

AGRICULTURE DECISIONS

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

AGRICULTURE DECISIONS

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

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

The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*.

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Beginning in Volume 63, all **Initial Decisions** decided in the calendar year by the Administrative Law Judge(s) will be arranged by the controlling statute and will be published chronologically along with appeals (if any) of those ALJ decisions issued by the Judicial Officer.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: NORTHERN MICHIGAN FRUIT COMPANY.

PACA Docket No. D-05-0008.

Decision and Order by Reason of Admissions.

Filed July 20, 2005.

PACA – Bankruptcy stay not applicable to PACA – Prompt payment, failure to make.

Andrew Y. Stanton, for Complainant.

Colleen M. Olson, for Respondent.

Decision and Order by Administrative Law Judge Jill S. Clifton.

Decision

[1] This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (frequently herein, “the PACA”), by the Complaint filed on April 1, 2005. Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (frequently herein, “AMS”), is represented by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

[2] The Complaint was served upon Respondent Northern Michigan Fruit Company (frequently herein, “Northern Michigan Fruit” or “Respondent”) on April 25, 2005, and Northern Michigan Fruit’s Answer was timely filed on May 6, 2005, by James W. Boyd, Esq., of Traverse City, Michigan, on behalf of the Chapter 7 Bankruptcy Trustee for Northern Michigan Fruit. The Answer, among other things, requests that Attorney James W. Boyd, Attorney for Colleen M. Olson, duly appointed Chapter 7 Trustee, be properly noted as the Attorney for the Bankruptcy Estate of Northern Michigan Fruit Company, Case no. GT02-10643, United States Bankruptcy Court, Western District of Michigan.

[3] The Complaint alleged that Northern Michigan Fruit, during the period August 1997 through August 2002, failed to make full payment promptly to 109 sellers of the agreed purchase prices in the total amount of \$545,021.42 for 982 lots of perishable agricultural commodities, which Northern Michigan Fruit purchased, received and accepted. The Complaint alleged further that Northern Michigan Fruit's business involved purchases from sellers, most of which were located within the State of Michigan, and sales to buyers, approximately two-thirds of which were located outside the State of Michigan; and that, therefore, Northern Michigan Fruit's purchases of the 982 lots of perishable agricultural commodities set forth in the Complaint were in interstate or foreign commerce, or in contemplation of interstate or foreign commerce.

[4] The Complaint alleged also that Northern Michigan Fruit had filed a Voluntary Petition (Case No. 02-10643) pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.*) in the United States Bankruptcy Court, Western Division of Michigan. [Northern Michigan Fruit's Chapter 11 proceeding was converted to Chapter 7 on February 18, 2004.]

[5] The Complaint requested that a finding that Northern Michigan Fruit's failures to make full payment promptly were in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and that the facts and circumstances of Northern Michigan Fruit's violations be ordered published.

[6] Northern Michigan Fruit's Answer neither admitted nor denied the averments set forth in the Complaint. Northern Michigan Fruit's Answer asserted that the "Automatic Stay" contained in Section 362 of the United States Bankruptcy Code (11 U.S.C. § 362) applied, and "Complainant must obtain permission of the Bankruptcy Court prior to proceeding in this forum."

[7] I find to the contrary, that disciplinary proceedings to enforce the PACA are not subject to the automatic stay pursuant to section 362 of the Bankruptcy Code. This action is a proceeding by a governmental

unit, the United States Department of Agriculture, to enforce its regulatory power, by taking disciplinary action against a firm that is alleged to have committed serious violations of the PACA by failing to make full and prompt payment for produce purchases. The filing of a bankruptcy petition does not stay “the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. . .” Section 362(b)(4) of the Bankruptcy Code (11 U.S.C. § 362(b)(4)).

[8] Further, section 525(a) of the Bankruptcy Code (11 U.S.C. § 525(a)) provides that a governmental unit may not deny, revoke, suspend or refuse to renew a license to a debtor who has filed for bankruptcy, with a few specified exceptions, including disciplinary actions brought under the PACA.

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a-499s), the Packers and Stockyards Act, 1921 (7 U.S.C. 181-229), and section 1 of the Act entitled “An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes,” approved July 12, 1943 (57 Stat. 422; 7 U.S.C. 204), a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. [emphasis added]

[9] The Department of Agriculture’s Judicial Officer has held that

PACA disciplinary proceedings are unaffected by the automatic stay, stating as follows, in *In re Ruma Fruit and Produce Co., Inc.*, 55 Agric. Dec. 642, 654-655 (1996):

Congress, in 1978, specifically amended section 525 of the Bankruptcy Code, (11 U.S.C. § 525), in order to authorize continuation of the Secretary's license suspension or revocation authority under the PACA even where, as here, the violations involve debts that are discharged in bankruptcy. *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984); *In re Fresh Approach, Inc.*, 49 B.R. 494, 496- 98 (N.D. Tex. 1985). In addition, it has repeatedly been held that there is no conflict between the maintenance of PACA disciplinary proceedings and a bankruptcy action. *Marvin Tragash Co. v. United States Dep't of Agric.*, 524 F.2d 1255 (5th Cir. 1975); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967), cert. denied, 389 U.S. 835 (1967); *In re Fresh Approach, Inc.*, *supra*, 49 B.R. at 496.

[10] Where, as here, the respondent has filed a bankruptcy petition schedule in which the respondent admits owing produce creditors, in accordance with the allegations of a disciplinary complaint that alleges that the respondent has violated section 2(4) of the PACA by failing to make full payment promptly for produce purchases, there is no material fact in dispute which warrants a hearing. The bankruptcy schedule constitutes an admission of liability which warrants the issuance of a Decision by Reason of Admissions, finding that the respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA. *In re Furr's Supermarkets, Inc.*, 62 Agric. Dec. 385 (2003); *In re D & C Produce, Inc.*, 62 Agric. Dec. 373 (2002); *In re Scarpaci Brothers, Inc.*, 60 Agric. Dec. 874 (2001); *In re State Produce Brokers, Inc.*, 60 Agric. Dec. 374 (2000); *In re Matos Produce Corp.*, 59 Agric. Dec. 904 (2000); and *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997). *See also, Veg-Mix, Inc. v. U.S. Dept. Of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987).

[11] Of great significance here is Schedule F of Northern Michigan Fruit's Bankruptcy Petition, a copy of which is attached to

AMS's Motion for a Decision, filed May 16, 2005. In that Schedule F, filed September 25, 2002, Northern Michigan Fruit has admitted its indebtedness to 108 of the 109 sellers of perishable agricultural commodities set forth in the Complaint for at least \$518,357.99 of the \$545,021.42 which the Complaint alleges Northern Michigan Fruit has failed to fully and promptly pay. Schedule F proves also that Northern Michigan Fruit does not dispute any of the debts it admittedly owes to the 108 sellers. The table attached to AMS's Motion for a Decision shows the comparison of Northern Michigan Fruit's admissions in Schedule F with the allegations in the Complaint, convincingly demonstrating the match.

[12] Northern Michigan Fruit has not denied Complainant's allegations that Respondent's business involves purchases from sellers, most of which are located within the State of Michigan, and sales to buyers, approximately two-thirds of which are located outside the State of Michigan; consequently, Respondent's purchases of perishable agricultural commodities were in interstate or foreign commerce, or in contemplation of interstate or foreign commerce.¹

[13] Accordingly, the within Decision and Order is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. § 1.130 *et seq.*

Findings of Fact

[14] Respondent, Northern Michigan Fruit Company, is a corporation organized and existing under the laws of the State of Michigan. Respondent's business address is 7161 NW Bay Shore Drive, Omena, Michigan 49674, and its mailing address is P. O. Box 253, Omena, Michigan 49674-0253.

[15] At all times material herein, Northern Michigan Fruit

¹ *See, In re The Produce Place*, 53 Agric. Dec. 1715, 1757 (1994), *aff'd* 91 F.3d 173 (D.C. Cir. 1996): "Likewise, there is interstate commerce when there is evidence that a substantial portion of the buyer's products are eventually sold out of state, even if the commodity subject to this transaction might not have left the state."

Company was licensed under the provisions of the PACA. License number 19911771 was issued to Northern Michigan Fruit on September 30, 1991. That license terminated on September 30, 2004, pursuant to Section 4(a) of the PACA (7 U.S.C. §499d(a)), when Northern Michigan Fruit failed to pay the required annual fee.

[16] Northern Michigan Fruit Company has admitted, through its filing of Schedule F of its Bankruptcy Petition, that Northern Michigan Fruit is indebted to 108 of the 109 sellers of perishable agricultural commodities set forth in the Complaint, for at least \$518,357.99 of the \$545,021.42 which the complaint alleges Northern Michigan Fruit has failed to fully and promptly pay for.

[17] As more fully set forth in paragraph III of the Complaint, in Schedule F of Northern Michigan Fruit's Bankruptcy Petition, and in the Table comparing the two, during the period August 1997 through August 2002, Northern Michigan Fruit Company failed to make full payment promptly to 108 sellers of the agreed purchase prices in the total amount of \$518,357.99, for numerous lots of perishable agricultural commodities, which Northern Michigan Fruit purchased, received and accepted in interstate or foreign commerce, or in contemplation of interstate or foreign commerce.

Conclusions

[18] The Secretary of Agriculture has jurisdiction.

[19] Northern Michigan Fruit Company's failure to make full payment promptly with respect to the transactions referred to in the above Findings of Fact, constitutes willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

[20] Northern Michigan Fruit Company committed willful, repeated and flagrant violations of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)) during August 1997

through August 2002, and the facts and circumstances of the violations shall be published.

[21] This order shall take effect on the 11th day after this Decision becomes final.

[22] This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

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APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

.....

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

....

§ 1.145 Appeal to Judicial Officer.

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

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

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

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral

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

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

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

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

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of

the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

In re: GLENN MEALMAN.
PACA-APP Docket No. 03-0013.
Decision and Order.
Filed July 28, 2005.

PACA-APP – Perishable Agricultural Commodities Act – Failure to make full payment promptly – Responsibly connected – Actively involved – Nominal director – Prosecutorial discretion – Disparate treatment.

The Judicial Officer reversed Chief Administrative Law Judge Marc R. Hillson's (Chief ALJ) decision concluding Glenn Mealman (Petitioner) was not responsibly connected with Furr's Supermarkets, Inc. (Furr's), when Furr's violated the PACA. The Judicial Officer found, during the period September 29, 1998, through February 23, 2001, Furr's willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4). During the violation period, Petitioner was a director of Furr's. The Judicial Officer concluded Petitioner proved by a preponderance of the evidence that he was not actively involved in the activities resulting in Furr's violations of the PACA. However, the Judicial Officer concluded Petitioner failed to prove by a preponderance of the evidence that he was only nominally a director of Furr's. The Judicial Officer rejected Petitioner's claim that he was deprived of due process of law because he was not allowed to introduce evidence to show that Furr's did not violate the PACA. The Judicial Officer found the Chief ALJ had explicitly permitted Petitioner to introduce evidence contesting the prior determination that Furr's had violated the PACA. The Judicial Officer also rejected Petitioner's contention that 7 U.S.C. §§ 499d(b), 499h(b) require a final decision concluding a commission merchant, dealer, or broker violated the PACA before issuance of an initial determination that a person was responsibly connected with that commission merchant, dealer, or broker. Finally, the Judicial Officer rejected Petitioner's claim that disparate treatment of Furr's directors was arbitrary and capricious, stating agency officials have broad prosecutorial discretion to decide against whom to issue responsibly connected determinations.

Andrew Y. Stanton, for Respondent.

James P. Tierney, Kansas City, Missouri, for Petitioner.

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.

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

PROCEDURAL HISTORY

On April 3, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Glenn Mealman [hereinafter Petitioner] was responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001, when Furr's violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]. On October 29, 2003, Petitioner filed Respondent [sic] Mealman's Petition For Review pursuant to 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] seeking reversal of Respondent's April 3, 2003, determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted an oral hearing on June 8, 2004, in Kansas City, Missouri. James P. Tierney, Lathrop & Gage, L.C., Kansas City, Missouri, represented Petitioner. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On August 27, 2004, Respondent filed Respondent's Proposed Findings of Fact, Conclusions and Order, and on August 31, 2004, Petitioner filed Brief of Petitioner. On September 17, 2004, Petitioner filed Reply Brief of Petitioner, and Respondent filed Respondent's Reply Brief.

On February 8, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision and Order] concluding Petitioner was not responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001, when Furr's willfully, flagrantly, and repeatedly violated the PACA (Initial Decision and Order at 17).

On March 9, 2005, Respondent appealed to the Judicial Officer, and on March 31, 2005, Petitioner filed Reply Brief of Petitioner. On April 11, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the Chief ALJ's conclusion that Petitioner was not responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001; therefore, I do not adopt the Initial Decision and Order as the final Decision and Order.

Petitioner's exhibits are designated by "PX"; Respondent's exhibits are designated by "RX"; exhibits included in the agency record, which is part of the record of this proceeding, are designated by "RC"; and references to the transcript are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

**CHAPTER 20A—PERISHABLE AGRICULTURAL
COMMODITIES**

.....

§ 499a. Short title and definitions

.....

(b) Definitions

For purposes of this chapter:

.....

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a

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

....

§ 499b. Unfair conduct

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

....

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

....

§ 499d. Issuance of license

(a) **Authority to do business; termination; renewal**

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required). . . .

(b) Refusal of license; grounds

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

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

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

. . . .

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

increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

. . . .

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

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

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

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

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

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

based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (C), 499h(b).

7 C.F.R.:

TITLE 7—AGRICULTURE

.....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS,
INSPECTIONS, MARKETING PRACTICES),
DEPARTMENT OF AGRICULTURE**

.....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

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

.....

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

.....

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

.....

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

7 C.F.R. § 46.2(aa)(5), (11).

DECISION

Summary

The term *responsibly connected* means affiliated or connected with

a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. The record establishes Petitioner was the director of Furr's Supermarkets, Inc., during the period November 1997 to March 2002, a period during which Furr's willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Furr's Supermarkets, Inc., despite his being a director of Furr's.

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

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

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

and would meet the first prong of the responsibly connected test.

I find Petitioner carried his burden of proof that he was not actively involved in the activities resulting in Furr's Supermarkets, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I find Petitioner failed to carry his burden of proof that he was only nominally a director of Furr's Supermarkets, Inc. Further, while Petitioner demonstrated that he was not an owner of Furr's Supermarkets, Inc., he did not demonstrate that Furr's was the alter ego of its owners.

Factual Background

Petitioner graduated from Emporia State University in 1957 with a degree in business administration. Following graduation, Petitioner worked for Fleming Companies, Inc., a food distribution company, in a variety of capacities for 39 years. By the time Petitioner left Fleming Companies, Inc., in 1996, he had worked as a merchandiser, manager, and eventually executive vice-president for Fleming's mid-America region. While Petitioner was executive vice-president for Fleming Companies, Inc.'s mid-America region, all of Fleming's operating divisions in the region reported to Petitioner. (Tr. 47-48.) Since Petitioner was only 63 when he retired and his full retirement benefits did not commence until he turned 65, Petitioner had a financial arrangement with Fleming Companies, Inc., to consult for and assist the company in various capacities (Tr. 49-50, 54-55, 65). Once Petitioner turned 65, he was paid by Fleming Companies, Inc., at an hourly rate, plus expenses, to serve on Furr's Supermarkets, Inc.'s board of directors (Tr. 34, 68).

Fleming Companies, Inc., was a substantial investor in Furr's Supermarkets, Inc. (Tr. 70-71). As such, Fleming Companies, Inc., was entitled to two seats on Furr's Supermarkets, Inc.'s board of directors (Tr. 21). In 1997, Fleming Companies, Inc., asked Petitioner to serve as a director on Furr's Supermarkets, Inc.'s board of directors (Tr. 21-22). All fees and expenses associated with this appointment were paid by Fleming Companies, Inc. (Tr. 34). Petitioner had no ownership interest in Furr's Supermarkets, Inc., and no role in the day-to-day management

of Furr's. Petitioner had no check-writing authority, had no role in the purchase of produce, and had no role regarding payment of Furr's creditors. (Tr. 26-27.)

As a director, Petitioner attended Furr's Supermarkets, Inc., board meetings. At the board meetings, Petitioner reviewed balance sheets and operating statements, discussed sales trends and finances, dealt with numerous corporate issues, and cast votes. Petitioner never attended a board meeting at which the failure to pay suppliers or individual accounts payable were discussed. (PX 1-PX 4, RC 5; Tr. 24-25.)

As a director, Petitioner was required to serve on at least one committee, and so he served on the real estate development committee. The real estate development committee met a few times during Petitioner's tenure. Petitioner evaluated possible supermarket sites, which evaluation required his reviewing reports and discussing the reports with other members of the real estate development committee and the full board of directors. Petitioner personally visited a potential supermarket site on one occasion. (Tr. 23-24, 75-77.)

Petitioner also nominated an individual to be a board member. Petitioner was requested to make the nomination because he was told that members of the selection committee should not be making a nomination. (Tr. 32-33; PX 1.)

Petitioner remained on the board of directors even after Fleming Companies, Inc., ceased having an ownership interest in Furr's Supermarkets, Inc., in June 2000, and ceased compensating Petitioner; however, Petitioner became ill and was unable to attend board meetings after July 2000 (Tr. 36-39, 72-73; PX 8 at ¶ 4). Petitioner had no participatory role either in Furr's Supermarkets, Inc.'s decision to file for bankruptcy or in any subsequent actions of Furr's (Tr. 41).

The PACA action against Furr's Supermarkets, Inc., was based on its failure to make full payment promptly to a produce seller, Quality Fruit & Vegetable Co. On February 6, 2003, former Chief Administrative Law Judge James W. Hunt issued a decision concluding Furr's failures to make full payment promptly to Quality Fruit & Vegetable Co. constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Furr's Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003) (RX 3, PX 9, RC 4).

Findings of Fact

1. Petitioner graduated from Emporia State University in 1957 with a degree in business administration.
2. Following graduation from Emporia State University, Petitioner worked for Fleming Companies, Inc., a food distribution company, in a variety of capacities for 39 years. By the time Petitioner left the Fleming Companies, Inc., in 1996, he had worked as a merchandiser, manager, and eventually executive vice-president for Fleming's mid-America region. While Petitioner was executive-vice president of Fleming Companies, Inc.'s mid-America region, all of Fleming's operating divisions in the region reported to Petitioner.
3. Petitioner served as a director of Furr's Supermarkets, Inc., from November 1997 until March 2002.
4. Petitioner occupied one of the two seats on the board of directors that his long-term employer, Fleming Companies, Inc., was entitled to fill as a result of its significant ownership interest in Furr's Supermarkets, Inc.
5. Petitioner had no ownership or employment interest in Furr's Supermarkets, Inc., and was never paid anything by Furr's. Between the time of his initial appointment to the board of directors, and Fleming Companies, Inc.'s termination of its ownership interest in June 2000, Fleming paid Petitioner for his work on the board of directors and also paid his expenses.
6. Petitioner did not resign from the board of directors at the time that Fleming Companies, Inc.'s ownership interest terminated and Fleming ceased paying Petitioner for his work on the board of directors; however, Petitioner became ill and ceased attending board meetings in July 2000.
7. Petitioner attended numerous board meetings during the period 1998 through June 2000. As each board member had to serve on at least one committee, Petitioner served on the real estate development committee. Petitioner evaluated possible supermarket sites, which evaluation required his reviewing reports and discussing the reports with other members of the real estate development committee and the full board of directors. Petitioner viewed one potential supermarket site as part of his duties for the real estate development committee.

8. Petitioner nominated an individual to be a board member. Petitioner was requested to make the nomination because he was told that members of the selection committee should not be making a nomination.

9. At board meetings, Petitioner reviewed balance sheets and operating statements, discussed sales trends and finances, dealt with numerous corporate issues, and cast votes. Petitioner never attended a board meeting at which the failure to pay suppliers or individual accounts payable were discussed.

10. Petitioner was never involved in Furr's Supermarkets, Inc.'s day-to-day business activities, had no check-writing or document-issuing authority, had no role in deciding what bills were to be paid, and had no knowledge of, or relationship with, Furr's creditors.

11. At all times material to this proceeding, Furr's Supermarkets, Inc., was a PACA licensee.

12. During the period September 29, 1998, through February 23, 2001, Furr's Supermarkets, Inc., failed to make full payment promptly to one produce seller, Quality Fruit & Vegetable Co., of the agreed purchase prices, or balances thereof, in the total amount of \$174,105.05 for 910 lots of perishable agricultural commodities which Furr's purchased, received, and accepted in interstate commerce and foreign commerce. On February 6, 2003, former Chief Administrative Law Judge James W. Hunt issued a decision concluding Furr's Supermarkets, Inc.'s failures to make full payment promptly to Quality Fruit & Vegetable Co. constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

13. Petitioner did not know Furr's Supermarkets, Inc., was considering bankruptcy until Furr's actually filed for bankruptcy. Petitioner had no role in the decision to file for bankruptcy. Petitioner did not have any knowledge of individual accounts that were not paid.

Conclusions of Law

1. Furr's Supermarkets, Inc.'s failures to make full payment promptly with respect to the transactions described in finding of fact number 12 are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Petitioner proved by a preponderance of the evidence that he was not actively involved in the activities resulting in Furr's Supermarkets, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

3. Petitioner failed to prove by a preponderance of the evidence that he was only nominally a director of Furr's Supermarkets, Inc.

4. Petitioner proved by a preponderance of the evidence that he was not an owner of Furr's Supermarkets, Inc.

5. Petitioner failed to prove by a preponderance of the evidence that Furr's Supermarkets, Inc., was the alter ego of its owners.

6. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Furr's Supermarkets, Inc., during the period when Furr's willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's Appeal Petition

Respondent raises three issues in Respondent's Appeal Petition. First, Respondent contends Petitioner should not have been permitted to introduce evidence contesting the PACA violations previously found in *In re Furrs Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003), to have been committed by Furr's Supermarkets, Inc. (Respondent's Appeal Pet. at 3-15).

The Chief ALJ permitted Petitioner to introduce evidence contesting the PACA violations previously found to have been committed by Furr's Supermarkets, Inc. (Initial Decision and Order at 2). However, the Chief ALJ concluded the issue of whether Petitioner should be allowed to introduce evidence to establish that Furr's Supermarkets, Inc., did not violate the PACA is largely moot, since Petitioner failed to introduce evidence establishing that Furr's did not violate the PACA (Initial Decision and Order at 8). I agree with the Chief ALJ's conclusion that the issue is moot; therefore, I find no need to address the issue.

Second, Respondent contends Petitioner failed to establish that he was not actively involved in the activities resulting in Furr's Supermarkets, Inc.'s violations of the PACA (Respondent's Appeal Pet. at 17-21).

I agree with the Chief ALJ's conclusion that Petitioner demonstrated

by a preponderance of the evidence that he was not actively involved in the activities that resulted in Furr's Supermarkets, Inc.'s violations of the PACA. The salient facts that demonstrate Petitioner's lack of active involvement in the activities that resulted in Furr's Supermarkets, Inc.'s violations of the PACA are set forth in the findings of fact.

Third, Respondent contends Petitioner failed to establish that he was only a nominal director of Furr's Supermarkets, Inc. (Respondent's Appeal Pet. at 21-24).

I agree with Respondent's contention that Petitioner failed to establish by a preponderance of the evidence that he was only nominally a director of Furr's Supermarkets, Inc. In order for a petitioner to show that he or she was only nominally a director, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and shareholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and failed to counteract or obviate the fault of others. The record establishes Petitioner had an actual, significant nexus with Furr's Supermarkets, Inc., during the violation period.

Petitioner was a highly experienced, well-educated manager, with 39 years of experience in the food industry at the time he became a director of Furr's Supermarkets, Inc. In 1957, Petitioner earned a bachelor's degree in business administration from Emporia State University. Petitioner worked for Fleming Companies, Inc., a food distribution company, for 39 years, and during at least the last 6 years of his employment with Fleming, Petitioner served as executive vice-president of the mid-America region. All of Fleming Companies, Inc.'s operating divisions in the region reported to Petitioner. (Tr. 47-48.) Based on Petitioner's education and experience, Petitioner knew, or should have known, about corporate structures, including the responsibility and authority that come with holding the position of director.

Initially, during Petitioner's tenure as a director of Furr's Supermarkets, Inc., the board of directors met every 2 months; the board

eventually convened every 3 months. Petitioner attended all of the board meetings from the time of his appointment as director until July 2000. (Tr. 78-79.) Fleming Companies, Inc., paid Petitioner \$100 per hour, plus expenses, to attend board meetings (Tr. 68-69).

Petitioner had significant responsibilities and authority as a director of Furr's Supermarkets, Inc. At the board meetings, Petitioner reviewed balance sheets and operating statements, dealt with numerous corporate issues, cast votes, and made a motion to elect Thomas Dahlen, president of Furr's Supermarkets, Inc., as a member of the board of directors (PX 1-PX 4; Tr. 24-25, 31-32). Further, in conjunction with Petitioner's position as director, he was a member of the real estate development committee and, in that capacity, Petitioner evaluated possible supermarket sites, which evaluation required his reviewing reports and discussing the reports with other members of the real estate development committee and the full board of directors (Tr. 23-24, 75-77). Petitioner personally visited a potential supermarket site on one occasion (Tr. 23).

In short, I find Petitioner had an actual, significant nexus with Furr's Supermarkets, Inc. Petitioner had the appropriate education and business experience to be a corporate director, received compensation for his services, and attended and actively participated in board meetings.

Reply Brief of Petitioner Filed March 31, 2005

On March 31, 2005, Petitioner filed Reply Brief of Petitioner in which Petitioner, contingent upon my reversing the Chief ALJ, appeals three of the Chief ALJ's rulings (March 31, 2005, Reply Brief of Petitioner at 18). Since I reverse the Chief ALJ's conclusion that Petitioner was not responsibly connected with Furr's Supermarkets, Inc., Petitioner's appeal petition becomes operative.

First, Petitioner contends he was deprived of due process of law when he was not permitted to contest the determination in *In re Furr's Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003), that Furr's Supermarkets, Inc., violated the PACA (March 31, 2005, Reply Brief of Petitioner at 4-6).

Petitioner's assertion that he was not permitted to contest the prior determination that Furr's Supermarkets, Inc., violated the PACA is not

supported by the record. Instead, the record reveals the Chief ALJ permitted Petitioner to contest the determination that Furr's Supermarkets, Inc., violated the PACA (Initial Decision and Order at 2). Therefore, even if I were to find that a failure to permit a petitioner to contest a prior determination that a commission merchant, dealer, or broker violated the PACA deprives that petitioner of due process (which I do not so find), I would not conclude Petitioner was deprived of due process of law.

Second, Petitioner contends Respondent exceeded statutory authority by prematurely determining that Petitioner was responsibly connected with a PACA violator. Specifically, Petitioner contends Respondent had no statutory authority to issue a determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., before Furr's was found to have violated the PACA. (March 31, 2005, Reply Brief of Petitioner at 6-7, Appendix A.)

On February 6, 2003, former Chief Administrative Law Judge James W. Hunt issued a decision concluding that Furr's Supermarkets, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period September 1998 through February 2001 (RC 4). The February 6, 2003, decision was not appealed and became final and effective. On April 3, 2003, almost 2 months after the former Chief Administrative Law Judge issued the decision concluding Furr's Supermarkets, Inc., had violated the PACA, Respondent issued a determination that Petitioner was responsibly connected with Furr's during the period September 29, 1998, through February 23, 2001. Therefore, Petitioner's assertion that Respondent's determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., preceded a final determination that Furr's violated the PACA is not supported by the record.

However, an initial determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., did precede the February 6, 2003, decision that Furr's violated the PACA. By letter dated October 23, 2002, Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, informed Petitioner that a complaint had been filed against Furr's Supermarkets, Inc., alleging that Furr's had violated the PACA and that he (Bruce W.

Summers) had made an initial determination that Petitioner was responsibly connected with Furr's at the time Furr's was alleged to have violated the PACA (RC 3). Mr. Summer's October 23, 2002, letter expressly states that a sanction would be imposed on Petitioner only following a determination that Furr's Supermarkets, Inc., violated the PACA, as follows:

If you do not respond to this letter within 30 days from receipt, this initial determination will become the Department's final determination that you were responsibly connected with Furr's Supermarket's Inc., at the time of the alleged violations, and you will waive any further procedure or hearing regarding your responsibly connected status. If it is then determined that Furr's Supermarket's Inc., did violate the PACA and its license is suspended or revoked, you will be notified of the exact date when your PACA license and employment restrictions will begin.

RC 3 at 2. Moreover, while Mr. Summer's October 23, 2002, letter does not expressly address the effect of a final determination that Furr's Supermarkets, Inc., did not violate the PACA, based on the letter, I infer that no sanction would have been imposed upon Petitioner and Mr. Summer's October 23, 2002, initial responsibly connected determination would have been a nullity.

Petitioner, citing sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), argues the PACA provides an express sequence that the United States Department of Agriculture must follow when determining a person's responsibly connected status; namely, a final decision concluding that a commission merchant, dealer, or broker violated the PACA must precede the initial determination that a person was responsibly connected with that commission merchant, dealer, or broker (March 31, 2005, Reply Brief of Petitioner at 6-7, Appendix A).

I disagree with Petitioner. I find nothing in section 4(b) or section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) that dictates the sequence urged by Petitioner. Section 4(b) of the PACA (7 U.S.C. § 499d(b)) sets forth circumstances under which the Secretary of Agriculture is statutorily required to refuse to issue a PACA license to a PACA license applicant. Section 8(b) of the PACA (7 U.S.C. §

499h(b)) identifies persons who a PACA licensee may not employ, except with the approval of the Secretary of Agriculture, and provides sanctions for a PACA licensee's employment of persons in violation of the section. Sections 4(b) and 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)) do not support Petitioner's argument that an initial determination that a person was responsibly connected with a commission merchant, dealer, or broker may not be issued until there has been a final determination that the commission merchant, dealer, or broker has committed a violation of the PACA.

Third, Petitioner contends Respondent's disparate treatment of Furr's Supermarkets, Inc.'s directors constitutes arbitrary and capricious action as to Petitioner (March 31, 2005, Reply Brief of Petitioner at 7-12).

The issue in this proceeding is whether Petitioner was responsibly connected with Furr's Supermarkets, Inc., during the period when Furr's violated the PACA. The status of Furr's Supermarkets, Inc.'s other directors during the period when Furr's violated the PACA is irrelevant to Petitioner's status. Even if other directors were responsibly connected with Furr's Supermarkets, Inc., during the period when Furr's violated the PACA and Respondent did not issue a determination that they were responsibly connected, those facts would not affect Petitioner's status.

I agree with the Chief ALJ that Respondent is entitled to exercise prosecutorial discretion. Respondent neither is prevented from issuing a responsibly connected determination as to Petitioner when not issuing the same determination as to others who are similarly situated nor is constrained to issue responsibly connected determinations as to all similarly situated persons. Petitioner has no right to have the PACA go unenforced against him, even if Petitioner can demonstrate that he is not as culpable as others who have not had responsibly connected determinations issued against them. PACA does not need to be enforced everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to issue responsibly connected determinations.

Although prosecutorial discretion is broad, it is not unbounded. The Supreme Court of the United States has long held that the decision to prosecute may not be based upon an unjustifiable standard such as race, religion, gender, or the exercise of protected statutory or constitutional

rights.² However, the record is devoid of any indication that Respondent used an unjustifiable standard to identify persons against whom to issue responsibly connected determinations.

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

ORDER

I affirm Respondent's April 3, 2003, determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001, when Furr's willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

In re: BAIARDI CHAIN FOOD CORP.
PACA Docket No. D-01-0023.
Decision and Order.
Filed September 2, 2005.

PACA – Perishable agricultural commodities – Failure to pay – Willful, flagrant, and repeated violations – Agreements to extend time for payment – No-pay case – Publication of facts and circumstances.

The Judicial Officer affirmed the Decision issued by Chief Administrative Law Judge Marc R. Hillson (Chief ALJ) concluding Respondent willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 67 sellers for 343 lots of produce and publishing the facts and circumstances of Respondent's violations. The Judicial Officer rejected Respondent's contention that the Chief ALJ was required to find the exact amount Respondent failed to pay its produce sellers in accordance with the PACA and the exact amount Respondent owed its produce

²See *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996); *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

sellers at the commencement of the hearing. The Judicial Officer also rejected Respondent's contention that the prompt payment provision in 7 U.S.C. § 499b(4) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension. Finally, the Judicial Officer rejected Respondent's contention that, based on Respondent's substantial efforts to pay its produce sellers, the only sanction justified by the facts is assessment of a civil monetary penalty.

Jeffrey J. Armistead, for Complainant.

Paul T. Gentile, New York, NY, for Respondent.

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.

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

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 2, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Baiardi Chain Food Corp. [hereinafter Respondent], during the period March 2000 through January 2001, failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of \$830,728.39 for 343 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). On October 23, 2001, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On February 2, 2004, and May 25, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. David A. Richman, Office of the General Counsel, United States Department of Agriculture, represented

Complainant.¹ Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On July 30, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on September 10, 2004, Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law. On October 4, 2004, Complainant filed Complainant's Reply Brief.

On April 8, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce; and (2) ordered the publication of the facts and circumstances of Respondent's violations.

On July 27, 2005, Respondent appealed to the Judicial Officer. On August 16, 2005, Complainant filed Complainant's Response to Respondent's Appeal. On August 22, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision. Therefore, except for minor modifications, pursuant to section 1.145(I) of the Rules of Practice (7 C.F.R. § 1.145(I)), I adopt the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion, as restated.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

¹On October 4, 2004, Jeffrey J. Armistead entered an appearance on behalf of Complainant, replacing David A. Richman as counsel for Complainant (Notice of Appearance, filed October 4, 2004).

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[.] . . .

.....

§ 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 in 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), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE
(STANDARDS, INSPECTIONS, MARKETING PRACTICES),
DEPARTMENT OF AGRICULTURE**

.....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

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

.....

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

.....

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

.....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed

upon time shall constitute “full payment promptly”: *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

**CHIEF ADMINISTRATIVE LAW JUDGE’S
INITIAL DECISION
(AS RESTATED)**

Decision

I find Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce.

Factual Background

Respondent is a corporation that was licensed under the PACA from June 8, 1948, until its PACA license terminated when Respondent failed to pay the annual PACA license renewal fee on June 8, 2001. David Axelrod was the president, director, and 100 percent stockholder of Respondent from at least 1998 until Respondent’s PACA license terminated. (Tr. at 34-35; CX 1.) Complainant received a number of reparation complaints, generated by Respondent’s alleged nonpayment for produce, between October 2000 and January 2001, and began an investigation of Respondent in early January 2001 (Tr. at 34). Carolyn Shelby, a marketing specialist employed by the United States Department of Agriculture, personally conducted the investigation and met with David Axelrod on January 8, 2001 (Tr. at 38). David Axelrod produced an “entire sack of unpaid invoices” and confirmed that the invoices related to “past due and unpaid produce transactions” (Tr. at 41-42). These unpaid invoices involved 67 different produce sellers and 343 separate transactions, and totaled \$830,728.39 (CX 5-CX 71). David Axelrod also provided Carolyn Shelby a copy of Respondent’s

accounts payable aging (Tr. at 42-43; CX 72). After Carolyn Shelby copied the records and returned the originals to David Axelrod, he confirmed that Respondent's unpaid invoice records were accurate (Tr. at 41-42).

Carolyn Shelby conducted two brief follow-up investigations in March 2002 and November 2003, in which she contacted several of Respondent's produce sellers to determine whether Respondent still owed them money. In March 2002, employees or agents of nine produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them \$342,906.75 for produce. In November 2003, employees or agents of seven produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them \$166,426.18 for produce. (Tr. at 57, 64-65; CX 74, CX 77.)

