

PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

ALLRED'S PRODUCE v. UNITED STATES DEPARTMENT OF AGRICULTURE.

No. 98-60187.

Decided July 1, 1999.

(Cite as 178 F.3d 743 (5th Cir.))

Perishable agricultural commodities – Sanction – Willful, flagrant, and repeated violations – Selective enforcement – Due process – Notification requirement – Sanction testimony.

The United States Court of Appeals for the Fifth Circuit affirmed the Judicial Officer's decision in which he found that petitioner willfully, flagrantly, and repeatedly failed to make full payment promptly for perishable agricultural commodities, in violation of 7 U.S.C. § 499b(4) and revoked petitioner's PACA license. The Court rejected petitioner's contention that the sanction imposed by the Judicial Officer was arbitrary and capricious and found the sanction was allowable under the PACA and the facts of the case. The Court found that the Judicial Officer's findings that petitioner's violations were willful, flagrant, and repeated were not error or abuse of discretion. The Court stated that, even if petitioner's contention that it was the target of selective enforcement because petitioner was a small to mid-sized buyer was true, there was no legal rationale for vacating the Judicial Officer's order. Selective enforcement must be based upon an unjustifiable standard, such as race, religion, or other arbitrary classification to constitute a basis for vacating an order. The Court also rejected petitioner's three procedural challenges as lacking merit. First, the Court found that the ALJ did not improperly admit the introduction of new claims against the petitioner during the administrative hearing and that the sanction was based on the 86 violations of the PACA alleged in the complaint. Second, the Court rejected petitioner's contention that the Secretary was required by 7 U.S.C. § 499f(b) to give petitioner written notification prior to the investigation. The Court found that, since the investigation began prior to the enactment of the written notification requirement, the requirement could not act as a bar to the Secretary's actions in this case. Further, the investigation was triggered by trust notices and a reparation complaint filed against petitioner. Thus, even if the written notification requirement applied, these written complaints satisfied the requirement. Third, the Court rejected petitioner's challenge to the ALJ's decision to permit sanction testimony, stating that there is no evidence that either the ALJ or the Judicial Officer relied on the sanction testimony, and even if they did rely on the testimony, their reliance was not erroneous because the recommendation was consistent with the PACA and the regulations.

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Before POLITZ, HIGGINBOTHAM and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Petitioner Allred's Produce ("Allred's") appeals a final order of the Secretary of Agriculture revoking its license under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s, for willful, repeated, and flagrant failure to make full payment promptly to various sellers of perishable agricultural commodities. Allred's contends that the Secretary's findings and sanction were arbitrary and capricious, that Allred's was singled out for selective enforcement, and that the Secretary failed to observe various procedural requirements under the PACA. For reasons that follow, the Secretary's order is affirmed.

I.

Before proceeding to the specific facts and issues of this case, it is useful to review the applicable statutory and regulatory framework. Congress enacted the PACA in 1930 "for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables." *George Steinberg and Son, Inc. v. Butz*, 491 F.2d 988 (2nd Cir. 1974). It was designed "to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." *Zwick v. Freeman*, 373 F.2d 110, 116 (2nd Cir. 1967). To that end, the PACA establishes a strict licensing system with often severe sanctions for violations of its requirements.

Under the PACA, every dealer of perishable agricultural commodities is required to be licensed by the Secretary of Agriculture. 7 U.S.C. § 499c(a). These dealers are subject to a number of statutory requirements, the most basic of which is that they make "full payment promptly" for all purchases of perishable agricultural commodities. 7 U.S.C. § 499b(4). The Secretary has defined "full payment promptly" to mean "[p]ayment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted." 7 C.F.R. § 46.2(aa)(5). Parties may agree to a different time limit, provided that they reduce such an agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. 7 C.F.R. § 46.2(aa)(11). The party claiming the existence of such an agreement has the burden of proof. *Id.*

The PACA authorizes stiff penalties for violation of the prompt payment requirement. Upon determining that any dealer has violated any of the PACA's statutory requirements, the Secretary may publish the facts and circumstances of the violation and suspend the license of the offender for up to 90 days. 7 U.S.C.

§ 499h(a). Moreover, if the violation is flagrant or repeated, the Secretary may revoke the license of the offender. *Id.* Alternatively, under the 1995 amendments to the PACA, the Secretary may impose a civil penalty not to exceed \$2,000 per violation or \$2,000 each day a violation continues. 7 U.S.C. § 499h(e).

II.

Allred's is a partnership formed in 1966, composed of Raymond M. Allred and his son, Ronald D. Allred. Its sole business is the purchase and sale of produce. Allred's has been licensed under the PACA continuously, without suspension or revocation, since 1977.

The PACA Branch of the United States Department of Agriculture ("PACA Branch") conducted three investigations of Allred's between 1994 and 1997. The first investigation was in 1994, and resulted in no formal complaint against Allred's. The second investigation, a compliance review, was in February 1996. It revealed that, during the period from May 1993 through February 1996, Allred's failed to make full payment promptly to 19 sellers for 86 lots of perishable agricultural commodities in the total amount of \$336,153.40. Based on these findings, PACA Branch initiated a complaint against Allred's in July 1996. The third investigation, an audit to ascertain whether Allred's had brought its operation into compliance with the PACA prior to hearing, was in May 1997. The audit revealed that \$149,329.66 of the original \$336,153.40 remained unpaid. The audit further found that the firm's total interstate and foreign commerce past due debt had risen to \$463,328.61, owed to 25 sellers for 125 lots of perishable agricultural commodities.

A hearing was conducted before an Administrative Law Judge ("ALJ") in June 1997. Additional testimony was taken during a telephone hearing in August 1997. The ALJ issued his decision from the bench at the close of the hearing. He found that Allred's Produce had failed to make full payment promptly to 19 sellers for 86 lots of perishable agricultural commodities in the amount of \$336,153.40 during the period from May 1993 through February 1996. He further found that these violations were willful, repeated, and flagrant. Based on these findings, the ALJ revoked the firm's PACA license.

Allred's filed an administrative appeal of the ALJ's decision and order in September 1997. The Judicial Officer ("JO"), acting for the Secretary, issued a final decision and order in December 1997 adopting the ALJ's decision and adding several more conclusions. Allred's sought reconsideration, which the JO denied in February 1998. The JO did, however, stay his order pending the outcome of judicial review. This appeal followed.

III.

Judicial review of the decision of an administrative agency is narrow. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The decision will be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. . . ." 5 U.S.C. § 706(2)(A). An appellate court may not substitute its own judgment for that of the Secretary. *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 373 (5th Cir. 1980). The Secretary's decision may only be overturned if it is unwarranted in law or without justification in fact. *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185-86, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973). Likewise, judicial review of a sanction imposed under the PACA is extremely limited. *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1030 (5th Cir. 1982). "The choice of sanctions imposed by the Secretary of Agriculture, through his Judicial Officer, may not be overturned in the absence of a patent abuse of discretion." *American Fruit Purveyors*, 630 F.2d at 374.

Allred's challenges the Secretary's final order on the following six grounds: (1) the sanction awarded was arbitrary and capricious; (2) the findings and conclusions of the Secretary were arbitrary and capricious; (3) Allred's was singled out for selective enforcement; (4) the allowance of the introduction of new claims at the agency hearing was in excess of the agency's authority and without observance of procedure; (5) the revocation of Allred's license was without observance of procedure because the Secretary failed to establish that a written notice of a violation of the PACA had been received by the Secretary prior to commencement of PACA Branch's investigation; and (6) the allowance and consideration of certain questionable and unreliable evidence and testimony at the hearing was without observance of procedure. We find these arguments unpersuasive.

A.

Allred's first argues that the Secretary's decision to impose the sanction of license revocation was arbitrary and capricious under the attendant circumstances of the case and under the custom and practice of the industry. According to Allred's, no supplier of perishable agricultural commodities realistically expects to be paid according to terms, and it is not uncommon for suppliers to extend payment terms during and after transacting business to accommodate the buyer. Thus, Allred's states, the 10-day time limit established by the regulations is outdated and does not reflect the real world. Revocation of Allred's license would

therefore have no deterrent effect on other buyers of perishable agricultural commodities. Allred's also describes as abusive the Secretary's failure to consider outside factors militating against the imposition of sanctions, such as Allred's efforts to pay its suppliers and the fact that no supplier of Allred's desired Allred's to be forced out of business, and the Secretary's failure to consider imposition of monetary penalties as an alternative sanction. Finally, Allred's contends that the Secretary abused his discretion by failing to consider whether the purpose behind the sanction—deterrence of violative conduct and reducing the risk of loss to suppliers—would be accomplished through license revocation.

These arguments are unavailing. As noted above, we will not overturn the Secretary's choice of sanction absent a patent abuse of discretion. *American Fruit Purveyors*, 630 F.2d at 374. Our only consideration, therefore, is "whether, under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of remedy.'" *Glover Livestock*, 411 U.S. at 189 (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612, 66 S.Ct. 758, 90 L.Ed. 888 (1946)). We find that the Secretary's judgment in this case was both warranted in law and justified in fact. Where a violation of the PACA is "flagrant or repeated," the PACA by its own terms authorizes revocation of the violator's license. 7 U.S.C. § 499h(a). Here, the Secretary found that Allred's violations of the PACA were both flagrant and repeated. For reasons discussed below, we agree. Thus, the revocation of Allred's license was well within the Secretary's authority. We will not embark on a legislative analysis of the PACA's relevance to modern industry practice, nor will we reexamine the aggravating and mitigating evidence to determine whether we would have arrived at some lesser sanction. Those are not appropriate functions for an appellate court sitting in review of a final administrative order. It is enough that the sanction imposed by the Secretary was allowable under the PACA and the facts of this case.

B.

Allred's next challenges as arbitrary and capricious the Secretary's finding that its failures to pay were willful, repeated, and flagrant. Allred's points out that, at the time of the hearing, it had paid over 50 percent of the past due accounts that were the subject of the Secretary's complaint, and was in the process of paying all outstanding accounts under terms acceptable to its suppliers. According to Allred's, no suppliers were complaining about mistreatment or past due payments, and many suppliers were continuing to supply Allred's even though Allred's owed them money. Under these circumstances, Allred's contends, it cannot be said that the failures to pay were willful, repeated, or flagrant.

