI on February 4, 1997, and was told by Mr Liu that he did not want to handle the broccoli because he felt he "might not be able to merchandise it." On February 4, 1997, Respondent showed the broccoli to Kenny Chan of Chan's Market, and was told by Mr. Chan

that he "felt that the broccoli would be difficult to sell and [that he] did not want to purchase it, even at a reduced price." Again on February 4, 1997, Respondent showed the broccoli to Mr. Vnine of V-9 Market who also refused to purchase any. On February 5, 1997, Respondent showed the broccoli to Donald Chin, a Chinese food wholesaler. Mr. Chin stated he did not feel the broccoli could be resold, and declined to purchase any. On February 6, 1997, a fifth firm, Lucky Farm Produce, was induced by Complainant to view the broccoli, and refused to make any purchases.

7. On February 12, 1997, Sang Oh Choi, Respondent's president, induced Harry Liu of CFI to purchase 96 cartons of the broccoli as a personal favor for $8.00 per carton. On February 16, Mr. Choi induced Mr. Vnine of V-9 Market to purchase 96 cartons of the broccoli at $6.50 per carton as a personal favor. In addition, a total of 79 cartons were sold to individual walk-in customers for an average of $7.50 per carton. Respondent reported gross proceeds of $2,032.50 to Complainant. Respondent incurred expenses in the amount of $2,700 for freight, $78.00 and $65.00 for inspections, and a dumping fee of $250.00.

8. Respondent had 881 cartons of the broccoli, which remained unsold, federally inspected on February 19, 1997 at 11:15 a.m. The inspection showed temperatures of 50 to 52 degrees Fahrenheit. Yellow to brown discoloration of the crowns was shown as 42 percent, with a range of 30 to 60 percent. Decay was shown as 43 percent, with a range of 33 to 58 percent, in early to moderate stages. Subsequently the 881 cartons of broccoli were dumped.

9. The formal complaint was filed on July 14, 1997, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant and Respondent agree that the original contract was changed from one of sale to one of consignment. Complainant's claim is based solely upon the assertion that Respondent failed to fulfill its fiduciary duties in a reasonable manner. Complainant points to the fact that the first sale was made on February 12, nine days after the inspection of the broccoli, and to the fact that only a total of 271 cartons out of the original 1,152 were sold. Without more, these facts would certainly show a failure to sell the broccoli in a prompt and reasonable manner. However, there are other facts which must be considered before we reach the conclusion that Complainant has met its burden of proving by a preponderance of the evidence that Respondent failed to adequately perform its fiduciary duties.

Respondent submitted affidavits by representatives of four firms to which the broccoli crowns were offered on February 4, and 5. In addition, Respondent's

president stated in a sworn affidavit that following receipt of a faxed request to handle the broccoli for Complainant's account he expressed concern by phone to Complainant's representative that the broccoli would be hard to merchandise, and was told that Complainant would have someone from Lucky Farm Produce come by to purchase the broccoli and take it off Respondent's hands. This statement was never denied by Complainant. However, when a representative of Lucky Farm Produce arrived at Respondent's place of business on February 6, to view the broccoli, he refused to purchase it. If Complainant undertook to have a local merchant view the broccoli with a view to purchase it, Complainant was sharing in the effort to dispose of the broccoli. This was entirely appropriate, as the broccoli still belonged to Complainant by virtue of the consignment agreement. Nowhere does Complainant allege that it was not aware of the situation as to sales, and in view of the refusal of Lucky Farm Produce (the firm secured by Complainant) to purchase the broccoli, it seems unlikely that Complainant was not aware of the difficulties Respondent was having in selling the broccoli.

In a situation where consigned merchandise does not readily sell we like to see evidence that the offering price was dropped radically in an effort to stimulate sales. Respondent's affidavits do not directly address this issue, although one of the affiants stated that he "did not want to purchase [the broccoli] even at a reduced price." In regard to consignment transactions we have said:

> Market circumstances vary widely from time to time and place to place. In addition, perishable commodities can be merchantable and still vary over a wide range as to quality and as to desirability on a given market dependent on many varying characteristics of such produce. [The consignee] was a company chosen by complainant to act as complainant's agent. . . . We are very reluctant to subject the performance of complainant's agent to the scrutiny of our hindsight.[2]

The statement quoted above is even more applicable when the produce is in a substantially damaged condition, as was the subject broccoli. If this were a situation where, following Respondent's acceptance, it had resold and claimed damages for Complainant's breach of contract, we would be disposed to hold

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[2]LaVern Co-operative Citrus Ass'n v. Mendelson-Zeller Co., Inc., 46 Agric. Dec. 1673, 1678 (1987).

Respondent to a slightly higher standard.[3] But here Complainant elected to have Respondent resell the broccoli on consignment, and involved itself in the effort to resell. Under these circumstances we are unable to find that Complainant has met its burden of proving by a preponderance of the evidence that Respondent breached its fiduciary duty relative to the broccoli. The complaint should be dismissed.

Order

The complaint is dismissed.
Copies of this order shall be served upon the parties.

THE CHUCK OLSEN CO. v. PRODUCE DISTRIBUTORS INC., AND PRODUCE ETC. MARKETING.
PACA Docket No. R-98-0083.
Decision and Order filed September 29, 1998.

Suitable Shipping Condition — Applicable Only At Contract Destination

Where the parties to an f.o.b. contract agreed to a destination of Patterson, New Jersey, with the proviso that the goods were not to be shipped to wholesalers in New York or to the New York Terminal Market, and the buyer diverted the goods to the New York Terminal Market, it was held that the suitable shipping condition warranty was not applicable.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Richard J. Mendelsohn, Salinas, CA, for Respondent.
Decision issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $12,373.55 in

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[3]We have in mind proof that the goods were offered to several potential buyers at progressively lower prices. If necessary, these offerings should proceed past the break even point, which, in the case of the broccoli, would have been $2.50 to $2.75 per carton. Respondent here may have done this, but the proof that it was done is lacking.

connection with a transaction in interstate commerce involving a truck load of table grapes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondents which filed answers thereto denying liability to Complainant.

The amount claimed in the formal complaint does not exceed $30,000.00, 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 did not file an opening statement, both Respondents filed answering statements, and Complainant filed a statement in reply. None of the parties filed briefs.

Findings of Fact

1. Complainant is an individual, Floyd Charles (Chuck) Olsen, doing business as The Chuck Olsen Co., whose address is P. O. Box 57, Cutler, California.

2. Respondent, Produce Distributors Inc. [hereafter sometimes Distributors], is a corporation whose address is 600 S. Livingston Ave., Suite 102, Livingston, New Jersey. At the time of the transaction involved herein this Respondent was licensed under the Act.

3. Respondent, Produce Etc. Marketing [hereafter sometimes Marketing], is the sole proprietorship of Tony Valenzuela. The address of this Respondent is 1000 S. Main St., Suite 550, Salinas, California. At the time of the transaction involved herein this Respondent was licensed under the Act.

4. On or about June 18, 1996, Complainant sold to Respondent Distributors, through Respondent Marketing acting as broker, one truck load consisting of 1,936 18-pound bagged boxes of U. S. No. 1 Table Grade Perlette Grapes, at $12.15 per box f.o.b., with a contract destination of Super Fresh, Inc., in Patterson, New Jersey, with the specific proviso that the grapes were not to go to any wholesalers in New York or to the New York Terminal Market.

5. On June 18, 1996, the grapes were shipped from loading point in Arizona, to Respondent Distributors' customer in Paterson, New Jersey. Respondent Distributor diverted the load to L & P Fruit Co., Inc., on the New York Terminal Market in Bronx, New York. On June 25, 1996, at 10:10 a.m., following

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[1]Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to $30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

unloading from the truck, the grapes were federally inspected with the following results in relevant part:

LOT	TEMPER-ATURES	PRODUCE	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	36 to 38 °F	Table Grapes	"Table Top Mountain UVG Perlett"	AZ	Bagged 18Lbsnet	1936 Cartons	N

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	02	%	00	%		%	Quality Defects, Scars	
	06	%	00	%		%	Shattered Berries (0 to 11%)	
	02	%	02	%		%	Crushed and Split Berries	
	02	%	02	%		%	Wet and Sticky Berries	
	12	%	00	%		%	Externaly (sic) Brown Discoloration (8 to 17%)	
	01	%	01	%		%	DECAY (Early Stages.)	
	25	%	05	%		%	CHECK - SUM	

GRADE: FAILS TO GRADE US NO1, TABLE ACCOUNT CONDITION DEFECTS.

6. Respondent Distributors has paid Complainant $11,148.85 for the grapes leaving a balance due of $12,373.55.

7. The informal complaint was filed on September 21, 1996, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant and Respondent Marketing agree that the sale of the subject grapes was on an f.o.b. basis, Paterson, New Jersey, being the contract destination, with the specific proviso that the grapes were not to go to New York. Respondent Distributors submitted an answer signed by Thomas Gangemi, Jr., its president. In this statement Mr. Gangemi affirmed that at the time of the transaction Distributors had a joint venture agreement with Joe Russo. Mr. Gangemi attached a statement which he claimed was from Joe Russo, but which Russo declined to sign. This statement tells a vastly different story from all the other participants in the transaction, and because it is not signed or verified, it is not considered evidence in this proceeding. However, the participation of Joe Russo in the transaction as a representative of Distributors is attested to by the broker

Marketing, as is the agreement by Russo on behalf of Distributors to the contract destination and the restriction that the load not go to New York.

According to the statement of Tony Valenzuela, Joe Russo informed him, following the inspection of the grapes at the place of business of L & P Fruit Co. in New York, that the grapes were rejected by Super Fresh in Paterson, New Jersey, and were then unilaterally moved by Russo to New York for sale. This is uncontradicted by any competent evidence of record. Such a rejection would have been to Distributors, and since no rejection was communicated to Complainant, the subsequent diversion of the grapes to New York was an acceptance as between Distributors and Complainant.[2]

The grapes were sold on an f.o.b. basis. The Regulations,[3] 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,[4] 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[5] which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery,"[6] are based upon case law predating the adoption of the Regulations.[7] 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

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[2]See Phoenix Vegetable Distributors v. Randy Wilson, Co., 55 Agric. Dec. 1345 (1996).

[3]7 C.F.R. § 46.43(i).

[4]7 C.F.R. § 46.43(j).

[5]7 C.F.R. § 46.43(j).

[6]7 C.F.R. § 46.44.

[7]See Williston, *Sales* § 245 (rev. ed. 1948).

conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery.[8] 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.[9] 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.[10]

The f.o.b. suitable shipping condition rule is applicable by its express terms only "at the contract destination agreed upon between the parties."[11] The reason for this qualification has to do with the fact that a warranty is being extended as to goods that are inherently perishable, and with the fact that the warranty goes beyond the condition of the goods at the time the goods are shipped. It guarantees that the goods are in such a condition at time of shipment as to carry, without abnormal deterioration, to a particular destination. This places a great amount of

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[8]See Pinnacle Produce, Ltd. v. Produce Products, Inc., 46 Agric. Dec. 1155 (1987); G & S Produce v. Morris Produce, 31 Agric. Dec. 1167 (1972); Lake Fruit Co. v. Jackson, 18 Agric. Dec. 140 (1959); and Haines City Citrus Growers Ass'n v. Robinson & Gentile, 10 Agric. Dec. 968 (1951).