Many of Respondent's produce sellers eventually received partial payment. Thus, while, at the time of Carolyn Shelby's January 2001 investigation, Respondent owed Agrexco (USA), Ltd., \$21,100 for produce, a portion of the debt, \$11,791.45, was paid to Agrexco (USA), Ltd., in 2002. This amount was paid by Summit Business Capital Corporation, which apparently had the rights to Respondent's receivables and was involved in using Respondent's remaining assets to pay part of Respondent's debt now that Respondent was no longer engaged in the produce business. The remainder of Respondent's debt to Agrexco (USA), Ltd., has never been paid. (Tr. at 14-15, 24-25.)

Richard Byllote testified that, on January 17, 2001, his company, Nathel & Nathel, Inc., formerly Wishnatzki & Nathel, Inc., agreed to accept payment of approximately 50 cents on the dollar to resolve Respondent's indebtedness to his company. Richard Byllote testified that this settlement was appropriate because he knew Respondent was having financial difficulties and, if he did not accept foregoing half the debt, he thought Respondent would not pay Wishnatzki & Nathel, Inc., anything. The agreement between the Respondent and Wishnatzki & Nathel, Inc., stated "Baiardi is closing its doors for business." (CX 78.) Respondent owed Wishnatzki & Nathel, Inc., approximately \$30,000, of which Respondent paid \$14,861 in accord with this agreement. (Tr. at 121-26; CX 78.)

At the hearing, Respondent called no witnesses, but rather presented its case through cross-examination of Complainant's witnesses. All of

Respondent's exhibits were likewise admitted through cross-examination, so the record does not contain any direct Respondent testimony as to the preparation and meaning of Respondent's exhibits. Most of Respondent's exhibits were the final settlements of claims against Respondent based on Respondent's representation that it was going out of business and constituted settlements in the general range of 50 cents for each dollar Respondent owed to each produce seller with whom such an agreement was executed. While counsel for Complainant voiced a continuing objection to the admission of these documents without a witness to vouch for their authenticity (and be subject to cross-examination as to the information contained in the documents), I have no basis to doubt that the documents constitute agreements with numerous produce sellers to settle claims for less than the original purchase prices.

Findings of Fact

1. Respondent is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the Complaint (Compl. ¶ II(a); Answer ¶ 2). Respondent held PACA license 114748 from June 8, 1948, until Respondent's PACA license terminated on June 8, 2001, for failure to pay the required PACA license renewal fee (Compl. ¶ II(b); Answer ¶ 2).

2. Complainant conducted an investigation of Respondent after receiving complaints that Respondent was not paying for perishable agricultural commodities. As part of this investigation, Carolyn Shelby, a marketing specialist employed by the United States Department of Agriculture, went to Respondent's place of business on January 8, 2001, and requested copies of Respondent's business records. David Axelrod, president, director, and 100 percent stockholder of Respondent, provided the requested records to Carolyn Shelby on January 11, 2001.

3. The records, which David Axelrod represented were accurate, demonstrated that, during the period March 2000 through January 2001, Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of \$830,728.39 for 343 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in intestate and

foreign commerce.

4. In March 2002, and again in November 2003, Carolyn Shelby contacted several produce sellers listed in the Complaint to ascertain whether Respondent still owed the produce sellers money for produce. In March 2002, employees or agents of nine produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them \$342,906.75 for produce. In November 2003, employees or agents of seven produce sellers listed in the Complaint told Carolyn Shelby that Respondent still owed them \$166,426.18 for produce. (Tr. at 64-65; CX 74, CX 77.)

5. Carolyn Shelby's January 2001 investigation revealed Respondent owed Coronet Foods, Inc., \$50,887.35 for produce (CX 5, CX 27). On January 29, 2001, Coronet Foods, Inc., entered into an agreement with Respondent in which Coronet Foods, Inc., agreed to accept \$31,328 in full satisfaction of the \$50,887.35 Respondent owed to Coronet Foods, Inc. Respondent paid Coronet Foods, Inc., \$14,000. (RX 20-RX 22, RX 25-RX 27.)

6. Carolyn Shelby's January 2001 investigation revealed Respondent owed Wishnatzki & Nathel, Inc., \$26,070 for produce (CX 5, CX 41). On January 17, 2001, Wishnatzki & Nathel, Inc., agreed to accept approximately 50 percent of the amount Respondent owed to Wishnatzki & Nathel, Inc., for produce (Tr. at 121, 125-26; CX 78).

7. Carolyn Shelby's January 2001 investigation revealed Respondent owed Agrexco (USA), Ltd., \$21,100 for produce (CX 5, CX 11). Summit Business Capital Corporation, which had legal rights to Respondent's accounts receivable, paid Agrexco (USA), Ltd., \$11,791.45 of the amount owed by Respondent. At the time of the commencement of the hearing, on February 2, 2004, Respondent had not paid the balance owed to Agrexco (USA), Ltd. (Tr. at 14-15).

8. Representing that it was going out of business, Respondent settled a number of its accounts with produce sellers listed in the Complaint by paying approximately 50 cents for each dollar Respondent owed. At least two other accounts were settled through court dispositions. There is no evidence that Respondent made full payment promptly to any sellers listed in the Complaint of the agreed purchase prices of the perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce.

Discussion

*Respondent Willfully, Flagrantly, and Repeatedly Violated
the PACA by Failing to Make Full Payment Promptly to 67
Produce Sellers Listed in the Complaint*

Respondent's contentions that its agreements with produce sellers to settle claims for less than the agreed purchase prices is the equivalent of an "opting-out" of the requirements of PACA is inconsistent with both the PACA and the clear, long-standing case law that governs these matters. While the appropriate penalty for Respondent's willful, flagrant, and repeated violations of the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) would normally be revocation of Respondent's PACA license, Respondent's PACA license has already been terminated for failure to pay the PACA license renewal fee. Thus, a finding that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the publication of the facts and circumstances of Respondent's violations, is the only appropriate remedy.

*Respondent Failed to Pay Promptly 67 Produce
Sellers the Agreed Purchase Prices for
Perishable Agricultural Commodities*

There is no legitimate dispute that Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce. Each of the 67 sellers was identified by David Axelrod as having unpaid invoices at the time of Carolyn Shelby's January 2001 investigation. Respondent has demonstrated that six of the 67 produce sellers listed in the Complaint signed "work out agreements" with Respondent, where payment of approximately 50 cents on the dollar was agreed to settle their claims and that claims of two other produce sellers were resolved by court dispositions. Many of the other exhibits submitted by Respondent appear to be similar settlements with a number of the other produce sellers to which Respondent owed payment for produce.

Respondent contends these agreements to accept reduced payments on a delayed basis, made after Respondent had been delinquent in its produce payments and in the face of Respondent's decision to close the business, take these transactions out of the scope of the PACA (Respondent's Proposed Findings of Fact and Conclusions of Law at 4-5).

The lead case in determining whether a purchaser of perishable agricultural commodities is subject to the PACA sanctions for failure to pay promptly is *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer announced in *Scamcorp* that he was distinguishing "slow-pay" cases from "no-pay" cases. In cases in which a respondent failed to achieve "full compliance" with the PACA within 120 days after service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a "no-pay" case and, in the case of flagrant or repeated violations, the violator's PACA license would be revoked. *Id.* at 548-49.

*Agreements to Change the Terms of Payment Subsequent
to the Initial Transaction Do Not Negate the PACA's
Prompt Payment Provisions*

While Respondent contends the work-out agreements allow Respondent to escape PACA sanctions, the case law holds squarely to the contrary. As the Judicial Officer stated in *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 619 (1993), "it has been repeatedly held that a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute full payment or negate a violation of the PACA." While parties are free to negotiate alternatives to the time within which payment is due, the Regulations specify the agreement must be reached before entering into the transaction and the agreement must be in writing. 7 C.F.R. § 46.2(aa)(11). Respondent's contention that a produce seller's choice to accept half payment, when the other choice is to accept no payment at all, renders the situation not governable by the PACA and the debtor not subject to disciplinary action, is not consistent with the PACA, the Regulations, or case law. Indeed, the type of situation faced by Respondent's produce sellers—accepting half payment or nothing—is just the type of situation

the PACA was designed to prevent.

The same logic applies to matters resolved in litigation. There is no authority to support Respondent's contention that, because Agrexco (USA), Ltd., and Ocean Mist Farms may have received partial payment of the debt owed them by Respondent as a result of litigation, the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) ceases to apply to those transactions.

The Unpaid Balance Is Substantial

Respondent's contention that the unpaid balance is de minimus and only warrants the assessment of a civil penalty is likewise without basis. There is no evidence that Respondent made full payment promptly of the agreed purchase prices to any of the 67 produce sellers listed in the Complaint. At the time of Carolyn Shelby's January 2001 investigation, Respondent's president, director, and 100 percent stockholder supplied the very list of unpaid produce sellers Complainant is relying upon and affirmed that the records, which indicate Respondent owed 67 produce sellers \$830,728.39, are accurate. That many of these claims were settled at 50 cents on the dollar does not negate Respondent's violations of the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Even if all payments were made under the work-out agreements, and even with the two court "dispositions," a substantial amount of the \$830,728.39 in non-payments alleged in the Complaint remains unpaid. Respondent's contention that only around \$30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar, Respondent has adduced no evidence to counter the testimony of Complainant's witnesses and the statement of Respondent's president, director, and 100 percent stockholder that none of the 67 produce sellers were fully and promptly paid.

Respondent's Violations Are Willful, Flagrant, and Repeated

In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act

prohibited by a statute or if a person carelessly disregards the requirements of a statute,” his acts are regarded as willful. *In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 714 (1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, until it closed its doors in January 2001, putting numerous produce sellers at risk, Respondent was “clearly operat[ing] in disregard of the payment requirements of the PACA,” *id.*, and has committed willful violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In determining whether a violation is flagrant, the Judicial Officer has factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 551 (1998). *Scamcorp*, as well as numerous other cases, involved fewer transactions with fewer produce sellers for a lesser amount of money than is involved in the instant case, and in each of those cases, the violations were found to be flagrant. The flagrant nature of the violations is exacerbated by the 10-month period of time over which Respondent’s violations occurred, and the repeated nature of Respondent’s violations is established by the 343 occurrences.

A Significant Penalty Is Warranted

Normally, in light of Respondent’s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), Respondent’s PACA license would be revoked. Here, with Respondent’s PACA license already terminated, the only appropriate sanction is the publication of the facts and circumstances of Respondent’s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in its Appeal Petition. First, Respondent contends the Chief ALJ erroneously failed to determine the exact number of unpaid produce sellers and the exact amount Respondent failed to pay to these produce sellers. Respondent contends “the amount of unpaid PACA governed accounts amounts to less than \$30,000.” (Respondent’s Appeal Pet. at 1-4.)

The Chief ALJ found, during the period March 2000 through January 2001, Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices in a total amount over \$830,000 for 343 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce (Initial Decision at 6). This finding alone is sufficient to conclude that Respondent violated the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)). I reject Respondent's contention that the Chief ALJ was somehow required to find that the exact amount Respondent failed to pay in accordance with the PACA was "\$830,728.39."

Moreover, the Chief ALJ addressed Respondent's contention that, at the time of the hearing, only \$30,000 remained unpaid, as follows:

. . . The contention that the unpaid balance is de minimus and only warrants civil penalties is likewise without basis. There is no evidence in the record that any of the 67 creditors were paid either timely or in full for the original amount that was due for the perishable produce. Witnesses testified that at the time of the initial investigation, Respondent's president supplied the very list of creditors that the PACA Branch is relying upon, and affirmed that the records, which indicated that 67 creditors were owed over \$830,000 by Respondent, were accurate. That many of these claims were settled at 50 cents on the dollar does not render the delinquent amount acceptable under PACA regulations. Even if all payments were made under the work-out agreements, and even with the two court "dispositions," over \$570,000 of the \$830,000 in non-payments alleged in the complaint remains unpaid. Respondent's contention that only around \$30,000 remains unpaid assumes that the work-out agreements and two court dispositions nullify all remaining debt. However, other than introducing a large packet of documents that indicate that a number of claims were settled for 50 cents on the dollar, Respondent has adduced no evidence to counter the testimony of the PACA witnesses, and the statement of its president, that apparently none of the 67 creditors were fully paid in a timely manner.

Initial Decision at 9-10.

Again I find the Chief ALJ's approximation of the amount that remained unpaid at the time of the hearing ("over \$570,000 of the \$830,000") sufficient. The Chief ALJ was not required to calculate the exact amount that Respondent still owed produce sellers at the commencement of the hearing.

Second, Respondent contends the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not applicable to transactions in which the produce buyer and produce seller agree to extend the time for payment. Respondent contends an agreement to extend the time for payment may be written or oral and may be made before or after the transaction, which is the subject of the extension. Respondent cites *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004), as support for this contention. (Respondent's Appeal Pet. at 5-6.)

I reject Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension. Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) defines the term *full payment promptly* for purposes of determining violations of the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)). Section 46.2(aa)(5) of the Regulations (7 C.F.R. § 46.2(aa)(5)) provides payment for produce must be made within 10 days after the day on which the produce is accepted. Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a produce transaction may elect to use a different time for payment; however, *the parties must reduce their agreement to writing before entering into the transaction* and must maintain a copy of the agreement in their records. Further, the party claiming the existence of the agreement to use a different time for payment has the burden of proving the existence of the agreement. Respondent did not introduce any evidence to show that Respondent entered into a written agreement with the produce sellers listed in the Complaint before the transactions, which are the subject of this proceeding.

Moreover, I find *American Banana Co. v. Republic Bank of New*

York, 362 F.3d 33 (2d Cir. 2004), inapposite. The Court in *American Banana Co.* held, if a produce seller enters into a pre-transaction or post-default oral or written agreement extending the time for payment beyond the 30-day maximum allowed to qualify for coverage under the PACA trust, the produce seller loses PACA trust protection. *American Banana Co.* offers no support for Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension.

Third, Respondent contends, based on Respondent's substantial efforts to pay its produce sellers, the only sanction warranted is a civil monetary penalty (Respondent's Appeal Pet. at 7).

Section 8 of the PACA (7 U.S.C. § 499h) provides, whenever the Secretary of Agriculture determines a commission merchant, dealer, or broker has flagrantly or repeatedly violated section 2 of the PACA (7 U.S.C. § 499b), the Secretary of Agriculture may publish the facts and circumstances of the violation, revoke the violator's PACA license, suspend the violator's PACA license, or assess the violator a civil monetary penalty. However, I have long held that a civil penalty is not appropriate in a "no-pay" case. "No-pay" cases include cases in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first.² As discussed in this Decision and Order, *supra*, the record establishes that Respondent failed to make full payment promptly in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Hearing Clerk served Respondent with the Complaint on August 8, 2001,³ and the hearing commenced February 2, 2004.⁴ Therefore, in order to avoid classification of this proceeding as a "no-pay" case, Respondent must have been in full compliance with the PACA no later than December 8, 2001. The record establishes that

²*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

³United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4579 1546.

⁴Tr. at 1, 3.

Respondent failed to make full payment to all produce sellers identified in the Complaint by December 8, 2001. Therefore, a civil monetary penalty is not justified by the facts in this proceeding.

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

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published.

The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

**In re: G & T TERMINAL PACKAGING CO., INC.; AND
TRAY-WRAP, INC.
PACA Docket No. D-03-0026.
Decision and Order.
Filed September 8, 2005.**

PACA – Perishable agricultural commodities – Bribery – Extortion – Illegal payments – Credibility determinations – Acts of employees and agents – Willful, flagrant, and repeated violations – License revocation.

The Judicial Officer held Respondents' payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities constituted failures to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce, in violation of 7 U.S.C. § 499b(4). The Judicial Officer found, even if all of Respondents' payments were extorted from Respondents by United States Department of Agriculture inspectors and the payments were made to obtain prompt inspection of perishable agricultural commodities and accurate United States Department of Agriculture inspection certificates, Respondents violated the PACA. The Judicial Officer stated a payment to a United States Department of Agriculture inspector to obtain a prompt inspection of perishable agricultural commodities and an accurate United States Department of Agriculture inspection certificate negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture inspector and undermines the confidence that produce industry members and consumers place in

quality and condition determinations rendered by the United States Department of Agriculture inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture inspectors.

Clara A. Kim and Ruben D. Rudolph, Jr., for Complainant.
Linda Strumpf, New Canaan, CT, for Respondents.
Initial decision issued by William B. Moran, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a Complaint on June 4, 2003. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

Complainant alleges: (1) during the period July 1999 through August 1999, G & T Terminal Packaging Co., Inc. [hereinafter Respondent G & T], through its president, director, and 100 percent stockholder, Anthony Spinale, made illegal payments to a United States Department of Agriculture inspector in connection with four federal inspections of perishable agricultural commodities which Respondent G & T purchased from one seller in interstate or foreign commerce; (2) during the period March 1999 through June 1999, Tray-Wrap, Inc. [hereinafter Respondent Tray-Wrap], through its employee or agent, Anthony Spinale, made illegal payments to a United States Department of Agriculture inspector in connection with six federal inspections of perishable agricultural commodities which Respondent Tray-Wrap purchased from four sellers in interstate or foreign commerce; (3) on October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging Anthony Spinale with

making cash payments to a United States Department of Agriculture inspector in order to influence the outcome of inspections of fresh fruits and vegetables at Respondents' place of business; (4) on August 21, 2001, the United States District Court for the Southern District of New York entered a judgment in which Anthony Spinale pled guilty to one count of bribery of a public official in violation of 18 U.S.C. § 201(b); (5) Anthony Spinale made illegal payments to a United States Department of Agriculture inspector on numerous occasions prior to the period March 1999 through August 1999; and (6) Respondent G & T and Respondent Tray-Wrap [hereinafter Respondents] willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Compl. ¶¶ III, V-VI).

On June 25, 2003, Respondents filed an Answer: (1) admitting that on or about October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging that Anthony Spinale gave money to a United States Department of Agriculture produce inspector; (2) admitting that Anthony Spinale pled guilty to count nine of the October 21, 1999, indictment; and (3) denying the remaining material allegations of the Complaint.

On October 25-29, 2004, and November 1, 2004, Administrative Law Judge William B. Moran [hereinafter the ALJ] conducted an oral hearing in New York, New York. Clara A. Kim and Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Linda Strumpf, New Canaan, Connecticut, represented Respondents.

On January 10, 2005, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on January 11, 2005, Respondents filed Post-Hearing Brief of Respondents. On February 22, 2005, Complainant filed Complainant's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law and Respondents filed Post-Hearing Reply Brief of Respondents.

On March 29, 2005, the ALJ issued Decision of the Administrative Law Judge [hereinafter Initial Decision and Order] finding Complainant

failed to establish Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and dismissing the case (Initial Decision and Order at 1, 91).

On April 27, 2005, Complainant appealed to the Judicial Officer, and on May 23, 2005, Respondents filed Respondents' Response to Complainant's Appeal Petition. On May 31, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the ALJ's conclusion that Complainant failed to establish Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); therefore, I do not adopt the ALJ's Initial Decision and Order as the final Decision and Order.

Complainant's exhibits are designated by "CX." Respondents' exhibits are designated by "RX." The transcript is divided into six volumes, one volume for each day of the 6-day hearing. Each volume begins with page 1 and is sequentially numbered. References to "Tr. I" are to the volume of the transcript that relates to the October 25, 2004, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the October 26, 2004, segment of the hearing; references to "Tr. III" are to the volume of the transcript that relates to the October 27, 2004, segment of the hearing; references to "Tr. IV" are to the volume of the transcript that relates to the October 28, 2004, segment of the hearing; references to "Tr. V" are to the volume of the transcript that relates to the October 29, 2004, segment of the hearing; and references to "Tr. VI" are to the volume of the transcript that relates to the November 1, 2004, segment of the hearing.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 20A—PERISHABLE AGRICULTURAL

COMMODITIES

.....

§ 499b. Unfair conduct

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

.....

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

.....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of

this title, 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.

.....

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499b(4), 499h(a), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

.....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

- (a) For the purpose of this section—
 - (1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either

before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

....
(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act[.]

....
(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such

official or person;

.....

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A), (2).

DECISION

Facts and Discussion

Respondents are New York corporations that share the same business and mailing address, B266 New York City Terminal Market, Bronx, New York 10474 (Answer ¶ II). At all times material to this proceeding, Respondents were licensed under the PACA. PACA license number 204079 was issued to Respondent G & T on April 3, 1964, when Respondent G & T began operating, and PACA license number 701550 was issued to Respondent Tray-Wrap on May 13, 1970, when Respondent Tray-Wrap began operating. (Answer ¶ II; CX 10, CX 10A, CX 11, CX 11A.)

At all times material to this proceeding, Anthony Spinale was a director, the president, and the 100 percent owner of Respondent G & T and managed the business operations of Respondent Tray-Wrap (Tr. II at 205-07; Tr. III at 110-11, 119-24, 126-27, 135-37, 145-46; CX 10, CX 10A).

William Cashin was employed, during the period July 1979 through August 1999, by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, as a produce inspector at the Hunts Point Terminal Market, New York (Tr. I at 66). From 1979 until August 1999, when William Cashin inspected Respondents' produce, he dealt with Anthony Spinale. Beginning about 1983 or 1984, until William Cashin left United States Department of Agriculture employment in August 1999, Anthony Spinale paid William Cashin in connection with inspections of perishable agricultural

commodities conducted at Respondents' place of business. These payments were not made to the Agricultural Marketing Service as payment for normal inspection services, but rather were cash payments made to William Cashin personally. (Tr. I at 72-81.)

During the period July 1999 through August 1999, Respondent G & T, through Anthony Spinale, paid William Cashin in connection with four inspections of perishable agricultural commodities that Respondent G & T purchased from one produce seller in interstate or foreign commerce. During the period March 1999 through June 1999, Respondent Tray-Wrap, through Anthony Spinale, paid William Cashin in connection with six inspections of perishable agricultural commodities that Respondent Tray-Wrap purchased from four produce sellers in interstate or foreign commerce. (Tr. V at 188-97, 204-05, 209-19, 221, 227-41; Tr. VI at 82-84, 97-99, 108-14.)

During the period 1990 through 1999, Anthony Spinale paid United States Department of Agriculture produce inspector Edmund Esposito in connection with inspections of perishable agricultural commodities at Respondents' place of business. These payments were not made to the Agricultural Marketing Service as payment for normal inspection services, but rather were cash payments made to Edmund Esposito personally. (Tr. IV at 183-84, 248-52.)

William Cashin was arrested by agents of the Federal Bureau of Investigation and charged with bribery and conspiracy to commit bribery. After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, whereby William Cashin agreed to assist the Federal Bureau of Investigation with an investigation of bribery by produce purchasers at the Hunts Point Terminal Market. During the investigation, William Cashin carried an audio, audio-video, or video recording device and surreptitiously recorded his interactions with various individuals at produce houses at the Hunts Point Terminal Market, including interactions with Anthony Spinale at Respondents' place of business. At the end of each day, William Cashin gave the tapes and any payments received to Federal Bureau of Investigation agents and recounted to Federal Bureau of Investigation agents what had occurred that day. Federal Bureau of Investigation agents completed FD-302 forms which reflect what William Cashin told them each day. All of Respondents' payments to

a United States Department of Agriculture inspector alleged in paragraph III of the Complaint relate to the investigation conducted by the Federal Bureau of Investigation with William Cashin's assistance. (Tr. I at 86-98.)

On October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging Anthony Spinale with nine counts of bribery of a public official in violation of 18 U.S.C. § 201(b) (Answer ¶ IV(a)). The indictment alleged that Anthony Spinale:

[U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, ANTHONY SPINALE, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit[s] and vegetables conducted at Tray-Wrap, Inc. and G & T Terminal Packaging Corp., both located at Hunts Point Terminal Market, Bronx, New York[.]

CX 17 at 1. The alleged bribes covered payments made to William Cashin in connection with 10 inspections of perishable agricultural commodities. (CX 1-CX 9, CX 17.) On August 21, 2001, the United States District Court for the Southern District of New York entered a judgment in which Anthony Spinale pled guilty to one count of bribery of a public official in violation of 18 U.S.C. § 201(b)(1) and was sentenced to 5 years' probation, 12 months' home confinement, and a \$30,000 fine. (Answer ¶ IV(b); CX 18, CX 20.)

The PACA does not specifically provide that a payment to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable

agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.¹

Anthony Spinale testified he made payments to United States Department of Agriculture inspectors as alleged in the Complaint, but contends he made the payments as a result of “soft extortion” by United States Department of Agriculture inspectors and only to obtain prompt inspections of Respondents’ perishable agricultural commodities and accurate United States Department of Agriculture inspection certificates (Tr. V at 186-97, 199-205, 208-21, 229-41; Tr. VI at 97-99, 108-14). While the record contains evidence that, at least some of Anthony Spinale’s payments to United States Department of Agriculture inspectors were bribes to obtain false United States Department of Agriculture inspection certificates (CX 18, CX 19, CX 20), I find, even if United States Department of Agriculture inspectors extorted each payment from Anthony Spinale and, in exchange for the payments, provided prompt inspections and issued accurate United States Department of Agriculture inspection certificates, Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

A payment to a United States Department of Agriculture inspector to obtain a prompt inspection of perishable agricultural commodities and an accurate United States Department of Agriculture inspection certificate negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture inspectors. A PACA licensee’s payment to a United States Department

¹7 U.S.C. § 499b(4).

of Agriculture inspector, whether it is to obtain an accurate United States Department of Agriculture inspection certificate or an inaccurate United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

Respondents called a former United States Department of Agriculture produce inspector, Edmund Esposito, who testified that Anthony Spinale paid him to obtain prompt inspections of perishable agricultural commodities and accurate United States Department of Agriculture inspection certificates. However, Edmund Esposito's testimony also reveals one way by which such payments can affect an inspector's objectivity and integrity and can result in the issuance of inaccurate United States Department of Agriculture inspection certificates, as follows:

[BY MS. STRUMPF:]

Q. Okay. And did Mr. Spinale ever ask you to alter an inspection?

[BY MR. ESPOSITO:]

A. No.

Q. Did he ever ask you to falsify an inspection?

A. No.

Q. Did you ever downgrade an inspection for Mr. Spinale?

A. Downgrade –

Q. I can rephrase the question if you don't understand it.

A. No, I understand the question, I'm just trying to think. He's never asked me to. I gave him a benefit of doubt on inspections.

Q. And what do you mean by that?

A. Well, if he's on the line I would throw up and make sure he's out.

Q. And did he ever ask you to do that?

A. No.

Q. Did you ever have any conversations with him

—

A. Not with him, no.

Q. — where he asked you to do that?

A. Not with him, no.

. . . .

Q. Why did you do it?

. . . .

A. Because I got paid and he's a nice guy, after he quit appealing me.

Tr. IV at 251-52.

The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or

employed by any commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Anthony Spinale was acting within the scope of his employment when he knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Anthony Spinale are deemed to be knowing and willful violations by Respondents.²

Complainant's Appeal Petition

Complainant raises six issues in Complainant's Appeal to Judicial Officer [hereinafter Appeal Petition]. First, Complainant contends the ALJ erroneously stated the ALJ's credibility findings should not be reviewed by the Judicial Officer (Complainant's Appeal Pet. at 5).

I have carefully reviewed the ALJ's Initial Decision and Order, and I cannot locate any statement by the ALJ indicating that his credibility determinations should not be reviewed by the Judicial Officer. To the contrary, the ALJ specifically states his credibility determinations are reviewable, but those credibility determinations are entitled to deference (Initial Decision and Order at 81 n.115). I agree with the ALJ. The Judicial Officer's consistent practice is to give great weight to credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.³

²*Post & Taback, Inc. v. Department of Agriculture*, 123 Fed. Appx. 406, 408 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 782-83 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

³*In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 605-09, (2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 (continued...)

Second, Complainant contends the ALJ erroneously failed to follow *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005) (Complainant's Appeal Pet. at 5-9).

In *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), I concluded a PACA licensee's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities violates section 2(4) of the PACA (7 U.S.C. § 499b(4)). The ALJ found Respondents, through Anthony Spinale, made payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities, as alleged in the Complaint. The ALJ states such payments, under any circumstances, are "wrong." (Initial Decision and Order at 84, 90.) Despite these findings, the ALJ concluded Complainant failed to establish the alleged violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and dismissed the Complaint. (Initial Decision and Order at 1, 84, 90-91.)

In light of the ALJ's finding that Anthony Spinale made payments as alleged in the Complaint, it would appear the ALJ erroneously failed

³(...continued)

F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp. 2d 1308 (D. Kan. 1998), *aff'd*, 12 Fed. Appx. 718, 2001 WL 401594 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock's 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).

to follow *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), when he dismissed the Complaint. However, the ALJ distinguishes the instant proceeding from *Post & Taback, Inc.* The ALJ found United States Department of Agriculture inspectors extorted payments from Anthony Spinale and Anthony Spinale made payments to United States Department of Agriculture inspectors to obtain prompt produce inspections and accurate United States Department of Agriculture inspection certificates (Initial Decision and Order at 83, 90). In *Post & Taback, Inc.*, I specifically found no evidence of extortion and found the PACA licensee's payments were made to a United States Department of Agriculture inspector to obtain inaccurate United States Department of Agriculture inspection certificates, which were then used to make false and misleading statements to produce sellers.⁴

I disagree with the ALJ's conclusion that *Post & Taback, Inc.*, can be distinguished from the instant proceeding. As discussed in this Decision and Order, *supra*, commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture inspectors. Even if I were to find Anthony Spinale made all of the payments to United States Department of Agriculture inspectors to obtain prompt inspections of perishable agricultural commodities and accurate United States Department of Agriculture inspection certificates and Anthony Spinale made all of the payments as a result of extortion by United States Department of Agriculture inspectors, I would follow *Post & Taback, Inc.* The extortion evidenced in this proceeding is not a "reasonable cause," under section 2(4) of the PACA (7 U.S.C. § 499b(4)), for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities. Moreover, avoidance of inspection delays and avoidance of the issuance of inaccurate United States Department of Agriculture inspection certificates are not "reasonable causes," under section 2(4) of

⁴*In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 819-20 (2003).

the PACA (7 U.S.C. § 499b(4)), for a commission merchant, dealer, or broker to fail to perform the implied duty to refrain from paying United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities.

A PACA licensee's payment to a United States Department of Agriculture inspector, whether caused by bribery or extortion and whether to obtain an accurate United States Department of Agriculture inspection certificate or an inaccurate United States Department of Agriculture inspection certificate, undermines the trust a produce seller places in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

Third, Complainant contends the ALJ erroneously gave the FD-302 forms (CX 1-CX 9) no weight (Complainant's Appeal Pet. at 9-10).

The ALJ gave the FD-302 forms no probative weight (Initial Decision and Order at 7-8). I disagree with the ALJ and give the FD-302 forms probative weight.

Anthony Spinale, who the ALJ found credible, admitted the material facts on the FD-302 forms. Anthony Spinale testified he paid William Cashin \$100 in connection with an inspection of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-678086-0 (Tr. V at 189-90; RX 1A). United States Department of Agriculture Inspection Certificate Number K-678086-0, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on March 24, 1999, at 1:30 p.m. (RX 1A; CX 1 at 5). The corresponding FD-302 form states an unnamed source reported that, on March 24, 1999, while at Respondent Tray-Wrap, the source performed one inspection and Anthony Spinale paid him \$100 for the inspection (CX 1 at 3-4).

Anthony Spinale testified he paid William Cashin \$100 in connection with an inspection of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-678091-0 (Tr. V at 190-94; RX 2A). United States Department of Agriculture Inspection Certificate Number K-678091-0, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on March 26, 1999, at 11:20 a.m. (RX 2A; CX 2 at 5). The corresponding FD-302 form states an unnamed source

reported that, on March 26, 1999, at approximately 11:30 a.m., while at Respondent Tray-Wrap, the source inspected tomatoes and Anthony Spinale paid him \$100 for the inspection (CX 2 at 3-4).

Anthony Spinale testified he paid William Cashin \$100 in connection with an inspection of one load of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-679811-0 (Tr. V at 186-88, 194-96; RX 3A). United States Department of Agriculture Inspection Certificate Number K-679811-0, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on April 23, 1999, at 11:35 a.m. (RX 3A; CX 3 at 5). The corresponding FD-302 form states an unnamed source reported that, on April 23, 1999, at approximately 11:30 a.m., while at Respondent Tray-Wrap, the source inspected one load of tomatoes and Anthony Spinale paid him \$100 for the inspection (CX 3 at 3-4).

Anthony Spinale testified he paid William Cashin \$100 in connection with an inspection of one load of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-765769-5 (Tr. V at 196-97, 199-205; RX 4A). United States Department of Agriculture Inspection Certificate Number K-765769-5, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on May 20, 1999, at 12:20 p.m. (RX 4A; CX 4 at 5). The corresponding FD-302 form states an unnamed source reported that, on May 20, 1999, at approximately 12:30 p.m., while at Respondent Tray-Wrap, the source performed one inspection of tomatoes and Anthony Spinale paid him \$100 for the inspection (CX 4 at 3-4).

Anthony Spinale testified he paid William Cashin \$100 in connection with an inspection of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-767032-6 (Tr. V at 208-21; RX 5A). United States Department of Agriculture Inspection Certificate Number K-767032-6, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on June 16, 1999, at 11:25 a.m. (RX 5A; CX 5 at 6). The corresponding FD-302 form states an unnamed source reported that, on June 16, 1999, at approximately 11:15 a.m., while at Respondent Tray-Wrap, the source performed one inspection of

tomatoes and Anthony Spinale paid him \$100 for the inspection (CX 5 at 4-5).

Anthony Spinale testified he paid William Cashin \$100 in connection with an inspection of tomatoes reflected on United States Department of Agriculture Inspection Certificate Number K-767363-5 (Tr. V at 229-40; RX 6A). United States Department of Agriculture Inspection Certificate Number K-767363-5, signed by William Cashin, establishes that William Cashin conducted an inspection of tomatoes at Respondent Tray-Wrap on June 23, 1999, at 11:10 a.m. (RX 6A; CX 6 at 5). The corresponding FD-302 form states an unnamed source reported that, on June 23, 1999, while at Respondent Tray-Wrap, the source performed an inspection of tomatoes and Anthony Spinale paid him \$100 for the inspection (CX 6 at 3-4).

Anthony Spinale testified he paid William Cashin \$100 in connection with an inspection reflected on United States Department of Agriculture Inspection Certificate Number K-768741-1 (Tr. VI at 97-99; RX 10B). United States Department of Agriculture Inspection Certificate Number K-768741-1, signed by William Cashin, establishes that William Cashin conducted an inspection of potatoes at Respondent G & T on July 15, 1999, at 12:00 p.m. (RX 10B; CX 7 at 5). The corresponding FD-302 form states an unnamed source reported that, on July 15, 1999, at approximately 12:00 noon, he went to Respondent G & T and performed an inspection of a railroad car of potatoes and Anthony Spinale paid him \$100 for the inspection (CX 7 at 3-4).

Anthony Spinale testified he paid William Cashin \$200 in connection with inspections of two loads of potatoes reflected on United States Department of Agriculture Inspection Certificate Numbers K-769382-3 and K-769381-5 (Tr. VI at 108-14; RX 11B, RX 12B). United States Department of Agriculture Inspection Certificate Number K-769382-3, signed by William Cashin, establishes that William Cashin conducted an inspection of potatoes for Respondent G & T on July 26, 1999, at 1:30 p.m. (RX 11B; CX 8 at 7). United States Department of Agriculture Inspection Certificate Number K-769381-5, signed by William Cashin, establishes that William Cashin conducted an inspection of potatoes for Respondent G & T on July 26, 1999, at 12:30 p.m. (RX 12B; CX 8 at 6). The corresponding FD-302 form states an unnamed source reported that, on July 26, 1999, he performed

inspections of two loads of potatoes and Anthony Spinale paid him \$200 for the two inspections (CX 8 at 3-5).

