

AGRICULTURE DECISIONS

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THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
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PERTAINING TO STATUTES ADMINISTERED BY THE

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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.

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

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PERISHABLE AGRICULTURAL COMMODITIES ACT**COURT DECISION****JSG TRADING CORP. v. UNITED STATES DEPARTMENT OF AGRICULTURE.**

No. 98-1342.

Decided May 25, 1999.

(Cite as 176 F.3d 536)

Perishable agricultural commodities — Remand — Commercial bribery — Promotional allowances — Per se standard.

A perishable agricultural commodities seller petitioned for review of the Judicial Officer's order revoking the seller's Perishable Agricultural Commodities Act (PACA) license. The Court held that the Judicial Officer's application of a *per se* test in determining that the seller's payments of more than *de minimis* amounts to purchasing agents constituted commercial bribery, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), was improper because the *per se* test did not conform to standards applied in previous cases and the Judicial Officer did not adequately explain the departure from prior agency practice. The Court found that in previous agency cases, the Judicial Officer required a showing that the produce buyer did not know of the produce seller's payments to the produce buyer's agents and that the produce seller made the payments to the produce buyer's agents to induce purchases from the produce seller. The Court also stated that several of the produce seller's payments arguably could be promotional allowances, which are allowed under the PACA. The Court remanded the case to the Judicial Officer stating that the Judicial Officer must: (1) explain the justification for employing a *per se* test for commercial bribery and must do so in conjunction with the promotional allowances provision in the PACA; or (2) abandon the *per se* test and apply the traditional commercial bribery test used in previous agency cases.

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

Before: EDWARDS, *Chief Judge*, GARLAND, *Circuit Judge*, and BUCKLEY, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* HARRY T. EDWARDS.

EDWARDS, *Chief Judge*:

On an appeal from a decision of an Administrative Law Judge ("ALJ"), a Judicial Officer of the United States Department of Agriculture ("USDA") determined that petitioner JSG Trading Corporation ("JSG") had violated § 2(4) of

the Perishable Agricultural Commodities Act ("PACA" or "Act"), 7 U.S.C. § 499b(4), by making a series of payments to the purchasing agents of two separate tomato buyers, L&P Fruit Corporation ("L&P") and American Banana, at a time when those agents were buying tomatoes from JSG on behalf of their respective employers. The Judicial Officer subsequently revoked JSG's license to deal in perishable agricultural commodities.

In this petition for review, JSG challenges the revocation of its license, alleging that the Judicial Officer was proceeding from an incorrect legal premise, namely, that *any* payment by a produce dealer to a purchasing agent above a *de minimis* level constitutes "commercial bribery" in violation of § 2(4) of PACA. JSG argues that this *per se* standard represents a marked departure from prior agency precedent, and that the case should be remanded for factual findings in accordance with the correct legal standard.

We agree that, in adopting a *per se* standard to measure commercial bribery, the Judicial Officer departed from well established precedent without adequate justification. We therefore remand the case to the agency, so that it may either attempt to justify its creation of a new, *per se* standard or make explicit factual findings pursuant to established law.

I. BACKGROUND

A. *Statutory and Regulatory Background*

"Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and to unfair practices." *Tri-County Wholesale Produce Co. v. USDA*, 822 F.2d 162, 163 (D.C. Cir. 1987). A later Congress summarized the purpose of PACA as follows:

[PACA] is admittedly and intentionally a "tough" law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the producers of perishable agricultural products—most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing—and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is

of the grade and quality they are paying for.

S. REP. NO. 84-2507, at 3 (1956). U.S. Code Cong. & Admin. Serv. 1956, pp. 3699, 3701. "[T]he goal of . . . [PACA is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 782 (D.C. Cir. 1983) (citations and internal quotation marks omitted). To achieve this end, the Act requires persons who buy or sell significant quantities of perishable agricultural commodities at wholesale in interstate commerce to have a license issued by the Secretary of Agriculture. See 7 U.S.C. § 499c.

Section 2 of the Act makes unlawful a number of activities by licensees. See *id.* § 499b. Relevant here is § 2(4), which makes it unlawful for any commission merchant, dealer, or broker, in any transaction involving any perishable agricultural commodity, to, *inter alia*, "fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction." *Id.* § 499b(4).

In 1995, PACA was amended to establish that certain payments were not illegal under § 2(4). Specifically, the following sentence was added to § 2(4):

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.

Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 9(b)(3), 109 Stat. 424, 430 (1995) (codified as amended at 7 U.S.C. § 499b(4)). The term "collateral fees and expenses" was defined as

any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity.

Pub. L. No. 104-48, § 9(a), 109 Stat. 424, 429-30 (1995) (codified as amended at 7 U.S.C. § 499a(b)(13)).

Upon a determination that a commission merchant, dealer, or broker has violated one of the provisions of § 2, the Act authorizes the Secretary of Agriculture to publish the facts and circumstances of the violation, and suspend the offender's PACA license for up to ninety days. See 7 U.S.C. § 499h(a). The Secretary may revoke the license if the violation is "flagrant or repeated." *Id.*

B. Factual Background

JSG is a New Jersey corporation in the business of buying and selling produce. In 1988, JSG was issued a PACA license, and that license was renewed annually thereafter. Beginning in January 1992, Steve Goodman served as JSG's president and controlled 75 percent of the company's stock. At all relevant times, Mr. Goodman was JSG's sole tomato buyer and seller. The transactions giving rise to the commercial bribery charges in this case originated from JSG's relationships with two tomato purchasers, L&P and American Banana, both produce dealers located at the Hunts Point Market in Bronx, New York.

The purchasing agents in the disputed L&P transactions were Tony and Gloria Gentile. Mr. Goodman and Mr. Gentile, as well as their families, apparently enjoyed a close social relationship. Long before any of the questioned transactions occurred—in fact, before Mr. Goodman had any relationship at all with JSG—Mr. Gentile taught Mr. Goodman the tomato business. The Goodman and Gentile families spent a great deal of time together, often dining out and going to shows in Atlantic City.

Mr. Gentile, who was the head tomato buyer for L&P from 1985 through 1991, had a joint account arrangement with L&P, whereby he would share profits and losses with L&P on the tomatoes that he purchased. Such joint accounts apparently are common in the New York produce industry. During the time that Mr. Gentile served as a buyer for L&P, he purchased tomatoes from JSG, as well as from other sellers.

In 1989, Mr. Goodman and Mr. Gentile formed a trucking company called Dirtbag Trucking Corp. ("Dirtbag"), and each was issued 75 shares of Dirtbag stock. Dirtbag, which operated out of JSG's office, always had a cash flow problem, and JSG advanced money to it on a number of occasions. Although JSG was Dirtbag's primary customer, Dirtbag also provided trucking services to other produce companies.

The purchasing agent in the questioned transactions with American Banana was Al Lomoriello. American Banana hired Mr. Lomoriello in 1991, on a joint account basis similar to L&P's arrangement with Mr. Gentile. According to Mr. Goodman and Mr. Lomoriello, Mr. Lomoriello sometimes provided various services to JSG, including delivering produce, collecting accounts receivable, and providing Mr. Goodman with pricing information on produce and market supplies.

C. Procedural Background

In January 1993, the USDA received a telephone complaint about JSG. The

caller said that Mr. Goodman had been making payments to Mr. Gentile while Mr. Gentile was buying tomatoes for L&P. The USDA assigned two investigators to audit JSG, and a formal PACA complaint was eventually brought against JSG, the Gentiles, and Mr. Lomoriello. The complaint alleged that the respondents had "engaged in a scheme" whereby JSG made payments to the Gentiles and Mr. Lomoriello "to induce [them] to purchase tomatoes from . . . JSG on behalf of [L&P and American Banana, respectively]." Amended Complaint ¶¶ 6-7, *reprinted in Joint Appendix ("J.A.") 10-11*. On June 17, 1997, after a lengthy hearing, the ALJ determined that the respondents had committed wilful, flagrant, and repeated violations of § 2(4). *See In re JSG Trading Corp.*, PACA Docket Nos. D-94-0508, D-94-0526 (June 17, 1997), at 46-47 ("ALJ Decision"), *reprinted in J.A.* 61-62. The ALJ found that, during the time that Mr. Gentile was buying tomatoes from JSG on behalf of L&P, Mr. Goodman and JSG made payments and transferred items of value to the Gentiles. Similarly, the ALJ found that JSG had made a series of payments to Mr. Lomoriello, while Mr. Lomoriello was buying tomatoes from JSG on behalf of American Banana. The ALJ identified seven transactions that he considered illegal bribes. We summarize them as follows:

1. The Boat

Mr. Goodman bought a boat in 1987 for approximately \$47,000. Beginning in late 1990, he allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's upkeep and maintenance. In late 1992, Mr. Goodman sold the boat to Mr. Gentile for \$10,000. It is undisputed that Louis Beni, L&P's secretary-treasurer and 35 percent owner, was aware of the purchase. In fact, Mr. Gentile told Mr. Beni that he had gotten a good deal on the boat. Two years later, after he had spent approximately \$7000 in repairs, Mr. Gentile sold the boat for approximately \$20,000.

2. The Car

In 1990, a 1990 model Mercedes 300 SEL car was leased to Mr. Gentile for 48 months. The lease was authorized through Dirtbag, although, as with many of Dirtbag's creditors, some of the lease was paid for by JSG. Mr. Goodman testified that he gave the car to Mr. Gentile for him to drive while doing work for Dirtbag. When the car was presented to Mr. Gentile, Mr. Goodman placed a red ribbon on it. It is undisputed that Mr. Gentile's superiors at L&P knew about the car, and knew about Mr. Gentile's association with Mr. Goodman and Dirtbag. Despite Mr. Goodman's and Mr. Gentile's testimony as to the work Mr. Gentile did for Dirtbag,

the ALJ found it "doubtful" that Mr. Gentile used the car for Dirtbag business, concluding rather that the car was probably a gift from Mr. Goodman to Mr. Gentile. See ALJ Decision at 23-24, *reprinted in J.A.* 38-39.

3. The Watch

In July 1992, Mr. Goodman purchased a \$3000 Rolex watch and gave it to Mr. Gentile as a gift. Mr. Goodman testified that he gave the watch to Mr. Gentile partly as a birthday present, partly as a present to celebrate Mr. Gentile's recovery from cancer, and partly in appreciation for Mr. Gentile's willingness to teach him about the tomato business. Mr. Gentile wore the watch openly, and it is undisputed that Mr. Beni knew about the gift.

4. The Stock Sale

When he was diagnosed with cancer, Mr. Gentile transferred his 75 shares of Dirtbag stock to Mrs. Gentile. In February 1991, Mrs. Gentile entered into a written agreement to sell her 75 shares of Dirtbag to Mr. Goodman for \$80,000. The agreement provided that upon final payment, a loan of \$40,000 from Mr. Gentile to Dirtbag would be released. There was also evidence that Mr. Gentile had invested an additional \$7000 in Dirtbag for a new truck. The ALJ concluded that, because Dirtbag was an unprofitable company, Mr. Goodman had overpaid the Gentiles by at least \$33,000 (\$80,000 minus the \$47,000 that Mr. Gentile had invested in Dirtbag). Neither party offered a valuation expert on this issue.

5. The Circular Checks

JSG issued 35 checks, totaling approximately \$62,000, made payable to "A. Gentile." These checks were not deposited in a bank account controlled or owned by the Gentiles. Instead, they were endorsed in the name of "A. Gentile" by JSG's bookkeeper, and redeposited in a JSG account. Although the checks were "circular," in that they ended up back in JSG's account, the ALJ found that the checks were used in JSG's records to indicate that Mr. Goodman was sharing his profit with Mr. Gentile. See ALJ Decision at 30, *reprinted in J.A.* 45. Further, the ALJ found that sixteen of the checks were shown in JSG's records as reducing a loan that Mr. Gentile owed to JSG. See *id.*

6. The Payments to Mrs. Gentile

JSG also made several payments to Mrs. Gentile. According to Mr. Goodman and Mrs. Gentile, the payments were for services rendered to JSG by Mrs. Gentile. Specifically, Mrs. Gentile testified that, at Mr. Goodman's request, she checked tomatoes at Florida packing houses and gave reports on her findings to Mr. Goodman. The ALJ, however, relying primarily on the fact that there was no written agreement between Mr. Goodman and Mrs. Gentile, found the payments to be bribes rather than compensation for services rendered.

7. The Payments to Mr. Lomoriello

From December 1992 through February 1993, a period during which Mr. Lomoriello was responsible for buying tomatoes on behalf of American Banana, JSG issued seven checks to Mr. Lomoriello, totaling approximately \$10,000. According to Mr. Goodman and Mr. Lomoriello, the payments were for various services Mr. Lomoriello rendered to JSG. American Banana's vice-president, Demetrius Contos, testified that he was aware that Mr. Lomoriello used his own truck during the evenings for his own business unrelated to American Banana. The ALJ, however, found that the payments were bribes, and cited evidence in JSG's records suggesting that Mr. Lomoriello was getting paid a certain amount for each box of tomatoes that JSG sold to American Banana.

After describing these seven payments, the ALJ interpreted prior agency precedent as dictating that "JSG could only make . . . payments [to the Gentiles and Mr. Lomoriello] with its customers' [*i.e.*, L&P's and American Banana's] permission." ALJ Decision at 18, *reprinted in* J.A. 33. The ALJ concluded that "[e]ven if it received permission, JSG should not have made more than *de minimis* payments to Mr. Gentile and Mr. Lomoriello. These payments were more than *de minimis*. Therefore, these payments constituted commercial bribery, in violation of section 2(4) of the PACA." *Id.* The ALJ found that the PACA violations were "wilful, flagrant, and repeated," and ordered JSG's PACA license revoked. *Id.* at 46, *reprinted in* J.A. 61.

JSG and the Gentiles (but not Mr. Lomoriello) appealed the ALJ's decision to the Judicial Officer, to whom the Secretary has delegated authority as the final deciding officer in the agency's adjudicatory process. *See* 7 C.F.R. §§ 1.132, 2.35 (1998). On March 2, 1998, the Judicial Officer adopted, with minor and insignificant changes, the ALJ's factual and legal conclusions. *See In re JSG Trading Corp.*, PACA Docket Nos. D-94-0508, D-94-0526 (May 2, 1998), at 8 ("Judicial Officer Decision"), *reprinted in* J.A. 70. JSG filed a petition for

reconsideration with the Judicial Officer, which was denied on June 1, 1998. *See In re JSG Trading Corp.*, PACA Docket Nos. D-94-0508, D-94-0526 (June 1, 1998), at 25 ("Reconsideration Order"), *reprinted in* J.A. 182. On July 30, 1998, the Judicial Officer issued a stay of the order revoking JSG's license pending judicial review. JSG, alone, then petitioned this court for review of the Judicial Officer's final determination.

II. ANALYSIS

A. Standard of Review

This court has exclusive jurisdiction to review final orders of the USDA in disciplinary actions brought under PACA. *See* 28 U.S.C. § 2342(2). We review the agency's orders under the Administrative Procedure Act's ("APA") arbitrary and capricious standard. That is, we will uphold the Judicial Officer's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence. *See* 5 U.S.C. § 706(2)(A), (E).

B. The Prohibition Against Commercial Bribery Under PACA

Section 2(4) of PACA does not, by its terms, proscribe "commercial bribery." Nevertheless, the agency has, on two previous occasions, interpreted the provision to cover activity that falls within the traditional definition of commercial bribery. *See In re Tipco, Inc.*, 50 Agric. Dec. 871, 1991 WL 295153 (1991), *aff'd per curiam*, *Tipco, Inc. v. Yeutter*, 953 F.2d 639 (4th Cir. 1992) (unpublished table decision), available in 1992 WL 14586; *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1990 WL 320442 (1990), *aff'd per curiam*, *Sid Goodman & Co. v. United States*, 945 F.2d 398 (4th Cir. 1991) (unpublished table decision), available in 1991 WL 193489.

Tipco and *Goodman* involved very similar facts, as well as some of the same parties. In each case, a wholesale produce dealer paid the purchasing agents of a supermarket chain 25 cents per package of produce bought by the chain, in an effort to induce the agents to buy from that dealer and not a competitor. The dealer then raised the price of each package by 25 cents, in order to cover the payment to the purchasing agents. The purchasing agents' employers—the supermarket chains—were unaware of the payments to their employees and the surcharge that they incurred. The payment schemes resulted in increased sales for the dealer, a kickback for the purchasing agents, and, of course, higher prices for the innocent supermarket chain. In each case, the agency brought complaints against the dealers

under PACA, and eventually revoked their PACA licenses, citing flagrant and repeated violations of § 2(4).

In *Goodman*, the first PACA case ever to address allegations of commercial bribery, the Judicial Officer applied the following definition of commercial bribery:

[T]he "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the gift, be sufficiently influenced by the offer to favor the offeror over other competitors."

In re Sid Goodman & Co., 49 Agric. Dec. 1169, 1184, 1990 WL 320442, at **10 (quoting 2 Rudolph Callman, *THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES* § 49 (3d ed. 1968)). The Judicial Officer went on to make specific findings that the dealer made the payments with the intent to induce the purchasing agents to buy from that dealer as opposed to its competitors, *see Goodman*, 49 Agric. Dec. at 1187, 1990 WL 320442, at **12, and that the payments were made surreptitiously, *i.e.*, without the knowledge of the purchasing agents' employers, *see id.* at 1187-88, 1990 WL 320442, at ** 13.

In *Tipco*, the same Judicial Officer once again made specific findings of both intent to induce, *see Tipco*, 50 Agric. Dec. at 896, 1991 WL 295153, at **16, and secrecy, *see id.* at 899, 1991 WL 295153, at **18. Although he did not repeat the definition of commercial bribery that he had used in *Goodman*, the Judicial Officer in *Tipco* made it clear that he was relying on the standard he had employed in the previous case. *See, e.g., id.* at 889, 1991 WL 295153, at **11 ("[T]he evidence of record is certain that licensee Tipco made surreptitious payments to its customer's employee to induce the employee to buy, or continue to buy, its produce, certainly, in derogation of its competitors. Under the precepts of the *Goodman* case, this is enough, in itself, for me to find that respondent Tipco deserves the same sanction for the same violation as found in the *Goodman* proceeding."). The Fourth Circuit, in unpublished dispositions, upheld the agency's interpretation of § 2(4) in both cases. *See Tipco, Inc. v. Yeutter*, 953 F.2d 639 (4th Cir. 1992) (unpublished table decision), available in 1992 WL 14586; *Sid Goodman & Co. v. United States*, 945 F.2d 398 (4th Cir. 1991) (unpublished table decision), available in 1991 WL 193489.

It is clear that the test for commercial bribery employed by the agency in *Goodman* and *Tipco* requires a finding of both intent to induce and secrecy. These requirements are not surprising, given that commercial bribery statutes typically contain at least these two elements. *See, e.g.,* N.Y. PENAL LAW §§ 180.00, 180.03 (McKinney 1999) ("A person is guilty of commercial bribing . . . when he confers,

or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."); 720 ILL. COMP. STAT. ANN. 5/29A-1 (West 1998) ("A person commits commercial bribery when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."); *see also* 2 Rudolph Callman, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 12.01, at 1 n.0.50; § 12.01, at 8-9 (4th ed. 1996 & Supp. 1999); BLACK'S LAW DICTIONARY 270 (6th ed. 1990) (defining commercial bribery as "[a] form of corrupt and unfair trade practice in which an employee accepts a gratuity to act against the best interests of his employer").

We do not disagree with the Fourth Circuit that the broad and ambiguous language of § 2(4) can be read to proscribe activity that falls within one of the traditional definitions of commercial bribery described above. Indeed, JSG concedes that commercial bribery is illegal under PACA. *See* Reply Brief of Petitioner at 4. The issue presented here is whether the agency applied the same commercial bribery standard in the instant case that it applied in both *Goodman* and *Tipco*, and, if not, whether it adequately explained its reasons for departing from prior agency precedent.

C. *The Commercial Bribery Standard Applied in This Case*

JSG argues that the agency in the instant case departed from the precedent established in *Goodman* and *Tipco* by applying a *per se* test for commercial bribery. The agency concedes that the Judicial Officer applied a *per se* test, which deems illegal any payment above a *de minimis* level from a produce dealer to a purchasing agent, regardless of whether there is any secrecy or intent to induce. Indeed, agency counsel stated at oral argument that "[t]here is no way of characterizing [the test employed by the Judicial Officer] any other way." Tr. of Oral Argument at 18. Agency counsel also conceded that, because he was employing a *per se* test, the Judicial Officer did not make explicit findings with respect to secrecy or intent to induce. *See id.* at 18, 19, 36. In fact, the Judicial Officer specifically found that Mr. Gentile's employer was aware of at least one of Mr. Goodman's gifts. *See, e.g.,* Judicial Officer Decision at 33, *reprinted in* J.A. 95 (finding that Mr. Beni was aware that Mr. Goodman had given Mr. Gentile a good deal on the boat). The agency argues, however, that the Judicial Officer's use of the *per se* test was permissible under prior agency precedent. We disagree. It is clear here that the Judicial Officer adhered to a new definition of commercial

bribery that finds no support in the case law; it is also clear that he offered no justification whatsoever either for his re-definition of commercial bribery or for the necessity of a *per se* test in this or any other case.

The Judicial Officer did purport to follow *Goodman and Tipco*. See, e.g., Judicial Officer Decision at 90, reprinted in J.A. 155 ("[T]he legal standard for bribery, in violation of section 2(4) of the PACA . . . is established by *Goodman and Tipco*. . ."). Nevertheless, the Judicial Officer never once, in his entire 96-page opinion, cited the actual definition of commercial bribery that was quoted in *Goodman* and employed by the agency in both *Goodman* and *Tipco*. Instead, the Judicial Officer cited the following dicta from the Judicial Officer's opinion in *Tipco*:

Included within [the obligations of a PACA licensee] is the positive duty to refrain from corrupting an employee of a person with whom [the licensee] is dealing, e.g., each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (e.g., more than a pen, calendar or lighter).

Judicial Officer Decision at 28, reprinted in J.A. 90 (quoting *Tipco*, 50 Agric. Dec. at 882-83, 1991 WL 295153, at **9). On the basis of that dicta—which, at most, establishes a risk of a PACA violation—the Judicial Officer reached the following conclusion with respect to the record in the instant case:

As in *Goodman and Tipco*, JSG was obligated to refrain from making payments to Mr. Gentile and Mr. Lomoriello since such payments would encourage Mr. Gentile and Mr. Lomoriello to purchase tomatoes from JSG. JSG could only make such payments with its customers' permission. Even if it received permission, JSG should not have made more than *de minimis* payments to Mr. Gentile and Mr. Lomoriello. The payments [made by JSG to Messrs. Gentile and Lomoriello] were more than *de minimis*. Therefore, these payments constitute commercial bribery, in violation of section 2(4) of the PACA.

Id. at 28-29, reprinted in J.A. 90-91 (brackets in original). This conclusion

blatantly ignores the legal test of commercial bribery established and applied in *Goodman and Tipco*, applying instead a *per se* rule that was never even contemplated in the prior cases.

Under the Judicial Officer's *per se* test, produce dealers are guilty of commercial bribery when they transfer items of value to purchasing agents, even if the agents' employers are fully aware of the gifts, and even if the dealers have no intent to induce the agents to buy from them. For example, Mr. Goodman claimed that he gave the Rolex watch to Mr. Gentile essentially as a gesture of friendship, and to celebrate Mr. Gentile's recovery from cancer. The Judicial Officer held that "[a]lthough Mr. Goodman said he was motivated by his friendship with Mr. Gentile, the [act of] bestowing such an expensive present upon Mr. Gentile at the time that JSG was selling large quantities of tomatoes to L&P . . . was unlawful." *Id.* at 35, *reprinted in* J.A. 97 (brackets in original); *see also* Reconsideration Order at 17, *reprinted in* J.A. 174 ("Mr. Goodman's alleged personal relationship with Mr. Gentile does not obviate the requirement that JSG refrain from making gifts of substantial value to Mr. Gentile[,] who was working for one of JSG's customers."). Under this theory, as agency counsel conceded at oral argument, *see* Tr. of Oral Argument at 27-31, it would have been illegal for Mr. Goodman to give the owner of L&P a Rolex watch, or even for Mr. Goodman to take the owner of L&P out to lunch. These are far-fetched notions of commercial bribery, at least under established law. We have been unable to find any precedent, in any context, that defines commercial bribery as here suggested, and agency counsel cited none.

Putting aside for the moment the question whether the Judicial Officer adequately justified his creation of this rather novel theory of commercial bribery, it is quite clear that this *per se* test deviates dramatically from the standard test for commercial bribery that was actually employed in *Goodman and Tipco*. For example, under the test cited in *Goodman*, the gift of the watch would not have been illegal unless there had been specific findings that Mr. Gentile's employer was not aware of the gift, and that Mr. Goodman intended to induce Mr. Gentile to purchase from JSG. Likewise, Mr. Goodman would hardly be guilty of commercial bribery under the traditional definition if he had taken the owner of L&P out to lunch, even if the purpose of the lunch was for Mr. Goodman to extoll the virtues of his product.

Although the agency was not strictly bound to follow the test for commercial bribery applied in prior cases, it was obligated to articulate a principled rationale for departing from that test. *See Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995) ("It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent."); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency

changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.") (footnote omitted). We find that the agency manifestly failed to explain its abrupt departure from prior precedent. We therefore are constrained to remand this case to the agency.

The agency may be able to provide a justification for applying a different and lesser standard for commercial bribery under § 2(4) than that cited in *Goodman*. Given the broad language of § 2(4), the agency is not necessarily bound by traditional statutory definitions of commercial bribery. Nonetheless, some justification for a lesser standard is necessary, for there is certainly no immediately apparent, or intuitive, rationale for a *per se* rule that does not require a finding of secrecy or intent to induce. Indeed, traditionally it is precisely the secrecy and intent to induce elements that are thought to transform otherwise innocent gifts into pernicious bribes that destroy marketplace competition. See 2 Rudolph Callman, *THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES* § 12.01, at 1 n.0.50 (4th ed. 1996 & Supp. 1999) ("When the fact that the seller is paying a commission to the buyer's purchasing agent is revealed to the buyer, there is no commercial bribery."); *id.* § 12.01, at 8-9 ("The consideration paid by the briber may involve such pecuniary benefits as cash payments, commissions and loans, or such nonpecuniary pleasures as dinner and entertainment (*e.g.*, theatre tickets), and trips. In any case, the true test is the intent or purpose of the offeror: Is the consideration given to influence the agent and cause him to subordinate his bargaining function and judgment?") (footnote omitted); Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. MIAMI L. REV. 365, 370-71 (1987) ("Businesses may (and usually do) provide gratuities, entertainment, campaign contributions, and the like in the hope of disposing the recipient favorably toward them. There must be more than this, however, to constitute a bribe. An agreement must exist between the payor and the recipient that there will be a *quid pro quo*."). Even the PACA official who testified on behalf of the agency at the hearing conceded that a gift exchanged between old friends who happened to be in a seller-buyer relationship was unlikely to run afoul of PACA. See J.A. 249-50 (testimony of Bruce Summers, Senior Market Specialist in the Trade Practices Section of the USDA's PACA Branch).

Even assuming that Mr. Goodman's gifts to Mr. Gentile were made not out of pure friendship, but rather in an effort to curry favor with Mr. Gentile, it is not immediately obvious how the marketplace is disturbed—or how Mr. Goodman is violating any implied duty under PACA—if Mr. Gentile's employer is aware of the gifts, and there is no specific *quid pro quo* agreement between Mr. Goodman and

Mr. Gentile. *Cf. United States v. Sun-Diamond Growers of California*, ___ U.S. ___, 119 S. Ct. 1402, 1406, ___ L.Ed.2d ___, ___ (1999) (explaining that the "intent to influence" element of the federal bribery of public officials statute, 18 U.S.C. § 201(b)(1), (2), means that "for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value in exchange for an official act"). In other words, without a finding of secrecy and intent to induce, there appears to be nothing to distinguish an illegal bribe from a simple promotional gift. *Cf. id.* at 1407 (criticizing as "peculiar" a reading of the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A), (B), that would "criminalize, for example, token gifts to the President . . . such as the replica jerseys given by championship sports teams each year during ceremonial White House visits [or] . . . a high school principal's gift of a school baseball cap to the Secretary of Education . . . on the occasion of the latter's visit to the school") (citation omitted). At oral argument, agency counsel acknowledged that it is, of course, not illegal for a seller to reduce his or her prices in an effort to induce purchases. But agency counsel admitted that, under the agency's *per se* standard, it *would* be illegal for the seller, rather than lowering prices, to instead take the owner of a purchasing entity out to dinner in an effort to promote his or her product. *See* Tr. of Oral Argument at 29, 31. There is no basis in the record or in the explanations offered by the agency for treating the latter transaction as illegal if the former is legal.

Indeed, Congress appeared to recognize the legality of promotional efforts when it passed the 1995 amendment to PACA, which allows the "good faith . . . payment . . . of collateral fees and expenses," which are defined as "any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity." 7 U.S.C. §§ 499a(b)(13), 499b(4). Several of the gifts given to Mr. Gentile by Mr. Goodman arguably could be considered "promotional allowances" made in good faith (*i.e.*, not in secret), and in connection with the marketing of JSG's product. The Judicial Officer summarily dismissed this suggestion, asserting in a conclusory manner that the payments were not promotional devices. *See* Judicial Officer Decision at 76, *reprinted in* J.A. 138. But no reasoning is offered to support this conclusion. Agency counsel suggested at oral argument that the amendment was intended only to cover trivial promotional devices, such as sales banners provided by wholesale dealers to retail outlets. *See* Tr. of Oral Argument at 33. Counsel was unable, however, to cite to any legislative history to support that interpretation, and the agency has never proffered it in any previous adjudication. Such a limited interpretation of the 1995 amendment may be entitled to deference under *Chevron*, but the agency has yet to advance a coherent theory to support it.

On remand, the agency must explain its justification, if it has one, for employing a *per se* test for commercial bribery, and it must do so in conjunction with the 1995 amendment to PACA. The agency is free, of course, to abandon the *per se* approach, and apply the traditional commercial bribery test employed in *Goodman and Tipco*. In any event, the agency must make factual findings that are precisely connected to the standard employed. Although the Judicial Officer alluded to record evidence that might support findings of both secrecy and intent to induce—particularly with respect to the payments to Mr. Lomoriello, *see, e.g.*, Judicial Officer Decision at 54-61, *reprinted in* J.A. 116-23—even agency counsel concedes that the Judicial Officer did not follow a traditional commercial bribery test and made no explicit findings that were tied to such a test.

This court, of course, cannot sift through the record evidence to find support for the result reached by the agency, *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."), nor can we affirm an agency's final order on the assumption that the agency might reach the same result upon remand, *see FEC v. Akins*, 524 U.S. 11, 118 S. Ct. 1777, 1786, 141 L.Ed.2d 10 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason."). Accordingly, we offer no view on the appropriate disposition of this case; the matters at issue here must be addressed by the agency in the first instance on remand of this case. Appropriate findings and conclusions by the agency may be made on the existing record or on a supplemented version of the existing record, as is deemed appropriate.

III. CONCLUSION

For the reasons stated above, we grant the petition for review and remand this case for further proceedings consistent with this opinion.

So ordered.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: PRODUCE DISTRIBUTORS, INC., and IRENE T. RUSSO, d/b/a JAY BROKERS.

PACA Docket No. D-97-0013.

Decision and Order as to Produce Distributors, Inc., filed October 21, 1998.

Failing to account honestly to consignors - Alteration of produce inspection certificates.

Judge Bernstein found that Respondents violated the PACA by failing to accurately account to consignors by making false and misleading statements to them and that Respondents also altered federal inspection statements, thereby making false and misleading statements to consignors.

Kimberly D. Hart, for Complainant.

David L. Durkin, Washington, DC, for Respondent Produce Distributors, Inc.

Lawrence A. Omansky, New York, NY, for Respondent Irene T. Russo, d/b/a Jay Brokers.

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

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

This proceeding was instituted by a Complaint filed on January 3, 1997, by the United States Department of Agriculture ("USDA" or "Complainant"). The Complaint alleges that Respondents, Produce Distributors, Inc. ("PDI") and Irene T. Russo, doing business as Jay Brokers, pursuant to a verbal joint venture agreement, made false and misleading statements for a fraudulent purpose by failing to truly and accurately account to 16 consignors for the net proceeds resulting from the sale of their produce in the amount of \$43,242.58 in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Complaint also alleges that Respondents altered federal inspection certificates, thereby making false and misleading statements for the purpose of failing to truly and accurately account to consignors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

I presided over a hearing on January 27-30, March 4-5, and April 15, 1998 in New York City. Complainant was represented by Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. Produce Distributors, Inc., was represented by David L. Durkin, Olsson, Frank &

Weeda, Washington, D.C. Irene Russo was represented by Lawrence Omansky and Dan Cherner, New York, New York.

Complainant introduced numerous exhibits into evidence at the hearing. Neither Respondent introduced any exhibits into evidence. Complainant's exhibits are referred to as "CX"; the hearing transcript for April 15, 1998, is referred to as "2 Tr."; and the remainder of the hearing transcript is referred to as "Tr."

Complainant and Respondent Irene Russo filed post-hearing briefs, proposed findings of fact, proposed conclusions of law and reply briefs. All proposed findings of fact, conclusions of law, 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, Produce Distributors, Inc. ("PDI") is a corporation organized and existing under the laws of the state of New Jersey. Its address is 600 South Livingston Avenue, Suite 102, Livingston, New Jersey 07039 (CX 1, 3).

2. At all times relevant, PDI was licensed under the provisions of the PACA, holding license number 771923. This license was renewed annually and was last subject to renewal on or before September 15, 1998 (CX 1).

3. Respondent Irene Russo is an individual, doing business as Jay Brokers, whose address is 81 Edgewood Drive, Orangeburg, New York 10962 (CX 4).

4. At all times relevant, Jay Brokers was licensed under the PACA, holding license number 891361. This license was renewed annually and was subject to renewal on or before June 8, 1998 (CX 2).

5. In May 1995, USDA initiated an investigation of PDI based on four reparation complaints made against PDI. USDA dispatched Robert Rucker, a senior marketing specialist, to examine the records of PDI and Jay Brokers. Ms. Rucker first visited PDI's office on May 24, 1995 (Tr. 29). She subsequently visited Jay Brokers' office. Ms. Rucker examined and photocopied documents and interviewed individuals.

5A. In June 1995, USDA expanded its investigation to a longer time period and to include Jay Brokers. USDA did not notify PDI or Irene Russo in writing that the investigation had been expanded and would include Irene Russo.

6. Ms. Rucker found irregularities in documents in Jay Brokers' files on some joint venture transactions such as files in which there were two accounts of sales with the gross proceeds, net proceeds and deductions differing; files that contained blank photocopies of customers' letterheads; and files that contained

copies of accounts of sales on thermal paper with changes made in ink (Tr. 44).

7. PDI's records indicated that records were often falsified by Joe Russo and/or Irene Russo to mislead shippers as to the amounts of profits involved in transactions and that inspection reports were often falsified by Joe Russo and/or Irene Russo.

8. PDI's president, Thomas Gangemi, Jr., told Ms. Rucker that PDI was involved in a joint venture arrangement with Joe Russo in which PDI would assume 60% of any profit or loss and Jay Brokers would assume 40% of any profit or loss (Tr. 30; 2 Tr. 6).

9. PDI's records showed that PDI's profits in the transactions at issue were apportioned 60% to PDI and 40% to Jay Brokers (Tr. 35; e.g., CX 16, p. 46; CX 18, p. 28; CX 20, p. 22; CX 33, p. 39; CX 36, p. 79; CX 38, p. 48; and CX 41, p. 40).

10. The records with respect to the transactions at issue contained numerous memoranda from Irene Russo to the shippers or customers proposing modifications of prices, and records of other communications between Irene Russo and the shippers and customers.

11. The records with respect to the transactions at issue also contained numerous memoranda signed by Irene Russo and faxed from Jay Brokers' fax number that instructed PDI as to fraudulent amounts to remit to shippers and amounts to bill customers in the produce transactions at issue (Tr. 37-40).

12. Based upon the evidence that Irene Russo actively participated in these transactions and that Jay Brokers received 40% of PDI's profits for the transactions at issue, I find that PDI and Irene Russo, doing business as Jay Brokers, were involved in a joint venture in the transactions at issue.

13. Although Joe Russo was listed in PDI's records as an employee, this was a subterfuge. In fact, Joe Russo, together with his wife, Irene Russo, was involved in the joint venture with PDI and he was listed falsely as an employee in PDI's records for his personal convenience.

14. Based upon the evidence, I find that PDI and Irene Russo made false and misleading statements to the consignors in the transactions at issue in order to gain profits in connection with their joint venture.

Conclusions of Law

1. Respondents Irene Russo, doing business as Jay Brokers, and Produce Distributors, Inc., acting as dealers and/or commission merchants, violated section 2(4) of the PACA by making false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment

basis.

2. Respondents Irene Russo, doing business as Jay Brokers, and Produce Distributors, Inc., were involved in a joint venture in connection with these violations in which profits resulting from these joint venture transactions were shared 60% to PDI and 40% to Irene Russo.

I. The False and Misleading Statements

In a "Notice" filed on June 16, 1998, Respondent PDI appeared to admit the alleged violation. That Notice stated in applicable part, ". . . on the last day of testimony in the above-captioned matter, Thomas Gangemi, Jr., the President and sole employee of Respondent, admitted that Respondent was liable for the acts and omissions of Joe Russo, a former agent of Respondent. All of the transactions detailed in the complaint in this matter involved Joe Russo." The Notice also stated that PDI had already surrendered its PACA license and would not file a brief.

Some of Mr. Gangemi's testimony to which the Notice may have referred includes, ". . . my opinion is that Joe Russo is the worst scourge on the produce industry and has victimized both Jay Brokers and Thomas Gangemi and Produce Distributors" (2 Tr. 24) and "I surrendered my license in contrition on March 1 and I say I've been victimized by Joe Russo, but it was my error -- in judgment in bringing him into my organization . . ." (2 Tr. 31).

After Mr. Gangemi made that statement, I stated, "Let me say that I appreciate your accepting responsibility for these actions, even though you've testified that, directly, you were not involved, but you accept responsibility for the actions of your agent and employee. I think that's very commendable on your part." Mr. Gangemi replied, "Well, I can't avoid it. Legally, I'm responsible. He's my employee" (2 Tr. 31).

PDI presented no defense with respect to either issue. However, Irene Russo denied that the alleged violations took place and denied that she was involved in a joint venture with PDI in connection with the alleged violations. Virtually all of Respondents' evidence was presented by Irene Russo.

Included in Complainant's evidence were 41 exhibits, each containing documents with regard to one of the 41 transactions at issue (CX 16-39, 41-56, 58). Complainant's investigator, Roberta Rucker, marked on the reverse side of each document from whose office the document was obtained. In the interest of avoiding redundancy, Complainant presented detailed testimony by Ms. Rucker and other witnesses regarding the documents in six prototype transactions (CX 16, 28, 33, 36, 38, 41) and Complainant represented that the violations in the other 35 transactions were similar to those in one or more of the prototype transactions (Tr.

110). Respondents presented no evidence to dispute Complainant's contention that the other 35 transactions contained conduct similar to that in one or more of the six prototype transactions and my examination of the exhibits in connection with the 35 other transactions supports the conclusion that Respondents' improper conduct was similar in those 35 other transactions.

Joe Russo represented PDI in all of these transactions. Joe Russo is married to Irene Russo. Irene Russo operated a produce business under the name of "Jay Brokers" from an office in her home. Joe Russo worked on the PDI transactions at issue from this home office. Irene Russo also assisted Joe in his work in these transactions and Irene participated in these transactions. Forty percent of the profits from these transactions was paid by PDI to Jay Brokers, after deducting from the 40% salaries and employer expenses in connection with listing Joe Russo in PDI's records as a PDI employee.

In all of the 41 transactions, PDI, represented by Joe Russo, sold produce on a consignment basis on behalf of consignors or suppliers. Thus, PDI acted in a fiduciary relationship as agent for the consignors. Based upon falsified documents that originated from the Russo office and based upon memoranda, faxes, and telephone calls from the Russo's, the consignors were led to believe that less money was received for the produce than was actually received and, based upon these falsified documents and representations, the consignors agreed to accept less money than PDI actually received. The differences between the amounts of money that PDI actually received and the smaller amounts of money that were misrepresented to the consignors as having been received were considered to be profits by PDI and these "profits" were divided 60% to PDI and 40% to Jay Brokers.

The six prototype transactions are as follows:

1. The Isaak Brothers Transaction (CX 16)

This transaction involved 1,716 cartons of peaches sold by PDI for Isaak Brothers on June 24, 1993. The produce was resold by PDI to BT Produce. Jay Brokers submitted a copy of an account of sales to Isaak Brothers from BT Produce on July 30, 1993, that showed that only 33 of the 1,716 cartons were sold and that the other 1,683 cartons were dumped (Tr. 112; CX 16, p. 15). The gross proceeds for the sale were reported as being \$352 and the cost was shown to exceed the proceeds for a loss of \$13,629. On September 20, 1993, Jay Brokers faxed a memo signed by "Irene" to Lee Isaak requesting that the file be closed at "zero billing" and "zero return," based upon the information provided in the account of sales forwarded to Isaak Brothers by Jay Brokers. Based upon this representation, Lee Isaak agreed (Tr. 111; CX 16, p. 7).

The documents in BT Produce's records indicated that PDI invoiced BT Produce for \$9,106 for the produce, an amount that was subsequently reduced to \$5,674 (CX 16, p. 25). Isaak Brothers was not paid any of this money. The \$5,674 was apportioned between PDI and Jay Brokers on a 60/40 basis (Tr. 116-17, 122; CX 16, p. 46). There was a notation on PDI's jacket file next to "JB" and "Produce" of "J/V" which Karyn Hertzberg, PDI's bookkeeper, explained represented payments under a joint venture agreement (Tr. 117; CX 16, p. 46). PDI's records indicated that Jay Brokers was paid \$2,269.60 (40%) and PDI was paid \$3,404.40 (60%) of the \$5,674.

Lee Isaak testified at the hearing that his decision to authorize closing the file with no proceeds returned to Isaak Brothers was based upon representations made to him by Irene and Joe Russo that there were negative net proceeds from the sale of the produce and that more than 95% of the produce was dumped. Mr. Isaak stated that he was unaware that BT Produce paid Respondent \$5,764 for the same produce (Tr. 634-38).

2. The Sun Pacific Transaction (CX 28)

This transaction involves the sale of grapes by PDI for Sun Pacific on September 22, 1994, for a contract price of \$12,841.50 (CX 28, p. 8). The produce was resold by PDI to L&P Fruit and was inspected upon arrival. PDI invoiced L&P at \$6,632.90 for the produce (Tr. 140-41; CX 28, p. 18). Jay Brokers' records included a copy of another account of sales on L&P's letterhead reflecting net proceeds of \$3,432 (Tr. 144-45; CX 28, p. 26). In response to a memo signed by "Irene" to Sun Pacific requesting authorization to accept a reduced price for the produce, Sun Pacific agreed (Tr. 137-38; CX 28, pp. 2, 23, 26).

PDI's file jacket shows that PDI received \$6,632.90 from L&P Fruit but remitted \$3,173.50 to Sun Pacific and allocated the difference between these amounts of \$3,459.40 between "JB" and "Produce" as profit on a 60-40 basis (CX 28, p. 28).

3. The John Simon Produce Transaction (CX 33)

John Simon Produce sold 2,100 watermelons through PDI at the original delivered contract price of \$5,510.75 on May 12, 1994 (CX 33, pp. 3, 20). The produce was sold to Frankie Boy Produce. John Simon Produce received a typewritten account of sales from Frankie Boy Produce indicating gross proceeds of \$1,864.74 minus a deduction for "COMM. & Repack" of \$511.66, resulting in a net proceeds of \$1,353.08 (CX 33, p. 13). John Simon issued an adjusted invoice for \$1,353.08 (CX 33, pp. 20-22). Jay Brokers' records contains a copy of the adjusted invoice for \$1,353.08. However, their copy of the adjusted invoice

contains a note from "Irene" instructing that Frankie Boy be billed \$1,864.74 (CX 33, p. 30) and Frankie Boy paid PDI \$1,864.74 (Tr. 159; CX 33, p. 25). Ms. Rucker found a blank copy of Frankie Boy's letterhead with the same fax imprint contained in the typewritten account of sales found in Jay Brokers' records for this transaction (CX 33, p. 37, 38; Tr. 160-62). It appears that Frankie Boy's account was copied on the blank letterhead and used to create the false typewritten account of sales that was submitted to John Simon (Tr. 162). Thus, the false account represented to John Simon that PDI received \$1,353.08, whereas PDI actually received \$1,864.74. The \$511.66 was split between "JB" and "Produce" on a 60-40 basis (Tr. 163-64; CX 33, pp. 39, 41, 42). The amount of \$204.66 which corresponds to 40% of the \$511.66 is the same amount reflected on PDI's invoice number 263900 and check number 1453 which PDI issued to Jay Brokers on August 17, 1994 (Tr. 165-68; CX 33, p. 44).

Terri Llorente, a representative of John Simon, who negotiated the transaction, testified that Joe Russo told her that there was a charge to commission and repack the watermelons (Tr. 472). Ms. Llorente stated that she would have expected that Frankie Boy Produce might have charged commission and repack charges, however, she was unaware that PDI and Jay Brokers divided the money that they falsely represented were commission and repack charges (Tr. 493-94, 498; CX 33, p. 39).

4. The Sun World Transaction (CX 36)

On July 15, 1994, Sun World sold 2,979 cartons of grapefruit through PDI for an original contract price of \$13,518.37 (CX 36, p.1-2). PDI resold the fruit to L&P and the produce was inspected upon arrival. Sun World received a faxed copy of an account of sales for the produce reflecting gross proceeds of \$13,768, deductions of \$11,698.55, and net proceeds of \$2,069.45 (Tr. 172, 521; CX 36, pp. 11-12). Based upon PDI's representations that these were the net proceeds from the sale, Sun World issued a corrected invoice to PDI for \$2,069.45 (Tr. 172, 521-22; CX 36, p. 13) and another corrected invoice for \$2,055.51 (CX 33, p. 82).

L&P's records revealed a different account of sales which showed net proceeds of \$8,023.45 (Tr. 174-75; CX 36, pp. 65-66).

Jay Brokers' records contained copies of these two different accounts of sales (Tr. 177-79; CX 36, pp. 75-78). Another irregularity was that L&P's records contained an invoice from PDI to L&P billing L&P at \$8,805.26, which was \$781.81 more than the \$8,023.45 reflected on the account of sales (Tr. 176; CX 36, p. 67). L&P paid \$8,805.26 to PDI and PDI remitted \$2,055.51 to Sun World. PDI and Jay Brokers divided the difference on a 60-40 basis.

5. The Sun World Transaction (CX 38)

Sun World sold 3,040 cartons of grapefruit to PDI at the original contract price of \$15,814.70 on or about July 28, 1994 (CX 38, pp. 1-2). PDI resold the produce to L&P Fruit. The produce was inspected upon arrival at L&P Fruit (CX 38, pp. 5-6). An account of sales on L&P letterhead was submitted to Sun World by Jay Brokers reflecting net proceeds of \$1,588.35 (Tr. 215-16; CX 38, pp. 7-8). Based upon this account of sales, Sun World issued a corrected invoice for \$1,695.50 (CX 38, p. 17). Sun World received a check from PDI dated September 7, 1994, which included \$1,695.50 for the invoice in question (Tr. 216; CX 38, p. 18). A copy of an account of sales obtained from L&P's records differed from the account of sales submitted to Sun World by Jay Brokers. The account in L&P's records showed net proceeds of \$4,551.35 instead of the \$1,588.35 reported to Sun World (Tr. 217-19; CX 38, pp. 17-18, 35-36). Jay Brokers' records revealed copies of two different accounts of sales on L&P's letterhead for the same produce, one showing net proceeds of \$1,588.35 and the other showing net proceeds of \$4,551.35 (Tr. 220-21; CX 38, pp. 43-46). PDI's records showed that finally L&P was invoiced and paid \$5,367 but that Sun World was paid only \$1,695.50. The difference of \$3,671.50 was divided between Produce Distributors and Jay Brokers on a 60-40 basis (Tr. 224; CX 38, pp. 47, 48). A copy of a stub of a check issued by PDI to Jay Brokers on November 9, 1994, contains an amount which exactly matches the 40% allocated to Jay Brokers by PDI for this transaction (CX 38, p. 54).

6. The Pacific International Marketing Transaction (CX 41)

This transaction involves the sale of 1,716 cartons of grapes by Pacific International Marketing to PDI at the original contract price of \$25,959.30. The produce was sold to BT Produce. The produce was inspected on July 7, 1994, and reinspected on July 8, 1994. The second inspection report submitted to Pacific International showed a total of 29% average defects including 8% serious damage of which 3% represented decay (CX 41, p. 12). A copy of the July 8, 1994, inspection report was not found in BT Produce's records. A slightly different version of the July 8, 1994, inspection report was found in Jay Brokers' records. That showed 27% average defects including 6% serious damage of which only 1% was for decay (CX 41, p. 38). A copy of the inspection report obtained from USDA Inspection Service indicated that the inspection report submitted to Pacific International had been altered in three places (Tr. 183-86; CX 41, p. 47). BT Produce's records contained a copy of a July 7, 1994, inspection report but not the July 8, 1994, inspection report that had been altered (CX 41, p. 33).