[9]As 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 8, *supra*.

[10]See Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co., 39 Agric. Dec. 703 (1980).

[11]7 C.F.R. § 46.43(j).

responsibility on the seller to select goods that will carry to the destination specified. Since normally the only variables that will affect the condition of the goods at destination, beyond the condition of the goods themselves and the conditions under which they are transported, is the time the goods will be in transit, we have interpreted the contract destination requirement in terms, not of a specific destination, but in terms of distance from shipping point.[12] This expansive interpretation of the concept of "contract destination" has been followed only because it was obviously in accord with the underlying intent of the contracting parties. Where, however, the parties go beyond the naming of a contract destination to specifically exclude a locale as a destination point, that exclusion must be honored by us in the application of the suitable shipping condition warranty. In other words, it cannot be that Complainant here intended for the warranty to be applicable to the shipment of the grapes to New York, even though New York is not significantly further from shipping point than Paterson, New Jersey. It is not for us to inquire as to the reason Complainant and Respondent agreed to this exclusion. We can only assume that they had reasons, good and sufficient to them, for making it. The clearly manifested intent of the parties to a contract must be upheld where it is not illegal, and does not conflict with public policy. We find the warranty of suitable shipping condition to be inapplicable to this transaction.

Respondent Distributors has not proven a breach as to the grapes, and since it accepted the grapes, it is liable to Complainant for their full purchase price, or $23,522.40. Complainant has already been paid $11,148.85, which leaves $12,373.55 still due from Respondent Distributors to Complainant. Respondent Marketing acted only as a broker relative to the transaction. Accordingly, the complaint against Respondent Marketing 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.[13] 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

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[12]See Magic Valley Potato Shippers, Inc. v. C. B. Marchant & Co., 42 Agric. Dec. 1602 (1983).

[13]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).

reparation award.[14] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent Produce Distributors Inc., shall pay to Complainant, as reparation, $12,373.55, with interest thereon at the rate of 10% per annum from July 1, 1996, until paid, plus the amount of $300.

The complaint against Respondent Produce Etc. Marketing is dismissed.

Copies of this Order shall be served upon the parties.

FRIEDRICH ENTERPRISES, INC. d/b/a ORIENTAL EXPRESS FRUIT & VEGETABLE CO. v. BENNY'S FARM FRESH DISTRIBUTING.
PACA Docket No. R-98-0134.
Decision and Order filed September 29, 1998.

Accord and Satisfaction – Amount of claim unliquidated.

After receipt and acceptance of blueberries, the parties agreed in writing to modify their contract to price after sale with full protection. Before the parties agreed on a price, the buyer tendered a check for this and another invoice that bore the notation "in full accord," and the seller negotiated the check. In accordance with UCC' 3-311, it was held that an accord and satisfaction may be accomplished when the amount of the claim is unliquidated, such as in a price after sale transaction where the parties have yet to agree upon a price and the check contained a statement indicating that the check was offered in full payment of the invoice.

Complainant, Pro se.
Respondent, Pro se.
Patrice Harps, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

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[14]See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, 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).

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $11,058.00 in connection with one truckload of blueberries shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon the Respondent, which filed an answer thereto, denying liability to Complainant.

Since the amount claimed in the formal complaint does not exceed $30,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an opening statement. Respondent filed an answering statement. Complainant filed a statement in reply. Neither party filed a brief.

Findings of Fact

1. Complainant, Friedrich Enterprises, Inc., doing business as Oriental Express Fruit & Vegetable Co., hereinafter referred to as Oriental Express, is a corporation whose post office address is P. O. Box 8288, Searcy, Arkansas 72145. At the time of the transaction involved herein, Oriental Express was not licensed under the Act.

2. Respondent is an individual, Ronald E. Pomerantz, doing business as Benny's Farm Fresh Distributing, hereinafter referred to as Benny's, whose post office address is 501 N. Wills Street, Chicago, Illinois 60610-1350. At the time of the transaction involved herein, Benny's was licensed under the Act.

3. On or about June 6, 1997, Oriental Express, by oral contract, sold to Benny's, one truckload of blueberries, consisting of 964 flats, at an f.o.b. price of $14.75 per flat, for which Oriental Express prepared invoice 1221, billing Benny's for a total of $14,219.00.

4. On June 20, 1997, the 964 flats of blueberries were shipped from loading point in Searcy, Arkansas, to three of Benny's customers located in Washington, D.C., and Jessup, Maryland, as follows: 100 flats were destined for Rock Garden/Cooseman in Washington, D.C., 464 flats were destined for Sid Goodman in Jessup, Maryland, and 400 flats were destined for Edward G. Rahll also in

Jessup, Maryland.

5. The three lots of blueberries arrived and were unloaded at the various destinations, where they were each federally inspected between the dates of June 23 and 24, 1997, with the following results, in relevant part:

Rock Garden, Washington, D.C.:

TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	NUMBER OF CONTAINERS	INSP. COUNT
42 to 44°	Blueberries Blueberries	No Brand Fresh	AR	100 cartons	Y

AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECTS	OTHER
44 %	44 %	--	Wet Berries (2 to 88%)	
03 %	03 %	--	Soft	
-1 %	-1 %	--	Decay	
48 %	48 %	--	CHECKSUM	

Sid Goodman, Jessup, MD:

TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	NUMBER OF CONTAINERS	INSP. COUNT
40 to 44°	Blueberries	"Oriental Express"	AR	500 cartons	N

AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECTS	OTHER
23 %	00 %	--	Wet Berries (15 to 38%)	Generally Firm.
05 %	05 %	--	Crushed and Leaking Berries (3 to 6%)	
04 %	02 %	--	Shriveling	
04 %	01 %	--	Sunken Areas	
06 %	06 %	--	Mold (2 to 8%)	
00 %	00 %	--	Decay	
42 %	14 %	--	CHECKSUM	

Edward G. Rahll, Jessup, MD

TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	NUMBER OF CONTAINERS	INSP. COUNT
40 to 42°	Blueberries	"Oriental Express"	AR	400 cartons	N

AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECTS	OTHER
31 %	00 %	--	Wet Berries (27 to 37%)	
06 %	02 %	--	Shriveling (4 to 8%)	
05 %	05 %	--	Crushed Berries (3 to 6%)	
04 %	04 %	--	Mushy	
04 %	02 %	--	Sunken Areas	
12 %	12 %	--	Mold (6 to 15%)	
00 %	00 %	--	Decay	
62 %	25 %	--	CHECKSUM	

6. On June 23, 1997, Benny's faxed a "PRICE AFTER SALE // PRODUCE MARKETING AGREEMENT" to Oriental Express, which was signed upon

receipt by its president, George Friedrich, on June 23, 1997, and which stated the following, in pertinent part:

Your firm has requested that we handle the product listed below. These are our terms and conditions:

1. USDA inspections will be at the shipper's request and cost.
2. Full price protection before and after settlement.
3. Full authority and discretion to employ any means necessary to dispose of the product including, but not limited to, the ability to consign, dump, or purchase the product; utilize any broker, auctioneer or dealer to sell, consign or joint account the product; contract with any trucking firm to transport the product to any other location at any reasonable cost with such costs deducted from proceeds.
4. All expenses incurred by ***Benny's farm fresh*** will be deducted from any and all receipts.
5. ***Benny's farm fresh*** is acting as a collect and remit broker in this transaction, not a shipper or a shipper's agent.

Since it is impractical to specify all the particular methods or circumstances that we may employ or encounter in an effort to dispose of the product, full authority is granted to ***Benny's farm fresh*** for the following product(s) listed below.

PRODUCT DESCRIPTION:	5719:Rock Garden 100 flats P.A.S. blueberries	5720:Goodman 500 flats P.A.S. blueberries	5721:Rahll 464 flats LESS $2.00 blueberries

Per our telephone conversation, the pre-cooled flats sat on the loading dock for several hours Friday afternoon, while the truck was loading. The truck was instructed to adjust his reefer unit to 32-25° (upon arrival, it was 44°). The last three (3) pallets were hand loaded on the floor, because there was insufficient room on the truck, according to the shipper. Prior to the first berry drop, the truck stopped at Wal-Mart (KY) and unloaded 2-pallets at their refrigerated loading dock. Upon arrival at the receivers', all the berries had significant wetness, with softness, crushed, leaking and shriveling also present. **Benny's farm fresh** will seek to have Checkmate (the truck broker) assume 50% of the damages.

Please sign, date and return the completed agreement via fax to ***Benny's farm fresh***. We will not accept your product until this agreement is properly executed and in ***our*** possession.

I HAVE READ, UNDERSTAND, AND AGREE TO THE ABOVE TERMS AND CONDITIONS AND HEREBY ACCEPT SAME. WE GIVE ***Benny's farm fresh*** AUTHORITY TO HANDLE OUR PRODUCT. I AM FULLY AUTHORIZED TO SIGN THIS DOCUMENT.

SIGNATURE: _____ DATED: ____/____/1997

7. On or about July 9, 1997, Benny's issued check number 6588, made payable to Oriental Express, in the amount of $6,111.00, $3,161.00 of which was intended as payment for the blueberries billed on Oriental Express's invoice 1221. On the memo portion of the check, Benny's added the notation "Inv 1213, 1221 (in full accord)". The check was cashed by Oriental Express, whose bank it cleared on or about July 16, 1997.

8. An informal complaint was filed on July 21, 1997, which is within nine months from when the cause of action accrued.

Discussion

Oriental Express brings this action to recover the balance of the agreed purchase price for one truckload of blueberries sold to Benny's. Oriental Express

admits that the blueberries arrived at the contract destinations in poor condition, but maintains that the deterioration resulted from improper handling in transit. Specifically, Oriental Express maintains that the trailer arrived loaded with blueberries destined for Wal-Mart in Kentucky, and that these blueberries had been loaded in a manner that did not leave sufficient pallet space on the trailer to accommodate the blueberries ordered by Benny's. In addition, Oriental Express maintains that the driver refused to cool the blueberries to 34°F, insisting that he had to keep the trailer temperature at 44°F as instructed by his dispatcher. Finally, Oriental Express states that the blueberries destined for Wal-Mart were loaded in the front of the trailer, which meant that the Oriental Express blueberries had to be off-loaded when the carrier stopped in Kentucky to make the Wal-Mart delivery.

The record shows that Oriental Express sold the blueberries to Benny's under f.o.b. terms. The Regulations[1] 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, 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."[2]

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[1] 7 C.F.R. § 46.43(i).

[2]The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot

(continued...)