Finally, in *United States of America v. Spinale*, Case Number 1:99 Cr. 01093-(01) (RCC) (S.D.N.Y. 2001), the United States Attorney for the Southern District of New York issued an indictment charging Anthony Spinale with nine counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The nine counts relate to payments made to William Cashin that are reflected in the FD-302 forms (CX 17). Anthony Spinale admitted under oath that he paid William Cashin as alleged in the indictment, as follows:

THE COURT: Mr. Spinale, you are charged in a nine-count Indictment. Count Nine of the Indictment charges you with bribing a public official, in violation of Title 18, United States Code, Section 201(b)(1)(A). . . .

. . . .

Have you seen a copy of the Indictment in which the government makes this charge against you?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you discussed it with your attorney?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you prepared to enter a plea today?

THE DEFENDANT: Yes.

THE COURT: Anthony Spinale, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Mr. Spinale, before a guilty plea can be accepted, I must determine that you understand the plea and its consequences, that the plea is voluntary and that there is a factual

basis for the plea. For that purpose, I must ask you a number of questions and your answers must be under oath.

Do you understand, Mr. Spinale, that the answers you give under oath may subject you to prosecution for perjury if you do not tell the truth?

THE DEFENDANT: Yes, your Honor.

THE COURT:

Mr. Spinale, did you commit the offense which you had been charged with?

THE DEFENDANT: Yes, your Honor.

THE COURT: Tell me in your own words what you did.

THE DEFENDANT: On August 13, 1999, I paid money to Bill Cashin for the purpose of influencing the outcome of his inspection report on a load of potatoes. I told him the specific amount I wanted him to put in the inspection report.

On the other dates in the indictment, I paid Mr. Cashin \$100 per inspection to influence the outcome of the report.

Your Honor, I would like to state I never intended to defraud the shippers who had sent me the produce.

THE COURT: Who is Bill Cashin?

THE DEFENDANT: Bill Cashin is a USDA inspector, produce inspector.

THE COURT:

He was inspecting the produce, is that correct?

THE DEFENDANT: I was paying him to dictate what he was putting into his report.

THE COURT: So it was his job to make reports about the produce that he was inspecting, and you were trying to influence him to write things in the report?

THE DEFENDANT: Yes.

THE COURT: And did you know what you were doing was wrong?

THE DEFENDANT: Yes.

THE COURT: Where did this take place?

THE DEFENDANT: In the Hunts Point Terminal Market, produce market.

CX 19 at 3-4, 10-11.

Based on Anthony Spinale's testimony in this proceeding and admissions in *United States of America v. Spinale*, I find the FD-302 forms accurately reflect payments Anthony Spinale made to William Cashin in connection with the inspection of perishable agricultural commodities, and I find the ALJ erroneously failed to give the FD-302 forms probative weight.

Fourth, Complainant contends the ALJ's determination that William Cashin was not credible, is error (Complainant's Appeal Pet. at 10-12).

The ALJ found "in all aspects where [William Cashin's] testimony conflicted with Mr. Spinale's testimony, Mr. Spinale's testimony was credible and Cashin's was not." (Initial Decision and Order at 81.)

As an initial matter, William Cashin's testimony conflicts with Anthony Spinale's testimony only regarding the purpose and reasons for Anthony Spinale's payments to William Cashin. Both William Cashin and Anthony Spinale testified that Anthony Spinale made payments to William Cashin in connection with William Cashin's inspections of perishable agricultural commodities for Respondents. William Cashin and Anthony Spinale also agreed on the amount of the payments and the

dates of the payments. The only conflict is that Anthony Spinale testified William Cashin engaged in “soft extortion” and he (Anthony Spinale) made the payments to obtain prompt inspections and accurate United States Department of Agriculture inspection certificates, whereas William Cashin testified Anthony Spinale engaged in bribery and made payments to obtain inaccurate United States Department of Agriculture inspection certificates (Tr. I at 81-88, 129-30). As discussed in this Decision and Order, *supra*, the purpose and reasons for Anthony Spinale’s payments to William Cashin are not relevant to this proceeding. A payment to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities, whether the result of extortion evidenced in this proceeding or bribery and whether to obtain accurate or inaccurate United States Department of Agriculture inspection certificates, is a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Judicial Officer’s consistent practice is to give great weight to credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.⁵ The ALJ detailed his reasons for finding William Cashin’s testimony was not credible. While there is some evidence that William Cashin’s testimony regarding the purpose and reasons for Anthony Spinale’s payments to William Cashin is credible, I do not find the record sufficiently strong to reverse the ALJ’s credibility determination.

Fifth, Complainant contends the ALJ erroneously concluded that, to prove a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), Complainant must prove Anthony Spinale’s payments to United States Department of Agriculture inspectors resulted in the issuance of false United States Department of Agriculture inspection certificates and financially benefitted Respondents (Complainant’s Appeal Pet. at 12-15).

The ALJ states Anthony Spinale paid William Cashin to obtain accurate United States Department of Agriculture inspection certificates and Respondents did not benefit financially from the transactions, as follows:

⁵See note 3.

. . . [T]he Court finds that as to the specific dates alleged in the Complaint, the produce really was as poor as the inspection certificate reflected and, in any event, Mr. Spinale did not improperly benefit financially from those transactions.

. . . .

Thus, regarding Cashin, the Court finds that he was extracting a personal “fee” for every *visit* to Mr. Spinale’s place of business and that in no instance was Mr. Spinale benefitting from those visits in the critical ways that USDA asserts. That is to say, in no instance among the dates cited in the Complaint did Mr. Spinale seek or obtain from Cashin an inspection report which downgraded a load of produce from its actual condition. Mr. Spinale, like at least some other merchants at Hunts Point, was paying Cashin in order to receive a prompt and accurate inspection. As USDA recognized, both through witnesses and in its statements through counsel, these inspections involve produce and as such, if they are to be useful, it is critical that inspections be carried out promptly. Because of that fact, Cashin and his cabal of corrupt cronies knew they had merchants like Mr. Spinale over a barrel. The merchants could pay them or risk either a delayed inspection or an inspection which rated produce as acceptable when an honest assessment would determine otherwise.

Initial Decision and Order at 78, 82-83 (emphasis in original) (footnotes omitted).

Complainant does not allege that Respondents made false statements for a fraudulent purpose in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) or that Respondents benefitted financially from Anthony Spinale’s payments to United States Department of Agriculture inspectors. Instead, Complainant alleges Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Compl. ¶ VI).

As stated in this Decision and Order, *supra*, I find commission merchants, dealers, and brokers have a duty to refrain from activities that negate, or give the appearance of negating, the impartiality of United States Department of Agriculture inspectors and activities that undermine the confidence that produce industry members and consumers place in quality and condition determinations rendered by United States Department of Agriculture inspectors. A PACA licensee's payment to a United States Department of Agriculture inspector in connection with an inspection of produce, whether the payment is designed to obtain an accurate United States Department of Agriculture inspection certificate or designed to obtain an inaccurate United States Department of Agriculture inspection certificate and whether the payment benefits the PACA licensee or does not benefit the PACA licensee, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

Therefore, I disagree with the ALJ's conclusion that, to prove a violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), Complainant must prove United States Department of Agriculture inspection certificates issued in connection with Anthony Spinale's payments to United States Department of Agriculture inspectors were false and Respondents benefitted financially from the payments.

Sixth, Complainant contends the ALJ erroneously found United States Department of Agriculture produce inspectors extorted money from Anthony Spinale, erroneously found extortion was relevant to this proceeding, and erroneously found extortion mitigates or exonerates Respondents' illegal payments (Complainant's Appeal Pet. at 16-26).

As stated in this Decision and Order, *supra*, I do not find the reason for Anthony Spinale's payments to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities relevant to this proceeding. Anthony Spinale's payment to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities, whether the result of extortion evidenced in this proceeding or bribery, violates section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Findings of Fact

1. Respondent G & T is a New York corporation whose business and mailing address is B266 New York City Terminal Market, Bronx, New York 10474 (Answer ¶ II).

2. Respondent Tray-Wrap is a New York corporation whose business and mailing address is B266 New York City Terminal Market, Bronx, New York 10474 (Answer ¶ II).

3. At all times material to this proceeding, Respondent G & T was licensed under the PACA. PACA license number 204079 was issued to Respondent G & T on April 3, 1964, when Respondent G & T began operating. Respondent G & T's PACA license has been renewed annually and is next subject to renewal on April 3, 2006. (Answer ¶ II; CX 10, CX 10A.)

4. At all times material to this proceeding, Respondent Tray-Wrap was licensed under the PACA. PACA license number 701550 was issued to Respondent Tray-Wrap on May 13, 1970, when Respondent Tray-Wrap began operating. Respondent Tray-Wrap's PACA license has been renewed annually and is next subject to renewal on May 13, 2006. (Answer ¶ II; CX 11, CX 11A.)

5. At all times material to this proceeding, Anthony Spinale was a director, the president, and the 100 percent owner of Respondent G & T (Tr. II at 205-07; Tr. III at 126-27; CX 10, CX 10A).

6. Anthony Spinale is the founder of Respondent Tray-Wrap and has managed the day-to-day operations of Respondent Tray-Wrap since the inception of Respondent Tray-Wrap. At all times material to this proceeding, Anthony Spinale managed the business operations of Respondent Tray-Wrap. (Tr. III at 110-11, 119-24, 135-37, 145-46.)

7. William Cashin was employed, during the period July 1979 through August 1999, by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, as a produce inspector at the Hunts Point Terminal Market, New York (Tr. I at 66).

8. From 1979 until August 1999, when William Cashin inspected Respondents' perishable agricultural commodities, he dealt with Anthony Spinale. Beginning about 1983 or 1984 until August 1999, Anthony Spinale paid William Cashin in connection with inspections of perishable agricultural commodities at Respondents' place of business. These payments were not made to the Agricultural Marketing Service as payment for normal inspection services, but rather

were cash payments made to William Cashin personally. (Tr. I at 72-81.)

9. During the period July 1999 through August 1999, Respondent G & T, through its president, director, and 100 percent stockholder, Anthony Spinale, made the following payments to a United States Department of Agriculture inspector in connection with four inspections of perishable agricultural commodities that Respondent G & T purchased from one produce seller in interstate or foreign commerce:

a. On July 15, 1999, Respondent G & T paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-768741-1.

b. On July 26, 1999, Respondent G & T paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-769381-5.

c. On July 26, 1999, Respondent G & T paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-769382-3.

d. On August 13, 1999, Respondent G & T paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-770380-4.

(Tr. V at 188-97, 204-05, 209-19, 221, 227-41; Tr. VI at 82-84, 97-99, 108-14; CX 7, CX 8, CX 19 at 3-4, 10-11; RX 10B, RX 11B, RX 12B.)

10. During the period March 1999 through June 1999, Respondent Tray-Wrap, through its employee or agent, Anthony Spinale, made the following payments to a United States Department of Agriculture inspector in connection with six inspections of perishable agricultural commodities that Respondent Tray-Wrap purchased from

four produce sellers in interstate or foreign commerce:

a. On March 24, 1999, Respondent Tray-Wrap paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-678086-0.

b. On March 26, 1999, Respondent Tray-Wrap paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-678091-0.

c. On April 23, 1999, Respondent Tray-Wrap paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-679811-0.

d. On May 20, 1999, Respondent Tray-Wrap paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-765769-5.

e. On June 16, 1999, Respondent Tray-Wrap paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-767032-6.

f. On June 23, 1999, Respondent Tray-Wrap paid \$100 to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities reflected on United States Department of Agriculture Inspection Certificate Number K-767363-5.

(Tr. V at 188-97, 204-05, 209-19, 221, 227-41; Tr. VI at 82-84, 97-99, 108-14; CX 1-CX 6, CX 19 at 3-4, 10-11; RX 1A, RX 2A, RX 3A, RX 4A, RX 5A, RX 6A.)

11. During the period 1990 through 1999, Anthony Spinale paid United States Department of Agriculture produce inspector Edmund

Esposito in connection with inspections of perishable agricultural commodities that Edmund Espoused conducted at Respondents' place of business. These payments were not made to the Agricultural Marketing Service as payment for normal inspection services, but rather were cash payments made to Edmund Esposito personally. (Tr. IV at 183-84, 248-52.)

12. On March 23, 1999, William Cashin was arrested by agents of the Federal Bureau of Investigation and charged with bribery and conspiracy to commit bribery. After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, whereby William Cashin agreed to assist the Federal Bureau of Investigation with an investigation of bribery by produce purchasers at the Hunts Point Terminal Market (Tr. I at 89).

13. During the investigation identified in Finding of Fact 12, William Cashin carried an audio, audio-video, or video recording device and surreptitiously recorded his interactions with various individuals at produce houses at the Hunts Point Terminal Market, including interactions with Anthony Spinale at Respondents' place of business. At the end of each day, William Cashin gave the tapes and any payments received to Federal Bureau of Investigation agents and recounted to Federal Bureau of Investigation agents what had occurred that day. The Federal Bureau of Investigation agents completed FD-302 forms which reflect what William Cashin told them each day. All of the payments alleged in paragraph III of the Complaint and identified in Finding of Fact 9 and Finding of Fact 10 relate to the investigation conducted by the Federal Bureau of Investigation with William Cashin's assistance. (Tr. I at 86-98.)

14. In October 1999, Edmund Esposito was arrested and charged with racketeering. Edmund Esposito pled guilty to bribery in March 2000. (Tr. IV at 184-85.)

15. On October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging Anthony Spinale with nine counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment alleged that Anthony Spinale:

[U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public

official, with intent to influence official acts, to wit, ANTHONY SPINALE, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit[s] and vegetables conducted at Tray-Wrap, Inc. and G & T Terminal Packaging Corp., both located at Hunts Point Terminal Market, Bronx, New York[.]

CX 17 at 1.

The bribes alleged in the indictment, covered payments made to William Cashin in connection with 10 inspections of perishable agricultural commodities identified in Finding of Fact 9 and Finding of Fact 10. (CX 1-CX 9, CX 17.)

16. On August 21, 2001, Anthony Spinale pled guilty to count nine of the criminal indictment (bribery of a public official (18 U.S.C. § 201(b)(1)(A)) and was sentenced to 5 years' probation, 12 months' home confinement, and a \$30,000 fine. (Answer ¶ IV(b); CX 18, CX 20.)

Conclusion of Law

Respondents engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

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

ORDER

1. Respondent G & T's PACA license is revoked. The revocation of Respondent G & T's PACA license shall become effective 60 days after service of this Order on Respondent G & T.

2. Respondent Tray-Wrap's PACA license is revoked. The revocation of Respondent Tray-Wrap's PACA license shall become

effective 60 days after service of this Order on Respondent Tray-Wrap.

In re: M. TROMBETTA & SONS, INC.
PACA Docket No. D-02-0025.
Decision and Order.
Filed September 27, 2005.

PACA – Perishable agricultural commodities – Bribery – Credibility determinations – Acts of employees and agents – Scope of employment – Willful, flagrant, and repeated violations – License revocation.

The Judicial Officer affirmed Administrative Law Judge Jill S. Clifton's (ALJ) decision concluding Respondent's payments, through its employee Joseph Auricchio, to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities constituted violations of 7 U.S.C. § 499b(4). The Judicial Officer rejected Respondent's contention that Joseph Auricchio was not acting within the scope of his employment when he made illegal payments to United States Department of Agriculture produce inspectors. The Judicial Officer found Administrative Law Judge Jill S. Clifton relied on the proper factors to determine whether Joseph Auricchio was acting within the scope of his employment and found no basis upon which to reverse the ALJ's credibility determinations. The Judicial Officer rejected Respondent's contention that revocation of Respondent's PACA license was unduly harsh, stating the revocation of Respondent's PACA license was warranted in law and justified in fact.

Andrew Y. Stanton, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a Complaint on August 16, 2002. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the

PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

Complainant alleges: (1) during the period April 1999 through July 1999, M. Trombetta & Sons, Inc. [hereinafter Respondent], through its employee, Joseph Auricchio, made illegal payments to a United States Department of Agriculture inspector in connection with seven false United States Department of Agriculture inspection certificates associated with seven transactions involving perishable agricultural commodities which Respondent purchased, received, and accepted from six sellers in interstate or foreign commerce; (2) on June 28, 2000, the United States District Court for the Southern District of New York entered a judgment in which Joseph Auricchio pled guilty to bribery of a public official in violation of 18 U.S.C. § 201(b); (3) Respondent made illegal payments to a United States Department of Agriculture inspector on numerous occasions prior to the period April 1999 through July 1999; and (4) Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce (Compl. ¶¶ III-VI). On October 4, 2002, Respondent filed an Answer denying the material allegations of the Complaint and raising five affirmative defenses.

On July 14-18, 21-23, 2003, and August 21, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted an oral hearing in New York, New York. David A. Richman, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.¹ Mark C. H. Mandell, Law Firm of

¹On January 31, 2005, Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, entered an appearance on behalf of Complainant, replacing David A. Richman as counsel for Complainant (Notice of Appearance, filed January 31, 2005).

Mark C. H. Mandell, Annandale, New Jersey, represented Respondent.²

On February 6, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order Pertaining Only to the Disciplinary Proceeding. On April 12, 2004, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, and Order. On April 30, 2004, Complainant filed Complainant's Reply to Respondent's Proposed Findings of Fact, Conclusions of Law, and Order.

On May 12, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) finding, during the period April 1999 through July 1999, Respondent, through its employee and agent, paid unlawful bribes and gratuities to a United States Department of Agriculture inspector in connection with seven federal inspections of perishable agricultural commodities which Respondent purchased, received, and accepted from six sellers in interstate or foreign commerce; (2) concluding Respondent engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities received or accepted in interstate or foreign commerce; (3) ordering publication of the facts and circumstances of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license (Initial Decision and Order at 20, 23).

On July 21, 2005, Respondent appealed to the Judicial Officer, and on August 3, 2005, Complainant filed Complainant's Response to Appeal Petition. On August 10, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, except for minor modifications, pursuant to section 1.145(I) of the Rules of Practice (7 C.F.R. § 1.145(I)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer

²On June 29, 2005, Paul T. Gentile, Gentile & Dickler, New York, New York, entered an appearance on behalf of Respondent, replacing Mark C. H. Mandell as counsel for Respondent (Letter from Paul T. Gentile and Mark C. H. Mandell to the Hearing Clerk, filed June 29, 2005).

follow the ALJ's conclusions, as restated.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Administrative Law Judge exhibits are designated "ALJX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

**CHAPTER 20A—PERISHABLE AGRICULTURAL
COMMODITIES**

....

§ 499b. Unfair conduct

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

....

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

section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, 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.

....

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499b(4), 499h(a), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

.....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—
(1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

.....

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

(b) Whoever—
(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
(A) to influence any official act[.]

.....

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A).

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

Decision Summary

Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period April 1999 through July 1999, at the Hunts Point Terminal Market in the Bronx, New York. Specifically, Respondent, through its employee Joseph Auricchio, made seven illegal cash payments to United States Department of Agriculture produce inspector William J. Cashin in connection with seven federal inspections of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce from six produce sellers. In addition, Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) on numerous occasions prior to the period April 1999 through July 1999, at the Hunts Point Terminal Market in the Bronx, New York. Specifically, Respondent, through its employee Joseph Auricchio, made illegal cash payments to United States Department of Agriculture produce inspectors in connection with federal inspections of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce from produce sellers. Respondent is responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee Joseph Auricchio, who, in the scope of his employment, paid the unlawful bribes and gratuities to United States Department of Agriculture produce inspectors. Under the PACA, the acts of the employee are deemed to be

the acts of the employer. Making illegal payments to United States Department of Agriculture produce inspectors was an egregious failure by Respondent to perform its duty under the PACA to maintain fair trade practices. The revocation of Respondent's PACA license is commensurate with the seriousness of Respondent's violations of the PACA.

Findings Of Fact

1. Respondent is a New York corporation, holding PACA license number 021070, with an address of Units 102-105, Hunts Point Terminal Market, Bronx, New York 10474 (CX 1).

2. Respondent was started in the 1890s, and the fifth generation of the family is now in the business. The current managers are Philip James Margiotta, also known as Philip J. Margiotta (at the Hunts Point Terminal Market), and Stephen Trombetta (at the Bronx Terminal Market). (Tr. 500, 504, 1677.)

3. At all times material to this proceeding, Philip Joseph Margiotta, also known as P.J. Margiotta, owned 60 percent of Respondent and Stephen Trombetta owned 40 percent of Respondent (CX 1; Tr. 1676-77).

4. At all times material to this proceeding, Respondent's president and treasurer were Philip Joseph Margiotta; Respondent's vice president was Stephen Trombetta; and Respondent's secretary was Philip James Margiotta (CX 1; Tr. 1662, 1679).

5. Respondent began doing business in the Hunts Point Terminal Market in the Bronx, New York, when Hunts Point Terminal Market opened, in about 1967 or 1968 (Tr. 502).

6. Respondent hired Joseph Auricchio in about 1994 to perform various jobs. At all times material to this proceeding, Mr. Auricchio worked for Respondent. In 1999, Mr. Auricchio worked as a salesperson for Respondent. (Tr. 504-05, 508, 1158.)

7. In 1999, Joseph Auricchio earned between \$800 and \$900 per week as a salesperson for Respondent. While Mr. Auricchio did not earn any commissions as part of his salary, he received bonuses equivalent to 1 or 2 weeks pay at Christmas. (Tr. 1131.)

8. On March 14, 2000, Joseph Auricchio pled guilty to one

count of the four-count indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000). The elements of the offense, bribery of a public official, to which Joseph Auricchio pled guilty, are that he gave a thing of value to a person who is a public official with the corrupt intent to influence an official act by that public official. (CX 4; RX N.)

9. In connection with his guilty plea, Joseph Auricchio told Judge Harold Baer, Jr., under oath, that on July 7, 1999, he offered a government official \$100 to inspect a load of vegetables at the Hunts Point Terminal Market in the Bronx, New York; that he knew what he was doing was wrong; that he did it willfully and knowingly; that the government official was a United States government inspector; and that he wanted the inspector to lower the grade of the vegetables, so that “we could sell it cheaper.” (RX N at 12-14).

10. On June 21, 2000, Joseph Auricchio was found to have paid approximately \$29,100 in cash bribes³ to United States Department of Agriculture produce inspectors at the Hunts Point Terminal Market between 1996 and September 1999 (the only time period for which data was available), in connection with inspections of fresh fruits and vegetables for Respondent and was sentenced on count four of the indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000), to the custody of the Bureau of Prisons for 1 year 1 day; followed by supervised release of 2 years; plus a \$5,000 fine; plus a \$100 special assessment. The other three counts of the four-count indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000), were dismissed. (ALJX 1; CX 4.)

11. The one count of bribery of a public official on July 7, 1999, of which Joseph Auricchio was convicted (CX 4), was based on the undercover work of William J. Cashin, a United States Department of Agriculture produce inspector at the Hunts Point Terminal Market who had for many years accepted unlawful bribes and gratuities from many produce workers.

12. From July 1979 until August 1999, William J. Cashin was

³The \$29,100 in cash bribes paid by Joseph Auricchio was determined by agreement of the parties for sentencing purposes (ALJX 1 at 2 n.1).

employed as a produce inspector for the United States Department of Agriculture at the Hunts Point, New York, office of the United States Department of Agriculture's Fresh Products Branch (Tr. 128-29).

13. William J. Cashin first inspected produce for Respondent when Mr. Cashin started working for the United States Department of Agriculture, in 1979 (Tr. 134).

14. William J. Cashin was not paid a bribe in connection with the inspection of produce for Respondent until Joseph Auricchio began paying him bribes in 1997 (Tr. 137, 142).

15. William J. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at the Hunts Point Terminal Market where Mr. Auricchio worked before he started working for Respondent (Tr. 139).

16. William J. Cashin agreed, immediately after having been arrested on March 23, 1999, to cooperate with the Federal Bureau of Investigation in its investigation of bribery of United States Department of Agriculture inspectors at the Hunts Point Terminal Market by continuing to operate as he had in the past and reporting daily the payments he collected (Tr. 143; CX 6-CX 9).

17. In response to William J. Cashin's daily reports, the Federal Bureau of Investigation prepared FD-302 forms which reflect what William J. Cashin told them each day (CX 5, CX 6 at 1-2, CX 7 at 1-2, CX 8 at 1-3, CX 9 at 1-2). The portions of the FD-302 forms which correlate to the unlawful bribes and gratuities Mr. Cashin received from Joseph Auricchio are organized for each count of the indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000), together with applicable United States Department of Agriculture inspection certificates, which show Respondent as having applied for the inspections. (CX 6-CX 9.)

18. Joseph Auricchio was acting in the scope of his employment as a produce salesperson for Respondent when he paid the unlawful bribes and gratuities. When Joseph Auricchio paid the unlawful bribes and gratuities, he was acting on behalf of Respondent; the unlawful payments could have benefitted Respondent; the unlawful payments were incorporated into Joseph Auricchio's regular work routine for Respondent; Joseph Auricchio made the unlawful payments on a regular basis; Joseph Auricchio was at his regular work place at Respondent

when he made the unlawful payments; and Joseph Auricchio made the unlawful payments during his regular work hours for Respondent (Tr. 363-65).

19. Joseph Auricchio was acting within the scope of his employment as a produce salesperson for Respondent each time he paid an unlawful bribe or gratuity to William J. Cashin, as reported in CX 6 through CX 9 and as reflected in count four of the indictment in *United States v. Auricchio*, Case No. 99 CR 01088-001 (HB) (S.D.N.Y. June 28, 2000), regardless of whether anyone at Respondent directed Joseph Auricchio to make the unlawful payments, provided Joseph Auricchio the money to make the unlawful payments, or was even aware that Joseph Auricchio was making the unlawful payments (Tr. 363-64).

20. After careful consideration of all the evidence before me, I accept as credible the testimony of Joan Marie Colson; William J. Cashin; John Aloysius Koller; Philip James Margiotta; Peter Silverstein; Max Montalvo; Frank J. Falletta; Matthew John Andras; Harlow E. Woodward, III; Stephen Trombetta; Martin A. Shankman; Patricia Baptiste; Philip Harry Lucks; and Philip Joseph Margiotta.

Discussion

Respondent's employee, Joseph Auricchio, paid unlawful bribes and gratuities to United States Department of Agriculture produce inspector William J. Cashin during the period April 20, 1999, through July 7, 1999, in connection with produce inspections requested by Respondent. In addition, Respondent's employee, Joseph Auricchio, on numerous occasions prior to the period April 1999 through July 1999, paid unlawful bribes and gratuities to United States Department of Agriculture produce inspectors in connection with produce inspections requested by Respondent. The only question is whether Joseph Auricchio's unlawful bribes and gratuities causes his employer, Respondent, to suffer the consequences under the PACA.

Respondent argues that the seven United States Department of Agriculture inspection certificates issued by William J. Cashin during the period April 20, 1999, through July 7, 1999, may not have contained any false information. Respondent suggests that what William J. Cashin recorded was true; that in actuality, he gave no "help." I do not discuss

the evidence that Respondent cites in support of its argument (*see* Respondent's Proposed Findings of Fact, Conclusions of Law, and Order), because the outcome here remains the same even if the United States Department of Agriculture inspection certificates were accurate. A payment to a United States Department of Agriculture inspector to obtain an accurate United States Department of Agriculture inspection certificate negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture inspector and undermines the confidence produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture inspector. Commission merchants, dealers, and brokers have a duty to refrain from paying United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture inspectors. A PACA licensee's payment to a United States Department of Agriculture inspector, whether it is to obtain an accurate United States Department of Agriculture inspection certificate or an inaccurate United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

Respondent argues Complainant's entire case is founded upon the allegation that the United States Department of Agriculture inspection certificates in issue contained false information (Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 21). I disagree. Making unlawful payments to a United States Department of Agriculture produce inspector is an unfair trade practice, regardless of the produce inspector's response (Complainant's Reply to Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 15-16).

Respondent argues that the recorded conversations between Joseph Auricchio and United States Department of Agriculture produce inspector William J. Cashin, while Mr. Cashin was working undercover, impeach Mr. Cashin's credibility when Mr. Cashin testified that he "gave help" by reporting the produce he inspected to be in worse

condition than it actually was (RX P, RX V). I disagree. The recorded conversations upon which Respondent relies, reveal caution on the part of both Mr. Auricchio and Mr. Cashin regarding the extent to which the produce should be misrepresented, if at all, but I find Mr. Cashin's testimony to be credible. The daily reporting to the Federal Bureau of Investigation, while Mr. Cashin was working undercover, provides reliable verification of Joseph Auricchio's unlawful payments on behalf of Respondent to a United States Department of Agriculture produce inspector (CX 6-CX 9).

United States Department of Agriculture produce inspector William J. Cashin testified, as follows:

[BY MR. RICHMAN:]

Q. Was there any basic understanding between you and Mr. Auricchio about what you would be doing with regard to your inspections for Respondent?

[BY MR. CASHIN:]

A. Yes.

Q. What was that understanding?

A. He was looking for help on the various loads of produce.

Q. And how did that understanding come about between you and Mr. Auricchio?

A. At M. Trombetta I don't remember the exact how it came about there, but I knew Joe Joe from another location in the market before he started working at Trombetta.

Q. And you had that understanding from that time as well?

A. Yes.

Q. How did Mr. Auricchio let you know that he wanted help on a particular load?

A. Usually I would in fact every time he was there, when I was sent to Trombetta, I would always talk to him. And he and I would discuss the load and he would tell me he needed help on the load.

Q. And what was your understanding of the meaning of the phrase help, when it was requested in connection with the produce inspection?

A. Help came in any one of three ways, and they weren't always done at the same time. The first one was he was asking me to write the condition defects on the certificate in such a way that they were over the delivery marks.

Q. Can you explain that actually what is good delivery?

A. Okay, in the USDA Standards there are tolerances for certain defects. The delivery standards are a parallel set of standards set forth either by the PACA or within the industry itself and these standards were set a little bit higher than the USDA Standards. And for example if the USDA allowed three percent decay in a certain defect, the good delivery standard would be five percent. So one of the ways of help was that Joe Joe would want me to write the product up in such a way that it was over the good delivery standard, because he didn't want the product to fail USDA, but still make good delivery.

Q. Okay and you mentioned there are three ways in which you would give help?

A. Yes, the second way was the number of

containers. He sometimes would need or want the number of containers reported on the certificate to closely match to the manifest of what was originally sent when loaded.

Q. Why would you do that?

A. It was my understanding it would make the certificate more legitimate, and also they would get more money back from the shippers.

Q. And what is the third way that you would give help?

A. The third help was temperature. You would need the temperature reported on the certificate to closely match the accepted levels of shipment. So again it would lend legitimacy to the inspection certificate.

Q. Were the figures that you put down on the inspection certificate when you gave help, an accurate reflection of the produce you were inspecting?

A. No.

Q. When you gave help with respect to the condition of the produce, how would the figure that you put down on the certificate for the condition of the produce help the Respondent?

A. Again, it was my understanding that they would be able to get more money back from the shippers or renegotiate their deals.

Q. And when you gave help with respect to the quantity of the produce, I think you just answered this, but just to clarify. When you gave help with respect to the quantity of the produce inspected, how would the figures you put down for the

quantity of the produce inspected help the Respondent?

A. Again, it was my understanding that it would lend legitimacy to the certificate and they were able to get more money back.

Q. And when you gave help with respect to the temperature of the produce, how would the figures that you put down for the temperature of the produce help the Respondent?

A. It again was my understanding it would lend legitimacy to the whole inspection package.

Q. On what percentage of the loads that you inspected of Respondent would you give help?

A. When Joe Joe was there, about 100 percent.

Q. And when did you first start receiving these payments at Trombetta?

A. In 1997.

Tr. 139-42.

Respondent argues Joseph Auricchio's payments to William J. Cashin may not have been "in connection with a produce transaction" (Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 22). Respondent's argument is strained in light of all the evidence that the money Joseph Auricchio gave William J. Cashin was in connection with a produce transaction. But this is how Respondent summarizes it:

Without an active Auricchio connection to the purchasing of the produce shipments and/or negotiations with suppliers, or Respondent's actual knowledge (with active or tacit approval) of Auricchio's alleged illegal activities down in the

sales booth, the vital link between the actions alleged by Complainant and the produce transactions it seeks to protect is broken, and Complainant cannot establish the violations of Section 2(4) that it has alleged. Since Complainant has failed to make that connection, the Complaint must be dismissed.

Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 23.

I disagree. Joseph Auricchio worked for Respondent. Even though Philip James Margiotta, the buyer/broker for much of the produce, may have had no idea that Mr. Auricchio was arranging for incoming produce to be reported by the United States Department of Agriculture produce inspector to be in worse condition than it actually was, the unlawful payments were nonetheless made in connection with produce transactions. Further, even though Respondent's negotiations of the prices to be paid for the incoming produce may have been honest and trustworthy, the unlawful payments were nonetheless made in connection with produce transactions.

Respondent argues that it provided proper supervision for Joseph Auricchio (Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 22-23). Actually, Respondent did very little, in 1999 and before, to surveil its own employees (Tr. 1140-55). During the time since Joseph Auricchio's criminal activity was exposed, Respondent has taken commendable precautions (Tr. 1161-63).

Respondent argues United States Department of Agriculture inspectors may have committed extortion and Joseph Auricchio may have been the victim of extortion (RX O; Respondent's Proposed Findings of Fact, Conclusions of Law, and Order at 27). There is no evidence that Joseph Auricchio was the victim of extortion (ALJX 1; Tr. 1129-30).

Section 16 of the PACA (7 U.S.C. § 499p) incorporates principal-agent common law, making no exception for criminal activity of the agent. Both the United States Court of Appeals for the District of

Columbia Circuit⁴ and the United States Court of Appeals for the Sixth Circuit⁵ have affirmed the use of the PACA principal-agency provision under circumstances like those in this proceeding.

Respondent argues that section 16 of the PACA (7 U.S.C. § 499p) is inapplicable to this case. Respondent argues that Joseph Auricchio's illegal payments to United States Department of Agriculture produce inspector William J. Cashin were beyond the scope of his employment; that Joseph Auricchio's criminal activity cannot have been within the scope of his employment and cannot become Respondent's violation of the PACA. I find to the contrary, that Joseph Auricchio was working within the scope of his employment when he paid the unlawful bribes and gratuities.

Joseph Auricchio did pay the unlawful bribes and gratuities within the scope of his employment as Respondent's produce salesperson. During Joseph Auricchio's working hours, at Respondent's location, as part of his job as a salesperson for Respondent, Joseph Auricchio met with United States Department of Agriculture produce inspectors to give them the information needed regarding the produce inspections. (Tr. 363-65.) Making illegal payments to the United States Department of Agriculture produce inspectors in connection with the produce inspections, even if he did that on his own, unknown to others, did not remove Joseph Auricchio from the scope of his employment.

Even if Joseph Auricchio was not authorized or directed by Respondent to pay unlawful bribes and gratuities to United States Department of Agriculture inspectors, and even if Respondent was unaware of his payments to United States Department of Agriculture inspectors, Respondent is indeed responsible under the PACA for Joseph Auricchio's unlawful bribes and gratuities in connection with the produce inspections ordered by Respondent.⁶

Regarding payment of the unlawful bribes and gratuities, there may

⁴*Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

⁵*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584 (6th Cir. 2003).

⁶7 U.S.C. § 499p; *Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584 (6th Cir. 2003).

not have been unity between employee and employer factually, but the principal-agent legal principle imposes unity between employee and employer. Consequently, whether Joseph Auricchio was authorized or directed by his employer to pay the unlawful bribes and gratuities does not affect the disposition of this proceeding.

After careful review of the evidence as a whole, I am unable to determine whether anyone at Respondent, besides Joseph Auricchio, was involved in making the unlawful payments. It is difficult to believe that Joseph Auricchio paid the unlawful bribes and gratuities out of his own pocket. The evidence fails to prove whether the money Joseph Auricchio gave United States Department of Agriculture inspectors was his own money, or Respondent's money, or money from some other source.

Joseph Auricchio was not a witness. From the evidence, including particularly the plea agreement letter (ALJX 1) and the transcript of Mr. Auricchio's guilty plea (RX N), there is no evidence suggesting that anyone at Respondent, besides Joseph Auricchio, may have been involved in paying the unlawful bribes and gratuities. Joseph Auricchio did not implicate his employer. The evidence does not prove that anyone else at Respondent knew Joseph Auricchio was illegally giving money to United States Department of Agriculture inspectors.