PDI's jacket file shows that BT Produce paid \$13,932.50 to PDI for the produce

but PDI remitted only \$13,003.50 to Pacific International and allocated the difference of \$929 on a 60-40 basis - \$557.40 to PDI and \$371.60 to Jay Brokers (Tr. 198; CX 41, p. 40).

• • • • •

The prototype transactions and the other 35 transactions provide overwhelming evidence that Respondents Irene Russo, doing business as Jay Brokers, and PDI made false and misleading statements for a fraudulent purpose and that they failed to truly and accurately account to consignors for the net proceeds resulting from the sale of their produce on a consignment basis.

Ms. Rucker's undisputed testimony was that the usual and customary fee paid by consignors to a "middle man" is twenty-five cents per carton (Tr. 132). However, after deducting such usual and customary fees, Respondents received approximately \$43,000 in "profits" as a result of their misrepresentations to their consignors.

Respondents' actions clearly violate section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The representatives of the five shippers who testified confirmed that they had absolutely no knowledge that the actual net proceeds were not accurately reported to them and that they relied upon PDI's representations in agreeing to accept less money than was actually received by PDI. All of these representatives felt that PDI had taken advantage of their firms in the fraudulent transactions and that their growers had been deprived of money that rightfully belonged to them.

While neither Joe Russo nor Irene Russo admit that they altered the accounts of sales or the inspection certificates, the majority of the altered documents were contained in Jay Broker's files; and Joe Russo and Irene Russo were actively involved in negotiating the transactions for PDI and in handling the paperwork. I conclude that Joe Russo and/or Irene Russo, as agents for PDI, intentionally altered the accounts of sales and inspection certificates.

Section 2(4) of the PACA requires that false and misleading statements be made for a "fraudulent purpose." The fraudulent purpose was to mislead Respondents' consignors to accept lesser amounts of money than were received.

Respondents knew or should have known that these fraudulent actions violated the PACA. PDI and Irene Russo have been active in the produce industry as PACA licensees for many years.

PDI is responsible for the acts of Joe Russo and Irene Russo. PDI hired Joe Russo as its agent and "employee" and allowed Joe Russo to use its company name and credit rating in connection with these transactions. PDI also received and

retained substantial profits from the fraudulent transactions. PDI cannot escape liability by claiming that it never questioned the records submitted to it by the Russos. PDI had an obligation to ensure that its actions and transactions conformed with the requirements of the PACA.

These violations of section 2(4) are most serious because they involve breaches of fiduciary duty by an agent to its principal. Respondent PDI, as an agent, owed its consignors a high degree of care, honesty and loyalty. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 145-6, 170 (1987); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732 (1978).

Respondents' actions were wilful, repeated, and flagrant. "Wilfulness" is defined as "if an act is done intentionally, irrespective of evil intent, or done with careless disregard to statutory requirements." *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 629 (1996). Joe Russo and Irene Russo, as PDI's agents, intentionally altered accounts of sales and inspection certificates in violation of section 2(4) of the PACA and they also acted with careless disregard of the statute's requirements.

Repeated violations are those occurring more than once. Respondents' actions violated the PACA in 41 separate transactions. *In re Atlantic Produce*, 35 Agric. Dec. 1631, 1640 (1976) *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. denied*, 439 U.S. 819 (1978). Respondents' violations were flagrant because of the number of violations, the amount of money involved, and the length of time during which the violations occurred. *Veg Mix, Inc.*, 48 Agric. Dec. 595 (1989); *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-74 (5th Cir. 1980) (*Per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 263-269 (1973).

II. The Joint Venture

There is no question in my mind that Irene Russo participated in a joint venture with PDI in connection with the fraudulent transactions at issue.

Irene Russo actively participated in the transactions and Jay Brokers received 40% of PDI's fraudulent gains after PDI deducted its expenses of listing Joe Russo as a PDI employee.

Many of the transaction files contained copies of notes written by Irene Russo to the participants, often asking suppliers to accept less money for their produce based upon falsified documents (e.g., CX 16, p. 7; CX 18, p. 7; CX 24, p. 20; CX 26, p. 17; CX 29, p. 5; CX 35, p. 3; CX 43, p. 5; CX 45, p. 4; and CX 48, p. 6).

At the bottom of PDI's file jackets for the relevant transactions are the letters "J/V" which stand for "joint venture." Adjacent to the letters "J/V" are written "Jay

B" which stands for "Jay Brokers" and "Produce" which stands for PDI. Adjacent to "Jay B" is an amount equal to 40% of PDI's profit in the transaction and adjacent to "Produce" is an amount equal to 60% of the profit (e.g., CX 16, p. 46; CX 28, p. 28; CX 33, p. 39; CX 43, p. 24; CX 55, p. 44).

Other relevant documentary evidence included a balance sheet for PDI as of December 31, 1993, and December 31, 1994. The balance sheet was reconstructed by Ms. Rucker who examined it but was not permitted to photocopy it. Ms. Rucker testified that the balance sheet listed payables in connection with a joint venture to either "JB" or "Jay Brokers" (CX 7; Tr. 70-73). PDI's aged payables ledger as of May 24, 1995, also lists payables to "JB" or "Jay Brokers." (CX 10, pp. 3-4; Tr. 87). Additionally, PDI's check register and canceled checks show payments by PDI to Jay Brokers in amounts corresponding to Jay Brokers' share of the joint venture profits in various transactions at issue (CX 15, 59; Tr. 95-98).

Several representatives of firms involved in the transactions testified. Some testified that they believed that Irene Russo was actively involved in the transactions; others testified that they did not have that impression. Thus, Susan Neill Lucas, president of Susan Neill Fresh Fruit Company, testified that she received faxed messages signed "Irene" originating from Jay Brokers (Tr. 387, 410; CX 18, p. 7). Teresa Llorente, a sales associate for John Simon Produce Company, also testified about significant dealings with Irene Russo (CX 33, p. 33; Tr. 496). Lee Isaac, a fruit broker for Isaac Brothers, testified that he dealt with Joe Russo at times and with Irene Russo at other times and he believed that Irene Russo worked for PDI (Tr. 639-40).

However, Bernadine Andrade, a product manager for Sun World International, stated that her conversations with Irene Russo about the transactions of her firm were not significant (Tr. 517). Similarly, Corky Meyers, Frank Porcaro, and John Kohl, other industry representatives, testified that they were not aware of any such joint venture (Tr. 609-11, 754-55, 870).

I do not accord much weight to the impressions of these representatives because their testimonies are conflicting and these individuals would not necessarily know whether or not PDI and Irene Russo were involved in the joint venture.

I attach more weight to the abundance of documents in the transaction files signed by Irene Russo, to PDI's records that show the joint venture, and to the testimony of several employees and representatives of PDI who were in a position to know about the joint venture. These individuals believed that there was such a joint venture.

Carol Dowe, PDI's billing clerk, testified that she believed that there was such a joint venture and that PDI's bookkeeper, Karyn Hertzberg, told her to record this in PDI's books and records. Ms. Dowe testified that in PDI's records, "J/V" meant

"joint venture" and "JB" meant "Jay Brokers." She also testified about conversations that she had with Irene Russo regarding the transactions (Tr. 974, 976, 978-82, 984, 996).

Ms. Rucker testified that Karyn Hertzberg, PDI's office manager, also described the transactions as being joint venture transactions (Tr. 41). Ms. Hertzberg told Ms. Rucker that "J/V" in PDI's books stood for "joint venture" (Tr. 117). Ms. Hertzberg also told Ms. Rucker that PDI maintained a ledger which recorded the balance owed to Jay Brokers for their share of the profits in the transactions (Tr. 51). Ms. Hertzberg also confirmed to Ms. Rucker that Joe Russo's gross salary and PDI's expenses of listing him as an employee were deducted from the 40% that was paid to Jay Brokers (Tr. 51). Although this testimony is hearsay, hearsay testimony is admissible in these proceedings and I accord significant weight to this testimony because Respondents could have called Ms. Hertzberg to contradict this testimony but did not do so.

Thomas Gangemi III, the son of PDI's president who had worked as a salesman for PDI, testified that, based upon his conversations with his father and based upon PDI's paperwork, he also concluded that PDI was involved in a joint venture with Jay Brokers (Tr. 1034). He stated:

Answer

It all came the day they came in the office and it was explained this is Joey and Irene Russo; they're going to be working for us on a joint venture deal. That was it.

Question

Well, who explained that to you.

Answer

My father.

Question

And was Irene present when this. . .

Answer

Yes, they were both present.

(Tr. 1045)

Mr. Gangemi further testified regarding Irene and Joe Russo:

They're, you know, a team. It was -- it always was a team to me, the Russos. It was never, you know, one or the other. It was just the Russos.

(Tr. 1046)

Paul Martucci, PDI's certified public accountant, also testified that PDI's employees told him that PDI and Jay Brokers were involved in such a joint venture (Tr. 947-50). He understood that there was no difference between Irene Russo and Joe Russo in connection with the work performed for PDI (Tr. 962-63). He confirmed that in PDI's records any expenses to PDI that resulted from listing Joe Russo as a PDI employee were offset against payments made by PDI to Jay Brokers (Tr. 959-61).

The final two witnesses were PDI's president, Thomas Gangemi, Jr., and Irene Russo. Their testimonies are important.

Mr. Gangemi testified that he was involved in a joint venture with Joe Russo and not with Irene Russo with regard to the transactions at issue; that Joe Russo requested that Joe be listed on PDI's books as an employee; and that Joe Russo requested that his 40% share of the profits to be paid to Jay Brokers after PDI deducted Joe Russo's gross salary and PDI's employee-related expenses (2 Tr. 6, 7, 33). Mr. Gangemi stated that if Ms. Rucker understood him to say otherwise, "it was inaccurate" (2 Tr. 6, 14). When asked why his employees assumed that there was such a joint venture, Mr. Gangemi stated:

That could have been supported by the constant messages they received signed "Irene" and the communications, telephone communications, you know. They could have assumed that.

(2 Tr. 16)

Irene Russo's testimony was frequently incredible. She stated that she wrote and signed the many notes contained in the transaction files, "because my husband has the most horriblest handwriting in the world and nobody could read it" (Tr. 804). When questioned why Ms. Dowe claimed that, on numerous occasions, Irene was the one speaking to Ms. Dowe and not Joe, Ms. Russo said that she was doing this to help her husband (Tr. 1055). I find unbelievable that Ms. Russo, who testified that she had a produce business of her own, would be so deeply involved in consistently renegotiating the transactions at issue merely to help her husband because he had poor handwriting.

When asked if Joe ever mentioned the 60-40 split to her, Ms. Russo again

answered in a manner that strained credibility. She answered:

He said he had - he was working for Buddy [Thomas Gangemi, Jr.] and that him and Buddy were, you know, they set up a deal and this is -- you know, this is what it was.

(Tr. 1060)

Ms. Russo's explanation of why Jay Brokers was receiving amounts of money "coincidentally" equal to 40% of the profits in the transactions in question, after Mr. Russo's salary and salary expenses were deducted, was even more incredible. She explained that these payments by PDI to Jay Brokers were to cover office expenses incurred by Joe for sharing her home office such as the use of the telephone and fax machine (Tr. 1065-67). However, she stated that there was no agreement as to how much would be paid for these expenses and she had no idea how any such amount was to be determined (Tr. 1064-65). Furthermore, she did not know whether she was to submit any documentation to anyone for any such expenses (Tr. 1064).

When Ms. Russo was asked to explain a check that Jay Brokers received from PDI for \$8,200, she could not explain what use of telephones, fax machine, or office expenses this covered. She answered:

Well, I know I was complaining about the phone bill and, you know, I had heat, I had the - and I told him, I said it's not enough. I told my husband it's not enough money to compensate for all this use of phones and the fax machine. And I said we need a little extra. So I know he spoke to Buddy. And he said, please, you know, help us out, we need a little extra into the - to be paid. And Buddy was always there.

(Tr. 1067-68)

When asked how much her telephone bills increased as a result of their use for the PDI work, Ms. Russo again did not make sense. Her answer:

They increased on a large - maybe \$500 to \$600 higher than - maybe up to \$1,000 sometimes. Joe was constantly on the phone. I mean, he would be calling long distance, hang up and redial the number again and hit the wrong number and redial it again.

(Tr. 1103)

When asked why the checks were sent erratically rather than being paid as bills were incurred, Ms. Russo answered:

Well, like I said, you know, I told Joe if the funds were running low, we need to be reimbursed back up on these expenses. So. . .

(Tr. 1103)

The weight of the evidence overwhelmingly supports the conclusion that Irene Russo, doing business as Jay Brokers, was involved in a joint venture with PDI with regard to the transactions at issue. Ms. Russo actively participated in the transactions and she received a share of the profits from the transactions. The exhibits show Ms. Russo's active participation and correlate the payments to Jay Brokers' share of the profits in the transactions at issue. Key PDI employees - Ms. Dowe and Ms. Hertzberg; PDI's certified public accountant, Mr. Martucci; and Thomas Gangemi, Jr., the son of PDI's president, all concluded that there was such a joint venture. PDI's records labelled the transactions as a joint venture between PDI and Jay Brokers. The testimony of Thomas Gangemi, Jr., is not inconsistent with the existence of such a joint venture. He testified that he had such a joint venture agreement with Joe Russo and that Joe Russo requested that payment be made to Irene's company. As I have previously stated, Ms. Russo's explanation that the payments to Jay Brokers are not payments of Jay Brokers share of the profits but are reimbursement for office expenses is preposterous. The large amounts of the payments would seem absurdly high as a reimbursement for telephone bills. Furthermore, Ms. Russo was unable to quantify such expenses, there was no agreement regarding such expenses and there were no bills or documentation for such expenses. Thus, in view of the active involvement of Irene Russo in the transactions in question and the compensation which she received, I conclude that there was a joint venture between Respondents as alleged.

III. The Issue of Expanding the Investigation

Section 6(c) of the PACA (7 U.S.C. § 499f(c) reads in applicable part:

(c)(1). Commencing or expanding an investigation

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation,

if the Secretary determines that violations of this Act are indicated other than the alleged violations specified in the complaint or notification that served as a basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(c)(3). Special notification requirements for certain investigations

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section, or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

The investigation in this matter was initiated in May 1995. PDI was notified of the investigation on May 24, 1995 (Tr. 292). In June 1995, Complainant expanded the time period of the investigation from an eight-month time period to a two-year time period and also expanded the investigation to include Jay Brokers (Tr. 46, 322). The investigation was also expanded in March 1996 and in April 1997 (Tr. 287-89). When the investigation was expanded to include Jay Brokers and each time the scope of the investigation was expanded, USDA did not notify PDI or Irene Russo in writing of the expansion of the investigation.

Respondent Russo contends that because Complainant failed to notify Respondents in writing that the investigation had been expanded, Complainant failed to comply with section 6(c)(3) of the PACA and, therefore, the Complaint must be dismissed. Respondent Russo also cites H.R. No. 104207, found in 1995 USCAN, p. 453 dated July 26, 1995, which includes a letter of Secretary of Agriculture Dan Glickman.

The language in section 6(c) of the PACA became effective in November 1995. The legislative history is not helpful in clarifying the language. The Senate issued no report. The House Report merely sets forth the language which was subsequently enacted.

However, in accordance with the Judicial Officer's decision in *In re Allred's Produce*, 56 Agric. Dec. 1884, 1917 (1997), I find that, since the beginning of this

investigation preceded the enactment of the amendment, the requirement for written notification of the expansion of the investigation does not apply here.

IV. Miscellaneous Comments

Respondent Irene Russo argues in her Reply Brief that New York State partnership law should be applied with respect to the joint venture. However, Complainant alleges that a joint venture was involved and not a partnership. Therefore, the definitions in the New York State partnership law are inapplicable.

I also disagree with Respondent's arguments in its Reply Brief that there cannot be a joint venture without "holding out to third parties." Respondent cites no authority for this proposition and I have found no such authority. A joint venture can be entered into and effectuated without publicizing it; there is no requirement that it be publicized.

Complainant does not need to prove that the altered produce records were actually done by Irene Russo herself. The evidence leads to the conclusion that the documents were altered at the Russo home office on behalf of PDI; and Irene Russo was involved in the joint venture with PDI with regard to the transactions at issue.

Respondent Russo also argues that Irene Russo had no motive to falsify certificates of inspection. Her motive is one of the strongest in the world - financial gain.

Respondent Russo argues that a negative inference must be drawn against Complainant because it failed to call PDI's bookkeeper or office manager, Karyn Hertzberg, as a witness to corroborate statements that Ms. Rucker testified that Ms. Hertzberg made. However, Respondent Russo also failed to call Ms. Hertzberg to contradict such statements. I also found it interesting that neither party called as a witness Joe Russo, an individual who was so deeply involved in these transactions.

Additionally, Ms. Rucker did not recant her testimony that PDI was involved in a joint venture with Jay Brokers, as Respondent Irene Russo alleges in its brief. Furthermore, I found Ms. Rucker to be an extremely credible witness.

V. The Appropriate Sanction

I agree with Complainant that given the serious breaches of fiduciary relationships here, the alteration of numerous documents, the wilfulness, and the repeated and flagrant nature of the violations, that the only appropriate sanction is revocation of the PACA licenses of both Respondents, Produce Distributors, Inc.

and Irene Russo, doing business as Jay Brokers. The imposition of a monetary fine as a civil penalty would be wholly inadequate. Nothing short of revocation of both Respondents' licenses would serve to protect the public and to serve notice upon others in the produce industry that such conduct is intolerable and will not be countenanced.

Order

Respondents Produce Distributors, Inc., and Irene Russo, doing business as Jay Brokers, have committed wilful, repeated, and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) and Respondents' PACA licenses are revoked.

This Decision will become final without further proceedings 35 days after service upon Respondents unless appealed to the Secretary by a party to the proceeding within 30 days after its service upon that party in accordance with section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

[This Decision and Order became final as to Produce Distributors, Inc., on January 13, 1999.-Editor]

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.

PACA Docket No. D-97-0013.

Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, filed January 25, 1999.

False or misleading statements - Joint venture - Investigation - Sanction - Willful violations - Repeated and flagrant violations - ALJ Credibility determinations - Motive for violations - Preponderance of the evidence - License revocation.

The Judicial Officer affirmed the Decision by Judge Bernstein (ALJ) concluding that Irene T. Russo, d/b/a Jay Brokers (Respondent), violated 7 U.S.C. § 499b(4) by making false and misleading statements to produce consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis. The Judicial Officer found that consignees owed consignors a high degree of care, honesty, and loyalty. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 145-46, 170 (1987). The Judicial Officer found that Respondent participated in a joint venture with Produce Distributors, Inc., in connection with the fraudulent transactions, and that a joint venture may exist even though the joint venture is not made known to third persons or the general public. The Judicial Officer found that Respondent's violations were willful, repeated, and flagrant. 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(4) and the number of Respondent's violations. Respondent's violations were "repeated" because repeated means more than one. Respondent's violations were flagrant because of the number of violations, the amount of money involved, and the length of time during which they occurred. The Judicial Officer stated that, while he is not bound by the ALJ's credibility determinations (5 U.S.C. § 557(b)), he gives great weight to an administrative law judge's credibility determinations because the administrative law judge has the opportunity to see and hear witnesses testify and the Judicial Officer found that the record supported the ALJ's credibility determinations. The Judicial Officer rejected Respondent's contention that her motive for violating 7 U.S.C. § 499b(4) was relevant to the issue of Respondent's violations. The Judicial Officer concluded that Complainant proved Respondent's violations by a preponderance of the evidence and revoked Respondent's PACA license.

Kimberly D. Hart, for Complainant.

David L. Durkin, Olsson, Frank & Weeda, Washington, D.C., for Respondent Produce Distributors, Inc.

Lawrence A. Omansky and Daniel Cherner, New York, New York, for Respondent Irene T. Russo, d/b/a Jay Brokers.

Initial decision issued by Edwin S. Bernstein, 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]; 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 January 3, 1997.

The Complaint: (1) alleges that during the period June 24, 1993, through April 14, 1995, Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondents], failed to account truly and correctly to 16 consignors, the net proceeds for 40 lots of perishable agricultural commodities, which Respondents received, accepted, and sold on behalf of the consignors, in interstate commerce (Compl. ¶ V(a)); (2) alleges that during the period June 24, 1993, through October 21, 1994, Respondents created false and inaccurate accounts of sales and altered existing accounts of sales for perishable agricultural commodities received, accepted, and sold on behalf of seven consignors for the fraudulent purpose of concealing from the consignors the accurate net proceeds amounts due them from the sale of their produce on a consignment basis (Compl. ¶ V(b)); (3) alleges that Respondents altered the contents of two United States Department of Agriculture, Agricultural Marketing Service, inspection certificates issued on October 18, 1993, and July 8, 1994, respectively, by changing the information

reported on the inspection certificates as they pertained to either the shipper's identity or percentage of decay and defects (Compl. ¶ V(c)); and (4) requests a finding that Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the issuance of an order revoking Respondents' PACA licenses (Compl. at 5).¹

Produce Distributors, Inc., filed an Answer on February 18, 1997, in which it denied the material allegations of the Complaint and raised two factual defenses and four affirmative defenses. Irene T. Russo, d/b/a Jay Brokers, filed an Answer on February 28, 1997, in which she denied the material allegations of the Complaint and raised six factual defenses and three affirmative defenses.

The ALJ presided over a hearing on January 27-30, March 4-5, and April 15, 1998, in New York, New York. Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. David L. Durkin, of Olsson, Frank & Weeda, Washington, D.C., represented Produce Distributors, Inc.² Lawrence A. Omansky and Daniel Cherner, New York, New York, represented Irene T. Russo, d/b/a Jay Brokers.

On June 15, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions, Order and Supporting Brief; on June 16, 1998, Produce Distributors, Inc., filed Notice stating that it had surrendered its PACA license (PACA License No. 771923), effective March 1, 1998, and that the Notice is filed in lieu of a full brief on the merits; on June 19, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Memorandum of Law [hereinafter Respondent Russo's Brief]; on July 8, 1998, Complainant filed Complainant's Reply Brief; and on July 10, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Reply Memorandum of Law [hereinafter Respondent Russo's Reply Brief].

On October 21, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondents made false statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis, in violation of section 2(4) of the PACA

¹On January 15, 1998, Complainant filed a Motion to Amend Complaint to correct a typographical error that appears on Exhibits A and B of the Complaint, and Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] granted Complainant's Motion to Amend Complaint (Order Amending Complaint). References in this Decision and Order to "Complaint" are to the Complaint as amended by the ALJ's January 15, 1998, Order Amending Complaint.

²On March 3, 1998, Produce Distributors, Inc., filed Notice stating that it: (1) would not offer further evidence or witnesses; (2) would not participate in the examination of witnesses; and (3) surrendered its PACA license (PACA License No. 771923), effective March 1, 1998.

(7 U.S.C. § 499b(4)); (2) concluded that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) found that Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were willful, flagrant, and repeated; and (4) revoked Respondents' PACA licenses (Initial Decision and Order at 5, 24).

On November 10, 1998, Irene T. Russo, d/b/a Jay Brokers, 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).³ On December 10, 1998, Complainant filed Complainant's Response to Respondent Irene Russo d/b/a Jay Brokers' Appeal Petition [hereinafter Complainant's Response].

Produce Distributors, Inc., did not appeal the Initial Decision and Order, which was served on Produce Distributors, Inc., on December 9, 1998. In accordance with the Initial Decision and Order (Initial Decision and Order at 24) and section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order became final and effective as to Produce Distributors, Inc., on January 13, 1999. On January 20, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision as to Irene T. Russo, d/b/a Jay Brokers.

Based upon a careful consideration of the record in this proceeding and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion of the appropriate sanction.

Complainant's exhibits are designated by the letters "CX." The portion of the transcript that relates to those segments of the hearing conducted on January 27-30 and March 4-5, 1998, are in six volumes containing pages numbered 1 through 1131. The portion of the transcript that relates to that segment of the hearing conducted on April 15, 1998, is in a single volume containing pages numbered 1 through 83. References in this Decision and Order to "Tr." are to the six volumes of the transcript that relate to the January 27-30 and March 4-5, 1998, segments of

³The 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)).

the hearing, and references in this Decision and Order to "Tr. Vol. II" are to the volume of the transcript that relates to the April 15, 1998, segment of the hearing.

PERTINENT STATUTORY PROVISION

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

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

....

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

7 U.S.C. § 499b(4) (1994).

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

Findings of Fact

1. Respondent, Produce Distributors, Inc., is a corporation organized and existing under the laws of the State of New Jersey. Produce Distributors, Inc.'s address is 600 South Livingston Avenue, Suite 102, Livingston, New Jersey 07039 (CX 1, CX 3).

2. At all times relevant to this proceeding, Produce Distributors, Inc., was licensed under the PACA, holding license number 771923. Produce Distributors, Inc., is no longer licensed under the PACA (Complainant's Response at 3; Produce Distributors, Inc.'s Notice, filed March 3, 1998; Produce Distributors, Inc.'s Notice, filed June 16, 1998).

3. Respondent Irene T. Russo is an individual, doing business as Jay Brokers, whose address is 81 Edgewood Drive, Orangeburg, New York 10962 (CX 4).

4. At all times relevant to this proceeding, Jay Brokers was licensed under the PACA, holding license number 891361. Jay Brokers' license was renewed annually and is subject to renewal on or before June 8, 1999 (CX 2).

5. In May 1995, USDA initiated an investigation of Produce Distributors, Inc., based on four reparation complaints made against Produce Distributors, Inc. USDA dispatched Roberta L. Rucker, a senior marketing specialist, to examine the records of Produce Distributors, Inc. Ms. Rucker first visited Produce Distributors, Inc.'s office on May 24, 1995 (Tr. 29).

6. In June 1995, USDA expanded its investigation to a longer time period and to include Jay Brokers (Tr. 42-43). USDA did not notify Produce Distributors, Inc., or Irene T. Russo, in writing, that the investigation had been expanded and would include Jay Brokers. Ms. Rucker examined and photocopied documents and interviewed individuals at Produce Distributors, Inc., and Jay Brokers. (Tr. 29-41, 47-49, 54-56.)

7. Ms. Rucker found irregularities in documents in Jay Brokers' files on some joint venture transactions, such as files in which there were two accounts of sales with the gross proceeds, net proceeds, and deductions differing; files that contained blank photocopies of customers' letterheads; and files that contained copies of accounts of sales on thermal paper with changes made in ink (Tr. 44).

8. Produce Distributors, Inc.'s records indicate that documents were falsified by Joseph Russo or Irene T. Russo, or both Joseph Russo and Irene T. Russo, to mislead produce consignors as to the amounts of profits involved in

transactions and that produce inspection reports were falsified by Joseph Russo or Irene T. Russo, or both Joseph Russo and Irene T. Russo.

9. Produce Distributors, Inc.'s president, Thomas Gangemi, Jr., told Ms. Rucker that Produce Distributors, Inc., was involved in a joint venture arrangement with Joseph Russo in which Produce Distributors, Inc., would assume 60 per centum of any profit or loss and Jay Brokers would assume 40 per centum of any profit or loss on the sale of produce by Produce Distributors, Inc. (Tr. 29-31; Tr. Vol. II at 6).

10. Produce Distributors, Inc.'s records show that Produce Distributors, Inc.'s profits in the transactions at issue in this proceeding were apportioned 60 percent to Produce Distributors, Inc., and 40 percent to Jay Brokers (Tr. 34-35; e.g., CX 16 at 46, CX 18 at 28, CX 20 at 22, CX 33 at 39, CX 36 at 79, CX 38 at 48, CX 41 at 40).

11. The records with respect to the transactions at issue in this proceeding contain numerous memoranda from Irene T. Russo to the produce consignors or customers proposing modifications of prices and records of other communications between Irene T. Russo and the produce consignors and customers (e.g. CX 16 at 7, 15, 48, CX 18 at 7, CX 24 at 20, CX 26 at 17, CX 28 at 2, 20, 22, 23, CX 29 at 5, CX 33 at 30, CX 35 at 3, CX 43 at 5, CX 45 at 4, CX 48 at 6).

12. The records with respect to the transactions at issue in this proceeding also contain numerous memoranda signed by Irene T. Russo and faxed from Jay Brokers' fax number that instructed Produce Distributors, Inc., as to fraudulent amounts to remit to produce consignors and amounts to bill customers in the produce transactions (Tr. 37-40).

13. Based upon the evidence that Irene T. Russo actively participated in the transactions at issue in this proceeding and that Jay Brokers received 40 per centum of Produce Distributors, Inc.'s profits for the transactions at issue in this proceeding, I find that Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, were involved in a joint venture in the transactions at issue in this proceeding.

14. Although Joseph Russo was listed in Produce Distributors, Inc.'s records as an employee, the identification of Joseph Russo as a Produce Distributors, Inc., employee was a subterfuge. In fact, Joseph Russo, together with his wife, Irene T. Russo, was involved in the joint venture with Produce Distributors, Inc., and he was listed falsely as an employee in Produce Distributors, Inc.'s records for his personal convenience.

15. Based upon the evidence, I find that Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, made false and misleading statements to the consignors in the transactions at issue in order to gain profits in connection with

their joint venture.

Conclusions of Law

1. Respondents Irene T. Russo, d/b/a Jay Brokers, and Produce Distributors, Inc., acting as dealers and/or commission merchants, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis.

2. Respondents Irene T. Russo, d/b/a Jay Brokers, and Produce Distributors, Inc., were involved in a joint venture in connection with these violations in which profits resulting from these joint venture transactions were shared 60 per centum to Produce Distributors, Inc., and 40 per centum to Irene T. Russo, d/b/a Jay Brokers.

I. The False and Misleading Statements

In a "Notice" filed on June 16, 1998, Produce Distributors, Inc., appeared to admit the alleged violations. Produce Distributors, Inc.'s Notice states, in applicable part: "on the last day of testimony in the above-captioned matter, Thomas Gangemi, Jr., the President and sole employee of Respondent, admitted that Respondent was liable for the acts and omissions of Joe Russo, a former agent of Respondent. All of the transactions detailed in the complaint in this matter involved Joe Russo." The Notice also states that Produce Distributors, Inc., had already surrendered its PACA license and would not file a brief.

Some of Mr. Gangemi, Jr.'s testimony to which Produce Distributors, Inc.'s Notice, filed June 16, 1998, may refer includes, "my opinion is that Joe Russo is the worst scourge on the produce industry and has victimized both Jay Brokers and Thomas Gangemi and Produce Distributors" (Tr. Vol. II at 24) and "I surrendered my license in contrition on March 1 and I say I've been victimized by Joe Russo, but it was my error -- my error -- my error in judgment in bringing him into my organization. I don't know what else to say." (Tr. Vol. II at 31.)

After Mr. Gangemi made that statement, the ALJ stated, "Let me say that I appreciate your accepting responsibility for these actions, even though you've testified that directly, you were not involved, but you accept responsibility for the actions of your agent and employee. I think that's very commendable on your part." Mr. Gangemi replied, "Well, I can't avoid it. Legally, I'm responsible. He's my employee." (Tr. Vol. II at 31.)

Produce Distributors, Inc., presented no defense with respect to either the issue

of its violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint, or the issue of its relationship with Joseph Russo. However, Irene T. Russo denied that the alleged violations took place and denied that she was involved in a joint venture with Produce Distributors, Inc., in connection with the alleged violations.

Included in Complainant's evidence are 41 exhibits, each containing documents with regard to one transaction in which Respondents are alleged to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CX 16-39, CX 41-56, CX 58). Complainant's investigator, Roberta L. Rucker, marked on the reverse side of many of the documents, the office from which the documents were obtained. In the interest of avoiding redundancy, Complainant presented detailed testimony by Ms. Rucker and other witnesses regarding the documents in six prototype transactions (CX 16, CX 28, CX 33, CX 36, CX 38, CX 41), and Complainant represented that the violations in the other 35 transactions were similar to those in one or more of the prototype transactions (Tr. 110). Respondents presented no evidence to dispute Complainant's contention that the other 35 transactions evidence conduct similar to that in one or more of the six prototype transactions. I have examined the exhibits in connection with the 35 other transactions and find that they support the conclusion that Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) in these 35 transactions in a manner similar to Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in the six prototype transactions.

Joseph Russo represented Produce Distributors, Inc., in all 41 of these transactions. Joseph Russo is married to Irene T. Russo (Tr. 800-01). Irene T. Russo operated a produce business under the name of "Jay Brokers" from an office in her home (Tr. 799-800). Joseph Russo worked on the Produce Distributors, Inc., transactions at issue from this home office (Tr. 800-01). Irene T. Russo also assisted Joseph Russo in his work in these transactions, and Irene T. Russo participated in these transactions. Forty percent of the profits from these transactions was paid by Produce Distributors, Inc., to Jay Brokers, after deducting from the 40 percent, salaries and employer expenses in connection with listing Joseph Russo in Produce Distributors, Inc.'s records as a Produce Distributors, Inc., employee (Tr. 51-53).

In all of the 41 transactions, Produce Distributors, Inc., represented by Joseph Russo, sold produce on a consignment basis on behalf of consignors. Thus, Produce Distributors, Inc., acted in a fiduciary relationship as agent for the consignors. Based upon falsified documents that originated from the Russos' office and based upon memoranda, faxes, and telephone calls from Joseph Russo and Irene T. Russo, the consignors were led to believe that less money was received for the produce than was actually received, and based upon these falsified documents

and representations, the consignors agreed to accept less money than Produce Distributors, Inc., actually received. The differences between the amounts of money that Produce Distributors, Inc., actually received and the smaller amounts of money that were misrepresented to the consignors as having been received were considered to be profits by Produce Distributors, Inc., and these "profits" were divided 60 percent to Produce Distributors, Inc., and 40 percent to Jay Brokers.

The six prototype transactions are as follows:

1. The Isaak Brothers Transaction (CX 16)

This transaction involved 1,716 cartons of peaches sold by Produce Distributors, Inc., for Isaak Brothers on June 24, 1993 (CX 16 at 1). The produce was resold by Produce Distributors, Inc., to B.T. Produce Co., Inc. (CX 16 at 15). Jay Brokers submitted a copy of an account of sales to Isaak Brothers from B.T. Produce Co., Inc., on July 30, 1993, that showed that only 33 of the 1,716 cartons were sold and that the other 1,683 cartons were dumped (Tr. 112; CX 16 at 15). The gross proceeds for the sale were reported as being \$352 and the cost was shown to exceed the proceeds for a loss of \$13,629 (CX 16 at 15). On September 20, 1993, Jay Brokers faxed a memorandum signed by "Irene" to Lee Isaak requesting that the file be closed at "zero billing" and "zero return," based upon the information provided in the account of sales forwarded to Isaak Brothers by Jay Brokers. Based upon this representation, Lee Isaak agreed (Tr. 111; CX 16 at 7).

The documents in B.T. Produce Co., Inc.'s records indicate that Produce Distributors, Inc., invoiced B.T. Produce Co., Inc., for \$9,106 for the produce, an amount that was subsequently reduced to \$5,674 (Tr. 113; CX 16 at 25, 32). Isaak Brothers was not paid any of this money. The \$5,674 was apportioned between Produce Distributors, Inc., and Jay Brokers on a 60/40 basis (Tr. 116-17, 122; CX 16 at 46). "J/V" is noted on the jacket of Produce Distributors, Inc.'s file next to "Jay B" and "Produce" which Taryn Hertzberg, Produce Distributors, Inc.'s bookkeeper, explained represented payments under a joint venture agreement (Tr. 117; CX 16 at 46). Produce Distributors, Inc.'s records indicate that Jay Brokers was paid \$2,269.60 (40 per centum of the \$5,674 paid by B.T. Produce Co., Inc.) and Produce Distributors, Inc., was paid \$3,404.40 (60 per centum of the \$5,674 paid by B.T. Produce Co., Inc.) (CX 16 at 46).

Lee Isaak testified at the hearing that his decision to authorize closing the file with no proceeds returned to Isaak Brothers was based upon representations made to him by Irene T. Russo and Joseph Russo that there were negative net proceeds from the sale of the produce and that more than 95 percent of the produce was dumped. Mr. Isaak stated that he was unaware that B.T. Produce Co., Inc., paid

Produce Distributors, Inc., \$5,674 for the same produce. (Tr. 633-38.)

2. The Sun Pacific Transaction (CX 28)

This transaction involved the sale of grapes by Produce Distributors, Inc., for Sun Pacific Enterprises on September 22, 1994, for a contract price of \$12,841.50 (CX 28 at 8). The produce was resold by Produce Distributors, Inc., to L&P Fruit Corporation and was inspected upon arrival (CX 28 at 10-11). Produce Distributors, Inc., invoiced L&P Fruit Corporation for \$6,632.90 for the produce (Tr. 140-41; CX 28 at 18). Jay Brokers' records included a copy of another account of sales on L&P Fruit Corporation's letterhead reflecting net proceeds of \$3,432 (Tr. 144-45; CX 28 at 26). In response to a memorandum signed by "Irene" to Sun Pacific Enterprises requesting authorization to accept a reduced price for the produce, Sun Pacific Enterprises agreed (Tr. 137-38; CX 28 at 2, 23, 26).

The jacket of Produce Distributors, Inc.'s file shows that Produce Distributors, Inc., received \$6,632.90 from L&P Fruit Corporation, but remitted \$3,173.50 to Sun Pacific Enterprises and allocated the difference between these amounts of \$3,459.40 between "Jay B" and "Produce" as profit on a 60/40 basis (CX 28 at 28).

3. The John Simon Produce Transaction (CX 33)

John Simon Produce Co. sold 2,100 watermelons through Produce Distributors, Inc., at the original contract price of \$5,510.75 on May 13, 1994 (CX 33 at 3, 20). The produce was sold to Frankie Boy Produce Corporation. John Simon Produce Co. received a typewritten account of sales from Frankie Boy Produce Corporation indicating gross proceeds of \$1,864.74 minus a deduction for "COMM. & Repack" of \$511.66, resulting in net proceeds of \$1,353.08 (CX 33 at 13). John Simon Produce Co. issued an adjusted invoice for \$1,353.08 (CX 33 at 20-22). Jay Brokers' records contain a copy of the adjusted invoice for \$1,353.08. However, its copy of the adjusted invoice contains a note from "Irene" instructing that Frankie Boy Produce Corporation be billed \$1,864.74 (CX 33 at 30), and Frankie Boy Produce Corporation paid Produce Distributors, Inc., \$1,864.74 (Tr. 159; CX 33 at 25). Ms. Rucker found a blank copy of Frankie Boy Produce Corporation's letterhead with the same fax imprint contained in the typewritten account of sales found in Jay Brokers' records for this transaction (CX 33 at 37-38; Tr. 160-62). It appears that Frankie Boy Produce Corporation's account was copied on the blank letterhead and used to create the false typewritten account of sales that was submitted to John Simon Produce Co. (Tr. 162). Thus, the false account represented to John Simon Produce Co. that Produce Distributors, Inc., received

\$1,353.08, whereas Produce Distributors, Inc., actually received \$1,864.74. The \$511.66 was split between "Jay B" and "Produce" on a 60/40 basis. (Tr. 163-64; CX 33 at 39, 41-42.) The amount of \$204.66, which corresponds to 40 per centum of the \$511.66, is the same amount reflected on Produce Distributors, Inc.'s invoice number 263900 and check number 1453, which Produce Distributors, Inc., issued to Jay Brokers on August 17, 1994 (Tr. 165-68; CX 33 at 44).

Theresa Llorente, a representative of John Simon Produce Co. who negotiated the transaction, testified that Joseph Russo told her that there were charges for commission and to repack the watermelons (Tr. 472). Ms. Llorente stated that she would have expected that Frankie Boy Produce Corporation might have commission and repack charges; however, she was unaware that Produce Distributors, Inc., and Jay Brokers divided the money that they falsely represented were commission and repack charges (Tr. 493-94, 497-98; CX 33 at 39).

4. The Sun World Transaction (CX 36)

On July 15, 1994, Sun World sold 2,979 cartons of grapefruit through Produce Distributors, Inc., for an original contract price of \$13,518.37 (CX 36 at 1-2). Produce Distributors, Inc., resold the fruit to L&P Fruit Corporation, and the produce was inspected upon arrival (CX 36 at 4-5). Sun World received a faxed copy of an account of sales for the produce reflecting gross proceeds of \$13,768, deductions of \$11,698.55, and net proceeds of \$2,069.45 (Tr. 172, 521; CX 36 at 11-12). Based upon Produce Distributors, Inc.'s representations that these were the net proceeds from the sales, Sun World issued a corrected invoice to Produce Distributors, Inc., for \$2,069.45 (Tr. 172, 521-22; CX 36 at 13) and another corrected invoice for \$2,055.51 (CX 33 at 82).

L&P Fruit Corporation's records reveal a different account of sales which show net proceeds of \$8,023.45 (Tr. 174-75; CX 36 at 65-66).

Jay Brokers' records contain copies of these two different accounts of sales (Tr. 177-79; CX 36 at 75-78). Another irregularity was that L&P Fruit Corporation's records contain an invoice from Produce Distributors, Inc., to L&P Fruit Corporation billing L&P Fruit Corporation \$8,805.26, which was \$781.81 more than the \$8,023.45 reflected on the account of sales (Tr. 176; CX 36 at 67). L&P Fruit Corporation paid \$8,805.26 to Produce Distributors, Inc., and Produce Distributors, Inc., remitted \$2,055.51 to Sun World. Produce Distributors, Inc., and Jay Brokers divided the difference on a 60/40 basis. (Tr. 181; CX 36 at 79.)

5. The Sun World Transaction (CX 38)

Sun World sold 3,040 cartons of grapefruit to Produce Distributors, Inc., at the original contract price of \$15,814.70 on or about July 28, 1994. Produce Distributors, Inc., resold the produce to L&P Fruit Corporation. (CX 38 at 1-2.) The produce was inspected upon arrival at L&P Fruit Corporation (CX 38 at 5-6). An account of sales on L&P Fruit Corporation letterhead was submitted to Sun World by Jay Brokers reflecting net proceeds of \$1,588.35 (Tr. 215-16; CX 38 at 7-8). Based upon this account of sales, Sun World issued a corrected invoice for \$1,695.50 (CX 38 at 17). Sun World received a check from Produce Distributors, Inc., dated September 7, 1994, which included \$1,695.50 for the invoice in question (Tr. 216; CX 38 at 18). A copy of an account of sales obtained from L&P Fruit Corporation's records differed from the account of sales submitted to Sun World by Jay Brokers. The account in L&P Fruit Corporation's records shows net proceeds of \$4,551.35, instead of the \$1,588.35 reported to Sun World (Tr. 217-19; CX 38 at 17-18, 35-36). Jay Brokers' records reveal copies of two different accounts of sales on L&P Fruit Corporation's letterhead for the same produce, one showing net proceeds of \$1,588.35 and the other showing net proceeds of \$4,551.35 (Tr. 220-21; CX 38 at 43-46). Produce Distributors, Inc.'s records show that finally L&P Fruit Corporation was invoiced and paid \$5,367, but that Sun World was paid only \$1,695.50. The difference of \$3,671.50 was divided between Produce Distributors, Inc., and Jay Brokers on a 60/40 basis. (Tr. 224; CX 38 at 47-48.) A copy of a stub of a check issued by Produce Distributors, Inc., to Jay Brokers on November 9, 1994, contains an amount which exactly matches the 40 per centum allocated to Jay Brokers by Produce Distributors, Inc., for this transaction (CX 38 at 54).

6. The Pacific International Marketing Transaction (CX 41)

This transaction involves the sale of 1,716 cartons of grapes by Pacific International Marketing to Produce Distributors, Inc., at the original contract price of \$25,959.30. The produce was sold to B.T. Produce, Co., Inc. (CX 41 at 1). The produce was inspected on July 7, 1994, and reinspected on July 8, 1994 (CX 41 at 11-12). The July 8, 1994, inspection report submitted to Pacific International Marketing shows a total of 29 percent average defects, including 8 percent serious damage of which 3 percent represented decay (CX 41 at 12). A copy of the July 8, 1994, inspection report was not found in B.T. Produce, Co., Inc.'s records. A slightly different version of the July 8, 1994, inspection report was found in Jay Brokers' records. The version of the July 8, 1994, inspection report found in Jay

Brokers' records shows 27 per centum average defects, including 6 per centum serious damage of which only 1 per centum was for decay (CX 41 at 38). A copy of the inspection report obtained from USDA Inspection Service indicates that the inspection report submitted to Pacific International Marketing had been altered in three places (Tr. 183-86; CX 41 at 47). B.T. Produce, Co., Inc.'s records contain a copy of a July 7, 1994, inspection report, but not the July 8, 1994, inspection report that had been altered (CX 41 at 33).

The jacket of Produce Distributors, Inc.'s file shows that B.T. Produce, Co., Inc., paid \$13,932.50 to Produce Distributors, Inc., for the produce, but Produce Distributors, Inc., remitted only \$13,003.50 to Pacific International Marketing and allocated the difference of \$929 on a 60/40 basis; \$557.40 to Produce Distributors, Inc., and \$371.60 to Jay Brokers (Tr. 198; CX 41 at 40).

The six prototype transactions and the other 35 transactions provide overwhelming evidence that Respondents Irene T. Russo, d/b/a Jay Brokers, and Produce Distributors, Inc., made false and misleading statements for a fraudulent purpose and that they failed to truly and accurately account to consignors for the net proceeds resulting from the sale of their produce on a consignment basis.

Ms. Rucker's undisputed testimony was that the usual and customary fee paid by consignors to a "middle man" is 25 cents per carton (Tr. 132-33). However, after deducting such usual and customary fees, Respondents received approximately \$43,000 in "profits" as a result of their misrepresentations to their consignors.

Respondents clearly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The representatives of the five produce consignors who testified confirmed that they had absolutely no knowledge that the actual net proceeds were not accurately reported to them and that they relied upon Produce Distributors, Inc.'s representations in agreeing to accept less money than was actually received by Produce Distributors, Inc. All of these representatives testified that Produce Distributors, Inc., had taken advantage of their firms in the fraudulent transactions and that their growers had been deprived of money that rightfully belonged to them (e.g. Tr. 387-90, 407-09, 493-94, 498-99, 534-36, 559-65, 573-77, 630-32, 635-36, 651-53).

While neither Joseph Russo nor Irene T. Russo admit that they altered the accounts of sales or the inspection certificates, the majority of the altered documents were contained in Jay Brokers' files; and Joseph Russo and Irene T. Russo were actively involved in negotiating the transactions for Produce Distributors, Inc., and in handling the paperwork. I conclude that Joseph Russo or Irene T. Russo, or both Joseph Russo and Irene Russo, as agents for Produce Distributors, Inc., intentionally altered the accounts of sales and inspection

certificates.

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires that false and misleading statements be made for a "fraudulent purpose." The fraudulent purpose was to mislead Respondents' consignors to accept lesser amounts of money than Produce Distributors, Inc., received.

Respondents knew, or should have known, that these fraudulent actions violated the PACA. Respondents have been active in the produce industry as PACA licensees for many years (Tr. 800; CX 1, CX 2).

Produce Distributors, Inc., is responsible for the acts of Joseph Russo and Irene T. Russo. Produce Distributors, Inc., hired Joseph Russo as its agent and "employee" and allowed Joseph Russo to use its company name and credit rating in connection with these transactions. Produce Distributors, Inc., also received and retained substantial profits from the fraudulent transactions. Produce Distributors, Inc., cannot escape liability by claiming that it never questioned the records submitted to it by Joseph and Irene T. Russo. Produce Distributors, Inc., had an obligation to ensure that its actions and transactions conformed with the requirements of the PACA.

These violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are serious because they involve breaches of fiduciary duty by an agent to its principal. Produce Distributors, Inc., as an agent, owed its consignors a high degree of care, honesty, and loyalty. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 145-46, 170 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732 (1978); *In re Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 695-96, 701 (1965), *aff'd*, 364 F.2d 889 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

Respondents' violations were willful, repeated, and flagrant. A violation is willful "if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 629 (1996). Joseph Russo and Irene T. Russo, as Produce Distributors, Inc.'s agents, intentionally altered accounts of sales and inspection certificates, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and they also acted with careless disregard of PACA's requirements.

Repeated violations are those occurring more than once. *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978). Respondents violated the PACA in 41 separate transactions. Respondents' violations were flagrant because of the number of violations, the amount of money involved, and the length of time during which the violations occurred.

II. The Joint Venture

There is no question in my mind that Irene T. Russo participated in a joint venture with Produce Distributors, Inc., in connection with the fraudulent transactions at issue.

Irene T. Russo actively participated in the transactions and Jay Brokers received 40 per centum of Produce Distributors, Inc.'s fraudulent gains after Produce Distributors, Inc., deducted its expenses of listing Joseph Russo as a Produce Distributors, Inc., employee.