We disagree. Under the regulations, "full payment promptly" means payment within 10 days of the date on which the produce is accepted, or payment within the time specified in writing by prior agreement of the parties. 7 C.F.R. § 46.2(aa). Allred's does not deny that it failed on numerous occasions to make full payment promptly under this definition. Nor does Allred's dispute that, during a nearly three-year period from May 1993 through February 1996, it failed to make full payment promptly on 86 lots of perishable agricultural commodities in the total amount of \$336,153.40. In light of these undisputed facts, we can find no error, and certainly no abuse of discretion, in the Secretary's finding that the violations were willful, repeated, and flagrant.

Violations are "repeated" under the PACA if they are not done simultaneously. *Reese Sales Company v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972); *Zwick v. Freeman*, 373 F.2d 110, 115 (2nd Cir. 1967). Here, the 86 violations were spread out over a period of two years and ten months. Violations are "willful" under the PACA "if the prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory authority." *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983). Similarly, 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. See *Reese*, 458 F.2d at 187; *Zwick*, 373 F.2d at 115. Here, Allred's violated the PACA 86 times over nearly three years for an amount totaling over \$300,000. To describe these violations as anything other than "willful" and "flagrant" would be to render those terms meaningless. The Second Circuit expressed this point best in *Zwick*: "[I]t is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of [the PACA]. It would be hard to imagine clearer examples of 'flagrant' violations of the statute than were exemplified by petitioners' conduct." *Zwick*, 373 F.2d at 115.

C.

Allred's argues next that it was singled out for selective enforcement under the PACA's disciplinary provisions. Allred's asserts that most complaints and disciplinary actions under the PACA are maintained against small to mid-sized buyers rather than institutional buyers. Thus, Allred's asserts, the brunt of enforcement falls on the shoulders of the small to mid-sized buyer.

This argument fails on its face. Even taking all of Allred's allegations as true, we can find no legal rationale for vacating the Secretary's order. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional

violation.” *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). Rather, it must be shown that the selective enforcement “was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Id.* Allred’s cites no authority, and we can find none, for the proposition that an otherwise culpable PACA violator is shielded from the consequences of his actions simply because the PACA is applied unevenly to non-institutional buyers. We agree with the Secretary that “[the] PACA does not need to be enforced everywhere to be enforced somewhere; and agency officials have broad discretion in deciding against whom to institute disciplinary proceedings.”

D.

Allred’s concludes with three challenges to the procedural validity of the ALJ’s hearing. Each of these challenges lacks merit.

First, Allred’s contends that the ALJ impermissibly allowed the introduction of “new claims” at the hearing. The “new claims” to which Allred’s refers are the new violations uncovered by PACA Branch in its May 1997 audit of Allred’s. Allred’s argues that the admission of these new claims at the hearing without amendment of the complaint forced Allred’s to respond to allegations without due process of law and substantially and irreparably injured its ability to present evidence to respond to the new claims.

We disagree. The final order of the Secretary makes clear that Allred’s was sanctioned solely for the 86 violations alleged in the Secretary’s original complaint, not for the additional violations uncovered in the May 1997 audit. The “new claims” evidence was actually nothing more than evidence of the current indebtedness of Allred’s, which was relevant to the question of relief from license revocation. Under Department of Agriculture policy, a dealer who otherwise faces license revocation may escape that sanction if it can show “(i) that it has made full payment of the transactions alleged in the Complaint, and (ii) [that] such payment was not made by ‘robbing Peter to pay Paul’.” *In re S W F Produce Co.*, 54 Agric. Dec. 693, 700 (1995) (citing *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 629-42 (1989)). The May 1997 audit revealed that Allred’s did not qualify for such a mitigation of sanction, and the so-called “new claims” evidence was admitted solely on that issue. Thus, the ALJ did not improperly admit evidence of new claims. Rather, he properly considered relevant evidence that Allred’s did not qualify for relief from license revocation on the existing claims. The sanction itself was based solely on the 86 violations alleged in the original complaint.

Second, Allred’s argues that the revocation of its license was without observance of procedure as required by law because there was no evidence that the

Secretary's investigation of Allred's was based on receipt by the Secretary of written notification of a violation of the PACA. Allred's notes that 7 U.S.C. § 499f(b) requires such written notification prior to commencement of an official investigation, and asserts that the Secretary failed to present evidence of such notification to justify the February 1996 compliance review that resulted in the complaint against Allred's.

This argument lacks basis both in law and in fact. The written notification requirement was added as part of the 1995 amendments to the PACA, more than a year after the initial investigation of Allred's began in 1994. The Secretary found, based on substantial record evidence, that the 1996 compliance review was a follow-up to the original 1994 investigation. We agree. As such, since the investigation began prior to the enactment of the written notification requirement, the requirement could not act as a bar to the Secretary's actions in this case. Moreover, the 1994 investigation was triggered by trust notices and a reparation complaint filed against Allred's. Thus, even if the written notification requirement did apply, these written complaints were sufficient to satisfy it.

Finally, Allred's challenges the ALJ's decision to admit the testimony of Joan Colson, the Secretary's representative, to make a sanction recommendation. Allred's contends that her testimony was entirely unsupported, undocumented, unsubstantiated, and unreliable, and that the admission of it was therefore without observance of procedure as required by law. Once again, we disagree. We note first that there is no reference to Ms. Colson's testimony in the ALJ's order, and that there is no evidence that either the ALJ or the Secretary relied on her testimony in imposing the sanction of license revocation. Additionally, we agree with the Secretary that Ms. Colson was a reliable witness with respect to the sanction recommendation, and that the sanction recommended and imposed was in accordance with the PACA. In sum, we find that the ALJ and the Secretary likely did not rely on Ms. Colson's testimony in imposing the sanction of license revocation, but even if they did, that reliance was not erroneous, because the recommendation was consistent with the PACA and the regulations.

IV.

We find that the Secretary's decision to revoke Allred's PACA license was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Therefore, the Secretary's Decision and Order is affirmed.

AFFIRMED.

**TOLAR FARMS AND/OR TOLAR SALES, INC. v. UNITED STATES
DEPARTMENT OF AGRICULTURE.**

No. 98-5456.

Filed July 30, 1999.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**ON PETITION FOR REVIEW OF A FINAL DECISION OF
THE UNITED STATES DEPARTMENT OF AGRICULTURE**

Before TJOFLAT, DUBINA and CARNES, Circuit Judges.

BY THE COURT:

This case is **DISMISSED** for lack of jurisdiction because a petition for review was not filed in this Court within 60 days after the entry of the January 5, 1998, order. *See* Fed.R.App.P. 15(a); 28 U.S.C. § 2344.

**IRENE T. RUSSO d/b/a JAY BROKERS v. UNITED STATES
DEPARTMENT OF AGRICULTURE.**

No. 99-4065.

Decided October 28, 1999.

(Cite as 199 F.3d 1323, 1999 WL 1024094 (2^d Cir.))

**Perishable agricultural commodities – Substantial evidence – Notification requirement –
Retroactive application of statute.**

The United States Court of Appeals for the Second Circuit concluded that the Judicial Officer's finding that petitioner was a joint venturer engaged in a fraudulent consignment scheme in violation of the PACA was supported by substantial evidence. The Court rejected petitioner's contention that the Secretary of Agriculture's failure to give written notice of the investigation violated 7 U.S.C. § 499f(c). The Court stated that the statutory notification requirement was not effective until after the Secretary expanded the investigation to include petitioner, and the Court found no basis for applying the statutory notification requirement retroactively. The Court rejected petitioner's contentions that the Department of Agriculture violated the Jencks Act, improper communications were made between a Department of Agriculture witness and other witnesses, and the ALJ was biased.

PRESENT: Hon. ROGER J. MINER, Hon. JOHN M. WALKER, JR., Hon. ROBERT A. KATZMANN, Circuit Judges.

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the Secretary be and it hereby is AFFIRMED.

Petitioner *pro se* Irene Russo d/b/a Jay Brokers ("petitioner") petitions for review of a March 23, 1999 order of the Secretary of the Department of Agriculture (the "DOA") revoking petitioner's license under the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. §§ 499a-499s.

On appeal, petitioner raises the following arguments: (1) the Secretary's decision that petitioner committed wilful, repeated, and flagrant violations of section 2(4) of PACA was not supported by substantial evidence, (2) the Secretary's failure to give written notice of its investigation to petitioner violated section 6(c) of PACA, as amended, (3) the DOA committed violations of the Jencks Act, (4) improper communications were made between a DOA witness and other witnesses, and (5) the Administrative Law Judge (the "ALJ") was biased.

The Secretary's findings of fact must be upheld on review by this court if they are supported by substantial evidence. *See Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 91 (2d Cir. 1997). We have carefully reviewed the record and find that the Secretary's findings were amply supported by both documentary and testimonial evidence.

The basic structure of the fraudulent consignment scheme is not disputed. Joseph Russo, petitioner's husband, worked as a sales representative for Produce Distributors, Inc. ("PDI"), arranging consignment sales of produce. A28, 240, 385-86. PDI would represent to growers that a larger percentage of their produce had been dumped as spoiled or damaged than was the case, thereby under-representing the proceeds of its sale. PDI would then pocket the difference. A28, A55-56. The DOA presented evidence of 41 separate fraudulent transactions, and six "prototype" transactions were explored in detail at the hearing before the ALJ. A28-33, A57-66. PDI's financial records and canceled checks presented at the hearing showed that for each one of the fraudulent transactions, PDI would pay petitioner forty percent of its total profits, including the portion due to fraud. A112-29, 214-19. The financial records also showed that Joseph Russo's salary and PDI's expenses in listing him as an employee were deducted from the forty percent paid over to petitioner. A237-39. Petitioner actively participated in the fraudulent transactions, personally writing notes to several of the growers asking

them to accept less money for their produce than was actually collected by PDI. A142-44, 149-51, 154, 208-212. There was testimonial evidence from PDI's billing clerk, one of its salesmen and the son of its president, and PDI's certified public accountant that they believed PDI was involved in a joint venture with petitioner. A395-400, 408, 387-89. The investigator for the DOA testified that PDI kept files on each of the fraudulent transactions. The jacket of each file included the notation "J/V," which according to PDI's office manager, stood for "joint venture." Next to that notation on each file were the notations "Jay B," which stood for "Jay Brokers," and "Produce," which stood for PDI. Written next to the notation "Jay B" on each file folder was an amount equal to forty percent of the particular transaction, and an amount equal to sixty percent was written next to the notation "Produce." A137, 140-41, 228.

After reviewing the record, we find that the evidence against petitioner was not just substantial, but overwhelming. We therefore reject petitioner's first argument.