John A. Koller, a senior marketing specialist employed by the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, testified that bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the United States Department of Agriculture recommends PACA license revocation as the only adequate option. I agree. I find Joseph Auricchio's actions within the scope of his employment are deemed to be the actions of Respondent and those actions were so egregious that nothing less than PACA license revocation is an adequate remedy. Mr. Koller explained the United States Department of Agriculture's recommendation for PACA license revocation as follows:

[BY MR. RICHMAN:]

Q. Are you aware of the sanction Complainant

recommends in this case?

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of the sanction?

A. I participated in the development of the sanction recommendation.

Q. And what is the sanction recommendation in this case?

A. A license revocation.

Q. And what is the basis for Complainant's sanction recommendation?

A. Well, the basis of Complainant's recommendation for a license revocation is based on several factors. The evidence clearly shows that Respondent paid bribes to a produce inspector. The FBI has documented that over a two-and-a-half month period of time, bribery payments were made that affected seven inspections. Further aggravating the situation, Mr. Cashin has testified that he had been accepting bribes from Respondent since 1997. And bribery payments to a produce inspector has an effect on the trade as a whole. And these -- what will happen is thousands of dollars in adjustments could arise or will arise from these false inspections. Another factor is the industry relies on the produce -- on the inspection certificate to quickly resolve disputes. And approximately 150,000 inspections are performed each year by the Fresh Products Branch, and it is important that these inspections are accurate. If there is any suspicion that these inspections have been tainted due to bribery payments being made to the Produce Inspector to change the outcome of the results, change the outcome of the

inspection, this is something that affects the industry as a whole. Because as the sellers become aware of this bribery situation coming along, then it affects the credibility of the inspection certificate itself and the inspection process. It provides a problem for the industry. The trades rely on the results of that inspection to be impartial and accurate. Another concern is the concern of when you have got a wholesaler that is paying bribes to a produce inspector, other wholesalers on the market may very well feel -- may very well pay bribes as well to the produce inspector. For example, when you have got a wholesaler in the Hunts Point Market who is paying bribes to a produce inspector to affect the outcome of the inspection and be in a position to get price adjustments on a particular commodity, then they will be able to sell the produce for less. And when other wholesalers become aware of this, they will feel that they are in a position to have to pay the bribes as well in order to compete with the wholesalers that are paying these bribes. And again, with this in consideration, the effects that this causes on the inspection process and the effect on the Hunts Point Market itself is that whether there is a wholesaler paying bribes or not, it casts a concern to the industry as to who they can rely on in the market there at the market -- the wholesalers on the market. Excuse me. And finally, the Department strongly believes that a strong sanction not only on the Respondent will also -- will not only be a deterrent to Respondent, but will also be a deterrent to other members of the trade who are contemplating making bribery payments to a produce inspector.

.....

Q. Does the fact that it was Mr. Cashin, a USDA employee, who received the bribes, have any effect on Complainant's sanction recommendation?

A. No.

Q. Why not?

A. Bribery payments being made to a produce inspector is a serious violation of the PACA. Whether it is to a produce inspector or to any member of the trade, and in the situation where a produce inspector has taken bribes on an inspection, does not excuse the PACA licensee from those actions of committing the bribery itself.

Q. Does Complainant recommend a civil penalty in this case as an alternative to license revocation?

A. No.

Q. Why not?

A. The Department feels that -- or it believes that this type of violation is a most serious violation under the Act. And as, you know, the effects of bribery payments, you know, first off, it is bribery payments of the produce inspector. You have got that. The bribery payments have been taking place over a period of time, they are repeated. The bribery payments affect the credibility of the inspection certificate, and then that consequently affects the reliability and credibility of that inspection to the industry to quickly resolve disputes. The other concern, again, is the competitive nature, the competitive aspect of the industry on the Hunts Point Market or any other market. If you have got firms paying bribes that are giving -- that are getting an advantage with price adjustments, there again, causes a problem with competition. Those firms that are not in the same situation, they are not able to compete in that situation. Also, the aspect of Department -- in order to deter this type of action, this violation, from occurring, a strong sanction of a license revocation to deal with one of these most serious violations of the Act would be the appropriate thing. And the Department has also consistently recommended that a revocation of a license be the recommendation for sanction where a serious violation of the PACA by committing a bribe has taken place.

Q. Is that the policy of the Department?

A. That is the policy of the Department.

Tr. 367-71.

Conclusions

Joseph Auricchio, Respondent's employee, paid unlawful bribes and gratuities to a United States Department of Agriculture inspector, during the period April 1999 through July 1999, in connection with seven federal inspections involving perishable agricultural commodities which Respondent purchased, received, and accepted from six sellers in interstate or foreign commerce. In addition, Joseph Auricchio, on numerous occasions, paid unlawful bribes and gratuities to United States Department of Agriculture inspectors prior to the period April 1999 through July 1999, in connection with federal inspections involving perishable agricultural commodities which Respondent purchased, received, and accepted from produce sellers in interstate or foreign commerce.

Joseph Auricchio was acting in the scope of his employment as a produce salesperson for Respondent, when he paid unlawful bribes and gratuities to United States Department of Agriculture inspectors in connection with federal inspections involving perishable agricultural commodities which Respondent purchased, received, and accepted from produce sellers in interstate or foreign commerce, even if what he did was unauthorized. When Joseph Auricchio paid the unlawful bribes and gratuities, he was acting on behalf of Respondent; the unlawful payments could have benefitted Respondent; the unlawful payments were incorporated into Joseph Auricchio's regular work routine for Respondent; Joseph Auricchio made the unlawful payments on a regular basis; Joseph Auricchio was at his regular work place at Respondent when he made the unlawful payments; and Joseph Auricchio made the unlawful payments during his regular work hours for Respondent.

Joseph Auricchio was acting as Respondent's agent when he paid unlawful bribes and gratuities to United States Department of Agriculture inspectors in connection with federal inspections involving

perishable agricultural commodities which Respondent purchased, received, and accepted from produce sellers in interstate or foreign commerce.

Joseph Auricchio's willful violations of the PACA are deemed to be Respondent's willful violations of the PACA. *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

Respondent, through its employee and agent, paid unlawful bribes and gratuities to United States Department of Agriculture inspectors in connection with federal inspections involving perishable agricultural commodities which Respondent purchased, received, and accepted from produce sellers in interstate or foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent is responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee who paid the unlawful bribes and gratuities to the United States Department of Agriculture produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, without reasonable cause, to perform an implied duty, arising out of any undertaking in connection with transactions involving perishable agricultural commodities purchased, received, and accepted in interstate or foreign commerce.

The duty that Respondent failed to perform is the duty to maintain fair trade practices required by the PACA. Paying unlawful bribes and gratuities to United States Department of Agriculture produce inspectors is an unfair trade practice and failure to maintain fair trade practices. Regardless of a produce inspector's response -- even if the produce inspector had not falsified the United States Department of Agriculture inspection certificates -- and even if the wholesaler gained no unfair economic advantage and made no attempt to gain any unfair economic advantage -- making unlawful payments to a United States Department of Agriculture produce inspector is an unfair trade practice. The unlawful payments to the United States Department of Agriculture produce inspectors were egregious even if Respondent got nothing in return. *JSG Trading Corp. v. United States Dep't of Agric.*, 235 F.3d

608, 614-15 (D.C. Cir. 2001).

Respondent's violations of the PACA were egregious, requiring a remedy of suspension or revocation. *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 780-81 (2003). Although suspension was the chosen remedy in *Geo. A. Heimos*, which concerned Geo. A. Heimos' employees altering inspection certificates, suspension would not be adequate to respond to the seriousness of Respondent's failures.

Respondent's failures threatened the integrity of the United States Department of Agriculture inspection process, casting suspicion on inspection results and tending to taint the marketplace.

Considering all of the evidence, Respondent, but for the actions of Joseph Auricchio, appears to have been trustworthy, honest, and fair-dealing. For the purpose of this Decision and Order, I find no culpability on the part of anyone within Respondent other than Joseph Auricchio. Of particular significance is that United States Department of Agriculture produce inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years and had been inspecting at Respondent's place of business for about 20 years, collected no bribes from Respondent until Joseph Auricchio started to work as a salesperson for Respondent in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working for Respondent. Nevertheless, I hold Respondent responsible for the actions of Joseph Auricchio, just as if Respondent itself had performed each of Mr. Auricchio's acts.

The United States Department of Agriculture is charged with overseeing the integrity of the United States Department of Agriculture inspection process and must take appropriate action against a PACA licensee committing an unfair trade practice, even if only one employee of the PACA licensee commits the unfair trade practice, and whether or not such employee is a manager, supervisor, officer, director, or shareholder of the PACA licensee.

Revocation of Respondent's PACA license is commensurate with the seriousness of Respondent's violations of the PACA (Tr. 367-71). Any lesser remedy than license revocation would not be commensurate with the seriousness of Respondent's PACA violations, even though many of

Respondent's competitors were committing like violations, and even though United States Department of Agriculture inspectors who took the unlawful bribes and gratuities were arguably more culpable than those that paid them (Tr. 367-71).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's Appeal Petition

Respondent raises five issues in Respondent's Appeal Petition. First Respondent asserts the ALJ's findings of fact are not supported by the evidence (Respondent's Appeal Pet. at 2-3).

I disagree with Respondent. I have carefully reviewed the record. I find the ALJ's findings of fact are supported by reliable, probative, and substantial evidence.

Second, Respondent contends the ALJ erroneously concluded Joseph Auricchio acted within the scope of his employment when he made payments to United States Department of Agriculture produce inspector William J. Cashin. Respondent asserts Mr. Auricchio was employed by Respondent as a "dock" salesperson with limited duties and responsibilities. Specifically, Respondent asserts Mr. Auricchio was not authorized to purchase produce, order inspections of produce, or negotiate prices paid for produce. (Respondent's Appeal Pet. at 4-6.)

As an initial matter, the evidence establishes that, at all times material to this proceeding, Joseph Auricchio had authority to order United States Department of Agriculture inspection of produce for Respondent (Tr. 532-33, 1117). Moreover, the issue in this proceeding is not Mr. Auricchio's authority to order produce, order United States Department of Agriculture inspection of produce, or negotiate prices, but rather, Mr. Auricchio's payments to United States Department of Agriculture inspectors in connection with the inspection of produce for Respondent.

Respondent contends the ALJ relied upon the wrong factors when determining whether Joseph Auricchio acted in the scope of his employment with Respondent when he paid a United States Department of Agriculture inspector in connection with the inspection of produce. The ALJ cited the following factors as the basis for her determination

that Mr. Auricchio was acting within the scope of his employment:

Joseph ("Joe Joe") Auricchio was acting in the scope of his employment as a produce salesman for Trombetta, Inc. when he paid the unlawful bribes and gratuities. When he paid the unlawful bribes and gratuities, he was acting on behalf of his employer, Trombetta, Inc.; the unlawful payments could have benefited Trombetta, Inc.; the unlawful payments were incorporated into his regular work routine for Trombetta, Inc.; he made the unlawful payments on a regular basis; he was at his regular work place at Trombetta, Inc. when he made the unlawful payments; and he made the unlawful payments during his regular work hours for Trombetta, Inc. Tr. 363-65.

Initial Decision and Order at 7. Generally, the factors considered to determine whether conduct of an employee or agent is within the scope of employment are: (1) whether the conduct is of the kind the employee or agent was hired to perform;⁷ (2) whether the conduct occurs during working hours; (3) whether the conduct occurs on the employment premises; and (4) whether the conduct is actuated, at least in part, by a purpose to serve the employer or principal.⁸ I find the ALJ considered the proper factors to determine whether Joseph Auricchio was acting within the scope of his employment with Respondent, and I agree with the ALJ's finding that Mr. Auricchio was acting within the scope of employment with Respondent when he paid United States Department of Agriculture inspectors in connection with the inspection of produce for Respondent.

Third, Respondent contends the ALJ erroneously concluded William J. Cashin's testimony was credible. Respondent asserts William J. Cashin gave perjured testimony. Specifically, Respondent asserts Mr. Cashin testified that he falsified United States Department

⁷Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

⁸See generally Restatement (Second) of Agency § 228 (1958).

of Agriculture inspection certificates in connection with his July 7, 1999, inspection of potatoes and lemons for Respondent, but that audio-visual tapes of conversations between Mr. Auricchio and Mr. Cashin regarding the inspection clearly establish that Mr. Auricchio told Mr. Cashin to issue accurate United States Department of Agriculture inspection certificates. (Respondent's Appeal Pet. at 7.)

I find nothing on the audio-visual tape (RX P) that supports Respondent's assertion that William J. Cashin gave perjured testimony regarding his falsification of the United States Department of Agriculture inspection certificates relating to the July 7, 1999, inspection of potatoes and lemons for Respondent (CX 9 at 3-4). Instead, I agree with the ALJ that the conversations on the audio-visual tape "reveal caution on the part of both Mr. Auricchio and Mr. Cashin[] regarding the extent to which the produce should be misrepresented, if at all" (Initial Decision and Order at 9). Therefore, I reject Respondent's assertion that Mr. Cashin gave perjured testimony.

Respondent also finds remarkable the ALJ's determination that William J. Cashin was credible in light of his taking bribes and committing tax fraud. Mr. Cashin's previous crimes implicate his credibility. However, the Judicial Officer's consistent practice is to give great weight to credibility determinations of administrative law judges, since they have the opportunity to see and hear witnesses testify.⁹ I find

⁹*In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____, slip op. at 16 (Sept. 8, 2005); *In re Southern Minnesota Beet Sugar Cooperative*, 64 Agric. Dec. 580, 605-09 (2005); *In re Excel Corp.*, 62 Agric. Dec. 196, 244-46 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 210 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (2004); *In re Wallace Brandon* (Decision as to Jerry W. Graves and Kathy Graves), 60 Agric. Dec. 527, 561-62 (2001), *appeal dismissed sub nom. Graves v. United States Dep't of Agric.*, No. 01-3956 (6th Cir. Nov. 28, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 602 (1999); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1055-56 (1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *aff'd*, 99 F. Supp.2d 1308 (D. Kan. 1998), *aff'd*, 12 Fed. Appx. 718 (10th Cir.), *cert. denied*, 534 U.S. 1440 (2001); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock's 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 (Table), 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, (continued...)

no basis on the record before me for reversing the ALJ's credibility determination.

Fourth, Respondent contends the ALJ erroneously relied on Joseph Auricchio's plea of guilty to bribery of a public official in connection with a United States Department of Agriculture inspection of potatoes on July 7, 1999, as Mr. Auricchio was not telling the truth when he stated during his allocution, he paid Mr. Cashin so that Respondent could sell produce at a cheaper price (Respondent's Appeal Pet. at 8).

On October 21, 1999, the United States Attorney for the Southern District of New York issued an indictment charging Joseph Auricchio with four counts of bribery of a public official in violation of 18 U.S.C. § 201(b). The indictment states Joseph Auricchio:

[U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, JOSEPH AURICCHIO, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the outcome of inspections of fresh fruit and vegetables conducted at M. Trombetta & Sons, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	4/20/99	\$100
TWO	5/11/99	\$100
THREE	6/16/99	\$50
FOUR	7/7/99	\$100

⁹(...continued)

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).

CX 3. Mr. Auricchio plead guilty to count four of the indictment, and admitted, under oath, that he paid William J. Cashin a bribe of \$100, as alleged in count four of the indictment, in connection with the inspection of potatoes in order to sell the potatoes cheaper, as follows:

THE COURT: All of this is under oath, Mr. Auricchio, so you understand that if you have made a false statement you can be prosecuted anew. I tell you that as a prelude. If you want to plead guilty, I want you to tell me what it is that you did that causes you to offer to plead guilty. Indeed, we are talking only about the fourth count in this 99 Crim. 1088 indictment. So, it is now your turn.

THE DEFENDANT: Well, on July 7 I offered a government official \$100 to inspect a load, your Honor.

THE COURT: To inspect a load of what?

THE DEFENDANT: I think it was potatoes.

THE COURT: It was vegetables.

THE DEFENDANT: Vegetables.

THE COURT: And in fact where did that happen?

THE DEFENDANT: In the Hunts Point Market.

THE COURT: Which is in the Southern District of New York?

THE DEFENDANT: Yes.

THE COURT: In the Bronx, right?

THE DEFENDANT: Yes.

THE COURT: And you knew that what you were doing was wrong, is that true?

THE DEFENDANT: Yeah, I knew it was wrong.

THE COURT: And did you do it willfully and knowingly?

THE DEFENDANT: Yes, your Honor.

THE COURT: And with respect to this inspector, he was a public official?

THE DEFENDANT: Yes.

THE COURT: What kind of inspector was he?

THE DEFENDANT: U.S. government inspector.

THE COURT: And he was looking at these potatoes for what purpose?

THE DEFENDANT: To lower the grade on it.

THE COURT: Is that what you wanted him to do? That wasn't his job, right?

THE DEFENDANT: No, no, he was looking at it to see what type of grade it was. I wanted him to lower it.

THE COURT: And what did that do for you?

THE DEFENDANT: You know, we could sell it cheaper.

THE COURT: I see. They weren't your potatoes. You simply purchased them from somebody else?

THE DEFENDANT: Yes, your Honor.

RX N at 12-14.

Respondent cites the July 7, 1999, audio-visual tape (RX P) as the basis for its assertion that the ALJ's reliance on Mr. Auricchio's plea and allocution is error. However, the audio-visual tape is consistent with Mr. Auricchio's guilty plea and allocution. Moreover, Mr. Cashin's testimony is consistent with Mr. Auricchio's plea and allocution. Therefore, I reject Respondent's contention that the ALJ erroneously relied on Mr. Auricchio's plea and allocution.

Fifth, Respondent contends revocation of Respondent's PACA license is unduly harsh and inappropriate (Respondent's Appeal Pet. at 9-10).

A sanction by an administrative agency must be warranted in law and justified in fact.¹⁰ The Secretary of Agriculture has authority to revoke

¹⁰*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983) (per curiam); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 388, (2005); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 186 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit* (continued...)

the PACA license of any commission merchant, dealer, or broker whenever the Secretary of Agriculture determines that the commission merchant, dealer, or broker has violated section 2 of the PACA (7 U.S.C. § 499b) and the violation is flagrant or repeated. As discussed in this Decision and Order, *supra*, Respondent's violations of section 2(4) of the PACA are flagrant, willful, and repeated. Therefore, the ALJ's revocation of Respondent's PACA license is warranted in law.

Moreover, I agree with the ALJ's finding that Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are egregious and revocation of Respondent's PACA license is justified in fact. A payment to a United States Department of Agriculture inspector negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture inspector. Commission merchants, dealers, and brokers have a duty to refrain from paying United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture inspectors. A PACA licensee's payment to a United States Department of Agriculture inspector, whether it is to obtain an accurate United States Department of Agriculture inspection certificate or an inaccurate United States Department of Agriculture inspection certificate, undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture inspector.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to

¹⁰(...continued)

& Produce Co., 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

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):

[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 recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute 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.*, 50 Agric. Dec. at 497. Here the administrative officials recommend the revocation of Respondent's PACA license, and I find no basis to depart from their recommendation.

The ALJ's Publication of the Facts and Circumstances of Respondent's Violations

The ALJ revoked Respondent's PACA license and ordered the publication of the facts and circumstances of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 22-23). The Secretary of Agriculture may revoke a commission merchant's, dealer's, or broker's PACA license for flagrant or repeated violations of section 2 of the PACA (7 U.S.C. § 499b) and may also order the publication of the facts and circumstances of the violations.¹¹ Publication of the facts and circumstances of Respondent's violations has the same effect on Respondent and persons responsibly connected with Respondent as revocation of Respondent's PACA license;¹²

¹¹See 7 U.S.C. § 499h(a).

¹²*In re JSG Trading Corp.* (Ruling as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion to Stay; and (4) Request for Pardon or (continued...)

therefore, I find no reason to order the publication of the facts and circumstances of Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in addition to revoking Respondent's PACA license.

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

ORDER

Respondent M. Trombetta & Sons, Inc.'s PACA license is revoked. The revocation of Respondent M. Trombetta & Sons, Inc.'s PACA license shall become effective 60 days after service of this Order on Respondent M. Trombetta & Sons, Inc.

RIGHT TO JUDICIAL REVIEW

Respondent M. Trombetta & Sons, Inc., has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent M. Trombetta & Sons, Inc., must seek judicial review within 60 days after entry of this Order.¹³ The date of entry of this Order is September 27, 2005.

**In re: JAMES THAMES.
PACA-APP Docket No. 04-0003
and
GEORGE E. FULLER, JR
PACA-APP Docket No. 03-0021
and
JON FULLER
PACA-APP Docket No. 03-0020.
Decision and Order.
Filed October 14, 2005.**

¹²(...continued)
Lesser Sanction), 61 Agric. Dec. 409, 424-27 (2002).

¹³See 28 U.S.C. § 2344.

PACA – Responsibly connected.

Ann Parnes, for Complainant.

Kenneth D. for, Respondent.

Decision and Order by Administrative Law Judge Victor W. Palmer.

DECISION AND ORDER

Preliminary Statement

This proceeding was initiated by three petitions for review of determinations by the Agricultural Marketing Service that subjected James Thames, George E. Fuller, Jr., and Jon Fuller to employment restrictions for being “responsibly connected” with a corporation found to have willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499a(b)(9), 499b(4); “the PACA”).

John Manning Company, Inc., a PACA licensee, was the subject of a disciplinary complaint that resulted in a default decision being entered against it on October 21, 2004. The default decision published the finding that John Manning Company, Inc. willfully, flagrantly and repeatedly violated the PACA by failing to pay \$1,953,098.39 for 1,102 lots of produce purchased in interstate commerce from 58 sellers, during the period October 13, 2001 through August 28, 2002. At the time of the violations, James Thames, George E. Fuller, Jr. and Jon Fuller were officers and directors of John Manning Company, Inc. In addition, James Thames held 16% and the Fullers each held 13% of the corporation’s outstanding shares of stock. For those reasons, each comes within the express definition of a person deemed to be “responsibly connected” with a corporate licensee found to be in violation of the PACA unless:

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

(7 U.S.C. § 499a(b)(9)).

I held an oral hearing on March 29, 2005, in Atlanta, Georgia. Jon Fuller and George Fuller were represented by Joseph P. Farrell, Esq., Quirk & Quirk, P.C., Atlanta, Georgia. James Thames was represented by Kenneth D. Federman, Esq., Rothberg and Federman, P.C., West Collingwood, New Jersey. The PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, was represented by Ann Parnes, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, DC. The record in this case consists of the transcribed testimony given at the hearing; the exhibits admitted at the hearing (BxB__); and certified Agency Records of the challenged determinations respecting James Thames (JTRX__), George E. Fuller, Jr. (GFRX__) and Jon Fuller (JFRX__). A brief was filed on behalf of James Thames. A brief and a reply brief were filed on behalf of the Agricultural Marketing Service. A letter was accepted from the Fullers in lieu of a formal brief in that they were no longer able to afford counsel.

Upon consideration of the record evidence and the arguments of the parties, I have found and concluded that James Thames, George E. Fuller, Jr. and Jon Fuller were responsibly connected with John Manning Company, Inc. at the time it was a licensee violating the PACA. For that reason they are subject to restrictions on their employment by PACA licensees pursuant to 7 U.S.C. § 499h(b). In reaching these conclusions, I took into consideration the fact that the corporation's produce purchasing activities had been taken over by Steven McCue who owned 51% of the corporation's shares of stock and apparently concealed his mismanagement of the corporation from Mr. Thames and the Fullers. However, Steven McCue never removed James Thames as an officer or director and did not undertake to remove the Fullers as officers and directors until May 17, 2002. Therefore when the violations were taking place, each possessed oversight powers and responsibilities pursuant to the corporate by-laws that they were obliged to exercise to protect the corporation and themselves as shareholders. Though there is no evidence that they ever personally engaged in actions designed to leave suppliers unpaid, they failed to fully employ their powers as officers and as the majority of the Board of Directors to constrain Steven McCue's

imprudent business practices that did leave suppliers unpaid. Because they had such powers, none was “only nominally a partner, officer, director, or shareholder of a violating licensee” as the PACA requires so as not to be deemed “responsibly connected” with a violating licensee. *See* 7 U.S.C. § 499a(b)(9).

Findings of Fact

1. John Manning Company, Inc. was formed in 1937 by John Manning and George Fuller, Sr. It was a specialty tomato re-packing house until 2000. George Fuller, Sr. became sole owner when John Manning died in 1969. In 1981, Jon Fuller and George E. Fuller, Jr., the sons of George Fuller, Sr., came into the business and became shareholders. In 1990, James Thames joined the business and bought shares from George Fuller, Sr. wherein George Fuller, Sr. retained 7% of the outstanding shares and the remaining 93% was divided equally between James Thames, Jon Fuller and George E. Fuller, Jr. In 1999, competition in the tomato repacking business became fierce resulting in a lower customer base for the company; and a new direction for the company was sought. James Thames introduced Steven McCue to the Fullers in late 1999. Thereupon, Steven McCue became President and he, James Thames, Jon Fuller and George E. Fuller, Jr. held equal shares of stock. The company greatly expanded with diversification into the handling of mixed fruits and vegetables. (JFRX 7Q, p.1).

2. In May of 2001, Steven McCue informed the others that he was being courted by a produce conglomerate and would only stay with John Manning Company, Inc. if he was allowed to purchase additional shares from the others to increase his shares to 51% of the total shares outstanding. James Thames and the Fullers agreed. (JFRX 7Q, p.1).

3. On August 27, 2001, at a joint meeting of the Board of Directors and the shareholders of John Manning Company, Inc., the shares of stock held by James Thames and the Fullers were re-assigned so that Steven McCue became a 51% shareholder. To accomplish this, Steven McCue purchased for \$1.00 a share, 13,500 shares from George E. Fuller, Jr., 13,500 shares from Jon Fuller and 10,000 shares from James Thames.

Promissory notes were given in payment, but James Thames and the Fullers never received the money promised by the notes. As a result of the re-assignment of the stock that totaled 131,000 shares, Steven McCue held 68,000 shares or slightly over 51%; James Thames held 21,000 shares or slightly over 16%; George E. Fuller, Jr. held 17,500 shares or slightly over 13%, Jon Fuller held 17,500 shares or slightly over 13%; and George E. Fuller, Sr. held 7,000 shares or slightly over 5%.(BXB 9, p. 1; testimony of George E. Fuller, Jr.).

4. When Steven McCue initially joined the company, profits increased and so did the salaries of James Thames and the Fullers. At the end of June 2001, the company had profits of \$130,000.00, and the Fullers were each entitled to \$65,000.00 of retained earnings on which they paid taxes. The weekly salaries of the Fullers and James Thames were increased from \$800.00 to \$1,000.00. When the Fullers later sought their share of the retained earnings, they were told they were needed to pay expenses and instead their salaries were increased to \$1,200.00 per week. James Thames did obtain some of his share of the retained earnings and his salary stayed at \$1,000.00 per week. (GFRX 7Q, p.1; testimony of Jon Fuller).

5. The By-Laws of John Manning Company, Inc. provide that the property and business of the corporation shall be managed by its Board of Directors that shall consist of not less than three nor more than five members. Each director shall hold office until the annual meeting of shareholders held next after his election and until a qualified successor shall be elected, or until his earlier death, resignation, incapacity to serve or removal. Any director may be removed, with or without cause, by the affirmative vote of the majority of the issued and outstanding shares at any regular or special meeting. The Board of Directors shall have the power to determine which accounts and books of the corporation shall be open to the inspection of shareholders. The By-Laws further provide for the following officers:

The President who shall be the chief executive officer of the corporation; shall preside at all meetings of the stockholders and directors; shall see that all orders and resolutions of the Board are carried into effect; and in addition to other specified duties shall

perform all other such duties as the Board may assign to him.

The Vice President who in the absence of the President, or in case of his failure to act, shall have all the powers of the President, and shall perform such duties as shall from time to time be imposed upon him by the Board of Directors.

The Secretary who shall attend and keep the minutes of all meetings of the Board of Directors and Stockholders; shall have charge of the records and seal of the corporation; and shall in general perform all the duties incident to the office of the Secretary of a corporation, subject at all times to the direction and control of the Board of Directors.

The Treasurer who shall keep full and accurate account of receipts and disbursement on the books belonging to the corporation; shall deposit all monies and other properties belonging to the corporation; shall disburse the funds of the corporation as may be ordered by the Board; shall render to the Board whenever they may require, an account of all his transactions as Treasurer and of the financial condition of the corporation; and shall perform such other duties as shall be assigned to him by the Board of Directors. (JTRX 4).

6. During the period October 13, 2001 through May 17, 2002, the officers of John Manning Company, Inc were Steven McCue, President; James Thames, Vice President; George E. Fuller, Jr., Treasurer; and Jon Fuller, Secretary. The four of them constituted the corporation's Board of Directors. Steven McCue attended to all of the buying and selling of produce for the company except in respect to a few old accounts, and he had charge of all other aspects of operations except for those still handled by James Thames and the Fullers. James Thames supervised the running of the tomato lines and supervised the packing crew. He also sold tomatoes to a couple of existing customers. George E. Fuller, Jr. assisted with tomato operations when James Thames was absent; coordinated maintenance service on the company's trucks, forklifts, electrical jacks and refrigeration; prepared inventory reports; and sometimes signed payroll checks. Jon Fuller was in charge of the company payroll; signed payroll checks; assisted with tomato operations when James Thames was absent; purchased tomato supplies; and

coordinated insurance for the company. On May 17, 2002, Steven McCue terminated the employment of the Fullers because they refused to put more money into the business, and they did not act as officers or directors after that date. Steven McCue and James Thames continued as President and Vice President and members of the Board of Directors until the corporation stopped doing business at the end of July 2002. (JFRX 7Q, p.2; JTRX 11, p.3).

7. Though John Manning Company, Inc. was profitable in June 2001, there were problems with paying bills. Both Jon Fuller and George E. Fuller, Jr. went to Steven McCue several times between July and September of 2001 and asked for financial information. It was promised but not delivered. At the end of December of 2001, George E. Fuller, Jr. again asked for financial statements. Steven McCue promised to provide the financials for 2001 by mid February, 2002, but told the Fullers he was only obligated to furnish financial information once or twice a year and because the Fullers no longer did any buying or selling, they did not need the information. Financial information was not furnished by Steven McCue until early May, 2002. (JFRX 7Q, p 2).

8. Though James Thames and the Fullers knew in 2001, that the company was having trouble paying its bills, the problems with paying suppliers were first acknowledged and discussed at the April 24, 2002 annual meeting of the Board of Directors. Steven McCue brought up the fact that shippers were demanding money and that if the checking account was frozen pursuant to the PACA Trust Agreement, John Manning Company, Inc. could not pay. He asked the Fullers for permission to go to their father for money to keep the company from going under. They gave their permission, but emphasized their father would insist upon seeing some Financials and that Zachary Thacker, the Comptroller/CFO who Steven McCue had brought aboard, had not yet provided the 2001 year ending statement. (JTRX 14).

9. On April 29, 2002, the Board of Directors had an impromptu meeting that Zachary Thacker attended. Financial difficulties were again discussed including \$200,000.00 owed to Weis-Buy which John Manning Company, Inc. could satisfy through weekly payments secured

by an 8 ³/₄% note and a signed guarantee by the directors. Jon Fuller said he was not signing anything else unless some Financials were forthcoming. Steven McCue promised they would be delivered by May 1, 2002. (JTRX 15).

10. On May 3, 2002, the Board of Directors had another meeting that was also attended by George E. Fuller, Sr., Zachary Thacker and Don Foster, Attorney for John Manning Company, Inc. The December 31, 2001 year ending report was distributed. It showed a \$140,805.00 loss in 2001 as well as a \$32,598.00 loss in the first quarter of 2002. Steven McCue asked the stockholders for their personal cash infusion to help the company during the financial hardship. He also expressed concern because of the Fullers' refusal to sign additional lines of credit with Weis-Buy. He also regarded George E. Fuller, Jr.'s periodic memos to him asking for financial reports to be "silly". He stated the company could save \$5,000.00 a week without George E. Fuller, Jr., Jon Fuller and James Thames on the payroll, and others could perform their jobs. Steven McCue stated that the company had a "50/50 shot of making or failing". Steven McCue stated he was going to do his best to save the company, and do whatever he had to do. He asked if anyone had anything to say. George E. Fuller, Sr. stated that he thought the company should reorganize under bankruptcy laws, but Steven McCue said that was not an option. George Fuller then said that, under the circumstances, he could not put any more money into the organization. (JTRX 16).

11. On May 17, 2002, Jon Fuller and George E. Fuller, Jr. were terminated as employees, and considered themselves terminated as officers and directors of John Manning Company, Inc. The company shut down on August 21, 2002 and its PACA license terminated on June 5, 2003 for failure to pay the annual license renewal fee.

12. On April 22, 2003, a disciplinary complaint was filed under the PACA against John Manning Company, Inc. for violating the PACA (7 U. S. C. § 499b(4)) from October 2001 through August 2002 by failing to pay \$1,953,098.39 to 58 sellers for perishable agricultural commodities purchased, received and accepted in interstate and foreign

commerce. The disciplinary complaint resulted in a default decree being entered against John Manning Company, Inc. that published the finding that it had committed willful, flagrant and repeated violations of the PACA. (JTRX 6).

Conclusions

The record evidence establishes that James Thames, George E. Fuller, Jr. and Jon Fuller were, within the meaning of the PACA definition, responsibly connected with a corporate licensee found to have violated the PACA. The record evidence does not establish that they were only nominally officers, directors and shareholders of the violating licensee.

The consequences of Steven McCue's mismanagement of John Manning Company, Inc. were disastrous for everyone. Suppliers went unpaid. Employees lost their jobs. James Thames became addicted for a time to pain killers. (JTRX 11).

But the consequences were especially tragic for the Fullers. The company their father had established in 1937 was left in ruins. Their personal reputations for honest dealing were sullied. Their reason for challenging the "responsibly connected" determinations was not to be eligible for industry employment, but to clear their names as honest men. In that respect, the facts do show they did nothing to intentionally harm anyone.

However, the PACA places the burden upon every officer and director of a corporate licensee to use all the powers they have under the by-laws to stay aware of the details of the corporation's activities and to obtain the financial information needed to assure that the licensee's produce suppliers are being promptly paid in full. When requests to Steven McCue for financial information were put off, James Thames and the Fullers had to do more. Legal counsel should have been retained and instructed to take every step necessary to find out if the company was still solvent and able to pay its suppliers. Steven McCue's obstinate resistance to furnishing the financials may well have made the appointment of a receiver necessary to obtain needed information and to put a halt to ongoing mismanagement. James Thames and the Fullers were not "nominal" officers and directors. Each had an actual

significant nexus with the violating company during the violation period. The by-laws vested all oversight and governance powers in the Board of Directors, and together, they constituted the majority of the Board. Though Steven McCue as majority stockholder could have removed them as directors, he did not. They therefore had powers that they failed to use to protect themselves, the corporation and the corporation's suppliers. Under these circumstances, James Thames and the Fullers were so positioned that they should have known of the misdeeds and taken steps to "counteract or obviate the fault of others" *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). See also *Minotto v. United States Department of Agriculture*, 711 F.2d 406, 408-409 (D. C. Cir. 1983); and *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975); and *Anthony Thomas*, 59 Agric. Dec. 367, 386 (2000). James Thames and the Fullers therefore cannot be found to be nominal officers, directors or shareholders under controlling legal precedents that have interpreted and applied the term "nominal" within the meaning of the PACA.