Many of the transaction files contain copies of notes written by Irene T. Russo to the participants, often asking suppliers to accept less money for their produce based upon falsified documents (e.g., CX 16 at 7, CX 18 at 7, CX 24 at 20, CX 26 at 17, CX 29 at 5, CX 35 at 3, CX 43 at 5, CX 45 at 4, CX 48 at 6).

At the bottom of the jackets of Produce Distributors, Inc.'s files for the relevant transactions are the letters "J/V" which stand for "joint venture." Adjacent to the letters "J/V" are written "Jay B" which stands for "Jay Brokers" and "Produce" which stands for "Produce Distributors, Inc." Adjacent to "Jay B" is an amount equal to 40 per centum of Produce Distributors, Inc.'s profit in the transaction and adjacent to "Produce" is an amount equal to 60 per centum of the profit (e.g., CX 16 at 46, CX 28 at 28, CX 33 at 39, CX 43 at 24, CX 55 at 44).

Other relevant documentary evidence includes a balance sheet for Produce Distributors, Inc., as of December 31, 1993, and December 31, 1994. The balance sheet was reconstructed by Ms. Rucker who examined it, but was not permitted to photocopy it. Ms. Rucker testified that the balance sheet lists payables in connection with a joint venture to either "JB" or "Jay Brokers" (CX 7 at 2; Tr. 70-73). Produce Distributors, Inc.'s aged payables ledger as of May 24, 1995, also lists payables to "JB" or "Jay Brokers" (CX 10 at 3-4; Tr. 87-88). Additionally, Produce Distributors, Inc.'s check register and canceled checks show payments by Produce Distributors, Inc., to Jay Brokers in amounts corresponding to Jay Brokers' share of the joint venture profits in various transactions at issue in this proceeding (CX 15, CX 59; Tr. 95-98).

Several representatives of firms involved in the transactions at issue in this proceeding testified. Some testified that they believed that Irene T. Russo was actively involved in the transactions; others testified that they did not have that impression. Thus, Susan Neill Lucas, president of Susan Neill Fresh Fruit Company, testified that she received faxed messages signed "Irene" originating from Jay Brokers (Tr. 387, 410; CX 18 at 7). Theresa Llorente, a sales associate for John Simon Produce Company, also testified about significant dealings with Irene T. Russo (CX 33 at 33; Tr. 496). Lee Isaac, a fruit broker for Isaac Brothers,

testified that he dealt with Joseph Russo at times and with Irene T. Russo at other times, and he believed that Irene T. Russo worked for Produce Distributors, Inc. (Tr. 639-40).

However, Bernadine Andrade, a product manager for Sun World, stated that her conversations with Irene T. Russo about the transactions of her firm were not significant (Tr. 517). Similarly, Corky Meyers, Frank Porcaro, and John Kohl, other industry representatives, testified that they were not aware of any such joint venture (Tr. 609-11, 754-55, 870).

I do not accord much weight to the impressions of these representatives because their testimonies are conflicting and these individuals would not necessarily know whether or not Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, were involved in a joint venture.

I attach more weight to the abundance of documents in the transaction files signed by Irene T. Russo, to Produce Distributors, Inc.'s records that show the joint venture, and to the testimony of several employees and representatives of Produce Distributors, Inc., who were in a position to know about the joint venture. These individuals believed that there was such a joint venture.

Carol Dowe, Produce Distributors, Inc.'s billing clerk, testified that she believed that there was such a joint venture and that Produce Distributors, Inc.'s bookkeeper, Taryn Hertzberg, told her to record sales handled by Joseph Russo as a joint venture by Produce Distributors, Inc., and Jay Brokers in Produce Distributors, Inc.'s books and records. Ms. Dowe testified that in Produce Distributors, Inc.'s records, "J/V" meant "joint venture" and "JB" meant "Jay Brokers." She also testified about conversations that she had with Irene T. Russo regarding the transactions (Tr. 974, 976, 978-82, 984-88, 991, 996).

Ms. Rucker testified that Taryn Hertzberg, Produce Distributors, Inc.'s office manager, also described the transactions as being joint venture transactions (Tr. 41). Ms. Hertzberg told Ms. Rucker that "J/V" in Produce Distributors, Inc.'s books stood for "joint venture" (Tr. 117). Ms. Hertzberg also told Ms. Rucker that Produce Distributors, Inc., maintained a ledger which recorded the balance owed to Jay Brokers for its share of the profits in the transactions (Tr. 51). Ms. Hertzberg also confirmed to Ms. Rucker that Joseph Russo's gross salary and Produce Distributors, Inc.'s expenses of listing him as an employee were deducted from the 40 percent that was paid to Jay Brokers (Tr. 51-52). Although this testimony is hearsay, hearsay testimony is admissible in these proceedings, and I accord significant weight to this testimony because Respondents could have called Ms. Hertzberg to contradict this testimony, but did not do so.

Thomas Gangemi, III, the son of Produce Distributors, Inc.'s president who had worked as a salesman for Produce Distributors, Inc., testified that, based upon his

conversations with his father and based upon Produce Distributors, Inc.'s paperwork, he also concluded that Produce Distributors, Inc., was involved in a joint venture with Jay Brokers (Tr. 1034), as follows:

[MR. OMANSKY:]

Q. Did you have any joint venture deals with any other sales people?

[MR. THOMAS GANGEMI, III:]

A. No. Just, you know, the Russos.

Q. Okay. And did Irene ever say she had a joint venture with Produce Distributors?

A. I don't recall.

Q. And any information you did have about any possible or alleged joint venture, that all came from your father?

A. It all came the day they came in the office. And it was explained this is Joey and Irene Russo; they're going to be working for us on a joint venture deal. That was it.

Q. Well, who explained that to you?

A. My father.

Q. And was Irene present when this --

A. Yes, they were both present.

Tr. 1045.

Mr. Gangemi, III, further testified regarding the relationship between Irene T. and Joseph Russo, as follows:

They're, you know, a team. It was -- it always was a team to me, the Russos. It was never, you know, one or the other. It was just the Russos.

Tr. 1046.

Paul Martucci, Produce Distributors, Inc.'s certified public accountant, also testified that Produce Distributors, Inc.'s employees told him that Produce Distributors, Inc., and Jay Brokers were involved in a joint venture (Tr. 946-50). He understood that there was no difference between Irene T. Russo and Joseph Russo in connection with the work performed for Produce Distributors, Inc. (Tr. 962-63). Mr. Martucci confirmed that in Produce Distributors, Inc.'s records, any expenses to Produce Distributors, Inc., that resulted from listing Joseph Russo as a Produce Distributors, Inc., employee were offset against payments made by Produce Distributors, Inc., to Jay Brokers (Tr. 959-61).

The final two witnesses were Produce Distributors, Inc.'s president, Thomas Gangemi, Jr., and Irene T. Russo. Their testimonies are important.

Mr. Gangemi, Jr., testified that he was involved in a joint venture with Joseph Russo and not with Irene T. Russo with regard to the transactions at issue in this proceeding; that Joseph Russo requested that Joseph Russo be listed on Produce Distributors, Inc.'s books as an employee; and that Joseph Russo requested that his 40 percent share of the profits be paid to Jay Brokers after Produce Distributors, Inc., deducted Joseph Russo's gross salary and Produce Distributors, Inc.'s employee-related expenses (Tr. Vol. II at 6-8, 33). Mr. Gangemi, Jr., stated that if Ms. Rucker understood him to say otherwise, "it was inaccurate" (Tr. Vol. II at 6, 14). When asked why his employees assumed that there was such a joint venture, Mr. Gangemi, Jr., stated:

. . . That could have been supported by the constant messages they received signed Irene and the communications, telephone communications, you know. They could have assumed that.

Tr. Vol. II at 16.

Irene T. Russo's testimony was frequently incredible. She stated that she wrote and signed the many notes contained in the transaction files, "[b]ecause my husband has the most horriblest handwriting in the world, and nobody could read it" (Tr. 804). When questioned why Ms. Dowe claimed that, on numerous occasions, Irene T. Russo was the one speaking to Ms. Dowe and not Joseph Russo, Ms. Russo said that she was doing this to help her husband (Tr. 1055). I find unbelievable that Ms. Russo, who testified that she had a produce business of her own, would be so deeply involved in consistently renegotiating the transactions at issue merely to help her husband because he had poor handwriting.

When asked if Joseph Russo ever mentioned the 60/40 split to her, Ms. Russo again answered in a manner that strained credibility. She answered:

He said he had -- he was working for Buddy [Thomas Gangemi, Jr.] and that him and Buddy were -- you know, they set up a deal and that this is -- you know, this is what it was.

Tr. 1060.

Ms. Russo's explanation of why Jay Brokers was receiving amounts of money "coincidentally" equal to 40 per centum of the profits in the transactions in question, after Mr. Russo's salary and salary expenses were deducted, was even more incredible. She explained that these payments by Produce Distributors, Inc., to Jay Brokers were to cover office expenses incurred by Joseph Russo for sharing her home office, such as the use of the telephone and fax machine (Tr. 1065-68). However, she stated that there was no agreement as to how much would be paid for these expenses and she had no idea how any such amount was to be determined (Tr. 1064-65). Furthermore, she did not know whether she was to submit any documentation to anyone for any such expenses (Tr. 1064).

When Ms. Russo was asked to explain a check that Jay Brokers received from Produce Distributors, Inc., for \$8,200, she could not explain what use of telephones, fax machine, or office expenses this covered. She answered:

Well, I know I was complaining about the phone bill and, you know, I had heat, I had the -- and I told him, I said it's not enough. I told my husband it's not enough money to compensate for all this use of phones and the fax machine. And I said we need a little extra. So I know he spoke to Buddy [Thomas Gangemi, Jr]. And he said, please, you know, help us out; we need a little extra into the -- to be paid. And Buddy was always there.

Tr. 1067-68.

When asked how much her telephone bills increased as a result of the use of Jay Brokers' telephones for the Produce Distributors, Inc., work, Ms. Russo again did not make sense. Her answer:

They increased on a large -- maybe \$500.00 to \$600.00 higher than -- maybe up to a \$1,000.00 sometimes. Joe was constantly on the phone. I mean, he would be calling long distance, hang up and redial the number again and hit the wrong number and redial it again.

Tr. 1103.

When asked why the checks were sent erratically rather than being paid as bills were incurred, Ms. Russo answered:

Well, like I said, you know, I told Joe if the funds were running low, we need to be reimbursed back up on these expenses. So --

Tr. 1103.

The weight of the evidence overwhelmingly supports the conclusion that Irene T. Russo, d/b/a Jay Brokers, was involved in a joint venture with Produce Distributors, Inc., with regard to the transactions at issue. Ms. Russo actively participated in the transactions, and she received a share of the profits from the transactions. The exhibits show Ms. Russo's active participation and correlate the payments to Jay Brokers' share of the profits in the transactions at issue. Key Produce Distributors, Inc., employees, Ms. Dowe and Ms. Hertzberg; Produce Distributors, Inc.'s certified public accountant, Mr. Martucci; and Thomas Gangemi, III, the son of Produce Distributors, Inc.'s president, all concluded that there was such a joint venture. Produce Distributors, Inc.'s records labelled the transactions as a joint venture between Produce Distributors, Inc., and Jay Brokers. The testimony of Thomas Gangemi, Jr., is not inconsistent with the existence of such a joint venture. He testified that he had such a joint venture agreement with Joseph Russo and that Joseph Russo requested that payment be made to Irene T. Russo's company. As stated in this Decision and Order, *supra*, Ms. Russo's explanation that the payments to Jay Brokers are not payments of Jay Brokers' share of the profits, but are reimbursement for office expenses, is not credible. The large amounts of the payments would seem absurdly high as a reimbursement for telephone bills. Furthermore, Ms. Russo was unable to quantify such expenses, there was no agreement regarding such expenses, and there were no bills or documentation for such expenses. Thus, in view of the active involvement of Irene T. Russo in the transactions in question and the compensation which she received, I conclude that there was a joint venture between Respondents, as alleged in the Complaint.

III. The Issue of Expanding the Investigation

Section 6(c) of the PACA provides, as follows:

§ 499f. Complaints, written notifications, and investigations

....

(c) Investigation of complaints and notifications

(1) Commencing or expanding an investigation

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(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. . . .

(3) Special notification requirements for certain investigations

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

7 U.S.C. § 499f(c) (Supp. II 1996).

The investigation in this matter was initiated in May 1995. Produce Distributors, Inc., was notified of the investigation on May 24, 1995 (Tr. 292). In June 1995, Complainant expanded the time period of the investigation from an 8-month time period to a 2-year time period and also expanded the investigation to include Jay Brokers (Tr. 46, 322). The investigation was also expanded in March 1996 and in April 1997 (Tr. 287-89). When the investigation was expanded to include Jay Brokers and each time the scope of the investigation was expanded, USDA did not notify Produce Distributors, Inc., or Irene T. Russo, d/b/a Jay Brokers, in writing, of the expansion of the investigation.

Respondent Irene T. Russo, d/b/a Jay Brokers, contends that because Complainant failed to notify Respondents, in writing, that the investigation had been expanded, Complainant failed to comply with section 6(c)(3) of the PACA (7 U.S.C. § 499f(c)(3)), and therefore, the Complaint must be dismissed.

However, section 6(c) of the PACA was not amended to require notification of investigation until November 15, 1995,⁴ after the investigation of Respondents was begun. Therefore, in accordance with *In re Allred's Produce*, 56 Agric. Dec. 1884, 1917 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998), I find that, since the beginning of this investigation preceded the enactment of the November 1995 amendment of section 6(c) of the PACA, the requirement for written notification of the expansion of the investigation does not apply to the investigation at issue in this proceeding.

IV. Miscellaneous Comments

Irene T. Russo, d/b/a Jay Brokers, argues that New York State partnership law should be applied with respect to the joint venture (Respondent Russo's Reply Brief at 33-36). However, Complainant alleges that a joint venture was involved and not a partnership. Therefore, the definitions in the New York State partnership law are inapplicable.

I also disagree with Respondent Irene T. Russo's arguments that there cannot be a joint venture "[a]bsent [a] 'holding out [of the joint venture] to third parties' (the general public)" (Respondent Russo's Reply Brief at 38). Irene T. Russo, d/b/a Jay Brokers, cites no authority for this proposition and I have found no such authority. A joint venture can be entered into and effectuated without publicizing

⁴Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 7(b), 109 Stat. 424, 428-29.

the joint venture; there is no requirement that a joint venture be publicized.⁵

⁵Courts that have addressed the elements of a joint venture have not included as an element of a joint venture that it must be publicized either to third persons or to the general public, as Irene T. Russo contends. See, e.g., *United States v. USX Corp.*, 68 F.3d 811, 826 (3d Cir. 1995) (stating that the *sine qua non* of a joint venture is a contract, express or implied, between the parties; other requisite elements of a joint venture are: (1) the contribution by each party of money, property, effort, knowledge, or some other asset to a common undertaking, (2) the existence of a joint property interest in the subject matter of the venture, (3) the right of mutual control or management over the venture, and (4) an agreement to share profits or losses of the venture); *Itel Containers Int'l Corp. v. Atlantrafik Express Service, Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990) (stating that in order to form a joint venture: (1) two or more persons must enter into a specific agreement to carry on an enterprise for profit; (2) their agreement must evidence their intent to be joint venturers; (3) each must make a contribution of property, financing, skill, knowledge, or effort; (4) each must have some degree of joint control over the venture; and (5) there must be provision for the sharing of both profits and losses); *Richardson v. Walsh Constr. Co.*, 334 F.2d 334, 336 (3d Cir. 1964) (stating that a joint venture is an association of persons or corporations who by contract, express or implied, agree to engage in a common enterprise for their mutual profit; the essential elements of a joint venture are: (a) a joint proprietary interest in, and a right to mutual control over, the enterprise; (b) a contribution by each of the parties of capital, materials, services, or knowledge; and (c) a right to participate in the expected profits); *McGhan v. Ebersol*, 608 F. Supp. 277, 282 (S.D.N.Y. 1985) (stating that, under New York law, a joint venture is defined as an association to carry out a single business enterprise for profit; a common enterprise for mutual benefit; or a combination of property, efforts, skill, and judgment in a common undertaking; in order to find a joint venture, the crucial factors to be considered are the intent of the parties, express or implied, whether there was joint control and management of the business, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge); *Sherrier v. Richard*, 564 F. Supp. 448, 457 (S.D.N.Y. 1983) (stating that, under New York law, a joint venture is generally defined as a special combination of two or more persons wherein, through some specific venture, profit is jointly sought without any actual partnership or corporation designation; the crucial factors to be considered are the intent of the parties, express or implied, whether there was joint control and management of the business, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge); *Williams v. Forbes*, 571 N.Y.S.2d 818, 819 (N.Y. App. Div. 1991) (stating that a joint venture is an association of two or more persons to carry out a single business enterprise for a profit, for which purpose they combine their property, money, effects, skill, and knowledge; and indispensable to the creation of a joint venture is sharing in the profits and losses of the business); *Mendelson v. Feinman*, 531 N.Y.S.2d 326, 328 (N.Y. App. Div. 1988) (stating that when determining whether a joint venture exists, the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the company, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge); *Ackerman v. Landes*, 493 N.Y.S.2d 59, 60 (N.Y. App. Div. 1985) (stating that a joint venture is generally defined as a special combination of two or more persons wherein, through some specific venture, profit is jointly sought without any actual partnership or corporation designation; the essential elements are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill, or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses); *Ramirez v. Goldberg*, 439

(continued...)

Complainant does not need to prove that the altered produce records were actually altered by Irene T. Russo herself. The evidence leads to the conclusion that the documents were altered at the Russo home office on behalf of Produce Distributors, Inc., and Irene T. Russo was involved in the joint venture with Produce Distributors, Inc., with regard to the transactions at issue in this proceeding.

Irene T. Russo, d/b/a Jay Brokers, also argues that she had no motive to falsify certificates of inspection (Respondent Russo's Brief at 44). Her motive was financial gain.

Irene T. Russo, d/b/a Jay Brokers, argues that a negative inference must be drawn against Complainant because Complainant failed to call Produce Distributors, Inc.'s bookkeeper or office manager, Taryn Hertzberg, as a witness to corroborate statements that Ms. Rucker testified that Ms. Hertzberg made. However, Irene T. Russo, d/b/a Jay Brokers, also failed to call Ms. Hertzberg to contradict such statements.

Additionally, Ms. Rucker did not recant her testimony that Produce Distributors, Inc., was involved in a joint venture with Jay Brokers, as Irene T. Russo, d/b/a Jay Brokers, contends (Respondent Russo's Brief at 16). Furthermore, I found Ms. Rucker to be an extremely credible witness.

V. The Appropriate Sanction

I agree with Complainant that, given the Respondents' serious breaches of their fiduciary relationships, the alteration of numerous documents, the willfulness, and the repeated and flagrant nature of the violations, the only appropriate sanction is revocation of the PACA licenses of both Respondents, Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Irene T. Russo, d/b/a Jay Brokers, raises three issues in her Appeal for Reconsideration on Docket No. D-97-0013 [hereinafter Appeal Petition]. First, Irene T. Russo, d/b/a Jay Brokers, contends that the ALJ erroneously found that Jay

⁵(...continued)

N.Y.S.2d 959, 961 (N.Y. App. Div. 1981) (stating that when determining whether a joint venture exists, the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge).

Brokers and Produce Distributors, Inc., engaged in a joint venture (Appeal Pet. at 1). Specifically, Respondent Irene T. Russo, d/b/a Jay Brokers, contends that the ALJ's credibility determinations, as they relate to testimony concerning the existence of a joint venture between Jay Brokers and Produce Distributors, Inc., are error (Appeal Pet. at 1-2).

I disagree with the contention by Irene T. Russo, d/b/a Jay Brokers, that the ALJ's credibility determinations are error. The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).⁶ The

⁶See also *In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 21-24 (Nov. 18, 1998); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 48 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 688 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re Kim Bennett*, 52 Agric. Dec. 1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating that the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating that agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (*per curiam*) (stating that while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. (continued...))

Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

.....

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

Appeals and review. . . .

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate

⁶(...continued)

1986) (stating that the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating that the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating that the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.⁷ The ALJ explained in great detail his reasons for his credibility determinations regarding the testimony concerning the existence of a joint venture between Produce Distributors, Inc., and Jay Brokers (Initial Decision and Order at 14-21). The record supports the ALJ's credibility determinations, and I do not find that the ALJ erred.

Second, Irene T. Russo, d/b/a Jay Brokers, contends that the ALJ erred by finding that she was motivated to violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) by financial gain (Appeal Pet. at 2).

The ALJ does address Irene T. Russo's motive for her violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as follows:

Respondent Russo also argues that Irene Russo had no motive to falsify certificates of inspection. Her motive is one of the strongest in the world -

⁷*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 23-24 (Nov. 18, 1998); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 47 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

financial gain.

Initial Decision and Order at 23.

The record supports the ALJ's statement regarding Ms. Russo's motive for her violations of the PACA. However, the motive for Irene T. Russo's violations of section 2(4) of the PACA is not relevant to whether she violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and even if I found that the ALJ erred with respect to Irene T. Russo's motive, that error would not affect the determination that Irene T. Russo, d/b/a Jay Brokers, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) or the sanction to be imposed for her violations.

Third, Irene T. Russo, d/b/a Jay Brokers, contends that she did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that she should never have been involved in the investigation that resulted in Complainant filing the Complaint (Appeal Pet. at 3).

I disagree with the contention that Irene T. Russo, d/b/a Jay Brokers, did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint. The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,⁸ and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.⁹ I have

⁸*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

⁹*In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Alfred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, (continued...)

carefully reviewed the record in this proceeding, and I agree with the ALJ that Complainant has proved its case by much more than a preponderance of the evidence.

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

Order

Jay Brokers' PACA license is revoked, effective 61 days after service of this Order on Irene T. Russo, d/b/a Jay Brokers.

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.

PACA Docket No. D-97-0013.

Order Denying Petition for Reconsideration as to Irene T. Russo, d/b/a Jay Brokers, filed March 23, 1999.

Joint venture - Notification of investigation - License revocation.

The Judicial Officer denied a Petition for Reconsideration filed by Irene T. Russo, d/b/a Jay Brokers. The Judicial Officer stated that the evidence supported a conclusion that Irene T. Russo, d/b/a Jay Brokers, participated in a joint venture with Produce Distributors, Inc., in which Irene T. Russo, d/b/a Jay Brokers, shared profits with Produce Distributors, Inc., resulting from their violations of 7 U.S.C. § 499(b)(4). The Judicial Officer stated that the requirement for notification of the expansion of an investigation under the PACA (7 U.S.C. § 499f(c)) did not apply to the investigation at issue in the proceeding because the PACA was not amended to require notification until November 15, 1995, after the investigation of Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, had begun.

⁹(...continued)

506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

Kimberly D. Hart, for Complainant.

David L. Durkin, Olsson, Frank & Weeda, Washington, D.C., for Respondent Produce Distributors, Inc.

Lawrence A. Omansky and Daniel Cherner, New York, New York, for Respondent Irene T. Russo, d/b/a Jay Brokers.

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 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 Complaint on January 3, 1997.

The Complaint: (1) alleges that during the period June 24, 1993, through April 14, 1995, Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondents], failed to account truly and correctly to 16 consignors, the net proceeds for 40 lots of perishable agricultural commodities, which Respondents received, accepted, and sold on behalf of the consignors, in interstate commerce (Compl. ¶ V(a)); (2) alleges that during the period June 24, 1993, through October 21, 1994, Respondents created false and inaccurate accounts of sales and altered existing accounts of sales for perishable agricultural commodities received, accepted, and sold on behalf of seven consignors for the fraudulent purpose of concealing from the consignors the accurate net proceeds amounts due them from the sale of their produce on a consignment basis (Compl. ¶ V(b)); (3) alleges that Respondents altered the contents of two United States Department of Agriculture, Agricultural Marketing Service, inspection certificates issued on October 18, 1993, and July 8, 1994, respectively, by changing the information reported on the inspection certificates as they pertained to either the shipper's identity or percentage of decay and defects (Compl. ¶ V(c)); and (4) requests a finding that Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the issuance of an order revoking Respondents' PACA licenses (Compl. at 5).¹

¹On January 15, 1998, Complainant filed a Motion to Amend Complaint to correct a typographical error that appears on Exhibits A and B of the Complaint, and Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] granted Complainant's Motion to Amend Complaint (Order Amending Complaint). References in this Order Denying Petition for Reconsideration, as to Irene T. Russo, d/b/a Jay Brokers, to "Complaint" are to the Complaint as amended by the ALJ's January 15, 1998, Order Amending Complaint.

Produce Distributors, Inc., filed an Answer on February 18, 1997, in which it denied the material allegations of the Complaint and raised two factual defenses and four affirmative defenses. Irene T. Russo, d/b/a Jay Brokers, filed an Answer on February 28, 1997, in which she denied the material allegations of the Complaint and raised six factual defenses and three affirmative defenses.

The ALJ presided over a hearing on January 27-30, March 4-5, and April 15, 1998, in New York, New York. Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. David L. Durkin, Olsson, Frank & Weeda, Washington, D.C., represented Produce Distributors, Inc.² Lawrence A. Omansky and Daniel Cherner, New York, New York, represented Irene T. Russo, d/b/a Jay Brokers.

On June 15, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions, Order and Supporting Brief; on June 16, 1998, Produce Distributors, Inc., filed Notice stating that it had surrendered its PACA license (PACA License No. 771923), effective March 1, 1998, and that the Notice is filed in lieu of a full brief on the merits; on June 19, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Memorandum of Law; on July 8, 1998, Complainant filed Complainant's Reply Brief; and on July 10, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Reply Memorandum of Law.

On October 21, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondents made false statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluded that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) found that Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were willful, flagrant, and repeated; and (4) revoked Respondents' PACA licenses (Initial Decision and Order at 5, 24).

On November 10, 1998, Irene T. Russo, d/b/a Jay Brokers, appealed to the Judicial Officer. On December 10, 1998, Complainant filed Complainant's Response to Respondent Irene Russo d/b/a Jay Brokers' Appeal Petition.

²On March 3, 1998, Produce Distributors, Inc., filed Notice stating that it: (1) would not offer further evidence or witnesses; (2) would not participate in the examination of witnesses; and (3) surrendered its PACA license (PACA License No. 771923), effective March 1, 1998.

Produce Distributors, Inc., did not appeal the Initial Decision and Order, which was served on Produce Distributors, Inc., on December 9, 1998. In accordance with the Initial Decision and Order (Initial Decision and Order at 24) and section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order became final and effective as to Produce Distributors, Inc., on January 13, 1999. On January 20, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision as to Irene T. Russo, d/b/a Jay Brokers.

On January 25, 1999, I issued a Decision and Order as to Irene T. Russo, d/b/a Jay Brokers: (1) concluding that Respondents made false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) revoking Jay Brokers' PACA license. *In re Produce Distributors, Inc.* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. ___, slip op. at 9, 42 (Jan. 25, 1999).

On March 2, 1999, Irene T. Russo, d/b/a Jay Brokers, filed Petition for Reconsideration of the Judicial Officer's Decision, PACA Docket No. D-97-0013 [hereinafter Petition for Reconsideration]. On March 17, 1999, Complainant filed Complainant's Response to Respondent Irene Russo d/b/a Jay Brokers' Petition for Reconsideration, and the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the January 25, 1999, Decision and Order as to Irene T. Russo, d/b/a Jay Brokers.

Irene T. Russo, d/b/a Jay Brokers, raises two issues in her Petition for Reconsideration. First, Irene T. Russo, d/b/a Jay Brokers, contends that my conclusion that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is error.

I have carefully reviewed the record, and the evidence supports the conclusion that Respondents were involved in a joint venture. The basis for my conclusion that Respondents were involved in a joint venture is fully explained in *In re Produce Distributors, Inc.*, *supra*, slip op. at 22-30, 33, 36-39.

Second, Irene T. Russo, d/b/a Jay Brokers, contends that she was not notified of an investigation of Irene T. Russo, d/b/a Jay Brokers (Pet. for Recons. at 1).

I found that in May 1995, the United States Department of Agriculture [hereinafter USDA] initiated an investigation of Produce Distributors, Inc., and that in June 1995, without notifying Produce Distributors, Inc., or Irene T. Russo in

writing, USDA expanded its investigation to include Jay Brokers. *In re Produce Distributors, Inc.*, *supra*, slip op. at 6-7 (Findings of Fact Nos. 5-6).

Section 6(c) of the PACA provides, as follows:

§ 499f. Complaints, written notifications, and investigations

....

(c) Investigation of complaints and notifications

(1) Commencing or expanding an investigation

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(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. . . .

(3) Special notification requirements for certain investigations

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section or expands such an investigation, the Secretary shall promptly notify

the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

7 U.S.C. § 499f(c) (Supp. III 1997).

The investigation in this matter was initiated in May 1995. Produce Distributors, Inc., was notified of the investigation on May 24, 1995. In June 1995, Complainant expanded the time period of the investigation from an 8-month time period to a 2-year time period and also expanded the investigation to include Jay Brokers. The investigation was also expanded in March 1996 and in April 1997. When the investigation was expanded to include Jay Brokers and each time the scope of the investigation was expanded, USDA did not notify Produce Distributors, Inc., or Irene T. Russo, d/b/a Jay Brokers, in writing, of the expansion of the investigation. *In re Produce Distributors, Inc., supra*, at 32.

However, section 6(c) of the PACA (7 U.S.C. § 499f(c)) was not amended to require notification of investigation until November 15, 1995,³ after the investigation of Respondents was begun. Therefore, in accordance with *In re Allred's Produce*, 56 Agric. Dec. 1884, 1917 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998), I find that, since the beginning of this investigation preceded the enactment of the November 1995 amendment of section 6(c) of the PACA, the requirement for notification of the expansion of the investigation does not apply to the investigation at issue in this proceeding.

For the foregoing reasons and the reasons set forth in the Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, filed January 25, 1999, *In re Produce Distributors, Inc., supra*, the Petition for Reconsideration filed by Irene T. Russo, d/b/a Jay Brokers, is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the

³Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 7(b), 109 Stat. 424, 428-29.

decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.⁴ Irene T. Russo's Petition for Reconsideration was timely filed and automatically stayed the January 25, 1999, Decision and Order. Therefore, since the Petition for Reconsideration filed by Irene T. Russo, d/b/a Jay Brokers, is denied, I hereby lift the automatic stay, and the Order in the Decision and Order as to Irene T. Russo, d/b/a Jay Brokers, filed January 25, 1999, is reinstated, with allowance for time passed.

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

Order

Jay Brokers' PACA license is revoked, effective 61 days after service of this Order on Irene T. Russo, d/b/a Jay Brokers.

⁴*In re Judie Hansen*, 58 Agric. Dec. ____, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ____, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ____, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ____, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

In re: PRODUCE DISTRIBUTORS, INC., AND IRENE T. RUSSO, d/b/a JAY BROKERS.

PACA Docket No. D-97-0013.

Stay Order as to Irene T. Russo, d/b/a Jay Brokers, filed May 17, 1999.

Kimberly D. Hart, for Complainant.

Irene T. Russo, Pro se.

Order issued by William G. Jenson, Judicial Officer.

On January 25, 1999, I issued a Decision and Order as to Irene T. Russo, d/b/a Jay Brokers: (1) concluding that Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondents], made false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis, in violation of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) concluding that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of the PACA; and (3) revoking Jay Brokers' PACA license. *In re Produce Distributors, Inc.* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. ___, slip op. at 9, 42 (Jan. 25, 1999). On March 2, 1999, Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondent], filed a petition for reconsideration of the January 25, 1999, Decision and Order, and on March 23, 1999, I denied Respondent's petition for reconsideration. *In re Produce Distributors* (Order Denying Petition for Reconsideration as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. ___ (Mar. 23, 1999).

On May 4, 1999, Respondent filed a request for a stay [hereinafter Motion for Stay Order] of the January 25, 1999, Order revoking Jay Brokers' PACA license, pending the outcome of proceedings for judicial review.

On May 12, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], opposed Respondent's Motion for Stay Order because "Complainant has not received any notice indicating that a petition for appeal has been filed by Respondent . . . in a [c]ourt of [a]ppeals." On May 13, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Motion for Stay Order.

The January 25, 1999, Order revoking Jay Brokers' PACA license will become effective May 26, 1999, unless a stay order is issued. Failure to issue a stay order until Complainant has received notice, establishing that Respondent has filed a

petition to review the January 25, 1999, Order, may result in revocation of Jay Brokers' PACA license during proceedings for judicial review. Therefore, in accordance with 5 U.S.C. § 705, I find justice requires postponement of the effective date of the January 25, 1999, Order revoking Jay Brokers' PACA license.

Respondent's Motion for Stay Order is granted. The Order issued in this proceeding on January 25, 1999, *In re Produce Distributors* (Decision and Order as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. ___ (Jan. 25, 1999), 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: SUNLAND PACKING HOUSE COMPANY.
PACA Docket No. D-96-0532.
Decision and Order filed February 17, 1999.**

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

The Judicial Officer affirmed the Decision by Judge Baker (ALJ) concluding that the evidence was not sufficient to find that Respondent made 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 approximately 10,622 cartons of hybrid grapefruit, in violation of 7 U.S.C. § 499b(5). The consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify. 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 the number of Respondent's violations. Respondent's violations are "repeated" because repeated means more than one. Each misrepresented carton of hybrid grapefruit constitutes a separate violation of 7 U.S.C. § 499b(5). 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 negligence, inadvertence, or carelessness with respect to distinguishing between the Oroblanco variety

and the Melogold variety of hybrid grapefruit. The Judicial Officer concluded that a 30-day suspension of Respondent's PACA license or, in lieu of a 30-day suspension, a \$120,000 civil penalty would be appropriate for Respondent's violations of 7 U.S.C. § 499b(5). The Judicial Officer rejected Respondent's request that Respondent be given credit for the time that Respondent closed its business based upon erroneous advice from the Hearing Clerk's office that Complainant had not filed an appeal. Respondent is bound by federal statutes and regulations, irrespective of erroneous advice of federal employees, and Respondent did not demonstrate that the Secretary was estopped from imposing a sanction against Respondent because of Respondent's closure of its business based on erroneous advice.

Andrew Y. Stanton, for Complainant.

Steven M. McClean, Fresno, California, for Respondent.

Initial decision issued by Dorothea A. Baker, 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 July 30, 1996.

The Complaint alleges that: (1) Sunland Packing House Company [hereinafter Respondent] willfully violated section 2(4) and (5) of the PACA (7 U.S.C. § 499b(4), (5)) during the 1994-1995 growing season by misrepresenting 7,718 cartons of Melogolds as Oroblancos and sold and shipped Melogolds as Oroblancos to customers in Japan and the United States (Compl. ¶¶ III, VIII); (2) Respondent willfully violated section 2(4) and (5) of the PACA (7 U.S.C. § 499b(4), (5)) during the 1995-1996 growing season by misrepresenting 2,904 cartons of Melogolds as Oroblancos and sold and shipped Melogolds as Oroblancos to customers in Japan and the United States (Compl. ¶¶ IV, VIII); and (3) Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to truly and correctly account to growers for shipments of Melogolds and Oroblancos (Compl. ¶¶ V-VIII).

Respondent filed Answer and Request for Oral Hearing [hereinafter Answer] on August 26, 1996, denying the material allegations of the Complaint.

Administrative Law Judge Dorothea A. Baker [hereinafter ALJ] presided over a hearing on July 10-11, 14-18, 1997, in Fresno, California. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. Steven M. McClean, Kane, McClean & Mengshol, Fresno, California, represented Respondent.

On October 15, 1997, Complainant filed Complainant's Proposed Findings of

Fact, Conclusions and Order, and on January 26, 1998, Respondent filed Respondent's Objection To Claimant's [sic] Proposed Findings of Fact. On February 6, 1998, Complainant filed Notice of Changes to Transcript Citations in Complainant's Proposed Findings of Fact, Conclusions and Order; and also on February 6, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order with Revised Transcript Citations [hereinafter Complainant's Brief]. On February 13, 1998, Complainant filed Complainant's Reply Brief. On May 4, 1998, Respondent filed Respondent's Reply to Complainant's Reply Brief.

On June 1, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Complainant failed to prove by a preponderance of the evidence the violations alleged in paragraphs V and VI of the Complaint; (2) stated that Complainant had withdrawn the alleged violation in paragraph VII of the Complaint; (3) concluded that, as a result of negligence, mistake, accident, or inadvertence, Respondent misrepresented Melogolds as Oroblancos, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)); and (4) suspended Respondent's PACA license for 15 days (Initial Decision and Order at 47-48, 62, 70).

On July 1, 1998, Complainant appealed to the Judicial Officer; on July 30, 1998, Respondent filed Response to Complainant's Appeal Petition [hereinafter Respondent's Response] and Respondent's Request For Oral Argument; and on July 31, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

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

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)), except with respect to the sanction imposed against Respondent by the ALJ, I adopt the Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the 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 AND REGULATORY 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:

. . . .

(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.

§ 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.

....

(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. §§ 499b(4)-(5), 499h(a), (e) (1994 & Supp. III 1997).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

....

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

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

DEFINITIONS

....

§ 46.2 Definitions.

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

....
(z) *Account promptly*, except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

....
(2) ... *And Provided further*, That nothing in the regulations in this part shall prohibit cooperative associations from accounting to their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. ...

....
(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. ...

....

Nothing in the regulations in this part shall limit the seller's privilege of shipping under a closed or advise bill of lading or other arrangement requiring cash on delivery unless there has been express prior agreement to the contrary between the parties; or prohibit cooperative associations from settling with their members on the basis of seasonal pools or other arrangements provided by their regulations or bylaws. If there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of the undisputed amount.

....

GROWERS' AGENTS AND SHIPPERS

....

§ 46.32 Duties of growers' agents.

(a) *General*. The duties, responsibilities, and extent of the authority of a growers' agent depend on the type of contract made with the growers. Agreements between growers and agents should be reduced to a written contract clearly defining the duties and responsibilities of both parties and the extent of the agent's authority in distributing the produce. When such agreements between the parties are not reduced to written contracts, the agent shall have available a written statement describing the terms and

conditions under which he will handle the produce of the grower during the current season and shall mail or deliver this statement to the grower on or before receipt of the first lot. A grower will be considered to have agreed to these terms if, after receiving such statement, he delivers his produce to the agent for handling in the usual manner. In the event an unsolicited lot of produce is accepted by an agent for handling in his usual manner, he shall promptly deliver or mail a copy of such statement to the grower. A copy of this statement, showing the name of the grower and the date the statement was delivered to the grower, shall be retained in the agent's files. An agent who does not have in his files either written contacts or a written statement as required herein is failing to prepare and maintain full and complete records as required by the Act. *Provided*, That regulations or bylaws of cooperative marketing associations may be used in lieu of individual agreements or contracts to determine the methods of accounting and settlement with their grower members. An agent who fails to perform any specification or duty, express or implied, is in violation of the Act and may be held liable for any damages resulting therefrom and for other penalties provided under the Act for such failure.

(b) *Accounting for charges.* A growers' agent whose operations include such services as the planting, harvesting, grading, packing, furnishing of containers or other supplies, storing, selling or distributing produce for or on behalf of growers shall prepare and maintain complete records on all transactions in sufficient detail as to be readily understood and audited. Agents must be in a position to render to the growers accurate and detailed accountings covering all aspects of their handling of the produce. . . . The agent shall prepare and maintain full and complete records on all details of such distribution to provide supporting evidence for the accounting. If an agent is working under a pool agreement with growers, the accounting shall show how the pool cost and pool sales prices are computed. If the agent and the growers have agreed on a fixed charge to cover the various operations conducted by the agent, actual expenses incurred for these services covered by the agreement are not required to be shown in the accounting. The failure of the agent to render prompt, accurate and detailed accountings in accordance with § 46.2(z) and (aa), is a violation of the Act.

.....

MISREPRESENTATION OR MISBRANDING

§ 46.45 Procedure in administering section 2(5) of the Act.

It is a violation of section 2(5) for a 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.

(a) *Violations.* Violations are considered to be serious, very serious, or repeated and/or flagrant, depending upon the circumstances of the misrepresentation.

(1) *Serious violations.* Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count, exceeding the tolerance(s) in an amount up to and including double the tolerance provided in the applicable grades, standards or inspection procedures;

(ii) Any lot of perishable agricultural commodity officially certified as failing to meet the declared weight;

(iii) Any lot of a perishable agricultural commodity in which the State, country, or region of origin of the produce is misrepresented because the lot is made up of containers with various labels or markings that reflect more than one incorrect State, country or region of origin. Example: A lot with containers individually marked to show the origin as Idaho or Maine or Colorado when the produce was grown in Wisconsin; or

(iv) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(2) *Very serious violations.* Include the following:

(i) Any lot of a perishable agricultural commodity shown by official inspection to contain scorable defects, off-size, off-count, in excess of double the tolerance(s) provided in the applicable grades, standards or inspection procedures;

(ii) Any lot of a perishable agricultural commodity packed in containers showing a single point of origin, which is other than that in which the produce was grown, such as containers marked "California" when the produced was grown in Arizona;

(iii) Any lot of a perishable agricultural commodity officially certified

as having an average net weight more than four percent below the declared weight;

(iv) Multiple sales or shipments of a misrepresented perishable agricultural commodity within a seven day period that can be attributed to one cause; or

(v) Any other physical act, verbal or written declaration, or record entry that misrepresents a lot of a perishable agricultural commodity to the same extent as the examples listed.

(3) *Flagrant violations.* Include, but are not necessarily limited to, the following examples:

(i) Shipment or sale of a lot of a perishable agricultural commodity from shipping point after notification by official inspection that the inspected commodity fails to comply with any marking on the container without first, correcting the misbranding;

(ii) *To offer for resale or consignment,* a lot of a perishable agricultural commodity that has been officially inspected at destination and found to be misbranded without advising a prospective receiver that the lot is misbranded and that the misbranding must be corrected before resale. When a resale or consignment is finalized, *written* notice must be given that the lot is misbranded and must be corrected before resale; or

(iii) To withhold or fail to disclose known material facts with respect to a misrepresentation or misbranding.

(b) *Evidence.* (1) Evidence concerning a misrepresentation or misbranding includes official certificates of an inspection made by any person authorized by the Department to inspect fruits and vegetables or other public certifiers, and includes investigations and audit findings and any business records, testimony or other evidence bearing on the subject.

7 C.F.R. §§ 46.2(z), (aa), .32(a)-(b), .45(a)-(b)(1) (1996).

CALIFORNIA CODES

Food and Agricultural Code

.....

Division 20

PROCESSORS, STORERS, DEALERS, AND DISTRIBUTORS

OF AGRICULTURAL PRODUCTS

Chapter 1

NONPROFIT COOPERATIVE ASSOCIATIONS

....

Article 2

GENERAL PROVISIONS

§ 54033. Nonprofit nature of associations

Associations which are organized pursuant to this chapter are "nonprofit," since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.

§ 54034. Exemption from conflicting laws

Any provisions of law which are in conflict with this chapter do not apply to any association which is provided for in this chapter.

....

§ 54036. Use of the word "cooperative"

A person, firm, corporation, or association, that is hereafter organized or doing business in this state, may not use the word "cooperative" as part of its corporate name or other business name or title for producers' cooperative marketing activities, unless it has complied with this chapter.

Article 3

PURPOSES

§ 54061. Persons authorized to form association; purposes

Three or more natural persons, a majority of whom are residents of this state, who are engaged in the production of any product, may form an association pursuant to this chapter for the purpose of engaging in any activity in connection with any of the following:

- (a) The production, marketing, or selling of the products of its members.
- (b) The harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping, or utilization of any product of its members, or the manufacturing or making of the byproducts of any product of its members.
- (c) The manufacturing, selling, or supplying to its members of machinery, equipment or supplies.
- (d) The financing of the activities which are specified by this section.
- (e) Any one or more of the activities which are specified in this section.

Cal. Food & Agric. Code §§ 54033, 54034, 54036, 54061 (West 1986).

CALIFORNIA CODE OF REGULATIONS

Title 3. Food and Agriculture

....

Division 3. Economics

Chapter 1. Fruit and Vegetable Standardization

....

Subchapter 4. Fresh Fruits, Nuts and Vegetables

....

Article 22. Citrus

§ 1430.13. Citrus, Marking Requirements.

... [E]very nonconsumer container, except master containers, shall be clearly and conspicuously marked with the following information:

....

(b) Variety Designation.

(1) Oranges, grapefruit, tangerines, or mandarins shall show the name of the variety, if known, or the words "Unknown Variety."

(2) For all varieties of navel oranges, the varietal designation shall be "Navel."

(3) For all varieties of valencia oranges, "Valencia."

(4) For all varieties of white marsh grapefruit, "Marsh White" or "Golden."

(5) For all varieties of pink marsh grapefruit, "Marsh Ruby" or "Marsh Red."

(6) For all varieties of Oroblanco, the varietal designation shall be "Oroblanco" or "Sweetie," provided that only one such designation shall be marked on the container. For all varieties of Melogold, the varietal designation shall be "Melogold". For the purpose of this article, the common name or identity of Oroblancos and Melogolds, and similar type hybrids resulting from a cross between pummelo and grapefruit shall be "grapefruit hybrid".^[1]

Cal. Code Regs. tit. 3, § 1430.13(b) (1998).

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

Findings of Fact

1. Respondent's address is 26454 Avenue 128, Porterville, California 93257-9718 (Tr. 19, 875; CX 1 at 1). Porterville is located in Tulare County, California (Tr. 856-57).

2. Pursuant to the licensing provisions of the PACA, License No. 184369 was issued to Respondent (CX 1). At the time of the hearing, this license had been renewed annually and was next subject to renewal on or before December 29, 1997 (CX 1 at 13).

3. Respondent is an agricultural cooperative association, formed under California law, that is composed of approximately 80 growers, which number varies (Tr. 19, 876). Respondent is a packer and marketer of the agricultural products of its members (RX 104 at 1). Respondent's current president is Harrison Smith, who is also one of the directors (Tr. 874; CX 1 at 14). Harrison Smith's grandfather was one of the founders of Respondent in 1916 (Tr. 19,

¹Section 1430.13(b)(1)-(5) was in effect at all times material to this proceeding. Section 1430.13(b) was amended, effective January 11, 1997, after the violations alleged in the Complaint, to add new paragraph (b)(6) (RX 126).

874-75).

4. Respondent has issued articles of incorporation and bylaws in conformity with the laws of California (Tr. 19; RX 104 at 1).

5. Respondent's growers produce several kinds of citrus fruit (Tr. 900). The fruit involved in this proceeding has been described variously as "hybrid grapefruit," "Oroblanco," or "Melogold" (CX 58; RX 100). The California Code of Regulations was amended, effective January 11, 1997, to require that varieties of Oroblanco be designated as "Oroblanco" or "Sweetie," to require that varieties of Melogold be designated as "Melogold," and to provide that the common name or identity of Oroblancos and Melogolds, and similar type hybrids, resulting from a cross between pummelo and grapefruit, is "grapefruit hybrid." (RX 126).²

6. Respondent is associated with a marketing cooperative, Sunkist Growers, Inc. [hereinafter Sunkist], and each grower that becomes a member of Respondent becomes a member of Sunkist (Tr. 903; RX 107). Sunkist is a cooperative of citrus growers and markets citrus for members in Arizona and California (Tr. 1000-01). Sunkist is the seller of hybrid grapefruit, as well as other produce, packed by Respondent (RX 110 at 2). Oroblancos and Melogolds are sold in domestic and Canadian markets, although the primary market is Japan (CX 24 at 61-67, 76-267; Tr. 1014). Sunkist, not Respondent, actually ships and sells the produce (Tr. 1038-39; RX 119 at 7 n.A1). A typical sale may involve the Tulare County Fruit Exchange, which is a local produce exchange which passes on Sunkist's requests for produce to those in the locality which have the produce ready to go to market (Tr. 1145-46). Sunkist allocates the amount of fruit to be sold and then arranges for delivery from its packers, such as Respondent, which Sunkist then exports (Tr. 1038-40). Respondent supplies fruit with which Sunkist fills the orders it has received (Tr. 1038-40). Sunkist would receive the proceeds of the sale and would deduct its assessments and other charges prior to the receipt by Respondent of the proceeds for the sale of the produce. If the Tulare County Fruit Exchange were involved, it would also deduct assessments or fees prior to the receipt by Respondent of the proceeds from the sale of the produce. (Tr. 1145-47.)

7. Generally, Respondent's growers executed an application for membership on a form. By executing the membership application, each member agreed to, and was bound by, Respondent's articles of incorporation and bylaws. (RX 103.) Under its bylaws, the delivery of fruit to Respondent for packing could result in the person making delivery becoming a member of Respondent with the

²In view of the numerous references to "hybrid grapefruit" made both in the transcript and in Complainant's and Respondent's filings, the nomenclature of "hybrid grapefruit" is utilized in this Decision and Order.

same rights and duties as those members who execute a written application for membership (RX 104 at 6-7: § 2.4).