Petitioner's second argument is that the Secretary's failure to give written notification of its investigation to petitioner violated section 6(c) of PACA, 7 U.S.C. § 499f(c)(3). A notification requirement was added to the statute when PACA was amended pursuant to the Perishable Agricultural Commodities Act Amendments of 1995, effective November 15, 1995. Pub. L. No. 104-48, §§ 7(b), 109 Stat. 424, 428-29. The DOA initiated the investigation of PDI in May 1995, and expanded the investigation to include petitioner in June 1995, several months before the notification provision became effective. Given the strong presumption against the retroactive application of legislation, *see, e.g., Henderson v. INS*, 157 F.3d 106, 129 (2d Cir. 1998), we see no reason to apply the amendment to section 6(c) retroactively. Statutes are not ordinarily afforded retroactive application unless "Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). Therefore we find there was no violation of the notification requirement.

We have considered petitioner's other arguments and find them to be without merit.

The order of the Secretary is hereby AFFIRMED.

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: H. SCHNELL & COMPANY, INC.

PACA Docket No. D-97-0024.

Decision and Order filed April 16, 1999.

Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Respondent failed to make full payment promptly to thirty-nine producer suppliers for perishable agricultural commodities. Judge Baker further found that such failure to pay constituted willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding was warranted.

Andrew Y. Stanton, for Complainant.

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

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is an administrative disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930 as amended, (7 U.S.C. § 499a et seq.), hereinafter sometimes referred to as the "PACA"; the regulations promulgated pursuant thereto, and the Rules of Practice governing formal adjudicatory administrative proceedings instituted by the Secretary (7 C.F.R. § 1.130 et seq.).

A Complaint was filed on May 29, 1997, alleging that the Respondent failed to make full payment promptly to 39 sellers for purchases of 317 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of \$2,435,869.17 during the period January 22, 1995 through April 14, 1996 and to 9 consignors of net proceeds in the amount of \$1,103,343.19 resulting from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in the course of interstate or foreign commerce during the periods September 17, 1995 through April 2, 1996.

The Complainant requested the sanction of a finding that Respondent committed willful, repeated and flagrant violations of section 2(4) of the PACA and a publication of that finding. Respondent filed an Answer, generally denying the allegations of the Complaint.

The case was assigned to me and a hearing date was scheduled for May 20, 1998. Prior thereto on March 17, 1998, the Complainant filed a Motion for a

Decision Without Hearing, to which Respondent filed no objection. Complainant requested a conference call to determine whether Respondent would be able to make full payment of its produce indebtedness and be in full compliance with the PACA by the date of the hearing, May 20, 1998. During said conference call it was revealed that as of that time the Respondent owed \$1,557,776.93 to produce creditors for the transactions set forth in the Complaint and that Respondent had no expectation of making full payment by the date set for hearing in the matter.

On May 14, 1998, I issued a Decision Without Hearing and on May 14, 1998 the oral hearing scheduled to commence May 20, 1998 was cancelled. The Decision Without Hearing which I issued found that the Respondent had committed willful, flagrant or repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the findings were ordered published.

Pursuant to extension therefor the Respondent filed an appeal to the Judicial Officer: "* * * on the sole basis that the decision of Judge Baker was rendered without affording the Respondent an oral hearing at which the Complainant would be required to prove its case. Absent a hearing, the Respondent is denied due process because of the employment restrictions which would result from a finding that the Respondent had committed unlawful, flagrant and repeated violations of section 2(4) of the PACA."

By Order dated September 17, 1998, the Judicial Officer ordered: "The Decision Without Hearing, filed on May 14, 1998, is vacated, and this proceeding is remanded to the ALJ to afford Respondent an opportunity for a hearing."

In response thereto, the Administrative Law Judge set a new hearing date for February 2, 1999, which occurred as scheduled. At that hearing, Complainant was represented by Andrew Y. Stanton, Esquire, Office of the General Counsel, Washington, D.C. and Respondent was represented by Paul T. Gentile, Esquire, Gentile and Dickler, 15 Maiden Lane, New York, New York 10038. Complainant called four witnesses and submitted evidence into the record. (EX 1-8). Respondent called no witnesses and did not submit any evidence. A transcript of the hearing was prepared. Both parties were given the opportunity to file briefs of proposed findings of fact, conclusions and an order, together with authorities in support thereof. The Complainant filed proposed corrections to the transcript and "Complainant's Proposed Findings of Fact, Conclusions and Order" on March 16, 1999.

The Respondent filed nothing, except a faxed notation to the Hearing Clerk on March 16, 1999, wherein it is set forth:

"Ms. Dawson:

Please be advised that the Respondent in the above referenced case waives presentation of a brief and reserves the right to respond to Complainant's brief.

Paul T. Gentile."

Thus, the Respondent has been given full opportunity for an oral hearing.

It is noted that the Respondent raised due process considerations by referencing the fact that employment sanctions might result from a finding that it engaged in willful, flagrant and repeated PACA violations. The question of whether certain persons were responsibly connected to Respondent was not an issue in this proceeding. Persons affiliated with Respondent whom the PACA Branch had determined to be responsibly connected to Respondent under 7 C.F.R. § 47.49 could have appealed such determinations by filing a Petition for Review, resulting in a hearing before an Administrative Law Judge (7 C.F.R. § 1.133(b)(2)). However, Petitions for Review were never filed in this matter. Thus persons affiliated with Respondent elected not to pursue the process available to them for the adjudication of their responsibly connected status.

During the hearing the Respondent indicated:

Judge Baker: * * * Do you wish to proceed with your case?

Mr. Gentile: No, your honor.

Judge Baker: Do you intend to present a case?

Mr. Gentile: No I don't. I am going to rely on the record and the deficiencies in the Complainant's case.

Judge Baker: Very well, Thank you * * *. (Tr. 106).

The reliance by the Respondent upon the deficiencies in the Complainant's case is ill advised and not sufficient to overcome the preponderance of the evidence which was adduced by the Complainant in support of its allegations. I have carefully considered Respondent's objections made at the oral hearing and have found them, in totality, to be wanting in persuasiveness. The Respondent objected to the evidence at the hearing upon various grounds such as incompetent evidence (Tr. 49); objections were made relating to hearsay (Tr. 61-63); questions were raised as to documentation relating to a lawsuit filed by the trust creditors of

Respondent (Tr. 84); objections were made to an affidavit as hearsay not subject to cross-examination (Tr. 91); and questions were raised relating to whether a reparation order was properly served. (Tr. 100).

The most weighty objection made by the Respondent with respect to the alleged deficiencies in the Complainant's case relates to counsel's statement set forth in the transcript (Tr. 66) as follows:

Mr. Gentile: Of course I knew that was the issue, Your Honor. I think counsel again misses the point. The issue is the proof. I fully anticipated that the Complainant would come to this hearing with proof, acceptable, admissible, probative, material proof. A chart made up by an investigator based upon phone calls is not proof of payment. It is not acceptable.

The hearing officer -- I mean the judicial officer, to my recollection, has never said that you can come to a hearing and present a chart through an investigator, and that suffices it to show what is unpaid at the time of the hearing. I don't believe he has ever said that. So I don't believe that is the law.

That is the nature of the objection, not the other matters which counsel has alluded to. (Tr 66).

I have considered these various objections, as well as others, made by the Respondent and have found them sufficiently lacking in persuasiveness to the extent that they detract from the amount and quality of the proof adduced by the Complainant. Moreover, with respect to many of these matters, the question of whether or not these payments had been made and the extent thereof, was information available to the Respondent itself. Certainly, it was in a position to dispute the evidence of the Complainant had Respondent believed such charts and other evidence were incorrect or were deficient. Respondent did not do so.

Accordingly, inasmuch as the Complainant's proposed findings of fact are adequately supported by the record, such findings of fact have, for the most part, been incorporated and are adopted herein.

Pertinent Statutory Provisions

1. Section 2(4) of the PACA (7 U.S.C. § 499b(4))

It shall be unlawful in or in connection with any transaction in interstate or

foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c). However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.

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

AUTHORITY OF SECRETARY. Whenever (1) the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, 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.

Findings of Fact

1. Respondent, H. Schnell & Company, Inc., is a corporation organized and existing under the laws of the State of New York. At the time of the transactions set forth in the Complaint, Respondent's business mailing address was 243 B NYC Terminal Market, Bronx, New York 10474. (CX 1). Respondent went out of business on March 18, 1996. (Tr. 97, 113).

2. Pursuant to the licensing provisions of the PACA, license number 680815 was issued to Respondent on November 2, 1967. This license automatically terminated on November 2, 1996, due to Respondent's failure to pay the required annual license renewal fee. (CX 1).

3. Complainant initiated an investigation of Respondent in May, 1996, based on numerous complaints received by Complainant's New Brunswick, New Jersey office indicating that Respondent had failed to pay for produce. (Tr. 16,19).

4. Gary Nefferdorf, a marketing specialist employed by Complainant's New Brunswick, New Jersey office, was assigned to conduct the investigation of Respondent. (Tr. 17). Mr. Nefferdorf carried out his investigation at Respondent's place of business from May 6, 1996 (Tr. 19), through approximately May 15, 1996. (Tr. 51). When Mr. Nefferdorf arrived at Respondent's place of business, the only person of authority present was Margaret Senzer, who identified herself as Respondent's office manager. (Tr. 19).

5. Mr. Nefferdorf served upon Ms. Senzer an April 30, 1996, letter from the Chief of the PACA Branch, stating that Mr. Nefferdorf was conducting an investigation of Respondent pursuant to allegations that Respondent had violated the prompt payment requirements of the PACA (CX 1a; Tr. 18-19).

6. Ms. Senzer provided Mr. Nefferdorf with an accounts' payable computer printout indicating Respondent's unpaid produce transactions. (CX 2; Tr. 19-21). From the information contained in this printout, Mr. Nefferdorf was able to obtain Respondent's file jackets containing records showing what Respondent owed to produce suppliers. (CX 4a-4II, 6a-6h; Tr. 21).

7. Some of Respondent's records indicated that payment had been made on certain transactions through the issuance of checks. (Tr. 38). However, according to Ms. Senzer, many of the checks referred to in Respondent's records were never issued. (Tr. 38-39).

8. According to Respondent's records, as of May, 1996, Respondent had failed to make prompt payment and owed \$2,435,869.17 to 39 sellers for purchases of 317 lots of perishable agricultural commodities in the course of interstate or foreign commerce during the period January 22, 1995, through April 14, 1996, and owed \$1,103,343.19 to nine consignors consisting of net proceeds resulting from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in the course of interstate or foreign commerce during the period September 17, 1995 through April 2, 1996. (CX 3, 5).