The PACA's definition of "responsibly connected" was amended in 1995, to resolve a split in the circuits in their interpretation of the term. The concept advanced by the Circuit Court for the District of Columbia in the above cited cases, that a "nominal" officer, director or shareholder may be found not to be responsibly connected had been rejected by courts in other circuits. See *Norinsberg v. United States Department of Agriculture et al*, 162 F.3d 1194 (D.C. Cir. 1998). The revised PACA definition now employs a rebuttable presumption test akin to that adopted by the DC Circuit:

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 Act and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or

entity subject to license which was the alter ego of its owners.
7 U.S.C. § 499a(b)(9)

As revised, the PACA allows a person who otherwise comes under its “responsibly connected” definition to show he should not be so considered by satisfying both parts of an evidentiary test that he “was not actively involved in the activities resulting in a violation” and “was only nominally a partner, officer, director, or shareholder of a violating license.” *See Norinsberg, supra* and *Thomas supra, at 385-387* (2000). Inasmuch as James Thames, George E. Fuller, Jr. and Jon Fuller for the reasons just explained, cannot be found to have only “nominally” been officers, directors and shareholders of John Manning Company, Inc., it is unnecessary to address whether under the applicable precedents they met their burden of proof that they were “not actively involved in the activities resulting in a violation”. As I stated before, I do believe that they did not instigate the consequences that befell the company and its unpaid suppliers.

Accordingly, the following order is being issued that places them under the employment restrictions mandated by the PACA. (7 U.S.C. § 499h(b)).

ORDER

It is hereby found that James Thames, George E. Fuller, Jr. and Jon Fuller were responsibly connected with John Manning Company, Inc., a PACA licensee, when it committed willful, repeated and flagrant violations of 7 U.S.C. § 499b(4) by failing to make full payment for produce purchased in interstate or foreign commerce.

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

Pursuant to the Rules of Practice, this Decision and Order shall become final without further proceedings, 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service.

Copies of this Decision and Order shall be served upon the parties.

In re: HUNTS POINT TOMATO CO., INC.

PACA Docket No. D-03-0014.

Decision and Order.

Filed November 2, 2005.

PACA – Perishable agricultural commodities – Failure to pay – Willful, flagrant, and repeated violations – Slow-pay case – No-pay case – Burden of proof – Preponderance of the evidence – Settlement offers – Publication of facts and circumstances.

The Judicial Officer affirmed the Decision issued by Chief Administrative Law Judge Marc R. Hillson (Chief ALJ) concluding Respondent willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 33 sellers for 118 lots of produce and publishing the facts and circumstances of Respondent's violations. The Judicial Officer rejected Respondent's contention that the Chief ALJ was required to find the exact amount Respondent failed to pay its produce sellers in accordance with the PACA, the exact number of produce sellers that had not been paid in full by the date of the hearing, and the exact amount Respondent owed these produce sellers on the date of the hearing. The Judicial Officer agreed with Respondent that Complainant had the burden of proof in the proceeding, but the Judicial Officer found Complainant proved by a preponderance of the evidence that Respondent violated 7 U.S.C. § 499b(4) and was not in full compliance with the PACA within 120 days after the Hearing Clerk served Respondent with the Complaint. The Judicial Officer rejected Respondent's contention that Complainant's failure to accept Respondent's settlement offer was an abuse of discretion. The Judicial Officer stated voluntary settlements are favored in proceedings under the rules of practice, but a party is not required to accept another party's settlement offer. The Judicial Officer also rejected Respondent's contention that the Chief ALJ's failure to direct Complainant to accept Respondent's settlement offer was an abuse of discretion. The Judicial Officer stated that the rules of practice (7 C.F.R. § 1.140(a)) authorize administrative law judges to direct parties to attend conferences and, at those conferences, to consider the negotiation, compromise, or settlement of issues or other matters as may expedite and aid in the disposition of the proceeding; however, administrative law judges have no authority under the rules of practice to direct a party to accept another party's settlement offer.

Andrew Y. Stanton, for Complainant.

Paul T. Gentile, New York, NY, for Respondent.

Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.

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

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on March 31, 2003. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Hunts Point Tomato Co., Inc. [hereinafter Respondent], during the period September 2001 through June 2002, failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). On August 7, 2003, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On August 10, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On October 15, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on November 17, 2004, Respondent filed Respondent's Proposed Findings of Fact and Law. On December 6, 2004, Complainant filed Complainant's Reply Brief.

On April 21, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision]: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the

agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations (Initial Decision at 7-8, 12).

On October 7, 2005, Respondent appealed to the Judicial Officer. On October 17, 2005, Complainant filed Complainant's response to Respondent's appeal petition. On October 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision. Therefore, except for minor modifications, pursuant to section 1.145(I) of the Rules of Practice (7 C.F.R. § 1.145(I)), I adopt the Chief ALJ's Initial Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion, as restated.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

APPLICABLE 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[.] . . .

.....

§ 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 in 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), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

.....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE
(STANDARDS, INSPECTIONS, MARKETING PRACTICES),
DEPARTMENT OF AGRICULTURE**

.....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

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

.....

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

.....

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

.....

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

7 C.F.R. § 46.2(aa)(5), (11).

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

Decision Summary

I find Respondent committed willful, flagrant, and repeated

violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities. By way of sanction, I order publication of the facts and circumstances of Respondent's violations.

Factual Background

Respondent is a corporation that was licensed under the PACA from July 25, 1979, until its PACA license terminated when Respondent failed to pay the required annual PACA license renewal fee on July 25, 2002 (CX 1; Tr. 67-71). Anthony Guerra was Respondent's president, sole director, and sole stockholder since July 2000 (CX 1 at 7-8).

Complainant received at least 10 reparation complaints against Respondent and, in June 2002, initiated an investigation of Respondent's alleged failures to pay, fully and promptly, for perishable agricultural commodities. Wayne Shelby, a marketing specialist employed by the United States Department of Agriculture, and Timothy Swainhart, an assistant regional director of the Perishable Agricultural Commodities Branch, United States Department of Agriculture, were assigned to conduct the investigation. (Tr. 23-24.) After sending Respondent a letter notifying it of the initiation of an investigation of Respondent's alleged failures to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities, Wayne Shelby and Timothy Swainhart visited Respondent's place of business on July 24, 2002 (CX 2 at 1; Tr. 27-28, 31). Lenny Guerra, Respondent's office manager, met with Wayne Shelby and Timothy Swainhart. Lenny Guerra identified Respondent's accounts payable files, each of which was in a separate jacket, which Wayne Shelby and Timothy Swainhart removed from the premises, copied, and returned. (Tr. 31-35.)

Wayne Shelby and Timothy Swainhart conducted an exit conference with Frederick, Anthony, and Lenny Guerra on August 7, 2002, at Respondent's place of business, at which time they handed a Notice of Investigation to Anthony Guerra (CX 2 at 2; Tr. 35-36). (Lenny Guerra had refused to accept the Notice of Investigation during the July 24, 2002, meeting (Tr. 35).)

The accounts payable files indicated that, during the period September 2001 through June 2002, Respondent failed to make full

payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate commerce (CX 3-CX 35; Tr. 37-49). Anthony Guerra admitted Respondent owed produce sellers over \$1,000,000 (Tr. 46), but in the absence of evidence that several transactions were in the course of interstate commerce, Complainant excluded those apparently intrastate transactions from the Complaint, resulting in the allegation that Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities in violation of the PACA (Tr. 47). Anthony Guerra said Respondent had been having business difficulties since September 11, 2001 (Tr. 46-47).

During the period August 2, 2004, through August 6, 2004, Josephine Jenkins, a marketing specialist employed by the United States Department of Agriculture, made follow-up telephone calls to several of Respondent's produce sellers listed in the Complaint to determine whether Respondent had paid these produce sellers since the initial investigation in 2002. She determined, by speaking with Lawrence Meuers, an attorney representing a number of Respondent's produce sellers in a PACA trust action, that eight of the produce sellers, who Complainant alleged were owed \$321,082.40, had been paid \$275,338.17 and were still owed \$45,744.23. Josephine Jenkins also contacted two of the other produce sellers listed in the Complaint and determined Respondent had not paid any of the \$68,302.50 Respondent owed them. (CX 36; Tr. 73-77.)

On May 31, 2002, nearly 10 months before Complainant filed the Complaint, two of the produce sellers listed in the Complaint, Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., instituted an action against Respondent pursuant to section 5(c) of the PACA (7 U.S.C. § 499e(c)), to enforce payment for produce from the PACA trust.¹ On May 31, 2002, Judge Richard Conway Casey issued a Temporary Restraining Order restraining Respondent from dissipating, paying, transferring, assigning, or selling assets covered by the trust provisions

¹*Nobles-Collier, Inc. v. Hunts Point Tomato Co.*, No. 02 CV 4128, 2004 WL 102756 (S.D.N.Y. Jan. 22, 2004).

of the PACA without agreement of Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., or until further order of the United States District Court for the Southern District of New York (RX 2). On October 2, 2002, Judge Lawrence M. McKenna issued a Preliminary Injunction and Order Establishing PACA Trust Claims Procedure, superseding and replacing Judge Casey's Temporary Restraining Order on behalf of 16 plaintiff companies.² The Preliminary Injunction and Order Establishing PACA Trust Claims Procedure: (1) recognized that Respondent was in possession of 100 percent of the PACA trust assets at issue; (2) established a PACA trust account into which all of Respondent's PACA trust assets would be deposited; (3) appointed an escrow agent; and (4) established procedures for proof of claims and distribution of trust assets. (RX 1.)

On August 6, 2004, the Friday before the hearing in the instant proceeding, counsel for Respondent suggested to counsel for Complainant that the hearing should be postponed so that Respondent could fully pay all its produce sellers. At the hearing, Respondent suggested postponement of the hearing to allow Respondent to pay its produce sellers. (Tr. 5-7.) No evidence was introduced suggesting that Respondent had petitioned the United States District Court for the Southern District of New York to release Respondent's assets so that any of the produce sellers could be paid, and no one testified as to how long the process would take, or why the suggestion was made only 4 days before the commencement of the hearing.

Findings of Fact

1. Respondent is a corporation that was organized and existing under the State of New York at the time of the transactions set forth in the Complaint (Compl. ¶ II(a); Answer ¶ 2).

2. Respondent held PACA license 791770 from July 25, 1979, until Respondent's PACA license terminated on July 25, 2002, for failure to pay the required PACA renewal fee (Compl. ¶ II(b); Answer

²On July 26, 2002, Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., amended the complaint in *Nobles-Collier, Inc. v. Hunts Point Tomato Co.*, No. 02 CV 4128, 2004 WL 102756 (S.D.N.Y. Jan. 22, 2004), to include 14 additional produce sellers with claims against Respondent subject to the trust provisions of the PACA (RX 2 at 2).

¶ 2).

3. Complainant conducted an investigation of Respondent after Complainant received at least 10 complaints that Respondent was not paying for perishable agricultural commodities. As part of this investigation, Wayne Shelby, a marketing specialist employed by the United States Department of Agriculture, and Timothy Swainhart, an assistant regional director for the Perishable Agricultural Commodities Branch, United States Department of Agriculture, went to Respondent's place of business on July 24, 2002. Wayne Shelby and Timothy Swainhart met with Lenny Guerra, Respondent's office manager, who identified and provided for copying Respondent's accounts payable files. (Tr. 23-24, 27-28, 31-35.)

4. The accounts payable files which Respondent provided to Complainant indicated that, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (CX 3-CX 35; Tr. 37-49).

5. At an exit conference on August 7, 2002, Respondent's president, sole director, and sole shareholder, Anthony Guerra, acknowledged that Respondent owed more than \$1,000,000 for produce purchased and received, some of which was not in interstate or foreign commerce (Tr. 46).

6. The Hearing Clerk served Respondent with the Complaint on April 23, 2003 (Memorandum to the File, from LaWuan Waring, Legal Technician, dated April 23, 2003).

7. During the period August 2, 2004, through August 6, 2004, Josephine Jenkins, a marketing specialist employed by the United States Department of Agriculture, made follow-up telephone calls to several of Respondent's produce sellers listed in the Complaint to determine whether Respondent had paid these produce sellers since the initial investigation in 2002. Josephine Jenkins determined, by speaking with Lawrence Meuers, an attorney representing a number of Respondent's produce sellers in a PACA trust action, that Respondent still owed them \$45,744.23 for produce Respondent purchased, received, and accepted in interstate commerce. Josephine Jenkins also contacted two of the

other produce sellers listed in the Complaint and determined Respondent had not paid any of the \$68,302.50 Respondent owed them for produce Respondent purchased, received, and accepted in interstate commerce. (CX 36; Tr. 73-77.)

8. On May 31, 2002, two of the produce sellers listed in the Complaint, Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., instituted an action against Respondent pursuant to section 5(c) of the PACA (7 U.S.C. § 499e(c)), to enforce payment for produce from the PACA trust. On May 31, 2002, Judge Richard Conway Casey issued a Temporary Restraining Order restraining Respondent from dissipating, paying, transferring, assigning, or selling assets covered by the trust provisions of the PACA without agreement of Nobles-Collier, Inc., and Tomatoes of Ruskin, Inc., or until further order of the United States District Court for the Southern District of New York (RX 2).

9. On October 2, 2002, Judge Lawrence M. McKenna issued a Preliminary Injunction and Order Establishing PACA Trust Claims Procedure, superseding and replacing Judge Casey's Temporary Restraining Order on behalf of 16 plaintiff companies. The Preliminary Injunction and Order Establishing PACA Trust Claims Procedure: (1) recognized that Respondent was in possession of 100 percent of the PACA trust assets at issue; (2) established a PACA trust account into which all of Respondent's PACA trust assets would be deposited; (3) appointed an escrow agent; and (4) established procedures for proof of claims and distribution of trust assets. (RX 1.)

Discussion and Conclusions of Law

Respondent Violated the PACA

Respondent's failure to pay the 33 produce sellers listed in the Complaint fully and in a timely manner is essentially undisputed. Respondent's August 6, 2004, offer to pay the 33 produce sellers in full does not change this case from a "no-pay" to a "slow-pay" case. While the appropriate penalty for such substantial noncompliance would normally include the revocation of the violator's PACA license, Respondent's PACA license has already been terminated for failure to pay the annual PACA license renewal fee. Thus, a finding that

Respondent has committed willful, flagrant, and repeated violations, and the publication of the facts and circumstances of Respondent's violations, is the only appropriate remedy.

*Respondent Failed to Timely Pay 33 Produce Sellers
Listed in the Complaint the Agreed Upon Purchase
Prices for Perishable Agricultural Commodities*

Respondent failed to pay 33 produce sellers the amounts that Respondent had originally agreed to pay. Respondent's own accounts payable files, which Complainant's representatives inspected and copied, indicated that, at the time of the 2002 inspection, Respondent had failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce.

Sixteen of Respondent's unpaid produce sellers participated in a PACA trust action filed under section 5(c) of the PACA (7 U.S.C. § 499e(c)). In a Preliminary Injunction and Order Establishing PACA Trust Claims Procedure issued in the PACA trust action, the escrow agent appointed by the United States District Court for the Southern District of New York was directed to pay the undisputed valid PACA claims against Respondent at 95 cents on the dollar, subject to availability of funds. No evidence was submitted as to how many produce sellers were actually paid. Complainant submitted, through the testimony of Josephine Jenkins, evidence that of the 10 produce sellers she had contacted, either directly or through their counsel, approximately 1 week before the August 10, 2004, hearing, none of the produce sellers had been paid in full. In particular, she was notified that eight produce sellers represented by Lawrence Meuers had been partially compensated by the PACA trust. These eight produce sellers had been paid \$275,338.17 out of the \$321,082.40 owed to them, which represents a payout of approximately 85.7 percent, significantly under the 95 percent authorized in the PACA trust action. Two other companies contacted by Josephine Jenkins indicated they had not been paid any of the \$68,302.50 Respondent owed them. There is no evidence that any of the 33 produce sellers listed in the Complaint have

been paid in full.

*The Court Order in the PACA Trust Case
Does Not Excuse Respondent's Failure to Pay*

While Judge Lawrence M. McKenna enjoined Respondent from disbursing any of its PACA trust assets other than through the actions of the court-appointed escrow agent operating the PACA trust, the injunction does not act as a relief from Respondent's "no-pay" status. Since the PACA trust action arose directly from Respondent's failures to pay its produce sellers in the first place, to allow the PACA trust action to protect Respondent against "no-pay" sanctions would be counter to the clear purposes of the PACA. While Respondent protests that it has the assets to pay all produce sellers fully, the record clearly indicates that, as of the hearing date, Respondent's produce sellers were only being paid 85 cents on the dollar, rather than the 95 cents on the dollar authorized in the PACA trust action. This partial payment is hardly consistent with Respondent's contention that it has sufficient assets to pay all produce sellers in full. Postponing a hearing based on Respondent's contention that it could now pay all produce sellers in full, where there is no evidence that Respondent petitioned Judge Lawrence M. McKenna to allow such payment and there is no affirmative evidence that such financial capability actually exists, is unwarranted.

Respondent implies Complainant had an obligation to "attempt to have Judge McKenna modify his order." (Respondent's Proposed Findings of Fact and Law at 5). I find no basis for this suggestion. Clearly, if Respondent had the funds to fully pay all produce sellers, such funds would have been required to be deposited in the PACA trust account established in the Preliminary Injunction and Order Establishing PACA Trust Claims Procedure issued by Judge Lawrence M. McKenna. Presumably, if the funds existed, all Respondent's produce sellers would have been paid—a circumstance that undisputedly has not occurred.

This Case Is a "No-Pay" Case

The lead case in determining whether a purchaser of perishable

agricultural commodities is subject to the PACA sanctions for failure to pay promptly is *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer announced in *Scamcorp* that he was distinguishing “slow-pay” cases, in which civil penalties or PACA license suspensions would be imposed, from “no-pay” cases, in which, in the case of flagrant or repeated violations, PACA license revocation would be the appropriate sanction. In the cases of failure to achieve “full compliance” with the PACA within 120 days after service of the complaint, or the date of the hearing, if that comes first, the violation would be treated as a “no-pay” case. *Scamcorp*, 57 Agric. Dec. at 548-49.

Although Respondent has offered to settle this case by paying all produce sellers in full, the Preliminary Injunction and Order Establishing PACA Trust Claims Procedure issued by Judge Lawrence M. McKenna, which Respondent has not sought to lift, indicates that Respondent’s offer was made without any legitimate basis and is quite speculative, to say the least. While it is unusual to even hear the discussion of settlement offers in open court, Complainant was under no obligation to accept Respondent’s offer, particularly when there is no indication that the offer could even be honored, given Judge McKenna’s Preliminary Injunction and Order Establishing PACA Trust Claims Procedure. Given the uncertainty as to whether Respondent’s offer to pay in full could even be effectuated, Respondent’s contention that Complainant’s failure to accept its offer was “arbitrary, capricious and an abuse of discretion” (Respondent’s Proposed Findings of Fact and Law at 6), has no basis.

Further, rescheduling a hearing to allow a settlement of a PACA case is inconsistent with the agency’s case law. In *Scamcorp*, the Judicial Officer held:

Rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers thwarts Department policy, which is designed to encourage PACA violators to pay produce suppliers promptly. Further, rescheduling a hearing in order to give a PACA violator additional time to pay produce suppliers unnecessarily delays these proceedings, which should be handled expeditiously, and is specifically contrary to the requirement in section 1.141(b) of the Rules of Practice (7 C.F.R.

§ 1.141(b)) that “the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties.”

Scamcorp, 57 Agric. Dec. at 548.

Respondent’s Violations Are Willful, Flagrant, and Repeated

In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person “intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute,” his acts are regarded as willful. *In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 713 (1994). Here, where Respondent continued to order and receive, and not pay for, produce for months, during the period September 2001 through June 2002, putting numerous produce sellers at risk, Respondent was clearly operating in disregard of the payment requirements of the PACA and has committed willful violations.

Moreover, I conclude that, as a matter of law, Respondent’s violations are repeated and flagrant. Respondent’s violations are “repeated” because repeated means more than one, and Respondent’s violations are flagrant because of the number of violations, the amount of money involved, the type of violations, and the 9-month period during which Respondent committed the violations.³

³See, e.g., *Allred’s Produce v. United States Dep’t of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating violations are repeated under the PACA if they are not done simultaneously and whether violations are flagrant under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred; holding 86 violations over nearly 3 years for an amount totaling over \$300,000 were willful and flagrant), *cert. denied*, 528 U.S. 1021 (1999); *Farley & Calfee v. United States Dep’t of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a
(continued...)

A Significant Penalty Is Warranted

Normally, in a “no-pay” case in which there are flagrant or repeated violations, revocation of the violator’s PACA license would be appropriate. Here, with Respondent already out of business and Respondent’s PACA license already terminated, the only appropriate remedy is the finding, which I hereby make, that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent’s violations shall be published.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises five issues in its Appeal Petition. First, Respondent contends the Chief ALJ erroneously failed to determine the exact number of unpaid produce sellers and the exact amount Respondent failed to pay to these produce sellers (Respondent’s Appeal Pet. at 2).

The Chief ALJ found, during the period September 2001 through June 2002, Respondent failed to make full payment promptly to 33 produce sellers of the agreed purchase prices in a total amount over \$795,000 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce (Initial Decision at 7-8). This finding alone is sufficient to conclude that Respondent violated the prompt payment provision in

³(...continued)

15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981) (describing 20 violations of the payment provisions of the PACA as flagrant); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding because the 295 violations of the payment provisions of the PACA did not occur simultaneously, the violations must be considered “repeated” violations within the context of the PACA and finding the 295 violations to be “flagrant” violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967).

section 2(4) of the PACA (7 U.S.C. § 499b(4)). I reject Respondent's contention that the Chief ALJ was somehow required to find that the exact amount Respondent failed to pay in accordance with the PACA was "\$795,878.80," and I disagree with Respondent's contention that the Chief ALJ failed to determine the exact number of Respondent's unpaid produce sellers.

Second, Respondent contends the Chief ALJ erroneously failed to determine the exact number of produce sellers that had not been paid in full by the August 10, 2004, hearing and the exact amount Respondent owed to these produce sellers (Respondent's Appeal Pet. at 2).

The Chief ALJ found Josephine Jenkins contacted 10 of the produce sellers listed in the Complaint approximately 1 week before the hearing and found Respondent had paid eight of the produce sellers \$275,338 of the \$321,082 owed to them and the two other produce sellers had not been paid any of the \$68,302 owed to them. The Chief ALJ also stated "[t]here is no evidence in this record that any of the 33 creditors listed in the complaint have been paid in full." (Initial Decision at 3, 8-9.)

I disagree with Respondent's contention that the Chief ALJ was required to determine the exact number of produce sellers that remained unpaid at the commencement of August 10, 2004, hearing and the exact amount Respondent owed each produce seller at the commencement of the August 10, 2004, hearing. The United States Department of Agriculture's "slow-pay-no-pay" policy merely requires that an administrative law judge determine whether a respondent is in full compliance with the PACA within 120 days after the Hearing Clerk serves the respondent with the complaint or the date of the hearing, if that occurs first. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case. Full compliance requires that a respondent have paid all produce sellers in full.

The Hearing Clerk served Respondent with the Complaint on April 23, 2003.⁴ The Chief ALJ found that 1 week prior to the August 10, 2004, hearing Respondent had not paid all of the produce sellers listed in the Complaint. Respondent was not in full compliance with the PACA within 120 days after the Hearing Clerk served Respondent with the Complaint; therefore, in accordance with the United States Department of Agriculture's "slow-pay-no-pay" policy, this case is a "no-pay" case. The Chief ALJ was not required to determine the exact number of produce sellers that had not been paid in full by the August 10, 2004, hearing and the exact amount Respondent owed each of these produce sellers in order to determine that this case is a "no-pay" case, as Respondent contends.

Third, Respondent contends the burden is on Complainant to prove that Respondent failed to pay produce sellers and the amount that Respondent failed to pay its produce sellers.

I agree with Respondent that the burden of proving Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) is on Complainant.⁵ However, I find Complainant proved by a preponderance

⁴Memorandum to the File, from LaWuan Waring, Legal Technician, dated April 23, 2003.

⁵Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act 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). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re PMD Produce Brokerage Corp.* 60 Agric. Dec. 780, 794 n.4 (2001) (Decision on Remand), *aff'd*, No. 02-1134, 2003 WL 211860247 (D.C. Cir. May 13, 2003); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *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), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d (continued...)

of the evidence that Respondent, during the period September 2001 through June 2002, failed to make full payment promptly to 33 sellers of the agreed purchase prices in the total amount of \$795,878.80 for 118 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Moreover, Complainant proved by a preponderance of the evidence that 1 week before the August 10, 2004, hearing and more than 120 days after the Hearing Clerk served Respondent with the Complaint, Respondent had not paid all of the produce sellers listed in the Complaint in full.

Fourth, Respondent asserts, 5 days before the August 10, 2004, hearing, it offered to settle this proceeding by paying all unpaid produce sellers in full and by paying a civil penalty. Respondent contends

⁵(...continued)

608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *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.*, 522 U.S. 951 (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*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

Complainant's failure to accept Respondent's settlement offer was an abuse of discretion and a scandalous decision. (Respondent's Appeal Pet. at 3-4.)

Voluntary settlements are highly favored in proceedings under the Rules of Practice.⁶ However, the Rules of Practice do not require a party to accept a settlement offer made by another party, as Respondent suggests. Complainant had complete discretion to accept or reject Respondent's settlement offer. Respondent's assertion that Complainant's rejection of Respondent's settlement offer is an abuse of discretion and a scandalous decision is without merit.

Fifth, Respondent contends the Chief ALJ's failure to direct Complainant to accept Respondent's settlement offer was an abuse of discretion. Respondent requests that I remand the proceeding to the Chief ALJ with directions to conduct a conference to determine Complainant's policies regarding the settlement of proceedings, and, if the Chief ALJ determines Complainant has settled proceedings similar to the instant proceeding by the payment of a civil penalty, the Chief ALJ should direct Complainant to settle the instant proceeding by Respondent's payment of a civil penalty. (Respondent's Appeal Pet. at 3-5.)

The Rules of Practice authorizes administrative law judges to direct parties or their counsel to attend conferences and, at those conferences, to consider the negotiation, compromise, or settlement of issues and such other matters as may expedite and aid in the disposition of the proceeding.⁷ However, administrative law judges have no authority under the Rules of Practice to direct a party to accept another party's settlement offer. Therefore, I deny Respondent's request that I remand this proceeding to the Chief ALJ with the instructions proposed by Respondent.

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

ORDER

⁶*In re Gwain Wilson*, 64 Agric. Dec. ___, slip op. at 3 (Oct. 3, 2005) (Remand Order as to John R. LeGate, Sr.); *In re Gwain Wilson*, 64 Agric. Dec. ___, slip op. at 3 (Sept. 27, 2005) (Remand Order as to William Russell Hyneman).

⁷ C.F.R. § 1.140(a)(3)(v), (ix).

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent must seek judicial review within 60 days after entry of this Order.⁸ The date of entry of this Order is November 2, 2005.

**In re :TERRY THOMAS FARMS, INC.,
PACA Docket No. D-04-0012
and In re TERRY R. THOMAS,
PACA-APP Docket No. 04-0015
and In re: TAMMIE L. FRANKS,
PACA-APP Docket No. 04-0016
and In re: TERESA A. THOMAS,
PACA-APP Docket No. 04-0017.
and In Re: BARBARA A. THOMAS,
PACA-APP Docket No. 04-0018.
Decision and Order.
Filed November 18, 2005.**

PACA – Responsibly connected.

Charles Spicknall, for Complainant.
Michael Chambers, for Respondent.
Decision and Order by Administrative Law Judge Victor W. Palmer.

DECISION AND ORDER

⁸See 28 U.S.C. § 2344.

These are consolidated proceedings to determine two sets of issues. Firstly, did Terry Thomas Farms, Inc., a corporation licensed under the Perishable Agricultural Commodities Act (7 U. S.C. § 499a *et seq.*; “the PACA”), violate section 2(4) of the PACA (7 U.S.C. § 499b(4)), by flagrant and repeated failures to make prompt and full payment to suppliers of fresh fruits and vegetables? Secondly, at the time of the alleged violations, were any of the officers, directors and shareholders of Terry Thomas Farms, Inc., “responsibly connected” with the corporation as that term is used in the PACA (7 U.S.C. § 499a(b)(9)), and for that reason subject to its licensing and employment restrictions as set forth in 7 U.S.C. § 499h.

On April 27, 2004, the PACA Branch, Fruit and Vegetable Programs, Agricultural Service, United States Department of Agriculture (“PACA Branch”), filed a disciplinary complaint against Terry Thomas Farms, Inc., a corporation licensed under the PACA, alleging that it had willfully, flagrantly and repeatedly violated the PACA by failing to make full and prompt payment of invoices, totaling over \$350,000.00, to seventeen suppliers of fruits and vegetables purchased between June 2001 and February 2003. On May 12, 2004, the PACA Branch notified Terry R. Thomas, Tammie L. Franks, Teresa A. Thomas and Barbara A. Thomas that they had been initially determined to be “responsibly connected” to Terry Thomas Farms, Inc., as that term is defined in 7 U.S.C. §499a(b)(9), and would therefore be subject to licensing and employment restrictions under the PACA as set forth in 7 U.S.C. §§ 499h(a) and (b)(2). After reviewing evidence submitted in challenge of the initial determinations, the PACA Branch issued final determinations that Tammie L. Franks and each of the Thomases were “responsibly connected” with Terry Thomas Farms, Inc. On September 2, 2004, petitions for review of those determinations were filed and, together with the disciplinary complaint, are the subjects of the instant proceedings. On June 7, 2004, an answer to the disciplinary complaint was filed. On September 9, 2004, certified copies of the records relied upon by the PACA Branch in determining that Tammie L. Franks and the Thomases were “responsibly connected” were filed. On April 4, 2005, the parties entered a Joint Stipulation to narrow the issues for hearing. On April 12, 2005, I conducted an oral hearing in Birmingham, Alabama. Michael Chambers, Esq., Birmingham, Alabama, represented

Terry Thomas Farms, Inc., Terry R. Thomas, Tammie L. Franks, Teresa A. Thomas and Barbara Thomas. The PACA Branch was represented by Charles Spicknell, Esq., Office of the General Counsel United States Department of Agriculture, Washington, DC. The filing of briefs was completed on August 26, 2005.

Upon consideration of the record evidence and the arguments of the parties, I have found and concluded for the reasons that follow, that Terry Thomas Farms, Inc. committed flagrant and repeated violations of the PACA, and that Tammie L. Franks and each of the Thomases were responsibly connected with the corporation at the time of the violations.

Findings of Fact

A. Terry Thomas Farms, Inc. and its failure to pay for produce

1. Terry Thomas Farms, Inc. was a duly formed corporation under the laws of the State of Alabama with a mailing address of 434 Finley Avenue W, Birmingham, Alabama 35204. Its current mailing address is c/o Michael L. Chambers, Esq, 205 North 20th Street, Suite 1010, Birmingham, Alabama 35203. (Joint Stipulation ¶ 1).

2. Terry Thomas Farms, Inc. was issued license number 991408 under the PACA on June 22, 1999. The license terminated on June 22, 2003 when the annual renewal fee was not paid. (Joint Stipulation ¶ 2).

3. During the period of June 2001 through February 2003, Terry Thomas Farms, Inc. failed to make full payment for 82 lots of fruits and vegetables purchased, received and accepted in interstate commerce or foreign commerce from nine sellers. These debts, as listed below, remained unpaid at the time of the hearing on April 12, 2005 (Joint Stipulation ¶3, ¶4, Tr. 20 and Tr. 49-50):

Seller	No. of Dates Accepted	Payment		
		Due Date	Lots	Unpaid Am't
(1) Produce Sales of S. Fla.	05/13/01-08/25/01	09/22/01	44	\$64,446.45
(2) Lucedale Produce Shed	06/01/01-06/21/01	07/02/01	3	\$ 7,680.00

(3) Tom Lange Co.	11/10/01-12/20/01	01/18/02	14	\$79,365.35
(4) Five Brothers Produce	04/14/02-05/01/02	05/22/02	4	\$ 6,196.40
(5) Joe McNair	06/11/02-06/26/02	07/10/02	4	\$ 6,000.75
(6) Peach Sales/Titan Farms	08/21/02-09/11/02	09/21/02	4	\$37,760.00
(7) Quality Produce	09/15/02-12/05/02	12/15/02	3	\$ 1,785.00
(8) William Farms	10/02/02-10/04/02	10/14/02	2	\$ 4,873.00
(9) Stovel Siemon LTD	01/02/03-01/23/03	02/20/03	<u>4</u>	<u>\$ 910.00</u>
			82	\$209,016.95

4. Terry Thomas Farms, Inc. fully cooperated with the PACA Branch during its investigation. (Joint Stipulation ¶ 5).

5. Terry Thomas Farms, Inc. had reduced the debt it originally owed from \$400,000.00 to the \$209,016.95 that was still owed at the time of the hearing. Of the 75 vendors with whom Terry Thomas Farms, Inc. customarily did business, only nine were still due balances at the time of the hearing. During the period June 2001 through February 2003, those nine unpaid vendors continued to do business with Terry Thomas Farms, Inc., accepted payment plans, never made demands for full payment and did not initiate lawsuits. (Tr. 14, 50, 51, 54, 55 and 79-80; Joint Stipulation ¶ 3 and ¶ 4).

6. During the period June 2001 through February 2003, Terry Thomas Farms, Inc. had accounts receivable amounting to approximately \$267,000.00 that despite actual collection efforts, it was unable to collect. (Tr. 22, 29 and 30-34).

B. The owners, directors and officers of Terry Thomas Farms, Inc.

7. Terry R. Thomas is married to Barbara Thomas. Teresa A. Thomas and Tammie L. Franks are their daughters. Tammie A. Franks is also the widow of Jeffrey Franks, who bought and sold produce as a 50% partner with Terry R. Thomas, his father-in-law, until October 30, 1998, when they incorporated the business as Terry Thomas Farms, Inc. (Tr. 60-62, 71, 148 and 234).

8. Initially, Terry Thomas Farms, Inc. had a two-member Board of Directors consisting of Terry R. Thomas and Jeffrey Franks who each had one half of the outstanding shares of stock. Terry R. Thomas was

President and Jeffrey Franks was Vice President. They elected Barbara Thomas to the position of Treasurer, and Tammie L. Franks to the position of Secretary. (Tr. 233-236; Barbara Thomas Agency Record, at RX 3).

9. Jeffrey Franks died in June of 2000. The 50% of the outstanding shares of stock he held in Terry Farms, Inc. became the property of Tammie L. Franks and her receipt of those shares was recognized in the corporate records on February 9, 2001, when she was elected Vice President. Also on February 9, 2001, the corporate records show that Terry R. Thomas transferred half of his shares of stock, or 25% of the total shares outstanding, to his other daughter, Teresa A. Thomas who was elected Secretary. (Tr. 61, 62, 120, 139-140, and 162; Teresa A. Thomas Agency Record, at RX 4).

10. On December 4, 2001, Terry Thomas transferred his remaining 25% of the total shares outstanding to his wife, Barbara Thomas. At that time, although he no longer owned any shares of stock, Terry Thomas was elected Chairman of the Board of Directors. (Tr. 189 and 203).

C. Terry R. Thomas' relationship to Terry Thomas Farms, Inc.

11. Terry R. Thomas was the co-founder of Terry Thomas Farms, Inc. which he and Jeffrey Franks incorporated on October 30, 1998. He served as one of its two initial directors, was its president and owned 50% of its outstanding shares of stock until February 9, 2001. On that date, he transferred half of his shares of stock (25% of the total outstanding) to his daughter Teresa A. Thomas. He continued in the office of President, owned 25% of the outstanding shares of stock and was a member of the Board of Directors until December 4, 2001, when he transferred his remaining shares of stock to his wife, Barbara A. Thomas. On that date, Teresa A. Thomas replaced him as President of the corporation and he was elected Chairman of the Board of Directors, even though he no longer owned any shares of stock. His transfers of stock were motivated by failing health and his wish to retire from the business. (Tr. 222-240 and Affidavit of Terry R. Thomas-Agency Record at RX 6).