8. Respondent is owned by its members and it is "nonprofit," that is, any profits are returned to the members (Tr. 19-20; RX 104). The expenses, charges, and losses are to be paid by the members and may be assessed against the members according to Respondent's bylaws (RX 104 at 14-15, 21: §§ 6.2, 9.5). In contrast, a proprietary packinghouse is for profit and is owned by its principals, not the growers whose fruit is packed by the proprietary packinghouse. All profits from packing and marketing the fruit, and the burden of any loss, will fall upon the owners of the proprietary packinghouse, not the growers. Article sixth of Respondent's amended articles of incorporation provides:

SIXTH: To provide funds for corporate purposes of Association, revolving funds and other allocated reserves may be established. Such revolving fund for allocated reserve credits shall not be deemed to evidence, create or establish any present property rights or interests, as such terms are herein used, but such credits shall be deemed to evidence an indebtedness of Association payable only as provided in the by-laws. In the event the membership of any member shall terminate for any reason whatsoever, such member shall not thereupon become entitled to demand or receive any interest in the property and assets of Association as herein defined, but shall be entitled only to receive payment of his revolving fund credits and his interest, if any, in other allocated reserves as and when same would have been paid had he remained a member.

RX 104 at 2. The amended articles of incorporation also sets forth Respondent's bylaws which were in effect in the 1994-1995 and 1995-1996 seasons (RX 104 at 5-25; Tr. 877).

9. Pursuant to the decision of its board of directors, Respondent generally assesses a packing charge on the fresh fruit at the time it is first packed. Fruit which is not suitable for packing as fresh fruit is either culled as rots or sent to juice (which can be after packing) to a by-products plant (Tr. 887).

10. Pursuant to the decision of the board of directors, Respondent assessed a contingency charge of 8 cents for each carton of hybrid grapefruit packed in the 1994-1995 season and 10 cents for each carton of hybrid grapefruit packed in the 1995-1996 season. Although Respondent advised its members of this contingency charge and it had been approved by Respondent's board of directors, Complainant alleged that Respondent failed to account to its members for this contingency charge because there was not an agreement, in writing, which was given to the

members prior to the season, expressly setting forth this charge. Although neither Respondent's articles of incorporation nor Respondent's bylaws reference a contingency charge to be imposed upon its members, the approval and ratification of the contingency charge each year by the board of directors and members was in accordance with the authority which the board of directors possesses pursuant to Respondent's bylaws.

11. Complainant also contends that only packing charges on cartons sold, as reflected by Sunkist's records, were in accordance with the PACA, notwithstanding the fact that Respondent did incur the cost to pack the fruit. In other words, despite Respondent's long-standing practice and the yearly approval by the board of directors and ratification by the members of that practice, Complainant would disallow Respondent's packing charge on certain cartons of fruit, which were packed, but not sold. Since Respondent incurred packing costs and there was nothing illegal about the practice of charging for packing, there is no valid basis for Complainant's contention that Respondent's packing charge for fruit not sold violated the PACA.

12. All actions of the board of directors in establishing and assessing charges to the members, as well as paying out juice proceeds, were ratified by Respondent's members for the 1994-1995 and 1995-1996 seasons at the annual meetings.

13. Respondent's fiscal year ends October 31st of each year. Respondent's expenses, during the period in question, exceeded its revenues. (RX 119, RX 120.) Under Respondent's bylaws, and, in particular, sections 6.1, 6.2, and 8.9, and article IX, the board of directors has the power, in its sole discretion, to assess members for Respondent's operating expenses and losses and to credit any losses against the revolving fund or any other reserve account.

14. Respondent properly made assessments or deductions to meet "the charges and expenses of the association," as provided in the bylaws, and also, pursuant to article IX of the bylaws, properly added the assessments or deductions to the revolving fund and/or other allocated reserve credits. Article IX of the bylaws provides that the method, amount, manner, and time of assessments or deduction for "charges and expenses of the association" shall be determined in the discretion of the board of directors. Accordingly, the bylaws permit assessment of a contingency charge by Respondent's board of directors in its sole discretion. Respondent's articles of incorporation and bylaws are in conformity with State of California law. Complainant does not contend that Respondent's bylaws or articles of incorporation are unlawful.

15. Respondent did not fail to "account promptly" and make "full payment promptly" to its members. As a cooperative, Respondent was only required to

account to its members and make payments to the members as required by its bylaws. Complainant presented no evidence that Respondent failed to comply with its bylaws and to account to its members, as required by the bylaws; Respondent demonstrated through a certified public accountant, a Sunkist auditor, and its own bookkeepers, that it did account to its members, as required by the bylaws. Respondent fully and correctly accounted to its members for all sums due them. Ms. Anthony, the Sunkist auditor, also established that Respondent's contingency charge is a charge customarily taken by other Sunkist packinghouses.

16. The board of directors established packing and contingency charges pursuant to sections 6.1(d), 6.2, 8.8, and 8.9, and article IX of the bylaws (RX 104) and acted in conformity with those provisions of the bylaws. The packing and contingency charges were necessary and usual business expenses. Respondent's deduction of packing and contingency charges from funds it remitted to its members was not a violation of the PACA.

17. Respondent is empowered to assess its members for the costs of continuing in business. In the instant case, even if Respondent "overcharged" its members or "failed to account properly" because of its assessment of charges, any such over assessment not necessary to pay the expenses and continue the operations of Respondent would be returned to the members. (RX 104 at 14-15, 18, 20-22: §§ 6.1(d), 6.2, and 8.9, and article IX.) The evidence supports Respondent's contention that there were no such "overcharges," as it appropriately assessed the charges pursuant to the discretion given it under the bylaws.

18. Paragraph VII of the Complaint alleges that Respondent failed to account, truly and correctly, to 20 of its members with respect to Melogolds and Oroblancos processed for juice, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The evidence shows that Respondent did account, truly and correctly, to 20 members with respect to Melogolds and Oroblancos processed for juice. Accordingly, paragraph VII of the Complaint is dismissed.

19. Paragraphs V and VI of the Complaint allege failure to account, truly and correctly, for \$4,439.29 and \$14,299.12, respectively, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). These figures were subsequently amended. The evidence does not show that Respondent failed to truly and correctly account to its members for \$4,269.16 (as amended) for the 1994-1995 season and \$14,028.23 (as amended) for the 1995-1996 season. Accordingly, paragraphs V and VI of the Complaint are dismissed.

20. Respondent did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) in its accounting to members for the proceeds from the sale of hybrid grapefruit, or in any other manner.

21. As a result of cross-breeding, hybrid grapefruit, known as Oroblancos

and Melogolds, were developed (Tr. 78-81, 98-99; CX 58; RX 100). Oroblancos and Melogolds are a cross between a pummelo and a grapefruit, and both come from a common source, as a result of hybridization (Tr. 35, 38, 78-81, 98-99; CX 58; RX 100). Melogolds and Oroblancos are substantially similar, but there are differences between them (Tr. 38-50, 1363; CX 58). Melogolds and Oroblancos cannot be shipped as "grapefruit" because of insufficient yellow color (Tr. 860, 862, 864).

22. The differences between Melogold and Oroblanco from mature trees are more easily discerned than the differences between Melogold and Oroblanco from immature trees (Tr. 1352-67, 1376-78). The shape of Melogold is comparable to Oroblanco, but Melogold has a slight tendency for more stem-end taper than Oroblanco (Tr. 45, 54, 1356-58). Oroblanco tends to be smaller than Melogold (Tr. 45, 54). Under ideal conditions, and, from mature trees, the differences relate to Melogold being more pummelo-like than Oroblanco (Tr. 47, 1376-77). The average peel thickness of Melogold, as a percentage of fruit diameter, is thinner than Oroblanco; the interior color and texture of Melogold are the same as in Oroblanco; the juice percentage of Melogold is slightly higher than Oroblanco; and Melogold may have a slight bitterness, particularly early and late in the harvest season (Tr. 46-48, 50, 54; RX 100 at 3). To the untrained eye, and even as to those more knowledgeable, there is a substantial likeness between Melogolds and Oroblancos (Tr. 61-66, 1362-63).

23. The testimony of a number of witnesses establishes that they did not agree as to the means of distinguishing Melogolds from Oroblancos--there was the "taste" test; thickness of peel; color and texture; interior color; juice test; and appearance (Mr. Josephson: Tr. 791-93; Mr. Roger Smith: Tr. 1352-68). Although "experts," such as the one grower witness of Complainant (Mr. Josephson: Tr. 784, 791-93, 807-08), and those experienced in the area of distinguishing between Oroblancos and Melogolds (Mr. Roger Smith: Tr. 1358, 1380-81) would have less tendency than others to confuse Melogolds and Oroblancos, this reduced tendency to confuse Melogolds and Oroblancos would not necessarily apply to a packinghouse manager or worker who was confronted with fruit from immature trees (Tr. 1352-68, 1376-78). The trees from which fruit was packed in the instant case were immature trees (Tr. 811, 1353-67, 1380-81).

24. In the 1994-1995 and 1995-1996 seasons, neither the State of California nor the United States Department of Agriculture [hereinafter USDA] had established identity standards or required varietal designations for Oroblancos and Melogolds (Tr. 858-69, 944). Identity standards describing and establishing the varieties of Oroblanco and Melogold became effective in January 1997 (RX 126). Prior to the 1994-1995 season, Respondent received no advice or instructions from

any governmental agency as to how to label or represent the hybrid grapefruit, despite Respondent's request for advice (Tr. 944). The advice received from county inspector Gould was that Melogolds and Oroblancos could not be identified or labeled as grapefruit because they did not have the yellow color required for grapefruit (Tr. 860, 864, 944). County inspector Gould also advised Respondent there were no identity standards for Melogolds or Oroblancos (Tr. 859-62, 864-65, 944).

25. Sunkist began shipping more than pallet-sized amounts of Oroblancos and Melogolds to Japan in the 1992-1993 season (Tr. 1005-06). Sunkist began shipping significant quantities of hybrid grapefruit to Japan during the 1993-1994 season, when it shipped approximately 30,000 cartons (Tr. 1006-07). In the 1994-1995 season, Sunkist shipped to Japan approximately 41,000 cartons of Oroblancos and 17,000 cartons of Melogolds (Tr. 1007). In the 1995-1996 season, Sunkist shipped to Japan 52,212 cartons of Oroblancos and no cartons of Melogolds (Tr. 1007; RX 109). Sunkist is probably the biggest United States exporter of hybrid grapefruit to Japan (Tr. 1037).

26. Under patent rights obtained by the University of California (Tr. 50; CX 58; RX 100), the Israelis started growing Oroblancos, which they called "Sweeties." In the 1992-1993 season, growers in Israel began shipping to Japan significant quantities of Sweeties. The volume of Israeli exports of Sweeties to Japan increased substantially since the 1992-1993 season. (Tr. 1006.) The Israelis shipped approximately 544,944 cartons during the 1993-1994 season, 980,494 cartons during the 1994-1995 season, 1,268,408 cartons during the 1995-1996 season, and 1,369,796 cartons during the 1996-1997 season (RX 108). Although the record is not explicit, the Israeli Sweeties may have arrived in Japan as early as November 1995, in the 1995-1996 season, although there is some indication that they did not arrive until December 1995 (Tr. 950; RX 108).

27. In the 1995-1996 season, Japanese customers developed a preference for Israeli Sweeties to hybrid grapefruit grown elsewhere (Tr. 1009, 1014, 1035). The Japanese prefer fruit with a dark green color, a hard texture, and a sweet taste (Tr. 1009). In order for growers in Tulare County to ship hybrid grapefruit containing the characteristics desired by the Japanese, harvesting and shipment must take place either in late October or early November (Tr. 1008-09).

28. During the 1994-1995 season, Sunkist sent Respondent orders for quantities of hybrid grapefruit sought by Japanese importers (Tr. 949-50). Sunkist made the determination as to allocation and delivery of the fruit to specific buyers (Tr. 1038-40). Respondent's fruit was delivered to Sunkist for loading onto two ships in the 1994-1995 season: The American Fuji and the Swan Stream (CX 23 at 3, 5). In the 1995-1996 season, Respondent delivered its fruit to Sunkist for

shipment to Japan on three ships: The Ohyoh, sailing date October 20, 1995 (CX 23 at 12); Spring Delight, sailing date October 27, 1995 (CX 23 at 15); and Columbus Canada, sailing date November 3, 1995 (CX 23 at 19).

29. Franklin Carl Arcure is currently the manager and the secretary/treasurer of Respondent and has been the manager of Respondent for the past 12 years, including the 1994-1995 and 1995-1996 seasons (Tr. 937). As the manager, Mr. Arcure has responsibility to oversee the entire packinghouse (Tr. 1491). This responsibility includes oversight of the field men, the packinghouse foreman, all fruit receiving, packing, grading, and sales, and member relations (Tr. 946). During the 1995-1996 season, Mr. Arcure also acted as Respondent's field man (Tr. 939-40). Mr. Arcure is also a member of Respondent and on its board of directors (Tr. 964).

30. During the 1994-1995 and 1995-1996 seasons, once the hybrid grapefruit was picked, Respondent transported it from the field to the packinghouse in bins (Tr. 140-41, 943; CX 5). Respondent's receiver made out receiving tags for the bins indicating the grower's name, the variety, and how many bins Respondent received (Tr. 142, 1430). When the fruit went through the packing line, Respondent's employees noted the number of cartons of various sizes packed on a document issued by Respondent, called a "grower carton tally" (Tr. 142; CX 5 at 3, CX 6 at 3, CX 10 at 3-13, CX 11 at 3). This information was then given to Respondent's secretary (Tr. 116-17).

31. The 1994-1995 season was the first time that Respondent had received Oroblancos and Melogolds in quantity, and Respondent did not know how to label, mark, represent, or identify the fruit (Tr. 858-65, 944; RX 126). Mr. Arcure and the board of directors regarded Melogolds and Oroblancos as the same, and they were treated as a single pool (Tr. 1138-40, 1143).

32. At times, Respondent found it necessary to repack hybrid grapefruit that had already been packed in cartons because some of the fruit had gone bad (Tr. 155-56, 980-81). On those occasions, in order to make the cartons saleable, Respondent removed the bad fruit and repacked the cartons (Tr. 156, 981). When this occurred, Respondent prepared repack slips, reflecting the repacking (Tr. 155-57). Respondent also prepared a repack summary sheet, reflecting the number of cartons repacked, the number of cartons left after repacking, and the number of cartons dumped (CX 8 at 1, CX 16 at 1).

33. For the 1994-1995 season, according to its own records, Respondent had 711 cartons of Oroblancos available for sale (788 cartons packed, less 77 cartons lost on repacking) (CX 8 at 1) and 11,253 cartons of Melogolds available for sale (11,308 cartons packed, less 55 cartons lost on repacking) (CX 16 at 1).

34. On the basis of records generated and produced by Sunkist and original

source documents (CX 9, CX 17), Respondent maintained in its records (but did not generate) shipment summary reports reflecting Sunkist's disposition of Oroblancos and Melogolds during the 1994-1995 season (Tr. 165-68). Information contained in the reports included the name of the buyer, the destination, the assignment number which Sunkist gave to the order, the exchange number, the ship date, and the quantity involved (Tr. 168-72).

35. Sunkist maintained a payment register covering the 1994-1995 and 1995-1996 seasons, indicating how much was paid by the buyers of Respondent's fruit, including Respondent's Oroblancos and Melogolds, the deductions made by Sunkist and the Tulare County Fruit Exchange, and the net payment to Respondent (Tr. 123-24, 183-87, 277-78; CX 20, CX 60).

36. All shipment summary reports were prepared by Sunkist which prepared all the sales documents concerning the sales of Oroblancos and Melogolds during the 1994-1995 season, and Respondent had copies of some of these records (Tr. 188-212, 225-53; CX 21, CX 23, CX 24).

37. During the 1994-1995 season, Respondent made some sales of Oroblancos and Melogolds through local cash sales, rather than in response to orders from Sunkist (Tr. 237-48; CX 22A).

38. During the 1994-1995 season, according to Respondent's records and the calculations made by Complainant, Respondent caused to be sold 8,429 cartons represented as Oroblancos, 7,718 more cartons of Oroblancos than it had available for sale, and 3,486 cartons of Melogolds (CX 18, CX 19A; Tr. 611-21, 636).

39. During the 1994-1995 season, Respondent accounted to its growers of Oroblancos and Melogolds by combining all the hybrid grapefruit into one pool (Tr. 258-60; CX 25). Respondent sent each of its Oroblanco and Melogold growers a pool statement for combined pool numbers 582 and 583, reflecting the disposition of each grower's product in the combined pool (Tr. 914; CX 25). Reference was made on the pool statements to "Mello Gold/Oro Blanco Pool" (CX 25 at 1). Thus, I have some doubt as to the exact number of cartons of Melogolds and Oroblancos that Respondent had available for sale during the 1994-1995 season, because the fruit was treated as the same variety without need to distinguish.

40. In calculating what should be remitted to its members for the 1994-1995 season, Respondent deducted a packing charge of \$2.85 for each carton packed, even if some of the cartons were later lost through repacking (RX 110 at 4). Respondent also deducted a contingency charge of 8 cents for each carton packed (Tr. 1259).

41. During the 1995-1996 season, Respondent differentiated between Melogolds and Oroblancos and accounted to its growers of hybrid grapefruit by

using separate pools for Oroblancos and for Melogolds (Tr. 315-16, 326-28; CX 42A, CX 43). Respondent also had a late season Melogold pool (Tr. 357-59; CX 51). Respondent sent each of its Oroblanco and Melogold growers a pool statement reflecting the disposition of each grower's products in either the Oroblanco pool or the Melogold pool (Tr. 330).

42. During the 1995-1996 season, Respondent received Oroblancos from 13 of its members (CX 26-CX 42). Respondent's records indicate that a total of 17,049 cartons were packed, 8,842 cartons went to juice, and 23 cartons were culls (CX 42A at 1).

43. During the 1995-1996 season, Respondent received Melogolds in two pools (Finding of Fact 41). The main pool contained Melogolds received from 10 of Respondent's members (CX 44A at 2-11). Respondent's records, as set forth in Complainant's calculations, indicate that a total of 10,001 cartons were packed, 20,652 cartons went to juice, and 494 cartons were culls (CX 44A at 1). The late season pool contained Melogolds received from only one member, Hal Campbell Revocable Living Trust (CX 51 at 2). Respondent's records indicate that a total of 299 cartons were packed, 2,101 cartons went to juice, and 6 cartons were culls (CX 51 at 1).

44. According to Complainant's calculations, the number of cartons of Melogolds which Respondent packed, sent to juice, or considered culls in the 1995-1996 season included, from Hillcroft Groves, 783 cartons packed, 410 cartons to juice, and 6 cartons considered culls (CX 44A at 5), and from Caliente Farms, 2,348 cartons packed, 2001 cartons to juice, and 13 cartons considered culls (CX 44A at 3).

45. For the 1995-1996 season, Respondent had available, as fresh fruit for sale, 17,049 cartons of Oroblancos and 10,300 cartons of Melogolds (CX 42A at 1, CX 44A at 1; RX 110 at 14).

46. In calculating what should be remitted to the members for the 1995-1996 season, Respondent deducted a packing charge of \$3 per carton on all cartons of Oroblancos packed, even if some of the cartons were later lost through repacking (RX 110 at 14). Respondent did not charge its members a packing charge on any of the cartons of Melogolds that went to juice during the 1995-1996 season, even though some of the fruit was packed in cartons before it was decided that the fruit was going to go to juice (Tr. 1474-76, 1531-32; CX 63 at 1). Respondent also deducted a contingency charge of 10 cents for each carton packed (Tr. 1314-16). These charges were consistent with a decision by the board of directors which determined to assess a packing charge only on cartons of Melogolds actually purchased during the 1995-1996 season (Tr. 1532). The board of directors made this decision because Respondent had packed Melogolds anticipating a larger

shipment of fruit into Japan (Tr. 1532). However, due to the ability of the Israelis to cold treat their Sweeties in transit, tremendous volumes of Sweeties arrived in Japan earlier than anticipated, limiting the market for Melogolds (Tr. 1013, 1022-25, 1532).

47. Respondent delivered its fruit to Sunkist at Port Hueneme, which sold the fruit and remitted the net proceeds to Respondent (Tr. 1038-44). Respondent maintained internal records concerning its pool accounting (Tr. 1067-78; RX 110).

48. During the 1995-1996 season, Respondent made some sales of Oroblancos and Melogolds through local cash sales, rather than in response to orders from Sunkist (Tr. 621-29).

49. During the 1995-1996 season, Respondent, through its sales agent, Sunkist, sold 19,953 cartons represented as Oroblancos, 2,904 more cartons of Oroblancos than Respondent had available for sale (Tr. 643-44, 1413-14, 1429-32; CX 45, CX 46 at 3). Upon inspection of the fruit, the county inspector, Mr. Milner, determined that Respondent packed Melogolds from Hillcroft Groves and Caliente Farms in cartons labeled Oroblancos, and the labels were changed, as he requested, before the Melogolds were delivered to Sunkist (Tr. 1395-1401, 1413-21, 1433-34).

50. Although the California Department of Food and Agriculture did not require varietal designation of Oroblancos and Melogolds during the 1994-1995 and 1995-1996 seasons (Finding of Fact 5), nevertheless, Sunkist (Tr. 1009-16), the Japanese purchasers (Tr. 1008-10; RX 109), and the county inspector (Tr. 1396-97) made a distinction between Melogolds and Oroblancos, particularly with respect to the 1995-1996 season, in which no Melogolds were shipped to Japan (RX 109). Sunkist's orders were for Oroblancos, and Respondent filled some of those orders with Melogolds. This finding is premised upon Respondent's own records, and Respondent has not refuted this finding.

51. Based upon the best evidence available, and without substantial evidence to rebut this evidence, I find that Sunkist, the sales agent of Respondent, during the 1994-1995 and 1995-1996 seasons, gave Respondent orders for Oroblancos, some of which orders Respondent filled with Melogolds (Findings of Fact 25, 38, and 49). Thus, Respondent misrepresented Melogolds as Oroblancos. At most, the number of cartons which Respondent misrepresented were 7,718 cartons in the 1994-1995 season and 2,904 in the 1995-1996 season, for a total of 10,622 cartons. However, because Melogolds and Oroblancos were treated as one pool in the 1994-1995 season, the precise number of cartons of Melogolds that were misrepresented as Oroblancos is not ascertainable.

52. During its long history of operation since 1916 (Tr. 19, 874-75), Respondent has had no prior violations of the PACA.

53. Respondent did not receive any complaints from the Japanese purchasers or from Sunkist with respect to the variety of fruit shipped during the 1994-1995 and 1995-1996 seasons (Tr. 962, 1031-32, 1465-66).

54. The evidence does not show that Respondent's misrepresentation of Melogolds as Oroblancos was for a fraudulent purpose, but rather the result of inadvertence, carelessness, or negligence on the part of Respondent's employees. There is a similarity of appearance between Melogolds and Oroblancos, especially when the fruit is from immature trees and one variety of fruit could be mistaken for the other, particularly by one not schooled in the differences (Tr. 61-66, 1352-67); the California Department of Food and Agriculture did not require varietal designation of Oroblancos and Melogolds during the two seasons involved in this proceeding (RX 126); a purchase representative from Japan toured the Oroblanco and Melogold groves and did not seem to require differentiation (Tr. 942-43, 947-49, 953-54); and errors were committed as to which groves were being picked and packed (Tr. 1395-1413).

55. Respondent did not make, for fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which was received in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

56. As a result of inadvertence, carelessness, or negligence, Respondent misrepresented approximately 10,622 cartons of Melogolds to be Oroblancos, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

57. However, as Respondent intentionally committed prohibited acts, irrespective of evil intent or erroneous advice, and acted with careless disregard of statutory requirements, Respondent's violations of section 2(5) of the PACA were willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)), and under USDA precedents.

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)).

Discussion

The proponent of an order has the burden of proof in proceedings conducted

under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). Quantitatively, Complainant need only show a scintilla more than 50 percent of the evidence to prevail under the preponderance standard. Put another way, Complainant need only show that Complainant's version of the facts is more likely than not correct. I find that Complainant has not met the burden of proof by a preponderance of the evidence with respect to allegations in paragraphs V, VI, and VII of the Complaint.

Respondent's amended articles of incorporation (RX 104 at 1-4) and its bylaws (RX 104 at 5-25) reflect the rules which govern the rights and duties of Respondent and its members. Under its bylaws, the delivery of fruit to Respondent for packing could result in the person making delivery becoming a member of Respondent with the same rights and duties as those members who execute a written application for membership (RX 104 at 6-7: § 2.4).

Also set forth in the bylaws are provisions relating to the election of directors (RX 104 at 11: § 5.2), including an enumeration of their general powers (RX 104 at 13-14: § 6.1). The bylaws provide "all corporate powers shall be exercised by or under the authority of, and the business and affairs of Association shall be controlled by, the board of directors" (RX 104 at 13: § 6.1). The board of directors' powers included the capacity to procure for, and furnish to, members such equipment and supplies and to render such services, as the board of directors might determine to be appropriate, for or in the production of fruit by members and the marketing of such fruit (RX 104 at 14: § 6.1(d)). The bylaws provide that tentative charges for such equipment, supplies, and services are to be assessed and collected in such amount and at such time as the board of directors may determine (RX 104 at 14: § 6.1(d)). Moreover, "[a]ny amount by which the total of such charges in any fiscal year may exceed cost, as determined by the board, shall be refunded ratably on a patronage basis, as of the close of the fiscal year, in such manner and at such time as the board may determine" (RX 104 at 14: § 6.1(d)).

Sections 6.2 and 8.9 of Respondent's bylaws provide that the method, amount, manner, and time of assessment or deduction shall be fixed and determined from time to time by the board of directors and that there was an obligation to return the net proceeds to the members after deducting all charges and operating expenses (RX 104 at 14-15: § 6.2). Such proceeds were to be returned to the members furnishing the fruit for marketing on the basis of the quantity or value of fruit furnished (RX 104 at 18: § 8.9).

In the instant case, the evidence shows that Respondent sustained a loss in the operative period, so no refund was due. Accordingly, the board of directors was

authorized to assess a contingency charge, packing charges, and/or other charges in an amount which was in the board's discretion. Under California law and the Regulations, these charges were lawful and did not violate the Regulations concerning the duty to account to growers. Article IX of Respondent's bylaws provides for the creation of a revolving fund and determinations with respect to the additions to the revolving fund, as well as the nature of revolving fund credits. The entire operation of the revolving fund, as more specifically set forth in the bylaws, was in the sole discretion of the board of directors. Article IX of the bylaws also indicates that there was to be no segregation of the revolving fund and that in the event Respondent sustained losses, such losses could be charged against current operating expenses, the revolving fund, or other allocated reserve credits.

Three reliable and very credible witnesses testified with respect to Respondent's financial operations and the maintenance of its books and records. Admittedly, they were unable to determine how Complainant arrived at its allegations that Respondent had not been remitting proper amounts to its members. Nevertheless, their testimony, combined with documentary evidence, such as RX 110 and RX 111, clearly establishes that there was nothing wrong with Respondent's records and that such records accurately and correctly reflected (except for two minor instances) the amounts of fruit received, the number of cartons shipped, and the disposition of the fruit that was not shipped. Although Sunkist could spot-check Respondent's records at any time, Respondent requested that Sunkist audit Respondent's books. This audit was conducted by Winnie Jo Anthony, who has been employed by Sunkist for 9 years and who, prior to that, worked for 14 years for the Lemon Administrative Committee. She was office manager, did all of the accounting, and was in charge of the Compliance Department, including fruit accountability and the auditing of records of the packinghouses, to assure that they were in compliance with regulatory requirements. She is field manager now, has two people working for her, and performs all of the packinghouse duties. She still performs field audits. (Tr. 1064-68.)

Ms. Anthony's audit report evidences that Respondent's books and records balance with those of Sunkist, with the exception of two minor bookkeeping errors, which are not of significance in this proceeding (RX 110). However, this report was maintained as a confidential document of Sunkist, was not given to Respondent, and was not available to Respondent until a *subpoena duces tecum* was issued in this proceeding. Accordingly, RX 110 first became available to Respondent at the hearing. During the course of her testimony, Ms. Anthony commented on Respondent's contingency fund, which was utilized principally to preclude back billings to Respondent's members and was not considered unusual by Ms. Anthony. Her testimony corroborated the testimony of other witnesses that

the contingency fund was a fund available for disbursement to meet unanticipated expenses. If it was not utilized, the proceeds ultimately would be returned to Respondent's members. Ms. Anthony found absolutely no lack of reporting with respect to the return of receipts to Respondent's members.

Also corroborating the accuracy of the business operations, as reflected in Respondent's records, was Virginia Hall who was Respondent's bookkeeper and manager and who has worked for Respondent for more than 15 years (Tr. 1231-32).

Ms. Hall's testimony descriptively sets forth the operations of Respondent's packinghouse, which operations do not involve the steady flow and disposition of inventory. Ms. Hall indicated, as did the testimony of other witnesses, that Respondent sold all of its fruit for the 1994-1995 season. However, for the 1995-1996 season, Respondent packed all of its fruit, but did not sell all of its fruit. It was estimated that 75 percent of the fruit which had been packed as Oroblancos were subsequently sent to juice. Thus, there was a large difference between the number of cartons packed and the number of cartons sold. Accordingly, packing charges during the 1995-1996 season were greater than packing charges for the 1994-1995 season because so many cartons had been packed prior to the fruit going to juice. Ms. Hall indicated that for the 1993-1994 season amounts were returned to Respondent's members and amounts had been returned to Respondent's members since then.

Mr. Paul Klippenstein, a certified public accountant licensed by the State of California, testified as to the accuracy of Respondent's books and records and correct procedures employed by Respondent with respect to its books and records. He testified that he had done work for Respondent for the last 5 years. He reviewed and audited Respondent's books and records and compiled monthly statements from the books and records. Mr. Klippenstein testified that his review of Respondent's books and records revealed proper accounting for all funds, that there was no underreporting of funds to Respondent's members, and that the books and records reflected Respondent's operations, including the maintenance of a contingency fund. Mr. Klippenstein testified that the contingency fund is necessary to prevent charge-backs to Respondent's members because Sunkist had an assessment which it could charge-back and the contingency fund is a vehicle to meet any additional charges made by Sunkist.

Complainant's allegations that Respondent withheld unreported amounts from its members and that there was lacking a specific written notice to the members of the charges attributable to their fruit, are unsubstantiated by the credible and reliable evidence of record.

Section 46.32(a) of the Regulations (7 C.F.R. § 46.32(a)) provides that written

agreements regarding accounting and settlement between a cooperative and its members are not necessary and that bylaws of a cooperative marketing association may be used in lieu of individual agreements or contracts to determine the methods of accounting and settlement with its grower members. Respondent's members agreed to be bound by Respondent's and Sunkist's bylaws (RX 103, RX 107). It would seem, *ipso facto*, that Respondent's bylaws would then delineate the duties of Respondent to account to its members.

Other sections of the Regulations provide that the bylaws may be used to define the cooperative's duty to account to its members. For example, section 46.2(z) of the Regulations (7 C.F.R. § 46.2(z)), defining "account promptly," states that a cooperative may account to its members on the basis of seasonal pools or other arrangements provided by its regulations or bylaws. Similarly, section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) defining "full payment promptly," provides that a cooperative may settle with its members on the basis of seasonal pools or other arrangements provided by its regulations or bylaws.

Respondent was not required to itemize the actual expenses incurred because, under section 46.32(b) of the Regulations (7 C.F.R. § 46.32(b)), this requirement is not applicable to cooperatives that determine to pool their growers' produce.

Complainant's position is that Respondent violated its duty to account properly because neither Respondent's bylaws nor any written agreement between Respondent and its members make a specific reference to a contingency fund. The Regulations do not require that the bylaws of a cooperative specifically delineate the charges to be assessed. The Regulations defining "account promptly" (7 C.F.R. § 46.2(z)) and "full payment promptly" (7 C.F.R. § 46.2(aa)) both provide that the cooperatives need only account to their members on the basis of "seasonal pools or other arrangements provided by their regulations or bylaws." Further, section 46.32(a) of the Regulations provides that the bylaws of cooperatives may be used to "determine the methods of accounting and settlement with their grower members." 7 C.F.R. § 46.32(a). Respondent's bylaws clearly provide that charges and expenses of the association would be met by assessments or deductions upon Respondent's members (RX 104 at 14: § 6.2). Further, the bylaws clearly advise Respondent's members that the "method, amount, manner, and time of assessment or deduction shall be fixed and determined from time to time by the board of directors" (RX 104 at 14-15: § 6.2).

Complainant does not contend that Respondent violated its bylaws. Complainant simply argues Respondent's bylaws are inapplicable and Respondent must comply with the Regulations applicable to entities that are not cooperatives. However, the Regulations explicitly provide that the bylaws of cooperatives, such as Respondent, may be used in lieu of individual agreements or contracts to

determine methods of accounting and settlement with grower members.

Further, the various charges and assessments for the reserve account or allocated reserve credits had been assessed by the board of directors. The actions of Respondent's board of directors and the manager were ratified by Respondent's members at the annual meeting each year. Accordingly, Respondent did not fail to account truly and correctly to its members, in violation of the PACA, so long as it followed its bylaws, which it did.

Complainant's claim that Respondent failed to account truly and correctly to its members rests upon the fact that no written document was given to each member expressly advising each member, prior to the season, that the contingency charges would be assessed. However, as a cooperative, a written statement or agreement was not required. (7 C.F.R. § 46.32(a).) Further, a cooperative is free to pool its fruit and account to its members in the manner provided by its bylaws. The evidence shows that Respondent's members were in fact advised of the contingency charge. Mr. Arcure testified that Respondent's members were told that the contingency charge would be assessed and that the assessment of the contingency charge was discussed at the annual meetings of the members and at meetings of the board of directors. Accordingly, Complainant's claim that Respondent's members were not specifically advised as to the contingency charges is in error.

The allegations in paragraphs V and VI of the Complaint, which allege a failure to account truly and correctly to Respondent's growers for \$4,439.29 and \$14,299.12, respectively, have not been proven by Complainant. These amounts were amended during the oral hearing to \$4,269.16 and 14,028.03, respectively. The claimed violations are premised upon Complainant's conclusion that Respondent must comply with regulations applicable to entities other than cooperative marketing associations. Complainant overlooks the fact that the Regulations only require that Respondent, as a nonprofit cooperative, account to its members, as required by Respondent's bylaws.

Complainant concedes that paragraph VII of the Complaint, relating to juice payments, should be withdrawn.

Paragraphs III and IV of the Complaint allege that Respondent, during the 1994-1995 growing season and the 1995-1996 growing season, misrepresented by word, act, mark, stencil, label, statement or deed, the character or kind of grapefruit that it shipped to its customers in Japan and the United States. Specifically, paragraphs III and IV of the Complaint allege that Respondent packed Melogolds in 7,718 cartons during the 1994-1995 season and 2,904 cartons during the 1995-1996 season and labeled or designated the cartons as containing Oroblancos and that Respondent then sold and shipped the Melogolds as Oroblancos to its customers in Japan and the United States. Complainant alleges in the Complaint

that, by reason of the facts alleged in paragraphs III and IV of the Complaint, Respondent had committed violations of section 2(4) and (5) of the PACA. However, on brief, Complainant asserts Respondent's actions were "in breach" of section 2(5) of the PACA, so that the misrepresentation allegation, *sub judice*, is now based solely upon section 2(5) of the PACA (7 U.S.C. § 499b(5)) (Complainant's Brief at 18).

Sunkist is an agricultural cooperative association (RX 107). Respondent is a member of Sunkist, which markets and sells Respondent's produce (Tr. 902-03, 1000-01). The Tulare County Fruit Exchange, an association of Sunkist growers located in Tulare County, where Respondent has its place of business, acts as an intermediary between growers, such as Respondent and Sunkist (Tr. 1145-46). Sunkist establishes a price for a particular commodity after consulting with the exchanges and packinghouses that have that commodity and that price is presented to the importers in Japan by Sunkist's subsidiary in Tokyo (Tr. 1002-04, 1038). The importers then place their orders, specifying a particular type or brand of fruit, to be loaded on a ship more than a week after the price is established (Tr. 1038). Sometimes, if there is an overwhelming demand, Sunkist asks its growers to deliver as much fruit as possible to Port Hueneme, California, where Sunkist loads the ships (Tr. 1039). Sunkist then allocates the fruit in transit to its customers (Tr. 1039). Orders are conveyed from Sunkist to Respondent and Sunkist's other packinghouses through a computer network called a Kirke system (Tr. 1039-40; CX 21). The orders for hybrid grapefruit specify Oroblanco or Melogold, and such information is on the order (Tr. 1053, 1062; CX 21). Therefore, Respondent's shipments of hybrid grapefruit to Sunkist during the 1994-1995 and 1995-1996 seasons were all in response to orders from Sunkist specifying the variety of hybrid grapefruit, Oroblancos or Melogolds, which was requested by purchasers from Sunkist.

During the 1994-1995 and 1995-1996 growing seasons, Oroblancos and Melogolds had not yet been designated as hybrid grapefruit by USDA or the State of California and the hybrid grapefruit was so new that there were no USDA or State of California regulations specifying how to identify Melogolds and Oroblancos (Tr. 858-70). In January 1997, a State of California regulation became effective, requiring that varieties of Oroblanco be designated as "Oroblanco" or "Sweetie," requiring that varieties of Melogold be designated as "Melogold," and providing that the common name or identity of Melogolds, Oroblancos, and similar type hybrids, resulting from a cross between a pummelo and a grapefruit, is "hybrid grapefruit" (RX 126).

Although the Oroblanco variety and the Melogold variety were patented by two scientists from the University of California at Riverside in 1981 and 1987,

respectively (CX 58), the rights to the fruit were obtained by firms in Israel (Tr. 1006).

Oroblancos and Melogolds, coming from a common source, possess certain similar characteristics (Tr. 35, 38, 78-81, 98-99; CX 58 at 1, 4; RX 100). Melogolds and Oroblancos from immature trees are harder to distinguish than Melogolds and Oroblancos from mature trees (Tr. 1356-58). The differences between Melogolds and Oroblancos become more apparent as the trees mature (Tr. 1359). It is more difficult to distinguish between Melogolds and Oroblancos prior to their maturity (Tr. 1356-62). There are differences between Melogolds and Oroblancos, both before and after they become ripe, as to size, shape, the thickness of the rind, and the color and texture of the rind (Tr. 45-46, 54). There is a deeper yellow color in Melogold than in Oroblanco; Oroblanco is greenish yellow. Melogold is juicier than Oroblanco (Tr. 46). There is a difference in the weight, as well as the taste (Tr. 47-48, 50). Oroblanco is sweeter than Melogold (Tr. 45-48, 54).

Sunkist made an effort in 1992 to develop a market for Oroblancos and Melogolds (Tr. 1005). The first time there was a shipment of pummelos, Melogolds, and Oroblancos of anything more than a pallet quantity, was in 1992 (Tr. 1005-06). With respect to Oroblancos and Melogolds, Sunkist is in direct competition with Israel (Tr. 1006). Israel has aggressively been marketing its Sweeties, which resemble and are of the same variety as Oroblancos (Tr. 1005-06, 1008). The first appreciable volume of exports of Sweeties from Israel to Japan was during the 1992-1993 season and, since 1993, the volume of exports has grown quickly (Tr. 1006). Israel has an exclusive agent in Japan who pursues that market with considerable determination (Tr. 1006). Sunkist's price policy is to let the price of its fruits fluctuate with the market; whereas Israel has entered into long-term contracts with a Japanese entity, commencing in the 1993-1994 season, for the delivery of specific volumes of specified varieties, together with a fixed price for a fixed output, for a specific time period (Tr. 1018-19). The Israeli delivery price for Sweeties is approximately \$7 to \$7.50 per carton and was a constant price for the 1994-1995, 1995-1996, and 1996-1997 seasons (Tr. 1019-20).

There is a limited time period when the Japanese market is open for Melogolds and Oroblancos (Tr. 1008). The Israeli fruit, preferred by the Japanese, arrives during the latter part of November and in the month of December (Tr. 1008-09). Melogolds and Oroblancos from the United States must be imported into Japan during part of October and November and the United States fruit must be sold within a short time period (Tr. 1008). The Japanese believe Sweeties are better than Oroblancos and Melogolds from California and prefer the dark-green color

and hard texture of Sweeties to California hybrid grapefruit (Tr. 1009). In addition, the Japanese believe that Sweeties are sweeter than Oroblancos (Tr. 1009-10). Oroblancos develop a yellowish color in November (Tr. 1010). Once the Sweeties arrive in Japan, there is no market for California Oroblancos (Tr. 1010).

Sweeties must be cold treated before they can be sold in Japan (Tr. 1012). During the 1994-1995 season, the Sweeties were cold treated at the warehouse prior to shipment from Israel to Japan. Thus, there was a delayed arrival and Sunkist had a week's advantage and tried to deliver its fruit during that week (Tr. 1012). In subsequent years, Sweeties were cold treated during transportation to Japan. Thus, the period during which Sunkist had a market in Japan for Melogolds and Oroblancos was narrowed further (Tr. 1013).

It is imperative that Oroblancos and Melogolds from California be shipped to Japan because the Japanese market is the principal market for Oroblancos and Melogolds (Tr. 1014). The aggressiveness of Israel in capturing this market has resulted in significant declines in prices for the Sunkist product. Between November 1993 and November 1996, there was an approximate \$9.95 decline in price for each carton of Oroblancos and Melogolds (Tr. 1020-21). In addition, the Japanese importers asked for a retroactive decrease in price (Tr. 1022). Once Sweeties get on the market, there is a pronounced decline in the price of Melogolds and Oroblancos sold by Sunkist to Japan (Tr. 1022). For instance, in November of 1993, Sunkist's hybrid grapefruit cartons were selling for \$21.93 and by December of 1993, they sold for \$9 per carton (Tr. 1022). During the 1994-1995 season in November, Sunkist's hybrid grapefruit cartons were selling for \$24 f.o.b. and in December they had decreased to \$15.36 per carton (Tr. 1022-23). During the 1995-1996 season, Sunkist's hybrid grapefruit sold in October for \$12.89 per carton and in November the price had decreased to \$7 per carton (Tr. 1023).

Israel can flood the market with Sweeties, which has an eventual effect upon other citrus products (Tr. 1024). In any event, Israel exports more Sweeties to the Japanese market than the market can easily handle and, once that occurs, the price of the Melogolds and Oroblancos from California dramatically decreases (Tr. 1024-25). After Sweeties stop entering Japan, then the market for California Melogolds and Oroblancos improves (Tr. 1025). However, by that time the California fruit is not comparable to the Sweeties because of the lack of the dark-green color, which the Japanese prefer (Tr. 1009).

The Israelis shipped to Japan approximately 544,944 cartons of Sweeties during the 1993-1994 season, 980,494 cartons of Sweeties during the 1994-1995 season, 1,268,408 cartons of Sweeties during the 1995-1996 season, and 1,369,796 cartons of Sweeties during the 1996-1997 season (Tr. 1007; RX 108). Sunkist, probably the biggest United States exporter of hybrid grapefruit to Japan, shipped

approximately 30,000 cartons of hybrid grapefruit in the 1993-1994 season, as compared with 544,944 cartons by the Israelis; 58,000 cartons in the 1994-1995 season, as compared with 980,494 cartons by the Israelis; and 52,212 cartons in the 1995-1996 season, as compared with 1,268,408 cartons by the Israelis (Tr. 1007; RX 108).

The issue involved in this proceeding is whether or not Complainant has proven that Respondent misrepresented 7,718 cartons of Melogolds as Oroblancos during the 1994-1995 season and 2,904 cartons of Melogolds as Oroblancos during the 1995-1996 season, for a total of 10,622 cartons that were misrepresented, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)). During the course of the hearing, Complainant amended its Complaint to change the number of cartons packed (Tr. 826; CX 62 at Ex. A, B). The number of cartons Complainant initially claimed was misrepresented is in Exhibits A and B attached to the Complaint (Compl. at Ex. A, B). Exhibit A, attached to the Complaint, alleges that, in the 1994-1995 season, Respondent received, and had available for sale, 11,253 cartons of Melogolds (Compl. at Ex. A). While this number remained constant in the various amendments, Complainant amended the total cartons of Melogolds reported and documented as sold, as well as the "Difference" between cartons of Melogolds received and cartons of Melogolds sold (Tr. 10, 507, 826; Compl. at Ex. A, B; CX 62). At the commencement of the hearing, Complainant announced amendments to the Complaint (Tr. 10). Much later, Complainant actually presented amended Exhibits A and B, over objection (Tr. 505-06). The ALJ allowed Complainant to amend the Complaint (Tr. 507). The first amended exhibits claimed 3,486 cartons of Melogolds reported and documented as sold, not 3,242 as in the original Exhibit A (Tr. 505-06; CX 62 at Ex. A). Moreover, the claimed "Difference" was revised to 7,767 (Tr. 506; CX 62 at Ex. A).

In addition, Complainant amended the figures concerning Melogolds for the 1995-1996 season (Tr. 505-07; CX 62 at Ex. B). Exhibit B, attached to the Complaint, alleges that, in the 1995-1996 season, Respondent received, and had available for sale, 10,001 cartons of Melogolds, and the total cartons of Melogolds reported and documented as sold as 8,079, leaving a difference of 1,922 (Compl. at Ex. B).

Were it not for Respondent's own records (Tr. 165-72; CX 9A) and the protestation of the county inspector that Melogolds were packed as Oroblancos (Tr. 1389-90, 1395-1403, 1413-14), there would be scant, if any, proof of misrepresentation. The evidence does not include examples of the alleged mislabels, and the number of cartons which were shipped as Oroblancos when they were in fact Melogolds cannot be ascertained. Nevertheless, the record, as a whole, does show that Respondent packed some Melogolds and misrepresented them to

be Oroblancos. Sunkist's purchasers did make a distinction when they specified the variety of fruit they were ordering, and Respondent, through the Kirke computer system, did pack in response to the purchasers' orders (Tr. 1039-40). Respondent's designation of Melogolds as Oroblancos was not in accordance with the purchasers' orders and was a misrepresentation of the character or kind of the fruit packed.

Complainant argues that Respondent's misrepresentations of 10,622 cartons of Melogolds as Oroblancos during the 1994-1995 and 1995-1996 seasons were intentional (Complainant's Brief at 18) and that Respondent was well aware of the variety of hybrid grapefruit the Japanese customers were ordering. The orders were conveyed from Sunkist to Respondent through the Kirke computer system and specified Oroblancos or Melogolds. (Complainant's Brief at 36.) Complainant further contends that there was obvious motivation to misrepresent (Complainant's Brief at 18-19, 29); namely, to take advantage of the window of opportunity to supply Oroblancos before the Sweeties arrived in Japan (Complainant's Brief at 29). Thus, Complainant asserts that Respondent knew, or should have known, of the differences prior to the 1994-1995 and 1995-1996 seasons (Complainant's Brief at 36-37).

The record establishes that, during the 1994-1995 and 1995-1996 seasons, Respondent received Melogolds and Oroblancos from its growers (Tr. 140-43, 188-89, 306; CX 5 at 3, CX 6 at 3, CX 10 at 3-13, CX 11 at 3, CX 21, CX 26-CX 42). Respondent treated these two varieties as the same for the 1994-1995 season (Tr. 1138-40, 1143). There were no USDA or State of California regulations specifying how to identify Melogolds and Oroblancos (Tr. 858-59, 944; RX 126). Because of the similarity in appearance of Melogolds and Oroblancos, it was difficult to distinguish between them (Tr. 61-66, 934-35, 1362-63), and at least some of Respondent's employees were not keenly aware of the differences so as to differentiate between the two (Tr. 1390).

In addition, the evidence concerning the "mislabeling" of cartons from Caliente Farms during the 1995-1996 season shows that Mr. Arcure and the owner of Caliente Farms had agreed the Oroblancos were to be picked before the Melogolds (Tr. 1404). However, the independent contractor picking crew did not skip over the Melogolds to pick Oroblancos after pummelos, as agreed, but picked the Melogolds second because they were the block adjacent to the pummelos and next in line (Tr. 1407-08). During a very hectic time of the season, and because the Oroblancos were supposed to be picked and delivered prior to Melogolds, Mr. Arcure believed the fruit arriving from Caliente Farms were Oroblancos (Tr. 1408-10). After they had been received as Oroblancos, Respondent advised Caliente Farms as to the number of field bins of Oroblancos received, and the owner called Mr. Arcure and told him the crew had picked the Melogolds second,

after the pummelos, instead of the Oroblancos (Tr. 1409-10). Due to the press of business, his double duty as both manager and field man, and the contemporaneous testing, picking, and shipping of large quantities of different varieties of fruit, e.g., pummelos, Oroblancos, Navel Oranges, Melogolds, Satsumas, and other varieties, Mr. Arcure forgot to advise the receiver to change the receiving tag on the fruit received from Caliente Farms (Tr. 1410-14). In addition, Mr. Arcure regarded Melogolds and Oroblancos as the same, since the California Department of Food and Agriculture had not designated Melogolds and Oroblancos as separate varieties (Tr. 1396, 1422).