Typically in an f.o.b. sale such as this, the buyer, in this case Benny's, would assume all risk of damage and delay in transit not caused by the seller, as per the Regulations.[3] However, we have also found that the shipper bears the responsibility for damage in transit due to faulty transit equipment *if the shipper knew of the defect in the equipment when he loaded the commodity* (emphasis added). Joe Phillips v. Wisill, Inc., 34 Agric. Dec. 763 (1975). *See also* Berwick Vegetable Cooperative v. A. G. Shore Company, 37 Agric. Dec. 1247 (1978). In this case, the record shows that Oriental Express was aware at the time of loading that there was insufficient space for proper loading, that the driver had no intention of maintaining the 34°F temperature requested, and that its blueberries would have to be off-loaded in order to effect delivery of the other blueberries in the trailer. The record shows further that Oriental Express, having knowledge of these defects, opted nevertheless to load its blueberries into the trailer for shipment to the contract destinations. We conclude, therefore, that since Oriental Express was aware at the time of loading that transportation conditions would be less than favorable to the maintenance of the blueberries in proper condition, it cannot now attempt to benefit from the existence of these conditions by claiming that they voided the warranty of suitable shipping condition.

With the warranty of suitable shipping condition remaining intact, the inspections performed promptly upon arrival at the contract destinations clearly show that the blueberries arrived abnormally deteriorated, constituting a breach of warranty by Oriental Express. Following discovery of Oriental Express's breach of warranty, Benny's faxed the "Price After Sale/Produce Marketing Agreement" detailed in Finding of Fact 6 to Oriental Express. The agreement, which set forth the terms under which the blueberries would be handled by Benny's, was promptly signed by Oriental Express's president, George Friedrich,

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[2](...continued)
remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See Pinnacle Produce, Ltd. v. Produce Products, Inc., 46 Agric. Dec. 1155 (1987); G & S Produce v. Morris Produce, 31 Agric. Dec. 1167 (1972); Lake Fruit Co. v. Jackson, 18 Agric. Dec. 140 (1959); and Haines City Citrus Growers Assn v. Robinson & Gentile, 10 Agric. Dec. 968 (1951).

[3] 7 C.F.R. § 46.43(i).

and returned to Benny's. Mr. Friedrich makes the unsworn allegation that he was coerced into signing the agreement because Benny's allegedly threatened to dump the blueberries if he refused to sign it. However, we note that if Benny's had chosen to take such ill-advised action upon Mr. Friedrich's failure to sign the agreement, Benny's actions would have constituted acceptance of the blueberries, and it would been liable to Oriental Express for the contract price less provable damages. Consequently, we find that Oriental Express has not proven that it was induced into signing the agreement by the threat of additional loss and that it must, therefore, abide by the terms contained therein.

The written agreement essentially changed the price terms of the contract to price after sale with full price protection. Although the agreement also includes the provision that Benny's would act as "collect and remit" broker, such an arrangement would create a contractual relationship between Oriental Express and the three firms that purchased the blueberries from Benny's, where none existed prior. In the absence of any evidence that the three firms acquiesced to this arrangement, we find this provision of the agreement to be invalid.

The term "price after sale" usually contemplates the parties agreeing to a price following the prompt resale of the produce. The evidence shows that after the blueberries were resold, Benny's offered a return of $3,161.00 to Oriental Express, representing a price of $4.00 per flat for the 100 flats shipped to Rock Garden, $7.00 per flat for the 464 flats shipped to Goodman, and $3.00 per flat for the 400 flats shipped to Rahll, less $1.25 per flat for freight, and $0.50 per flat for brokerage. Oriental Express claims that additional monies are due based upon Benny's agreement to seek recovery of 50% of the damages from the truck broker, as stated in the written agreement. Benny's responded to this claim with the allegation that Oriental Express effected an accord and satisfaction when it accepted Benny's check bearing the notation, "Inv 1213, 1221 (in full accord)."

In this regard, the Uniform Commercial Code § 3-311 states the following:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the

claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. . . .

With respect to part (a) above, the evidence shows that Benny's in good faith tendered payment in the amount of $3,161.00 to Oriental Express, and that this amount was intended to fully satisfy the amount due for blueberries at issue herein. The evidence shows further that at the time Oriental Express received this payment, the parties had agreed that the blueberries would be handled under price after sale terms, but had not yet settled upon a price. Therefore, Oriental Express's claim against Benny's was at that time unliquidated. Finally, the evidence shows that Oriental Express obtained payment of the amount tendered by cashing the check.

With respect to part (b) above, the evidence shows that the check tendered by Benny's bore restrictive language on its face which was intended to place Oriental Express on notice that the check was offered as payment in full for the invoices noted. Oriental Express argues that since the amount tendered did represent payment in full for invoice 1213, it believed that the notation "in full accord" was made in reference to that invoice only. However, assuming this was the case, we would expect that the notation would appear next to invoice number 1213, instead of next to the disputed invoice, number 1221, where it actually appears on the check. Regardless of its placement, however, we find that the notation is unambiguous in its reference to the transaction herein in dispute, and is sufficiently conspicuous as to have placed Oriental Express on notice that the

payment was offered in full satisfaction of both invoices.

It is therefore our finding that the check tendered by Benny's satisfies both subsections (a) and (b) of U.C.C. § 3-311, set forth above. Furthermore, Oriental Express has not shown that either of the conditions set forth under subsection (c) are applicable to this matter. Consequently, we find that Benny's has provided sufficient evidence to prove that Oriental Express accepted its payment of $3,161.00 in full satisfaction of the amount due for the blueberries billed on its invoice 1221. Accordingly, Oriental Express's claim for a balance due on this invoice should be dismissed.

Order

The complaint is hereby dismissed.

Copies of this order shall be served upon the parties.

MISCELLANEOUS ORDERS

In re: QUEEN CITY FARMS, INC.
PACA Docket No. D-97-0020.
Order Denying Petition for Reconsideration and Reopening Hearing filed July 7, 1998.

Petition to reopen hearing — Parties — Service — Petition for reconsideration.

The Judicial Officer denied Respondent's petition to reopen the hearing and petition for reconsideration. The Rules of Practice (7 C.F.R. § 1.146(a)(2)) provide that a petition to reopen the hearing may be filed at any time prior to the issuance of the decision of the Judicial Officer and Respondent's petition to reopen the hearing, filed after the issuance of the Judicial Officer's Order Denying Late Appeal, was not timely filed. Even if Respondent's petition to reopen the hearing had been timely filed, it would be denied because no hearing had been held in this proceeding prior to Respondent's filing its petition to reopen the hearing. There is no requirement in the Rules of Practice that filings in the proceeding must be served on officers, owners, and directors of a corporate respondent. The filings were properly served on the only respondent in the proceeding, Queen City Farms, Inc.

Andre Allen Vitale, for Complainant.
Victor Dahar, Manchester, New Hampshire, and Peter M. Solomon, Londonderry, New Hampshire, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on April 1, 1997.

The Complaint alleges that: (1) during the period May 1995 through November 1995, Queen City Farms, Inc. [hereinafter Respondent], failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities in the total amount of $713,638.10, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); (2) on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" (Compl. ¶ IV(b)); (3) Respondent admitted in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims* that it owes the 19 sellers referred to in

paragraph III of the Complaint at least $859,886.05 (Compl. ¶ IV(b)); and (4) the failure of Respondent to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent filed Respondent's Answer [hereinafter Answer] on May 27, 1997: (1) admitting that on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" (Answer ¶ IV); (2) admitting that Respondent states, in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, that it owes the 19 sellers referred to in paragraph III of the Complaint at least $859,886.05, but stating that, as of the date of the filing of the Answer, the total amount Respondent owes to the 19 sellers referred to in paragraph III of the Complaint may be less than the amount set forth in *Schedule F - Creditors Holding Unsecured Nonpriority Claims* (Answer ¶ IV); and (3) denying that, during the period May 1995 through November 1995, it failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities in the total amount of $713,638.10, which Respondent purchased, received, and accepted in interstate commerce and stating that the total amount of $713,638.10 cannot be verified by Respondent (Answer ¶ III).

On November 17, 1997, Complainant filed Motion for Decision Without Hearing by Reason of Admission and Supporting Memorandum [hereinafter Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Proposed Default Decision]. Respondent did not file any response to Complainant's November 17, 1997, filings. On January 6, 1998, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued Decision Without Hearing by Reason of Admissions [hereinafter Default Decision] in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) in which the ALJ: (1) found that Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848"; (2) found that Respondent has admitted in its bankruptcy pleadings that, as of November 20, 1995, it owed at least $713,638.10 for 578 lots of perishable agricultural commodities to the 19 sellers that are referred to in paragraph III of the Complaint; (3) concluded that Respondent's admitted failures to make full payment promptly for perishable agricultural commodities constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4));

and (4) ordered publication of the facts and circumstances of the violation (Default Decision).

On April 13, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] On April 29, 1998, Complainant filed Motion to Dismiss Appeal Petition. On May 5, 1998, Respondent filed Objection to the United States Department of Agriculture's Motion to Dismiss, and on May 7, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

On May 13, 1998, I issued an Order Denying Late Appeal in which I concluded that the Judicial Officer has no jurisdiction to hear Respondent's Appeal from Decision Without Hearing by Reason of Admissions [hereinafter Appeal Petition], which was filed after the Default Decision issued by the ALJ had become final. *In re Queen City Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 9-11, 22-23 (May 13, 1998).

On June 8, 1998, Respondent filed Petition for Reconsideration of Order Denying Late Appeal and for Reopening Hearing [hereinafter Petition for Reconsideration]. On June 25, 1998, Complainant filed Objections to Respondent's Petition for Reconsideration, and on June 30, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the Order Denying Late Appeal, issued May 13, 1998.

APPLICABLE STATUTORY PROVISIONS AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

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

§ 499b. Unfair conduct

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

. . . .

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

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS, INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF AGRICULTURE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

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

DEFINITIONS

. . . .

§ 46.2 Definitions.

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

. . . .

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

. . . .

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

7 C.F.R. § 46.2(aa)(5).

In addition to Respondent's request that I reconsider the Order Denying Late Appeal, Respondent requests that the hearing be reopened (Pet. for Recons. at 1). Section 1.146(a)(2) of the Rules of Practice provides that a petition to reopen the hearing may be filed at any time prior to the issuance of the decision of the Judicial Officer, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

. . . .

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

The Order Denying Late Appeal was issued May 13, 1998, and Respondent's petition to reopen the hearing was filed June 8, 1998. Therefore, Respondent's petition to reopen the hearing, filed 26 days after the issuance of the Judicial Officer's Order Denying Late Appeal, is untimely and is denied.[2]

Moreover, even if Respondent's petition to reopen the hearing had been timely filed, the petition would be denied because a petition to reopen a hearing to take further evidence may only be granted if a hearing in the proceeding in question

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[2]*See In re JSG Trading Corp.*, 57 Agric. Dec. ___, slip op. at 11 (June 1, 1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.) (denying respondent's petition to reopen the hearing because the petition to reopen the hearing was filed 57 days after the Judicial Officer's decision was issued); *In re Potato Sales Co.*, 55 Agric. Dec. 708 (1996) (Order Denying Pet. to Reopen Hearing) (denying respondent's petition to reopen the hearing because the petition to reopen the hearing was filed approximately 2 months after the Judicial Officer issued the decision).

has preceded the petition to reopen the hearing. The Rules of Practice define the word "hearing" as follows:

> **§ 1.132 Definitions.**
>
> As used in this subpart [(7 C.F.R., pt. 1, subpart H)], the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
>
> . . . .
>
> *Hearing* means that part of the proceeding which involves the submission of evidence before the Judge for the record in the proceeding.