9. Mr. Nefferdorf informed Ms. Senzer and Respondent's attorney, Mr. Gentile, that he had determined that approximately \$3,000,000.00 was past due and unpaid. (Tr. 50-52). Neither Ms. Senzer nor Mr. Gentile disputed Mr.

Nefferdorf's findings. (Tr. 50, 52).

10. After leaving Respondent's place of business, Mr. Nefferdorf contacted certain produce suppliers to obtain sworn statements regarding the interstate nature of their transactions with Respondent. (Tr. 53-54).

11. In May, 1998 and January, 1999, Mr. Nefferdorf conducted follow-up investigations to determine if Respondent's produce suppliers had received any payment of the amounts owed by Respondent. (Tr. 55). The investigations were done in preparation for the hearing that was scheduled for May 20, 1998, but postponed (Tr. 55), and the hearing that took place on February 2, 1999. (Tr. 55). Mr. Nefferdorf contacted the suppliers by telephone. (Tr. 55). During Mr. Nefferdorf's January, 1999 investigation, he was able to contact some of Respondent's unpaid produce suppliers (Tr. 56-57), and was informed that Respondent still owed \$550,085.17 based on the transactions in the Complaint. (Tr. 58). Mr. Nefferdorf prepared a table setting forth the results of his January, 1999 telephone conversations with Respondent's produce suppliers. (CX 7).

12. At the time of the oral hearing, the evidence shows that Respondent owed at least \$550,085.17 to produce suppliers. Had this not been so, Respondent could have shown otherwise. It did not do so.

Discussions and Conclusions

At the February 2, 1999, hearing in this matter, Complainant presented extensive evidence supporting the allegations in its Complaint that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to numerous sellers and consignors of perishable agricultural commodities.

Complainant's investigator, Gary Nefferdorf, testified that he obtained evidence from Respondent's own records showing that Respondent had failed to make full payment promptly to 39 sellers for purchases of 317 lots of perishable agricultural commodities in the course of interstate or foreign commerce in the amount of \$2,435,869.17 during the period of January 22, 1995 through April 14, 1996, and to nine consignors of net proceeds in the amount of \$1,103,343.19 resulting from the sale of 41 lots of perishable agricultural commodities which Respondent received and accepted on consignment in the course of interstate or foreign commerce during the period September 17, 1995 through April 2, 1996. Mr. Nefferdorf also testified that he conducted a follow-up investigation in January, 1999, immediately before the February 2, 1999, hearing, which determined that Respondent still owed at least \$550,085.17 for the transactions in the Complaint.

Complainant also introduced testimony from witnesses, representing produce suppliers set forth in the Complaint, who testified about Respondent's failure to pay promptly and its harmful effect on their businesses. John Mangia, president of Bacchus Associates, Monmouth, New Jersey, stated that Respondent originally owed about \$59,000.00 but eventually paid \$8,000.00, leaving \$51,000.00 currently owing. (Tr. 86). Mr. Mangia testified that Respondent's payment practices harmed his business. (Tr. 86). "You have to do at least \$700-800,000.00 worth of business in order to recoup that kind of money. We work on an 8 percent commission." Alan Elkin, owner of Alanco Corp., Bronx, New York, testified that Respondent originally owed approximately \$199,000.00 for produce purchases made in February and March, 1996. Mr. Elkin stated that Respondent paid \$83,000.00 in July, 1996 (Tr. 113) and \$86,000.00 in January, 1997 (Tr. 114), but never paid \$30,625.20. (Tr. 115). Mr. Elkin testified that Respondent's late payment and failure to make payment helped put his company, out of business (Tr. 115-116). Annabel D. Arena, a director of Frank Donio, Inc., submitted an affidavit (CX 8) in which she stated that Respondent originally owed \$51,300.00, made some payments and currently owes \$39,400.00. Ms. Arena stated that Respondent damaged her firm in a number of ways: "It decreased our company's profits, effected [sic] our cash flow, and made it harder to maintain our pay schedule. Our vendors are paid from 7 to 21 days. No later than 21 days."

Respondent elected not to call any witnesses or submit any evidence or to submit post-hearing briefs. The only documents introduced into the record by Respondent are its Answer, which consists of a general denial, and an appeal to the Judicial Officer, claiming that the May 14, 1998, Decision Without Hearing denied Respondent due process.

Respondent's failures to make full payment promptly for produce constitute willful, flagrant and repeated violations of the PACA. *In re: Caito Produce Co.*, 48 Agric. Dec. 602 (1989). Although Respondent has offered no excuse for its failure to make full payment promptly, even if it had, no excuse would be acceptable. As stated by the Judicial Officer in *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996):

The overriding doctrine set forth in *Caito* is that, because of the peculiar nature of the perishable agricultural commodities industry, and the Congressional purpose that only financially responsible persons should be engage in the perishable agricultural commodities industry, excuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been repeated failures to pay a substantial amount of money over an extended period of time.

The appropriate sanction is a finding of the commission of willful, flagrant and repeated violations of section 2(4) of the PACA, and the publication thereof.

At the hearing, Complainant presented a witness, Basil W. Coale, Jr., senior marketing specialist with the PACA Branch, who gave testimony concerning Complainant's recommended sanction. Mr. Coale pointed out the severe harm that payment violations such as those committed by Respondent do to the perishable agricultural industry. (Tr. 77-78). Mr. Coale testified that, since Respondent does not currently have a PACA license, as it terminated in 1996, Complainant recommends the sanction of a finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding. (Tr. 79). Mr. Coale stated that Complainant does not recommend a civil penalty in lieu of a finding of the commission of willful, flagrant and repeated violations, as, pursuant to the Judicial Officer's *Scamcorp* decision,¹ a civil penalty is not appropriate as long as a Respondent has not made full payment of its produce obligations and/or is not in compliance with the PACA as of the date of the hearing. (Tr. 79-80).

It is the policy of the Judicial Officer, first adopted in *In re: Gilardi Truck and Transportation, Inc.*, 43 Agric. Dec. 118 (1984), that a license revocation is the only possible sanction when a PACA licensee has failed to make payment in accordance with the PACA and owes more than a *de minimis* amount to produce sellers by the date of the hearing or, if no hearing is held, by the time the Answer was due. If a Respondent has made full payment and is in full compliance with the PACA by the date of the hearing (or the time the Answer is due if no hearing is held), a license suspension is ordered. Since the 1995 amendments to the PACA, a civil penalty may be ordered in lieu of a suspension or revocation (7 U.S.C. § 499h(e)) if the Respondent's financial condition is sufficiently strong (*Scamcorp, Inc.*, *supra*, at 569 n. 20), although a civil penalty is not appropriate as long as a Respondent has not made full payment of its produce obligations and/or is not in compliance with the PACA as of the date of the hearing. This principle has recently been affirmed in two decisions of the U.S. Court of Appeals for the

¹*In re: Scamcorp, Inc.*, d/b/a Goodness Greeness, 57 Agric. Dec. 527 (1998), where the Judicial Officer stated that, with regard to complaints alleging the failure to make full payment promptly under the PACA that are filed subsequent to the date of issuance of *Scamcorp*, if the respondent is not in full compliance with the PACA within 120 days after the complaint is served upon the respondent or the date of the hearing, whichever occurs first, the case will be treated as a "no pay" case, and revocation will be the appropriate sanction. *Id.* at 548-549, 562 n. 3. The complaint in this case was filed prior to the issuance of *Scamcorp*. The Judicial Officer further stated that a civil penalty is not an appropriate sanction in a "no pay" case. *Id.* at 570-571.

Second Circuit; *Havana Potatoes of New York Corporation and Haypo, Inc. v. United States*, 136 F.3d 89 (2d Cir. 1997) and *Kanowitz Fruit and Produce Co., Inc. v. United States of America*, No. 97-4224, U.S. App. Lexis 28025 (2d Cir. October 29, 1998).

As Respondent's PACA license has terminated, a finding of willful, flagrant and repeated violations of section 2(4) of the PACA and publication thereof is appropriate, rather than a license revocation.

In view of Respondent's failure to make full payment promptly of the amounts alleged in the Complaint and its failure to show compliance with the payment requirements of the PACA by the date of the hearing, the issuance of an order finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA and publication of that finding are warranted.

Order

Respondent herein, H. Schnell & Company, Inc., is hereby found to have committed willful, flagrant and repeated violations of section 2(4) of the PACA.

This finding is ordered published.

This order shall become effective without further proceedings thirty-five (35) days after the service thereof upon the Respondent unless there is an appeal to the Judicial Officer within thirty (30) days after receiving service. (7 C.F.R. § 1.131, § 1.142, § 1.145, *et seq.*)

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 26, 1999.-Editor]

In re: KIRBY PRODUCE COMPANY, INC.
PACA Docket No. D-98-0002.
Decision and Order filed July 12, 1999.

Default — Admissions — Official notice — Failure to pay — Willful, flagrant, and repeated violations — License revocation.

The Judicial Officer affirmed Judge Hunt's (ALJ) Decision Without Hearing by Reason of Admissions in which the ALJ found that Respondent committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) by failing to make full payment promptly for perishable agricultural commodities and revoked Respondent's PACA license. The Judicial Officer held that the new "slow-pay/no-pay" policy articulated in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), applies to PACA disciplinary cases instituted after January 25, 1999, the date *In re Scamcorp, Inc.*, *supra*, was published in *Agriculture Decisions*; therefore, the new policy was not applicable to the proceeding and if

Respondent paid all of its produce sellers by the date of the hearing, the case would be a "slow-pay" case. However, the Judicial Officer held that Respondent was not entitled to a hearing because Respondent's agreement to documents issued in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996), constituted an admission of the material allegations in the Complaint. Further, Respondent's request for a continuance of the hearing to enable Respondent to make full payment to its perishable agricultural commodities sellers before the hearing constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by the date of the hearing. The Judicial Officer stated that documents filed in United States courts that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings and held that the ALJ properly took official notice of documents issued in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996), in accord with the Administrative Procedure Act (5 U.S.C. § 556(e)) and the Rules of Practice (7 C.F.R. § 1.141(h)(6)). The Rules of Practice (7 C.F.R. § 1.145(i)) require the Judicial Officer to rule on appeals, upon the basis of, and after due consideration of, the record and any matter of which official notice is taken. The Judicial Officer stated that a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held. The Judicial Officer also held that application of the default provisions of the Rules of Practice did not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution.

Jane McCavitt, for Complainant.

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

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

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

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 20, 1997.