The evidence supports a finding that Respondent's misrepresentations of Melogolds from Hillcroft Groves and Caliente Farms as Oroblancos were the result of inadvertence, carelessness, or negligence. If Mr. Arcure was intentionally packing Melogolds as Oroblancos, fruit from far more than two growers out of the many growers' fruit would have been packed in "misabeled" cartons. However, county inspector Milner only found Melogolds from two growers packed in cartons labeled Oroblancos, and the record does not suggest that Respondent misrepresented fruit from any other grove during the 1995-1996 season (Tr. 1395-1422).

Complainant maintains that Respondent did know the difference between Melogolds and Oroblancos and that Respondent intentionally misrepresented Melogolds as Oroblancos (Complainant's Brief at 27-28). This allegation is not supported by the credible evidence. What happened were packing errors on the part of some of Respondent's employees (Tr. 1402-10). Further, the number of cartons of Melogolds which were actually misrepresented as cartons of Oroblancos has not been clearly established in the record. From Respondent's own books and records (Tr. 258-60, 313-15, 325-30, 357-60; CX 25, CX 42A, CX 43 at 1-2, CX 44A at 3, 6, CX 51), it appears, according to Complainant's calculations (Complainant's Brief at 14-18, 38), that Respondent misrepresented approximately 10,622 cartons of Melogolds as Oroblancos.

Based upon my evaluation of the record as a whole and having given full credibility to Respondent's witnesses, I find that it is more likely Respondent's misrepresentations were the result of negligence, carelessness, or inadvertence.

Complainant argues that issuance of the patents for Oroblanco and Melogold establishes the existence of two kinds of fruit to determine whether the PACA was violated by Respondent by the designation of Melogolds as Oroblancos (Complainant's Brief at 30). However, the granting of the patents is not dispositive as to whether there are two "kinds" of fruit for purposes of determining whether the PACA was violated by the representation of Melogolds as Oroblancos.

The purpose of a patent is to grant to the patentee protection from the asexual

reproduction of the particular plant by others (Black's Law Dictionary 1125 (6th Ed. 1990); CX 58 at 2, 5). Complainant has not shown a by preponderance of the evidence that a patent is intended to define variety or "kind" for all purposes; further, the PACA nowhere adopts or incorporates plant patents as the standard for establishing different "kinds."

Therefore, the granting of separate patents for Oroblancos and Melogolds, denominating each fruit as a "variety," does not define "kind" under the PACA. The granting of the patents merely means the fruits are separate varieties for purposes of the patentee's right to exclude others from asexually producing Oroblancos and Melogolds.

The similarity of Melogolds and Oroblancos is clearly established by the record (Tr. 35, 38, 44-66, 78-81, 98-99, 860-64, 1352-67; CX 58; RX 100, RX 126). Melogolds and Oroblancos are not different species of fruit, but rather, they are the same species and have the same scientific name (Tr. 35-43, 863-70; CX 58; RX 100, RX 126). The two seeds, which were original sources of the seedlings planted and later named as Oroblancos and Melogolds, came from the same piece of fruit (Tr. 35-38; RX 100 at 2-3). Thus, these two varieties of hybrid grapefruit were a single species of sterile, seedless fruit coming from a common source with the same scientific name.

Complainant admits that Respondent's violations could have been the result of gross negligence (Complainant's Brief at 37). The intentional misrepresentations attributable to Respondent by Complainant are inferences and are not supported by the record evidence.

Respondent knew the variety of fruit Sunkist wanted for its purchasers (Tr. 948-50, 1038-40). By packing Melogolds as Oroblancos, Respondent misrepresented its fruit in response to a contractual request. Although Respondent's misrepresentations were the result of mere negligence, carelessness, or inadvertence, Respondent willfully did the prohibited acts.

Turning now to sanctions, the PACA Branch, through auditor, Ms. Joan M. Colson, recommended revocation of Respondent's PACA license (Tr. 666). Ms. Colson indicated that, because the alleged violations were of such serious nature, the PACA Branch was not recommending a civil penalty (Tr. 670). However, Ms. Colson testified that should a civil penalty be assessed, a civil penalty of \$500,000 to \$1,000,000 would be appropriate (Tr. 671).

As was explained by Ms. Colson, Complainant did not specifically identify 10,600 cartons (Tr. 677-78, 685-88, 735). In fact, no one was able to testify that certain cartons were shipped at a certain time, or to a certain destination, or on a certain common carrier. Instead Ms. Colson testified: "No, . . . we didn't tag specifically 10,600 cartons. What we did was we calculated how many cartons of

Melogolds and Oroblancos were received by [Respondent] over this two-year period and then how many were documented as sold and then the difference between the two on Oroblancos was 10,600" (Tr. 735). Complainant's calculations were not premised upon Respondent's own records as much as those obtained from Sunkist and other sources (Tr. 123-24, 183-212, 225-53, 277-78, 643-44, 1130-31; CX 20-CX 24, CX 47, CX 60; RX 110). Sunkist was the selling agent (Tr. 1000-05) and there were intermediaries, such as the Tulare County Fruit Exchange (Tr. 1145-46), as well as intermediaries in the Japanese market (Tr. 1002-04, 1038).

On brief, Complainant pursues its recommendation that a license revocation is the only appropriate sanction and for reason thereof relies heavily upon the testimony of Ms. Colson, as well as reference to *Potato Sales Co., Inc. v. Department of Agric.*, 92 F.3d 800 (9th Cir. 1996) (Complainant's Brief at 53-55).

Section 8(a) and (e) of the PACA (7 U.S.C. § 499h(a), (e) (Supp. III 1997)) provides that if the Secretary determines a 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 PACA license of the offender, or assess a civil penalty.

USDA's 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, 479 (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):

[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.

The record does not justify the sanction sought by Complainant, namely, revocation, or, in the alternative, the imposition of a civil penalty of \$500,000 to \$1,000,000.

Complainant's sanction witness, Ms. Colson, indicated that it was the position of Complainant that Respondent's acts were willful, repeated, and flagrant (Tr. 665); that the violations were willful because there was an intentional scheme to misrepresent (Tr. 665); that the violations were repeated because of the large number of transactions involved in the approximately 10,622 cartons of Melogolds misrepresented as Oroblancos (Tr. 666); and that the violations were flagrant because there was false accounting to Respondent's growers, which was repeated because of the large number of transactions (Tr. 666). In addition, Ms. Colson was

concerned with the international aspects of this misrepresentation and, since some of the misrepresented cartons were believed to have been exported, there could be international ramifications as to whether or not foreign importers could rely upon the labeling of produce from the United States (Tr. 667-68).

Ms. Colson relied heavily in her recommendation upon *Potato Sales Co., supra*, which involved the mislabeling and export from the United States to Taiwan of New Zealand apples as Washington State apples (Tr. 666-67, 670, 682-83). Specifically, Ms. Colson testified that "the case here is similar to *Potato Sales [Co.]*, and even worse than *Potato Sales [Co.]*, because we do have the false accounting issue" (Tr. 670).

As pointed out by Respondent, the Judicial Officer has indicated in *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1570-72 (1981), that while intent is not an element of misrepresentation violations, nevertheless, good faith and the lack of fraudulent intent are mitigating circumstances, which should be taken into account when determining the severity of the penalty (Respondent's Objection to Claimant's [sic] Proposed Findings of Fact at 72-73). Other USDA decisions reinforce the conclusion that revocation of Respondent's PACA license is an unduly harsh sanction not called for in this case. For instance, the Judicial Officer stated in *In re Stemilt Growers, Inc.*, that failure to pay cases routinely draw a sanction of license revocation, whereas, it is not USDA policy to remove from the industry a firm that engages in misrepresentation; rather, it is the policy of USDA to impose a sanction sufficiently severe to deter not only the violator but other potential violators from such conduct in the future, as follows:

[I]t is the policy of the Department to remove from the industry a firm that fails to pay for produce, notwithstanding the firm's inability to pay because of sudden or unexpected cash-flow problems.

However, it is not the policy of the Department to remove from the industry a firm that engages in misbranding. Rather, it is the policy of the Department to impose a sanction sufficiently severe to deter not only the respondent but other potential violators from such conduct in the future. *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1569-73 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Cir. 1983); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 793-99 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976).

In re Stemilt Growers, Inc., 49 Agric. Dec. 520, 528 (1990).

Also, in *Limeco, Inc.*, the Judicial Officer held that Limeco, Inc., sold 411

cartons of Mexican limes that it represented to be Florida produce; that Limeco, Inc., made false and misleading statements in connection with the 411 cartons of misrepresented limes; and that Limeco, Inc., maintained documents which incorrectly disclosed the country of origin of the limes. *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 10-11 (Aug. 18, 1998). Such misrepresentations were held to be a violation of section 2(5) of the PACA for which the administrative law judge imposed a 15-day suspension of Limeco, Inc.'s PACA license and for which the Judicial Officer increased the suspension to 45 days. *In re Limeco, Inc.*, *supra*, slip op. at 37.

The subject case relating to Respondent has a number of mitigating factors. Respondent had not received advice from an official that the produce it was packing was nonconforming prior to shipment of the produce. Respondent made efforts to secure information concerning standards for labeling the fruit, the result being that Respondent was advised that there were no identity standards (Tr. 858-59, 944; RX 126). The misrepresentations were the result of inadvertence, carelessness, or negligence on the part of Respondent, rather than intent to deceive Respondent's customers, and were, at least in part, the result of the similarity between Melogolds and Oroblancos. There were no complaints from either Sunkist or the Japanese purchasers of Respondent's fruit (Tr. 962, 1030-31, 1465-66). Since January 1997, there have been labeling requirements for Melogold and Oroblanco varieties (RX 126) and, with Respondent's long history of PACA compliance (Tr. 19, 874-75), the strong likelihood is that Respondent will continue its observance of the PACA requirements. Under these circumstances, revocation of Respondent's PACA license would not be appropriate.

Moreover, there is no purpose to be served under the PACA by an extended suspension. There have been extensive pleadings, a lengthy transcript, voluminous exhibits, and lengthy briefs relating to this matter. All of these have been carefully considered and are reflected in this Decision and Order. Accordingly, the sanction, which I believe would deter Respondent and others in the perishable agricultural commodities industry from violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) in the future, is a 30-day suspension of Respondent's PACA license, or, in lieu thereof, a civil penalty of \$120,000.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The Complaint alleges that: (1) Respondent willfully, flagrantly, and repeatedly violated section 2(4) and (5) of the PACA (7 U.S.C. § 499b(4), (5)) during the 1994-1995 and 1995-1996 growing seasons, by misrepresenting 10,622 cartons of Melogolds as Oroblancos and sold and shipped Melogolds as Oroblancos to

customers in Japan and the United States (Compl. ¶¶ III, IV, VIII); and (2) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to truly and correctly account to some of its growers for shipments of Melogolds and Oroblancos in the 1994-1995 and 1995-1996 growing seasons.

The ALJ found that Complainant failed to prove the allegations based upon section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 38). Therefore, the ALJ dismissed paragraphs V-VII and part of paragraph VIII of the Complaint (Initial Decision and Order at 47-48). Complainant did not appeal the dismissal of the violations of section 2(4) of the PACA alleged in paragraphs V-VII of the Complaint (Complainant's Appeal at 1). Moreover, I infer that Complainant abandons the violations of section 2(4) of the PACA alleged in paragraphs III and IV of the Complaint, as well, since Complainant does not restrict abandonment of the alleged violations of section 2(4) of the PACA to particular paragraphs of the Complaint and mentions and argues only the alleged violations of section 2(5) of the PACA in Complainant's Appeal. Thus, there remains only the matter of the alleged violations of section 2(5) of the PACA in paragraphs III, IV, and VIII of the Complaint.

I find, except with respect to the number of violations of the PACA, that the factual situation of the proceeding, *sub judice*, differs in no material way from the factual situation in *Western Sierra Packers, Inc.*, in which I found that there were violations of sections 2(5) and 9 of the PACA (7 U.S.C. §§ 499b(5), 499i), as alleged in the *Western Sierra Packers, Inc.*, complaint. *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 20 (Sept. 30, 1998). In summary, section 2(4) violations are dismissed from both cases, and, although section 9 was charged and found in *Western Sierra Packers, Inc.*, section 9 was not charged in the proceeding, *sub judice*, which leaves only section 2(5) of the PACA as material to both cases.

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.³ Section 2(5) of the PACA (7 U.S.C. § 499b(5))

³Perishable 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—

....

(continued...)

has been amended numerous times,⁴ 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 1956.⁵ 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).

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 of Representatives Report, as follows:

DEPARTMENTAL VIEWS

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

³(...continued)

(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[.]

⁴Act 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.

⁵Act of July 30, 1956, Pub. L. No. 842, ch. 786, § 1, 70 Stat. 726.

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.*, 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., 20 Agric. Dec. 955, 969-73 (1961), *aff'd per curiam*, 309 F.2d 646 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963) (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.⁶ Thus, as a matter of law, proof of a violation of section 2(5) of the PACA does not require, *inter alia*, proof of fraud, intent, fraudulent intent, intent to benefit from fraud, knowledge, guilty knowledge, detrimental reliance, knowledge of detrimental reliance, actual reliance, knowledge of actual reliance, actual injury, or knowledge of actual injury.

⁶See *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 31 (Sept. 30, 1998) (stating that any representation of the subject matter described in 7 U.S.C. § 499b(5)) which is false, even if the misrepresentation is unintentional or accidental, constitutes a violation of 7 U.S.C. § 499b(5)); *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 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).

The record establishes that Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit, in violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).

Complainant raises five issues in Complainant's Appeal. First, Complainant contends:

There is no question as to the number of cartons unlawfully misrepresented by Respondent, as Respondent's own records show that it misrepresented 10,622 cartons of Melogold as Oroblanco over a two year period.

Complainant's Appeal at 3. Respondent replies that the ALJ was correct that the precise number of misrepresented cartons was not determined and could not be determined from the record (Respondent's Reply at 5).

I disagree with Complainant's contention that Complainant proved that Respondent misrepresented exactly 10,622 cartons of Melogolds as Oroblancos. Complainant's sanction witness, Joan M. Colson, admitted that the specific number of cartons of Melogolds misrepresented as Oroblancos was not specifically observed by her or any other USDA employee. Rather, a method of deduction was used, whereby Complainant determined the number of cartons of Melogolds and Oroblancos Respondent had on hand and used simple arithmetic to determine the number of cartons that were misrepresented. However, Complainant did not actually see any cartons labeled or designated Oroblanco, which contained Melogold (Tr. 676-78, 688). Further, during the 1994-1995 season, Respondent accounted to its growers of Oroblancos and Melogolds by combining all the hybrid grapefruit into one pool (Tr. 258-60, 914; CX 25). Thus, under these circumstances, I have some doubt as to the exact number of cartons of Melogolds and Oroblancos that Respondent had for sale, because the fruit was treated as the same variety with no need to distinguish between the two varieties.

However, Complainant has shown by a preponderance of the evidence that Respondent misrepresented approximately 10,622 cartons of Melogolds as Oroblancos. Under the circumstances in this proceeding, I impose the same sanction against Respondent based on Complainant's proof that Respondent misrepresented approximately 10,622 cartons of Melogolds as Oroblancos, as I would have imposed had Complainant proved that Respondent misrepresented exactly 10,622 cartons of Melogolds as Oroblancos.

Second, Complainant contends that:

Melogold and Oroblanco are two different "kinds" of fruit, of which

Respondent was aware or should have been aware, and misrepresenting the Melogold variety as the Oroblanco variety is a violation of section 2(5) of the PACA.

Complainant's Appeal at 13. Respondent replies that Oroblancos and Melogolds are not different kinds of fruit for inspection purposes; hence, Respondent did not misrepresent Melogolds as Oroblancos (Respondent's Reply at 13).

The ALJ found that Oroblancos and Melogolds were not two different "kinds" of fruit; yet, the ALJ, nonetheless, found that Respondent had violated section 2(5) of the PACA. Complainant argues that the ALJ "appears inconsistent" (Complainant's Appeal at 13) and that the ALJ's "finding that Oroblanco and Melogold are not different 'kinds' of fruit was error." (Complainant's Appeal at 21.)

I agree with Complainant. The record establishes that, despite their similarities, Melogolds and Oroblancos are two different kinds of fruit. The PACA does not define the word "kind," as it is used in section 2(5) of the PACA, and the legislative history applicable to the Act of August 20, 1937,⁷ that amended the PACA to make it unlawful to misrepresent the "kind" of a perishable agricultural commodity, does not explicate legislative intent with respect to the meaning of the word "kind" in section 2(5) of the PACA.

When not defined by the statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted.⁸

⁷Act of Aug. 20, 1937, Pub. L. No. 328, ch. 719, 50 Stat. 725.

⁸See *Walters v. Metropolitan Educational Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) (stating that in the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning); *Smith v. United States*, 508 U.S. 223, 228 (1993) (stating that when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning); *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (stating that courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning); *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) (stating that in cases of statutory construction, we begin with the language of the statute; unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (stating that words used in a statute are to be given their ordinary meaning in the

(continued...)

Webster's Collegiate Dictionary defines the word "kind" as "fundamental nature or quality"; "a group united by common traits or interests"; or "a specific or recognized variety" (Webster's Collegiate Dictionary 642 (10th ed. 1997)).⁹

The record clearly establishes that, despite their similarities, Melogolds and Oroblancos were recognized by growers and purchasers, during the 1994-1995 and 1995-1996 seasons, as different kinds of fruit. I find that Melogolds and

⁸(...continued)

absence of persuasive reasons to the contrary); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, 465 (1968) (stating that in the absence of persuasive reasons to the contrary, we attribute to the words of a statute their ordinary meaning); *Crane v. Commissioner*, 331 U.S. 1, 6 (1947) (stating that words of statutes should be interpreted where possible in their ordinary, everyday senses); *United States v. Stewart*, 311 U.S. 60, 63 (1940) (stating that Congress will be presumed to have used a word in its usual and well-settled sense); *City of Lincoln v. Ricketts*, 297 U.S. 373, 376 (1936) (stating that in construing the words of an act of Congress, we seek the legislative intent; we give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation); *Old Colony R. Co. v. Commissioner*, 284 U.S. 552, 560 (1932) (stating that the legislature must be presumed to use words in their known and ordinary signification); *De Ganay v. Lederer*, 250 U.S. 376, 381 (1919) (stating that unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense and with the meaning commonly attributed to them); *Greenleaf v. Goodrich*, 101 U.S. 278, 285 (1879) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws); *Maillard v. Lawrence*, 16 How. 251, 261 (1853) (stating that the popular or received import of words furnishes the general rule for the interpretation of public laws; and whenever the legislature enacts a law, the just conclusion from such a course must be that the legislators not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large); *Levy v. McCartee*, 6 Pet. 102, 110 (1832) (stating that the legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context); *Minor v. The Mechanics' Bank of Alexandria*, 1 Pet. 46, 64 (1828) (stating that the ordinary meaning of the language of a statute must be presumed to be intended, unless it would manifestly defeat the object of the provisions); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 54-55 (July 31, 1998) (stating that when not defined by the statute, words of a statute are to be given their ordinary or common meaning in the absence of a contrary intent or unless giving the words their ordinary or common meaning would defeat the purpose for which the statute was enacted), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998). See also *In re The Lubrizol Corp.*, 51 Agric. Dec. 1198, 1205 (1992) (stating that the term *used* is not defined in the Plant Variety Protection Act; therefore, it must be accorded its ordinary, dictionary meaning).

⁹See also *Alex J. Mandl, Inc. v. San Roman*, 170 F.2d 839, 841 (7th Cir. 1948) (stating that the word *kind*, when referring to merchandise, generally means "generic or specific quality or character of the article under consideration" or its "essential or distinguishing quality"); *International Minerals & Chemical Corp. v. Property Appraisal Dep't*, 492 P.2d 1265, 1268 (N.M. Ct. App. 1972) (stating that *kind* means "category" or "class"); *City of St. Louis v. James Braudis Coal Co.*, 137 S.W.2d 668, 670 (Mo. Ct. App. 1940) (stating that *kind* means "class, grade, sort").

Oroblancos are, and at all times relevant to this proceeding were, different kinds of fruit for purposes of the PACA and that the ALJ erred when she determined that they were not different kinds of fruit.

Third, Complainant contends that:

ALJ Baker erroneously concluded that Respondent's misrepresentations were unintentional.

Complainant's Appeal at 21. Respondent replies that Respondent did not intentionally misrepresent any commodities (Respondent's Reply at 33-41).

Complainant correctly argues that "intent is not an element of misbranding violations under section 2(5) of the PACA," but incorrectly concludes that the ALJ's finding that Respondent's misrepresentations were unintentional "ignores the substantial evidence of intent in the record." (Complainant's Appeal at 21.) I disagree with Complainant's contention that the ALJ ignored the evidence of intent. The ALJ thoroughly discussed the evidence of intent in the record, but found that the evidence was not sufficient to find that Respondent intentionally violated section 2(5) of the PACA (7 U.S.C. § 499b(5)). Instead, the ALJ found that Respondent's violations of section 2(5) were the result of negligence, mistake, accident, or inadvertence (Initial Decision and Order at 62).

Fourth, Complainant contends that: "Respondent's violations of the PACA were willful, repeated, and flagrant" (Complainant's Appeal at 28). Respondent replies that the ALJ implicitly and correctly decided that Respondent's violations were not willful, repeated, or flagrant (Respondent's Reply at 41).

Violations of section 2(5) of the PACA do not require willfulness as a element of the offense. However, Complainant is correct that the ALJ failed to make findings as to whether Respondent's violations were willful, repeated, or flagrant.

The record establishes that Respondent willfully and repeatedly misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit, in violation of section 2(5) of the PACA (7 U.S.C. § 499(b)(5)).

Therefore, I agree with Complainant that the ALJ erroneously failed to find Respondent's violations of section 2(5) of the PACA willful (Complainant's Appeal at 28-29). 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

¹⁰See, 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 (continued...)

Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(5)) and the number of Respondent's violations. The variety of hybrid grapefruit ordered by purchasers from Respondent was specified. Respondent negligently, carelessly, or inadvertently filled orders for Oroblancos by providing Melogolds. Respondent knew, or should have known, that the hybrid grapefruit in question was the Melogold variety and could not lawfully be represented as the Oroblanco variety. For example, in the 1995-1996 season, around November 9, 1995, Mr. Milner, a county inspector, brought to Respondent's attention that Melogolds were in cartons erroneously labeled as Oroblancos (Tr. 1396-97, 1400-01). Respondent's manager and field man, Mr. Arcure, testified that he went to the packinghouse the weekend after county inspector Milner was there, to check the identity of the hybrid grapefruit, but "forgot" to correct the mistake (Tr. 1413-14). Thus, Mr. Arcure, who had experience with Melogolds and Oroblancos and was warned by the county inspector of probable violations, admitted that he "forgot" to

¹⁰(...continued)

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 Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 33 (Sept. 30, 1998); *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), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, No. 97-4224, 1998 WL 863340 (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.'")

change the labels on the cartons of the hybrid grapefruit that were packed from Caliente Farms and Hillcroft Groves (Tr. 1401, 1409-10, 1413).

Respondent's violations were also repeated. Respondent's violations are repeated because "repeated" means more than one.¹¹ Respondent misrepresented, by word or statement, the character or kind of approximately 10,622 cartons of hybrid grapefruit. Each misrepresented carton constitutes a separate violation of section 2(5) of the PACA (7 U.S.C. § 499b(5)).¹²

Regarding flagrant, Complainant argues that Respondent's violations are similar to those in *Potato Sales Co.*, *supra*, and therefore are to be found similarly flagrant. However, Complainant's sanction witness, Ms. Joan M. Colson, linked and emphasized Respondent's alleged violations of section 2(4) of the PACA for failure to truly and correctly account, to the found violations of failure to truly and correctly account in *Potato Sales Co.*, *supra*. However, the violations of section 2(4) of the PACA, at issue in this proceeding, are dismissed and are no pertinent part of the sanction inquiry. Thus, Complainant's emphasis on similarity to *Potato Sales Co.*, *supra*, for violations of section 2(4) of the PACA now militates against *Potato Sales Co.*, *supra*, as the paradigm case that Respondent's violations were flagrant.

Fifth, Complainant contends that the proper sanction is license revocation (Complainant's Appeal at 30). Respondent replies that revocation is not an appropriate sanction. Respondent requests that no sanction be imposed, but states, if a sanction is to be imposed, that it be limited to the 15 days that Respondent closed its business due to incorrect advice from the Office of the Hearing Clerk (Respondent's Reply at 6, 49).

I have carefully examined the circumstances surrounding Respondent's violations of section 2(5) of the PACA, and I do not find that Complainant has made a convincing showing for revocation.

Complainant on appeal still recommends revocation of Respondent's PACA

¹¹See *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 35 (Sept. 30, 1998) (stating that respondent's misrepresentations of 2,319 cartons of grapefruit were repeated violations of section 2(5) of the PACA); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 18 (Aug. 18, 1998) (holding that respondent's misrepresentations of 411 cartons of limes in 3 shipments, to 3 different customers, on 3 separate occasions, constitute repeated violations of the PACA); *In re Potato Sales Co.*, 54 Agric. Dec. 1382, 1402-04 (1995) (stating that the misrepresentations of the place of origin of 7,554 cartons of apples were repeated violations of the PACA), *aff'd*, 92 F.3d 800 (9th Cir. 1996).

¹²*In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 35 (Sept. 30, 1998); *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).

license, even though a major part of Complainant's case was dismissed,¹³ and Complainant did not appeal the dismissal. At the hearing, Complainant's sanction witness testified that Respondent's misrepresentations of one kind of fruit for another and failures to fully account were so serious that no civil penalty was recommended and only revocation was appropriate; but, if there had to be a civil penalty imposed as the appropriate remedy, the civil penalty would have to be \$500,000 to \$1,000,000.

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:

[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 do not adopt the sanction of revocation recommended by the administrative

¹³The ALJ dismissed paragraphs V-VII of the Complaint and the violations of section 2(4) of the PACA alleged in paragraphs III and IV of the Complaint.

¹⁴*In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 36 (Sept. 30, 1998); *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).

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)), which allegation was dismissed by the ALJ and not appealed by Complainant.

Further, while Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) 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 the Oroblanco variety and the Melogold variety at a time when no identity standards had been issued by the State of California (RX 126). Nonetheless, Respondent's violations were willful and repeated, involving approximately 10,622 cartons of hybrid grapefruit, and Respondent's violations risk undermining the confidence foreign importers have in representations relating to produce exported from the United States (Tr. 668-69). However, there is no evidence that Respondent's Japanese customers were not satisfied with Respondent's exported hybrid grapefruit (Tr. 908-11, 1029-32; CX 23 at 3).

Section 8(a) and (e) of the PACA (7 U.S.C. § 499h(a), (e) (Supp. III 1997)) provides that, if the Secretary determines that a 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 PACA license of the offender, or assess a civil penalty.

Section 8(e) of the PACA (7 U.S.C. § 499h(e) (Supp. III 1997)) provides that I may assess a civil penalty in lieu of the revocation or suspension of Respondent's PACA license for its violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)). 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*. Further, I find that Respondent operates a large business.

Complainant's sanction analysis estimates Respondent's losses, if Respondent had a revoked license for 2 years, which Complainant explains is the time period required before a licensee whose PACA license has been revoked may re-apply for a license. Complainant's sanction witness, Ms. Joan M. Colson, computed Respondent's probable losses at \$2.8 million over a 2-year hiatus, which Complainant and Ms. Colson "realized was an unrealistic figure to request" (Tr. 672; Complainant's Brief at 54).

Thereafter, Ms. Colson bases the computation of Respondent's probable losses on a 90-day suspension, estimating therefrom a probable loss figure of \$360,000.

Complainant adds \$20,000 to the \$360,000, because Respondent allegedly failed to account, truly and correctly, to its growers for \$20,000. Finally, Complainant adds an "additional sum" for the seriousness of the violations. Simple arithmetic reveals such an "additional sum" to be \$120,000 to \$620,000, in order to reach the recommended \$500,000 to \$1,000,000 civil penalty (Tr. 671-72; Complainant's Brief at 54).

Complainant originally sought only revocation and only reluctantly addressed the statutory issue of civil penalties (7 U.S.C. § 499h(e)). In the context of opposing any civil penalty, Complainant uses a 2-year time period, that a revoked licensee must wait to be eligible for a new license, to determine that Respondent would lose \$2.8 million over the 2 years. Complainant argues that it "realized" that requesting a \$2.8 million civil penalty was unrealistic, but Complainant gave no reasons as to how or why Complainant came to such a realization. Therefore, Complainant did not address the obvious question raised by the \$2.8 million loss figure, to wit, if it is unrealistic to seek a \$2.8 million civil penalty equal to revocation, then why is it realistic to cause Respondent virtually the same loss, the same \$2.8 million, by revoking Respondent's license? I do not here decide that there are no salient arguments, only that Complainant did not make any.

Complainant thereafter calculates Respondent's losses from a 90-day suspension, but Complainant does not recommend a 90-day suspension. Significantly, Complainant gives no reasons, and no explanation, for choosing a hypothetical 90-day suspension, in lieu of revocation. Despite Complainant's ostensibly random choice of a hypothetical 90-day suspension, I infer that Complainant actually considers a 90-day suspension to be a more realistic sanction than revocation.

Complainant estimates Respondent's losses from the hypothetical 90-day suspension to be \$360,000, to which Complainant adds \$20,000 allegedly not truly and correctly accounted back to Respondent's growers, and an additional sum for the seriousness of the violations, which totals a civil penalty of \$500,000 to \$1,000,000, in lieu of a 90-day suspension. Losses of \$360,000 seem reasonable for a 90-day period. However, the \$20,000 figure is not useful because it is not described as a civil penalty, but is money apparently owed, or at least not paid, to growers by Respondent. Further, the alleged violations of section 2(4) of the PACA formed part of Complainant's theory of the serious violations for which Complainant adds an additional sum of \$120,000 to \$620,000 to the civil penalty. But, since Complainant does not break it down, there is no way to know what part Complainant meant the alleged violations of section 2(4) of the PACA to have in computing the civil penalty for serious violations.

Therefore, my analysis of Complainant's original sanction recommendation and

sanction witness' testimony is that Complainant unrealistically seeks revocation of Respondent's PACA license, when Complainant's own analysis points to a 90-day suspension. However, since Complainant only proved the violations of section 2(5) of the PACA, I impose only a 30-day suspension of Respondent's PACA license. Complainant estimates that Respondent's losses from a suspension of its PACA license would be approximately \$4,000 for each day of suspension. Based upon Complainant's estimates, a \$120,000 civil penalty for Respondent's violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)), in lieu of the 30-day suspension of Respondent's PACA license, would be appropriate.

Respondent contends that it "was affirmatively advised by the Hearing Office [on July 6, 1998, that] no appeal had been filed and, therefore, [Respondent] closed its packing house, laid off employees, and suspended operations on July 7, 1998[,] as required by the [Initial Decision and Order]" (Respondent's Reply at 5). Based on this contention, Respondent requests that no sanction be imposed on Respondent or, in the alternative, that the sanction "be limited to the closure incurred by Respondent when it was not timely advised of the appeal by the Complainant" (Respondent's Reply at 5).

The record reveals that Respondent was served with the Initial Decision and Order on June 8, 1998.¹⁵ Section 1.142(c)(4) of the Rules of Practice provides that the administrative law judge's decision does not become effective until 35 days after the date of service of the decision on the respondent, unless there is an appeal to the Judicial Officer, as follows:

§ 1.142 Post-hearing procedure.

....

(c) *Judge's decision.* . . .

....

(4) The Judge's decision shall become effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided,*

¹⁵See Domestic Return Receipt for Article Number P 093 143 38.

however, that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.142(c)(4).

Further, the ALJ's Initial Decision and Order states that the Initial Decision will become effective 35 days after service, as follows:

This Decision and Order shall become final thirty-five (35) days after service thereof upon the parties, unless there is an appeal to the Judicial Officer within thirty (30) days.

Initial Decision and Order at 70.

Thus, had no party appealed, the ALJ's Initial Decision and Order would have become effective on July 13, 1998, and Respondent's PACA license would have been suspended beginning July 13, 1998, not July 7, 1998, as Respondent contends. Under these circumstances, I find no basis for Respondent's belief that it was required to begin its PACA license suspension on July 7, 1998, pursuant to the Initial Decision and Order issued by the ALJ.

Moreover, the record reveals that Complainant filed a timely appeal on July 1, 1998. Hence, the ALJ's Initial Decision and Order never became effective. Further still, Respondent admits that it received a copy of Complainant's timely-filed appeal on July 10, 1998, three days prior to the date on which the ALJ's Initial Decision and Order would have become effective had no timely appeal been filed (Letter from Steven M. McClean to Office of the Hearing Clerk, filed July 20, 1998).

Finally, Respondent's reliance for its contention that no sanction should be imposed on it because of erroneous advice Respondent received from Ms. LaWuan Waring, Legal Technician, Office of the Hearing Clerk, is misplaced. It is well-settled that individuals are bound by federal statutes and regulations, irrespective of the advice of federal employees.¹⁶ Therefore, even if Respondent was given erroneous advice by Ms. Waring, Respondent was bound by the Rules of Practice.

I infer that Respondent contends that the Secretary of Agriculture is estopped

¹⁶See *FCIC v. Merrill*, 332 U.S. 380, 382-86 (1947); *In re David M. Zimmerman*, 57 Agric. Dec. ____, slip op. at 15, 27 (Nov. 18, 1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 227 (1998), appeal dismissed, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 20 (1990); *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1477 (1988); *In re Maquoketa Valley Coop. Creamery*, 27 Agric. Dec. 179, 186 (1968); *In re Leslie E. Donley*, 22 Agric. Dec. 449, 452 (1963).

from imposing a sanction against Respondent because of Ms. Waring's statement to Respondent that Complainant had not filed an appeal, as of July 6, 1998. The doctrine of equitable estoppel is not, in itself, either a claim or a defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.¹⁷ One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his or her position for the worse.¹⁸ Ms. Waring did nothing to lead Respondent to believe that the ALJ's Initial Decision and Order would become effective July 7, 1998, or that Respondent was required to cease business on July 7, 1998.

Further, even if Respondent had acted to its detriment based on Ms. Waring's statements, it is well settled that the government may not be estopped on the same terms as any other litigant.¹⁹ It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws.²⁰ Equitable estoppel does not generally apply to the government acting in its sovereign capacity,²¹ as it was doing in this case,²² and estoppel is only available

¹⁷*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

¹⁸*Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, 965 F.2d 413, 418 (7th Cir. 1992).

¹⁹*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

²⁰*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

²¹*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

²²*See In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977). *Cf. In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 28 (Nov. 18, 1998) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the (continued...)

if the government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.²³ Respondent bears a heavy burden when asserting estoppel against the government, and it has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, I find no basis upon which to grant Respondent's request that no sanction be imposed because Respondent closed its packinghouse on July 7, 1998.

Finally, in formulating this sanction, I am relying a great deal on the credibility determinations of the ALJ, because the nature of this case turns on the believability of Respondent's witnesses. The ALJ gave "full credibility to Respondent's witnesses" (Initial Decision and Order at 57). The consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law judges, since they have the opportunity to see and hear witnesses testify.²⁴ The ALJ explained in great detail,

²²(...continued)

Animal Welfare Act); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding that the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2d Cir. Jan. 22, 1982);

²³*City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

²⁴*In re David M. Zimmerman*, 57 Agric. Dec. ___, slip op. at 23-24 (Nov. 18, 1998); *In re IBP, inc.*, 57 Agric. Dec. ___, slip op. at 47 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *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, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales* (continued...)

throughout the Initial Decision and Order, her reasons for concluding that Respondent's witnesses' testimony was fully credible. The record supports the ALJ's credibility determinations.

Therefore, based on the record, I find that a 30-day suspension of Respondent's PACA license or, in lieu of the 30-day suspension, the assessment of a \$120,000 civil penalty would deter Respondent and others in the perishable agricultural commodities industry from violations of section 2(5) of the PACA (7 U.S.C. § 499b(5)) in the future.

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

Order

1. Respondent is assessed a civil penalty of \$120,000, 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 65 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. D-96-0532.

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 30 days, and the 30-day suspension shall take effect beginning on the 66th day after service of this Order on Respondent.

²⁴(...continued)

Co., 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

In re: MICHAEL NORINSBERG.
PACA-APP Docket No. 96-0009.
Decision and Order on Remand filed April 5, 1999.

Responsibly connected — Active involvement — Ministerial function — Retroactivity — Nominal officer and director — Alter ego.

The Judicial Officer, on remand, reversed the Chief of the PACA Branch's decision that Petitioner was *responsibly connected*, as that term is defined in the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)), with The Norinsberg Corporation during the time that The Norinsberg Corporation violated the PACA. The Judicial Officer had previously affirmed the Chief of the PACA Branch, based on the Judicial Officer's conclusion that Petitioner was actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA. *In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997). Petitioner filed a petition for review of the Judicial Officer's determination, and the United States Court of Appeals for the District of Columbia Circuit remanded the case instructing the Judicial Officer to articulate a standard to determine whether Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194 (1998). The Judicial Officer held that a petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA. Applying this standard to Petitioner, the Judicial Officer found that Petitioner participated in activities resulting in The Norinsberg Corporation's violations of the PACA; however, Petitioner demonstrated by a preponderance of the evidence that he performed a ministerial function only and thus, was not actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA.

Andrew Y. Stanton, for Respondent.

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

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

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

Michael Norinsberg [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Petition on September 14, 1993.

The Petition challenges the August 11, 1993, determination of the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was responsibly connected with The Norinsberg Corporation during the period that

The Norinsberg Corporation violated the PACA,¹ in that Petitioner was the secretary, treasurer, director, and a 15 percent stockholder of The Norinsberg Corporation and involved in the daily activities of The Norinsberg Corporation.

On January 2, 1997, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] conducted an oral hearing in New York, New York. Stephen P. McCarron, McCarron & Associates, Washington, D.C., represented Petitioner. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Respondent.

On February 10, 1997, Petitioner filed Petitioner's Proposed Findings of Fact and Conclusions of Law and a Memorandum in Support of Petitioner's Proposed Findings of Fact and Conclusions of Law, and on February 11, 1997, Respondent filed Respondent's Brief. On February 19, 1997, Petitioner filed Petitioner's Reply Brief and Respondent filed Respondent's Reply Brief.

On May 6, 1997, the ALJ issued an Initial Decision and Order in which the ALJ found: (1) The Norinsberg Corporation was the alter ego of Robert Norinsberg; (2) Petitioner only nominally was a secretary, a treasurer, a director, and a stockholder of The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA; and (3) Petitioner was not actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA (Initial Decision and Order at 8-9). The ALJ concluded that "Michael Norinsberg was not responsibly connected to The Norinsberg Corporation at the time of the corporation's violations of the PACA" (Initial Decision and Order at 4) and reversed the "Order of the Chief, PACA Branch, Fruit and Vegetable Division, USDA, dated August 11, 1993, which found that Michael Norinsberg was 'responsibly connected' to The Norinsberg Corporation" (Initial Decision and Order at 13).

On May 28, 1997, Respondent appealed to the Judicial Officer. On July 21, 1997, Petitioner filed Petitioner's Opposition to Respondent's Appeal Petition, and on July 23, 1997, the Hearing Clerk transmitted the case to the Judicial Officer for decision.

On October 21, 1997, I issued a Decision and Order: (1) concluding Petitioner

¹During the period from April 1991 through February 1992, The Norinsberg Corporation purchased, received, and accepted 46 lots of perishable agricultural commodities from 10 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of \$424,913.75. The Norinsberg Corporation's failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and its PACA license was revoked pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)). *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995).

was only nominally an officer and director of The Norinsberg Corporation during the period The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding The Norinsberg Corporation was the alter ego of Robert M. Norinsberg and Petitioner held 2.97914 per centum of the outstanding stock of The Norinsberg Corporation during the period that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) concluding Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) affirming the August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA. *In re Michael Norinsberg*, 56 Agric. Dec. 1840, 1851, 1864-65 (1997), *remanded*, 162 F.3d 1194 (D.C. Cir. 1998).

On December 3, 1997, Petitioner filed Petition for Reconsideration contending that I erred by applying the definition of the term *responsibly connected* in the PACA, as amended by the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter PACAA-1995],² to determine whether Petitioner was responsibly connected with The Norinsberg Corporation during the period from April 1991 through February 1992. On January 9, 1998, Respondent filed Response to Petitioner's Petition for Reconsideration, and the Hearing Clerk transmitted the case to the Judicial Officer for reconsideration of the October 21, 1997, Decision and Order.

On January 26, 1998, I denied Petitioner's Petition for Reconsideration finding that until Petitioner filed his Petition for Reconsideration, Petitioner consistently took the position that the definition of *responsibly connected* in the PACA, as amended by the PACAA-1995, should be applied in the proceeding and concluding that Petitioner cannot raise a new argument for the first time on appeal and cannot argue a legal position on appeal that is contrary to the position Petitioner consistently argued in the proceeding, until he filed Petitioner's Petition for Reconsideration. *In re Michael Norinsberg*, 57 Agric. Dec. 791 (1998) (Order Denying Pet. for Recons.).

Petitioner filed a petition for review of my determination that he was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA, and the United States Court of Appeals

²Pub. L. No. 104-48, 109 Stat. 424 (1995).

for the District of Columbia Circuit granted Petitioner's petition for review and remanded the case stating that I inadequately articulated the factors relevant in interpreting the term *actively involved* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997). The Court instructed that, on remand, I articulate a standard to determine whether Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA and, if necessary, address the issue of retroactive application of the definition of the term *responsibly connected* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997), 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). *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1200 (D.C. Cir. 1998).

Petitioner and Respondent each requested the opportunity to file a brief on the issues on remand, which requests I granted. On March 10, 1999, Petitioner filed Petitioner's Brief on Remand, and Respondent filed Respondent's Brief on Remand. On March 18, 1999, Petitioner filed Petitioner's Reply to Respondent's Brief on Remand, and the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision on remand.

Applicable Statutory Provisions

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

....

(b) Definitions

....

(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.

7 U.S.C. § 499a(b)(9) (1994).

§ 499a. Short title and definitions

....

(b) Definitions

....

(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. III 1997).

Petitioner was an officer and director of The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA.³ *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1848, 1851 (Finding of Fact Nos. 16, 27; Conclusion of Law No. 4). Thus, Petitioner meets the first sentence of the definition of the term *responsibly connected* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997), and the burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with The Norinsberg Corporation. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)) provides a two-pronged test which Petitioner must meet in order to demonstrate that he was not responsibly connected with The Norinsberg Corporation. First, a petitioner

³See note 1.

must demonstrate by a preponderance of the evidence that the 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 petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or (2) the petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.

In the October 21, 1997, Decision and Order, I concluded that Petitioner failed to meet the first prong of the test, *viz.*, Petitioner failed to demonstrate by a preponderance of the evidence that he was not actively involved in the activities resulting in the PACA violations committed by The Norinsberg Corporation. The basis for my conclusion is Petitioner's signing 14 checks drawn on two of The Norinsberg Corporation's accounts made payable to three individuals who were not produce sellers in amounts totaling \$59,728.60. I found that Petitioner's signing the checks was active involvement in an activity resulting in violations of the PACA by The Norinsberg Corporation because Petitioner's actions enabled persons who presented these checks for payment to receive payment and resulted in the substantial reduction of the resources available to The Norinsberg Corporation to make full payment promptly to produce sellers in accordance with the PACA. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1857.⁴

The United States Court of Appeals for the District of Columbia Circuit admonished that I did not adequately articulate the factors relevant to the interpretation of the term *actively involved* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997) and remanded the case to me to articulate a standard that the Court can review in an informed manner. *Norinsberg v. United States Dep't of Agric., supra*, 162 F.3d at 1196, 1200.

⁴While a petitioner's failure to meet the first prong of the test ends the inquiry, I found that Petitioner met the second prong of the two-pronged test. Specifically, Petitioner demonstrated by a preponderance of the evidence that he was only a nominal officer and director of The Norinsberg Corporation. Further, I noted that, although Petitioner demonstrated by a preponderance of the evidence that The Norinsberg Corporation was the alter ego of Robert M. Norinsberg, the alter ego defense was not available to Petitioner because he was an owner (Petitioner held 2.97914 per centum of the outstanding stock) of The Norinsberg Corporation. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1859-65.

The Court states that, at oral argument, the United States Department of Agriculture suggested that, while Petitioner's act of signing checks made payable to persons who were not produce sellers was active involvement in an activity resulting in a violation of the PACA, the act of mailing the very same checks would not be active involvement in an activity resulting in a violation of the PACA. The Court further states that both actions, signing the checks and mailing the checks, could constitute active involvement in the activities resulting in a violation of the PACA, and the Judicial Officer provides no principled way to distinguish between the two. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d at 1200.

The PACA does not define the term *actively involved in the activities resulting in a violation of the PACA*, and there is no legislative history revealing Congressional intent with respect to the meaning of the term. The reason for my failure to articulate a standard for determining whether an individual was actively involved in the activities resulting in a violation of the PACA was my view that whether an individual was actively involved in activities resulting in a violation of the PACA requires a fact-specific determination and consideration of the totality of the circumstances.⁵ For this same reason, I addressed the facts in *In re Michael Norinsberg, supra*, and I did not attempt to distinguish hypothetical situations, such as a nominal officer who merely mails a check to a person who is not a produce seller; thereby reducing the resources available to the PACA licensee to pay produce sellers in accordance with the PACA.

However, in accordance with the Court's instruction, I have reflected on an appropriate standard to be used to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA. The standard is based upon my review and consideration of *Norinsberg v. United States Dep't of Agric., supra*; the helpful briefs on remand filed by Petitioner and Respondent; and *Maldonado v. Department of Agric.*, 154 F.3d 1086 (9th Cir. 1998), a case that was decided after I issued the October 21, 1997, Decision and Order in *In re Michael Norinsberg, supra*.

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her

⁵*Cf. United States v. Vertac Chemical Corp.*, 46 F.3d 803, 808 (8th Cir. 1995) (indicating that actual or substantial control requires at a minimum active involvement in activities and stating that determining whether an entity has exerted actual or substantial control requires a fact-intensive inquiry and consideration of the totality of the circumstances), *cert. denied sub nom. Hercules, Inc. v. United States*, 515 U.S. 1158 (1995); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 843-45 (3rd Cir. 1994) (same).

participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

For example, mailing a check to a person who is not a produce seller enables the person who presents the check for payment to receive payment and results in the reduction of the resources available to a PACA licensee to pay produce sellers in accordance with the PACA. Thus, if the PACA licensee does not pay a produce seller in accordance with the PACA because the PACA licensee has mailed payment to an individual who is not a produce seller, the individual who mails the check participates in an activity resulting in a violation of the PACA. However, a petitioner who demonstrates by a preponderance of the evidence that he or she did not exercise any judgment, discretion, or control regarding which envelopes were mailed, would not have been actively involved in the activity that resulted in a violation of the PACA, even if the petitioner's act of mailing the payment resulted in the partnership's, corporation's, or association's failure to pay a produce seller in accordance with the PACA. Similarly, a supervisor of the mail room, who does not actually mail checks, but supervises the PACA licensee's mail room, participates in activities resulting in a violation of the PACA if a mail room employee mails a check to a person who is not a produce seller and that person presents the check for payment and payment of the check results in the reduction of the resources available to the PACA licensee such that the partnership, corporation, or association fails to pay a produce seller in accordance with the PACA. However, the mail room supervisor who demonstrates by a preponderance of the evidence that he or she did not exercise any judgment, discretion, or control regarding which envelopes were mailed, would not have been actively involved in the activity that resulted in a violation of the PACA, even if one of the payments mailed from the mail room is to a person who is not a produce seller and the mailing resulted in the partnership's, corporation's, or association's failure to pay a produce seller in accordance with the PACA.

On the other hand, if a petitioner, who exercises judgment or discretion regarding, or has control over, who should be paid, how much they should be paid, or when they should be paid, fails to pay a produce seller in accordance with the PACA, the petitioner is actively involved in an activity resulting in a violation of the PACA. Similarly, if a petitioner, who exercises control over which payments to mail, fails to mail a payment to a produce seller so that the produce seller is paid

in accordance with the PACA, the petitioner is actively involved in an activity resulting in a violation of the PACA.

This standard is consistent with my reading of *Maldonado* in which the United States Court of Appeals for the Ninth Circuit reversed the Secretary of Agriculture's determination that Ernest Maldonado, a nominal officer of a PACA violator, was actively involved in activities resulting in the PACA licensee's failure to pay produce sellers in accordance with the PACA. The Court in *Maldonado* appears to base its decision that Mr. Maldonado was not actively involved in activities resulting in a violation of the PACA on Mr. Maldonado's lack of control over the activities resulting in the failure of the PACA licensee to pay produce sellers and the ministerial nature of Mr. Maldonado's check signing, as follows:

As to the first requirement in the statute, there is no evidence that Maldonado was "actively involved" in the transactions that resulted in the PACA violation. The violation in this case was W. Fay's failure to pay \$19,590.75 for twelve shipments of mixed citrus from October 19, 1992 through February 26, 1993. Maldonado testified that he was not involved in that particular sale. Nor, according to Maldonado's testimony, did he generally make any of the decisions as to what bills got paid and when. Although Maldonado was authorized to co-sign checks, he did not participate in the fraudulent activities of the Dukeshersers that resulted in money being siphoned from the firm to their pockets. He merely signed checks when he was asked to do so.