12. The transactions which are the basis of the disciplinary complaint against Terry Thomas Farms, Inc. began on June 10, 2001. From that date until Terry R. Thomas divested himself of all of his stock, the corporation had failed to make full payment promptly for over \$100,000.00 worth of produce purchased, received and accepted in more than 50 transactions with three firms. (Joint Stipulation ¶ 4, Tr. 239-240).

13. After divesting himself of his shares of stock and giving up the office of President, Terry R. Thomas remained as a director during 2002, but did not attend or participate in any corporate meetings of directors or shareholders. He was not listed as a shareholder, director or officer of the corporation on its 2002 license certificate; however, he continued to work for Terry Thomas Farms, Inc. as an unpaid volunteer and, in that capacity, received and negotiated price adjustments on its behalf until early January of 2003. (Tr. 248-256, EX 10 and Affidavit of Terry Thomas-Agency Record at RX 6).

14. Terry R. Thomas, together with his wife, Barbara, did all they could to keep the business going. They sold their home. They borrowed approximately, \$250,000.00 from their relatives that, together with their personal savings, they put into the failing business. After the business shut down, they made payments to vendors with their personal checks. (Tr. 42, 59 and 190-191).

C. Barbara A. Thomas' relationship to Terry Thomas Farms, Inc.

15. Barbara A. Thomas has worked in the produce industry with her husband, Terry, since 1964. When Terry Thomas Farms, Inc. was incorporated, she was elected its Treasurer and continued to serve in that position until the corporation went out of business in early 2003. Barbara A. Thomas bought and sold produce, wrote and signed checks; and she controlled payments to vendors. On February 9, 2001, she signed a unanimous consent form for the board of directors which showed her to be a director and her re-election as Treasurer. She was a 25% shareholder of the corporation from December 4, 2001 until early 2003. (Affidavit of Barbara A. Thomas-Agency Record RX 11).

16. During the end days of Terry Thomas Farms, Inc., Barbara A. Thomas basically ran the corporation without consultation with others. She undertook to settle its debts to suppliers and wrote settlement checks for roughly 10% of what they were owed. Some produce creditors refused the 10% settlement offer and were paid in full and others have yet to be paid. (Tr. 190-191, Joint Stipulation ¶ 4).

D. Tammie L. Franks' relationship to Terry Thomas Farms, Inc.

17. Tammie L. Franks is the daughter of Terry and Barbara Thomas and Teresa A. Franks is her sister. She has an Associate's degree in paralegal studies. Tammie L. Franks was the Secretary of Terry Thomas Farms, Inc. from November 5, 1998 until February 9, 2001. On February 9, 2001, she was recognized in the corporate records as having inherited her deceased husband's shares of stock in the corporation which amounted to 50% of all of its outstanding shares, and she was elected the corporation's Vice President. (Tr. 16, 61-63, 120, 130, 134, 138, 139, EX 4).

18. During the period of June 2001 through February 2003, when the failures to pay vendors took place, Tammie L. Franks was a 50% shareholder, Vice President, and Director of Terry Thomas Farms, Inc. She received a weekly salary and performed clerical work that included updating accounts receivable, answering phones and taking orders for produce. She also took calls from vendors, wrote checks for the corporation, and occasionally signed invoices for produce as the produce was delivered to Terry Thomas Farms, Inc. She did not, however, attend any shareholders' meetings, or exercise any rights as a shareholder, or make any decisions respecting which vendors would be contacted to supply produce, or which vendors would be paid. (Tr. 120-124, 134-138, 143, 145, Affidavit of Tammie L. Franks-Agency Record at RX 7).

19. When Terry Thomas Farms, Inc. experienced difficulties in paying its bills; Tammie L. Franks made some payments to assist the business from her home equity line of credit and took a salary cut in mid 2001. (Tr. 68, 137-138).

E. Teresa A. Thomas' relationship to Terry Thomas Farms, Inc.

20. Teresa A. Thomas is the daughter of Terry and Barbara Thomas. She is the sister of Tammie L. Franks. She has a Bachelor degree in environmental studies. In 1999, she returned to Birmingham to work at Terry Thomas Farms, Inc. On February 9, 2001, Teresa A. Thomas received one half of her father's shares, or 25% of the total outstanding shares, in Terry Thomas Farms, Inc. On that date, she was a director of the corporation and was elected its Secretary. She remained the corporation's Secretary until December 4, 2001, when she replaced her father as President of the corporation. (Tr. 150-151, 162-163, 169-170, 175-176, Affidavit of Teresa A. Thomas-Agency Record at RX 8).

21. During the period of June 2001 through February 2003, when the failures to pay vendors took place, Teresa A. Thomas was a 25% shareholder, and a director of Terry Thomas Farms, Inc. During that period, she was its Secretary until December 4, 2001, when she was elected its President. She received a weekly salary and performed clerical work that included answering phones. She also sold produce to the public and other wholesalers; and she worked with customers in the warehouse assembling their orders. She ordered produce only in unusual, emergency situations and never wrote checks although authorized to do so. She never attended a directors' or shareholders' meeting or performed the duties of the corporation's President. She never decided whom to pay, how much to pay or when to pay selling vendors. (Tr. 149, 153-155, 163-170, 175-176, Affidavit of Terry A. Thomas-Agency Record at RX 8).

22. When Terry Thomas Farms, Inc. experienced difficulties in paying its bills; Teresa A. Thomas took a salary cut. During 2002, she was only a part-time employee with the corporation. (Tr. 68, 173-174).

Conclusions

1. Terry Thomas Farms, Inc., a corporation licensed under the

PACA, violated the PACA by flagrant and repeated failures to make prompt and full payment to suppliers of fresh fruits and vegetables.

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful:

For any commission merchant, dealer, or broker...in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce...to fail...to...make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had....

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

Whenever (1) the Secretary determines...that any commission merchant, dealer, or broker has violated any of the provisions of section 2... 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.

In addition to whether Terry Thomas Farms, Inc. committed a flagrant and repeated violation of section 2 of the PACA, the parties dispute whether it was willful. However, a finding respecting willfulness is unnecessary in this case. Under the Administrative Procedure Act (5 U.S.C. § 558(c)), in order to revoke a license for reasons other than public health or safety, a warning letter offering the licensee an opportunity to achieve compliance with the statute must first be given the licensee unless the violation is “willful”. *See In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998). If, however, as in the instant case, the license has already terminated, and instead of license revocation, the facts of the violation are being published, there is no need for a finding that the violation was willful. *See In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 397 (2000).

Even though superfluous, it is noted that a finding that the licensee’s violations were willful would be consistent with Departmental policy. In circumstances where there have been “repeated failures to pay a

substantial amount of money over an extended period of time,” the Department customarily finds the violation to have been willful and revokes an existing PACA license. This policy has been upheld upon challenge in federal courts. *See Andershock’s Fruitland, Inc., et al. v. USDA*, 151 F.3d 735, 737, 57 Agric. Dec. 1458 (7th Cir. 1998); *Havana Potatoes of New York Corp. v. U.S.*, 136 F. 3d 89, 93 (2d Cir. 1997).

Moreover, a violation may be willful irrespective of evil motive. *See Limeco*, 57 Agric. Dec. 1548, 1560 (1998). When a firm holding an existing license has failed to pay produce vendors promptly and in full as expressly required by the PACA, willfulness will be established on the basis of the length of time during which such violations occurred and the number and dollar amount of the transactions involved. *See In re Scamcorp, Inc.*, 57 Agric. Dec. 527, at 552-553 (1998).

Even when the inability of a licensee to pay vendors was precipitated by the failure of its own customers to pay their accounts receivable, the licensee is not absolved from being found to have violated the payment requirements of the PACA. *See In re The Caito Produce Co.*, 48 Agric. 602, 622 (1989); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996). Nor is a licensee absolved from liability because, in the face of its insolvency, its produce vendors have accepted partial payments and released the licensee from further claims. *In re Top Fresh, Inc.* 53 Agric. Dec. 951, 953-954 (1994).

By failing to pay for perishable produce in 82 transactions, Terry Thomas Farms, Inc. committed repeated violations of section 2 of the PACA. Still owing, at the hearing held on April 12, 2005, \$209,016.95 for those produce purchases made between June 2001 and February 2003, established the violations to also be flagrant. *See In re Pugach, Inc.*, 55 Agric. Dec. 581, 587-588 (1995); and *In re Coastal Banana & Tomato Co.*, 55 Agric. Dec. 617, 621 (1996).

A succinct statement of applicable USDA policy and its underlying rationale is to be found in *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 397 (2000):

The purpose of the PACA is to not only protect growers and producers from the ‘sharp practices of financially irresponsible and unscrupulous brokers’ in the produce industry, but also to protect growers and producers from any produce dealer or broker who, regardless of the reason, fails to pay promptly for the produce it buys.

In re Tony Kastner and Sons Produce Co., 51 Agric. Dec. 741, 745 (1992); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1159 (1983). When there is more than one failure to make full payment promptly and the amount is more than *de minimis*, the violations of the PACA are repeated and flagrant. The penalty for failure to make full payment by the time of the hearing is revocation of the respondent's license or, if the license has expired, publication of a finding that the respondent has committed repeated and flagrant violations of the PACA. *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. at 1156.

Therefore, under applicable Departmental policy, the failure to pay before the hearing, \$209,016.95 for produce purchased over one year in 82 transactions requires publication of a finding that Terry Thomas Farms, Inc. committed flagrant and repeated violations of the PACA. Departmental policy requires this finding even where, as here, the owners of the business have an honorable history of scrupulous dealings with suppliers, and had not failed to pay their suppliers in full and on time, until their own customers failed to pay them. Moreover, the fact that they did all they could to keep the business going by selling their home, borrowing money from their relatives, and paying vendors from their personal checking account is unavailing under this policy. It is a policy of long duration that the courts accept as consistent with the purposes of the PACA. See *Andershock's Fruitland, Inc.*, *supra*; and *Havana Potatoes of New York Corp.*, *supra*.

2. Terry R. Thomas was responsibly connected with Terry Thomas Farms, Inc. at the time it committed flagrant and repeated violations of section 2 of the PACA.

Section 8(b) of the PACA places restrictions on the employment by PACA licensees of any person found to have been responsibly connected with anyone who committed any flagrant or repeated violation of section 2 of the PACA. (7 U.S.C. § 499h(b)).

"Responsibly connected" is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(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 responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act and that the person was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The second sentence was added by amendment in 1995. It affords those who would otherwise fit within the statutory definition of “responsibly connected”, the right to demonstrate that they were not responsible for the specific violation. (H.R. Rep. No. 104-207, at 11 (1995)). The amendment’s statutory background may be found in *Michael Norinsberg v. United States Department of Agriculture and United States of America*, 162 F. 3d 1194, 1196-1197 (D.C. Cir. 1998), reprinted in 57 Agric. Dec. 1465, 1465-1467 (1998); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1482-1487 (1998); and *In re Michael J. Mendenhall*, 57 Agric. Dec. 1607, 1615-1619 (1998). The amendment established:

...a two-prong test for rebutting the presumption when a person meets the definition of *responsibly connected* in the first part of the statute: the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (“and”), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.

Salins, 57 Agric. Dec. 1474, 1487-1488.

Terry R. Thomas has failed to satisfy either prong of the test. As set forth in Findings of Fact 11 and 12, *supra*, from the time the violations began on June 10, 2001 until December 4, 2001, Terry R. Thomas was the President of the corporation, was one of its directors and owned 25% of its stock. During that time, the corporation failed to make full payment promptly for over \$100,000.00 worth of produce purchased, received and accepted in more than 50 transactions. His functions in relation to the activities that were in violation of the PACA, cannot be found to have been ministerial in nature only as is required to satisfy the first prong of the test. *See In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999). After transferring his stock to his wife, Barbara, on December 4, 2001, Terry R. Thomas remained as a director of the corporation and continued to work for it as an unpaid volunteer who received and negotiated price adjustments on its behalf until January of 2003. Though unpaid, he continued to perform functions for the corporation where he exercised judgment and discretion that exceeded those that could be categorized as merely ministerial, and he continued to not meet the first prong of the statutory test.

He also failed to meet the second prong of the test. During the initial payment violations, as the President, director and owner of 25% of the corporate licensee's stock, Terry R. Thomas was not a nominal officer, director or shareholder.

As the Court stated in *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987), in determining whether or not an individual is nominal, 'the crucial inquiry is whether an individual has an 'actual, significant nexus with the violating company,' rather than whether the individual has exercised real authority.' Petitioner cannot avoid responsibility for the violations...(the corporate licensee) committed while he was president, simply because he chose not to exercise the powers he had.

In Re Anthony L. Thomas, 59 Agric. Dec. 367, 387-388 (2000). For these reasons, it is concluded that Terry R. Thomas was responsibly connected with Terry Thomas Farms, Inc. when it flagrantly and repeatedly violated the PACA.

3. Barbara A. Thomas was responsibly connected with Terry Thomas Farms, Inc. at the time it committed flagrant and repeated violations of the PACA.

The evidence conclusively shows that Barbara A. Thomas was actively involved in the violations of the PACA by Terry Thomas Farms, Inc. She and her family members have testified that during the last days of the corporation's existence, Barbara A. Thomas ran it without consulting them, undertook to settle its debts to suppliers and wrote the settlement checks. She was also the corporation's Treasurer, a director and from December 4, 2001 until early 2003, she was a 25% shareholder.

Under the applicable legal precedents previously set forth, it is therefore concluded that Barbara A. Thomas was responsibly connected with Terry Farms, Inc. when it flagrantly and repeatedly violated the PACA.

4. Tammie L. Franks was responsibly connected with Terry Thomas Farms, Inc. at the time it committed flagrant and repeated violations of the PACA.

The evidence shows that Tammie L. Franks took no part in buying produce other than taking phone calls from vendors or occasionally signing delivery invoices. Her work was essentially clerical and she deferred all business decisions during the time the violations took place, to her mother. As one whose functions can be categorized as basically ministerial in nature, Tammie L. Franks has met the first prong of the statutory test.

Unfortunately, she does not meet its second prong. It cannot be found that she had a merely nominal relationship to the licensee during the period when the violations occurred. At that time, she was a 50% shareholder, Vice President and a Director of Terry Farms, Inc. and for that reason she had:

...an actual significant nexus with the violating company during the violation period... (that)... required that (she) know, or should know, about violations being committed and... be held responsible for (her) failure to 'counteract or obviate the fault of

others.’

Bell, supra, 39 F. 3d at 1201.

In re: Anthony L. Thomas, 59 Agric. Dec. 367 at 386 (2000).

I therefore must conclude that Tammie L. Franks was responsibly connected with Terry Thomas Farms, Inc. when it flagrantly and repeatedly violated the PACA.

5. Teresa A. Thomas was responsibly connected with Terry Thomas Farms, Inc. at the time it committed flagrant and repeated violations of the PACA.

Teresa A. Thomas had clerical duties and only ordered produce in unusual situations. However, she also sold produce to the public and other wholesalers; and she worked with customers in the warehouse assembling their orders. Though her functions were not at a managerial level, they appear to have been more than merely ministerial in nature. But regardless of whether she fits within the first prong of the test, she too fails to meet the second prong.

Teresa A. Thomas was President, a 25% shareholder and a director of Terry Thomas Farms, Inc. when it violated the PACA. She therefore had a significant nexus to the corporation that places her outside of the “nominal” designation. Under applicable precedents, she must be concluded to have been responsibly connected with the corporate licensee and “... held responsible for her failure to counteract or obviate the fault of others.” *In re: Anthony L. Thomas, supra*.

For these reasons, the following Order is being issued.

ORDER

An Order is hereby issued publishing the finding that Terry Thomas Farms, Inc. committed flagrant and repeated violations of section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

Additionally, it is found that Terry R. Thomas, Tammie L. Franks, Teresa A. Thomas and Barbara A. Thomas were each responsibly connected with Terry Thomas Farms, Inc. at the time it committed the

flagrant and repeated violations.

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

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

**In re: B.T. PRODUCE CO., INC.,
PACA Docket No. D-02-0023
and
LOUIS R. BONINO,
PACA Docket No. APP-03-0009
and
NAT TAUBENFELD,
PACA Docket No. APP-03-0011.
Decision and Order.
Filed December 6, 2005.**

PACA – Responsibly connected.

Ann Parnes, for Complainant.

Mark C.H. Mandell, for Respondent.

Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

Decision

In this decision I find that in PACA Docket No. D-02-0023, Respondent B.T. Produce Co., Inc.¹ willfully violated the Perishable Agricultural Commodities Act (Act), and the regulations thereunder. In particular, I find that Respondent violated section 2(4) of the Act, as a consequence of one of its principals paying bribes to a USDA inspector

¹In PACA Docket No. D-02-0023, the USDA's Associate Deputy Administrator, Fruit and Vegetable Service, Agricultural Marketing Service is the Complainant, and B.T. Produce, Inc. is the Respondent. In PACA Docket No. APP-03-0009, Louis R. Bonino is the Petitioner, in PACA Docket No. APP-03-0010, David Taubenfeld was the Petitioner, and in PACA Docket No. APP-03-0011, Nat Taubenfeld is the Petitioner.

on at least 42 occasions. The violations committed were serious and extended over a significant period of time, and were likely committed to secure a competitive advantage over others. However, after weighing the statutory factors, I am not revoking B.T.'s license, but am instead imposing a civil penalty of \$360,000 in lieu of a six month suspension of their license. I also find that both Louis Bonino, in PACA Docket No. APP-03-0009, and Nat Taubenfeld, in PACA Docket No. APP-03-0011, are responsibly connected to B.T.²

Procedural History

On August 15, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, issued a Complaint charging Respondent with "willfully, flagrantly and repeatedly" violating section 2(4) of the Act, and requesting that Respondent's PACA license be revoked. On September 30, 2002, Respondent filed its Answer, denying that it had violated the Act as alleged, and claiming several affirmative defenses. Respondent asked that the claims be dismissed or that an oral hearing be scheduled. On December 2, 2002, former Chief Judge James W. Hunt set the case for a hearing to commence on August 4, 2003.

Meanwhile, on March 31, 2003, James R. Frazier, Chief of the PACA Branch of the Agricultural Marketing Services, made determinations that Louis R. Bonino, David Taubenfeld and Nat Taubenfeld were responsibly connected with Respondent. On April 17, 2003, Petitioners each filed appeals of those determinations. On June 20, 2003, Judge Hunt consolidated the disciplinary case against Respondent and the petitions challenging the responsibly connected determinations for hearing, pursuant to Rule 137(b) of the Rules of Procedure.

The consolidated matter was reassigned to me on July 10, 2003. The hearing was continued to December 1, 2003 due to the illness of David Taubenfeld. I conducted a hearing in New York City from December

²With respect to Petitioner David Taubenfeld, subsequent to the conclusion of the hearing the PACA Chief withdrew his determination that David Taubenfeld was responsibly connected to B.T. during the time period the violations were alleged to have been committed. Accordingly, on January 28, 2005, I granted David Taubenfeld's motion to dismiss his petition for review.

8 through 11, 2003, February 17-20, 2004, and August 3 through 4, 2004.³ Christopher Young-Morales and Ann Parnes of the U. S. Department of Agriculture's Office of General Counsel represented the Agency, and Mark Mandell and Jeffrey Chebot represented Respondent in the disciplinary case and the Petitioners in the responsibly connected matter. The parties subsequently filed initial and reply briefs, and proposed findings of fact and conclusions of law.

Factual Background ⁴

What was apparently a long-standing atmosphere of corruption surrounding the Hunts Point Terminal Market in the Bronx became the subject of a fairly extensive federal investigation in 1999. Hunts Point is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of Respondent. It handles huge volumes of produce, delivered from points throughout the country and the world. Because produce may have been grown or shipped from many thousands of miles away from New York City, inspections by USDA inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may be acting at the behest of the shipper or another party up or down the line. Approximately 22,000 produce inspections are conducted annually by USDA inspectors at Hunts Point. These inspections are crucial to the successful working of the market at Hunts Point and other produce markets, as the USDA is ostensibly a neutral party who examines the product and verifies its condition, thus allowing for the resolution of potential disputes

³Although the hearing was scheduled to be completed in December, continuances were necessary due to the recurring illness of David Taubenfeld. Mr. Taubenfeld was finally able to testify on August 3, 2004. Tragically, Mr. Taubenfeld passed away in October, 2005.

⁴A significant portion of this section is adapted from my decision in *Kleiman & Hochberg* (appeal pending before the Judicial Officer)

concerning the condition of the product that arrives at the wholesale market. The inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the load, and can result in the renegotiation of terms regarding the sale of the produce.

As a general rule, produce needs to be sold as quickly as possible. This is particularly true with produce that is near ripe or ripe, or where there are defects within the shipment, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where an inspection is requested, it is often beneficial to the wholesaler and the shipper to begin selling the produce immediately to get the best price for the produce. Essentially, every hour ripe or defective produce sits around the warehouse costs someone money. However, it is in everyone's best interest that the inspection be conducted as soon as possible, so that an accurate accounting of the state of the produce is available to settle possible disputes.

The 1999 investigation, known as Operation Forbidden Fruit, apparently conducted primarily by the Federal Bureau of Investigation (FBI) with the significant involvement of USDA's Office of Inspector General (OIG), uncovered a large network of USDA inspectors who were receiving bribes regarding their conduct of inspections, and produce houses that were paying these bribes. At the same time, it was evident that many produce houses were not paying bribes, and not all inspectors were corrupt.

Complainant's principal witness, William Cashin, is a former USDA inspector at Hunts Point who was caught accepting bribes by investigators, and was arrested by the FBI. Tr. 60⁵. To avoid a prison term, Cashin agreed to cooperate with the investigation, and to wear or carry devices allowing him to record, either through audio or visual

⁵ "Tr." Refers to the transcript. Complainant's exhibits are marked CX and are sequentially numbered. Respondent's exhibits are marked RX and are sequentially lettered (A-Z, AA-SS). The exhibits for the responsibly connected cases are marked RNT 1-11 and RLB 1-9 for Nat Taubenfeld and Louis Bonino, respectively.

means, many of the transactions that involved the alleged offering and taking of bribes. Tr. 61-62, CX 5. During the course of Cashin's participation in Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, Cashin continued his normal business activities as an inspector. At the conclusion of each business day, he would meet with FBI and OIG agents to discuss the day's events, principally which inspections he received bribes for and for how much. Tr. 61-62. He turned over the money he received as bribes during each of these meetings. *Id.* These meetings are recorded on the FBI 302 forms, many of which have been received in evidence at the hearing. CX 6-19. It is worth noting that apparently the only activity that Cashin was asked about was the identity of the person offering the bribe, the house that person worked for, the type of produce inspected, and the amount of the bribe. Amazingly, particularly in light of the allegations made by Complainant in this case that in exchange for the bribes Cashin "helped" the briber by misreporting some aspect of what he observed, there is not a shred of evidence on these forms as to what Cashin did in exchange for the bribes.

Cashin testified that for each of the 42 inspections that he conducted at B.T. between the time of his arrest and his resignation, he was paid \$50 in bribes by William Taubenfeld, who at that time was the secretary, a director, and part owner of the company. He stated that in 60% to 75% of these inspections he gave "help" to B.T., in the form of overstating the percentage of defects, overstating the number of containers inspected, or mis-stating the temperatures of the load. Tr. 50-53, 58.

William Taubenfeld, who is the son of Nat Taubenfeld and the brother of David Taubenfeld, was indicted on October 21, 1999 for thirteen counts of Bribery of a Public Official. On May 16, 2001, he pled guilty to a single charge of bribery of a public official in connection with three bribes he paid to Cashin on July 14, 1999. In his plea, he stated that he paid the bribes "with the expectation that on some occasions he would give me favorable treatment by downgrading his rating of produce that he was inspecting." RX QQ at p. 12. William Taubenfeld was sentenced to fifteen months in prison, and 3 years probation, and was ordered to pay a \$4,000 fine and \$14,585 in

restitution. *Id.*, CX 4, Tr. 257-258. William Taubenfeld's connections with B.T. were severed shortly after his arrest, with his ownership rights transferring back to Nat Taubenfeld. He did not appear at the hearing.

B.T. has established itself as a handler of second rate, third rate and distressed produce. Tr. 686-687, 690-691.⁶ Much of the produce the company handles has been rejected by other produce houses or stores. B.T. has a reputation for being able to sell lower grades of produce, or produce where the load has significant defects, for good value, so that others send them their lower quality merchandise because they are able to make them more money than they could make otherwise. A number of witnesses testified that they were well aware that the loads inspected by Cashin contained many problems, since that was why they sent the load to B.T. in the first place, and that they were not surprised when they saw the inspection reports. Further, they were generally pleased with the results achieved by B.T. in the sale of the load.

Nat Taubenfeld⁷, the president of B.T., has been in the fruit and vegetable business since he arrived in this country in 1949. In 1990, he set up the current B.T. business (he had used the same name in a previous business a few decades earlier) with Louis Bonino as his 30% partner. He worked the fruit and vegetable side of the business, while Louis Bonino primarily served as office manager, supervising the employees and managing the money. Tr. 689-690. He brought William Taubenfeld into the business from the time of its establishment, and gradually brought his son David in as well.⁸ Tr. 692-693. He gave both William and David shares in the business, although no compensation was involved for these transactions and no share certificates were issued. Tr. 695.

Nat Taubenfeld stated that he was unaware that his son was making illegal payments to Cashin. He further stated that he had never given

⁶Or as David Taubenfeld stated: "We are not a house of quality. We are a house of seconds and rejections and off-quality product." Tr. 1789.

⁷His given name is Naftali but he is universally referred to in his business and in this case as Nat.

⁸While David Taubenfeld was listed as a partner in the company, he apparently was not personally aware of that fact, and his role in the company was clearly that of an employee rather than a principal.

money to any USDA inspector to “attempt to influence the result of that produce inspection.” Tr. 698. However, he did indicate that on a number of occasions he gave Cashin money, not to influence inspections but as an act of charity in response to solicitations from Cashin for loans to help Cashin in his relationship with his girlfriend. Tr. 702-704. He was not sure of the time period for these “loans.” Cashin had testified that Nat Taubenfeld had been paying him bribes for years, even before he established B.T. Tr. 42-44. While the payments Nat Taubenfeld made to Cashin are not the subject of this case, it has some disturbing implications concerning his treatment of inspectors, and his judgment, that have a bearing in fashioning a remedy in this matter.

There was never any evidence introduced indicating that Louis Bonino knew anything about the bribes William Taubenfeld paid to Cashin. It is clear that Mr. Bonino was not involved in the buying and selling of fruit and vegetables, and basically managed the other aspects of the business. Mr. Bonino, who retired on disability as a New York City police officer, and who owned a trucking business before joining Nat Taubenfeld in forming B.T., signed checks and contracts, put in surveillance measures, and managed office staff at B.T. Tr. 595-602. He was a 30% owner in the company from the time it was created in 1990, and is its vice-president. RLB 1. As part of his duties, he also handled the thirty to forty reparations cases that arose as a result of the Forbidden Fruit operation, and which resulted in B.T. paying reparations of \$400,000 to \$500,000. Tr. 605-607. Mr. Bonino expressed surprise as to why anyone would pay to inflate the defects or otherwise misstate the condition of fruits and vegetables that were already known to have substantial defects and which likely had already been rejected by others before being shipped to B.T., and stated he was not aware of the illegal payments. Tr. 608-609.

Much of the hearing consisted of testimony concerning the 42 inspection certificates, and whether Cashin in fact “helped” B.T. with respect to any of the loads of produce that were the subject of these certificates. Since Cashin steadfastly maintained that he had no specific memory of how he helped B.T. in any particular inspections, and since Complainant called no witnesses who were connected to any of the 42 inspections to testify that they had been in any way impacted by Cashin’s actions, there has been little to no reliable proof that any of

these certificates were in fact inaccurate. On the other hand, B.T. personnel testified that each of the certificates was accurate, and their testimony was corroborated in a number of instances by testimony from the shippers of the produce that the information in the inspection certificates was consistent with what they expected, given what they knew of the condition of the loads.

Complainant attempted to buttress Cashin's credibility by playing an audiotape of one of his inspections at B.T. on April 23, 1999, where William Taubenfeld was also present. CX 21. The audiotape was not of the highest quality. The inspection reflected in the discussion was memorialized in the inspection certificate admitted as CX 8. While the tape was difficult to hear, it is clear that William Taubenfeld suggested the percentages of defects in a load of tomatoes, and that Cashin reported the suggested defects in his inspection certificate. Cashin also indicated that the practice of pointing out problems with a load was not unusual. "It's very commonplace for a member of the industry, whether he pays or doesn't pay, to pull defects out of a box and say look at this, look at this, look at that, look what I found." Tr. 973. It was also common for people in the produce business to suggest to the inspector what percentages of defects were in a load. Tr. 974. Cashin's conclusion that he "helped" B.T. with regard to this inspection was based on the fact that Cashin put down the very numbers suggested by William Taubenfeld on the inspection form, and are not based on any recollection that those numbers are incorrect. *Id.*

While Complainant called no witnesses, other than Cashin, who could have corroborated that any particular inspection certificate was falsified, Respondent's witnesses testified as to their recollection of each transaction. Not only did Nat and David Taubenfeld testify regarding loads they handled that were subject to one of the 42 inspection certificates, but office manager Robin Long, salesman Michael Bonino (who is the son of Petitioner Louis Bonino), Steven Goodman, who was affiliated with the shipper JSG, Peter Silverstein, the president of Northeast Trading, and Harold Levy, a fruit broker at Northeast Trading, all testified as to their roles in many of these transactions.

It is worth discussing several of the transactions in a little more detail. For example, Nat Taubenfeld discussed one of the first inspections included in the indictment and cited in the complaint, which

was one of three that took place on March 24, 1999. This inspection involved a load of plums from David Oppenheimer and Company which was received by B.T. two days earlier. On the receiving ticket, Nat Taubenfeld noted in his own handwriting that the plums were "very ripe," RX A, p. 1, Tr. 1095. This indicated to him that "the merchandise had to be moved quick, sold under any price, and not play around with it." *Id.* The shipment was "pas" or price after sale, indicating that a final price on the merchandise was not to be calculated until the produce was sold or otherwise disposed of. Tr. 1089. The inspection certificate finding of serious damage to 18% of the load, RX A, p. 6, was not inconsistent with his observations that the plums were very ripe. While Oppenheimer suggested that the price be \$9 per box of plums, they agreed to an adjustment of \$8 per box after factoring in the prices B.T. was able to get for the plums (averaging \$8.20), along with the costs associated with repacking or discarding some of the plums. In Nat Taubenfeld's opinion, B.T. suffered a net loss on the transaction. Tr. 1098-1100.

Another transaction worth mentioning is the June 14, 1999 inspection of cherries from Northeast Trading. RX Q. Nat Taubenfeld indicated on the bill of lading, RX Q, p. 3, that the cherries were "soft", as opposed to the firm cherries that customers' desire. Tr. 1148. He testified that he received an average of \$5.26 per box under the market price for these cherries, and that he received a \$6 reduction from Northeast Trading as a result. He did not dispute the inspection certificate indicating 21% defects. Peter Silverstein, the president of Northeast Traders, testified with respect to that same shipment, that he had no indication that there was anything wrong with the inspection certificate, Tr. 1648, and that the shipper did not appeal the inspection, Tr. 1639. He thought that it was likely that the older cherries in this shipment were competing against younger and fresher cherries. Tr. 1648-1649.

With respect to pricing in general, Nat Taubenfeld emphasized that shippers and B.T. had a very flexible relationship and that sometimes when a shipper receives a higher price than would be expected from the sale of produce, the understanding is that B.T. would be allowed to recoup a larger profit sometime down the road, to make up for a lesser profit or a loss for a different load. Tr. 1089-1092. He pointed out that

“the relationship between the shipper and us plays a tremendous role in our business.” Tr. 1092. “[I]t’s one hand washes the other. Sometimes you can make a few dollars more, and sometimes the shipper says that’s what I can give you and that’s what we do.” Tr. 1100. David Taubenfeld had a more dramatic explanation—“It’s a lot of begging. There’s a lot of begging to our customers and pleading and fighting over prices and things like that.” Tr. 1797. David Taubenfeld added that they often “work for nothing” on a particular load with the idea of keeping a shipper happy, so the shipper will help them out at a later time. Tr. 1945.

Even though Complainant was unable to demonstrate that any particular inspection certificate was falsified to B.T.’s benefit, the only probative evidence offered in this matter as to the purpose for the illegal payments was favorable treatment in the form of downgrading the quality of inspected produce, on what appears to be an as-needed basis. The portrayal by Respondent of its shippers as a contented lot satisfied with the results of inspection certificates is belied by the fact that Operation Forbidden Fruit generated a significant number of reparations actions against B.T., and something in the vicinity of \$500,000 in reparations payments by B.T. Tr. 605-607. Certainly, even if loads which were expected by the shipper to be seconds or worse were falsely downgraded even further by the inspector, there would be lower price expectations on behalf of the shipper, and would possibly result in an apparently exceptional job in selling damaged goods that could inure to B.T.’s benefit in terms of future business. Tr. 1302-1305.

David Nielsen, a senior marketing specialist in the PACA Branch’s New Brunswick, New Jersey office, testified as to his role in the investigation. His methodology basically consisted of reviewing documents provided the PACA Branch from the FBI and from USDA’s Inspector General’s Office. Tr. 247. He examined the license files of B.T., and the complaint history of B.T. as well as the documents that were supplied to him. Tr. 252. He went to B.T.’s premises on March 26, 2001 as part of his investigation, particularly seeking out the purchase and sales records related to the inspection certificates that he had been given by the FBI and IG. He spent about two weeks on site in March and April, and returned for another two weeks several months later. Tr. 279. Substantial requested records were turned over to him.

While Mr. Nielsen testified that he produced a report of investigation that B.T. violated section 2(4) of the PACA by paying bribes to a federal inspector to falsify 42 inspection certificates, he based that conclusion on what he had received from the FBI and the IG, and admitted under cross-examination that there were no records of B.T. indicating any evidence of falsification of inspection reports, nor were there any records supporting a finding that B.T. paid bribes. Tr. 284-287. Likewise, although he stated in his report that the 42 inspection certificates were used to obtain price adjustments, his report was not accurate. Tr. 290-291. He later admitted that in other areas the conclusions in his investigative report were not always accurate, Tr. 308 (no adjustment on the load from Trinity Fruit, RX I, even though his inspection report said that a falsified inspection was used to get an adjustment); Tr. 310 (no adjustment on the load of Garden Fresh Mangos or Mission produce mangos even though his inspection report said that a falsified inspection was used to get an adjustment); and that his statement in his investigation report about falsification was “an assumption . . . my understanding of the information that I had been given.” Tr. 321.

John Koller, a senior marketing specialist with the PACA Branch, testified as Complainant’s sanctions witness. Mr. Koller testified that the payment of bribes by B.T. “to a produce inspector constitutes willful, repeated and flagrant violations of the PACA.” Tr. 489. Mr. Koller further testified that bribing an inspector “corrupts the inspection process,” Tr. 490, and violates the fair trade practices provisions of PACA. He testified that the payment of bribes by William Taubenfeld constituted bribery by B.T. since William Taubenfeld was an officer and employee of B.T., and since his actions were within the scope of his employment. Tr. 490-491. He pointed out that when pleading guilty in court, William Taubenfeld admitted that the bribes were made with an expectation of favorable treatment on some occasions. Tr. 496, RX QQ.

Mr. Koller recommended that an appropriate sanction would be revocation of B.T.’s license. Tr. 499. He stated that civil penalties were not appropriate here, because “bribery payments being made to a produce inspector to obtain false information on the inspection . . . undermines the credibility of the inspection certificate itself, and . . . the inspection process and its credibility.” Tr. 502. He also stated that

revocation was warranted because of the length of time the bribery had continued and because “USDA has consistently recommended license revocation in the case of bribery . . .” Tr. 503. Even in instances where a bribe was paid and the particular inspection certificate was accurate, there is a benefit to the bribe payer, according to Mr. Koller, because the bribe payer could benefit at a later time, Tr. 516, and because bribery creates an “unlevel playing field.” Tr. 591. Indeed, in his guilty plea, William Taubenfeld stated the purpose of his illegal payments was for future benefits. However, Mr. Koller also admitted that the Department was not “able to identify a single one of the 42 inspections here that was falsified . . .” Tr. 533.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable produce. Among other things, it defines and seeks to sanction unfair conduct in the conduct of transactions involving perishables. Section 499b provides:

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.