The Complaint alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of \$1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent, represented by Lynn Tarpy, Hagood, Tarpy & Cox, Knoxville, Tennessee, filed an Answer on November 12, 1997, in which Respondent generally denied the material allegations of the Complaint. However, Respondent's Answer contains a provision which appears to contradict the general denial and indicates that Respondent has not paid the 20 perishable agricultural commodities sellers identified in paragraph III of the Complaint, but rather made arrangements to pay the sellers, as follows:

3. The allegations of Paragraph III are denied. The Respondent would state that it has made arrangements to pay all twenty (20) sellers in full through a repayment plan approved by the United States District Court for the Eastern District of Tennessee Northern Division, Docket No.: 3:96-CV-526. The United States District Court has not only approved the repayment plan but has directed that particular payments be made. Said Court Orders supersede the action by the Secretary. Any enforcement action by the secretary which interferes with the Orders of the Court will be invalid and of no effect. The Secretary has previously received a copy of the original Order setting out the Plan.

Answer ¶ 3.

On December 4, 1997, Paul T. Gentile, Gentile & Dickler, New York, New York, filed an appearance on behalf of Respondent in substitution for Ms. Tarpy, and Respondent filed an Amended Answer denying the material allegations of the Complaint and deleting those provisions of the Answer that appear to contradict Respondent's denial of the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the ALJ] scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the ALJ). On November 16, 1998, the ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed Request for Official Notice requesting that the ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co.*, *supra*; Motion for Decision Without Hearing by Reason of Admissions

[hereinafter Motion for Default Decision]; and a proposed Decision Without Hearing by Reason of Admissions [hereinafter Proposed Default Decision]. Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co., supra*, and that Respondent's agreement to the issuance of the Order and the attached list of creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission stating that Complainant cannot use the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*, as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the ALJ issued Order Canceling Hearing and Decision Without Hearing by Reason of Admissions [hereinafter Initial Decision and Order], pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), in which the ALJ: (1) found that Respondent and its creditors consented to the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*; (2) found that Respondent's agreement to the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co., supra*, and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (4) concluded that Respondent's failures to make full payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4).

On March 3, 1999, Respondent filed Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions; on March 24, 1999, Complainant filed Response to Respondent's Motion for Reconsideration; on April 1, 1999, Respondent filed Motion to Permit Reply to Complainant's Response to Respondent's Motion for Reconsideration and The Reply to Complainant's Response; and on April 7, 1999, the ALJ filed Order Denying Motion for Reconsideration.

On May 28, 1999, Respondent appealed to the Judicial Officer; on June 17, 1999, Complainant filed Complainant's Response to Respondent's Appeal Petition; and on June 18, 1999, the Hearing Clerk transmitted the record of the proceeding

to the Judicial Officer for decision.

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

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

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.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

TITLE 7—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[.]

7 C.F.R. § 46.2(aa)(5).

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

Findings of Fact

1. The mailing address of Respondent, Kirby Produce, Company, Inc., is P.O. Box 6808, Knoxville, Tennessee 37914-0808. Respondent's business address is 2124 Forest Avenue, Knoxville, Tennessee 37916.
2. Pursuant to the licensing provisions of the PACA, Respondent was issued license number 931573 on August 3, 1993. Respondent renewed its license annually, and Respondent is next subject to renewal on or before August 3, 1999.
3. As more fully set forth in paragraph III of the Complaint, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15.¹ As of December 2, 1998, \$1,215,723.99 remained past due and unpaid, with \$387,012.16

¹The Complaint alleges that, during the period August 1995 through July 1996, Respondent failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of fruits and vegetables in the total amount of \$1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III). Complainant withdrew the allegation in paragraph III of the Complaint that Respondent failed to make payment, totaling \$7,123.30, to Douberly Farms, Newberry, Florida, for two lots of watermelons, in violation of the PACA (Motion for Default Decision at 3).

paid late.²

Conclusion of Law

Respondent's failures to make full payment promptly with respect to the 204 transactions referenced in Finding of Fact No. 3, *supra*, constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises two issues in its Appeal Petition. First, Respondent contends that full payment of Respondent's perishable agricultural commodities sellers by the date of the hearing would render this case a "slow-pay" case (Appeal Pet. at 3).

I agree with Respondent's contention that if Respondent paid all of its produce sellers by the date of the hearing, this case would be a "slow-pay" case.

PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times. The Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing or, if no hearing was held, by the time the answer was due. Cases in which a respondent had failed to pay by the date of the hearing were referred to as "no-pay" cases. License revocation could be avoided and the suspension of a license of a PACA licensee who failed to pay in accordance with the PACA would be ordered if a PACA violator made full payment by the date of the hearing (or, if no hearing was held, by the time the answer was due) and was in full compliance with the PACA by the date of the hearing. Cases in which a respondent had paid and was in full compliance with the PACA by the time of the hearing were referred to as "slow-pay" cases. The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent's present compliance not involve credit agreements for more than 30 days.

In *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), I changed the Judicial

²December 3, 1998, Declaration of John W. Wood, Senior Marketing Specialist, PACA Branch, Agricultural Marketing Service, United States Department of Agriculture.

Officer's "slow-pay"/"no-pay" policy.³ However, the new policy applies to PACA disciplinary cases instituted after January 25, 1999, the date *In re Scamcorp, Inc.*, *supra*, was published in *Agriculture Decisions*, or after personal notice of *In re Scamcorp, Inc.*, *supra*, served on a respondent, whichever occurs first. The instant proceeding was instituted before January 25, 1999, and Complainant does not allege that Respondent was given personal notice of *In re Scamcorp, Inc.*, *supra*.

Second, Respondent contends that it is entitled to a hearing to prove that prior to the hearing, it has paid its perishable agricultural commodities sellers.

I disagree with Respondent's contention that it is entitled to a hearing, and I find no basis for setting aside the ALJ's Initial Decision and Order and remanding the case to the ALJ for a hearing.

Respondent denied the material allegations of the Complaint in its Amended Complaint, and the ALJ scheduled a hearing to commence on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). However, on November 12, 1998, Respondent moved to continue the hearing until such time as Respondent has made full payment to its perishable agricultural commodities sellers, as follows:

³The new "slow-pay"/"no-pay" policy is as follows: In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

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

Full compliance requires not only that a respondent have paid all produce sellers in accordance with the PACA, but also, in accordance with *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), that a respondent have no credit agreements with produce sellers for more than 30 days.

Administrative Law Judge James W. Hunt
U.S. Department of Agriculture
Office of Administrative Law Judge
14th & Independence Avenue, S.W.
Room 1081 - South Building
Washington, D.C. 20250-9200

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

In March, 1996 certain produce creditors of the above referenced Respondent, Kirby Produce Company, Inc. ("Kirby") commenced action against Kirby in the United States District Court for the Eastern District of Tennessee entitled Brown's Produce, et al. v. Kirby Produce Company, et al. under case number 3:96 CV526. The action was brought by the plaintiffs in order to seek redress under Section 5(c) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499(e)(c) [sic] for unpaid produce transactions.

After due deliberation, and the consent of all PACA trust creditors and the Respondent, U.S. District Court Judge Leon Jordan issued an order which provided for the orderly liquidation of the Respondent's assets and the eventual payment of all trust creditors. (See attached order dated June 25, 1996.) Thereafter the Respondent has been in compliance with Judge Jordan's order and has made periodic payments.

On September 8, 1998 you issued an order directing that a hearing be held on January 13, 1999 in Knoxville, Tennessee. The purpose of this letter is to make motion for an adjournment of the hearing until that time when the Respondent has made full payment to all trust creditors pursuant to Judge Jordan's order. As you are aware, the payment of all produce debt prior to the hearing substantially reduces the potential sanction which may be imposed upon the Respondent. Failure to grant this motion for adjournment will frustrate the order of Judge Jordan and prejudice Respondent's position at the time of the hearing.

Thank you for your consideration of this motion for adjournment.

Very truly yours,
/s/
Paul T. Gentile

Letter dated November 10, 1998, from Paul T. Gentile to the ALJ.

Respondent attached a copy of the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, *supra*, to its motion to continue the scheduled hearing.

United States District Court Judge Leon Jordan's Order states, as follows:

Upon agreement of the parties, representations of counsel, and for good cause shown, the Court finds:

1. The Plaintiffs and all other similarly situated creditors are or may be produce creditors of the Defendants under Section 5(c) of the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499e(c), and have not been paid for produce in the amounts to be determined under the claims procedures set forth herein.
2. The Defendants, Randy W. Kirby and Clifton S. Kirby are the officers and directors of Kirby who directed its day to day operations. Kirby Produce Company is and remains a corporation incorporated under the laws of the State of Tennessee whose Charter has not been dissolved or revoked, either voluntarily or by administrative action.
3. All the parties recognize and agree that Kirby and the Defendants do not have enough produce related assets on which to impose a statutory trust to guarantee immediate and full payment to all PACA creditors. The Defendants, corporately and individually, do not have enough assets to pay all the Defendants [sic] in full. There is approximately \$2,300,000.00 owed to PACA and non-PACA creditors of Kirby. In order to insure that those produce related assets upon which a statutorily imposed trust exists are used only to pay those creditors under 7 U.S.C. § 499e(c), a claims procedure is to be set up to insure that payment. Said claims procedure will be incorporated into this Order.

- 4. It is in the best interest of the Perishable Agricultural Commodities Act, Plaintiffs, all PACA creditors, and all other creditors of the Defendants that this Agreement be entered into.

Therefore, it is ORDERED, ADJUDGED AND DECREED that:

- 1. Judgment shall be entered against the Defendants for the benefit of and on behalf of each and every creditor of the Defendant [sic] in the amount to be determined through the claims procedure set forth below.

. . . .

- 8. A list of all creditors, both PACA and non-PACA, of the Defendants are [sic] attached hereto as Exhibit B. Included with the name of the Creditor is the Creditor's address and the amount which the Defendant's records show is owed to that Creditor as of May 29, 1996.
- 9. Unless the claims procedure shows otherwise, all Creditors for purposes of distributions under the 2nd, 3rd and 4th funds shall be presumed to be entitled to the amounts shown on Exhibit B for their payment.

The ALJ took official notice of the Order and the list of Respondent's creditors attached to the Order and found that Respondent's agreement to the Order and the list of Respondent's creditors attached to the Order constitutes an admission of the material allegations of the Complaint (Initial Decision and Order at 2).⁴

⁴The list of Respondent's creditors attached to United States District Court Judge Leon Jordan's Order lists 19 of the 20 perishable agricultural commodities sellers identified in paragraph III of the Complaint and indicates that Respondent owes those 19 perishable agricultural commodities sellers amounts that are similar to or identical to the amounts that are alleged in paragraph III of the Complaint as past due, as follows:

Seller	Complaint	Order
Apio Produce Sales	\$ 800.00	\$ 800.00
Watten Distributing Co.	882.00	882.00

(continued...)