Maldonado v. Department of Agric., *supra*, 154 F.3d at 1087-88.

Moreover, in contexts other than the PACA, courts have indicated that control is a factor to be examined to determine who is actively involved with a particular activity.⁶

⁶See, e.g., *LDL Research & Development II, Ltd. v. Commissioner*, 124 F.3d 1338, 1342 (10th Cir. 1997) (stating that research expenditures are made in connection with the partnership's trade or business if the taxpayer is actively involved in the research project as a trade or business and indicating that the degree of taxpayer control or regular and substantial participation is the primary determinant between active involvement and passive investment); *Nickeson v. Commissioner*, 962 F.2d 973, 978 (10th Cir. 1992) (citing with approval the holding in *Diamond v. Commissioner*, 930 F.2d 372 (4th Cir. 1991), that lack of control over activities indicates that taxpayers were passive investors and not actively engaged in a trade or business); *Diamond v. Commissioner*, 930 F.2d 372, 376 (4th Cir. 1991) (stating that an entity with no control over activities in which it invests is a passive investor and cannot be engaged in a trade or business in connection with those activities); *Zink v. United States*, 929 F.2d (continued...)

Respondent contends that there are at least four factors that should be given strong consideration to determine whether a person has demonstrated that he or she was not actively involved in activities resulting in a violation of the PACA (Respondent's Brief on Remand at 4-10).

First, Respondent contends that "the nature of the person's actions with respect to the activities resulting in the PACA violations" should be examined to determine whether an individual was actively involved in an activity resulting in a violation of the PACA. "The more closely [a person] participated in the activities resulting in the violation, the less likely it is that he or she should be able to successfully show a lack of active involvement." (Respondent's Brief on Remand at 5.) Respondent provides the following as examples of situations in which a person would most likely be able to demonstrate that he or she was not actively involved in activities resulting in a violation of the PACA:

If that person's job functions were mainly clerical, as in *Minotto v. United States*, 711 F.2d 406 (D.C. Cir. 1983), it would also be likely that the person would be able to show a lack of active involvement, unless his or her clerical functions were activities that resulted in the corporation's payment violations. Similarly, where the alleged responsibly connected person's duties were essentially to buy and sell produce, as in *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), the connection between the nature of the person's involvement and the activities resulting in the violations would probably be too tenuous to support a finding of active involvement in the activities resulting in the corporation's failure to pay for produce.

Respondent's Brief on Remand at 5.

I agree with Respondent's contention that a person who demonstrates by a preponderance of the evidence that he or she performed mainly clerical duties was most likely not actively involved in activities that resulted in a violation of the

⁶(...continued)

1015, 1022-23 (5th Cir. 1991) (stating that the lack of control over activities in which taxpayers invested leads to the conclusion that taxpayers were passive investors and were not engaged in a trade or business); *Burns v. D. Oltmann Maritime PTE Ltd.*, 901 F. Supp. 203, 207 (E.D. Va. 1995) (stating that the *M/V Neptune Jade* was not actively involved with cargo activities when the longshoreman, who was under the direction and control of the stevedore company, was killed); *United States v. Conservation Chemical Co. of Ill.*, 733 F. Supp. 1215, 1221-22 (N.D. Ind. 1989) (indicating that active involvement in Resource Conservation and Recovery Act violations is shown by regular and significant activity and responsibility for environmental control).

PACA. My agreement with Respondent is based on my view that an individual who performs primarily clerical duties generally will not exercise judgment or discretion with respect to, or control over, activities resulting in a violation of the PACA. However, while the characterization of an individual's functions (e.g., clerical, technical, professional, sales, management, or policy) within a partnership, corporation, or association may be a general indicator of the judgment, discretion, or control exercised by that individual, such characterization would not be dispositive of the issue of active involvement in an activity resulting in a violation of the PACA.⁷

Thus, a nominal officer of a corporate PACA violator may show that his or her duties were primarily clerical, but if he or she exercised some judgment or discretion with respect to, or control over, an activity and that activity resulted in a violation of the PACA, the general nature of the individual's duties would not insulate the individual from being found to have been actively involved in the activity resulting in a violation of the PACA.

Second, Respondent contends that "the nature of a person's relationship to the violating company" should be examined to determine whether an individual was actively involved in an activity that resulted in a violation of the PACA (Respondent's Brief on Remand at 6). Respondent asserts that using this factor:

[a] corporate officer, director or major stockholder who exercised a great deal of authority over a corporation that committed PACA violations would have difficulty showing that he or she was not actively involved in the activities resulting in the violation. If an alleged responsibly connected person was found to have little authority over corporate affairs, such as the appellant in *Minotto*, a bookkeeper who was made a corporate director to satisfy quorum requirements and who engaged in very minor corporate functions, such as appearing at meetings and voting at the direction of her superiors, that factor would tend to support a showing of the absence of active involvement based on the limited nature of the person's authority.

Respondent's Brief on Remand at 6.

I agree with Respondent's contention that an officer, director, or major shareholder who exercises a great deal of authority over a corporate PACA violator

⁷See *In re Michael Norinsberg*, *supra*, 56 Agric. Dec. at 1857-58 (rejecting the ALJ's conclusion that an individual is not actively involved in activities resulting in a violation of the PACA unless the individual participated at a managerial level in decision making activities that resulted in the violation).

may have difficulty demonstrating by a preponderance of the evidence that he or she was not actively involved in activities that resulted in a violation of the PACA. This difficulty is merely a function of the fact that a person with general authority over a corporate PACA violator is more likely to have exercised judgment or discretion with respect to, or control over, the activities that resulted in a violation of the PACA, than a person who has limited corporate authority. However, I do not agree that an alleged responsibly connected individual's demonstration by a preponderance of the evidence that he or she had very limited corporate authority would, by itself, demonstrate that he or she was not actively involved in activities that resulted in a violation of the PACA. An individual who exercises authority over only one limited area of corporate activities could be responsibly connected due to his or her active involvement in activities resulting in a violation of the PACA.

For example, if an individual, whose only activity on behalf of the corporation and only authority within the corporation is the payment of accounts payable, fails to pay a produce seller in accordance with the PACA, the individual would be actively involved in an activity that resulted in a violation of the PACA, despite the individual's lack of control over any other corporate activity.

Third, Respondent contends that "how the individual is viewed by those doing business with the firm" should be examined to determine whether an individual was actively involved in an activity that resulted in a violation of the PACA (Respondent's Brief on Remand at 6). Respondent explains the reasons for examination of this factor, as follows:

If the alleged responsibly connected person indicates to those with whom the corporation conducts business that he or she has important decision making duties, or holds him [sic] or herself out as authoritative, that person should be considered actively involved. An even stronger indication of active involvement is when a person obtained the position of officer, director or greater than 10% shareholder because he or she was well known to and respected by the produce industry and that person's reputation was used to attract customers or get credit.

Respondent's Brief on Remand at 6.

Evidence provided by persons dealing with a PACA violator may be important with respect to the issue of a petitioner's active involvement in activities resulting in a violation of the PACA. However, the ultimate issue is not the petitioner's reputation in the produce industry, the petitioner's representations regarding his or

her responsibilities in a partnership, corporation, or association, or how well known the petitioner is to those who deal with the partnership, corporation, or association. Instead, at least for the first prong of the responsibly connected test, the ultimate issue is the petitioner's active involvement in the activities resulting in a violation of the PACA.

For example, a petitioner, who exercises discretion over who to pay and when to make payment, may demonstrate by a preponderance of the evidence that he or she has never made any representations to persons dealing with the partnership, corporation, or association regarding his or her responsibilities and no person dealing with the partnership, corporation, or association knows of the petitioner's responsibilities. Despite this proof, a petitioner who decides not to pay a produce seller in accordance with the PACA would be actively involved in an activity resulting in a violation of the PACA.

Fourth, Respondent contends that scienter should be examined to determine whether an individual was actively involved in an activity that resulted in a violation of the PACA. Respondent explains the reasons for an examination of this factor, as follows:

If an officer, director or greater than 10% shareholder knew that his or her activities resulted in PACA violations, this is a significant indication of active involvement. However, a person may still be actively involved even in the absence of such knowledge if he or she should have known that these activities resulted in PACA violations. In the highly regulated arena of perishable agricultural commodities, corporate officers, directors and greater than 10% shareholders may not defeat their responsibly connected status by actively seeking ignorance. In *Minotto, supra*, at 408, the court noted that absence from the record was any "suggestion that Minotto knew **or should have known** of the Company's misdeeds [emphasis added]." The court's recognition that a corporate director may be responsibly connected without actual knowledge of the corporation's violations as long as the director should have known of the violations is consistent with the long-recognized principle that a corporate officer and director are fiduciaries, and "in the discharge of his responsibilities must use at least that degree of diligence that an 'ordinarily prudent' person under similar circumstances must use." *Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264 (2d Cir. 1986). If a corporate officer signs checks, he or she should be considered actively involved even without actual knowledge of the corporation's payment problems, as long as a prudent person under

similar circumstances would know that the check signing would result in PACA violations.

Respondent's Brief on Remand at 6-7.

I disagree with Respondent's contention that scienter is a factor that should be examined to determine if an individual was actively involved with activities that resulted in a violation of the PACA. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)) does not provide that active involvement is dependent upon whether the individual knew or should have known that activities in which he or she participated would result in a violation of the PACA.⁸

Thus, if a petitioner buys produce from a seller who is not paid by the partnership, corporation, or association, in accordance with the PACA, the petitioner is actively involved in an activity resulting in a violation of the PACA, even if the petitioner does not know, or have reason to know, that the partnership, corporation, or association cannot pay the produce seller.

I have reviewed my October 21, 1997, Decision and Order in *In re Michael Norinsberg, supra*, in light of the standard articulated, *supra*. I find, applying the standard, that I erred. Petitioner participated in activities resulting in The Norinsberg Corporation's violations of the PACA; however, Petitioner demonstrated by a preponderance of the evidence that he performed a ministerial function only. Therefore, I now find that, while Petitioner participated in activities resulting in The Norinsberg Corporation's violations of the PACA, Petitioner was not actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA.

Specifically, Petitioner signed 14 checks drawn on The Norinsberg Corporation's checking accounts at Chase Manhattan Bank and Republic National Bank of New York, payable to three persons who were not produce creditors of The Norinsberg Corporation. Petitioner's activities (signing checks) enabled persons who presented these checks for payment to receive payment and resulted in the substantial reduction of resources available to The Norinsberg Corporation to pay produce sellers in accordance with the PACA. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1857. Thus, Petitioner participated in activities that resulted in The Norinsberg Corporation's violations of the PACA.

⁸I found in *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1850, that, at the time Petitioner signed checks payable to individuals who were not produce sellers, Petitioner knew that The Norinsberg Corporation was not paying produce sellers in accordance with the PACA. However, I did not intend to indicate that a petitioner must knowingly participate in a PACA violation or must know that his or her activities will result in a PACA violation, to be responsibly connected.

However, I find that my conclusion in *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1857, that "Petitioner was therefore actively involved in activities resulting in The Norinsberg Corporation's violations of the PACA and the fact that Petitioner engaged in these activities at the direction of another does not negate Petitioner's active involvement," is error. Petitioner demonstrated by a preponderance of the evidence that his signing of the checks was a ministerial function only. The checks were presented to Petitioner for signature with the checks already made out as to payee and amount. Petitioner signed the checks presented to him when the president of The Norinsberg Corporation was not available and at the direction of the president of The Norinsberg Corporation. *In re Michael Norinsberg, supra*, 56 Agric. Dec. at 1849, 1858. I find, under these circumstances, that Petitioner did not exercise judgment or discretion with respect to, or control over, the check signing and that Petitioner performed only a ministerial function.

The United States Court of Appeals for the District of Columbia Circuit also instructs that I address the issue of retroactivity, as follows:

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, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997).

Norinsberg v. United States Dep't of Agric., 162 F.3d at 1200.

Until Petitioner filed his Petition for Reconsideration, Petitioner consistently took the position in this proceeding that the definition of the term *responsibly connected* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997) should be applied in this proceeding. In his Petition for Reconsideration, Petitioner changed this position, as follows:

[T]he amended definition of the term 'responsibly connected' [in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997))], as interpreted by the Judicial Officer, imposes new and detrimental legal consequences on [P]etitioner so that it cannot be applied retroactively to his conduct which occurred before the amendment.

Petition for Reconsideration at 1 (footnote omitted).

I rejected Petitioner's claim of error on the grounds that Petitioner could not raise a new argument for the first time on appeal to the Judicial Officer and a party is not allowed to argue a legal position on appeal that is contrary to the position argued earlier in the proceeding. *In re Michael Norinsberg*, 57 Agric. Dec. 791, 795-96 (1998) (Order Denying Pet. for Recons.)

While the standard which I have applied in this Decision and Order on Remand differs from the United States Court of Appeals for the District of Columbia Circuit precedent applicable to the definition of the term *responsibly connected* prior to its amendment by the PACAA-1995, Petitioner has not suffered a "detrimental legal consequence"; therefore, it is not necessary to address the issue of retroactivity in this Decision and Order on Remand.

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

Order

The August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA, is reversed.

In re: MICHAEL NORINSBERG.

PACA-APP Docket No. 96-0009.

Order Denying Petition for Reconsideration on Remand filed May 25, 1999.

Responsibly connected — Active involvement — Nominal officer and director.

The Judicial Officer denied Respondent's petition for reconsideration on remand. The Judicial Officer held that the standard in *In re Michael Norinsberg*, 58 Agric. Dec. ____ (Apr. 5, 1999) (Decision and Order on Remand), to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA, does not conflict with the two-pronged test in 7 U.S.C. § 499a(b)(9) (Supp. III 1997) or render the determination of whether a person was actively involved in the activities resulting in a violation of the PACA, superfluous. The Judicial Officer also rejected Respondent's contention that Petitioner exercised informed judgment when he participated in activities (signing checks made payable to persons who were not produce sellers) resulting in violations of the PACA by The Norinsberg Corporation.

Andrew Y. Stanton, for Respondent.

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

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

Order on Remand issued by William G. Jenson, Judicial Officer.

Michael Norinsberg [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Petition on September 14, 1993.

The Petition challenges the August 11, 1993, determination of the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA,¹ in that Petitioner was the secretary, treasurer, director, and a 15 percent stockholder of The Norinsberg Corporation and involved in the daily activities of The Norinsberg Corporation.

On October 21, 1997, I issued a Decision and Order: (1) concluding Petitioner was only nominally an officer and director of The Norinsberg Corporation during the period The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluding The Norinsberg Corporation was the alter ego of Robert M. Norinsberg and Petitioner held 2.97914 per centum of the outstanding stock of The Norinsberg Corporation during the period that The Norinsberg Corporation committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) concluding Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) affirming the August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected

¹During the period from April 1991 through February 1992, The Norinsberg Corporation purchased, received, and accepted 46 lots of perishable agricultural commodities from 10 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of \$424,913.75. The Norinsberg Corporation's failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the Judicial Officer revoked The Norinsberg Corporation's PACA license pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)). *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995).

with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA. *In re Michael Norinsberg*, 56 Agric. Dec. 1840, 1851, 1864-65 (1997), *remanded*, 162 F.3d 1194 (D.C. Cir. 1998).

Petitioner filed a petition for review of my determination that he was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA, and the United States Court of Appeals for the District of Columbia Circuit granted Petitioner's petition for review and remanded the case stating that I inadequately articulated the factors relevant in interpreting the term *actively involved* in 7 U.S.C. § 499a(b)(9) (Supp. III 1997). The Court instructed that, on remand, I articulate a standard to determine whether Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1200 (D.C. Cir. 1998).

On April 5, 1999, I issued a Decision and Order on Remand adopting the following standard to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA:

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

In re Michael Norinsberg, 58 Agric. Dec. ___, slip op. at 10 (Apr. 5, 1999) (Decision and Order on Remand).

Applying this standard to Petitioner, I found that Petitioner was not actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA. *In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 18-19 (Apr. 5, 1999) (Decision and Order on Remand).

On April 26, 1999, Respondent filed Respondent's Petition to Reconsider; on May 19, 1999, Petitioner filed Petitioner's Opposition to Respondent's Petition to Reconsider; and on May 21, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the April 5, 1999, Decision

and Order on Remand.

Applicable Statutory Provisions

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

§ 499a. Short title and definitions

....

(b) Definitions

....

(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. III 1997).

Respondent raises two issues in Respondent's Petition to Reconsider. First, Respondent contends that the standard in *In re Michael Norinsberg*, 58 Agric. Dec. ____ (Apr. 5, 1999) (Decision and Order on Remand), to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA, conflicts with the two-pronged test in 7 U.S.C. § 499a(b)(9) (Supp. III

1997) because the standard is essentially the same as the standard to determine whether a petitioner was only nominally a partner in a partnership that violated the PACA or only nominally an officer, director, or shareholder of a corporation or association that violated the PACA (Respondent's Pet. to Recons. at 3). Respondent asserts that the application of essentially the same standard, to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA and to determine the nature of a person's relationship to a partnership, corporation, or association that has violated the PACA, renders the determination of whether a person was actively involved in the activities resulting in a violation of the PACA, superfluous.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)) provides a two-pronged test which a partner in a partnership that has violated the PACA or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association that has violated the PACA must meet in order to demonstrate that he or she was not responsibly connected with the PACA violator. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a petitioner's failure to meet the first prong of the statutory test results in the petitioner's failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or (2) the petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.

The standard, which I adopted in the Decision and Order on Remand, to determine whether a petitioner was actively involved in the activities resulting in a violation of the PACA, does not render the first prong of the two-pronged test superfluous. The standard requires a petitioner 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 or association to prove by a preponderance of the evidence that he or she meets both prongs of the two-pronged test. Moreover, proof that a petitioner's participation in the activities resulting in a violation of the PACA was limited to the performance of ministerial functions does not, by itself, also constitute proof that the petitioner meets the second prong of the two-pronged test. Likewise, proof that a petitioner was only a nominal partner in a partnership or only a nominal officer, director, or shareholder of a corporation or association does

not, by itself, also constitute proof that the petitioner's participation in the activities resulting in a violation of the PACA was limited to ministerial functions.

I indirectly addressed this issue in the Decision and Order on Remand in response to Respondent's contention that one of the factors that should be examined to determine whether an individual was actively involved in the activities resulting in a violation of the PACA is "the nature of a person's relationship to the violating company" (Respondent's Brief on Remand at 6). Respondent asserted that using this factor:

[a] corporate officer, director or major stockholder who exercised a great deal of authority over a corporation that committed PACA violations would have difficulty showing that he or she was not actively involved in the activities resulting in the violation. If an alleged responsibly connected person was found to have little authority over corporate affairs, such as the appellant in *Minotto*, a bookkeeper who was made a corporate director to satisfy quorum requirements and who engaged in very minor corporate functions, such as appearing at meetings and voting at the direction of her superiors, that factor would tend to support a showing of the absence of active involvement based on the limited nature of the person's authority.

Respondent's Brief on Remand at 6.

Thus, Respondent contends in Respondent's Brief on Remand that proof of a person's limited authority in an organization would also tend to prove that the person was not actively involved in the activities resulting in a violation of the PACA. I rejected Respondent's contention that proof of a petitioner's limited authority would also demonstrate that the petitioner was not actively involved in the activities resulting in a violation of the PACA, as follows:

I agree with Respondent's contention that an officer, director, or major shareholder who exercises a great deal of authority over a corporate PACA violator may have difficulty demonstrating by a preponderance of the evidence that he or she was not actively involved in activities that resulted in a violation of the PACA. This difficulty is merely a function of the fact that a person with general authority over a corporate PACA violator is more likely to have exercised judgment or discretion with respect to, or control over, the activities that resulted in a violation of the PACA, than a person who has limited corporate authority. However, I do not agree that an alleged responsibly connected individual's demonstration by a

preponderance of the evidence that he or she had very limited corporate authority would, by itself, demonstrate that he or she was not actively involved in activities that resulted in a violation of the PACA.

In re Michael Norinsberg, 58 Agric. Dec. ___, slip op. at 15 (Apr. 5, 1999) (Decision and Order on Remand).

Second, Respondent contends that even under the standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA, which is set forth in *In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 10 (Apr. 5, 1999) (Decision and Order on Remand), Petitioner was actively involved in the activities resulting in a violation of the PACA (Respondent's Pet. to Recons. at 9). Specifically, Respondent contends that Petitioner exercised his own informed judgment when he signed checks made payable to persons who were not produce sellers. Therefore, under the standard in *In re Michael Norinsberg*, 58 Agric. ___ (Apr. 5, 1999) (Decision and Order on Remand), Petitioner was actively involved in the activities resulting in The Norinsberg Corporation's violations of the PACA. (Respondent's Pet. to Recons. at 10-11.)

For the reasons set forth in *In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 19-20 (Apr. 5, 1999) (Decision and Order on Remand), I disagree with Respondent's contention that Respondent exercised his own informed judgment when he signed checks made payable to persons who were not produce sellers.

For the foregoing reasons and the reasons set forth in *In re Michael Norinsberg*, 58 Agric. Dec. ___ (Apr. 5, 1999) (Decision and Order on Remand), Respondent's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely filed petition for reconsideration.²

²*In re Produce Distributors, Inc.*, 58 Agric. Dec. ___, slip op. at 8 (Mar. 23, 1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay brokers); *In re Judie Hansen*, 58 Agric. Dec. ___, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. ___, slip op. at 18 (July 7, 1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Alfred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael* (continued...)

Respondent's Petition to Reconsider was timely filed and automatically stayed the April 5, 1999, Decision and Order on Remand. Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in the Decision and Order on Remand filed April 5, 1999, is reinstated, with allowance for time passed.

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

Order

The August 11, 1993, determination by the Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with The Norinsberg Corporation during the period that The Norinsberg Corporation violated the PACA, is reversed.

²(...continued)

Norinsberg, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).



PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

EL RANCHO FARMS v. IM EX TRADING COMPANY.

PACA Docket No. R-97-0149.

Decision and Order filed February 10, 1999.

Inspections - Timeliness.

Where foreign inspection was conducted seven days after receipt by the customer, and eleven days after arrival in Santos, Brazil, buyer was found to have failed to prove condition of grapes on arrival. Buyer showed by a preponderance of the evidence that this was the normal time for securing inspections in Brazil, but failed to show that seller knew at time of entering the contract that a Brazilian survey would take such an extraordinary length of time to secure.

George S. Whitten, Presiding Officer.

Thomas R. Oliveri, Newport Beach, CA, for Complainant.

Jerome R. Aiken, Yakima, WA, 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 \$24,912.50 in connection with a transaction in interstate commerce involving table grapes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Respondent's answer included a counterclaim in the amount of \$38,133.52 arising out of the same transaction as that which formed the basis of the complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in the formal counterclaim 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

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

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. Both parties filed a brief.

Findings of Fact

1. Complainant, El Rancho Farms, is a partnership comprised of Jessie Kirkorian, Lynn B. Kirkorian, and Roy Kirkorian. Complainant's address is P. O. Box 596, Arvin, California. At the time of the transaction involved herein Complainant was licensed under the Act.

2. Respondent, Im Ex Trading Company, is a corporation whose address is 117 N. 50th Avenue, Yakima, Washington. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about July 24, 1995, the parties entered into a contract calling for the sale of 1,530 lugs of U. S. No. 1 Thompson Seedless Grapes, LBK brand, at \$15.00 per lug, plus \$.75 per lug for pallets, \$.75 per lug for pre-cooling, \$50.00 for a Deltatrack temperature recorder, and \$.25 per lug for brokerage, or \$24,912.50, f.o.b. Arvin, California, with a contract destination of Santos, Brasil, S. A.

4. The grapes were federally inspected at shipping point on July 27 and 28, 1995, and graded U.S. No. 1, Table. On July 29, 1995, at 9:35 a.m., the loading of the container was completed, and the grapes were billed to Respondent. The grapes were then sent to a controlled atmosphere facility for treatment with tectrol, and then shipped to the Maersk Line, Port of Long Beach, Long Beach, California. From the Port of Long Beach the grapes were shipped by rail to Charleston, South Carolina. At Charleston, South Carolina they were shipped by ocean freight to Santos, Brasil, S. A., where they arrived on September 2, 1995. On September 8, 1995, Respondent notified Complainant that the grapes did not arrive in good condition.

5. On September 13, 1995, 1,260 lugs of grapes were subjected to a survey performed by SGS do Brasil, S.A. This survey stated in relevant part as follows:

Certificado N°: 4401/0001E/00041

Certificate VISUAL INSPECTION REPORT - Agridiv -100041

Parcel : Described as " 1.787 boxes of Fresh Table Grapes"

**Marks : a) LBK / THOMPSON SEEDLESS TABLE GRAPES NET
WT 23 LBS 10,4 KG / PRODUCE OF U. S. A. / EL**

- RANCHO FARMS / CALIFORNIA TABLE GRAPES (Said to be 1.530 boxes)
- a) GRAPE KING / PREMIUM CALIFORNIA TABLE GRAPES GUIMARRA VINGARDS (sic)/ GV PRODUCE OF U.S.A. / EXOTIC / NET WT 28 LBS (Said to be 90 boxes)
 - b) CASTLE ROCK / CALIFORNIA TABLE GRAPES / FANTASY SEEDLESS NET WT 23 LBS / PRODUCE OF U.S.A. (Said to be 90 boxes)
 - c) CARDINAL TABLE GRAPES NET WT 23 LBS 10,4 KG / TABLE GRAPES / PRODUCE3 (sic) OF U.S.A. / HEMPHILL AND WILSON ENTERPRISES (Said to be 77 boxes)

Reference

Docts (copies): - Phytosanitary certificate FPC 959531
 - B/L n. SEA 309345 dd. 21.08.95
 - Invoice n. 3280419-1 dd. 29.07.95

Supplier: LA COLINA EXPORTADORA, IMPORTADORA e REPRESENTACÖES LTDA

...

We hereby certify that by order and for account of Messrs. La Colina Exportadora, Importadora E Representacões Ltda we verified the visual quality of the aforementioned parcel, and have to report the following:

PACKING : Goods were packed into new boxes duly marked and identified, being variety Cardinal and variety Exotic packed into isopor boxes and the variety Thompson Seedless and the variety Fantasy Seedless packed into cardboard boxes.

TEMPERATURE: Average temperature of chamber = + 0,2.C.

SAMPLING : At the moment of inspection we found 1.260 boxes of Thompson Seedless, 90 boxes of Exotic, 55 boxes of Fantasy Seedless and 62 boxes of Cardinal. Of these lots, 60 boxes of Thompson + 9 boxes of Exotic + 6 boxes of Fantasy Seedless + 7 boxes of Cardinal duly marked and identified were chosen at random, were opened and submitted to visual inspection.

VISUAL INSPECTION REPORT

VISUAL

QUALITY: * Product : Fresh grapes "in nature" - Vitis vinifera
* Crop / Preparation : New current, gathered and prepared on 1995
* Origin : USA

Our expert effected goods inspection and based ou (sic) visual examination it was verified that:

VARIETY THOMPSON SEEDLESS AND VARIETY FANTASY SEEDLESS: In all boxes opened we noted that the goods were with visual appearance seriously affected. In these boxes, we verified damaged berries / clusters due to rot and/or bruissing (sic), shouwing (sic) deterioration signs, presenting fungi on the surface, with your storage life being diminished, and unfit for human consumption.

VARIETY EXOTIC: 100 % of goods seemingly free from foreign matters, impurities, with fruits well grown up, with uniform colour and conformation. Taste and flavor are proper and characteristic of the specie and variety. Fruits maturation degree allows handling, transportation and conservation if goods are kept under proper storage conditions.

VARIETY CARDINAL: About 35,00 % of fruits / clusters showing presence of fungi on the surface, with your storage life being diminished, and unfit for human consumption.

Also it probably will be sent to a secuundary (sic) marketplace;

Place and date

of inspection : Effected at Frigorifo Dunivan - Rua da Mooca, 1736 São Paulo - SP (1.260 boxes of Thompson Seedless), and at CEAGESP - Rua Gastão Vidigal , Pav. HFE box 106 on September 13th, 1995.

...

São Paulo, September 14th, 1995.

6. Respondent has not paid any part of the purchase price of the grapes to Complainant.

7. The informal complaint was filed on November 25, 1995, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant brings this action to recover the purchase price of 1,530 lugs of grapes sold to Respondent on an f.o.b. basis in the course of foreign commerce, and accepted by Respondent in Brasil. Respondent seeks to recover, by its counterclaim, damages resulting from an alleged breach of the warranty of suitable shipping condition by Complainant in reference to the same shipment.

The major issue argued between the parties relates to the amount of time the grapes were in transit between the shipping point in California, and the destination in Brasil, and the length of time between arrival of the shipment in Brasil and the survey that took place in that country. In addition the parties dispute whether the terms of the f.o.b. contract contemplated acceptance by Respondent at the port of Long Beach, and whether the parties explicitly contracted for the transportation route, and the length of time the grapes were in transit.

Complainant contends that "[a]s the shipment was sold under f.o.b. terms, suitable shipping conditions (sic) warranted only to the Port of Long Beach, California." However, Complainant's invoice and the truck bill of lading clearly list the destination as "Santos, Brazil," and no documentation relative to the shipment supports this contention by Complainant. We find that the contract was f.o.b. with a contract destination of Santos, Brazil.

Respondent contends that the normal method of transit for refrigerated freight from the West Coast to Brazil, at the time in question, was for the produce to be shipped to the East Coast by rail, and from thence, by steamship to Brazil. Respondent alleges that the normal transit time was 30 to 40 days, and that Complainant was notified orally before the contract was agreed to that this was the normal time. Complainant's general manager, Mervin (Boom) Houston, who handled negotiations on Complainant's behalf, denied that he was notified that the grapes would be shipped by rail to the East Coast, or that normal transit time was 30 to 40 days. There is nothing in the documentation relative to the contract to support Respondent's assertion that Complainant was given notice of the circumstances of transit, and we find that Respondent has failed to prove its assertions in this regard by a preponderance of the evidence. However, Respondent's evidence preponderates as to the method of transit chosen, and that the normal time was 30 to 40 days, and we find on the basis of the evidence of

record that a 40 day transit period was within the limits of normality for a shipment from the West Coast to Brazil at the time in question.

Respondent's chief buyer, McKinley Williams, who handled negotiations on Respondent's behalf, asserted that the grapes were shipped by Complainant on July 29, to the Port of Long Beach. This accords with the truck bill of lading. According to Williams the grapes were treated with Tectrol at "Transfresh" on July 31, and shipped by rail to Charleston, S.C. on August 1, 1995.² Williams states that the grapes were loaded on the ocean vessel Maersk Miami V9513 which sailed on August 14, 1995, that they arrived at Santos, Brazil on September 2, 1995, and were transported inland to Respondent's Brazilian customer in Sao Paulo on September 6, 1995. Williams also states that Respondent was notified on the evening of September 7, that the arrival was unsatisfactory, and that he informed Complainant's office of this, verbally and by fax, on the morning of September 8. This is not denied by Complainant. Mr. Williams asserts that the container was sent back to the Port of Santos from Sao Paulo on September 8, and that a surveyor's report was scheduled for the earliest possible time, which turned out to be September 13, 1995. However, the survey report states that the survey was performed at Sao Paulo, not at the Port of Santos.

The surveyor sampled 60 boxes out of 1,260 boxes of Thompson Seedless. No explanation was given by Respondent as to what became of the remaining 270 boxes that were a part of the shipment. The surveyor also sampled 6 boxes out of 55 boxes of Fantasy Seedless grapes that are not a part of this proceeding, and then lumped these samples together with those from the Thompson Seedless lot for reporting purposes. The sample size for the Thompson Seedless grapes was slightly less than one half of one percent of the total.³ The rule of thumb for U.S. inspections is one percent. However, a sample size of one half of one percent would be permissible if the inspector saw during the course of drawing and inspecting the randomly drawn samples that the samples were all showing

²Mr. Williams asserted that the Maersk Bill of Lading #SEA309345 confirms that the container was shipped on August 1, 1995, from the Port of Long Beach by rail. However, Respondent did not place this bill of lading in evidence. Mr. Williams' statement that the vessel sailed from Charleston, S.C. on August 14, 1995, was also not supported by a copy of the ocean bill of lading. The survey done in Sao Paulo refers to a copy of bill of lading SEA 309345 seen by the surveyor, and states that it is dated August 21, 1995. No attempt at explaining these apparent discrepancies was made by Respondent.

³In *Borton & Sons, Inc. v. Firman Pinkerton Co., Inc.*, 51 Agric. Dec. 905 (1992), a Mexican government inspector took a sample of 100 boxes out of a 2,756 box load, and then looked at 10 randomly drawn samples from the 100 boxes. We held that the sample was inadequate.

approximately the same percentage of the same defects. Here there is no way to ascertain that this was the case. The surveyor made the following statement as to the samples drawn:

In all boxes opened we noted that the goods were with visual appearance seriously affected. In these boxes, we verified damaged berries / clusters due to rot and/or bruising (sic), showing (sic) deterioration signs, presenting fungi on the surface, with your storage life being diminished, and unfit for human consumption.

This sounds very much like only a visual inspection was done.⁴ U. S. inspections, and competent foreign surveys, are performed by removing the damaged berries and weighing or counting the berries affected by each type of condition factor.⁵ The description of the berries given by the surveyor does not state a percentage for any of the damaged grapes in any of the samples. Although the description, taken as a whole, certainly sounds like the grapes were in very poor condition, there is no way to be certain as to the exact condition of the grapes. It is possible, for instance, that the described conditions in the samples applied to only 3 percent of the grapes in the samples. If this were the case there would be no indication of a breach even had the survey been performed immediately. We have refused to use surveys that do not state a percentage of condition defects.⁶

Respondent asserted that the eleven days that elapsed between the arrival of the vessel at Sao Paulo and the survey was normal, and supported this assertion with the testimony of an independent expert with an impressive curriculum vita.

⁴Apparently the surveyor only opened the sample boxes and looked at the general appearance of the grapes in each box.

⁵Of course, there is no way to know that a foreign survey uses the same standard as to what constitutes damage from a condition defect as that used by U.S. inspections. For instance, instructions for a U. S. inspection may specify, for a given commodity, that a particular defect is not scoreable as damage unless its manifestation exceeds a certain aggregate surface area. See for example Market Inspection Instructions: Lettuce, Fruit and Vegetable Division, Fresh Products Standardization and Inspection Branch, Agricultural Marketing Service, United States Department of Agriculture, ¶ 144 (March, 1976). In the absence of international standards, and in the interest of the promotion of trade, we assume that defects reported on foreign surveys are of sufficient severity to affect marketability. In fact, we commonly do our best to utilize foreign inspections. See for example *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969 (1997).

⁶*Ontario International, Inc. v. The Nunes Company*, 52 Agric. Dec. 1661 (1993).

However, none of this expert's listed experience relates to Brazil, and there is no foundation for the specific testimony that the time period was normal. The assertion was also supported by Respondent's receiver in Brazil, but this can hardly be termed disinterested testimony. Complainant made no effort to submit evidence on the point. However, the question is not whether the eleven day period was normal, which we doubt (in spite of Respondent's preponderant evidence), but whether an inspection eleven days after arrival can be used to disclose the condition of perishables on arrival.⁷ In no circumstances have we ever extended our use of arrival inspections so far. In an important case⁸ involving the shipment of grapefruit from the West coast to England it was found that transit time was normal, but a survey of the fruit made seven days after arrival, and four days after the consignee's receipt, could not be used to show the condition of the fruit on arrival.⁹ In this case the grapes were surveyed seven days after receipt by the customer in Brazil, and eleven days after arrival. We find that Respondent has not shown the condition of the grapes on arrival, and therefore has not shown a breach of contract by Complainant.

Since Respondent accepted the grapes, and did not prove a breach by Complainant, it became liable to Complainant for the full contract price, or \$24,912.50. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act. Respondent's counterclaim arose out of the same transaction and was based on the allegation of breach of contract by Complainant. Accordingly, the counterclaim 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

⁷It should be noted that there was no showing, nor effort to show, that Complainant knew that a Brazilian survey would take such an extraordinary length of time to secure.

⁸*Trans-West Fruit Co., Inc. v. Americal*, 42 Agric. Dec. 1955 (1983).

⁹*Id.*, at 2013-14. Compare the following cases involving domestic shipments where too much time was found to have expired between arrival and subsequent inspection: *Borton & Sons, Inc. v. Firman Pinkerton Co., Inc.*, 51 Agric. Dec. 905 (1992) [four days after arrival of pears]; *Dan R. Dodds v. Produce Products, Inc.*, 48 Agric. Dec. 682 (1989) [eight days after arrival of potatoes, citing case where seven days held too long]; *Bruce Newlon Co., Inc. v. Richardson Produce Co.*, 34 Agric. Dec. 897 (1975) [six days after arrival of potatoes]; *D.L. Piazza Co. v. Stacy Distributing Co.*, 18 Agric. Dec. 307 (1959) [four days after arrival of carrots]; *Vaughn-Griffin Packing Co. v. Thomas Aeozzo & Son*, 17 Agric. Dec. 1035 (1958) [five to six days after arrival of oranges]; *P. F. Likins Co. v. Walter Holm & Co.*, 10 Agric. Dec. 593 (1951) [extensive defects in tomatoes five days after arrival].

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, \$24,912.50, with interest thereon at the rate of 10% per annum from September 1, 1995, until paid, plus the amount of \$300.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

PEAK VEGETABLE SALES v. NORTHWEST CHOICE, INC.
PACA Docket No. R-98-0129.
Decision and Order filed February 25, 1999.

Damages – Failure to establish.

Interest – Award for amount previously paid.

Respondent failed to establish damages because it did not submit an accounting of the resale of the commodity. No alternative method of assessing damages was found.

It was determined that Respondent owed Complainant \$5,398.75 of the original \$25,601.50 purchase price, since it already paid Complainant \$19,617.25 when it filed its answer. Complainant's claim for interest on the \$19,617.25 for the period between the original date on which it was due, and the date on which it was paid was granted. It was stated that the award of such interest is similar to the award of interest in connection with undisputed amount orders, and is in accord with precedent which views

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).

¹¹See *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).

the authority to award interest as incident to the statutory duty to award the injured party "the full amount of damages sustained in consequence of such violations."

George S. Whitten, Presiding Officer

Complainant, Pro se.

Respondent, Pro se.

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

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant sought an award of reparation in the amount of \$25,601.50 in connection with six transactions in interstate and foreign commerce involving potatoes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant in the amount claimed, but admitting liability for \$19,617.25, and including a check to Complainant for that amount.

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. Neither party filed a brief.

Findings of Fact

1. Complainant, Peak Vegetable Sales, is a cooperative whose address is 1200 King Edward Street, Winnipeg, Manitoba, Canada.
2. Respondent, Northwest Choice, Inc., is a corporation whose address is 2513 LeMister Avenue, Wenatchee, Washington. At the time of the transactions involved herein Respondent was licensed under the Act.

¹Effective November 15, 1995, the threshold for hearings in reparation proceedings was raised to \$30,000 by the Perishable Agricultural Commodities Act Amendments of 1995 (Public Law 104-48).

3. On or about October 10, 1996, Trademark Produce, Inc., a broker, issued a confirmation of sale covering potatoes sold by Complainant to Respondent. The confirmation stated that the potatoes were to be shipped from "Man. Canada" on a delivered basis by truck, and further provided in relevant part as follows:

QUANTITY	DESCRIPTION	PRICE
30 (thirty) truck loads	Potatoes each containing —	
850 ±	Canadian #1 50# ctn size A	\$7.00/Ctn
	Potatoes - 2" to 3" - 2¼" 60% ↑	US Funds
	Russetted Variety	
	Pricing included all fees to Calexico, CA	
	Protecting 25¢/ctn	

Shipping to begin at N.W. Choice instruction

NWChoice Reserves option for additional 60 loads - same terms

...

Peak to bill NWChoice Directly -

4. On October 11, 1996, Roy Vinke, Sales and Marketing Manager of Complainant, sent a letter to Dick Dehlinger of Trademark Produce, Inc., Bend, Oregon, the broker who negotiated the contract between Complainant and Respondent, memorializing the terms of the contract between the parties herein. The letter stated, in relevant part, as follows:

Please find listed below details regarding the sale of #1 A size 60% 2¼" up russets packed in 50# ctns.

- All transactions will be in U.S. funds.

- Pricing is as follows: \$7.00 50# ctn delivered to Calexico, California and Nogales, Arizona.

- Brokerage of .25 per 50# ctn will be paid to Trademark Produce Inc.

- Trademark Produce Inc. will be required to invoice Peak of the Market brokerage on a per load basis stating bill of lading # for cross referencing. If you wish you can invoice more than one load per invoice provided each load is accompanied with our bill of lading #.
- All product will be federally inspected.
- Any potential claims must be filed within 48 hours from date of receipt.
- Claims filed must have a U.S. federal inspection to substantiate claim.
- Customs, duty, phyto certificates, Canadian inspection will be paid by Peak of the Market.
 - Delivery dates of product will be upon mutual agreement.

5. On October 21, 1996, Respondent's Jeff Sutton wrote to Complainant's Roy Vinke confirming the contract. The letter stated, in relevant part, as follows:

...

As per our agreement the following terms shall be agreed upon by Northwest Choice Inc. and Peak Vegetable Sales.

- 1). Product is purchased based upon 50lb carton. Each carton containing Burbank or Norkotah Russets ranging in size from 90ct to 120ct with even blend of each size.
- 2). Product is purchased based upon a delivered price of \$7.00 U.S. to San Diego, CA, Calexico, CA, Yuma, AZ. Customs, Duty, Phytosanitary, Canadian Inspection, and In Bond costs will be included in the delivered price.
- 3). All product will be accompanied with a Federal Inspection
- 4). Any potential claims must be filed within 48 hours from date of receipt with notification to Shipper. Claims must be accompanied with a USDA Federal inspection to substantiate claim. Shipper will authorize permission to call USDA Federal Inspection.

5). Delivery dates of product shall be mutually agreed upon between Shipper and Receiver on a load to load basis.

6). Payment Terms shall be established at 15 days from date of shipment unless otherwise agreed upon by Shipper and Receiver on a load to load basis.

...

6. On October 21, 1996, Respondent issued a purchase order to Complainant, No. 1389 [Inv. No. 18564], calling for the shipment of one load of "850 US 1 50lb 90-120ct Norkotah Russet" potatoes at \$7.00. The shipping date was stated to be 10/22/96. Complainant shipped 840 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/24/96. The load arrived at the U.S. destination at ABC Cooling, Cole Rd & Portico, Calexico, CA, on 10/28/96. Respondent has paid Complainant \$4,536.00 of the original \$5,880.00 invoice price.

7. On October 21, 1996, Respondent issued a purchase order to Complainant, No. 1390 [Inv. No. 18640], calling for the shipment of one load of "850 US 1 50lb 90-120ct Norkotah Russet" potatoes at \$7.00. The shipping date was stated to be 10/22/96. Complainant shipped 830 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/25/96. The load arrived at the U.S. destination at ABC Cooling, Cole Rd & Portico, Calexico, CA, on 10/28/96. Respondent has paid Complainant \$4,483.00 of the original \$5,810.00 invoice price.

8. On October 21, 1996, Respondent issued a purchase order to Complainant, No. 1392 [Inv. No. 18643], calling for the shipment of one load of "850 US 1 50lb 90-120ct Norkotah Russet" potatoes at \$7.00. The shipping date was stated to be 10/22/96. Complainant shipped 815 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/31/96. The load arrived at the U.S. destination at ABC Cooling, Cole Rd & Portico, Calexico, CA, on 11/05/96. Respondent has paid Complainant \$4,224.75 of the original \$5,705.00 invoice price.

9. On October 26, 1996, Respondent issued a purchase order to Complainant, No. 1402 [Inv. No. 18641], calling for the shipment of one load of "850 US 1 50lb 90-120ct Burbank Russet" potatoes at \$7.00. The shipping date was stated to be 10/28/96. Complainant shipped 830 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 10/28/96. The load arrived at the

U.S. destination at California Pacific Fruit Co., 2001 Main Street, San Diego, CA, on 10/31/96. Respondent has paid Complainant \$2,623.50 of the original invoice price of \$5,810.00.

10. Following unloading, the potatoes covered by purchase order 1402 [Inv. No. 18641] were federally inspected at the place of business of California Pacific Fruit Co. on 10/31/96, at 1:40 p.m., with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 50 °F	Potatoes	"Peak of the Market" Russet 50lbs	M B	18641	830 Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	02	% 00	%	% Quality (mechanical damage)	
	05	% 05	%	% Soft Rot (3 to 6%)	Soft Rot is in early stages
	07	% 05	%	% CHECKSUM	4 oz. To 14 oz., 2½ inch min dia.

GRADE: Fails to grade U.S. No 1 4oz or 2½ inch minimum only account condition

11. On November 19, 1996, Respondent issued a purchase order to Complainant, No. 1407 [Inv. No. 18718], calling for the shipment of one load of "850 US 1 50lb 90-120ct Burbank Russet" potatoes at \$7.00. The shipping date was stated to be 11/21/96. Complainant shipped 600 cartons of size A, 60% 2¼" and larger, and 170 cartons of 110 count, Canadian No. 1 Russet potatoes on 11/20/96. The load arrived at the U.S. destination at California Pacific Fruit Co., 2001 Main Street, San Diego, CA, on 11/22/96. Respondent has paid Complainant the entire original invoice price of \$5,390.00.

12. On November 17, 1996, Respondent issued a purchase order to Complainant, No. 1412 [Inv. No. 19690], calling for the shipment of one load of "850 US 1 50lb 90-120ct Burbank Russet" potatoes at \$7.00. The shipping date was stated to be 11/29/96. Complainant shipped 850 cartons of size A, 60% 2¼" and larger Canadian No. 1 Russet potatoes on 11/29/96. The load arrived at the U.S. destination at California Pacific Fruit Co., 2001 Main Street, San Diego, CA, CA, on or about 12/03/96. Respondent has paid Complainant \$2,897.00 of the original invoice price of \$5,950.00.

13. Following unloading, the potatoes covered by purchase order 1412 [Inv. No. 19690] were federally inspected at the place of business of California Pacific Fruit Co. on 12/03/96, at 11:20 a.m., with the following results in relevant part:

LOT	TEMPERATURES	PRODUCE	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	45 to 48 °F	Potatoes	"Peak of the Market" Russet Canada No. 1	C N	BL 19690	850 50lb Cartons	N

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	04	% 00	%	% Quality (misshapen, mechanical damage)	4 oz. to 14 oz., 2½ inch min diameter.
	04	% 00	%	% Fusarium Tuber Rot (Dry Type) (2 to 6%)	
	05	% 05	%	% Soft Rot (2 to 8%)	Soft Rot is in early stages
	13	% 05	%	% CHECKSUM	

GRADE: Fails to grade U.S. No 1, 4oz or 2½ inch min. diameter only account condition

14. The formal complaint was filed on May 27, 1997, which was within nine months after the causes of action herein accrued.

Conclusions

Respondent included a check for \$19,617.25 with its answer. This leaves a total of \$5,984.00, divided between five of the six loads, still in dispute between the parties. Basically, Respondent claims that Complainant failed to send correct paperwork as to some of the loads causing a delay in the loads crossing from the California destinations into Mexico, that sizing was incorrect for all the loads, and that, as to two of the loads, there was a breach in regard to condition on arrival in California. Respondent also claims that there was an agreement between the parties for adjustments on all of the loads.

Letters and memorandums were faxed by the parties to each other, and we have presumed receipt on the same day that such were dated. Both the October 10, broker's memorandum, and the October 11, letter from Complainant to Respondent, recite a size of A, 60 percent 2¼" and up. However the confirming

letter from Respondent to Complainant dated October 21, states that each carton is to contain 90ct to 120ct, with an even blend of each size. Respondent's purchase orders, the first three of which were dated October 21, simply stated that the pack was to be "50lb 90-120ct."² Respondent's November 7, and 8, letters to Complainant, in regard to the first four loads, all complain about the sizing of the potatoes. The size A, 60 percent 2¼" and up designation gives latitude for the shipments to have contained a mix that might have included potatoes that were both larger and smaller than the 90ct to 120ct designation. That they did contain such a mix was tacitly admitted by Complainant in a letter dated November 12, quoted below in part:

A) Upon discussion with Dick Dehlinger of Trademark Produce Inc. he indicated that the product requested for sale to Mexico was #1 A size cartons. Based on Agriculture Canada specifications the product would be sized as 60% 2¼" and up. We found out that this was not the case at all well after the fact. We had already packed and shipped product when we were told that the product should be sized as a 120 - 90 count. This information was found out by contacting you direct rather than working through Trademark who is our representative for this deal.