7 C.F.R. § 1.132.

There has been no hearing in the instant proceeding. Rather, the Default Decision in this proceeding was issued by reason of admissions without hearing. Therefore, even if Respondent's petition to reopen the hearing had been timely filed, it would be denied because no hearing had been held in this proceeding prior to Respondent's filing its petition to reopen the hearing.[3]

Respondent contends that the Default Decision was improperly entered against it because Michael Litvin, a former vice president, director, and holder of 50 per centum of the outstanding stock in Respondent, did not receive a copy of the Motion for Default Decision, the Proposed Default Decision, and the Hearing Clerk's November 18, 1997, letter transmitting the Motion for Default Decision and the Proposed Default Decision (Pet. for Recons. at 2-3). Moreover, Respondent contends that the Order Denying Late Appeal should be set aside and its Appeal Petition should be considered because Mr. Litvin did not receive a copy of the Default Decision and the Hearing Clerk's letter transmitting the Default Decision, until March 14, 1998; and thus, Respondent's Appeal Petition was timely filed (Pet. for Recons. at 4-5).

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[3]*See In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418, 1434-35 (1996) (Order Denying Late Appeal) (stating that a petition to reopen a hearing and take further evidence may only be granted if a hearing in the proceeding in question has preceded the petition to reopen the hearing); *In re Ow Duk Kwon*, 55 Agric. Dec. 78, 83 n.2 (1996) (Order Denying Late Appeal as to Ow Duk Kwon) (stating that while the Rules of Practice do provide for reopening a hearing to take further evidence, no hearing in the proceeding had been held which could be reopened).

As an initial matter, Mr. Litvin is not a party to this proceeding. The Rules of Practice identify parties to a proceeding, as follows:

§ 1.132 Definitions.

As used in this subpart [(7 C.F.R., pt. 1, subpart H)], the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

. . . .

Complainant means the party instituting the proceeding.

. . . .

Respondent means the party proceeded against.

7 C.F.R. § 1.132.

The record establishes that the party who instituted this proceeding is the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, and the only party proceeded against is Queen City Farms, Inc. Mr. Litvin is not a party to this proceeding, and there is no requirement in the Rules of Practice that filings in this proceeding must be served on officers, owners, and directors of a corporate Respondent.

Moreover, I find that Respondent was served with the Motion for Default Decision and the Proposed Default Decision and that Respondent was served with the Default Decision on January 10, 1998.

Section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) provides that proposed decisions, motions for adoption of proposed decisions, and final decisions are deemed to be received by a party on the date of delivery by certified mail to the last known principal place of business of the attorney or representative of a party, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

. . . .

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual. . . .

7 C.F.R. § 1.147(c)(1).

The record reveals that Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on or about April 7, 1997.[4] Respondent filed a timely Answer. The Answer indicates that Respondent was represented by Peter M. Solomon, Esq., of Boutin & Solomon, P.A., Londonderry, New Hampshire. However, Mr. Solomon filed letters on September 30, 1997, and October 6, 1997, respectively, stating that he was withdrawing from representation of Respondent and that Mr. Victor Dahar is the only person who can represent Respondent, as follows:

September 23, 1997

Ms. Linda Hamlin
US Department of Agriculture
Room 2446, South Building
Washington, DC 20250-1400

Re: **Queen City Farms, Inc.**
PACA Docket #: D-97-0020

Dear Ms. Hamlin:

It is my obligation to withdraw from representation of Queen City Farms, Inc. In my attempt to represent Michael Litvin, a former

[4]Letter from Chris Marchand, Claims and Inquiries, United States Postal Service, to Joyce A. Dawson, Hearing Clerk, United States Department of Agriculture, dated June 10, 1997.

Shareholder of that company, I raised defenses on behalf of Queen City Farms, Inc. which has gone through a bankruptcy. I believe that the only person who can appropriately represent Queen City Farms, Inc. would be the United States Bankruptcy Court Appointed Trustee. The Trustee is Victor Dahar, Esquire of 20 Merrimack Street, Manchester, New Hampshire 03101.

Thank you for your courtesy and cooperation.

Very truly yours,
/s/
Peter M. Solomon

Letter dated September 23, 1997, from Peter M. Solomon to Ms. Linda Hamlin, filed September 30, 1997.

September 30, 1997

Joyce A. Dawson, Hearing Clerk
US Department of Agriculture
OALJ, Room 1081
South Building
Washington, DC 20250-9200

Re: **Queen City Farms, Inc.**
PACA Docket #: D-97-0020

Dear Clerk Dawson:

It is my obligation to withdraw from representation of Queen City Farms, Inc. In my attempt to represent Michael Litvin, a former Shareholder of that company, I raised defenses on behalf of Queen City Farms, Inc. which has gone through a bankruptcy. I believe that the only person who can appropriately represent Queen City Farms, Inc. would be the United States Bankruptcy Court Appointed Trustee. The Trustee is Victor Dahar, Esquire of 20 Merrimack Street, Manchester, New Hampshire 03101.

In addition, I am also withdrawing the Answer which was filed on or

about May 23, 1997 on behalf of Queen City Farms, Inc.

Thank you for your courtesy and cooperation.

Very truly yours,
/s/
Peter M. Solomon

Letter dated September 30, 1997, from Peter M. Solomon to Joyce A. Dawson, filed October 6, 1997.

Moreover, Respondent states in its Petition for Reconsideration that "[t]he Bankruptcy Trustee . . . acted . . . as the representative of the Queen City Farms, Inc. estate, by managing the estate's funds for the benefit of creditors of the estate." (Pet. for Recons. at 4 (footnote omitted).)

On November 17, 1997, Complainant filed Motion for Default Decision and Proposed Default Decision. A copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a copy of a letter dated November 18, 1997, from the Hearing Clerk, were served on Mr. Victor Dahar by certified mail on November 24, 1997.[5]

Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in 7 C.F.R. § 1.139.

On January 6, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ filed the Default Decision. A copy of the Default Decision and a copy of a letter dated January 6, 1998, from the Hearing Clerk, were served on Mr. Victor Dahar by certified mail on January 10, 1998.[6] Respondent failed to file an appeal with the Hearing Clerk within the required time, and on February 20, 1998, the Hearing Clerk issued a Notice of Effective Date of Decision Without Hearing by Reason of Admissions, which was served by

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[5]See Domestic Return Receipt for Article Number P 093 033 773, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by D. Marlen, and stating that the date of delivery is November 24, 1997.

[6]See Domestic Return Receipt for Article Number P 093 033 798, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by Victor Dahar, and stating that the date of delivery is January 10, 1998.

certified mail on Mr. Victor Dahar on February 26, 1998.[7] On April 13, 1998, Respondent filed Respondent's Appeal Petition, which I rejected as untimely. *In re Queen City Farms, Inc., supra.*

I find no basis for Respondent's contentions that Respondent was not served with a copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a letter dated November 18, 1997, from the Hearing Clerk, and that Respondent was not served with a copy of the Default Decision and a copy of a letter dated January 6, 1998, from the Hearing Clerk, until March 14, 1998.

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

Order

Respondent's Petition for Reconsideration of Order Denying Late Appeal and for Reopening Hearing is denied. The Decision Without Hearing by Reason of Admissions, filed by Administrative Law Judge Edwin S. Bernstein on January 6, 1998, is the final Decision and Order in this proceeding.

In re: JSG TRADING CORP., GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES, ANTHONY GENTILE, AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.
In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.
Stay Order as to JSG Trading Corp. filed July 30, 1998.

Andrew Y. Stanton, for Complainant.
John V. Esposito and Mel Cottone, Hilton Head Island, South Carolina, and Mark C.H. Mandell, Annandale, New Jersey, for Respondent JSG Trading Corp.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

On March 2, 1998, I issued a Decision and Order as to JSG Trading Corp.,

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[7]See Domestic Return Receipt for Article Number P 368 420 969, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by D. Marlen, and stating the delivery date is February 26, 1998.

Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile, in which I concluded, *inter alia*, that JSG Trading Corp. [hereinafter Respondent] committed willful, flagrant, and repeated violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and revoked Respondent's PACA license. *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 659-60, 684, (1998). On April 28, 1998, Respondent filed a petition for reconsideration, which I denied. *In re JSG Trading Corp.*, 57 Agric. Dec. 710 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.).

On July 29, 1998, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Motion for a Stay Order as to Respondent JSG Trading Corp. [hereinafter Motion for Stay Order] stating that "[o]n July 24, 1998, Respondent JSG Trading Corp. filed a Petition for Review of the June 1, 1998, Order with the United States Court of Appeals for the District of Columbia Circuit, No. 98-1342" and requesting "that the June 1, 1998, Order pertaining to Respondent JSG Trading Corp. be stayed until the appeal is resolved." Moreover, Complainant asserts in his Motion for Stay Order that his counsel, Mr. Andrew Y. Stanton, "has been informed by Counsel for Respondent JSG Trading Corp. that it also desires a stay of the June 1, 1998, Order."

On July 29, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Complainant's Motion for Stay Order.

Complainant's Motion for Stay Order is granted. The Order issued in this proceeding on March 2, 1998, as it relates to Respondent, *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640 (1998), which Order was reinstated with allowance for time passed, *In re JSG Trading Corp.*, 57 Agric. Dec. 710 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Order Lifting Stay filed August 21, 1998.

Jane McCavitt, for Complainant.
Respondents, pro se.
Order issued by William G. Jenson, Judicial Officer.

On November 6, 1997, I issued a Decision and Order concluding that Tolar Farms and/or Tolar Sales, Inc. [hereinafter Respondents], willfully, repeatedly, and flagrantly violated section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA], and ordered the publication of the facts and circumstances set forth in the Decision and Order. *In re Tolar Farms*, 56 Agric. Dec. 1865, 1881 (1997). On November 25, 1997, Respondents filed a petition for reconsideration, which I denied. *In re Tolar Farms*, 57 Agric. Dec. 775 (1998) (Order Denying Pet. for Recons.).

On March 4, 1998, Respondents filed a letter requesting "a stay to give the evidence to a higher court" [hereinafter Respondents' Petition for a Stay Order]. On March 4, 1998, Jane McCavitt, attorney for the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], informed me by telephone that Complainant did not oppose Respondents' Petition for a Stay Order, and on March 5, 1998, I granted Respondents' Petition for a Stay Order. *In re Tolar Farms*, 57 Agric. Dec. 790 (1998) (Stay Order).

On July 23, 1998, Complainant filed Motion to Lift Stay Order which states, as follows:

> On March 4, 1998[, R]espondents filed a notice in letter form requesting that a stay order be granted because [R]espondents intended to appeal the Judicial Officer's Decision and Order and his Order Denying Petition for Reconsideration. A Stay Order was issued on March 5, 1998.
>
> To date, [R]espondents have not submitted any evidence that an appeal petition has been filed.
>
> Therefore, Complainant hereby requests that the Stay Order be lifted and the previous orders issued in this case become final.