Official notice is authorized by the Administrative Procedure Act and the Rules of Practice. The Administrative Procedure Act provides, as follows:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

. . . .

(e) . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show to the contrary.

5 U.S.C. § 556(e).

Sections 1.141(h)(6) and 1.145(i) of the Rules of Practice provide, as follows:

⁴ (...continued)		
Rawls Brokerage	1,795.00	2,145.00
Gordon Tatum, Inc.	303,243.75	306,261.60
Fagerberg Produce Co., Inc.	2,043.75	2,043.75
Appalachian Apple, Inc.	82,595.50	82,595.50
Stanley Orchard Sales, Inc.	14,223.00	6,510.50
Juniper Tomato Growers, Inc.	33,504.25	24,504.25
Langlade Potato Dist., Inc.	21,072.50	21,072.50
Apple Action Fruit Sales, Inc.	618,499.50	642,301.75
Castellini Company	4,053.00	4,053.00
Belle Harvest Sales, Inc.	22,763.70	22,763.70
Sound Commodities, Inc.	57,000.10	57,000.10
Pride Packing Company	1,176.00	1,470.00
Northern Fruit Company, Inc.	839.00	839.00
Weis-Buy Services, Inc.	266,039.45	261,113.45
Basin Produce Corp.	57,766.00	57,766.00
M & E Produce Co., Inc.	112,678.85	112,678.85
C.H. Robinson Co.	<u>1,760.80</u>	<u>1,760.80</u>
	\$1,602,736.15	\$1,608,561.75

The only perishable agricultural commodities seller that is listed in paragraph III of the Complaint and is not on the list of Respondent's creditors in Exhibit B attached to the Order issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, *supra*, is Douberly Farms. Complainant withdrew the allegation in paragraph III of the Complaint that Respondent failed to make payment, totaling \$7,123.30, to Douberly Farms, Newberry, Florida, for two lots of watermelons, in violation of the PACA (Motion for Default Decision at 3).

§ 1.141 Procedure for hearing.

....

(h) *Evidence.* . . .

....

(6) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

....

§ 1.145 Appeal to Judicial Officer.

....

(i) *Decision of the judicial officer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal.

7 C.F.R. §§ 1.141(h)(6), .145(i).

Federal courts may take judicial notice of proceedings in other courts if those proceedings have a direct relation to matters at issue.⁵ Therefore, under section

⁵*Conforti v. United States*, 74 F.3d 838, 840 (8th Cir.), *cert. denied*, 519 U.S. 807 (1996); *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995), *cert. denied*, 517 U.S. 1158 (1996); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); *United States v. Hope*, 906 F.2d 254, 260-61 n.1 (7th Cir. 1990), *cert. denied*, 499 U.S. 983 (1991); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987); *E.I. du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986); *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir. 1984) (*per curiam*); *Hart v. Commissioner*, 730 (continued...)

1.141(h)(6) of the Rules of Practice (7 C.F.R. § 1.141(h)(6)) an administrative law judge presiding over a PACA disciplinary proceeding may take official notice of proceedings in a United States district court that have a direct relation to the PACA disciplinary proceeding. Moreover, under section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)) the Judicial Officer shall rule on any appeal on the basis of, and after due consideration of, any matter of which official notice is taken, as well as the record of the proceeding. Documents filed in United States court proceedings that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings.⁶

On rare occasions default decisions have been set aside for good cause shown or where the complainant did not object.⁷ However, a decision without hearing,

⁵(...continued)

F.2d 1206, 1207-08 n.4 (8th Cir. 1984) (per curiam); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), cert. denied, 461 U.S. 960 (1983); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir.), cert. denied, 449 U.S. 996 (1980); *St. Louis Baptist Temple v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979); *Granader v. Public Bank*, 417 F.2d 75, 82-83 (6th Cir. 1969), cert. denied, 397 U.S. 1065 (1970); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 48 n.20 (3d Cir. 1947).

⁶*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 893 (1997); *In re S W F Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1609 (1993); *In re Allsweet Produce Co.*, 51 Agric. Dec. 1455, 1457 n.1 (1992); *In re Magnolia Fruit & Produce Co.*, 49 Agric. Dec. 1156, 1158 (1990), *aff'd*, 930 F.2d 916 (5th Cir. 1991) (Table), printed in 50 Agric. Dec. 854 (1991); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 627 (1989); *In re Roman Crest Fruit, Inc.*, 46 Agric. Dec. 612, 615 (1987); *In re Anthony Tammara, Inc.*, 46 Agric. Dec. 173, 175-76 (1987); *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729, 731 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021, 2024 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016, 2018 (1985); *In re A. Pellegrino & Sons, Inc.*, 44 Agric. Dec. 1602, 1606 (1985), *appeal dismissed*, No. 85-1590 (D.C. Cir. Sept. 29, 1986); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1587 (1985), *aff'd and remanded*, 832 F.2d 601 (D.C. Cir. 1987), *remanded*, 47 Agric. Dec. 1486 (1988), *final decision*, 48 Agric. Dec. 595 (1989).

⁷*See In re H. Schnell & Co.*, 57 Agric. Dec. ____ (Sept. 17, 1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the United States Constitution); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint (continued...))

based upon a respondent's admission that the respondent has failed to make full payment promptly for perishable agricultural commodities in accordance with the PACA, as alleged in the complaint, generally is not set aside,⁸ and Respondent has shown no basis for setting aside the Initial Decision and Order.

Respondent's agreement with the Order and list of creditors issued by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, *supra*, constitutes an admission that Respondent owes \$1,608,561.75 to the 19 perishable agricultural commodities sellers which Complainant alleges Respondent has failed to pay promptly and in full.⁹ Further, on November 12, 1998, Respondent filed a motion to continue the hearing scheduled to commence on January 13, 1999, to enable Respondent to make full payment to its perishable agricultural commodities sellers prior to the hearing and convert the case from a "no-pay" to a "slow-pay" case (Letter dated November 10, 1998, from Paul T. Gentile to the ALJ). Respondent's request for a continuance of the hearing to

⁷(...continued)

by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

⁸*See, e.g., In re Tolar Farms*, 56 Agric. Dec. 1865, 1877-78 (1997) (stating that in view of the respondents' answer and the respondents' promissory notes evidencing failure to make prompt payment, there is no material issue of fact that warrants holding a hearing), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (stating that in view of the respondent's admissions in the documents it filed in a bankruptcy proceeding, there is no material issue of fact that warrants holding a hearing); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1413 (1995) (stating that the administrative law judge correctly held that a hearing was not required where the record, including the respondent's bankruptcy documents, shows that the respondent has failed to make full payment exceeding a *de minimis* amount), *appeal dismissed*, No. 95-70906 (9th Cir. Nov. 8, 1996); *In re National Produce Co., Inc.*, 53 Agric. Dec. 1622, 1626 (1994) (stating that the administrative law judge correctly held that a hearing was not required where the record, including the respondent's bankruptcy documents, shows that the respondent failed to make full payment exceeding a *de minimis* amount).

⁹See note 1.

enable Respondent to make full payment to its perishable agricultural commodities sellers before the hearing constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by January 13, 1999, the date of the hearing.

A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held.¹⁰ In view of Respondent's agreement to the Order and the attached list of creditors issued in *Brown's Produce v. Kirby Produce Co.*, *supra*, there is no material issue of fact that warrants holding a hearing. Moreover, it is not necessary to show that the undisputed facts prove all the allegations in the Complaint.¹¹ The same order would be issued in this case unless the proven violations are *de minimis*.¹²

Respondent failed to make full payment of the agreed purchase prices promptly to 19 sellers for 204 lots of perishable agricultural commodities in the total amount

¹⁰*H. Schnell & Company, Inc.*, 57 Agric. Dec. ___, slip op. at 8 (Sept. 17, 1998) (Remand Order).

¹¹The Complaint alleges that Respondent failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of \$1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III). Complainant withdrew the allegation in paragraph III of the Complaint that Respondent failed to make payment to Douberly Farms and now alleges that Respondent failed to make full payment to 19 perishable agricultural commodities sellers (Motion for Default Decision at 3). Respondent's agreement to the Order and the list of creditors issued in *Brown's Produce v. Kirby Produce Co.*, *supra*, constitutes an admission that it owes these same 19 sellers \$1,608,561.75. Respondent admits in the Order and the list of creditors attached to the Order that it owes the same amount as alleged in paragraph III of the Complaint to 12 of these sellers: Apio Produce Sales; Watten Distributing Company; Fagerberg Produce Company, Inc.; Appalachian Apple, Inc.; Langlade Potato Dist., Inc.; Castellini Company; Belle Harvest Sales, Inc.; Sound Commodities, Inc.; Northern Fruit Company, Inc.; Basin Produce Corp.; M & E Produce Co., Inc.; and C.H. Robinson Co. Respondent admits in the Order and the list of creditors issued in *Brown's Produce v. Kirby Produce Co.*, *supra*, that it owes more than the amounts alleged in paragraph III of the Complaint to 4 of these sellers: Rawls Brokerage; Gordon Tantum, Inc.; Apple Action Fruit Sales, Inc.; and Pride Packing Company. Respondent admits in the Order and the list of creditors issued in *Brown's Produce v. Kirby Produce Co.*, *supra*, that it owes \$7,712.50 less than the amount alleged in paragraph III of the Complaint (\$14,223) to Stanley Orchard Sales, Inc.; it owes \$9,000 less than the amount alleged in paragraph III of the Complaint (\$33,504.25) to Juniper Tomato Growers, Inc.; and it owes \$4,926 less than the amount alleged in paragraph III of the Complaint (\$266,039.45) to Weis-Buy Services, Inc.

¹²*In re Tolar Farms*, 56 Agric. Dec. 1865, 1878 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (1997); *In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question); *In re Fava & Co.*, 46 Agric. Dec. 79 (1984) (Ruling on Certified Question).

of \$1,602,736.15, which Respondent had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period August 1995 through April 1996, a period of 9 months.