The penalties for violating the Act may be severe. Thus, upon a finding that a licensed dealer or broker "has violated any of the provisions of section 499b," the Secretary may, "if the violation is flagrant and repeated . . . revoke the license of the offender." 7 U.S.C. §499h(a). The Act also provides for civil penalties as an alternative to license suspension or revocation. "In lieu of suspending or revoking a license . . . the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continuesgiv[ing] due consideration to the size of the business, the number of employees, and the seriousness, nature and amount of the violation." 7 U.S.C. §499h(e).

The Act does not require that Respondent be aware of the specific violations committed by one of its principals or employees in order for the company to be found liable for the violations. Section 16 of the Act, 7 U.S.C. §499p, provides:

. . . the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person."

In addition to penalizing the violating dealer or broker, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id.*

(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.

Findings of Fact

1. B.T. Produce Co., Inc. (Respondent) is a New York Corporation whose business and mailing address is 163-133 Row A, Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to this matter, Respondent was a licensee under the Perishable Agricultural Commodities Act (PACA, or the Act). CX 1.

2. William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture's Agricultural Marketing Service's Fresh Products Branch, from July 1979 through August 1999. Tr. 36.

3. Cashin was one of numerous USDA produce inspector's who participated in a scheme whereby they received bribes for the conduct of produce inspections. On March 23, 1999, Cashin was arrested by agents of the FBI and USDA's OIG. Tr. 60. After his arrest, Cashin entered into a cooperation agreement with the FBI, agreeing to assist the FBI with their investigation into corruption at Hunts Point Market. Tr. 60-62 , CX 5.

4. With the approval of the FBI and the OIG, Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. Cashin surreptitiously recorded interactions with individuals at different produce houses using audio and/or video recording devices. At the end of each day, Cashin would give the FBI agents his tapes, turn in any bribes he received, and recount his activities. The FBI agents would prepare a "302" report summarizing what Cashin told them about

that day's activities. Tr. 61-62; CX 6-19.

5. Beginning in 1994, and more specifically from the period between March 24, 1999 through August, 1999, William Taubenfeld paid bribes to William Cashin. In particular, he paid Cashin \$50 bribes for each of the 42 inspections cited in the Complaint.

6. The bribes were paid with the expectation that Cashin would occasionally downgrade the quality of the merchandise he was inspecting, presumably to give B.T. a competitive advantage. RX QQ.

7. There was no specific evidence that any of the 42 inspections cited in the Complaint were falsified.

8. The evidence supports a finding that there were transactions where B.T.'s position was improved by the falsification of inspections as a result of bribes paid to Cashin.

9. During the period in which he paid bribes to Cashin, William Taubenfeld was secretary, a director and a significant shareholder in Respondent. CX 1.

10. During the period described in paragraph 9, Nat Taubenfeld was president, a director, and a significant shareholder in B.T. CX 1. Nat Taubenfeld was intimately involved in the day-to-day operations of B.T., particularly in the area of buying and selling of fruit.

11. During the period described in paragraph 9, Louis Bonino was the vice-president, a director and a thirty percent shareholder of B.T. CX 1. Louis Bonino was involved in the day-to-day operations of B.T., principally managing the office aspect of operations.

12. There is no evidence that Nat Taubenfeld or Louis Bonino knew that William Taubenfeld was making illegal payments to William Cashin.

Conclusions of Law

1. Payment of bribes to a USDA produce inspector constitutes a failure to perform a duty express or implied in connection with transactions of perishable agricultural commodities in violation of section 2(4) of PACA.

2. The acts of bribery committed by William Taubenfeld constitute violations of section 2(4) of PACA by Respondent.

3. Respondent has committed 42 willful, flagrant and repeated violations of PACA 2(4) by paying bribes to a USDA produce inspector.

4. The appropriate sanction in this case is license suspension for a period of 180 days. Rather than suspend Respondent's license, I impose an alternative civil penalty of \$360,000.

5. Nat Taubenfeld is responsibly connected to Respondent.

6. Louis Bonino is responsibly connected to Respondent.

Discussion

I find that one of Respondent's principal owners and officers, William Taubenfeld, paid bribes to William Cashin in each of the 42 instances alleged by Complainant. I further find that bribery of a USDA produce inspector violates the Perishable Agricultural Commodities Act, and that these violations were willful, flagrant and repeated. I find that Respondent is liable for these violations. I further find that while there is no specific evidence that any of these 42 inspection certificates were falsified, that the evidence shows that the illegal payments were made with the expectation that B.T. would receive some help from Cashin in the form of falsified inspection reports, and that while Complainant provided no proof of any specific falsification, the fact that significant reparations were paid by B.T. as a direct result of Operation Forbidden Fruit cannot be ignored. I find that the purposes of the PACA can best be achieved in this matter by the assessment of a significant civil penalty, rather than license revocation. Therefore, I am imposing a civil penalty of \$360,000 against Respondent in lieu of a 180-day suspension

of its license. Since I am not suspending or revoking Respondent's license (unless Respondent elects to serve the suspension rather than pay the penalty), there is no ban on the employment of Nat Taubenfeld or Louis Bonino by any licensee; however, I am making a finding, in the event that my sanction remedy is subsequently reversed, that Nat Taubenfeld and Louis Bonino are each responsibly connected to Respondent.

I. Respondent's bribery of a USDA produce inspector on at least 42 occasions constituted willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act.

A. William Taubenfeld, the secretary, director and a major shareholder in Respondent, paid bribes to USDA produce inspector William Cashin on at least 42 occasions.

There is no evidence which would contradict a finding that William Taubenfeld made \$50 payments to William Cashin in the 42 instances recited in the complaint. While William Taubenfeld's plea was only for a single count of bribery based on three inspections for which he was bribed on July 14, 1999, Cashin's undisputed testimony as corroborated in the FBI's 302 forms, along with William Taubenfeld's guilty plea, leave little doubt that the practice of bribing Cashin was part of a long-standing practice.

It is likewise undisputed that William Taubenfeld was secretary of Respondent at the time the violations alleged in the Complaint were committed, and that he was a significant shareholder of Respondent. ⁹

B. Respondent is liable for the violative acts of William Taubenfeld that were committed within the scope of his employment or office.

⁹B.T.'s filings with the PACA Branch indicate that an entity known as "Taubenfeld Brothers Produce, Inc." was 70% owner of B.T. at the time of the violations, but apparently no stock certificates were ever issued to memorialize this, nor was Nat Taubenfeld even aware that this entity existed. It is clear, though, that Nat Taubenfeld and his son William, along with Louis Bonino, were the principal owners of the company.

Section 16 (U.S.C. §499p) of the Act that states that “in every case” “the act, omission, or failure of any agent, officer or other person acting for or employed by any commission merchant, dealer, or other person acting for or employed by any commission merchant, dealer or broker, within the scope of his employment or office,” “shall be deemed the act, omission, or failure” of the employer. There is no disputing that William Taubenfeld paid bribes to William Cashin for the 42 inspections. While there was no evidence indicating that the money used to bribe Cashin came from company funds, nor was there any specific evidence that either Nat Taubenfeld or Louis Bonino was aware of the bribery, the purpose behind the bribes, as undisputedly testified to by Cashin and confirmed by the plea of William Taubenfeld, was to benefit Respondent, with the hope that produce inspected by Cashin would be downgraded to the benefit of B.T.

Thus, in *Post & Tauback, Inc.*, 62 Agric. Dec. 802 (2003), the Judicial Officer held that Section 16 “provides an identity of action between a PACA licensee and the PACA licensee’s agents and employees.” *Id.*, at 820. As long as William Taubenfeld was acting within the scope of his employment, which he clearly was, violations committed by him are deemed to be violations by Respondent.

Even if other principals in the company, as well as its employees, were unaware of William Taubenfeld’s actions, the absence of actual knowledge is insufficient to rebut the burden imposed by section 499p. In *Post & Tauback, Inc.*, the Judicial Officer unequivocally held that “as a matter of law, . . . violations by [an employee] . . . are . . . violations by Respondent, even if Respondent’s officers, directors, and owners had no actual knowledge of the . . . bribery . . . and would not have condoned [it].” *Id.*, at 821. If a company can be held responsible for the acts of an employee, who was not an officer or an owner, even where the company’s officers had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is both an owner and an officer, whether or not the other officers had actual knowledge of the violative conduct. The clear and specific language of the Act would be defeated by any other interpretation.

C. Bribery of a USDA produce inspector violates PACA.

Section 2(4) of the PACA makes it unlawful “to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any . . . transaction.” Agency case law has consistently interpreted this provision to hold that the payment of bribes to a USDA produce inspector is a violation of PACA. Thus, the Judicial Officer held in *Post & Taback, Inc.*:

A produce buyer’s payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector’s determinations of the condition and quality of the inspected produce. Moreover, unlawful gratuities and bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection system and undermine the produce industry’s trust in the entire inspection system.

Id., at 825.

Bribery, whatever the motive, in and of itself offends the notion of fair competition. The Agency, through the Judicial Officer, and the Courts, has recognized that there is a general commercial duty to deal fairly which is required of all PACA licensees. In *Sid Goodman and Co., Inc.*, 49 Agric. Dec. 1169, 1183-4 (1990), *aff’d*, 945 F. 2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), the Judicial Officer cites a line of cases to the effect that “members of the produce industry have an obligation to deal fairly with one another” and goes on to hold that commercial bribery is “unfair” in the context of PACA. Similar holdings, although under distinguishable circumstances, confirm this view of commercial bribery. *See e.g.*, *JSG Trading Corp.*, 58 Agric. Dec. 1041 (1999), *aff’d* 235 F. 3rd 608 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 458 (2001).

I followed this same line of reasoning in *Kleiman & Hochberg* (appeal pending before the Judicial Officer).

D. The bribery violations committed by Respondent were

willful, flagrant and repeated.

Complainant easily meets its burden of showing that the bribes paid by William Taubenfeld constituted willful, flagrant and repeated violations of the PACA.

A violation is “willful” if “irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.” *PMD Produce Brokerage Corp.*, 60 Agric. Dec. 780, 789 (2001). Here, William Taubenfeld, and therefore Respondent, knew that the payments made to Cashin in the 42 inspections involved in this case were illegal, but essentially decided that they needed to make these payments for the benefit of their business. Clearly, Respondent made a business decision to violate the law, rather than to pursue alternative measures. This constitutes willful conduct.

Likewise, the violations were “flagrant.” In *Post & Taback, supra*, the Judicial Officer found, citing the dictionary definition of “flagrant” as covering conduct “conspicuously bad or objectionable” or so bad that it “can neither escape notice nor be condoned,” that “payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are conspicuously bad and objectionable acts that cannot escape notice or be condoned because . . . they corrupt the United States Department of Agriculture’s produce inspection system and disrupt the produce industry.” *Id.*, at 829-30. Here, where the purpose of the bribes undisputedly would be to gain an occasional competitive advantage over a grower or a seller, the long-standing practice of Respondent bribing Cashin easily meets the definition of flagrant under applicable case law.

Finally, the violations are obviously repeated. Complainant demonstrated that 42 instances of bribery occurred between March and August, 1999, and that there was every indication that this practice had begun long before Operation Forbidden Fruit. Since repeated means more than once, this element has been established by Complainant.

Thus, I hold that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA.

II. The Appropriate Sanction Against Respondent is a Civil Penalty of \$360,000

Complainant has requested the imposition of license revocation as an appropriate sanction for these violations, contending that, in essence, for any bribery conviction under PACA revocation, rather than imposition of a civil penalty or other remedy, is the only appropriate sanction. Respondent, on the other hand, urges that, if I find that violations have been committed, then I should assess a penalty of \$2,000 for each of the instances of bribery, for a total civil penalty of \$84,000. After weighing the statutory and regulatory factors, I conclude that a \$360,000 civil penalty in lieu of a six-month license suspension is appropriate.

While Complainant failed to show any particular instance in which an inspection certificate was falsified by Cashin as a result of the bribes he was being paid by William Taubenfeld, it is abundantly clear that the bribes served as a type of retainer for future favors on an as-needed basis, to the benefit of B.T., and to the detriment of shippers, sellers or growers. This is a significant degree more serious, in my estimation, than a situation, such as was present in Kleiman & Hochberg, where there was no reliable evidence that any certificates were ever falsified, and the consistent and reliable testimony supported a finding that bribes were only paid to get the inspectors to conduct the inspection in a timely manner. Here, the bribing official admitted in his plea that the purpose of the bribes was to get Cashin to downgrade produce on occasion.

In addition, the attitude of Respondent's president, Nat Taubenfeld, towards the making of payments to a USDA inspector does not reflect a corporate attitude consistent with the PACA. Although illegal payments made by Nat Taubenfeld were not a subject of the complaint, Cashin testified that before William Taubenfeld paid him bribes, Nat Taubenfeld paid him as well, both at B.T. and in his prior workplace. Tr. 48-50. Nat Taubenfeld testified that he did indeed give Cashin several hundred dollars over time but that he did it out of charity, after Cashin told him he had "problems" with a girlfriend, that it "was always pretty much the same story," and that these "loans" were not given with

the expectation of receiving anything in return. Tr. 711-713. Even if Nat Taubenfeld was motivated by charitable intentions, it is either extremely naïve or extremely cynical for the president of a produce company to pay such gratuities to the very person who inspects his produce.¹⁰

Even though the violations in this case are more severe than those in *Kleiman & Hochberg*, I find that the goals of the PACA can be readily met by the imposition of a \$360,000 civil penalty in lieu of a six month suspension than by revocation of B.T.'s license. Complainant contends, in essence, that whenever an individual in a produce company pays a bribe to a produce inspector revocation is mandated, and implies that that is the Judicial Officer's sanction policy as well. Comp. Br. At 35. While there is no question that bribery is one of the most serious, if not the most serious, violations of the PACA, the fact is that there is a permissible range of sanctions under the statute. By the specific terms of 7 U.S.C. §499h(e), even where a violation is serious enough to warrant a license revocation, the Secretary is given the authority to instead impose a civil penalty "not to exceed \$2,000 for each violative transaction or each day the violation continues." While the Secretary must consider "the size of the business, the number of employees, and the seriousness, nature, and amount of the violation," *Id.*, it is abundantly clear that Congress gave the Secretary discretion to assess a civil penalty even where the circumstances could justify a license revocation.

Certainly, the Secretary is free, on his own accord or through the Judicial Officer, of establishing a policy that whenever bribes are paid to a produce inspector for the purpose of influencing, either at the time of paying the bribe or at some undefined future occasion, the outcome of a produce inspection, the sanction is revocation, without any option for alternative civil penalties. At this point, neither the Secretary nor the Judicial Officer has established such a policy.

Complainant, primarily through the testimony of its sanctions witness, John Koller, vigorously advocates that revocation is the only appropriate sanction, due to "the detrimental effect that bribery of inspectors has on the produce industry." Comp. Br. At 37, Tr. 498.

¹⁰I do not include the \$20 farewell gift for Cashin's "retirement" in this categorization.

However, neither Mr. Koller at the hearing, nor Complainant in its briefs, provides any specific reason why a significant civil penalty will not accomplish the deterrence that is the aim of the statute. While I am required to give “appropriate weight to the recommendation of the administrative officials charged with the responsibility for achieving the congressional purpose,” *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), *aff’d* 991 F. 2d 803, I am not required to blindly follow these recommendations, particularly when no showing has been made why a civil penalty cannot serve as a “strong sanction” that would deter the bribery of produce inspectors.

In imposing a civil penalty, rather than license revocation, I did give consideration to the impact on Respondent’s employees. The fact that 35-40 employees who were not involved in the acts of bribery, and who had no basis to believe that any criminal acts were being committed, would lose their jobs, and the fact that the significant majority of these employees are minorities, Tr. 599, 661, 664, supports the imposition of a civil penalty, which has more of an impact on company ownership than its non-culpable employees.

On the other hand, Respondent’s suggestion that an appropriate penalty would be \$84,000, Resp. Br. at 92, based on a \$2,000 civil penalty for each of the 42 inspections cited in the complaint, would result in an inadequate sanction in terms of the types of violations committed, and the duration of the violations. These were very serious violations, which strike at the heart of the produce inspection process. Here, the purpose of the bribes was to give Respondent an economic advantage over other parties to produce transactions. The Judicial Officer has repeatedly imposed serious sanctions when this criterion is met. Thus, in *Sid Goodman and Co., Inc.*, *supra*, the Judicial Officer sustained an administrative law judge’s determination that license revocation was appropriate in large part because payments were made to employees of another company to induce them to purchase from Goodman, to the economic advantage of Goodman and the disadvantage of the company of the employees who received the illegal payments. Similarly, in *Tipco, Inc.*, 50 Agric. Dec. 871 (1991), the decision emphasized that “members of the produce industry have an obligation to deal fairly with one another,” *Id.*, at 882, and that utilizing bribery to gain an advantage over competitors was a significant factor in the

Judicial Officer's decision to revoke a PACA license.

While there are clearly some factors here that would justify imposition of the ultimate sanction of license revocation, I believe that the imposition of a significant civil penalty would be more consistent with the Act's ultimate aims. In imposing a sanction, the Secretary of Agriculture takes "aggravating and mitigating circumstances into account . . . The United States Department of Agriculture's sanction policy has long provided that the sanction is determined by examining all relevant circumstances." *George A. Heimos Produce Company, Inc.*, 62 Agric. Dec. 763, 797 (2003). As I already discussed, I find that factoring in the serious nature of the violation, the size and nature of the business, including the welfare of its employees, and the likely deterrent effect, the \$360,000 civil penalty is consistent with the PACA.

III. Respondent's Constitutional Claims are Without Basis

Respondent contends that holding it liable for the actions of William Taubenfeld violates its constitutional rights to due process and equal protection. To the extent that I have the authority to rule on constitutional challenges, I find these claims to be without justification.

Respondent bases its constitutional claims on the Agency's applying Section 16 of the PACA to hold Respondent liable for the actions of William Taubenfeld, who it classifies as a "rogue" employee. While Respondent is of course entitled to due process, it is clear to me that the literal terms of the statute are intended to apply to just this type of situation—that when a corporate officer and shareholder commits illegal acts on behalf of the corporation then the corporation is liable. See discussion, *supra*, at 20-21. Section 16 of the PACA is explicit in providing for corporate liability for just this type of situation, and the PACA has been consistently interpreted accordingly. Further, this portion of the act is also consistent with the doctrine of *respondeat superior*. Holding a corporation responsible for the actions of its employees, particularly where the employee is an officer, director and stockholder, and where the admitted purpose of the actions is to benefit the corporation at a later date, hardly puts a strain on the corporation's constitutional rights.

Respondent's irrebuttable presumption contention also fails. While

an irrebuttable presumption would raise constitutional questions, *Landrum v. Block*, 40 Agric. Dec. 922, 925 (1981), the notion that Respondent is responsible for the actions of its employees, let alone someone who is an officer, director and shareholder acting for what he perceives to be the future benefit of the Respondent, and to the possible economic detriment of others engaging in transactions with Respondent, is not offensive to due process.

IV. Both Nat Taubenfeld and Louis Bonino are Responsibly Connected to Respondent

Although I am only imposing a civil penalty against Respondent, I am making findings on the two responsibly connected petitions in the event that my sanction imposition is reversed or modified, or if Respondent elects to accept the 180-day license suspension in lieu of the payment of the \$360,000 civil penalty.

Nat Taubenfeld

Nat Taubenfeld is the co-founder of Respondent, and has been president, a director and the individual in charge of the produce end of B.T. since its inception. RNT 1, Tr. 678, 684, 698, 700, 716-717. He has participated in the day-to-day management of Respondent from the day he co-founded it, principally running the night shift, buying and selling produce, etc. He communicated to B.T. personnel how he expected them to conduct B.T.'s business, and had a significant role in the hiring and firing of personnel. Tr. 705-707, 721. His role included requesting inspections from USDA inspectors, and seeking and obtaining price adjustments based on the results of inspections. Tr. 1281, 1298. He brought both of his sons into the business. Tr. 701-703.

Although Nat Taubenfeld is not charged with being directly involved in the violative acts, his actions regarding "charitable" payments to Cashin are not consistent with an individual who instructs his employees on the proper way to do business. Tr. 705-707. There is no dispute that he made numerous payments to Cashin that were not related to the fee that USDA collects for the conduct of inspections. However, since there are no allegations that he made any such payments during the period that

is the subject of the complaint, I rule that he has met his burden of showing, under the statute, that he “was not actively involved in the activities resulting in a violation of this Act.”

However, the statute requires not only a showing of non-involvement in the violative activities, but requires an additional showing that the person “was only nominally a partner, officer, director or shareholder.”

Nat Taubenfeld fails to meet his burden under this test, as it is clear that he was intimately involved in the day-to-day workings of B.T., that he was considered by company personnel to be the head of the company, and that he was involved in many or most of the decisions involving the produce end of the company. Tr. 669, 684, 1281, 1298. He had the authority to hire and fire, he signed checks (Tr. 705, RNT 6), he made decisions as to what to buy, when to call for inspections, and far more. He does not come close to meeting the test for showing that he was not actively involved in B.T. or that his position was purely nominal.

Louis Bonino

There is no evidence that Louis Bonino participated in or was aware of any of the violative activities that are the subject of the complaint. However, Mr. Bonino is unable to meet the burden of the second prong of the responsibly connected definition, as he was a 30% stockholder, vice-president and director of the corporation since he co-founded it with Nat Taubenfeld in 1990. RLB 1.

In particular, Mr. Bonino was directly involved in the day-to-day affairs of Respondent, running the office side of the business. Tr. 595, 605, 652-653. His responsibilities included signing checks, handling cash, signing contracts, hiring, firing and training employees, and overseeing security. He personally was present at Respondent’s business address three to four days a week. Tr. 633. He directly handled, on behalf of Respondent, reparation complaints that were filed against it. Tr. 611. While it can be argued that by virtue of his responsibilities he should have discovered the illegal acts of William Taubenfeld and taken action to prevent them, and accordingly should be found to have been “actively involved” in the violative acts, he successfully met his burden of showing that there was no reasonable way he could have known of the illegal payments.

As with Nat Taubenfeld, however, Mr. Bonino is unable to show that he was only “nominally” involved in Respondent’s operations. His ownership role, his substantial responsibilities in many aspects of the business, and his authority over employees are inconsistent with a nominal role in B.T.

CONCLUSION AND ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent is assessed a civil penalty of \$360,000 in lieu of a 180-day suspension of its license.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

In re: DONALD R. BEUCKE AND KEITH K. KEYESKI.
PACA APP DOCKET No. 04-0014.
PACA APP DOCKET No. 04-0020.
Decision and Order.
Filed December 20, 2005.

PACA – Responsibly connected.– Two prong test.

Charles L. Kendall, for Complainant.
Effic Anastassiou, Paul Hart, and Paul Moncrief for Respondents.
Decision and Order by Administrative Law Judge Peter M. Davenport.

DECISION AND ORDER

This proceeding was initiated by two petitions for review of determinations by the Agricultural Marketing Service that subjected

Donald R. Beucke and Keith K. Keyeski to employment restrictions for being “responsibly connected” with Bayside Produce, Inc., (Hereinafter “Bayside”), a corporation found to have willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act (7 U.S.C. § 499, *et seq.*, the “PACA”).

Bayside, a PACA licensee, was the subject of a disciplinary complaint that resulted in a default decision being entered against it on August 25, 2004 by Administrative Law Judge Victor W. Palmer. The default decision authorized publication of the finding that Bayside willfully, flagrantly and repeatedly violated the PACA by failing to pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period from November 23, 2002 to February 7, 2003.

An oral hearing in this matter was held in San Jose, California on October 12 and 13, 2005. Donald R. Beucke is represented by Effie F. Anastassiou, Esquire and Paul Hart, Esquire, both of Anastassiou & Associates, Pismo Beach and Salinas, California; Keith K. Keyeski is represented by Paul W. Moncrief, Esquire, Lombardo & Giles, P.C., Salinas, California; and the Respondent is represented by Charles L. Kendall, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C.

A total of 45 exhibits were admitted into evidence on behalf of Petitioner Beucke (CX 1-45) and 9 exhibits on behalf of Petitioner Keyeski (KK 1-9).

Thirty-three exhibits were introduced and admitted by the Respondent, consisting of the certified Agency Record for Petitioner Beucke (RX 1 -21), the additional exhibits introduced at the hearing (RX 22-25) and the certified Agency Record for Petitioner Keyeski (EX 1-8). Briefs have been filed by all parties.

Upon consideration of all of the evidence, I conclude that Donald R. Beucke and Keith K. Keyeski were responsibly connected with Bayside at the time it was a licensee violating the PACA and for that reason, they are subject to the employment restrictions on their employment by PACA licensees pursuant to 7 U.S.C. § 499h(b).

During the time of the violations¹¹ Donald R. Beucke was the Vice President, Secretary and a director of Bayside. Keith K. Keyeski had been a Vice President and a director of Bayside, but resigned those positions prior to the November 23, 2002 date. He did however continue to manage the San Diego office of Bayside until December 13, 2002. The two petitioners each held 33 1/3 % of the corporation's outstanding shares. For those reasons, each comes within the presumptive definition of a person deemed to be "responsibly connected" with a corporate licensee found to be in violation of the PACA.

The term "responsibly connected" is defined in § 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(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 responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act and that the person was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The second sentence was added by amendment in 1995 and affords those who would otherwise fall within the statutory definition of "responsibly connected" an opportunity to demonstrate that they were not responsible for the specific violation. The amendment was discussed in *Michael Norinsberg v. United States Department of Agriculture and United States of America*, 162 F. 3d 1194, 1196- 1197 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-1467 (1998); *In re Lawrence D. Salins*, 57

¹¹Keith K. Keyeski orally resigned as an officer and director on October 8, 2002 and confirmed his verbal resignation by letter dated October 18, 2002. (KK 5). He did not however relinquish his shares until March 11, 2003. (KK 1). Donald R. Beucke's participation in the affairs of Bayside is documented during the entire period.

Agric. Dec. 1474, 1482-1487 (1998); and *In re Michael J Mendenhall*, 57 *Agric. Dec.* 1607, 1615-1619 (1998).

The amendment creates a two prong test for rebutting the statutory presumption:

...the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (“and”), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that the petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners. *Salins*, 57 *Agric. Dec.* 1474, 1487- 1488.

Actual knowledge of PACA violations is not required as active involvement may be found where a petitioner has made produce purchases for which the suppliers were not paid, and where a petitioner chose to make purchases of produce even though he or she knew or should have known that the company was not paying produce suppliers for perishable agricultural commodities. *In re Janet S. Orloff, Merna K. Jacobson and Terry A. Jacobson*, 62 *Agric. Dec.* 281 (2003).

Both petitioners argue that they were only nominally involved, asserting that the financial aspects of the business were handled exclusively by Wayne Martindale, the President of Bayside and owner of the other 33 1/3% of the shares of the corporation not owned by the petitioners. The testimony of numerous witnesses called by the Respondents supports their position only to the extent that it establishes Martindale did retain possession of the corporation's checkbook and was the individual that those that did business with Bayside regarded as the individual responsible for payment of invoices.

The petitioners both have significant experience and lengthy involvement with the produce industry. Donald Beucke has twenty-six

years of experience in the industry, starting initially as a field inspector and later progressing to the position of buyer and broker. (Tr. 213-214). He has served as the President of Martindale Distributing Company, a business founded by his late stepfather, Dale Martindale, (Tr. 218, 312) and was the Vice-President, Secretary and a director of Bayside (RX 1) as well owning shares in two other businesses involved in the produce industry¹² He acknowledged being able to and did sign Bayside checks¹³ but testified that he did so only when directed to do so by Wayne Martindale or Shane Martindale, both of whom are his step brothers, or Kathy Walker, the Executive Coordinator of Bayside. (Tr. 235-240). By his testimony, his involvement with Bayside was limited to purchases and sales for one account, Produce People, and that he last took an order from them in February of 2003. (Tr. 243-246). He resigned as Vice President, as director, and from any position of employment of and with Bayside by letter dated April 11, 2003 and executed a document titled Resignation and Acknowledgment of Stock Redemption dated October 23, 2003 which surrendered his shares in Bayside as of April 4, 2003. (CX 6-7).

Keith K. Keyeski started his career in the produce business in 1985 or 1986 working in the warehouse and worked his way up to a position in sales. He had become acquainted with Wayne Martindale and Donald Beucke through his industry contacts and sometime around August of 1997 started working for them out of his home and later opening an office for Bayside in San Diego, California. According to his account, he joined Bayside in an arrangement that was “basically a three-way partnership” with “equal duties, equal opportunity, equal money, equal everything.” (Tr. 359-360, 361-362). Except for writing checks for produce and other major expenses, he ran the day to day

¹²Donald Beucke testified that his late step father Dale Martindale gave him a 1/3 interest in Martindale Produce, that he initially owned half of Bayside before he and Wayne Martindale each sold enough shares to Keith K. Keyeski to enable him to acquire a 1/3 interest. He owned a 1/3 interest in Garden Fresh.

¹³(Tr. 234-235). CX 39 contains 29 checks written by Respondent Beucke on Bayside's Community Bank of Central California account, including two written to himself.

operation of the San Diego office of the corporation.¹⁴ Once he managed accumulate a necessary \$7,000.00 investment, he became a shareholder, director and officer in February of 2000; however, according to his account, nothing really changed after he became a shareholder, director and officer of the corporation. The San Diego operation grew significantly and by 2002 was generating the bulk of Bayside's sales.¹⁵ In October of 2002, by then convinced that Wayne Martindale was not "pulling his weight," and unhappy with the monetary return from his own efforts, he contacted William Trask, an attorney, for advice. (Tr. 374). Trask drafted a letter for Keith Keyeski to Wayne Martindale and Donald Beucke dated October 18, 2002 which confirmed his verbal notice of October 8, 2002, that he was resigning as Vice President and as a member of the board of directors and that as of December 31, 2002¹⁶ he would be resigning all positions at Bayside. The letter went on to propose that each of them continue to contribute to the business as usual and suggested three alternatives, one of which was his offer to purchase Bayside. (Tr. 374-375; KK 5). No formal response to the letter was received, but sometime in November of 2002 Wayne Martindale advised he had conferred with Donald Beucke and that "they" wanted to keep the business. (Tr. 375-378). Thereafter Keyeski's contact with Wayne Martindale became difficult, with little or no information being provided by Martindale. (Tr. 377). As he had suggested in his October 18, 2002 letter, Keyeski continued to run Bayside's San Diego office and processed orders as usual as "[t]hat's my job" until December 13, 2002. (Tr. 385). On December 15, 2002, he obtained his own PACA license and commenced operation from Bayside's former San Diego location as New Horizon Distributing, Inc. Still anticipating some return from his investment as he thought Bayside was financially sound, he retained his shares in Bayside until March of

¹⁴Bayside did have an account at Bank of America that Keith Keyeski was able to write checks on; however, according to testimony, only a minimal balance was maintained in the account which was used only for payroll, rent and minor incidental expenses. (Tr. 362-363)

¹⁵Tr. 376. According to Keyeski, Donald Beucke did generate income for the corporation, but Wayne Martindale was not.

¹⁶This was verbally amended to December 13, 2002.

2003.¹⁷ (KK 1-2).

The evidence introduced through multiple witnesses called by the Petitioners demonstrates that the companies that dealt with Bayside lodged the blame for Bayside's payment problems on Wayne Martindale's misconduct and not on either Donald Beucke or Keith Keyeski. Universally those witnesses professed to remain willing to do business with both of them. Both men are regarded as honorable and after the fact have contributed significant amounts financially to attempt to correct the problems which occurred. There is no evidence that either of them personally engaged in any affirmative action designed to leave suppliers unpaid. Neither of them however acted upon the reports coming to them that invoices were not being paid in a timely manner.¹⁸ Such failure to exercise their oversight obligations owed by them to the corporation as shareholders, if not as officers, cannot be excused. Their failure to employ their majority interest in the corporation to constrain and halt the misconduct of Wayne Martindale did leave suppliers unpaid. Because they had such power and failed to exercise it while still holding positions as shareholders, a corporate officer and or actively involved in Bayside's business activities, neither of them can be considered "only nominally a partner, officer, director, or shareholder of a violating licensee". Accordingly, the following Findings of Fact and Conclusions of Law will be made.

FINDINGS OF FACT

1. Bayside Produce, Inc. is a California corporation, organized and chartered on September 15, 1997, which applied for and received PACA License Number #19981824. Annual renewals of that license were made on or before its annual anniversary date through 2002 for the

¹⁷Keith Keyeski's letter of March 11, 2003 requested that minutes of the corporation be forwarded to him that reflected that he was not affiliated with Bayside "other than as a shareholder" after December 14, 2002. (KK 1).

¹⁸Keyeski denied hearing any reports of non payment until the second or third week of January of 2003 which was after he had resigned as an officer and director of Bayside. (Tr. 385) He however remained a shareholder until March 11, 2003 noting in his letter of that date that "... as of December 14, 2002, other than as a shareholder, I was not affiliated in any way with Bayside Produce, Inc." (KK 1).

year ending August 26, 2003. (RX 1-2).

2. Bayside's shareholders and directors consisted of Wayne Martindale and Donald Beucke, with each of them owning 50% of the shares of outstanding stock until February 22, 2000 when Bayside amended its by-laws to increase the number of directors from two to three and adding Keith Keyeski as an equal shareholder, officer and member of the board of directors. (RX 4; EX 6).

3. Pursuant to a Default Decision entered by Administrative Law Judge Victor W. Palmer, Bayside was found to have wilfully, flagrantly and repeatedly violated the PACA by failing to timely pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period November 23, 2002 to February 7, 2003. (CX 1; RX 22).

4. Petitioner Beucke has significant experience with over 26 years in the produce industry and has owned and held positions as a corporate officer in two other produce companies beside Bayside. He was listed on Bayside's PACA license and license certificate as Vice President, Secretary, director and as a 33-1/3% shareholder throughout the violation period from November 23, 2002 to February 7, 2003. His signature appears on the initial minutes of the Bayside Board of Director's meeting on September 15, 1997, the stock certificate issued in his name and the minutes of the Bayside Board of Director's February 22, 2000 meeting. (Tr. 213-214, 218, and 312; RX 1-4; CX 9, 10, 11 and 12).

5. Petitioner Beucke purchased produce on behalf of Bayside on at least 33 occasions during the violation period of November 23, 2002 to February 7, 2003 for which the suppliers of the produce were not paid. (Tr. 248-252, 300-305, 323-324; CX 21, 23, 26, 32, 33, and 35).

6. Petitioner Beucke's name and signature appeared on the bank signature card for Bayside's Bank America Account # 01719-21437 and he was authorized to draw funds on that account during the period November 23, 2002 to February 7, 2003. (RX 23).

7. Petitioner Beucke's name and signature appeared on the bank authorizations for Bayside's Community Bank of Central California Account # 1361955 and he was authorized to draw funds on that account during the period November 23, 2002 to February 7, 2003. During that

period, he signed 29 checks on the account, including checks to 11 produce suppliers as well as 2 checks payable to himself. (RX 24; CX 39 pp. 222, 272, 296, 360, 505, 571, 595, 597. 607, 710, 726, 730, and 736).

8. Petitioner Beucke, as an officer of Bayside, signed a Corporate Resolution to Borrow under Loan # 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003. (RX 24).

9. By letter dated April 30, 2003 from his attorney Lester W. Shirley to Wayne Martindale, Petitioner Beucke tendered his resignation as a director and Vice President of Bayside as well as from any position of employment with Bayside. (RX 1; CX 6).