On August 14, 1998, Respondents filed a response to Complainant's Motion

to Lift Stay Order which states, as follows:

> We have sent all the proper paper work to Atlanta.[] We never received any information on where to file an appeal. We had to research all that on our own. We still want a day in court where we can tell our side of the story. We think we have been good for the industry and will continue to be good for the produce industry.
>
> We feel if you ask the produce industry, not people in offices outside the industry[,] they will tell you the same.
>
> The Atlanta court of appeals will let us know after [it has] looked at all the paper work.
>
> We are faxing this to keep the Stay Order active.

On August 14, 1998, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's Motion to Lift Stay Order.

The United States Court of Appeals for the Eleventh Circuit has no record of Respondents' having sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). I telephoned Respondents on two occasions after I received the record from the Hearing Clerk for a ruling on Complainant's Motion to Lift Stay Order and asked that Respondents immediately send me, by telefax, evidence of their having sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). Respondents have failed to provide any evidence that they sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997).

For the forgoing reasons, Complainant's Motion to Lift Stay Order is granted. The Stay Order issued March 5, 1998, *In re Tolar Farms*, 57 Agric. Dec. 790 (1998), is lifted, and the Order issued in *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997) ordering the publication of the facts and circumstances set forth in the November 6, 1997, Decision and Order, is effective 65 days after service on Respondents of this Order Lifting Stay.

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Order Denying Request for Stay filed September 22, 1998.

Jane McCavitt, for Complainant.
Respondents, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On November 6, 1997, I issued a Decision and Order concluding that Tolar Farms and/or Tolar Sales, Inc. [hereinafter Respondents], willfully, repeatedly, and flagrantly violated section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA], and ordered the publication of the facts and circumstances set forth in the Decision and Order. *In re Tolar Farms*, 56 Agric. Dec. 1865, 1881 (1997). On November 25, 1997, Respondents filed a petition for reconsideration, which I denied. *In re Tolar Farms*, 57 Agric. Dec. 775 (1998) (Order Denying Pet. for Recons.).

On March 4, 1998, Respondents filed a letter requesting "a stay to give the evidence to a higher court" [hereinafter Petition for a Stay Order]. On March 4, 1998, Jane McCavitt, attorney for the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], informed me by telephone that Complainant did not oppose Respondents' March 4, 1998, Petition for a Stay Order, and on March 5, 1998, I granted Respondents' Petition for a Stay Order. *In re Tolar Farms*, 57 Agric. Dec. 790 (1998) (Stay Order).

On July 23, 1998, Complainant filed Motion to Lift Stay Order, which I granted on August 21, 1998, based on the lack of any record of Respondents' having sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). *In re Tolar Farms*, 57 Agric. Dec. ___ (Aug. 21, 1998) (Order Lifting Stay).

On September 3, 1998, Respondents requested that I issue a stay order, and in support of their oral request, Respondents sent me proof of delivery of a package from Tony Tolar to the United States Court of Appeals for the Eleventh Circuit on August 14, 1998.[1] On September 14, 1998, Respondents informed me by telephone that they had received a letter from the United States Court of Appeals for the Eleventh Circuit stating that they had not filed a notice of appeal with that court. Respondents then sent me a facsimile of the letter which they

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[1]See letter, dated September 2, 1998, from Federal Express Corporation to Ruth Ann Fralye, filed September 3, 1998.

had received from the United States Court of Appeals for the Eleventh Circuit, which states as follows:

September 4, 1998

Mr. Tony Tolar
3000 Case Road
LaBelle, Florida 33935

RE: Money Order j/a/o $100.00

Dear Mr. Tolar:

The enclosed check in the amount of $100.00 was received by us for appellate docket and filing fees. The above referenced check is being returned to you since it does not appear that the notice of appeal was filed in this court. Due to lack of documentation, we are unable to process it. Please send a copy of the petition, along with the check, in order for us to identify this docketing.

Sincerely,

THOMAS K. KAHN, Clerk

By: Patricia F. Thomas
Deputy Clerk

The record reveals that Respondents have attempted to seek judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). However, the record also reveals that Respondents have not filed a petition for review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997).

For the forgoing reasons, Respondents' September 3, 1998, oral request for a stay order is denied.[2]

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[2]On September 21, 1998, Mr. Tony Tolar, one of the principals of Tolar Farms and Tolar Sales, Inc., advised me, by telephone, that Respondents intend to file a petition for review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997), in the future. I advised Mr. Tolar that I would deny Respondents' September 3,

(continued...)

In re: TOLAR FARMS AND/OR TOLAR SALES, INC.
PACA Docket No. D-96-0530.
Order Granting Stay filed September 30, 1998.

Jane McCavitt, for Complainant.
Respondents, Pro se.
Order issued by William G. Jenson, Judicial Officer.

On November 6, 1997, I issued a Decision and Order concluding that Tolar Farms and/or Tolar Sales, Inc. [hereinafter Respondents], willfully, repeatedly, and flagrantly violated section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA], and ordered the publication of the facts and circumstances set forth in the Decision and Order. *In re Tolar Farms*, 56 Agric. Dec. 1865, 1881 (1997). On November 25, 1997, Respondents filed a petition for reconsideration, which I denied. *In re Tolar Farms*, 57 Agric. Dec. 775 (1998) (Order Denying Pet. for Recons.).

On March 4, 1998, Respondents filed a letter requesting "a stay to give the evidence to a higher court" [hereinafter Petition for a Stay Order]. On March 4, 1998, Jane McCavitt, attorney for the Acting Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], informed me by telephone that Complainant did not oppose Respondents' March 4, 1998, Petition for a Stay Order, and on March 5, 1998, I granted Respondents' Petition for a Stay Order. *In re Tolar Farms*, 57 Agric. Dec. 790 (1998) (Stay Order).

On July 23, 1998, Complainant filed Motion to Lift Stay Order, which I granted on August 21, 1998, based on the lack of any record of Respondents' having sought judicial review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997). *In re Tolar Farms*, 57 Agric. Dec. ___ (Aug. 21, 1998) (Order Lifting Stay).

On September 3, 1998, Respondents requested that I issue a stay order, and in support of their oral request, Respondents sent me proof of delivery of a package from Tony Tolar, one of the principals of Tolar Farms and Tolar Sales, Inc., to the United States Court of Appeals for the Eleventh Circuit on August 14, 1998. However, on September 14, 1998, Respondents informed me by telephone that they had received a letter, dated September 4, 1998, from the United States Court of Appeals for the Eleventh Circuit stating that Respondents had not filed a notice

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[2](...continued)
1998, oral request for a stay order, but that Respondents would not be precluded by the denial from filing another request for a stay order. I urged Mr. Tolar to attach to any future request for stay order, evidence that a petition for review had actually been filed.

of appeal with that court. Based on the September 4, 1998, letter from the United States Court of Appeals for the Eleventh Circuit to Respondents, I denied Respondents' September 3, 1998, request for a stay and urged Respondents to attach to any future request for a stay order, evidence that a petition for review has actually been filed. *In re Tolar Farms*, 57 Agric. Dec. ___ (Sept. 22, 1998) (Order Denying Request for Stay).

On September 28, 1998, Respondents sent me a facsimile of the letter, dated September 25, 1998, which they received from the United States Court of Appeals for the Eleventh Circuit, which indicates that Respondents have now filed a petition for review of *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997).[1]

For the foregoing reasons, Respondents' September 28, 1998, request for a stay order is granted. The Order issued in this proceeding on November 6, 1997, *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: H. SCHNELL & COMPANY, INC.
PACA Docket No. D-97-0024.
Remand Order filed September 17, 1998.

Due process — Conference calls — Evidence — Admissions — Opportunity for hearing — Remand order.

The Judicial Officer vacated Administrative Law Judge Baker's (ALJ) Decision Without Hearing and remanded the case to the ALJ to provide Respondent with an opportunity for an oral hearing. While admissions made by a party during a prehearing conference can constitute an adequate basis for findings of fact in a decision and the issuance of a default decision, Respondent's attorney's *indication*, during a conference call, that Respondent would not be able to pay all of its produce sellers by the date of the hearing, appears to be contrary to Respondent's position, taken during the April 29, 1998, and May 13, 1998, conference calls, that it does not concede the amounts which remain unpaid. Moreover, the ALJ states in the Decision Without Hearing that Respondent declined to admit an inability to pay. Under these circumstances, Respondent's attorney's *indication* does not constitute an admission of the material allegations of the Complaint or an admission that Respondent would be unable to make full payment of amounts owed to produce sellers by the date of the hearing. Accordingly, the Decision Without Hearing was not properly issued, and Respondent was deprived of its rights under the due process clause of the Fifth Amendment to the United States Constitution.

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[1]Specifically, the letter, dated September 25, 1998, from the United States Court of Appeals for the Eleventh Circuit states that Respondents' docketing fee has been received and that their case is docketed as "Case No.: 98-5456."

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, New York, New York, for Respondent.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Remand Order issued by William G. Jenson, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on May 29, 1997.

The Complaint alleges that: (1) H. Schnell & Company, Inc. [hereinafter Respondent], during the period January 22, 1995, through April 14, 1996, failed to make full payment promptly to 39 sellers of the agreed purchase prices in the total amount of $2,435,869.17 for 317 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce (Compl. ¶ III); (2) Respondent, during the period September 17, 1995, through April 2, 1996, failed to make full payment promptly to 9 consignors net proceeds in the total amount of $1,103,343.19 derived from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in interstate and foreign commerce (Compl. ¶ IV); and (3) by reason of the facts alleged in paragraphs III and IV of the Complaint, Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶ V). Complainant requests: (1) a finding that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) an order that such violations be published (Compl. ¶ V(2)).

Respondent filed an Answer on June 20, 1997, denying the material allegations of the Complaint and requesting a hearing.

On November 14, 1997, Complainant filed Motion to Set Oral Hearing stating that "the issues have been joined, [C]omplainant requests that a pre-hearing conference be held and that this case be assigned a date certain for oral hearing." On January 21, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] filed Designation of Oral Hearing Date stating that "[p]ursuant to prehearing conference call of January 20, 1998, the oral hearing herein is to commence at 9 a.m., local time, on May 20, 1998, in New York City."

On March 17, 1998, Complainant filed Complainant's Request for a Conference Call Regarding Respondent's Payment of its Produce Indebtedness and

Motion for a Decision Without Hearing [hereinafter Motion for Conference Call and Default Decision] stating that Complainant believes that it is highly unlikely that Respondent will be able to make full payment of the debt for produce alleged in the Complaint by the date of the hearing, as follows:

> . . . [C]omplainant requests a conference call to determine whether [R]espondent will be able to make full payment of its produce indebtedness and will be in full compliance with the PACA by the date of the hearing. If it is determined that [R]espondent will be unable to make full payment of its produce indebtedness or be in full compliance with the PACA by the May 20, 1998, hearing date, an order should be issued finding that [R]espondent has committed willful, repeated and flagrant violations of the PACA and that the finding be published.
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> . . . .
>
> In the case at hand, it is [C]omplainant's belief that [R]espondent is claiming to have made partial payment of the amounts alleged in the [C]omplaint, although well over $1,000,000 remains past due and unpaid. Complainant believes it highly unlikely that [R]espondent will be able to make full payment of the amount alleged in the [C]omplaint by the date of the hearing. . . . [A] conference call should be held to determine if there is a reasonable likelihood that [R]espondent will be able to pay off the amounts owed by the date of the hearing, May 20, 1998. If, at the conference call, [R]espondent indicates that it will not be able to make full payment of the amounts alleged in the [C]omplaint or will not be in full compliance with the PACA by the May 20, 1998, hearing date, an order such as the one appended should be issued finding that [R]espondent has committed willful, repeated and flagrant violations of the PACA and ordering that the finding be published.