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.¹³

¹³See, e.g., *Allred's Produce v. United States Dep't of Agric.*, ___ F.3d ___ (5th Cir. July 1, 1999) (stating that 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 that 86 violations over nearly 3 years for an amount totaling over \$300,000 were willful and flagrant); *Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *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 that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000), cert. denied, 389 U.S. 835 (1967); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (concluding that the respondent's failure to pay 19 sellers \$713,638.10 for 578 lots of perishable agricultural commodities, during the period of May 1995 through November 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), appeal dismissed sub nom. *Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998) (concluding that the respondent's failure to pay 35 sellers \$634,791.13 for 165 transactions involving perishable agricultural commodities, during the period of April 1993 through June 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997) (holding that the respondents' failure to pay 7 sellers \$192,089.03 for 46 lots of perishable agricultural commodities, during the period of July 1995 through September 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), appeal docketed, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917 (1997) (concluding that the respondent's failure to pay 18 sellers \$206,850.69 for 62 lots of perishable agricultural commodities, during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), aff'd, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), cert. denied, 119 S.Ct. 1575 (1999); *In re Five Star Food* (continued...)

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.¹⁴ Willfulness is reflected by

¹³(...continued)

Distributors, Inc., 56 Agric. Dec. 880 (1997) (concluding that the respondent's failure to pay 14 sellers \$238,374.08 for 174 lots of perishable agricultural commodities, during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities, during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers \$101,577.50 for 23 lots of perishable agricultural commodities, during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that respondent Andershock's Fruitland, Inc.'s failure to pay 11 sellers \$245,873.41 for 113 lots of perishable agricultural commodities, during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that the respondent's failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that the respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

¹⁴See, e.g., *Allred's Produce v. United States Dep't of Agric.*, ___ F.3d ___ (5th Cir. July 1, 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Sunland Packing House Co.*, 58 Agric. Dec. ___, slip op. at 70 (Feb. 17, 1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. ___, slip op. at 33 (Sept. 30, 1998); *In re Limeco, Inc.*, 57 Agric. Dec. ___, slip op. at 17 (Aug. 18, 1998); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1575 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, (continued...)

Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.¹⁵ Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of \$1,602,736.15 for 204 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period August 1995 through April 1996.

Respondent knew, or should have known, that it could not make prompt

¹⁴(...continued)

1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("Willfully" could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

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

¹⁵See *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 94 (2d Cir. 1997); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827-28 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1906-07 (1997), *aff'd*, ___ F.3d ___ (5th Cir. July 1, 1999); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879-80 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued, over a 9-month period, to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not have sufficient capitalization; and consequently, could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.¹⁶

Accordingly, the Initial Decision and Order was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution.¹⁷

¹⁶See *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 829 (1998), *appeal dismissed sub nom. Litvin v. United States Dep't of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1907 (1997), *aff'd*, ___ F.3d ___ (5th Cir. July 1, 1999); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1880-81 (1997), *appeal docketed*, No. 98-5456 (11th Cir. Sept. 25, 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

¹⁷See *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating that the due process clause does not require an agency hearing where there is no disputed issue of material fact); *Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir.) (stating that an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 519 U.S. 913 (1996); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating that an agency may ordinarily dispense with a hearing when no genuine dispute exists); *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 (D.C. Cir. 1986) (rejecting petitioner's contention that the Federal Energy Regulatory Commission's failure to hold an evidentiary hearing denied petitioner procedural due process and stating that since no material factual dispute exists, the Federal Energy Regulatory Commission was not required to hold a hearing); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1364 (D.C. Cir. 1985) (stating that a request for a hearing must contain evidence that raises a material issue of fact on which a meaningful hearing might be held), *cert. denied*, 475 U.S. 1123 (1986); *United States v. Cheramie Bo-Truc # 5, Inc.*, 538 F.2d 696, 698 (5th Cir. 1976) (stating that even when a statute mandates an adjudicatory proceeding, neither that statute, nor due process, nor the Administrative Procedure Act requires an agency to conduct a meaningless evidentiary hearing (continued...))

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

Order

Respondent's PACA license is revoked, effective 65 days after service of this Order on Respondent.

In re: KIRBY PRODUCE COMPANY, INC.

PACA Docket No. D-98-0002.

Order Denying Petition for Reconsideration filed October 4, 1999.

Petition for reconsideration — Admissions — Default — Failure to pay by date of hearing.

The Judicial Officer denied Respondent's Petition for Reconsideration. The Judicial Officer found that Respondent's November 12, 1998, motion to continue the hearing to enable Respondent to make full payment to its perishable agricultural commodities sellers prior to the hearing and convert the case from a "no-pay" to a "slow-pay" case, constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by the date of the hearing. The Judicial Officer also found that based on Respondent's November 12, 1998, admission, no issue of material fact exists regarding full payment to Respondent's perishable agricultural commodities sellers by the date of the hearing and no hearing is required.

Jane McCavitt, for Complainant.

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

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

Order issued by William G. Jenson, Judicial Officer.

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C.

¹⁷(...continued)

when the facts are undisputed); *Independent Bankers Ass'n. of Georgia v. Board of Governors*, 516 F.2d 1206, 1220 (D.C. Cir. 1975) (stating that the case law in this circuit is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose); *United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 453 (9th Cir. 1971) (stating that it is settled law that when no fact question is involved or the facts are agreed, an agency hearing is not required); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969) (stating that no agency hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law).

§§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.49) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on October 20, 1997.

The Complaint alleges that: (1) during the period August 1995 through July 1996, Kirby Produce Company, Inc. [hereinafter Respondent], failed to make full payment promptly to 20 sellers of the agreed purchase prices for 206 lots of perishable agricultural commodities in the total amount of \$1,609,859.45, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); and (2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent, represented by Lynn Tarpy, Hagood, Tarpy & Cox, Knoxville, Tennessee, filed an Answer on November 12, 1997, in which Respondent generally denied the material allegations of the Complaint. However, Respondent's Answer contains a provision which appears to contradict the general denial and indicates that Respondent has not paid the 20 perishable agricultural commodities sellers identified in paragraph III of the Complaint, but rather made arrangements to pay the sellers, as follows:

3. The allegations of Paragraph III are denied. The Respondent would state that it has made arrangements to pay all twenty (20) sellers in full through a repayment plan approved by the United States District Court for the Eastern District of Tennessee Northern Division, Docket No.: 3:96-CV-526. The United States District Court has not only approved the repayment plan but has directed that particular payments be made. Said Court Orders supersede the action by the Secretary. Any enforcement action by the secretary which interferes with the Orders of the Court will be invalid and of no effect. The Secretary has previously received a copy of the original Order setting out the Plan.

Answer ¶ 3.

On December 4, 1997, Paul T. Gentile, Gentile & Dickler, New York, New York, filed an appearance on behalf of Respondent in substitution for Ms. Tarpy, and Respondent filed an Amended Answer denying the material allegations of the Complaint and deleting those provisions of the Answer that appear to contradict Respondent's denial of the material allegations of the Complaint.

Administrative Law Judge James W. Hunt [hereinafter the ALJ] scheduled a hearing to commence in Knoxville, Tennessee, on January 13, 1999 (Summary of Telephone Conference; Notice of Hearing). On November 12, 1998, Respondent filed a motion to continue the hearing until Respondent has made full payment to all perishable agricultural commodities sellers, pursuant to an Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, Case No. 3:96-CV-526 (E.D. Tenn. June 25, 1996) (Letter dated November 10, 1998, from Paul T. Gentile to the ALJ). On November 16, 1998, the ALJ denied Respondent's motion to continue the hearing (Order Denying Motion to Continue Hearing).

On December 4, 1998, Complainant filed: (1) Request for Official Notice requesting that the ALJ take official notice of the Order, the list of Respondent's creditors, and a Marketing Agreement issued in *Brown's Produce v. Kirby Produce Co.*, *supra*; (2) Motion for Decision Without Hearing by Reason of Admissions [hereinafter Motion for Default Decision]; and (3) a proposed Decision Without Hearing by Reason of Admissions. Complainant contends in Complainant's Motion for Default Decision that Respondent and its creditors consented to the Order issued in *Brown's Produce v. Kirby Produce Co.*, *supra*, and that Respondent's agreement to the issuance of the Order and the attached list of creditors constitutes an admission of the material allegations of the Complaint (Motion for Default Decision at 2-3).

On December 29, 1998, Respondent filed Objection and Opposition to Motion for Decision Without Hearing by Reason of Admission, stating that Complainant cannot use the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, *supra*, as an admission to the Complaint and that Respondent is entitled to a hearing.

On December 31, 1998, the ALJ issued Order Canceling Hearing and Decision Without Hearing by Reason of Admissions [hereinafter Initial Decision and Order], pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), in which the ALJ: (1) found that Respondent and its creditors consented to the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, *supra*; (2) found that Respondent's agreement to the Order issued on June 25, 1996, by United States District Court Judge Leon Jordan in *Brown's Produce v. Kirby Produce Co.*, *supra*, and attachments to the Order constitutes an admission of the material allegations of the Complaint; (3) found that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate and foreign commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total

amount of \$1,602,736.15; (4) concluded that Respondent's failures to make full payment promptly to the 19 perishable agricultural commodities sellers constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) revoked Respondent's PACA license (Initial Decision and Order at 2-4).

On March 3, 1999, Respondent filed Respondent's Motion for Reconsideration of Decision Without Hearing by Reason of Admissions; on March 24, 1999, Complainant filed Response to Respondent's Motion for Reconsideration; on April 1, 1999, Respondent filed Motion to Permit Reply to Complainant's Response to Respondent's Motion for Reconsideration and The Reply to Complainant's Response; and on April 7, 1999, the ALJ filed Order Denying Motion for Reconsideration.

On May 28, 1999, Respondent appealed to the Judicial Officer; on June 17, 1999, Complainant filed Complainant's Response to Respondent's Appeal Petition; and on June 18, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On July 12, 1999, I issued a Decision and Order: (1) finding that, during the period August 1995 through April 1996, Respondent purchased, received, and accepted in interstate commerce, from 19 sellers, 204 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$1,602,736.15; (2) finding that, as of December 2, 1998, \$1,215,723.99 remained past due and unpaid, with \$387,012.16 paid late; (3) concluding that Respondent's failures to make full payment promptly with respect to the 204 transactions constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) revoking Respondent's PACA license. *In re Kirby Produce Company, Inc.*, 58 Agric. Dec. ___, slip op. at 7-8, 26 (July 12, 1999).

On August 19, 1999, Respondent filed a petition for reconsideration of the July 12, 1999, Decision and Order; on September 30, 1999, Complainant filed Complainant's Response to Respondent's Petition for Reconsideration; and on October 1, 1999, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for reconsideration of the July 12, 1999, Decision and Order.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

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.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

TITLE 7—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[.]

7 C.F.R. § 46.2(aa)(5).

Respondent raises two issues in Respondent's Petition for Reconsideration.