B) I also addressed on numerous occasions to both you and Dick that we were long on baker count russets. Both parties indicated that you would try to move the product for us. Both you and Dick indicated that there was no market for this product. I later found out on a three way call with your agent at the Mexican border and yourself that the bakers offered to you earlier were exactly what they wanted.

Complainant later characterized this as a verbal agreement between the parties that Complainant should continue to ship the size A, 60 percent 2¼" and up potatoes because Respondent's end user indicated that the product shipped was exactly what they wanted. However, we think it falls short of a verbal agreement. As the second paragraph of the letter quoted above says, Respondent and the broker were telling Complainant all along that there was no market for the "bakers." If, as Complainant represents, an end receiver in Mexico stated that the bakers were exactly what was

²It is unlikely that Respondent meant what is literally stated in the October 11, letter, because the mixing of the 90 to 120ct sizes in each box would be both very unusual and difficult to accomplish. In any event, the parties do not raise or dispute this point, and we assume that Respondent's meaning was that there would be an even distribution of 90 to 120ct cartons of potatoes.

wanted, this does not change Respondent's demand that a different size be shipped. The dispute between Complainant and Respondent as to the size called for by the contract presents difficult and interesting issues of law, especially in light of the provisions of section 2-207 of the Uniform Commercial Code. However, in view of our conclusions hereafter in regard to Respondent's failure to substantiate damages it is not necessary that we decide these issues.

In regard to the loads covered by Findings of Fact 6 and 7, Respondent's invoices 1389 and 1390, Respondent claims that the parties agreed to an adjustment in the price at time of arrival consisting of a \$1.00 per carton allowance, \$.35 per carton storage fee, and a \$.25 per carton brokerage fee. Respondent cites letters which it sent to Complainant on November 7, 1996, as documenting these adjustments to the invoice price. However, an examination of these letters shows that Respondent did not speak in terms of an agreement having been reached as to these charges, but rather as though it was unilaterally claiming the charges. We conclude that Respondent has failed to prove its contention that the adjustments claimed were agreed to by Complainant.

Complainant admits that incorrect paper work was sent to Respondent which caused delay in these loads crossing the border, however Complainant contends that this was caused by incorrect information being sent to Complainant by Respondent on the purchase orders. However, Complainant also admits that the correct information was at the bottom of the purchase orders, but was unnoticed by Complainant. Our examination of the purchase orders discloses that the pertinent information was in large print and clearly delineated. Complainant also claimed that incorrect import permit numbers were sent by Respondent as to these loads, but that Complainant kept no copy of the incorrect documents. We conclude that Complainant has failed to prove its contentions that the delay was caused by incorrect information being supplied by Respondent, and that Complainant caused the delay in these loads crossing the border into Mexico. Respondent has claimed that charges of \$.35 per carton were incurred for storage at the border due to Complainant's failure to supply the correct paper work. This charge was not documented by Respondent, but Complainant, though it objected to paying the fee, did not contest its accuracy. The fee is modest and reasonable, and accordingly we will allow it.

Respondent has claimed the \$1.00 per carton, not only as an agreed adjustment, but also as damages for Complainant's breach in causing untimely delivery into Mexico, and its alleged breach as to size. However, Respondent failed to establish this amount, or any other amount as damages since it failed to submit an accounting

of the resale of the potatoes.³ Respondent only states that “[d]ue to the condition, sizing problem, delay in time which caused lost business to the end receiver in Mexicali, the end receiver has agreed to return \$6.00 per carton.” This totally fails to establish damages, and we know of no way to make any reasonable estimate of damages for these breaches, or alleged breaches.⁴ Accordingly, the \$1.00 claim is disallowed.

Respondent also claimed a \$.25 per carton brokerage fee. Respondent admits that this was the “profit” which it negotiated in its sale of the loads to the end receiver. A profit can potentially be recovered in a proper calculation of damages, but this depends upon the applicable market price at time of arrival. There is no basis for Respondent to recover this claimed brokerage fee.

The invoice price of these two loads totaled \$11,690.00. The \$.35 per carton storage fee which we have allowed on these two loads amounts to \$584.50. Respondent has already paid Complainant \$9,019.00 on these two loads. This leaves \$2,086.50 still due and owing as to the first two loads.

Respondent claims that the third load, covered by Finding of Fact 8, Respondent’s purchase order 1392, was adjusted to \$5.50. Complainant states that the adjustment was to \$6.00. Respondent’s letter of November 7, 1996, relative to this load confirms the \$5.50 adjustment as having been granted orally at the time of arrival of the load in Mexico. Complainant replied on November 12, 1996, in a letter to Respondent, that it did not agree to a \$5.50 adjustment, but to a \$6.00 adjustment. We conclude that Respondent has failed to prove that a \$5.50 adjustment was agreed to. For the same reasons as recited above relative to the

³It is our policy, especially where parties are not represented by attorneys, as here, to consult applicable market reports in an attempt to assess damages. To this end we consulted the Los Angeles Wholesale Market Reports for October 28, 31, November 5, and December 3, 1996. These reports do not show sales of any potatoes from Canada, nor do they show any sales of U.S. size A potatoes (which must include 40% 2½” and larger instead of the Canadian requirement of 60% 2¼” and larger). They do show sales of 90, 100, and 120 count U.S. No. 1 Norkotahs from Nevada, Oregon, and Washington. The f.o.b. prices shown for these sizes average lower than the \$7.00 per 50lb. carton delivered prices of the subject potatoes. This evidence would seem to indicate that Respondent was not harmed by the substitution of sizes. In any event, we have exhausted our ability to show damages assuming a breach by Complainant as to size.

⁴The usual measure of damages for accepted goods is the difference between the value of the goods accepted as shown by a prompt and proper resale of the goods, and the value the goods would have had if they had been as warranted. This latter figure is usually shown by applicable market reports. See UCC § 2-714(2) and *Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric Dec 1643 (1979). We were also unable to show damages by a market price differential between the sizes. See note 3 *supra*.

first two loads Respondent is not entitled to a \$.25 brokerage fee as to this load. Respondent's liability as to this load is \$6.00 per carton, or \$4,890.00. Respondent has already paid Complainant \$4,224.75 of this amount which leaves \$665.25 still due and owing as to this load.

As to the load covered by Findings of Fact 9 and 10, Respondent's purchase order 1402, Respondent in a letter dated November 8, 1996, memorialized a modification of the contract calling for the load to be purchased on an open basis with an accounting of sales to be provided by California Pacific Fruit Co. to Respondent, and by Respondent to Complainant. In its November 12, 1996, letter Complainant did not deny the agreement to sell this load on an open basis, but simply said: "[w]e are prepared to credit \$1.00 per carton for this load." We conclude that the contract was modified to call for a sale on an open basis, with the promised accountings to be the basis for a future agreement as to the price. However, Respondent has not furnished an accounting from California Pacific Fruit Co., and the claimed accounting from Respondent is not an accounting. It does not break down the sales as to lots, nor does it disclose the dates on which the sales took place. It simply lists 830 cartons sold at \$3.50, and deducts \$74.00 for the inspection and \$.25 per carton for brokerage. The inspection as to this load shows a breach of contract for a delivered sale of Canadian No. 1 product.⁵ We could, therefore, use the inspection as a basis for computing damages.⁶ However, the adjustment allowed by Complainant of \$1.00 per package will be more favorable to Respondent. We find that Respondent's liability to Complainant as to this load is \$4,980.00. Respondent has already paid Complainant \$2,623.50, which leaves \$2,356.50 still due from Respondent to Complainant on this load.

The parties agree that nothing remains due on the fifth load. As to the sixth load, covered by Findings of Fact 12 and 13, Respondent's purchase order 1412, Complainant granted Respondent a credit of \$2,762.50. Complainant has been paid the remaining amount by Respondent except for a deduction of \$.25 per carton for brokerage. This deduction is unwarranted for the reasons already stated as to the first two loads. Respondent still owes Complainant \$290.50 as to this load.

⁵Canadian standards allow a 2% maximum tolerance at destination for soft rot.

⁶See *Fresh Western Marketing, Inc. v. McDonnell & Blankford, Inc.*, 53 Agric. Dec. 1869 (1994); *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993); *V. Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987); *Arkansas Tomato Co. v. M-K & Sons Produce Co.*, 40 Agric. Dec. 1773 (1981); *Ellgren & Sons v. Wood Co.*, 11 Agric. Dec. 1032 (1952); and *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986).

The total that we have found due and owing from Respondent to Complainant is \$5,398.75. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Damages have been held to include interest.⁷ 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.⁸ However, Complainant contends that Respondent should be required to pay interest, not just on the \$5,398.75 we have found due, but also on the \$19,617.25 which it paid with its answer. Complainant contemplates that this interest would run for the period for which such amount was withheld. We agree. If Respondent had admitted in its answer that the \$19,617.25 was due, but had not tendered the check for that amount, we would have issued an award in Complainant's favor for the \$19,617.25 as an undisputed amount.⁹ Such an award would have included interest. What Complainant asks us to do in this case does not differ greatly from the award of interest in an undisputed amount order. The award would be in keeping with our precedent which views our authority to award interest as incident to the statutory duty to award the injured party "the full amount of damages sustained in consequence of such violations."¹⁰ Also, the award of interest in this situation will provide an additional motive for licensees to avoid slow payment, and it will not remove the motive to admit and pay any amount known by the Respondent to be due, because by so paying a Respondent will avoid interest for the balance of the period before the final order is issued. Of course, a Respondent will not be prohibited from negotiating an early payment which, by specific written agreement with the Complainant, could be made not subject to an interest award. Complainant, in this case, claims interest at the rate of 24 percent. However, 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.

⁷*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).

⁸See *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).

⁹See 7 U.S.C. 499g(a), and 7 C.F.R. § 47.8(b).

¹⁰7 U.S.C. 499e(a).

Order

Within 30 days from the date of this Order Respondent shall pay to Complainant, as reparation, \$5,398.75, with interest thereon at the rate of 10% per annum from December 1, 1996, until paid, plus the amount of \$300.

Within 30 days from the date of this Order Respondent shall also pay to Complainant interest at the rate of 10% per annum on the sum of \$19,617.25 for the period from December 1, 1996, to September 1, 1997.

Copies of this order shall be served upon the parties.

Ta-De DISTRIBUTING COMPANY, INC. v. R.S. HANLINE & CO., INC.
PACA Docket No. R-99-0052.
Decision and Order filed June 1, 1999.

Contracts - Intent of the Parties.

Where the parties to a contract covering tomatoes imported from Mexico agreed, following their arrival at destination, to the tomatoes being handled pursuant to the May 2, 1997, Clarification of the October 28, 1996 Suspension Agreement on Fresh Tomatoes from Mexico (termed the "Commerce Dept. Rules"), it was held that, although such rules used portions of the accustomed terminology of the Uniform Commercial Code, this Department's Regulations, and decisions under the Act in a way that is foreign to the usual meaning accorded those terms, the Secretary would seek to give effect to the intent of the parties as evidenced by their agreement to abide by such rules. Accordingly the "Commerce Dept. Rules" were interpreted in a manner deemed to be consistent with the intended meaning of such rules rather than in accord with the meaning usually accorded to the terms used therein.

George S. Whitten, Presiding Officer.

Complainant, Pro se.

Respondent, Pro se.

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

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of \$41,364.50 in connection with four transactions in interstate commerce involving tomatoes.

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. 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. Both parties filed briefs.

Findings of Fact

1. Complainant, Ta-De Distributing Company, Inc., is a corporation whose address is P. O. Box 1486, Nogales, Arizona.

2. Respondent, R. S. Hanline & Co., Inc., is a corporation whose address is P. O. Box 494, Shelby, Ohio. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about March 9, 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck with license number TFL-6673 OH, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04244; Purchase Order No. 61125

616 ctns.	4x5 Western Pride brand vine ripe	at \$7.00 per ctn.	\$ 4,312.00
264 ctns.	5x6 Western Pride brand	at 5.00 per ctn.	1,320.00
880 ctns.	5x5 Western Pride brand vine ripe	at 6.00 per ctn.	5,280.00
	Cox Recorder		23.00
	Buying Brokerage	.25 per ctn.	<u>440.00</u>
1,760 ctns.			\$11,375.50

4. On March 12, 1998, at 10:30 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number TLF-6673 OH, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. Certificates of the inspection revealed, in relevant part, as follows:

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K - 268485 - 0

LOT	TEMPER- ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	51 to 60 °F	TOMATOES	"Western" tade-Dist. 5x6	MX	Arizona 11 20 309	264 Cartons	Y
B	52 to 60 °F	TOMATOES	"Western" tade-Dist. 4x5	MX	Arizona 11 20 309 or 7300 104	616 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	12	% 04	% 01	% quality defects (10 to 15%) scars, insects, misshapen.	Average 15% turning and pink, 80% light red to red,
	01	% 01	% 00	% internal discoloration.	Size average 2 9/32 to 2 20/32 inches in diameter
	02	% 00	% 00	% sunburn	
	05	% 02	% 00	% bruising	
	09	% 03	% 01	% sunken discolored areas (7 to 12%)	
	00	% 00	% 00	% soft	
	03	% 03	% 03	% Decay	
	32	% 13	% 05	% CHECKSUM	
B	14	% 06	% 02	% quality defects (10 to 20%) scars, insects, misshapen.	Average 20% turning to pink; 75% light red to red.
	02	% 02	% 00	% internal discoloration	Size average 2 24/32 to 3 12/32 inches in diameter.
	03	% 00	% 00	% sunburn	
	06	% 01	% 00	% bruising	
	09	% 04	% 01	% sunken discolored areas (5 to 13%).	
	00	% 00	% 00	% soft	

04	% 04	% 04	% Decay	Each lot decay mostly advanced, some in early to moderate stages.
38	% 17	% 07	% CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 account of grade defects.

REMARKS: For inspection on another lot of tomatoes also in load see Certificate K268486.

K-268486 - 8

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	51 to 60 °F	TOMATOES	"Western" dist. by tade-dist. Nogales, Arizona stamped (5x5)	MX	Arizona 11 20 309 or 3230 309 or 9230307	880 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
14	% 06	% 02	% 02	% quality defects (8 to 20%) scars, insects, misshapen	
01	% 01	% 00	% 00	% internal discoloration	
01	% 00	% 00	% 00	% sunburn	Average 40% turning to pink; 55% light red to red.
06	% 02	% 00	% 00	% bruising (4 to 10%)	
10	% 04	% 02	% 02	% sunken discolored areas (8 to 14%)	
00	% 00	% 00	% 00	% soft	
04	% 04	% 04	% 04	% Decay (0 to 6%) mostly advanced, some in early to moderate stages.	Size ranges 2 14/32 to 3 inches in diameter Practically no undersize.
36	% 17	% 08	% 08	% CHECKSUM	

GRADE: Fails to grade US No 1 only account of grade defects.

REMARKS: For inspection on remainder of load see certificate K 268 485

5. On March 19, 1998, 80 cartons of the size 5x6 tomatoes, stated to be from truck license TLF 6673 OH, were federally inspected at the place of business of Respondent and found to contain 4 percent serious damage by sunburn, 5 percent damage, including 3 percent serious damage by bruising, 33 percent damage, including 25 percent serious damage, including 18 percent very serious damage by sunken discolored areas (ranging from 17 to 42 percent), 5 percent soft, and 48 percent decay (range 33 to 67 percent, stated to be mostly early to moderate stages, many advanced). On the same day 297 cartons of the size 4x5 tomatoes, stated to be from the same truck, were found to contain 8 percent damage, including 6 percent serious damage by sunburn (range 5 to 13 percent), 8 percent damage, including 3 percent serious damage by bruising (range 0 to 13 percent), 26 percent damage, including 21 percent serious damage, including 15 percent very serious damage by sunken discolored areas (range 18 to 38 percent), 4 percent soft, and 33 percent decay (range 20 to 50 percent). On the same day 298 cartons of the size 5x5 tomatoes, said to be from the same truck, were found to contain 5 percent serious damage by sunburn, 8 percent damage, including 6 percent serious damage by bruising (range 0 to 14 percent), 14 percent damage, including 13 percent serious damage, including 11 percent very serious damage by sunken discolored areas (range 0 to 30 percent), 6 percent soft, and 62 percent decay.

6. On or about March 11 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck with license number P05784 IN, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04330; Purchase Order No. 61134

528 ctns.	4x5 Azteca brand vine ripe	at \$7.00 per ctn.	\$ 3,695.00
880 ctns.	5x5 Azteca brand vine ripe	at 7.00 per ctn.	6,160.00
	Cox Recorder		23.00
	Buying Brokerage	.25 per ctn.	<u>352.00</u>
1,408 ctns.			\$10,231.50

7. On March 13, 1998, at 12:45 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number P 05784 IN, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. A certificate of the inspection revealed, in relevant part, as follows:

K - 268490 - 0

LOT	TEMPER- ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	50 to 54 °F	TOMATOES	"AZTECA" TA- DE-Dist. Co.	MX	4x5-40 Count	528 Cartons	Y

B 49 to 58 °F TOMATOES "AZTECA" TA-DE-Dist. Co. MX 5x5-50 Count 880 Cartons Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	11	% 05	% 01	% quality defects (8 to 15%) scars, growth cracks, misshapen.	Average 10% green to breakers, 30% turning to pink, 55% light red to red.
	02	% 02	% 00	% internal discoloration.	Size ranges 3 to 3½ inches in diameter. No undersize
	04	% 00	% 00	% sunburn	
	11	% 04	% 02	% sunken discolored areas (8 to 18%)	
	08	% 02	% 00	% bruising (3 to 13%)	
	01	% 01	% 01	% soft	
	06	% 06	% 06	% Decay (3 to 15%)	
	43	% 20	% 10	% CHECKSUM	
B	10	% 04	% 01	% quality defects (6 to 14%) scars, growth cracks, misshapen.	
	04	% 00	% 00	% sunburn	
	07	% 03	% 01	% sunken discolored areas (4 to 10%).	
	10	% 02	% 00	% bruising (2 to 20%)	
	02	% 02	% 02	% soft	
	04	% 04	% 04	% Decay	
	37	% 15	% 08	% CHECKSUM	

GRADE: A lot fails to grade U.S. No. 1 account of grade defects. B lot fails to grade U.S. No. 1 only account of condition.

REMARKS: For inspection of 5x6's also in load see Certificate K268491.

8. On March 23, 1998, 294 cartons of the size 4x5 tomatoes, stated to be from truck license P 05784 IN, were federally inspected at the place of business of Respondent and found to contain 9 percent serious damage by bruising (range 5 to 13 percent), 32 percent damage, including 29 percent serious damage, including 20 percent very serious damage by sunken discolored areas (range 20 to 45 percent), and 53 percent decay. On the same day 245 cartons of the size 5x5 tomatoes, stated to be from the same truck, were found to contain 6 percent serious damage by bruising (range 0 to 10 percent), 30 percent damage, including 25 percent serious damage, including 15 percent very serious damage by sunken discolored areas (range 0 to 60 percent), and 58 percent decay.

9. On or about March 11, 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck with license number P10807 IN, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04331; Purchase Order No. 61135

352 ctns.	4x5 Western Pride brand vine ripe	at \$7.00 per ctn.	\$ 2,464.00
880 ctns.	5x5 Western Pride brand vine ripe	at 5.00 per ctn.	4,400.00
352 ctns.	5x6 Western Pride brand	at 5.00 per ctn.	1,760.00
	Cox Recorder		23.00
	Buying Brokerage	.25 per ctn.	<u>396.00</u>
1,584 ctns.			\$9,043.50

10. On March 16, 1998, at 10:50 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number P 10807 IN, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. Certificates of the inspection revealed, in relevant part, as follows:

K - 268494 - 2

LOT	TEMPER- ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	53 to 54 °F	TOMATOES	"Western" tade- dist. 5x5	MX	ARIZONA	880 Cartons	Y
B	53 to 55 °F	TOMATOES	"Western" tade- dist. 4x5	MX	INSPECTION 7400310	352 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	08	% 03	% 01	% quality defects (6 to 14%) scars, misshapen, insect damage.	Average 55% turning to pink, 45% light red to red,

	01	% 00	% 00	% sunburn	Size ranges 2½ to 3 inches in diameter
	01	% 01	% 01	% internal discoloration	
	06	% 01	% 00	% bruising (4 to 8%)	
	11	% 05	% 02	% sunken discolored areas (6 to 14%)	
	00	% 00	% 00	% soft	
	02	% 02	% 02	% Decay	
	29	% 12	% 06	% CHECKSUM	
B	10	% 05	% 02	% quality defects (8 to 15%) scars, growth cracks, misshapen.	Average 10% turning to pink; 85 % light red to red.
	03	% 03	% 03	% internal discoloration	Size range 2¼ to 3¼ inches in diameter
	10	% 03	% 00	% bruising (5 to 18%)	
	14	% 05	% 03	% sunken discolored areas (8 to 25%)	
	00	% 00	% 00	% soft	
	07	% 07	% 07	% Decay (3 to 13%) mostly early to moderate stages, some advanced	
	44	% 23	% 12	% CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 only account of condition.

REMARKS: For inspection on 5x6's also in load see Certificate K268495.

K-268495 - 9

LOT	TEMPER-ATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	52 to 54 °F	TOMATOES	"Western" tade dist.5x6	MX	ARIZONA INSPECTION 7400310	352 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
08	% 04	% 02	% 02	% quality defects (7 to 10%) scars, misshapen	Average 5% turning to pink; 95% light red to red.
02	% 00	% 00	% 00	% sunburn	
03	% 03	% 03	% 03	% internal discoloration	Size ranges 2 4/32 to 2 1/4 inches in diameter
06	% 02	% 00	% 00	% bruising (3 to 8%)	
14	% 06	% 02	% 02	% sunken discolored areas (10 to 20%)	
00	% 00	% 00	% 00	% soft	
02	% 02	% 02	% 02	% Decay	
35	% 17	% 09	% 09	% CHECKSUM	

GRADE: Fails to grade US No 1 only account of condition.

REMARKS: For inspection on 4x5's and 5x5's also in load see certificate K 268 494

11. On March 23, 1998, 147 cartons of the size 4x5 tomatoes, stated to be from truck license PI 10807 IN, were federally inspected at the place of business of Respondent and found to contain 5 percent damage, including 4 percent serious damage by bruising, 17 percent damage, including 13 percent serious damage, including 9 percent very serious damage by sunken discolored areas (ranging from 0 to 35 percent), and 75 percent decay (range 50 to 100 percent). On the same day 306 cartons of the size 5x5 tomatoes, stated to be from the same truck, were found to contain 8 percent damage, including 7 percent serious damage by bruising (range 4 to 10 percent), 6 percent damage, including 4 percent serious damage by sunburn (range 2 to 10 percent), 37 percent damage, including 32 percent serious damage, including 24 percent very serious damage by sunken discolored areas (range 3 to 48 percent), and 47 percent decay (range 40 to 60 percent). On the same day 171 cartons of the size 5x6 tomatoes, said to be from the same truck, were found to contain 12 percent damage, including 10 percent serious damage by bruising (range 0 to 20 percent), 23 percent damage, including 20 percent serious damage, including 14 percent very serious damage by sunken discolored areas (range 0 to 40 percent), and 55 percent decay (range 30 to 100 percent).

12. On or about March 12, 1998, Complainant sold to Respondent on an f.o.b. basis, and shipped from loading point in Nogales, Arizona, aboard a truck

with license number TIR 1243 OH, to Respondent in Shelby, Ohio, one load of tomatoes as follows:

Invoice No. 04392; Purchase Order No. 61153

264 ctns.	4x5 Azteca brand vine ripe	at \$7.00 per ctn.	\$ 1,848.00
704 ctns.	5x5 Azteca brand vine ripe	at 5.00 per ctn.	3,520.00
704 ctns.	4x5 Western Pride brand vine ripe	at 7.00 per ctn.	4,928.00
	Buying Brokerage	.25 per ctn.	<u>418.00</u>
1,672 ctns.			\$10,714.00

13. On March 16, 1998, at 10:30 a.m., a federal inspection of tomatoes, stated to have been unloaded from a carrier with license number TIR-1243 OH, was made at the warehouse of R. S. Hanline Co. in Shelby, Ohio. Certificates of the inspection revealed, in relevant part, as follows:

K - 268493 - 4

LOT	TEMPER- ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	48 to 50 °F	TOMATOES	"AZTECA" tade- dist. 5x5	MX		704 Cartons	Y
B	47 to 50 °F	TOMATOES	"Western" tade- dist. 4x5	MX	Arizona 595-0311 on many top layer cartons	704 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER
A	13	% 06	% 03	% quality defects (10 to 16%) growth cracks, scars, misshapen.	Average 5% green to breakers 35% turning to pink, 55% light red to red,
	04	% 00	% 00	% sunburn	Size ranges 2¼ to 3 inches in diameter
	06	% 02	% 00	% bruising (4 to 8%)	
	09	% 04	% 01	% sunken discolored areas (6 to 12%)	
	00	% 00	% 00	% soft	
	03	% 03	% 03	% Decay	
	35	% 15	% 07	% CHECKSUM	

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B	11	% 05	% 02	%	quality defects (8 to 15%) scars, growth cracks, misshapen.	Average 15% turning to pink; 80% light red to red.
	01	% 01	% 00	%	internal discoloration	Size average 3 to 3½ inches in diameter
	08	% 02	% 00	%	bruising (3 to 13%)	
	16	% 07	% 03	%	sunken discolored areas (8 to 25%)	
	00	% 00	% 00	%	soft	
	03	% 03	% 03	%	Decay	
	39	% 18	% 08	%	CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 account of grade defects.

REMARKS: For inspection on remaining lots also in load see Certificate K268492.

K - 268492 - 6

LOT	TEMPER- ATURES	PRODUCT	BRAND/ MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	48 to 50 °F	TOMATOES	"SUN" [?] Sales 4x5	MX		88 Cartons	Y
B	48 to 50 °F	TOMATOES	"AZTECA" TA-De-Dist. 4x5	MX		264 Cartons	Y

LOT	AVERAGE DEFECTS	including SER DAM	including V. S. DAM	OFFSIZE/DEFECT	OTHER	
A	08	% 03	% 00	%	quality defects (5 to 10%) scars, growth cracks.	Average 35% turning to pink, 60% light red to red,
	10	% 00	% 00	%	sunburn (8 to 13%)	Each lot size ranges 3 to 3¼ inches in diameter. No undersize.
	08	% 08	% 04	%	internal discoloration (0 to 15%)	
	12	% 04	% 02	%	sunken discolored areas (8 to 15%)	
	12	% 03	% 00	%	bruising (10 to 15%)	
	00	% 00	% 00	%	soft	
	03	% 03	% 03	%	Decay	

	53	% 21	% 09	% CHECKSUM	
B	09	% 04	% 02	% quality defects (5 to 10%) scars, growth cracks.	Average 15% green to breakers; 15% turning to pink; 55 % light red to red.
	02	% 00	% 00	% sunburn	Size each lot ranges 3 to 3/4 inches in diameter. No undersize.
	09	% 04	% 01	% sunken discolored areas (8 to 13%)	
	09	% 03	% 00	% bruising (0 to 13%)	
	02	% 02	% 02	% soft	
	14	% 14	% 14	% Decay	
	45	% 27	% 19	% CHECKSUM	

GRADE: Each lot fails to grade U.S. No. 1 account of condition.

REMARKS: For inspection on other lots also in load see Certificate K268493.

14. On March 25, 1998, 80 cartons of the size 4x5 Azteca brand tomatoes, stated to be from truck license TIR 1243 OH, were federally inspected at the place of business of Respondent and found to contain 9 percent damage, including 7 percent serious damage by sunburn (range 5 to 13 percent), 9 percent damage, including 7 percent serious damage by bruising (range 5 to 13percent), 25 percent damage, including 21 percent serious damage, including 11 percent very serious damage by sunken discolored areas (range 20 to 30 percent), 10 soft (range 5 to 13 percent), and 45 percent decay (range 38 to 50 percent). On the same day 29 cartons of the size 4x5 "Sun I" tomatoes, stated to be from the same truck, were found to contain 93 percent decay (range 83 to 100 percent). On the same day 331 cartons of the size 4x5 "Western" brand tomatoes, stated to be from the same truck, were found to contain 8 percent damage, including 6 percent serious damage by sunburn (range 5 to 10 percent), 6 percent damage, including 5 percent serious damage by bruising (range 0 to 10 percent), 20 percent damage, including 17 percent serious damage, including 11 percent very serious damage by sunken discolored areas (range 0 to 33 percent), 8 percent soft (range 3 to 10 percent), and 57 percent decay (range 40 to 83 percent). On the same day 154 cartons of the size 5x5 "Azteca" brand tomatoes, said to be from the same truck, were found to contain 6 percent damage, including 4 percent serious damage by sunburn (range

0 to 10percent), 11 percent damage, including 8 percent serious damage by bruising (range 8 to 15 percent), 28 percent damage, including 24 percent serious damage, including 17 percent very serious damage by sunken discolored areas (range 15 to 38 percent), and 55 percent decay (range 38 to 75 percent).

15. The formal complaint was filed on July 27, 1998, which was within nine months after the causes of action therein accrued.

Conclusions

The contract between Complainant and Respondent was negotiated by Donna Allender of Nikademos Distributing Co., Inc. Ms. Allender maintained that following arrival of the tomatoes, and notice to Complainant of the inspection results, Complainant's Robert Bennen, Jr. agreed to the tomatoes being handled according to Commerce Department rules.¹ There has been no allegation in this proceeding that adherence to Commerce Department rules was a part of the terms of the original contract between Complainant and Respondent. However, this is not the issue raised by Ms. Allender. Rather, Ms. Allender alleges a modification of the original contract, following acceptance of the tomatoes by Respondent, that allowed Respondent to handle the tomatoes under the rules of the suspension agreement.

Complainant denied that there was any such agreement, and submitted the affidavit of Robert L. Bennen, Jr. in support of this denial. Mr. Bennen stated:

Due to the slight condition problems upon arrival, I advised the broker, Donna Allender, of Nikademos Distributing Company, Inc., to tell R. S. Hanline & Co., Inc. to do the best they could with the tomatoes. At no time did I grant authorization for consignment handling or to have the tomatoes reworked.

In a letter to this Department which is a part of the Report of Investigation Ms. Allender strongly contended that Mr. Bennen, Jr. did agree to the handling of the tomatoes, and, in support of her allegation, pointed to corrected memorandums of

¹The reference is to the October 28, 1996 Suspension Agreement signed by Mexican growers/exporters of tomatoes [Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, Federal Register: November 1, 1996 (Volume 61, Number 213), as clarified May 2, 1997. Under the suspension agreement the Mexican growers/exporters agreed that certain terms and conditions would apply to the first sale of tomatoes exported to the U.S., through the first handler (importer/broker), and to the first purchaser.

sale which she issued as to each load of tomatoes. These corrected memorandums were dated on the same day as the first inspection of each of the loads, and contained words identical to or similar to the following: "Will handle as to Commerce Dept. Rules." Complainant never denied receipt of these corrected memorandums, and did not object to them until March 24, 1998, or twelve days after the issuance of the first corrected memorandum. We conclude on the basis of all the evidence of record that the parties agreed to the four loads being handled according to Commerce Department rules.

The relevant Commerce Department rules are those contained in the May 2, 1997, Clarification of the October 28, 1996 Suspension Agreement on Fresh Tomatoes from Mexico. The pertinent portion of the Clarification states as follows:

If the USDA inspection indicates that the lot has: 1) over 8% soft/decay condition defects, or 2) over 15% of any one condition defect, or 3) greater than 20% total condition defects, the receiver may reject the lot or may accept a portion of the lot and reject the quantity of tomatoes lost during the salvaging process. In those instances, price adjustments will be calculated as described below. For these purposes, a condition defect is defined as any defect cited by USDA on an inspection certificate that is not specifically identified as a quality defect. When a lot of tomatoes has condition defects in excess of those outlined above as documented on an inspection certificate, the documented percentage of the tomatoes with condition defects are considered DEFECTIVE tomatoes.

A USDA inspection certificate must be provided to support claims for rejection of all or part of a lot.

...

In calculating the transaction price for lots subject to an adjustment claim for condition defects, as defined above, the tomatoes classified as DEFECTIVE will be treated as rejected and as not having been sold.

...

The price invoiced to and paid by the receiver for the accepted tomatoes must not fall below the reference price.

The shipper may reimburse the receiver for actual destruction costs associated with the DEFECTIVE tomatoes. These expenses will not be considered in the calculation of the price for the accepted tomatoes.

The shipper may reimburse the receiver for the expenses, associated directly with salvaging and reconditioning the lot (e.g., inspection fees and repacking charges) calculated as follows:

If the salvaging and reconditioning activity is performed by a party unaffiliated with the receiver, the inspection fee and the fee charged for the service may be reimbursed.

If the salvaging and reconditioning activity is performed by the receiver or a party affiliated with the receiver, the inspection fee and either the direct labor costs or, in lieu thereof, one-half of the ordinary and customary repacking charges may be reimbursed.

Any reimbursements from, by, or on behalf of the shipper which are not specifically excepted above will be factored into the calculation of the price for the accepted tomatoes by the Department.

The receiver may not resell the DEFECTIVE tomatoes. The receiver may choose to have the DEFECTIVE tomatoes destroyed, donated to non-profit food banks, or returned to the shipper. The DEFECTIVE tomatoes may not be sold to a processor.

...

It is evident that this Commerce Department document uses the term "reject," and its variants, in a way that is foreign to the Uniform Commercial Code, this Department's Regulations, and to our decisions under the Perishable Agricultural Commodities Act.² Nevertheless, we must attempt to give effect to the intent of the

²In the usual sense of the word a rejection entails a reversion of title back to the seller. UCC § 2-401(4). Following a rejection a buyer has no duties relative to the rejected goods (except to hold them for a sufficient time for the seller to remove them) unless the seller has no agent or place of business at the market of rejection, and if such agent or place of business does not exist, then the obligation of the buyer is to follow whatever reasonable instructions for the disposition of the goods may be given

(continued...)

parties herein as evidenced by their agreement to abide by the "rules" expressed in this document.³ The "rules" appear to us to contemplate that the receiver may take possession of a load, have the tomatoes promptly inspected, rework the tomatoes if they do not conform to the condition standards stated in the "rules," and dump the tomatoes lost in reworking. It appears that a separate inspection must be made of the actual tomatoes that are candidates for dumping. As to the term "reject" as used in the "rules," we interpret the meaning, in most instances, to be to give notice of a breach.

The first load of tomatoes contained three lots consisting of 616 cartons of size 4x5's, 264 cartons of size 5x6's, and 880 cartons of size 5x5's. The size 4x5 tomatoes were found by a prompt inspection to have a total of 24 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty,⁴ and also exceeds the amount of condition defects allowed under the

²(...continued)

by the owner of the goods (the seller), or in the absence of such instructions to make a reasonable effort to sell perishables for the seller's account. Following rejection, the buyer is held only to good faith standards in dealing with the seller's goods. UCC § 2-602 and 603. A request by the seller that the goods be salvaged by reworking would be unreasonable, unless the buyer's business were set up to do reworking, and if it were not, it would clearly be only within the province of the seller to arrange for a reworking of what, by rejection, would now be the seller's goods. Also, for the buyer to rework the goods without the seller's permission would, itself, be an act of acceptance. UCC § 2-606. Once goods are rejected the burden of proof is on the seller to show that the goods were conforming, and not upon the buyer to show that the rejection was justified. *Daniel P. Crowley, et al. v. Calflo Produce, Inc.*, 55 Agric. Dec. 674 (1996) and UCC § 2-607(4). Furthermore, under the UCC, a commercial unit must be accepted or rejected in its entirety (UCC 2-606(2)), and this Department's Regulations have defined "commercial unit" for the produce industry as, generally speaking, truckload and carlot quantities. 7 C.F.R. §46.43(ii). See also *Primary Export International v. Blue Anchor, Inc.*, PACA Docket R-95-037, decided Feb. 11, 1997, 56 Agric. Dec. ____ (1997). However, under UCC § 1-102(3), the effect of the provisions of the Code may, for the most part, be varied by the parties.

³See *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, at note 18 (1997).

⁴The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) are made applicable in f.o.b. sales. The Regulations (7 C.F.R. § 46.43 (i)) define f.o.b. as meaning "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." Suitable shipping condition is defined 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 rule is based upon case law predating the adoption of the Regulations. See Williston, (continued...)

May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 297 cartons of the original 616 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the \$7.25 contract price for the 319 cartons not dumped, or \$2,312.75.

The 264 cartons of 5x6 tomatoes were found to have only 20 percent condition defects which does not constitute a breach of contract under the "rules." Therefore the entire original contract price of \$5.25 per carton, or \$1,386.00 is due as to this lot of tomatoes.

The 880 cartons of 5x5 tomatoes were found by a prompt inspection to have a total of 22 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 298 cartons of the original 880 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the \$6.25 contract price for the 582 cartons not dumped, or \$3,637.50. The total we have found due for the three lots is \$7,336.25. Complainant is also entitled to the \$23.00 cost of the Cox temperature recorder, for a total of \$7,359.25. Respondent is

⁴(...continued)

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. 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. 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 Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951). 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 *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

entitled to deduct from this amount of the cost of freight, in the amount of \$1.20 per carton, applicable to the 595 cartons that were dumped, or \$714.00 plus the cost of the two inspections or \$316.00, for total deductions of \$1030.00. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is \$5,615.25.

The second load of tomatoes contained two lots consisting of 528 cartons of size 4x5's, and 880 cartons of size 5x5's. The size 4x5 tomatoes were found by a prompt inspection to have a total of 32 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes, and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 294 cartons of the original 528 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the \$7.25 contract price for the 234 cartons not dumped, or \$1,696.50.

The size 5x5 tomatoes were found by a prompt inspection to have a total of 27 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes, and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 245 cartons of the original 880 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the \$7.25 contract price for the 635 cartons not dumped, or \$4,603.75. The total we have found due for the two lots is \$6,300.25. Complainant is also entitled to the \$23.00 cost of the Cox temperature recorder, for a total of \$6,323.25. Respondent is entitled to deduct from this amount of the cost of freight, in the amount of \$1.20 per carton, applicable to the 539 cartons that were dumped, or \$646.80, plus the cost of two inspections, or \$386.50, for a total deduction of \$1033.30. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is \$5,289.95.

The third load of tomatoes contained three lots consisting of 352 cartons of size 4x5's, 880 cartons of size 5x5's, and 352 cartons of size 5x6's. The size 4x5 tomatoes were found by a prompt inspection to have a total of 34 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the

tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 147 cartons of the original 352 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the \$7.25 contract price for the 205 cartons not dumped, or \$1,486.25.

The 880 cartons of 5x5 tomatoes were found by a prompt inspection to have a total of 21 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 306 cartons of the original 880 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the \$5.25 contract price for the 574 cartons not dumped, or \$3,013.50.

The size 5x6 tomatoes were found by a prompt inspection to have a total of 27 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 171 cartons of the original 352 cartons of 5x6 tomatoes. Under the "rules" Complainant is entitled to the \$5.25 contract price for the 181 cartons not dumped, or \$950.25. The total we have found due for the three lots is \$5,450.00. Complainant is also entitled to the \$23.00 cost of the Cox temperature recorder, for a total of \$5,473.00. Respondent is entitled to a deduction from this amount of the cost of freight, in the amount of \$1.20 per carton, applicable to the 624 cartons that were dumped, or \$748.80 plus the cost of two inspections or \$305.50, for a total deduction of \$1054.30. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is \$4,395.70.

The fourth load of tomatoes contained three lots consisting of 264 cartons of size 4x5 Azteca brand, 704 cartons of size 5x5's, and 704 cartons of size 4x5 Western Pride brand. The size 264 cartons of 4x5 Azteca brand tomatoes were found by a prompt inspection to have a total of 36 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 80 cartons of the original 264 cartons of 4x5 Azteca brand tomatoes.

Under the "rules" Complainant is entitled to the \$7.25 contract price for the 184 cartons not dumped, or \$1,334.00.

The 704 cartons of 5x5 tomatoes were found by a prompt inspection to have a total of 22 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 154 cartons of the original 704 cartons of 5x5 tomatoes. Under the "rules" Complainant is entitled to the \$5.25 contract price for the 550 cartons not dumped, or \$2,887.50.

The 704 cartons of size 4x5 Western Pride brand tomatoes were found by a prompt inspection to have a total of 28 percent condition defects. This exceeds what we would allow under the suitable shipping condition warranty, and also exceeds the amount of condition defects allowed under the May 2, 1997 Clarification of the Suspension Agreement. Respondent reworked the tomatoes and dumped those tomatoes not salvaged. The second inspection serves as a dump certificate for 331 cartons of the original 704 cartons of 4x5 tomatoes. Under the "rules" Complainant is entitled to the \$7.25 contract price for the 373 cartons not dumped, or \$2,704.25. The total we have found due for the three lots is \$6,925.75. Complainant is also entitled to the \$23.00 cost of the Cox temperature recorder, for a total of \$6,948.75. Respondent is entitled to deduct from this amount of the cost of freight, in the amount of \$1.20 per carton, applicable to the 565 cartons that were dumped, or \$678.00 plus the cost of two inspections or \$309.00, for a total deduction of \$987.00. Although Respondent reworked the tomatoes, it did not submit records of its expenses in connection with the reworking, or any data as to the customary cost of reworking. The net amount due Complainant from Respondent on this load is \$5,961.75.

The total we have found due and owing from Respondent to Complainant is \$21,262.65. 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.⁵ Since the Secretary is charged with the duty of awarding damages, he also has the duty,

⁵*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).

where appropriate, to award interest at a reasonable rate as a part of each reparation award.⁶ 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, \$23,316.65, with interest thereon at the rate of 10% per annum from April 1, 1998, until paid, plus the amount of \$300.

Copies of this order shall be served upon the parties.

⁶See *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).

In re: FRESH PREP, INC.
PACA Docket No. D-98-0014.
In re: MARY LECH.
PACA-APP Docket No. 99-0001.
In re: MICHAEL RAAB.
PACA-APP Docket No. 99-0002.
Decision and Order filed May 17, 1999.

Motion to withdraw complaint — With prejudice — Without prejudice — Federal Rules of Civil Procedure.

The Judicial Officer affirmed the dismissal without prejudice by Administrative Law Judge Dorothea A. Baker. The Judicial Officer rejected Respondent's and Petitioners' contention that an administrative law judge who grants a litigant's motion to withdraw a complaint without prejudice allows the movant to control the hearing date; rejected Respondent's and Petitioners' contention that dismissal of the Complaint without prejudice will necessarily deprive them of an adjudication on the merits; and rejected Respondent's and Petitioners' contention that they will suffer legal prejudice if Complainant is allowed to re-file the Complaint.

Kimberly D. Hart, for Complainant.
Stephen P. McCarron, Washington, D.C., for Fresh Prep, Inc., and Mary Lech.
Richard G. Tarlow, Calabasas, California, for Michael Raab.
Decision and Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, 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 Complaint on February 20, 1998.

The Complaint: (1) alleges that Fresh Prep, Inc. [hereinafter Respondent], engaged in commercial bribery during approximately the period June 17, 1992, through August 30, 1995 (Compl. ¶ III); and (2) requests a finding that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and an order revoking Respondent's PACA license (Compl. at 4).

Respondent filed Answer to Complaint on March 18, 1998, in which it denied the material allegations of the Complaint and asserted affirmative defenses. On July 20, 1998, Complainant filed a Motion to Assign a Date for Oral Hearing, and on July 31, 1998, Respondent filed a Motion for In-Person Oral Hearing and a Memorandum in Support of Motion for In-Person Oral Hearing.

On August 25, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] conducted a pre-hearing conference with Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., who represented Complainant, and Stephen P. McCarron, McCarron & Associates, Washington, D.C., who represented Respondent. Complainant and Respondent agreed that the hearing would commence January 26, 1999 (Notification to Parties of Certification and Summary, filed February 26, 1999 [hereinafter Certification and Summary], at 2), and on August 26, 1998, the ALJ issued an order scheduling the hearing to commence January 26, 1999 (Designation of Oral Hearing Date). On December 2, 1998, the ALJ, "with agreement of the parties," changed the date of hearing to commence February 9, 1999 (Change in Oral Hearing Date From January 26, 1999 to February 9, 1999).

On January 20, 1999, pursuant to section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)), the ALJ consolidated *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, with *In re Mary Lech*, PACA-APP Docket No. 99-0001, and *In re Michael Raab*, PACA-APP Docket No. 99-0002. The ALJ's order consolidating the three proceedings provides that the hearing for the consolidated proceeding would commence February 9, 1999 (Notification to the Parties).

On February 5, 1999, Complainant requested a continuance arguing that Respondent's counsel had raised an "alternative defense theory" in a meeting held with Complainant's counsel on January 15, 1999, and Complainant was unable to investigate the merits of Respondent's "alternative defense theory" prior to the date of the scheduled hearing. The ALJ denied Complainant's request for a continuance. (Certification and Summary at 5.)

On February 5, 1999, after the ALJ denied Complainant's request for a continuance, Complainant filed Complainant's Request for a Voluntary Dismissal Without Prejudice of the Administrative Complaint [hereinafter Motion to Withdraw Complaint]. On February 8, 1999, the ALJ canceled the hearing scheduled for February 9, 1999 (Cancellation of Oral Hearing), and gave the parties until February 17, 1999, to respond to Complainant's Motion to Withdraw Complaint (Response Time as to Motion to Dismiss Without Prejudice).

On February 17, 1999: (1) Complainant filed Complainant's Brief in Support of Voluntary Dismissal Without Prejudice of the Administrative Complaint; and (2) Respondent and Petitioner Lech filed a Memorandum in Support of Denial of Complainant's Request for Dismissal Without Prejudice and Affidavit of Stephen P. McCarron, seeking dismissal of the Complaint with prejudice.

On February 18, 1999, the ALJ gave the parties an opportunity to file responses to the February 17, 1999, filings (Additional Filing Time). On February 25, 1999:

(1) Respondent and Petitioner Lech filed (a) Reply to Complainant's Brief in Support of Motion for Voluntary Dismissal Without Prejudice, and (b) Limited Objection to Complainant's Request for Dismissal Without Prejudice and Request for Dismissal With Prejudice; (2) Petitioner Raab filed Notice of Objection to Dismissal Without Prejudice; and (3) Complainant filed (a) Complainant's Reply to Memoranda Filed by Respondent and Petitioner Michael Raab Regarding Complainant's Motion for Voluntary Dismissal Without Prejudice, and (b) Affidavit of Kimberly D. Hart.

On February 26, 1999, pursuant to section 1.143(e) of the Rules of Practice (7 C.F.R. § 1.143(e)), the ALJ certified Complainant's Motion to Withdraw Complaint to the Judicial Officer (Certification to Judicial Officer), stating that the question for determination and certification is whether the Complaint should be dismissed with prejudice or dismissed without prejudice. On March 2, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on the ALJ's Certification to Judicial Officer.

On March 11, 1999, I issued a ruling stating that Complainant's Motion to Withdraw Complaint, filed February 5, 1999, should be granted, and the Complaint, filed February 20, 1998, should be dismissed without prejudice. *In re Fresh Prep, Inc.*, 58 Agric. Dec. ____, slip op. at 12 (Ruling on Certified Question).

On March 11, 1999, the ALJ issued a Dismissal of Complaint, which states in its entirety, as follows:

In accordance with the Judicial Officer's "Ruling on Certified Question," the Complainant's Motion to Withdraw Complaint, filed February 5, 1999, is granted and the Complaint filed in *In re: Fresh Prep[,] Inc.*, PACA Docket No. D-98-0014, is dismissed without prejudice.

On April 12, 1999, Respondent and Petitioner Lech and Petitioner Raab [hereinafter Petitioners] appealed to the Judicial Officer; on May 3, 1999, Complainant filed Complainant's Response to Appeal Petition of Respondent, Petitioners Mary Lech and Michael Raab [hereinafter Complainant's Response]; and on May 4, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's Dismissal of Complaint. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Dismissal of Complaint as the final Decision and Order.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent and Petitioners raise four issues in Appeal Petition of Respondent and Petitioner Mary Lech [hereinafter Appeal Petition] and Notice of Joinder of Petitioner Michael Raab in Respondent Fresh Prep's Appeal Petition. First, Respondent and Petitioners contend that the ALJ's Dismissal of Complaint violates the Administrative Procedure Act (5 U.S.C. § 554), the Rules of Practice, and the Due Process Clause of the Fifth Amendment to the United States Constitution because the ALJ's Dismissal of Complaint unlawfully allows Complainant to control the hearing date (Appeal Pet. at 1-8).

I disagree with Respondent's and Petitioners' contention that an administrative law judge, who grants a litigant's motion to withdraw a complaint without prejudice, allows the movant to control the hearing date.

The Administrative Procedure Act provides that employees presiding at hearings may regulate the course of the hearing, as follows:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

....

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

....

(5) regulate the course of the hearing[.]

5 U.S.C. § 556(c)(5).

Sections 1.141(b)(1) and 1.144(c)(2) of the Rules of Practice provide that the administrative law judge assigned to a proceeding shall have the power to set the time of the hearing, as follows:

§ 1.141 Procedure for hearing.