One copy each of Complainant's Motion for Conference Call and Default Decision and Complainant's proposed Decision Without Hearing were served on Respondent by certified mail on March 27, 1998.[1] Respondent failed to file objections to Complainant's proposed Decision Without Hearing within 20 days after service, as provided in 7 C.F.R. § 1.139. However, two conference calls were

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[1]See Return Receipt for Article Number P 093 143 267.

conducted on April 29, 1998, and May 13, 1998, respectively (Decision Without Hearing at 2).

On May 14, 1998, Complainant filed a motion for immediate issuance of Complainant's proposed Decision Without Hearing in which Complainant asserts that Respondent has no expectation of making full payment of the debt for produce alleged in the Complaint by the date of the hearing, as follows:

> Complainant hereby sets forth the current status of Respondent's produce indebtedness for the transactions alleged in the [C]omplaint, as agreed during a May 13, 1998, telephone conference call involving Administrative Law Judge Dorothea A. Baker, Paul T. Gentile, attorney for Respondent, and Andrew Y. Stanton, Attorney for Complainant. . . . Complainant asserts that Respondent currently owes $1,557,776.93 to 34 of the 45 sellers and consignors for the transactions set forth in the [C]omplaint.
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> . . . .
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> During the conference call, Complainant's counsel asserted that he had been advised by Respondent's counsel of payments that Respondent . . . had made to its produce creditors. . . . Complainant's counsel stated that he had deducted the payments allegedly made to the produce creditors in the [C]omplaint and found that Respondent currently owed approximately 1.5 million dollars for the transactions alleged in the [C]omplaint. . . .
>
> . . . .
>
> As Respondent currently owes $1,557,776.93 to 34 of the 45 sellers and consignors for the transactions set forth in the [C]omplaint and as Respondent has no expectation of making full payment by the date set for hearing in this matter, a Decision in the form of the proposed Decision Without Hearing filed with Complainant's Request for a Conference Call Regarding Respondent's Payment of its Produce Indebtedness and Motion for a Decision Without Hearing should immediately be issued finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA, and directing that such finding be published.

Current Status of Respondent's Produce Indebtedness for the Transactions Alleged in the Complaint at 1-3, 5.

Later, on May 14, 1998, the ALJ filed an order canceling the hearing scheduled to commence on May 20, 1998 (Cancellation of Oral Hearing) and a Decision Without Hearing in which the ALJ concluded, based on the April 29, 1998, and the May 13, 1998, conference calls, that Respondent had not made full payment of the amounts alleged in the Complaint to be owed to produce sellers and consignors and would not be able to make full payment of the amounts alleged in the Complaint to be owed to produce sellers and consignors by the date of the scheduled hearing, as follows:

> Upon a motion filed by [C]omplainant, a conference call was held at which [R]espondent's attorney indicated that, by the date of the hearing, May 20, 1998, [R]espondent would still owe in excess of $1,000,000 to produce creditors for the purchases and consignments set forth in the [C]omplaint. . . .
>
> The Motion for a Decision Without Hearing, filed by Complainant on March 17, 1998, requested a [c]onference call in connection therewith. On April 29, 1998, and May 13, 1998, such conference calls took place. As a result thereof[,] Respondent stated its position that it is entitled to an oral hearing because, prior to the proof which Complainant would be required to put forth at an oral hearing, the Respondent will not concede the amounts which remain unpaid and that absent an oral hearing[,] it is denied due process because of the employment restrictions which would result from a finding that Respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA.
>
> The Complainant, on May 14, 1998, filed a document indicating that taking into account the amounts that Respondent indicated had been paid as of May 13, 1998, the Respondent still owed $1,557,776.93 to 34 of the 45 sellers and consignors in the Complaint. Complainant filed no Motion for admissions, but, from the [c]onference calls[,] I conclude that it is highly unlikely that Respondent will be able to make full payment of the amounts owed by the date of the hearing, six days away. Although Respondent declines to formally admit this inability to pay, it appears that an oral hearing would serve no useful purpose and that Complainant's Motion for Decision Without Hearing should be, and is hereby, granted.

Decision Without Hearing at 2-3.

The ALJ: (1) found that Respondent, during the period January 22, 1995,

through April 14, 1996, failed to make full payment promptly to 39 sellers for purchases of 317 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of $2,435,869.17; (2) found that Respondent, during the period September 17, 1995, through April 2, 1996, failed to make full payment promptly to nine consignors of net proceeds in the amount of $1,103,343.19 resulting from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in interstate or foreign commerce; (3) found that, by the date of the hearing, May 20, 1998, Respondent would still owe an amount of $1,557,776.93 to produce creditors for the purchases and consignments set forth in the Complaint; (4) concluded that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) ordered the publication of the findings (Decision Without Hearing at 4-5).

On July 16, 1998, Respondent appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] On July 31, 1998, Complainant filed Complainant's Response to Respondent's Appeal, and on September 3, 1998, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, the Decision Without Hearing is vacated and the proceeding is remanded to the ALJ to provide Respondent with an opportunity for an oral hearing.

Respondent states in Respondent's Appeal that the ALJ's Decision Without Hearing was rendered without affording Respondent an oral hearing; thereby denying Respondent due process.

I agree with Respondent's contention that the failure to provide Respondent with an opportunity for a hearing in this proceeding constitutes a denial of due process.

Section 8(a) of the PACA (7 U.S.C. § 499h(a)) provides that the Secretary of Agriculture's determination that a commission merchant, dealer, or broker has violated any provision of section 2 of the PACA (7 U.S.C. § 499b) must be made in accordance with section 6 of the PACA (7 U.S.C. § 499f (Supp. II 1996)), as follows:

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

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. § 499h(a).

Section 6(c)(2) of the PACA (7 U.S.C. § 499f(c)(2) (Supp. II 1996)) provides that the Secretary of Agriculture must afford the person against whom a disciplinary action for a violation of the PACA is instituted an opportunity for a hearing, as follows:

§ 499f. Complaints, written notifications, and investigations

. . . .

(c) Investigation of complaints and notifications

. . . .

(2) Issuance of complaint by Secretary; process

In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business. . . .

7 U.S.C. § 499f(c)(2) (Supp. II 1996).

However, a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held.[3] Therefore, a decision without hearing, based upon a respondent's admission that the respondent has failed to make full payment promptly for perishable agricultural commodities in accordance with the PACA, as alleged in the complaint, generally is not set aside.[4] However, on rare occasions default decisions have been set aside for good cause shown or where the complainant did

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[3]*Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating that the due process clause does not require an agency hearing where there is no disputed issue of material fact); *Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir.) (stating that an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 117 S. Ct. 282 (1996); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating that an agency may ordinarily dispense with a hearing when no genuine dispute exists); *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 (D.C. Cir. 1986) (rejecting petitioner's contention that the Federal Energy Regulatory Commission's failure to hold an evidentiary hearing denied petitioner procedural due process and stating that since no material factual dispute exists, the Federal Energy Regulatory Commission was not required to hold a hearing); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985) (stating that a request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held), *cert. denied*, 475 U.S. 1123 (1986); *United States v. Cheramie Bo-Truc # 5, Inc.*, 538 F.2d 696, 698 (5th Cir. 1976) (stating that even when a statute mandates an adjudicatory proceeding, neither that statute, nor due process, nor the Administrative Procedure Act requires an agency to conduct a meaningless evidentiary hearing when the facts are undisputed); *Independent Bankers Ass'n. of Georgia v. Board of Governors*, 516 F.2d 1206, 1220 (D.C. Cir. 1975) (stating that the case law in this circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose); *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971) (stating that it is settled law that when no fact question is involved or the facts are agreed, an agency hearing is not required); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (stating that no agency hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law).

[4]*See In re Tolar Farms*, 56 Agric. Dec. 1865, 1877-78 (1997) (stating that in view of respondents' answer and respondents' promissory notes evidencing failure to make prompt payment, there is no material issue of fact that warrants holding a hearing); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (stating that in view of respondent's admissions in the documents it filed in a bankruptcy proceeding, there is no material issue of fact that warrants holding a hearing); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1413 (1995) (stating that the administrative law judge correctly held that a hearing was not required where the record, including respondent's bankruptcy documents, shows that respondent has failed to make full payment exceeding a *de minimis* amount), *appeal dismissed*, No. 95-70906 (9th Cir. Nov. 8, 1996).

not object.[5] I find Respondent's constitutional challenge to the proceeding sufficiently persuasive to warrant my vacating the Decision Without Hearing and remanding the proceeding to the ALJ to afford Respondent an opportunity for a hearing.

The Decision Without Hearing is based on Respondent's attorney's indication during a conference call that, by May 20, 1998, the date of the then-scheduled hearing, Respondent would still owe in excess of $1,000,000 to produce sellers for the purchases and consignments of perishable agricultural commodities listed in the Complaint (Decision Without Hearing at 2). However, the Decision Without Hearing also states that Respondent took the position during the April 29, 1998, and May 13, 1998, conference calls, that it is entitled to an oral hearing because, prior to the proof which Complainant is required to introduce at an oral hearing, Respondent does not concede the amounts which remain unpaid (Decision Without Hearing at 2-3).

While oral admissions made by a party during a prehearing conference may, in unusual circumstances, constitute an adequate basis for findings of fact in a decision and the issuance of a default decision,[6] I find that, in order to constitute

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[5]*See In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the PACA had lapsed before service was attempted) (Remand Order), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer) (Order Vacating Default Decision and Remanding Proceeding), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because complainant had no objection to respondent's motion for remand) (Remand Order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (setting aside a default decision and accepting a late-filed answer because complainant did not object to respondent's motion to reopen after default) (Order Reopening After Default).