10. On October 23, 2003, Petitioner Beucke executed documents entitled Resignation and Acknowledgment of Stock Redemption and Stock Assignment Separate from Stock Certificate, both of which purported to be effective April 4, 2003. (RX 5-6; cx 7).

11. Petitioner Keyeski has been involved in the produce business since 1985 or 1986, starting first in the warehouse before moving into sales. From sometime in 1990 until July of 1997, he was the sales manager of Coast Citrus Distributors, a San Diego company. (Tr. 357,393).

12. Starting in approximately August of 1997, he entered into an arrangement with Wayne Martindale and Petitioner Beucke that was "basically a three way partnership, ... equal duties, equal opportunity, equal money, equal everything." (Tr. 3 58- 359)

13. Once he managed to accumulate the necessary \$7,000.00 investment, on February 22, 2000, Petitioner Keyeski attended a Bayside board meeting in Salinas, California and became a 33 1/3% shareholder, Vice President and director of Bayside. (Tr. 368).

14. Petitioner Keyeski ran the San Diego office of Bayside as a general manager, controlling all aspects of its operation, including managing the payroll, paying the rent and other incidental expenses of Bayside's San Diego business except for depositing receivables and paying for purchases of produce. (Tr. 364-365, 397).

15. Petitioner Keyeski purchased produce on behalf of Bayside on at least four occasions during the violation period November 23, 2002 to February 7, 2003 for which suppliers of the produce were not

paid. (Tr. 161 -164, 167- 168; CX 1 6; CX 28; CX 4 1 and CX 44).

16. By letter dated October 18, 2002, Petitioner Keyeski confirmed his verbal notice of October 8, 2002 that he was resigning as Vice President and as a member of the board of directors of Bayside and that he would be resigning all positions at Bayside as of December 31, 2002. The December 31, 2002 date was later verbally changed to December 13, 2002. (Tr. 375; KK 5; EX 5).

17. On March 3, 2003, Petitioner Keyeski executed a Declaration of Lost Stock [Certificate] and Assignment of Shares which was forwarded to Bayside by letter dated March 11, 2003. (Tr. 386; KK 1; KK 2; EX 8).

CONCLUSIONS OF LAW

1. Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA. He was the Vice President, Secretary and a member of the board of directors, as well as holding 33 1/3% of the outstanding stock of Bayside during the period November 23, 2002 to February 7, 2003 and purchased produce from suppliers that were not paid during that period.

2. By reason of his active involvement with Bayside, Petitioner Beucke was not only nominally a partner, officer, director, or shareholder of Bayside during the period November 23, 2002 to February 7, 2003 and was an owner of a violating entity which was the alter ego of its owners.

3. Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA. Although he had resigned his positions as Vice President and member of the board of directors prior to the period November 23, 2002 to February 7, 2003, he retained his 33-1/3% stock ownership until March 11, 2003, he continued to run Bayside's San Diego operation of Bayside through December 13, 2002 and purchased produce from suppliers that were not paid during the period November 23, 2002 through at least December 10, 2002.

4. By reason of his active involvement with Bayside, Petitioner Keyeski was not only nominally a partner, officer, director, or shareholder of Bayside during the period November 23, 2002 to

February 7, 2003 and was an owner of a violating entity which was the alter ego of its owners.

ORDER

1. The determination of the Chief of the PACA Branch that Donald R. Beucke was responsibly connected with Bayside during the period November 23, 2002 to February 7, 2003 during which period Bayside wilfully, flagrantly and repeatedly violated the PACA by failing to pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers should be affirmed.

2. The determination of the Chief of the PACA Branch that Keith K. Keyeski was responsibly connected with Bayside during the period November 23, 2002 to February 7, 2003 during which period Bayside wilfully, flagrantly and repeatedly violated the PACA by failing to pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers should be affirmed.

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

Copies of this Decision and Order shall be served upon the Parties by the Hearing Clerk's Office.

PACA AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: HUNTS POINT TOMATO CO., INC.

PACA Docket No. D-03-0014.

Denial Ruling.

Filed August 10, 2005.

Andrew H. Stanton, for Complainant.

James P. Tierney, for Respondent.

Ruling by Chief Administrative Law Judge Marc R. Hillson.

Denial of Respondent's Petition to Rehear and Reargue

On April 21, 2005, I issued a decision holding that Hunt's Point Tomato Co., Inc. committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, and I ordered that the facts and circumstances of the violations be published. Respondent filed a Petition to Rehear and Reargue, pursuant to §1.146(a) (3) of the Rules of Procedure. I have reviewed the Petition, and the Response filed by Complainant, and I find that the Petition contains nothing that would cause me to modify my April 21 decision. Therefore the Petition is denied.

The Petition lists, without explanation, five Findings of Fact and two Conclusions of Law that it contends I should have made in the April 21 decision. Several of the suggested Findings were directly considered and ruled on by me in my earlier decision, and in the absence of any proffered reason by Respondent as to why I should change my Findings, I decline to do so. One of the assertions—that I should have inquired into aspects of how Respondent would make payments of the unpaid invoices—is puzzling, in that counsel for Respondent, who declined to put on any affirmative testimony, calling no witnesses and only introducing exhibits as part of his cross-examination, appears to misapprehend my role vis-à-vis his role at the hearing. That he elected to present no evidence was his decision. In any event, the fact that Respondent had failed to make payments to its numerous creditors for a lengthy period of time was never seriously disputed, and squarely

resolves the case as a no-pay case under *In re. Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The amount of assets involved in the stay in the federal court action was not material to my decision, nor was the fact that the stay existed in the first place. What is material is that Respondent owed substantial amounts on long-standing debts directly covered by the PACA.

The provisions of my April 21, 2005 order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

In re: GLENN MEALMAN.
PACA-APP Docket No. 03-0013.
Order Denying Petition to Reconsider.
Filed October 3, 2005.

**PACA-APP – Perishable Agricultural Commodities Act – Responsibly connected
– Nominal director – Prosecutorial discretion.**

The Judicial Officer denied Petitioner's petition to reconsider *In re Glenn Mealman*, 64 Agric. Dec. ____ (July 28, 2005). The Judicial Officer rejected Petitioner's assertion that Respondent determined Petitioner was responsibly connected with Furr's Supermarkets, Inc., prior to the determination that Furr's violated the PACA stating that the record did not support Petitioner's assertion. The Judicial Officer also rejected Petitioner's contention that Respondent engaged in selective prosecution, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, stating the due process clause of the 14th Amendment, by its terms, is applicable to the states and is not applicable to the federal government. Finally, the Judicial Officer rejected Petitioner's contention that he was only a nominal director of Furr's because he had been appointed to Furr's board of directors by his former employer, Fleming Companies, Inc., and Fleming paid Petitioner for attending Furr's board meetings.

Andrew Y. Stanton, for Respondent.
James P. Tierney, Kansas City, Missouri, for Petitioner.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On April 3, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Glenn Mealman [hereinafter Petitioner] was responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001, when Furr's violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ On October 29, 2003, Petitioner filed "Respondent [sic] Mealman's Petition For Review" pursuant to 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] seeking reversal of Respondent's April 3, 2003, determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted an oral hearing on June 8, 2004, in Kansas City, Missouri. James P. Tierney, Lathrop & Gage, L.C., Kansas City, Missouri, represented Petitioner. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent. Following the hearing, Petitioner and Respondent filed post-hearing briefs.

On February 8, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision and Order] concluding Petitioner was not responsibly connected with Furr's Supermarkets, Inc., during the period

¹During the period September 29, 1998, through February 23, 2001, Furr's Supermarkets, Inc., failed to make full payment promptly to one seller of the agreed purchase prices in the total amount of \$174,105.05 for 910 lots of perishable agricultural commodities, which Furr's purchased, received, and accepted in interstate and foreign commerce. Former Chief Administrative Law Judge James W. Hunt concluded that Furr's Supermarkets, Inc.'s failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Furr's Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003). (I infer, based on the record before me and the former Chief Administrative Law Judge's February 6, 2003, decision, that "Furr's Supermarkets, Inc.," referred to in *In re Furr's Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003), and "Furr's Supermarkets, Inc.," referred to in this proceeding, are the same entity.)

September 29, 1998, through February 23, 2001 (Initial Decision and Order at 17).

On March 9, 2005, Respondent appealed to the Judicial Officer, and on March 31, 2005, Petitioner filed a response to Respondent's appeal petition. On April 11, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On July 28, 2005, I issued a Decision and Order affirming Respondent's April 3, 2003, determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001.²

On September 2, 2005, Petitioner filed a petition to reconsider *In re Glenn Mealman*, 64 Agric. Dec. ____ (July 28, 2005). On September 23, 2005, Respondent filed a response to Petitioner's petition to reconsider. On September 27, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Petitioner's petition to reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Petitioner raises three issues in Petitioner's Petition to Reconsider the Decision of the Judicial Officer [hereinafter Petition to Reconsider]. First, Petitioner contends he could not be found to be responsibly connected with Furr's Supermarkets, Inc., prior to a determination that Furr's had violated the PACA (Petitioner's Pet. to Reconsider at second unnumbered page).

On February 6, 2003, former Chief Administrative Law Judge James W. Hunt filed a decision concluding that Furr's Supermarkets, Inc., violated the PACA during the period September 1998 through February 2001.³ The February 6, 2003, decision was not appealed and became final and effective. On April 3, 2003, almost 2 months after the former Chief Administrative Law Judge filed the decision concluding Furr's Supermarkets, Inc., had violated the PACA, Respondent issued a determination that Petitioner was responsibly connected with Furr's

²*In re Glenn Mealman*, 64 Agric. Dec. ____, slip op. at 26 (July 28, 2005).

³*In re Furrs Supermarkets, Inc.* (Decision Without Hearing Based on Admissions), 62 Agric. Dec. 385 (2003).

during the period September 29, 1998, through February 23, 2001. Therefore, Petitioner's assertion that Respondent's determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., preceded a final determination that Furr's violated the PACA, is not supported by the record.

Petitioner correctly points out that, on October 23, 2002, well in advance of the February 6, 2003, decision that Furr's violated the PACA, Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, issued an initial determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc. However, Mr. Summer's October 23, 2002, initial determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., did not become final. Instead, Petitioner, in accordance with section 47.49(c) of the Rules of Practice Under the Perishable Agricultural Commodities Act (7 C.F.R. § 47.49(c)), submitted reasons for his belief that he was not responsibly connected with Furr's Supermarkets, Inc., to Respondent, who did not issue a determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., until April 3, 2003. Therefore, I reject Petitioner's contention that Respondent determined Petitioner was responsibly connected with Furr's Supermarkets, Inc., prior to the determination that Furr's violated the PACA.

Second, Petitioner contends Respondent engaged in selective prosecution in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and the Administrative Procedure Act (Petitioner's Pet. to Reconsider at second and third unnumbered pages).

The due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;⁴ it is not a state. Therefore, as a matter of law, the United States Department of Agriculture could not have violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, as Petitioner contends.

⁴See 5 U.S.C. §§ 101, 551(1).

Moreover, the Administrative Procedure Act does not prohibit selective prosecution, as Petitioner contends. To the contrary, an agency decision regarding enforcement is agency action generally committed to the agency's absolute discretion under the Administrative Procedure Act (5 U.S.C. § 701(a)(2)).⁵

Petitioner further asserts Respondent has advanced no justifiable standard by which he may properly issue a determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., and make a determination that another director was not responsibly connected with Furr's (Petitioner's Pet. to Reconsider at third unnumbered page).

The issue in this proceeding is whether Petitioner was responsibly connected with Furr's Supermarkets, Inc., during the period when Furr's violated the PACA. The status of Furr's Supermarkets, Inc.'s other directors during the period when Furr's violated the PACA is irrelevant to Petitioner's status. Even if other directors were responsibly connected with Furr's Supermarkets, Inc., during the period when Furr's violated the PACA and Respondent did not issue a determination that they were responsibly connected, those facts would not affect Petitioner's status. Respondent neither is prevented from issuing a responsibly-connected determination as to Petitioner when not issuing the same determination as to others who are similarly situated nor is constrained to issue responsibly-connected determinations as to all similarly situated persons. Petitioner has no right to have the PACA go unenforced against him, even if Petitioner can demonstrate that he is not as culpable as others who have not had responsibly-connected determinations issued against them. PACA does not need to be enforced

⁵*Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (stating the Court has recognized on several occasions that an agency's decision not to prosecute or enforce, whether civil or criminal process, is a decision generally committed to an agency's absolute discretion); *Sierra Club v. Whitman*, 268 F.3d 898, 902-03 (9th Cir. 2001) (citing *Heckler* for the proposition that the decision not to investigate or enforce is committed to agency discretion and unreviewable under the Administrative Procedure Act); *Massachusetts Public Interest Research Group v. United States Nuclear Regulatory Comm'n*, 852 F.2d 9, 14-19 (1st Cir. 1988) (holding the NRC's refusal to issue an order requiring the owner of a nuclear power plant to show cause why the plant should not remain closed or have its license suspended until alleged safety deficiencies are remedied is agency action committed to agency discretion under 5 U.S.C. § 701(a)(2) and not subject to judicial review).

everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to issue responsibly-connected determinations.

Although prosecutorial discretion is broad, it is not unbounded. The Supreme Court of the United States has long held that the decision to prosecute may not be based upon an unjustifiable standard such as race, religion, gender, or the exercise of protected statutory or constitutional rights.⁶ However, the record is devoid of any indication that Respondent used an unjustifiable standard to identify persons against whom to issue responsibly-connected determinations.

Third, Petitioner contends he was only a nominal director of Furr's Supermarkets, Inc., because he was placed on Furr's Supermarkets, Inc.'s board of directors by Fleming Companies, Inc., which paid him for attending board meetings (Petitioner's Pet. to Reconsider at fourth unnumbered page).

In order for a petitioner to show that he or she was only nominally a director, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. The record establishes that Fleming Companies, Inc., asked Petitioner to serve as a director on Furr's Supermarkets, Inc.'s board of directors and that Fleming paid Petitioner for attending board meetings, as Petitioner asserts. Nevertheless, these facts alone do not establish by a preponderance of the evidence that Petitioner did not have an actual, significant nexus with Furr's Supermarkets, Inc.

Petitioner also contends I erroneously concluded Petitioner was not a nominal director solely because of his business experience and education. Petitioner further states, under my approach, no director can be a nominal director if he or she is well-educated and experienced. (Petitioner's Pet. to Reconsider at fourth unnumbered page.)

I based my conclusion that Petitioner had an actual, significant nexus with Furr's Supermarkets, Inc., on a number of factors, in addition to Petitioner's education and experience. These factors are fully discussed in *In re Glenn Mealman*, 64 Agric. Dec. ____, slip op. at 19-20 (July 28,

⁶See *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996); *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

2005). Therefore, I reject Petitioner's contention that I erroneously concluded Petitioner was not a nominal director solely because of his business experience and education.

For the foregoing reasons and the reasons set forth in *In re Glenn Mealman*, 64 Agric. Dec. ____ (July 28, 2005), Petitioner'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 to reconsider. Petitioner's petition to reconsider was timely-filed and automatically stayed *In re Glenn Mealman*, 64 Agric. Dec. ____ (July 28, 2005). Therefore, since Petitioner's petition to reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Glenn Mealman*, 64 Agric. Dec. ____ (July 28, 2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

I affirm Respondent's April 3, 2003, determination that Petitioner was responsibly connected with Furr's Supermarkets, Inc., during the period September 29, 1998, through February 23, 2001, when Furr's willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Petitioner must seek judicial review

within 60 days after entry of this Order.⁷ The date of entry of this Order is October 3, 2005.

**In re: BAIARDI CHAIN FOOD CORP.
PACA Docket No. D-01-0023.
Order Denying Petition to Reconsider.
Filed November 15, 2005.**

PACA – Perishable agricultural commodities – Failure to pay – Willful, flagrant, and repeated violations – Agreements to extend time for payment – Slow-pay-no-pay policy – Publication of facts and circumstances.

The Judicial Officer denied Respondent's petition to reconsider *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____ (Sept. 2, 2005). The Judicial Officer rejected Respondent's contention that Complainant was required to prove and the Judicial Officer was required to find the exact amount Respondent owed each of its produce sellers 120 days after the Hearing Clerk served Respondent with the Complaint in order to determine whether the case was a "no-pay" case or a "slow-pay" case. The Judicial Officer found that *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004), did not support Respondent's contention that the prompt payment provision in 7 U.S.C. § 499b(4) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension.

Jeffrey J. Armistead, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 2, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated

⁷See 28 U.S.C. § 2344.

pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that Baiardi Chain Food Corp. [hereinafter Respondent], during the period March 2000 through January 2001, failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of \$830,728.39 for 343 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce, in willful violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). On October 23, 2001, Respondent filed an Answer denying the material allegations of the Complaint (Answer ¶¶ 3-4).

On February 2, 2004, and May 25, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. David A. Richman, Office of the General Counsel, United States Department of Agriculture, represented Complainant.¹ Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On July 30, 2004, Complainant filed Complainant's Proposed Findings of Fact, Conclusions and Order, and on September 10, 2004, Respondent filed Respondent's Proposed Findings of Fact and Conclusions of Law. On October 4, 2004, Complainant filed Complainant's Reply Brief.

On April 8, 2005, the Chief ALJ issued a Decision [hereinafter Initial Decision]: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations.

On July 27, 2005, Respondent appealed to the Judicial Officer. On

¹On October 4, 2004, Jeffrey J. Armistead entered an appearance on behalf of Complainant, replacing David A. Richman as counsel for Complainant (Notice of Appearance, filed October 4, 2004).

August 16, 2005, Complainant filed Complainant's Response to Respondent's Appeal. On August 22, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On September 2, 2005, I issued a Decision and Order: (1) concluding Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of the agreed purchase prices for perishable agricultural commodities which Respondent purchased, received, and accepted in interstate and foreign commerce; and (2) ordering the publication of the facts and circumstances of Respondent's violations.²

On October 12, 2005, Respondent filed a Petition to Reconsider *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____ (Sept. 2, 2005). On November 4, 2005, Complainant filed Complainant's Response to Respondent's Petition. On November 10, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition to Reconsider.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

.....

²*In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____, slip op. at 13, 17, 22 (Sept. 2, 2005).

§ 499b. Unfair conduct

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

. . . .

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

. . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

.....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in 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), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

.....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE
(STANDARDS, INSPECTIONS, MARKETING PRACTICES),
DEPARTMENT OF AGRICULTURE**

.....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

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

.....

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

.....

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

.....

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

7 C.F.R. § 46.2(aa)(5), (11).

**CONCLUSIONS BY THE JUDICIAL OFFICER
ON RECONSIDERATION**

Respondent raises two issues in Respondent's Petition to Reconsider. First, Respondent asserts an approximation of the amount Respondent failed to pay produce sellers violates due process (Respondent's Pet. to Reconsider at 2).

Complainant proved by a preponderance of the evidence³ and I found

³Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act 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). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Hunts Point Tomato Co.*, 64 Agric. Dec. ____, slip op. at 22 n.5 (Nov. 2, 2005); *In re PMD Produce Brokerage Corp.* 60 Agric. Dec. 780, 794 n.4 (2001) (Decision on Remand), *aff'd*, No. 02-1134, 2003 WL 211860247 (D.C. Cir. May 13, 2003); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *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), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *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.*, 522 U.S. 951 (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*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, (continued...)

that, during the period March 2000 through January 2001, Respondent failed to make full payment promptly to 67 sellers of the agreed purchase prices in the total amount of \$830,728.39 for 343 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in interstate and foreign commerce (CX 5-CX 72; Tr. 38-43). *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____, slip op. at 10-11 (Sept. 2, 2005). Thus, I reject Respondent's assertion that the amount Complainant proved and I found Respondent failed to pay its produce sellers in accordance with the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)), was approximated.

Further, I disagree with Respondent's assertion that Complainant was required to prove and I was required to find the exact amount that remained unpaid to Respondent's produce sellers. The United States Department of Agriculture's "slow-pay-no-pay" policy merely requires that I determine whether a respondent is in full compliance with the PACA within 120 days after the Hearing Clerk serves the respondent with the complaint or the date of the hearing, if that occurs first. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case. Full compliance requires that a respondent have paid all produce sellers in full.

The Hearing Clerk served Respondent with the Complaint on

³(...continued)

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).

August 8, 2001.⁴ Complainant proved by a preponderance of the evidence⁵ and I found that, in March 2002, Respondent owed at least nine produce sellers listed in the Complaint \$342,906.75 for produce and, in November 2003, Complainant owed at least seven produce sellers listed in the Complaint \$166,426.18 for produce (CX 74, CX 77; Tr. 57, 64-65). *In re Baiardi Chain Food Corp.*, 64 Agric. ____, slip op. at 8, 11 (Sept. 2, 2005). Thus, Respondent was not in full compliance with the PACA within 120 days after the Hearing Clerk served Respondent with the Complaint. In accordance with the United States Department of Agriculture's "slow-pay-no-pay" policy, this case is a "no-pay" case. Complainant was not required to prove and I was not required to find the exact number of unpaid produce sellers and the exact amount Respondent owed each produce seller in March 2002 and in November 2003 in order to determine that this case is a "no-pay" case, as Respondent contends.

Second, Respondent contends I misapprehended *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004). Respondent contends *American Banana* holds that a produce seller may opt out of the prompt payment provisions of the PACA by agreeing to extend payment terms beyond 30 days and the agreement may be oral or written and may occur before or after the produce transaction. (Respondent's Pet. to Reconsider at 3.)

I reject Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension. Section 46.2(aa) of the Regulations (7 C.F.R. § 46.2(aa)) defines the term *full payment promptly* for purposes of determining violations of the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)). Section 46.2(aa)(5) of the Regulations (7 C.F.R. § 46.2(aa)(5)) provides payment for produce must be made within 10 days after the day on which the produce is accepted. Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that

⁴United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4579 1546.

⁵See note 3.

parties to a produce transaction may elect to use a different time for payment; however, *the parties must reduce their agreement to writing before entering into the transaction* and must maintain a copy of the agreement in their records. Further, the party claiming the existence of the agreement to use a different time for payment has the burden of proving the existence of the agreement. Respondent did not introduce any evidence to show that Respondent entered into a written agreement with the produce sellers listed in the Complaint before the transactions, which are the subject of this proceeding.

I have re-read *American Banana Co. v. Republic Bank of New York*, 362 F.3d 33 (2d Cir. 2004). I find *American Banana* inapposite. The Court in *American Banana* held, if a produce seller enters into a pre-transaction or post-default oral or written agreement extending the time for payment beyond the 30-day maximum allowed to qualify for coverage under the PACA trust, the produce seller loses PACA trust protection. *American Banana* offers no support for Respondent's contention that the prompt payment provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is inapplicable to a transaction in which a produce buyer and produce seller agree to extend the time for payment after the transaction, which is the subject of the extension.

For the foregoing reasons and the reasons set forth in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____ (Sept. 2, 2005), 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 to reconsider. Respondent's Petition to Reconsider was timely-filed and automatically stayed *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____ (Sept. 2, 2005). Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. ____ (Sept. 2, 2005), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Respondent's violations shall be published. The publication of the facts and circumstances of Respondent's violations shall be effective 60 days after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Respondent must seek judicial review within 60 days after entry of the Order in this Order Denying Petition to Reconsider.⁶ The date of entry of the Order in this Order Denying Petition to Reconsider is November 15, 2005.

**In re: G & T TERMINAL PACKAGING CO., INC., AND
TRAY-WRAP, INC.
PACA Docket No. D-03-0026.
Stay Order.
Filed December 1, 2005.**

PACA – Perishable agricultural commodities – Stay order.

Clara A. Kim and Ruben D. Rudolph, Jr., for Complainant.
Linda Strumpf, New Canaan, CT, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On September 8, 2005, I issued a Decision and Order concluding G & T Terminal Packaging Co., Inc., and Tray-Wrap, Inc. [hereinafter Respondents], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA] and revoking Respondents' PACA licenses.¹

⁶See 28 U.S.C. § 2344.

¹*In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ___, slip op. at 37 (Sept. 8, 2005).

On October 18, 2005, Respondents filed a petition for review of *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____ (Sept. 8, 2005), with the United States Court of Appeals for the Second Circuit. On November 29, 2005, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], filed a Motion for Stay requesting a stay of the Order in *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____ (Sept. 8, 2005), pending the outcome of proceedings for judicial review. On December 1, 2005, Respondents informed the Office of the Judicial Officer, by telephone, that they have no objection to Complainant's Motion for Stay.

In accordance with 5 U.S.C. § 705, Complainant's Motion for Stay is granted.

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

ORDER

The Order in *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____ (Sept. 8, 2005), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: P.J. MARGIOTTA.
PACA-APP Docket No. 03-0012.
Order Dismissing Case.
Filed December 28, 2005.

Andrew Stanton, for Respondent.
Mark C.H. Mandell, for Petitioner.
Order issued by Jill S. Clifton, Administrative Law Judge.

By letter dated October 21, 2005, Petitioner, P.J. Margiotta withdrew his Petition for Review. Petitioner is represented by Mark C.H. Mandell, Esq. Respondent, PACA Branch, Fruit and Vegetable

2006 PERISHABLE AGRICULTURAL COMMODITIES ACT

Programs, Agricultural Marketing Service, United States Department of Agriculture did not object. Respondent is represented by Andrew Y. Stanton, Esq.

Accordingly, this case is **DISMISSED**.

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

In re: STEPHEN TROMBETTA.
PACA-APP Docket No. 03-0008.
Order Dismissing Case.
Filed December 28, 2005.

Andrew Stanton, for Respondent.
Mark C.H. Mandell, for Petitioner.
Order issued by Jill S. Clifton, Administrative Law Judge.

By letter dated October 21, 2005, Petitioner, Stephen Trombetta withdrew his Petition for Review. Petitioner is represented by Mark C.H. Mandell, Esq. Respondent, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture did not object. Respondent is represented by Andrew Y. Stanton, Esq.

Accordingly, this case is **DISMISSED**.

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

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: MENDEZ DISTRIBUTING CO., INC.
PACA. Docket No. D-04-0013.
Decision Without Hearing by Reason of Default.
Filed July 19, 2005.

PACA - Default.

Jeffrey Armistead, for Complainant.
Respondent, Pro se.

Decision and Order issued by Peter M. Davenport, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter referred to as the "Act"), instituted by a Complaint filed on April 27, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period July 2002 through July 2003, Mendez Distributing Co., Inc., (hereinafter, "Respondent") failed to make full payment promptly to 23 sellers, of the agreed purchase prices, or balances thereof, in the total amount of \$1,036,620.73 for 223 lots of perishable agricultural commodities which it received, accepted and sold in interstate and foreign commerce.

A copy of the complaint was mailed to Respondent by certified mail at its last known principal place of business on May 14, 2004, and was returned to the office of the Hearing Clerk. A copy of the complaint was remailed to Respondent by regular mail on June 14, 2004 pursuant to Section 1.147(c) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Covering Various Statutes (7 C.F.R. § 1.130 *et seq.*, hereinafter "Rules of Practice"). A copy of the complaint was mailed to Respondent by certified mail at its

last known mailing address on April 27, 2004, and was returned to the office of the Hearing Clerk. A copy of the complaint was remailed to Respondent to its mailing address by regular mail on May 14, 2004 pursuant to Section 1.147(c) of the Rules of Practice. No answer to the complaint has been received. The time for filing an answer having expired, 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 is a corporation, organized and existing under the laws of the State of California. Respondent's business mailing address is 746 Market Court, Los Angeles, California 90021-1103. Respondent's mailing address is 672 Darrell Street, Costa Mesa, California 92627-2404.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20030456 was issued to Respondent on January 7, 2003. This license was suspended on August 20, 2003 because of Respondent's failure to pay a reparation award pursuant to Section 7(d) of the PACA (7 U.S.C. § 499g(d)). The license terminated on January 7, 2004 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 III of the Complaint, during the period July 2002 through July 2003, Respondent failed to make full payment promptly to 23 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$1,036,620.73 for 223 lots of perishable agricultural commodities, which it purchased, received, accepted in the course of interstate and foreign commerce.

4. On August 14, 2003, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court for the Central District of California. The petition was designated Case No. LA 03-32088-VZ. Respondent admits in its bankruptcy schedules that 17 of the 23 sellers listed in paragraph III of the complaint hold undisputed, unsecured

claims for perishable agricultural commodities that are equal to or greater than the amounts alleged in paragraph III, for a total of \$872,134.86.

Conclusions

Respondent's failure to make full payment promptly with respect to the 223 transactions referred to in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated 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, 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 the parties.

[This Decision and Order became final September 12, 2005.-Editor]

In re: DO RIPE FARMS, INC.
PACA. Docket No. D-04-0018.
Decision Without Hearing by Reason of Default.
Filed August 10, 2005.

PACA - Default.

Christopher Young-Morales, for Complainant.

Andrew B. Hellinger, for Respondent.

Decision and Order issued by Marc R. Hillson, 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 9, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period September 2002 through April 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 16 sellers, 100 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$1,040,164.80.

A copy of the complaint was served upon Respondent by certified mail on July 20, 2004. In a July 28, 2004 letter to the Hearing Clerk, Respondent acknowledged that it was served with the complaint on July 20, 2004. In the letter, Respondent requested an extension of 60 days (until October 20, 2004) to file its answer. Respondent did not answer the complaint until November 24, 2004. As the answer was received over thirty days passed the extended deadline of October 20, 2004, 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 is a corporation organized and existing under the laws of the state of Georgia. Its business mailing address is 721 Hosannah Road, Locust Grove, Georgia, 30248.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 2000-0951 was issued to Respondent on March 24, 2000. This license terminated on March 24, 2002, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay its required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, during the period September 2002 through April 2003, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 16 sellers, 100 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$1,040,164.80.

Conclusions

Respondent's failure to make full payment promptly with respect to the 100 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated 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, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice governing procedures under the 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 September 20, 2005.-Editor]

**In re: FRANCES F. REMUS, AN INDIVIDUAL d/b/a GET IT
FROM THE GIRLS, AND ALSO d/b/a SHIMA PRODUCE.
PACA Docket No. D-04-0019.
Decision Without Hearing by Reason of Default.
Filed October 7, 2005.**

PACA – Default.

Claire Kim, for Complainant.

Respondent Pro se.

Decision and Order by Administrative Law Judge Peter M. Davenport.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*; hereinafter “Act” or “PACA”), instituted by a Complaint filed on August 12, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period August 2002 through March 2003, Respondent Frances F. Remus, an individual doing business as Get It From The Girls, and also doing business as Shima Produce (hereinafter “Respondent”) failed to make full payment promptly to four sellers of the agreed purchase prices in the total amount of \$670,348.20 for 281 lots of perishable agricultural commodities which it purchased, received and accepted in interstate commerce.

On August 13, 2004, a copy of the Complaint was mailed to Respondent via certified mail to its business address. The Complaint was returned unclaimed on September 21, 2004 with the following forwarding address: Frances F. Remus, P.O. Box 1595, West Sacramento, California 95691-1595. On November 5, 2004, a copy of the Complaint was remailed to Respondent's forwarding address via regular mail by the Hearing Clerk. Pursuant to Section 1.147(c) (7 C.F.R. § 1.147(c)) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*; hereinafter “Rules of Practice”), service is deemed made on the date of remailing by regular mail. Respondent has not answered the Complaint. The time for filing an Answer having expired, 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 (7 C.F.R. § 1.139) of the Rules of Practice.

Findings of Fact

1. Respondent is an individual who does business in the State

of California. Respondent's former business address was 1347 Windward Circle, West Sacramento, California 95691. Its current business address is P.O. Box 1595, West Sacramento, California 95691-1595.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. PACA license number 19970870 was issued to Respondent on February 19, 1997. That license terminated on February 19, 2003, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period August 2002 through March 2003, Respondent purchased, received and accepted in interstate commerce from four 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 \$670,348.20.

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, flagrant and repeated 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, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

Pursuant to the Rules of Practice, 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).

**In re: DEE PRODUCE CORP.
PACA. Docket No. D-05-0015.
Decision Without Hearing by Reason of Default.
Filed November 9, 2005.**

PACA - Default.

Jonathan Gordy, for Complainant.
Respondent, Pro se.
Decision and Order issued by Marc R. Hillson, 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.*; “PACA”), instituted by a Complaint filed on July 26, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period of April 2004 through November 2004, Respondent Dee Produce Corp. (“Respondent”) failed to make full payment promptly to fourteen sellers of the agreed purchase prices in the total amount of \$1,043,253.70 for 162 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

A copy of the complaint was served upon Respondent by certified mail on July 29, 2005. Respondent has not answered the complaint. The time for filing an answer having run, and upon the motion of Complainant for the issuance of a decision without hearing by reason of default, the following decision and order is issued without further investigation or hearing pursuant to Section 1.139 (7 C.F.R. § 1.139) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. *et seq.*; hereinafter “Rules of Practice”).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the Commonwealth of Puerto Rico. Its business address is Nave #5,

Plaza Del Mecado, Caguas, Puerto Rico 00725. Its mailing address is PMB 199 Box 4956, Caguas, Puerto Rico 00725.

2. At all times material to this order, Respondent was licensed under the provisions of PACA. PACA license number 19911097 was issued to respondent on May 15, 1991. The license terminated on May 16, 2005, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period April 2004 through November 2004, Respondent purchased, received and accepted in interstate commerce from fourteen (14) sellers for 162 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 \$1,043,253.70.

Conclusions

Respondent's failure to make full payment promptly with respect to the 162 transactions set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals the Decision to the Secretary 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 of this Decision shall be served upon the parties.

[This Decision and Order became final December 24, 2005.-Editor]

**In re: DEW DROP FARMS, LLC.
PACA Docket No. D-05-0009.
Default Decision Without Hearing.
Filed December 12, 2005.**

PACA – Default.

Chris Young-Morales, for Complainant.
Respondent Pro se.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson.

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 10, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The complaint alleges that during the period May 14, 2004 through October 23, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 14 sellers, 124 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$943,573.19.

A copy of the complaint was mailed by the Hearing Clerk to Respondent by certified mail on May 11, 2005, and was signed for by Respondent's representative on May 14, 2005. Therefore, the Hearing Clerk served the complaint upon Respondent pursuant to Section 1.147 of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted By The Secretary (7 C.F.R. § 1.147, hereinafter referred to as the “Rules of Practice”), as of May 14, 2005. Respondent did not file an answer to the Complaint within the 20 day time period prescribed by Section 1.136 of the Rules of Practice. Complainant moved for the issuance of a Decision Without Hearing by the Administrative Law Judge, pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). As Respondent failed to answer the complaint within the 20 day time period prescribed by the Rules of Practice, 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 is a corporation organized and existing under the laws of the state of Pennsylvania. Its business mailing address is 407 Frederick Drive, Dallastown, Pennsylvania 17313.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. Pursuant to the licensing provisions of the Act, license number 20021486 was issued to Respondent on August 20, 2002. This license was terminated pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)) when Respondent failed to pay its required annual renewal fee on August 20, 2005.

3. As more fully set forth in paragraph III of the complaint, during the period May 14, 2004 through October 23, 2004, Respondent purchased, received, and accepted, in interstate and foreign commerce, from 14 sellers, 124 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$943,573.19.

Conclusions

Respondent's failure to make full payment promptly with respect to the 124 transactions set forth in Finding of Fact No. 3, above, constitutes willful, flagrant and repeated 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, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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

Pursuant to the Rules of Practice governing procedures under the 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.

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CONSENT DECISIONS

(Not published herein - Editor)

See also www.usda.gov/da/oaljdecisions

PERISHABLE AGRICULTURAL COMMODITIES ACT

A&B Produce, Inc. PACA Docket No. D-04-0021. 8/10/05.

Jody D. DeSomma, an individual doing business as Impact Brokerage and/or Impact Brokerage Corporation, and Impact Brokerage Corporation. PACA Docket No. 04-0017. 9/28/05.

M&T Chirico, Inc. PACA Docket No. 05-0021. 10/24/05.

Phillip Hall. PACA-APP Docket No. 05-0003. 12/2/05.

Frutech, Inc. PACA-Docket No. D-04-0027. 12/16/05.