....

(b) *Time, place, and manner.* (1) If any material issue of fact is joined

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

. . . .

§ 1.144 Judges.

. . . .

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

. . . .

(2) Set the time, place, and manner of a conference and the hearing, adjourn the hearing, and change the time, place, and manner of the hearing[.]

7 C.F.R. §§ 1.141(b)(1), .144(c)(2).

The record establishes that the ALJ set the time of the hearing in this proceeding. While the ALJ's Dismissal of the Complaint resulted in the cancellation of the scheduled hearing, Complainant had no control over the ruling that the ALJ would issue and, if the ALJ had denied Complainant's Motion to Withdraw Complaint, the hearing would have been held as scheduled, barring any change in the time of the hearing by the ALJ. Moreover, if Complainant re-files the Complaint in the future, the administrative law judge assigned to the new proceeding will set the time for any hearing.

Second, Respondent and Petitioners disagree with the policy reasons which I identified in *In re Fresh Prep, Inc.*, 58 Agric. Dec. ____ (Mar. 11, 1999) (Ruling on Certified Question), as the basis for my view that generally a complainant in a proceeding under the Rules of Practice should be allowed to withdraw the complaint without prejudice (Appeal Pet. at 5-7).

I identified three policy reasons for my view, as follows:

The right of a party instituting a proceeding under the Rules of Practice to voluntarily withdraw a complaint and reinstate the proceeding should be preserved, except under rare circumstances. My reasons for this view are as follows. First, a dismissal with prejudice has the same effect as a decision adverse to complainant issued by an administrative law judge after full consideration of the merits of the case; viz., the judicial act of dismissal with prejudice is generally *res judicata* of the merits, even if the merits have not been considered. In contested cases, strong policy reasons favor a decision on the merits, rather than a dismissal with prejudice based on a complainant's motion to dismiss the complaint without prejudice.

Second, generally, the party instituting a proceeding pursuant to the Rules of Practice is an administrative official representing the government acting in its sovereign capacity and having the responsibility for achieving the congressional purpose of a statute which has allegedly been violated. Under such circumstances, which are applicable to the proceeding, *sub judice*, an administrative law judge should be reluctant to bar future prosecution of a potentially meritorious case based solely upon the complainant's request to withdraw the complaint without prejudice. Moreover, the Secretary of Agriculture is charged with administering a large number of statutes that are adjudicated pursuant to the Rules of Practice. Barring a complainant from presenting the complainant's case thwarts the Secretary of Agriculture's proper administration of the statute that is the subject of the dismissed case.

Third, if administrative law judges were, as a general matter, to dispose of motions to withdraw complaints without prejudice by dismissing the complaints with prejudice, complainants may become reluctant to file motions to withdraw complaints, even when such motions are appropriate. A case that is prosecuted by a complainant only because the complainant fears that a motion to withdraw the complaint will result in the complaint being dismissed with prejudice, could waste the time and resources of the participants in the proceeding. Limiting the circumstances under which a complaint is dismissed with prejudice should forestall any reluctance on the part of a complainant to file a motion to withdraw a complaint, if the complainant is not certain that it should proceed against the respondent.

In re Fresh Prep, Inc., 58 Agric. Dec. ____, slip op. at 8-10 (Mar. 11, 1999) (Ruling on Certified Question) (footnotes omitted).

Respondent and Petitioners contend that the first policy reason is subverted by a decision that allows Complainant to withdraw the Complaint without prejudice, as follows:

... [R]espondent and [P]etitioners opposed the [Complainant's] motion for a continuance because, after over two and one-half years, they wanted and were entitled to a decision on the merits. The ALJ agreed by correctly denying the [Complainant's] request for a continuance for lack of good cause. Thus, there is no adjudication on the merits because the [Complainant] is allowed to dismiss without prejudice at will.

Appeal Pet. at 6.

I disagree with Respondent's and Petitioners' contention that dismissal of the Complaint without prejudice will necessarily deprive them of an adjudication on the merits. Complainant contends, and I agree, that there are two possible scenarios that could result from the Complaint being dismissed without prejudice (Complainant's Response at 9). First, Complainant could re-file essentially the same complaint as the Complaint which Complainant filed on February 20, 1998, which would result in an adjudication on the merits. Second, Complainant could decide not to re-file the Complaint, which would render adjudication moot.

Respondent and Petitioners contend that the second policy reason gives Complainant an advantage over the other litigants because it allows Complainant to "overrule" the ALJ's orders as to the time of the hearing; whereas the other litigants have no similar right to postpone a hearing (Appeal Pet. at 6-7).¹

I disagree with Respondent's and Petitioners' contention that the second policy reason enables a complainant to "overrule" an administrative law judge's order setting the time of the hearing. Dismissal of a complaint filed in a proceeding in

¹I noted in the Ruling on Certified Question that an administrative law judge should be reluctant to bar future prosecution of a potentially meritorious responsibly connected proceeding, based upon the petitioner's request to withdraw the petition without prejudice. *In re Fresh Prep, Inc.*, 58 Agric. Dec. ____, slip op. at 9 n.6 (Mar. 11, 1999) (Ruling on Certified Question). Respondent and Petitioners correctly note that a petitioner in a responsibly connected case must file a petition for review of a determination of the Chief of the PACA Branch within 30 days of receipt of the notification of the Chief's responsibly connected determination. (See 7 C.F.R. § 47.49(d).) Thus, a dismissal of a petition without prejudice in a responsibly connected proceeding may not preserve a petitioner's right to re-file a petition.

which an administrative law judge has previously set a time for a hearing results in cancellation of the hearing. This result follows even if the complaint is dismissed without prejudice because, while dismissal without prejudice does not bar a subsequent proceeding, a dismissal without prejudice is a final disposition of the proceeding in which the hearing is scheduled. However, the power to grant or deny a complainant's motion to withdraw a complaint without prejudice (and, consequently, to affect the time of the hearing) rests with the administrative law judge. Pursuant to section 1.143(a) of the Rules of Practice (7 C.F.R. § 1.143(a)), a complainant may file a motion to withdraw a complaint without prejudice, but the complainant's filing does not guarantee that the motion will be granted and does not in any way affect the administrative law judge's order setting the time for hearing.

Respondent and Petitioners contend that the third policy reason sets up a "straw man" and is bad policy because it encourages the Secretary of Agriculture to keep unsubstantiated cases brewing (Appeal Pet. at 7). Respondent and Petitioners state that, generally, a motion to withdraw a complaint is granted without prejudice and that they never argued that generally a complaint should be dismissed with prejudice (Appeal Pet. at 7). Instead, Respondent and Petitioners contend that the circumstances in this case require dismissal with prejudice because Complainant's Motion to Withdraw Complaint was for the purpose of "subverting" a valid ruling, which Complainant, like the other parties to the proceeding, is obliged to obey (Appeal Pet. at 7).

Complainant's Motion to Withdraw Complaint did not "subvert" the ALJ's order setting the time for hearing. Pursuant to section 1.143(a) of the Rules of Practice (7 C.F.R. § 1.143(a)), Complainant may file Complainant's Motion to Withdraw the Complaint, but Complainant's filing does not guarantee that Complainant's motion will be granted and does not in any way affect the ALJ's order setting the time for hearing.

Third, Respondent and Petitioners state that they agree with the circumstances which I identified in *In re Fresh Prep, Inc.*, 58 Agric. Dec. ___ (Mar. 11, 1999) (Ruling on Certified Question), as bases for dismissing a complaint with prejudice, but state that "the facts and circumstances of this case are not addressed" (Appeal Pet. at 7-8).

I identified the circumstances in which a complainant's motion to withdraw a complaint should result in dismissal with prejudice, as follows:

. . . [T]here are circumstances in which an administrative law judge should dismiss a complaint with prejudice. While the circumstances of each case must be examined to determine the proper disposition of a motion to

withdraw a complaint, generally, a complainant's motion to withdraw a complaint in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the complainant moves to withdraw the complaint with prejudice; (2) error is apparent on the face of the complaint such that the complainant should be precluded from refileing essentially the same flawed complaint; (3) allowing the complainant to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the complainant has filed multiple motions to withdraw, followed in each case by the refileing of essentially the same complaint.

In re Fresh Prep, Inc., 58 Agric. Dec. ___, slip op. at 10 (Mar. 11, 1999) (Ruling on Certified Question) (footnote omitted).

Contrary to Respondent's and Petitioners' contention, I addressed the circumstances in this proceeding, as follows:

Complainant has not moved to withdraw the Complaint with prejudice, Complainant's February 5, 1999, Motion to Withdraw Complaint is the first such motion filed by Complainant in this proceeding, and I do not find, and there is no allegation, that error is apparent on the face of the Complaint. However, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab each contend that allowing Complainant to reinstitute the proceeding would legally prejudice them. I have carefully considered Respondent's and Petitioner Mary Lech's February 17, 1999, and February 25, 1999, filings, and Petitioner Michael Raab's February 25, 1999, filing, and I do not find that dismissing the Complaint without prejudice will result in substantial legal prejudice to any of these parties. Instead, it appears that, if Complainant files a complaint identical to the Complaint filed on February 20, 1998, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab will have the same legal position they would have had, if Complainant had proceeded to hearing on February 9, 1999.

In re Fresh Prep, Inc., 58 Agric. Dec. ___, slip op. at 11 (Mar. 11, 1999) (Ruling on Certified Question) (footnote omitted).

Fourth, Respondent and Petitioners contend that they will suffer legal prejudice if Complainant is allowed to re-file the Complaint (Appeal Pet. at 8-9). Respondent and Petitioners, relying on *D'Alto v. Dahon California, Inc.*, 100 F.3d 281 (2d Cir. 1996) and *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354 (10th

Cir. 1996), contend that the factors that must be considered to determine if a litigant will suffer legal prejudice by an administrative law judge's granting of a motion to withdraw a complaint without prejudice are: (1) the opposing party's effort and expense in preparing for trial; (2) excessive delay and lack of diligence by the moving party; (3) insufficiency of the explanation of the need for dismissal; and (4) the present stage of the litigation (Appeal Pet. at 9; Memorandum in Support of Denial of Complainant's Request for Dismissal Without Prejudice at 5). The cases cited by Respondent and Petitioners concern voluntary dismissal of an action by order of a court under Rule 41(a)(2) of the Federal Rules of Civil Procedure.

However, Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the PACA, in accordance with the Rules of Practice.²

²See generally *Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), printed in 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Anna Mae Noell*, 58 Agric. Dec. ___, slip op. at 23 (Jan. 6, 1999) (stating that the Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice); *In re United Foods, Inc.*, 57 Agric. Dec. 329, 348 (1998) (stating that the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and in accordance with the Rules of Practice Governing Proceedings on Petitions To Modify (continued...)

I have carefully considered Respondent's and Petitioners' filings, and I do not find that dismissing the Complaint without prejudice will result in substantial legal prejudice to Respondent or Petitioners. Instead, it appears that, if Complainant files a complaint identical to the Complaint filed on February 20, 1998, Respondent and Petitioners will be in the same legal position they would have had, if Complainant had

proceeded to hearing on February 9, 1999.³

For the foregoing reasons, the following Order is issued.

Order

Complainant's Motion to Withdraw Complaint, filed February 5, 1999, is granted, and the Complaint, filed February 20, 1998, is dismissed without prejudice.

²(...continued)

or To Be Exempted From Research, Promotion and Education Programs); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 421-22 (1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding that the Federal Rules of Civil Procedure are not followed in proceedings before the United States Department of Agriculture).

³While Respondent will face the threat of a second proceeding, I do not find that the threat of a second proceeding constitutes substantial legal prejudice.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

**In re: ANDERSHOCK FRUITLAND, INC., AND JAMES A. ANDERSHOCK, d/b/a AAA RECOVERY.
PACA Docket No. D-95-0531.
Order Lifting Stay filed January 20, 1999.**

Eric Paul, for Complainant.

Mark A. Amendola, Cleveland, Ohio, for Respondents.

Order issued by William G. Jenson, Judicial Officer.

On September 12, 1996, I issued a Decision and Order: (1) concluding that Andershock Fruitland, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499b(4)) [hereinafter the PACA]; (2) concluding that James A. Andershock, d/b/a AAA Recovery, is not entitled to a PACA license; (3) revoking Andershock Fruitland, Inc.'s PACA license; (4) denying the application for a license filed by James A. Andershock, d/b/a AAA Recovery; and (5) ordering the publication of the facts and circumstances of the decision. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1212-13, 1233 (1996). On September 26, 1996, Andershock Fruitland, Inc., and James A. Andershock, d/b/a AAA Recovery [hereinafter Respondents], filed a petition for reconsideration, which I denied. *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

On January 22, 1997, Respondents filed a Motion for Stay pending disposition of Respondents' petition for review filed with the United States Court of Appeals for the Seventh Circuit. On March 4, 1997, I granted Respondents' Motion for Stay. *In re Andershock Fruitland, Inc.*, 56 Agric. Dec. 1029 (1997) (Stay Order).

On December 7, 1998, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Complainant's Request for Order Lifting Stay Order which states, as follows:

The final Order of the Secretary having been upheld by the United States Court of Appeals for the Seventh Circuit and the time for further judicial review having run, Complainant requests that the attached Order Lifting Stay Order be issued.

Complainant's Request for Order Lifting Stay Order and Complainant's proposed Order Lifting Stay Order were served on Respondents on December 17, 1998.¹ Respondents failed to file a response to Complainant's Request for Order Lifting Stay Order within 20 days after service, as required by section 1.143(d) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.143(d)).

On January 15, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Complainant's Request for Order Lifting Stay Order.

The United States Court of Appeals for the Seventh Circuit denied Respondents' petition for review on August 10, 1998. *Andershock's Fruitland, Inc. v. United States Dep't of Agric.*, 151 F.3d 735 (7th Cir. 1998), and the time for further judicial review has run.

For the forgoing reasons, Complainant's Request for Order Lifting Stay Order is granted. The Stay Order issued March 4, 1997, *In re Andershock Fruitland, Inc.*, 56 Agric. Dec. 1029 (1997) (Stay Order), is lifted, and the Order issued in *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996), is effective as follows:

Order

1. Andershock Fruitland, Inc.'s PACA license is revoked, effective 30 days after service of this Order on Andershock Fruitland, Inc.

2. The application for a PACA license filed by James A. Andershock, d/b/a AAA Recovery, is denied, effective upon service of this Order on James A. Andershock, d/b/a AAA Recovery.

3. The facts and circumstances set forth in *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996), shall be published.

¹Domestic Return Receipt for Article Number P 368 428 508.

In re: MICHAEL J. MENDENHALL.
PACA-APP Docket No. 97-0008.
Stay Order filed January 28, 1999.

Eric Paul, for Respondent.

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

Order issued by William G. Jenson, Judicial Officer.

On November 10, 1998, I issued a Decision and Order: (1) concluding that Michael J. Mendenhall [hereinafter Petitioner] was responsibly connected with Mendenhall Produce, Inc., during the period of time that Mendenhall Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner 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)). *In re Michael J. Mendenhall*, 57 Agric. Dec. ___, slip op. at 65 (Nov. 10, 1998). The Hearing Clerk served Petitioner with the Decision and Order on November 13, 1998,¹ and the Order subjecting Petitioner 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)) became effective on January 17, 1999.

On January 28, 1999, the Acting Chief of the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service [hereinafter Respondent], filed Respondent's Request for a Stay Order, requesting a stay of the November 10, 1998, Order pending the outcome of proceedings for judicial review. Petitioner's counsel, Stephen P. McCarron, informed me, in a telephone call, conducted on January 28, 1999, that Petitioner does not oppose Respondent's Request for a Stay Order.

On January 28, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for a ruling on Respondent's Request for a Stay Order.

Respondent's Request for a Stay Order is granted. The Order issued in this proceeding on November 10, 1998, *In re Michael J. Mendenhall*, 57 Agric. Dec. ___ (Nov. 10, 1998), is hereby stayed pending the outcome of proceedings for judicial review.

This Stay Order is issued *nunc pro tunc* and is effective January 17, 1999. This Stay Order shall remain effective until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

¹Domestic Return Receipt for Article Number P 093 174 724.

In re: LIMECO, INC.
PACA Docket No. D-97-0017.
Order Lifting Stay filed February 22, 1999.

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).

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 26, 1998, I granted Respondent's Motion for a Stay. *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Oct. 26, 1998) (Stay Order).

On February 19, 1999, the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed Motion to Lift Stay Order stating that "[o]n January 28, 1999, Respondent's appeal was dismissed by the United States Court of Appeals for the Eleventh Circuit for want of prosecution." See *Limeco, Inc. v. United States Dep't of Agric.*, No. 98-5571 (Jan. 28, 1999) (Entry of Dismissal). On February 19, 1999, I telephoned J. Randolph Liebler, counsel for Respondent, who informed me that Respondent does not intend to seek further judicial review of *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Aug. 18, 1998), and that Respondent does not oppose Complainant's Motion to Lift Stay Order.

For the foregoing reasons, Complainant's Motion to Lift Stay Order is granted. The Stay Order issued October 26, 1998, *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Oct. 26, 1998) (Stay Order), is lifted and the Order issued in *In re Limeco, Inc.*, 57 Agric. Dec. ___ (Aug. 18, 1998), is effective, as follows:

Order

Respondent's PACA license is suspended for a period of 45 days, effective 14 days after service of this Order on Respondent.

In re: FRESH PREP, INC.
PACA Docket No. D-98-0014.
In re: MARY LECH.
PACA-APP Docket No. 99-0001.
In re: MICHAEL RAAB.
PACA-APP Docket No. 99-0002.
Ruling on Certified Question filed March 11, 1999.

Motion to withdraw complaint — With prejudice — Without prejudice — Federal Rules of Civil Procedure.

The Judicial Officer ruled, in response to a question certified by Administrative Law Judge Baker, that Complainant's motion to withdraw its complaint without prejudice should be granted. The Judicial Officer stated that while reference to the Federal Rules of Civil Procedure may provide some guidance with respect to the Rules of Practice, the Federal Rules of Civil Procedure are not applicable to administrative proceedings that are conducted before the Secretary of Agriculture, under the PACA, in accordance with the Rules of Practice. The Judicial Officer concluded that while the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a complaint, generally, a complainant's motion to withdraw a complaint in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the complainant moves to withdraw the complaint with prejudice; (2) error is apparent on the face of the complaint such that the complainant should be precluded from refileing essentially the same flawed complaint; (3) allowing the complainant to reinstitute the same proceeding would result in substantial legal prejudice to the other litigants; or (4) the complainant has filed multiple motions to withdraw, followed in each case by the refileing of essentially the same complaint.

Kimberly D. Hart, for Complainant.
Stephen P. McCarron, Washington, D.C., for Fresh Prep, Inc., and Mary Lech.
Richard G. Tarlow, Calabasas, California, for Michael Raab.
Ruling issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, 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 Complaint on February 20, 1998.

The Complaint: (1) alleges that Fresh Prep, Inc., engaged in commercial bribery during approximately the period June 17, 1992, through August 30, 1995 (Compl. ¶ III); and (2) requests a finding that Fresh Prep, Inc., willfully, flagrantly,

and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the issuance of an order revoking Fresh Prep, Inc.'s PACA license (Compl. at 4).

Fresh Prep, Inc., filed Answer to Complaint on March 18, 1998, in which it denied the material allegations of the Complaint and asserted affirmative defenses. On July 20, 1998, Complainant filed a Motion to Assign a Date for Oral Hearing, and on July 31, 1998, Fresh Prep, Inc., filed a Motion for In-Person Oral Hearing and a Memorandum In Support of Motion for In-Person Oral Hearing.

On August 25, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] conducted a pre-hearing conference with Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., who represented Complainant, and Stephen P. McCarron, McCarron & Associates, Washington, D.C., who represented Fresh Prep, Inc. The parties agreed that the hearing would commence January 26, 1999, and that they would exchange copies of anticipated exhibits and a list of anticipated witnesses on or before November 18, 1998. The parties informed the ALJ that they expected that the hearing would require 3 or 4 days. (Notification to Parties of Certification and Summary, filed February 26, 1999 [hereinafter Certification and Summary], at 2.) On August 26, 1998, the ALJ issued an order scheduling the hearing to commence January 26, 1999 (Designation of Oral Hearing Date).

Subsequent to the ALJ's August 26, 1998, Designation of Oral Hearing Date, the ALJ was informed that the hearing could take up to 9 days and that Complainant did not wish to have the hearing fragmented. On December 2, 1998, the ALJ, "with agreement of the parties," changed the date of hearing to commence February 9, 1999 (Change in Oral Hearing Date From January 26, 1999 to February 9, 1999).

On January 20, 1999, pursuant to section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)), the ALJ consolidated *In re Fresh Prep, Inc.*, PACA Docket No. D-98-0014, with *In re Mary Lech*, PACA-APP Docket No. 99-0001, and *In re Michael Raab*, PACA-APP Docket No. 99-0002. *In re Mary Lech, supra*, and *In re Michael Raab, supra*, were each instituted by a petition for review of a determination by the Chief of the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, that an individual was responsibly connected with Fresh Prep, Inc., during the period that Fresh Prep, Inc., is alleged in the Complaint to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The ALJ's order consolidating the three proceedings provides that the hearing for the consolidated proceeding would commence February 9, 1999 (Notification to the Parties).

On January 20, 1999, Petitioner Michael Raab requested a continuance of the hearing stating that "I have previously discussed this [request for a continuance] with Ms. Hart who has indicated that she is not opposed to . . . a continuance" (Letter from Richard G. Tarlow, counsel for Petitioner Michael Raab, to the ALJ, filed January 20, 1999). The ALJ telephoned Ms. Hart who indicated that she had not agreed to a continuance (Certification and Summary at 4). The ALJ then issued an order giving all parties an opportunity to file responses to Petitioner Michael Raab's request for a continuance on or before January 25, 1999 (Relative to Request for Continuance). On January 25, 1999, Fresh Prep, Inc., and Petitioner Mary Lech jointly filed Opposition of Fresh Prep, Inc. and Mary Lech to the Request for Continuance of the Responsibly Connected Case Against Michael Raab. Complainant filed no response to Petitioner Michael Raab's request for a continuance. On January 26, 1999, the ALJ denied Petitioner Michael Raab's request for a continuance. (Continuance Denied.)¹

On February 5, 1999, Complainant orally requested a continuance of the hearing on the ground that Fresh Prep, Inc.'s counsel had raised an "alternative defense theory" in a meeting held with Complainant's counsel on January 15, 1999, and that Complainant was unable to investigate the merits of Fresh Prep, Inc.'s "alternative defense theory" prior to the date of the scheduled hearing. The ALJ orally denied Complainant's oral request for a continuance. (Certification and Summary at 5.)

On February 5, 1999, after the ALJ denied Complainant's request for a continuance, Complainant filed Complainant's Request for a Voluntary Dismissal Without Prejudice of the Administrative Complaint [hereinafter Motion to Withdraw Complaint].² On February 8, 1999, the ALJ canceled the hearing scheduled for February 9, 1999 (Cancellation of Oral Hearing), and gave the parties

¹Complainant contends that it has not been served with Petitioner Michael Raab's request for a continuance, and Complainant did not become aware of Petitioner Michael Raab's request for a continuance until January 28, 1999, after the ALJ denied Petitioner Michael Raab's request for a continuance (Complainant's Response to Judge Baker's Order Issued Relative to Request for Continuance).

²The ALJ states that Complainant's Motion to Withdraw Complaint was filed "literally minutes after the denial of [Complainant's] request for a continuance" (Certification and Summary at 6). Complainant admits that the Motion to Withdraw Complaint resulted from the ALJ's denial of Complainant's February 5, 1999, request for a continuance and Complainant's need for additional time to assure itself of the persuasiveness of its case and its support by a preponderance of the evidence (Complainant's Brief in Support of Motion for Voluntary Dismissal Without Prejudice of Administrative Complaint at 5).

until February 17, 1999, to respond to Complainant's Motion to Withdraw Complaint (Response Time as to Motion to Dismiss Without Prejudice).

On February 17, 1999: (1) Complainant filed Complainant's Brief in Support of Voluntary Dismissal Without Prejudice of the Administrative Complaint; and (2) Fresh Prep, Inc., and Petitioner Mary Lech filed a Memorandum In Support of Denial of Complainant's Request for Dismissal Without Prejudice and Affidavit of Stephen P. McCarron, seeking dismissal of the Complaint with prejudice.

On February 18, 1999, the ALJ granted a request that the parties be given an opportunity to file responses to the February 17, 1999, filings (Additional Filing Time). On February 25, 1999: (1) Fresh Prep, Inc., and Petitioner Mary Lech jointly filed (a) Reply to Complainant's Brief in Support of Motion for Voluntary Dismissal Without Prejudice, and (b) Limited Objection to Complainant's Request for Dismissal Without Prejudice and Request for Dismissal With Prejudice; (2) Petitioner Michael Raab filed Notice of Objection to Dismissal Without Prejudice; and (3) Complainant filed (a) Complainant's Reply to Memoranda Filed by Respondent and Petitioner Michael Raab Regarding Complainant's Motion for Voluntary Dismissal Without Prejudice, and (b) Affidavit of Kimberly D. Hart.

On February 26, 1999, pursuant to section 1.143(e) of the Rules of Practice (7 C.F.R. § 1.143(e)), the ALJ certified Complainant's Motion to Withdraw Complaint to the Judicial Officer (Certification to Judicial Officer), and on March 2, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on the ALJ's Certification to Judicial Officer.

The ALJ states that the question for determination and certification is whether the Complaint should be dismissed with prejudice or dismissed without prejudice.

As an initial matter, I note that in her February 8, 1999, order giving the parties time to respond to Complainant's Motion to Withdraw Complaint, the ALJ directed the attention of the parties to Rule 41 of the Federal Rules of Civil Procedure, as follows:

... [B]efore ruling on whether the Complaint in Fresh Prep[,] Inc., should be dismissed without prejudice, the parties hereto are granted until February 17, 1999, within which to file a response to said Motion to Dismiss Without Prejudice.

Although the F.R.C.P. are not necessarily applicable in administrative proceedings, nevertheless, guidance can be achieved by reference to Rule 41, relating to dismissal of actions and the circumstances and conditions

under which Complaints are dismissed with prejudice and without prejudice.

Response Time as to Motion to Dismiss Without Prejudice.

While I agree with the ALJ that reference to the Federal Rules of Civil Procedure may provide some guidance with respect to the Rules of Practice, the Federal Rules of Civil Procedure are not applicable to administrative proceedings that are conducted before the Secretary of Agriculture, under the PACA, in accordance with the Rules of Practice.³

The right of a party instituting a proceeding under the Rules of Practice to voluntarily withdraw a complaint and reinstitute the proceeding should be

³See generally *Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam), 1995 WL 523336 (6th Cir. 1995), printed in 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Anna Mae Noell*, 58 Agric. Dec. ____, slip op. at 23 (Jan. 6, 1999) (stating that the Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture under the Animal Welfare Act, in accordance with the Rules of Practice); *In re United Foods, Inc.*, 57 Agric. Dec. 329, 348 (1998) (stating that the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and in accordance with the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 421-22 (1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. 1543, 1559 (1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture proceedings conducted under the Rules of Practice); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating that the Federal Rules of Civil Procedure are not applicable to United States Department of Agriculture disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), printed in 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding that the Federal Rules of Civil Procedure are not followed in proceedings before the United States Department of Agriculture).

preserved, except under rare circumstances. My reasons for this view are as follows. First, a dismissal with prejudice has the same effect as a decision adverse to complainant issued by an administrative law judge after full consideration of the merits of the case; viz., the judicial act of dismissal with prejudice is generally *res judicata* of the merits, even if the merits have not been considered.⁴ In contested cases, strong policy reasons favor a decision on the merits, rather than a dismissal with prejudice based on a complainant's motion to dismiss the complaint without prejudice.

Second, generally, the party instituting a proceeding pursuant to the Rules of Practice is an administrative official representing the government acting in its sovereign capacity and having the responsibility for achieving the congressional purpose of a statute which has allegedly been violated. Under such circumstances, which are applicable to the proceeding, *sub judice*, an administrative law judge should be reluctant to bar future prosecution of a potentially meritorious case based solely upon the complainant's request to withdraw the complaint without prejudice. Moreover, the Secretary of Agriculture is charged with administering a large

⁴See, e.g., *Aungst v. Continental Machines, Inc.*, 90 F.R.D. 348, 350 (M.D. Pa. 1981) (stating that dismissal with prejudice acts as a bar to further action upon the same claims); *Hicks v. Allstate Ins. Co.*, 799 S.W.2d 809, 810 (Ark. 1990) (stating that dismissal of an action with prejudice is as conclusive of the rights of the parties as if there were an adverse judgment as to the plaintiff after trial); *People v. Creek*, 447 N.E.2d 330, 333 (Ill. 1983) (stating that dismissal of an information with prejudice has the same effect as a final adjudication on the merits and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action); *Schuster v. Northern Co.*, 257 P.2d 249, 252 (Mont. 1953) (stating that the term *with prejudice*, as used in a judgment of dismissal is the converse of the term *without prejudice*, and a judgment or decree of dismissal with prejudice is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff; the terms *with prejudice* and *without prejudice* have been recognized as having reference to, and being determinative of, the right to bring a future action); *Harris v. Moyer's Estate*, 202 S.W.2d 360, 362 (Ark. 1947) (stating that the words *with prejudice*, when used in an order of dismissal, indicate that the controversy is thereby concluded); *Bryant v. Ryburn*, 174 S.W.2d 938, 939 (Ark. 1943) (stating that the "suit having been dismissed with prejudice by the plaintiffs therein, such action was as conclusive of the rights of the parties as would an adverse judgment after trial"); *Fenton v. Thompson*, 176 S.W.2d 456, 460 (Mo. 1943) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff); *Union Indemnity Co. v. Benton County Lumber Co.*, 18 S.W.2d 327, 330 (Ark. 1929) (stating that the term *with prejudice* is the converse of the term *without prejudice* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final prosecution adverse to the plaintiff).

number of statutes that are adjudicated pursuant to the Rules of Practice.⁵ Barring a complainant from presenting the complainant's case thwarts the Secretary of Agriculture's proper administration of the statute that is the subject of the dismissed case.⁶

Third, if administrative law judges were, as a general matter, to dispose of motions to withdraw complaints without prejudice by dismissing the complaints with prejudice, complainants may become reluctant to file motions to withdraw complaints, even when such motions are appropriate. A case that is prosecuted by a complainant only because the complainant fears that a motion to withdraw the complaint will result in the complaint being dismissed with prejudice, could waste the time and resources of the participants in the proceeding. Limiting the circumstances under which a complaint is dismissed with prejudice should forestall any reluctance on the part of a complainant to file a motion to withdraw a complaint, if the complainant is not certain that it should proceed against the respondent.

Nonetheless, there are circumstances in which an administrative law judge should dismiss a complaint with prejudice. While the circumstances of each case must be examined to determine the proper disposition of a motion to withdraw a complaint, generally, a complainant's motion to withdraw a complaint in a proceeding instituted under the Rules of Practice should not result in dismissal with prejudice, unless: (1) the complainant moves to withdraw the complaint with prejudice; (2) error is apparent on the face of the complaint such that the complainant should be precluded from refileing essentially the same flawed complaint;⁷ (3) allowing the complainant to reinstitute the same proceeding would

⁵The Rules of Practice are applicable to all adjudicatory proceedings under the statutory provisions listed in 7 C.F.R. § 1.131(a) and the proceedings described in 7 C.F.R. § 1.131(b).

⁶While the same reasoning would not apply in a proceeding instituted by a petitioner in a responsibly connected case, an administrative law judge should be reluctant to bar future prosecution of a potentially meritorious responsibly connected case, based upon the petitioner's request to withdraw the petition without prejudice. A petitioner faces licensing and employment restrictions (7 U.S.C. §§ 499d(b), 499h(b)) and barring a petitioner from presenting his or her case, based solely upon the petitioner's motion to withdraw the petition without prejudice, would subject a petitioner to licensing and employment restrictions without an examination of the merits of the petitioner's case.

⁷*Cf. In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 114 (1997) (dismissing with prejudice a petition filed in a proceeding instituted under section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(A)); concluding that the petition, which
(continued...)

result in substantial legal prejudice to the other litigants; or (4) the complainant has filed multiple motions to withdraw, followed in each case by the refile of essentially the same complaint.

Complainant has not moved to withdraw the Complaint with prejudice, Complainant's February 5, 1999, Motion to Withdraw Complaint is the first such motion filed by Complainant in this proceeding, and I do not find, and there is no allegation, that error is apparent on the face of the Complaint. However, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab each contend that allowing Complainant to reinstitute the proceeding would legally prejudice them. I have carefully considered Respondent's and Petitioner Mary Lech's February 17, 1999, and February 25, 1999, filings, and Petitioner Michael Raab's February 25, 1999, filing, and I do not find that dismissing the Complaint without prejudice will result in substantial legal prejudice to any of these parties. Instead, it appears that, if Complainant files a complaint identical to the Complaint filed on February 20, 1998, Respondent, Petitioner Mary Lech, and Petitioner Michael Raab will have the same legal position they would have had, if Complainant had proceeded to hearing on February 9, 1999.⁸

Complainant's Motion to Withdraw Complaint, filed February 5, 1999, should be granted, and the Complaint, filed in this proceeding on February 20, 1998, should be dismissed without prejudice.⁹

⁷(...continued)

alleged that petitioner was not a handler, left petitioner no standing to institute an action under 7 U.S.C. § 608c(15)(A); and holding that the administrative law judge erred by dismissing the petition without prejudice because dismissal without prejudice would allow the petitioner to file the same flawed petition, but stating that there is precedent for allowing the petitioner to file a similar petition in which it alleges that it is a handler).

⁸While Respondent will face the threat of a second proceeding, I do not find that the threat of a second proceeding constitutes substantial legal prejudice.

⁹Complainant's argument that Respondent caused Complainant to file Complainant's Motion to Withdraw Complaint 4 days before the scheduled hearing is without merit. At least by January 11, 1999, Complainant knew of Respondent's "alternative defense theory," which is the basis for Complainant's Motion to Withdraw Complaint (Memorandum in Support of Denial of Complainant's Request for Dismissal Without Prejudice at 3; Affidavit of Stephen P. McCarron ¶ 8). Most of the delay between the time Complainant learned of Respondent's "alternative defense theory" and Complainant's Motion to Withdraw Complaint is inexplicable. Complainant should complete its investigation of the merits of Respondent's "alternative defense theory" as expeditiously as possible. If, based on its investigation, Complainant concludes that no complaint alleging that Respondent

(continued...)

In re: FRESH PREP, INC.
PACA Docket No. D-98-0014.
In re: MARY LECH.
PACA-APP Docket No. 99-0001.
In re: MICHAEL RAAB.
PACA-APP Docket No. 99-0002.
Dismissal of Complaint filed March 11, 1999.

In accordance with the Judicial Officer's "Ruling on Certified Question", the Complainant's Motion to Withdraw Complaint, filed February 5, 1999, is granted and the Complaint filed in *In re: Fresh Prep. Inc.*, PACA Docket No. D-98-0014, is dismissed without prejudice.

Copies hereof shall be served upon the parties.

GEORGE L. POWELL and JERALD POWELL, d/b/a POWELL FARMS v.
GEORGIA SWEETS BRAND, INC., AND DEL MONTE FRESH PRODUCE,
N.A., INC.
PACA Docket No. R-99-0035.
Order of Dismissal as to Respondent Del Monte Fresh Produce, N.A., Inc.,
filed June 22, 1999.

George S. Whitten, Presiding Officer.

J. Michael Hall, Statesboro, GA, for Complainant.

Jesse C. Stone, Swainsboro, GA, for Respondent Georgia Sweets Brand, Inc.

Joseph P. McCafferty, Cleveland, Ohio, for Respondent Del Monte Fresh Produce, N.A., Inc.

Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), in which Complainant seeks a reparation award from the Respondents in the amount of \$193,217.80 in connection with multiple trucklots of onions shipped and sold in interstate commerce in accordance with a grower's agent agreement.

⁹(...continued)

engaged in commercial bribery during approximately the period June 17, 1992, through August 30, 1995, should be filed, Complainant should inform Respondent's and Petitioner Mary Lech's counsel and Petitioner Michael Raab's counsel of that fact immediately after reaching such a conclusion.

Counsel for Complainant and Counsel for Respondent Del Monte Fresh Produce, N.A., Inc. filed a Consent Order in which Complainant and Respondent Del Monte stipulate to the dismissal of Complainant's claims against Del Monte. Paragraph 3 of the Consent Order provides:

Powell's claims against Del Monte are dismissed **without prejudice**. Should Complainants refile their claims or otherwise institute proceedings against Del Monte before the Secretary of Agriculture relating to the subject matter of this action, Del Monte agrees to **waive any objection or defense based on statute of limitations, or jurisdictional time limit**; (Emphasis added.)

Complainant and Respondent Del Monte have, by entering this stipulation, attempted to waive a jurisdictional limitation of the Secretary's authority to adjudicate reparation claims. Section 6(a)(1) of the PACA (7 U.S.C. § 499f(a)(1)) provides, in pertinent part:

Any person complaining of any violation of any provision of section 2 by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition,

It has long been determined that the above-cited section of the PACA is a limit on the jurisdiction of the Secretary to hear reparation claims. *Cadenasso v. California-Mexico Distributing Co.*, 2 Agric. Dec. 751 (1943). This conclusion was based upon the Supreme Court's interpretation of a similar statutory provision in the Interstate Commerce Act in the case of *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U.S. 638 (1918), where the Court found "that the two-year provision of the act is not a mere statute of limitations, but is jurisdictional, - is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusions." *Id.*, 246 U.S. at 642. Since the provision in the PACA that requires that claims involving transactions in perishable agricultural commodities be filed within nine months of the date that the cause of action accrued is jurisdictional, the parties cannot alter or waive the time period. The jurisdiction of the Secretary cannot be waived or extended by agreement of the parties. *Cadenasso, supra*. Therefore, the intended waiver contained in Paragraph 3 of the Consent Order is ineffectual.

The dismissal of Complainant's claim against Respondent Del Monte effectively ends the Secretary's ability to exercise jurisdiction over the claim. Any attempt by Complainant to refile or institute a proceeding before the Secretary against Respondent Del Monte based on the same transactions involved in the current matter would be denied, notwithstanding the parties' attempted agreement to waive the application of the time limit. Jurisdictional issues can be raised in this forum *sua sponte*. *De Backer Potato Farms, Inc. v. Pellerito Foods, Inc.*, 57 Agric. Dec. 770 (1998); *Provincial Fruit Company Ltd. v. Brewster Heights Packing, Inc.*, 39 Agric. Dec. 1514 (1980). Because such a complaint would be filed well beyond the statutory time period, the Secretary would raise an objection to the complaint, even if the respondent did not, and dismiss the complaint for want of jurisdiction over the claim.

Accordingly, Complainant's claims against Respondent Del Monte will be dismissed, thereby extinguishing the jurisdiction of the Secretary to adjudicate its claims.

Order

Complainant Powell Farms' claims against Respondent Del Monte Fresh Produce, N.A., Inc., are hereby dismissed.

Complainant Powell Farms' claims against Respondent Georgia Sweets Brand, Inc., shall be adjudicated in the same manner and under the same procedure as if the Order of Dismissal had not been issued.

PERISHABLE AGRICULTURAL COMMODITIES ACT**DEFAULT DECISIONS**

In re: DONALD L. WILSON, d/b/a D&R MARKETING.

PACA Docket No. D-98-0013.

Decision and Order filed November 25, 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 February 11, 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 August 1995, through May 1996, Respondent failed to make full payment promptly to 19 sellers in the total amount of \$232,473.50 for 51 transactions involving perishable agricultural commodities it purchased, received, accepted, and resold in interstate and foreign commerce.

A copy of the complaint was mailed to the Respondent by certified mail on February 12, 1998, returned unclaimed on February 6, 1998, and was mailed again by regular mail on May 6, 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, Donald L. Wilson, d/b/a D & R Marketing, is an individual whose business address is 18530 Kalin Ranch Road, Victorville, California 92392. Respondent's mailing address is 3919-A Guasti Road, Ontario, California 91761.

2. At all times material herein, Respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 910736 was issued to Respondent on March 5, 1991. The license was suspended on October 4, 1996, for failure to pay three reparation orders pursuant to Section 7(d)

of the PACA (7 U.S.C. § 499g(d)). This license terminated on March 5, 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 August 1995, through May 1996, Respondent purchased, received, accepted, and resold in interstate and foreign commerce from 19 sellers, 51 transaction involving perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$232,473.50.

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 following Order is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. §499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 27, 1999.-Editor]

**In re: GEORGE G. GOOSIE, d/b/a G&S PRODUCE.
PACA Docket No. D-98-0024.
Decision and Order filed December 16, 1998.**

Jane McCavitt, for Complainant.
Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 23, 1998, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period September 1996 through May 1997, respondent purchased, received, and accepted, in interstate and foreign commerce, from 17 sellers, 281 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$320,184.28.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, George G. Goosie, dba G & S Produce, is a individual, whose address is 2220 Forest Avenue, Knoxville, Tennessee 37916.

2. Pursuant to the licensing provisions of the Act, license number 962489 was issued to respondent on September 4, 1996. This license terminated on September 4, 1997, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period September 1996 through May 1997, respondent purchased, received, and accepted, in interstate and foreign commerce, from 17 sellers, 281 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full

payment promptly of the agreed purchase prices, in the total amount of \$320,184.28.

Conclusions

Respondent's failure to make full payment promptly with respect to the 281 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

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

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final January 25, 1999.-Editor]

In re: COSTA & HARRIS PRODUCE, INC.
PACA Docket No. D-98-0023.
Decision and Order filed December 17, 1998.

Imani K. Ellis-Cheek, for Complainant.
Respondent, Pro se.

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

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on July 16, 1998, 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 June 1996 through January 1998, Respondent purchased, received and accepted, in interstate commerce from 33 sellers, 265 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 \$768,434.78.

A copy of the Complaint was served upon Respondent on July 28, 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, Costa & Harris Produce, Inc., was a corporation organized and existed under the laws of the State of New York. Its business mailing address was New York City Terminal Market, Unit 334, Bronx, New York 10474.

2. At all times material herein, Respondent was licensed under the provisions of PACA. License number 810934 was issued to Respondent on April 28, 1981. This license terminated on April 28, 1998, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499g), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the Complaint, during the period of June 1996 through January 1998, Respondent purchased, received and accepted, in interstate commerce from 33 sellers, 265 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 \$768,434.78.

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 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 hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final January 27, 1999.-Editor]

**In re: ROBINSON POTATO SUPPLY COMPANY OF KANSAS CITY,
KANSAS, INC.**

PACA Docket No. D-98-0021.

Decision and Order filed December 30, 1998.

Mary Hobbie, for Complainant.

Respondent, Pro se.

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

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) hereinafter referred to as the "Act", instituted by a Complaint filed on May 4, 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 January 1997, through April 1997, respondent failed to make full payment promptly to 35 sellers in the total amount of \$686,434.39 for 272 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 May 4, 1998, using its post office box address and again mailed by regular mail on June 11, 1998 (the complaint was returned unclaimed on June 11, 1998 and undeliverable on July 24, 1998, respectively). The complaint was again mailed to respondent using its street address by certified mail on July 24, 1998, and again by regular mail on August 24, 1998 (the complaint was again returned undeliverable on August 3, 1998 and September 3, 1998, respectively). 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, Robinson Potato Supply Company of Kansas City, Kansas, Inc., was a corporation organized and existing under the laws of the State of Kansas. Its business address was 200 South 5th Street, Kansas City, Kansas 66101-3895. Its mailing address was Post Office Box 171176, Kansas City, Kansas 66117-0176.

2. At all times material herein, respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 881346 was issued to respondent on June 8, 1988. The license terminated on June 8, 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 January 1997, through April 1997, respondent purchased, received, and accepted in interstate commerce from 35 sellers, 272 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 \$686,434.39.

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-five days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final April 18, 1999.-Editor]

In re: R&B PRODUCE, INC.
PACA Docket No. D-99-0001.
Decision and Order filed January 22, 1999.

JoAnn Waterfield, for Complainant.
Respondent, Pro se.

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

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 8, 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 November 1996 through July 1997, Respondent failed to make full payment promptly to six sellers of the agreed purchase prices in the total amount of \$110,919.39 for 32 lots of perishable agricultural commodities, that Respondent purchased, received and accepted in interstate commerce.

A copy of the complaint was served upon Respondent, and it 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 is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, R&B Produce, Inc., is a corporation organized and existing under the laws of the Commonwealth of Virginia, with a business address of 19268

Poplar Street, Melfa, Virginia 23410, and business mailing address of P.O. Box 159, Melfa, Virginia 23410.

2. PACA license number 962264 was issued to Respondent on August 6, 1996. This license was suspended on July 17, 1998, for failure to pay reparation awards, and was terminated on August 6, 1998, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph 3 of the complaint, Respondent, during the period November 1996 through July 1997, failed to make full payment promptly to 6 sellers of the agreed purchase prices in the total amount of \$110,919.39 for 32 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce.

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 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the 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, 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final March 5, 1999.-Editor]

In re: UNITED FRUIT AND PRODUCE CO., INC.
PACA Docket No. D-98-0027.
Decision and Order filed February 3, 1999.

Deborah Ben-David, for Complainant.
Respondent, Pro se.

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

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) hereinafter referred to as the Act, instituted by a Complaint filed on September 1, 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 March 26, 1997, through March 6, 1998, Respondent failed to make full payment promptly to 30 sellers of the agreed purchase prices totaling \$321,878.66 for 240 lots of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Finding of Fact

1. United Fruit and Produce Co., Inc., (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of Pennsylvania. Its mailing address is 1812 Peach Street, Erie, Pennsylvania 16501.
2. At all times material herein, Respondent was licensed under the provisions of the Act. License number 870711 was issued to Respondent on February 26, 1987. This license terminated on February 26, 1998, pursuant to section 4(a) of the Act (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.
3. As more fully set forth in paragraph III of the complaint, during the period March 26, 1997, through March 6, 1998, Respondent purchased, received, and accepted in interstate or foreign commerce 240 lots of perishable agricultural

commodities from 30 sellers but failed to make full payment promptly of the agreed purchase prices thereof in the total amount of \$321,878.66.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact Number 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 Act (7 U.S.C. §499b(4)). This finding is hereby ordered published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§1.139 and 1.145).

Copies shall be served upon the parties.

[This Decision and Order became final March 18, 1999.-Editor]

In re: ENNIS & MCGEE PRODUCE CO., INC.
PACA Docket No. D-98-0030.
Decision and Order filed February 10, 1999.

Deborah Ben-David, for Complainant.
Respondent, Pro se.

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

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq.*) hereinafter referred to as the Act, instituted by a complaint filed on September 11, 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 November 1996 through November 1997, Respondent failed to make full payment promptly to 49 sellers of the agreed purchase prices totaling \$1,272,394.24 for 4,363 transactions of perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent, which complaint has not been answered. The time for filing an answer having run, and upon motion of the Complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Finding of Fact

1. Ennis & McGee Produce Company, Inc., (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of North Carolina. Its mailing address is 1117 Agriculture Street, Raleigh, North Carolina 27603.
2. At all times material herein, Respondent was either licensed or operating subject to license under the provisions of the Act. License number 841593 was issued to Respondent on July 3, 1984. This license terminated on July 3, 1997, pursuant to section 4(a) of the Act (7 U.S.C. §499d(a)), when Respondent failed to pay the required annual renewal fee.
3. As more fully set forth in paragraph III of the complaint, during the period November 1996 through November 1997, Respondent purchased, received, and accepted in interstate or foreign commerce 4,363 transactions of perishable

agricultural commodities from 49 sellers but failed to make full payment promptly of the agreed purchase prices thereof in the total amount of \$1,272,394.24.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact Number 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 Act (7 U.S.C. §499b(4)). This finding is hereby ordered published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§1.139 and 1.145).

Copies shall be served upon the parties.

[This Decision and Order became final March 20, 1999.-Editor]

CONSENT DECISIONS

(Not published herein - Editor)

PERISHABLE AGRICULTURAL COMMODITIES ACT

James T. Whitlock, d/b/a Garden Fresh Produce Company. PACA Docket No. D-98-0010. 1/6/99.

Triple-A-Tomato & Produce Co., Inc. PACA Docket No. D-98-0008. 1/11/99.

R.A.M. Produce Distributors, Inc. PACA Docket No. D-98-0011. 1/21/99.

Just A Taste Produce Company of New Jersey, Inc. PACA Docket No. D-99-0005. 1/26/99.

Custom Cuts, Inc. PACA Docket No. D-99-0002. 2/11/99.

Joe Genova & Associates, Inc. PACA Docket No. D-98-0001. 3/2/99.

L & P Fruit Corp. PACA Docket No. D-99-0007. 4/29/99.

Cohen Marketing International, Inc. PACA Docket No. D-98-0029. 5/11/99.

Joseph K. Lurie. PACA Docket No. D-99-0008. 6/25/99.