[6]*See In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (stating that where a respondent admitted in its answer that it failed to pay at least one produce seller in full, the administrative law judge should determine through a prehearing conference whether the respondent admits owing more than a *de minimis* amount for perishable agricultural commodities, in which case a hearing would not be necessary) (Ruling on Certified Question); *In re Fava & Company, Inc.*, 46 Agric. Dec. 79 (1984) (stating that where a respondent admitted in its bankruptcy petition that it owes most of sums alleged in the complaint and since it is so unlikely that produce sellers expressly agreed to a 15-month delayed payment, the administrative law judge should determine through a prehearing conference whether, at the time that the contracts for produce were made, the respondent's produce sellers expressly agreed to delayed payment) (Ruling on

(continued...)

a basis for findings of fact and a default decision, the oral statements relied upon during the conference call must clearly constitute an admission of the material allegations of the complaint. The statements made by Respondent's attorney's do not meet this criterion. First, the ALJ does not refer to an admission made by Respondent, but rather describes Respondent's attorney's statements as an *indication* that, by the date of the hearing, Respondent would owe in excess of $1,000,000 to produce creditors for the purchases and consignments set forth in the Complaint (Decision Without Hearing at 2). Second, Respondent's attorney's *indication* appears to be contrary to Respondent's position, which position Respondent took during the conference call, that it would not concede amounts which remain unpaid (Decision Without Hearing at 3). Finally, although the ALJ issued the Decision Without Hearing based on Respondent's attorney's indication during a conference call that Respondent would not be able to make full payment of the amounts owed to produce sellers by the date of the hearing, the ALJ states that "Respondent declines to formally admit this inability to pay" (Decision Without Hearing at 3). Under these circumstances, I do not find that the record clearly establishes that Respondent's attorney's *indication* constitutes an admission of the material allegations of the Complaint or an admission that Respondent would be unable to make full payment of amounts owed to produce sellers by the date of the hearing.

Accordingly, the Decision Without Hearing, filed May 14, 1998, was not properly issued in this proceeding, and Respondent was deprived of its rights under the due process clause of the Fifth Amendment to the United States Constitution.

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

Order

The Decision Without Hearing, filed on May 14, 1998, is vacated, and this proceeding is remanded to the ALJ to afford Respondent an opportunity for a hearing.

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[6](...continued)
Certified Question); *but cf. In re Rex Kneeland*, 50 Agric. Dec. 1571, 1573 (1991) (stating that under the Rules of Practice, findings of fact cannot be based on "evidence" adduced during a telephone conference).

DEFAULT DECISIONS

In re: BOBBY E. ROBERTSON, d/b/a BOBBY ROBERTSON PRODUCE.
PACA Docket No. D-98-0009.
Decision and Order filed April 20, 1998.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act", instituted by a Complaint filed on January 2, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1994 through December 1996, respondent failed to make full payment promptly to 10 sellers in the total amount of $426,170.11 for 42 lots of perishable agricultural commodities it purchased, received and accepted in interstate commerce.

A copy of the Complaint was mailed to the respondent by certified mail on January 2, 1998, returned unclaimed on February 6, 1998, and was mailed again by regular mail on February 10, 1998. This complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Bobby Robertson, d/b/a Bobby Robertson Produce, was a corporation organized and existing under the laws of the State of Alabama. Its business address was 414 Finley Avenue, Birmingham, Alabama 35207. Its mailing address was Route One, Box 2595, Oneonta, Alabama 35121.

2. At all times material herein, respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 950699 was issued to respondent on February 9, 1995. This license terminated on February 9, 1997, when respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of December 1994 through December 1996, respondent purchased, received and accepted, in interstate commerce from 10 sellers, 42 shipments of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $426,170.11.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 16, 1998.-Editor]

In re: STEPHEN WERNER.
PACA Docket No. D-98-0022.
Decision and Order filed July 8, 1998.

Default — Failure to file answer — Failure to make full payment promptly — Willful, flagrant, and repeated violations — Operating without a license.

Andre Vitale, for Complainant.
Thomas Pragies, Garden City, NY, for Respondent.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This notice to show cause and disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter the PACA, was instituted on June 4, 1998 by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, by the filing of a Notice to Show Cause and Complaint alleging that Respondent is unfit to engage in the business of a commission merchant, dealer, or broker, because he has engaged in practices of a character prohibited by the PACA, and has committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices, in the total amount of $309,664.55, to 13 sellers for 69 lots of perishable agricultural commodities which he purchased, received, and accepted in interstate and foreign commerce between June 28, 1996, and May 1, 1998. Respondent was served with the Notice to Show Cause and Complaint and did not file an answer within the time period required by section 1.136 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.136), hereinafter the Rules of Practice.

The period for filing a timely answer has elapsed and Complainant has filed a motion for the issuance of a default decision. Accordingly, the following Decision Without Hearing By Reason of Default is issued without further investigation or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Stephen Werner, herein referred to as Respondent, is an individual with a business mailing address of 41 Leeside Drive, Great River, New York 11739.

2. Pursuant to the licensing provisions of the PACA, license number 960900 was issued to Respondent on February 22, 1996, but was terminated on February 22, 1998, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required license renewal fee.

3. After Respondent's license terminated, he continued to buy and sell perishable agricultural commodities in wholesale or jobbing quantities in interstate commerce without a valid or effective PACA license. At all times material herein, Respondent has operated subject to the PACA.

4. As set forth in section IV of the Notice to Show Cause and Complaint, Respondent failed to make full payment promptly of the agreed purchase prices, in the total amount of $309,664.55, to 13 sellers for 69 lots of perishable agricultural commodities which he purchased, received, and accepted in interstate and foreign commerce between June 28, 1996, and May 1, 1998.

5. On May 6, 1998, Respondent submitted a complete application for a PACA license. Complainant determined that Respondent is unfit to engage in the business of a commission merchant, dealer, or broker, because he has engaged in practices of a character prohibited by the PACA, and withheld the issuance of a PACA license to Respondent, pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)).

Conclusions

1. Respondent operated subject to the PACA without having a valid or effective license.

2. Respondent's failures to make full payment promptly for produce purchases, as set forth in Finding of Fact 4, constitute wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

3. Respondent's actions of operating subject to the PACA without a license and failing to make full payment promptly for produce purchases are practices of a character prohibited by the PACA. Therefore, Respondent is unfit to be licensed under the PACA.

Accordingly, the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

The denial of the Respondent's application for a license is upheld.

This Decision and Order 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 sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 17, 1998. Editor]

In re: FARM FRESH PRODUCE, INC.
PACA Docket No. D-97-0010.
Decision and Order filed July 7, 1998.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), was instituted on December 2, 1996, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, by the filing of a complaint alleging that Respondent wilfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly of the purchase prices, in the total amount of $773,340.16, to 37 sellers for 294 shipments of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce between October 1993 and July 1996. The complaint requests a finding that Respondent has committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations of the PACA be published.

Respondent was served with the complaint on December 6, 1996 and did not file an answer within the time required by section 1.136 of the Rules of Practice governing this proceeding (7 C.F.R. § 1.136). As a result of the Respondent's failure to file a timely answer, Complainant filed a motion for the issuance of a Decision Without Hearing by Reason of Default.

After the time period for filing an answer expired, Respondent submitted four documents which Complainant attached to a Motion for Decision Without Hearing by Reason of Admissions. The information contained in those four documents, constitutes admissions that Respondent had fully paid three sellers set forth in the complaint[1], had fully paid three other sellers between December 31, 1996, and April 30, 1997, for purchases which had become due between November 1994 and November 1995, and that as of April 30, 1997, had not paid the full amounts that

[1]Respondent did not provide the dates on which it paid these three sellers. Without this information we can not determine whether or not Respondent paid them promptly, in compliance with the PACA. For the purpose of this decision, those three sellers will not be included in the discussion of Respondent's admitted violations of the PACA.

it owed to twelve sellers[2] for purchases which had become due between December 1995 and July 1996. In addition to the admissions Respondent made in the documents it submitted, its failures to admit, deny, or explain the allegations that it failed to make full payment promptly to nineteen sellers named in the complaint, constitute admissions that it had not paid those nineteen sellers. 7 C.F.R. § 1.136(c).

It is a violation of Section 2(4) of the PACA to fail to make full payment promptly for produce purchases. 7 U.S.C. § 499b(4). The PACA requires that full payment must be made within ten days of receipt of a shipment or within an alternative time period upon which the parties have agreed and put into writing before the purchase was made. 7 C.F.R. § 46.2(aa)(5), (11); *In re Havana Potatoes of New York Corp. et. al.*, 55 Agric. Dec. 1234 (1996). Respondent has admitted that it failed to fully and promptly pay 34 sellers for 282 purchases which it made between September 1993 and July 1996, the purchase prices of which total $699,943.23. Respondent's failures to make full payment promptly for its produce purchases are violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent's admitted failures to make full payment promptly to numerous sellers (34 sellers), in more than *de minimus* amounts (totaling $699,943.23), which it made over an extended period time (almost three years), constitute wilful, flagrant, and repeated violations of Section 2(4) of the PACA. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1211 (1996); *In re Caito Produce Co.*, 48 Agric. Dec. 602 (1989).

Respondent's failure to admit, deny, or explain the allegation that its PACA license was terminated on May 17, 1996, is an admission of that allegation. 7 C.F.R. § 1.136. Given that Respondent does not have a PACA license, the only appropriate sanction for its admitted violations is a finding that Respondent has committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of Respondent's violations of the PACA be published.

Upon motion by Complainant, the following Decision Without Hearing by Reason of Default or Admissions is issued without further investigation or

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[2]Respondent indicated that as of April 30, 1997, it had lower amounts past due than the amounts alleged with respect eleven sellers listed in the complaint. Respondent also submitted evidence that its principals entered into a promissory note with another seller which the complaint alleges it had not promptly paid. Neither Respondent's attempts to make incremental payments to eleven sellers, nor the promissory note into which its principals entered with Delta Packing, mitigates against the finding that Respondent violated Section 2(4) of the PACA or the finding that its violations were wilful, flagrant, and repeated. *In re: Scamcorp, Inc.*, PACA Dkt. No. D-95-0502, slip op. at 50-51 (Jan. 29, 1998); *In re: Tolar Farms and/or Tolar Sales, Inc.*, PACA Dkt. No. 96-0530, 1997 WL 730379 (USDA Nov. 6, 1997).

proceeding, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Farm Fresh Produce, Inc., herein referred to as Respondent, is a corporation, organized and existing under the laws of the State of Rhode Island with a business mailing address of 40 Harris Avenue, Providence, Rhode Island 02903.

2. PACA License number 851157 was issued to Respondent on May 17, 1985, and terminated on May 17, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), because Respondent failed to pay the required annual renewal fee.

3. Respondent failed to fully and promptly pay the purchase prices, in the total amount of $699,943.23, to 34 sellers for 282 shipments of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce between September 1993 and July 1996.

Conclusions

Respondent's failures to make full payment promptly for its produce purchases, as set forth *ante,* Finding of Fact 3, constitute wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). As a result of Respondent's violations of the PACA and the fact that it does not have a valid and effective PACA license, the following Order is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

This Decision shall 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 sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final August 19, 1998.-Editor]

In re: DAVID FISHGOLD, INC.
PACA Docket No. D-97-0025.
Decision and Order filed June 8, 1998.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.), hereinafter referred to as the "Act", instituted by a Complaint filed on June 26, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 1996 through January 1997, respondent failed to make full payment promptly to 31 sellers in the total amount of $707,262.08 for 254 lots of perishable agricultural commodities it purchased, received and accepted in interstate commerce.

A copy of the Complaint was served upon respondent on July 3, 1997, which 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, David Fishgold, Inc., was a corporation organized and existing under the laws of the State of New York. Its mailing address was P.O. Box 22806, Rochester, New York, 14692.

2. At all times material herein, respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 951393 was issued to respondent on May 25, 1995. This license was suspended on January 31, 1997, for failure to pay a reparation award pursuant to Section 7(d) of the PACA (7 U.S.C. § 499g), and terminated on May 25, 1997, when respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 3 of the complaint, during the period January 1996 through January 1997, respondent purchased, received and accepted, in interstate commerce from 31 sellers, 254 shipments of perishable agricultural

commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of $707,262.08.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Findings of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139, .145).

Copies hereof shall be served upon the parties

[This Decision and Order became final August 27, 1998.-Editor]

In re: ADAMS PRODUCE, INC.
PACA Docket No. D-98-0016.
Decision and Order filed July 23, 1998.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

This disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*), hereinafter the PACA, was instituted on December 16, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service,

United States Department of Agriculture, by the filing of a complaint alleging that Respondent failed to make full payment promptly of the net proceeds, in the total amount of $844,876.25, to 26 sellers for 555 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between January 1994 and January 1996. Respondent was served with a copy of the complaint, for which it was granted four extensions of time in which file an answer—the last of which expired May 11, 1998–but did not file an answer within the time provided.

The period for filing a timely answer has elapsed and Complainant has filed a motion for the issuance of a default decision. Accordingly, the following Decision Without Hearing by Reason of Default is issued without further investigation or hearing, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceeding Instituted by the Secretary (7 C.F.R. § 1.139), hereinafter the Rules of Practice.

Findings of Fact

1. Adams Produce, Inc., referred to herein as Respondent, is a corporation organized and existing under the laws of State of Texas with a business address of 10554 King William Drive, Dallas, Texas 75220, and a business mailing address of P.O. Box 541715, Dallas, Texas 75354.

2. At all times material herein, Respondent operated subject to the PACA. PACA license number 940809 was issued to Respondent on March 14, 1994, and was suspended on March 5, 1996, because Respondent failed to pay a reparation award that had been entered against it. Respondent's PACA license terminated on March 14, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), because it failed to pay the required annual renewal fee.

3. As set forth more fully in paragraph III of the complaint, Respondent failed to make full payment promptly of the net proceeds, in the total amount of $844,876.25, to 26 sellers for 55 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between January 1994 and January 1996.

Conclusions

Respondent's failures to make full payment promptly, as set forth in Finding of Fact 3, constitute wilful, repeated, and flagrant violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the following order is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

This Decision and Order 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 sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies hereof shall be served upon parties.

[This Decision and Order became final August 31, 1998.-Editor]

In re: ROMNEY & ASSOC., INC., a/t/a R&R DISTRIBUTING.
PACA Docket No. D-98-0007.
Decision and Order filed September 15, 1998.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by James W. Hunt, Administrative Law Judge.

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*) (PACA), was initiated on December 30, 1997, by a complaint alleging that Respondent wilfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, in the total amount of $354,420.43, to nine (9) sellers for 44 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce during May 1996 and June 1996. The complaint requests a finding that Respondent committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order that the facts and circumstances of its violations be published.

Respondent was served with the complaint by regular mail on February 18, 1998, after service by certified mail was unsuccessful—having been returned as unclaimed. On March 26, 1998, Respondent filed an answer admitting the allegations in sections II and III of the complaint, but denied that it owed the amounts claimed as past due. Respondent's answer states that it filed a Chapter 11 bankruptcy petition which it claimed would enable it to make full payment to

its creditors. A copy of Respondent's bankruptcy petition which was filed on October 22, 1997, in the U.S. Bankruptcy Court for the District of Arizona (Case No. B-9714458 PHX RGM), was attached to a motion filed by Complainant requesting the issuance of a Decision Without Hearing by Reason of Admissions.

The bankruptcy petition includes a list of the creditors holding the twenty largest unsecured claims against Respondent, hereinafter referred to a the "List of Unpaid Creditors", in which Respondent admits that it is indebted to six out of the nine sellers named in the complaint, for at least $311,846.03 out of the $319,551.48 which the complaint alleges that it owes those six sellers. Respondent's answer also admits that it failed to make full payment promptly to the remaining three sellers listed in the complaint, but not in the List of Unpaid Creditors, denying that it owes the amounts alleged as past due. Respondent's admissions warrant the immediate issuance of a decision finding that it has committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA and ordering the publication of the facts and circumstances of its violations.

On motion of Complainant for the issuance of a Decision Without Hearing By Reason of Admissions, the following decision is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice governing this proceeding (7 C.F.R. § 1.139), hereinafter referred to as the "Rules of Practice".

Findings of Fact

1. Romney & Assoc., Inc., also trading as R & R Distributing, herein referred to as Respondent, is a corporation organized and existing under the laws of the State of Arizona with a business mailing address of 2049 North Doran, Mesa, Arizona 85203.

2. At all times material to this matter, Respondent operated subject to the PACA. PACA license number 941065 was issued to Respondent on April 25, 1994, and was suspended on January 14, 1997, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)), because Respondent failed to pay a reparation award that had been entered against it. Respondent's PACA license was terminated on April 25, 1997, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), because it failed to pay the required annual renewal fee .

3. On October 22, 1997, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*), designated case No. B-9714458 PHX RGM, in the U.S. Bankruptcy Court for the District of Arizona.

4. In Respondent's List of Unpaid Creditors and answer, it admitted that it

failed to make full payment promptly, for at least $311,846.03, to nine sellers for at least 44 loads of perishable agricultural commodities which it purchased in interstate commerce during May 1996 and June 1996.

Conclusions

Respondent does not have a valid or effective PACA license and has admitted to actions which constitute wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, the following Order is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

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 sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies hereof shall be served on the parties.

[This Decision and Order became final October 26, 1998.-Editor]

In re: GROCERY IMPORT & EXPORT INTERNATIONAL CORP., a/k/a G.I.E. INTERNATIONAL CORP.
PACA Docket No. D-97-0032.
Decision and Order filed August 28, 1998.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act", instituted by a Complaint filed on September 10, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service,

United States Department of Agriculture. It is alleged in the complaint that during the period of December 8, 1995, through July 24, 1996, respondent purchased, received and accepted, in interstate commerce from 3 sellers, 111 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 $453,267.72.

A copy of the Complaint was mailed to the respondent by certified mail on September 12, 1997, and again by regular mail on January 13, 1998, 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, Grocery Import & Export International Corp., a/k/a G.I.E. International Corp., is a corporation organized and existing under the laws of the State of California. Its business mailing address is 2133 Violet Street, Los Angeles, California 90021.

2. At all times material herein, respondent was not and has never been licensed under the Act. However, respondent at all times pertinent herein, has conducted business subject to the Act.

3. As more fully set forth in paragraph 3 of the complaint, during the period of December 8, 1995, through July 24, 1996, respondent purchased, received and accepted, in interstate commerce from 3 sellers, 111 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 $453,267.72.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act

(7 U.S.C. § 499b(4)), and the facts and circumstances of such violations 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 thereof 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, .145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final November 20, 1998-Editor]

In re: JAMES O'SULLIVAN d/b/a H&M PRODUCE.
PACA Docket No. D-98-0006.
Decision and Order filed October 8, 1998.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), which was instituted on December 29, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, through the filing of a complaint alleging that Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of $205,838.85, to 12 sellers for 40 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce between July 1995 and October 1995. In accordance with section 1.147 of the Rules of Practice governing this proceeding (7 C.F.R. § 1.147), hereinafter the "Rules of Practice", Respondent was served with the complaint by regular mail on February 5, 1998, after service by certified mail, return receipt requested, to Respondent's last known address of record, was returned unclaimed. Respondent did not file an answer to the complaint and the time for filing a timely answer, as provided by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), has elapsed. On Complainant's motion for the

issuance of a default decision, 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. James O'Sullivan, herein referred to as Respondent, is an individual doing business as H&M Produce with a business mailing address of 547 Seaton Street, Los Angeles, California 90013.

2. At all times material herein, Respondent did not have a valid and effective PACA license, but was operating subject to the PACA.

3. As set forth more fully in section III of the complaint, Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of $205,838.85, to 12 sellers for 40 lots of perishable agricultural commodities which he purchased, received, and accepted in interstate and foreign commerce between July 1995 and October 1995.

Conclusions

Respondent's failures to make full payment promptly for his produce purchases, as set forth above in Finding of Fact No. 3, constitute wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

This decision will become final without further proceedings thirty-five (35) days after it has been served on Respondent, unless appealed to the Secretary by a party to the proceedings within thirty days (30) after service, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final December 1, 1998.-Editor]

In re: SANFORD PRODUCE EXCHANGE, INC.
PACA Docket No. D-98-0012.
Decision and Order filed October 16, 1998.

Andre Vitale, for Complainant.
Respondent, Pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

This disciplinary proceeding, brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*), hereinafter the PACA, was instituted on February 6, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, by the filing of a complaint alleging that Respondent failed to make full payment promptly of the net proceeds, in the total amount of $256,025.66, to 21 sellers for 91 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between August 1996, and June 1997. Respondent was served with the complaint by regular mail on April 1, 1998, after service by certified mail, return receipt requested, to Respondent's last known address of record, was returned unclaimed. Respondent did not file an answer to the complaint and the time for filing a timely answer, as provided by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), has elapsed. Complainant has filed a motion for the issuance of a default decision. Accordingly, the following Decision Without Hearing By Reason of Default is issued without further investigation or hearing, pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.139), hereinafter the Rules of Practice.

Findings of Fact

1. Sanford Produce Exchange, Inc., referred to herein as Respondent, is a corporation organized and existing under the laws of the State of Florida, with a business address of 1300 French Avenue, Stall 18, State Farmers Market, Sanford, Florida 32772, and a business mailing address of 1300 S. French Avenue, Box 2C, Sanford, Florida 32771.

2. License number 960105 was issued to Respondent on October 13, 1995, and terminated on October 13, 1997, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), because Respondent failed to pay the required annual renewal fee. At all times material herein, Respondent operated subject to the PACA.

3. As set forth in section III of the complaint, Respondent failed to make full

payment promptly of the net agreed purchase prices, in the total amount of $256,025.66, to 21 sellers for 91 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between August 1996 and June 1997.

Conclusions

Respondent's failures to make full payment promptly, as set forth in Finding of Fact 3, constitute wilful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed wilful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The facts and circumstances of Respondent's violations of the PACA shall be published.

This Decision and Order 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 sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies hereof shall be served upon parties.

[This Decision and Order became final December 14, 1998-Editor]

CONSENT DECISIONS

(Not published herein-Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

TKO Farms, Inc. PACA Docket No. D-98-0003. 7/29/98.

Finest Fruits, Inc. PACA Docket No. D-98-0017. 9/15/98.

Fruit Salad, Inc. PACA Docket No. D-97-0027. 10/9/98.

Lakeside United Foods, Inc., d/b/a Farm Fresh Dist., Farm Fresh Distributors, Farm Fresh Fruit & Veg., and Farm Fresh Produce. PACA Docket No. D-98-0015. 10/28/98.

Rick Ray Fruits and Vegetables, Inc. PACA Docket No. D-99-0003. 11/12/98.

Campo Tropical, Inc. PACA Docket No. D-98-0020. 11/19/98.

L A Vegetable Exchange, Inc. PACA Docket No. D-98-0031. 12/4/98.