First, Respondent contends that I erred in finding that Respondent's request for a continuance of the scheduled hearing, to enable Respondent to make full payment to its perishable agricultural commodities sellers before the hearing, constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by the date of the hearing (Respondent's Pet. for Recons. at 2).

I disagree with Respondent's contention that I erred in finding that Respondent admitted that it would not be able to make full payment to its perishable agricultural commodities sellers by the date of the hearing.

Respondent's November 12, 1998, motion to continue the hearing until such time as Respondent has made full payment to its perishable agricultural commodities sellers states, as follows:

Administrative Law Judge James W. Hunt
U.S. Department of Agriculture
Office of Administrative Law Judge
14th & Independence Avenue, S.W.
Room 1081 - South Building
Washington, D.C. 20250-9200

Re: In re: Kirby Produce Company, Inc.
PACA Docket No. D-98-0002

Dear Judge Hunt:

In March, 1996 certain produce creditors of the above referenced Respondent, Kirby Produce Company, Inc. ("Kirby") commenced action against Kirby in the United States District Court for the Eastern District of Tennessee entitled Brown's Produce, et al. v. Kirby Produce Company, et al. under case number 3:96 CV526. The action was brought by the plaintiffs in order to seek redress under Section 5(c) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499(e)(c) [sic] for unpaid produce transactions.

After due deliberation, and the consent of all PACA trust creditors and the Respondent, U.S. District Court Judge Leon Jordan issued an order

which provided for the orderly liquidation of the Respondent's assets and the eventual payment of all trust creditors. (See attached order dated June 25, 1996.) Thereafter the Respondent has been in compliance with Judge Jordan's order and has made periodic payments.

On September 8, 1998 you issued an order directing that a hearing be held on January 13, 1999 in Knoxville, Tennessee. The purpose of this letter is to make motion for an adjournment of the hearing until that time when the Respondent has made full payment to all trust creditors pursuant to Judge Jordan's order. As you are aware, the payment of all produce debt prior to the hearing substantially reduces the potential sanction which may be imposed upon the Respondent. Failure to grant this motion for adjournment will frustrate the order of Judge Jordan and prejudice Respondent's position at the time of the hearing.

Thank you for your consideration of this motion for adjournment.

Very truly yours,
/s/
Paul T. Gentile

Letter dated November 10, 1998, from Paul T. Gentile to the ALJ.

I have again carefully reviewed Respondent's November 12, 1998, motion, and I again find that Respondent's motion to continue the hearing scheduled to commence on January 13, 1999, to enable Respondent to make full payment to its perishable agricultural commodities sellers prior to the hearing and convert the case from a "no-pay" to a "slow-pay" case, constitutes an admission that Respondent would not be able to make full payment in accordance with the PACA by January 13, 1999, the date of the hearing.

Second, Respondent contends that my conclusion that there is no material issue of fact that warrants holding a hearing, is error (Respondent's Pet. for Recons. at 2-3). Specifically, Respondent contends that "full payment has been made prior to the hearing date" and that Complainant disputes this material fact; thus, there is an issue of material fact and Respondent is entitled to a hearing to prove that it has made full payment to its perishable agricultural commodities sellers (Respondent's Pet. for Recons. at 3).

As fully explicated in *In re Kirby Produce Company, Inc.*, *supra*, I find that Respondent's November 12, 1998, motion for a continuance constitutes Respondent's admission that it would not be able to make full payment in

accordance with the PACA by January 13, 1999, the date of the hearing. Based on Respondent's November 12, 1998, admission, I find that no issue of material fact exists regarding full payment to Respondent's perishable agricultural commodities sellers by the date of the hearing and no hearing is required.

For the foregoing reasons and the reasons set forth in *In re Kirby Produce Company, Inc.*, *supra*, Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.¹ Respondent's Petition for Reconsideration was timely filed and automatically stayed the July 12, 1999, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed July 12, 1999, is reinstated, with allowance for time passed.

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

¹*In re James E. Stephens*, 58 Agric. Dec. ___, slip op. at 11 (June 18, 1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. ___, slip op. at 9 (May 25, 1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. ___, slip op. at 7 (May 6, 1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. ___, slip op. at 8 (Mar. 23, 1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. ___, slip op. at 24 (Mar. 15, 1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. ___, slip op. at 7 (Mar. 9, 1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. ___, slip op. at 4-5 (Jan. 6, 1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

Order

Respondent's PACA license is revoked, effective 65 days after service of this Order on Respondent.

**In re: JSG TRADING CORP.; GLORIA AND TONY ENTERPRISES, d/b/a/ G&T ENTERPRISES; ANTHONY GENTILE; AND ALBERT LOMORIELLO, JR., d/b/a HUNTS POINT PRODUCE CO.
PACA Docket No. D-94-0508.**

**In re: GLORIA AND TONY ENTERPRISES, d/b/a G&T ENTERPRISES, AND ANTHONY GENTILE.
PACA Docket No. D-94-0526.**

Decision and Order on Remand as to JSG Trading Corp. filed November 29, 1999.

Commercial bribery — Fair dealing — Rebuttable presumption — License revocation — Willful, flagrant, and repeated violations.

The Judicial Officer found that JSG Trading Corp. (Respondent) violated section 2(4) of the PACA. On March 2, 1998, the Judicial Officer issued a decision in which he applied a *per se* test to determine whether Respondent engaged in commercial bribery when it made payments to two purchasing agents who, at the time of the payments, were buying tomatoes from Respondent on behalf of their respective principals. The Judicial Officer concluded that, since Respondent's payments to the purchasing agents were more than *de minimis*, Respondent had engaged in commercial bribery, in violation of section 2(4) of the PACA. *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999). Respondent filed a petition for judicial review. The United States Court of Appeals for the District of Columbia Circuit granted Respondent's petition for review and remanded the case to the Judicial Officer, instructing the Judicial Officer either to explain the justification for using a *per se* test to determine whether Respondent violated section 2(4) of the PACA or to abandon the *per se* test and apply traditional definitions of commercial bribery to determine whether Respondent violated section 2(4) of the PACA. *JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d 536 (D.C. Cir. 1999). On remand, the Judicial Officer abandoned the *per se* test, found that Respondent had engaged in activities that fell within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, and revoked Respondent's PACA license. Specifically, the Judicial Officer found that the record contained substantial evidence that: (1) Respondent made payments to Mr. Gentile, a purchasing agent for L&P, one of Respondent's produce customers, and Mr. Lomoriello, a purchasing agent for American Banana, one of Respondent's produce customers; (2) the value of Respondent's payments to Mr. Gentile was more than *de minimis* and the value of Respondent's payments to Mr. Lomoriello was more than *de minimis*; (3) Respondent made at least some of the payments to Mr. Gentile to induce Mr. Gentile to purchase produce from Respondent and Respondent made payments to Mr. Lomoriello to induce Mr. Lomoriello to purchase produce from Respondent; and (4) the principals at L&P were not fully aware of all of the

payments made by Respondent to Mr. Gentile and the principals at American Banana were not fully aware of the payments made by Respondent to Mr. Lomoriello. The Judicial Officer found that the evidence introduced by Complainant raised a rebuttable presumption that Respondent had violated section 2(4) of the PACA and that Respondent did not introduce evidence sufficient to rebut the presumption.

Andrew Y. Stanton, for Complainant.

Richard M. Adler, Washington, DC, for Respondent.

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

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

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted the disciplinary proceeding captioned PACA Docket No. D-94-0508 pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) by filing a Complaint on November 8, 1993.¹

On April 8, 1994, Complainant filed an Amended Complaint alleging that JSG Trading Corp. [hereinafter Respondent] willfully, flagrantly, and repeatedly violated section 2(4) of the PACA.² Specifically, the Amended Complaint alleges that: (1) during the period from January 3, 1992, through February 24, 1993, Respondent, G&T, and Mr. Gentile engaged in a scheme in which Respondent made payments to G&T, under the direction, management, and control of Mr. Gentile, to induce G&T to purchase tomatoes from Respondent on behalf of L&P Fruit Corp. [hereinafter L&P]; and (2) during the period from December 15, 1992, through February 24, 1993, Respondent and Mr. Lomoriello engaged in a scheme whereby Respondent made payments to Mr. Lomoriello to induce him to purchase tomatoes from Respondent on behalf of American Banana Co., Inc. [hereinafter American Banana]. The Amended Complaint requests revocation of

¹PACA Docket No. D-94-0526 is a related disciplinary proceeding which has been concluded and forms no part of this Decision and Order on Remand as to JSG Trading Corp.

²The Amended Complaint also alleges that Gloria and Tony Enterprises, d/b/a G&T Enterprises [hereinafter G&T], Anthony Gentile, and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA. However, as this Decision and Order on Remand as to JSG Trading Corp. relates to Respondent, I limit the references to allegations against, responses by, and filings by G&T and Messrs. Gentile and Lomoriello to those necessary to describe the status of this proceeding as it relates to Respondent.

Respondent's PACA license. Respondent filed an answer denying the material allegations in the Complaint and the Amended Complaint.

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a 15-day hearing in New York, New York. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], Washington, DC, represented Complainant. Mark C.H. Mandell, Annandale, New Jersey, represented Respondent.³ Subsequent to the hearing, Complainant and Respondent filed post-hearing briefs.

On June 17, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which, *inter alia*, the ALJ: (1) found that payments by Respondent to Messrs. Gentile and Lomoriello constituted commercial bribery; (2) found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA; and (3) revoked Respondent's PACA license.

On September 23, 1997, Respondent appealed to the Judicial Officer. On November 7, 1997, Complainant filed Complainant's Response to Appeal Petitions,⁴ and on November 13, 1997, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On March 2, 1998, I issued a Decision and Order as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile [hereinafter Decision and Order] in which I adopted the Initial Decision and Order as the final Decision and Order. *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999).

On April 28, 1998, Respondent filed a petition for reconsideration of the March 2, 1998, Decision and Order; on May 14, 1998, Complainant filed a reply to Respondent's petition for reconsideration; and on May 19, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the Decision and Order issued March 2, 1998.

On June 1, 1998, I denied Respondent's petition for reconsideration. *In re JSG Trading Corp.*, 57 Agric. Dec. 710 (1998) (Order Denying Pet. for Recons. as to

³On July 11, 1997, Mr. John V. Esposito and Mr. Mel Cottone of the Law Offices of Cottone & Esposito, Hilton Head Island, South Carolina, entered an appearance on behalf of Respondent. Subsequently, Richard M. Adler of O'Connor & Hannan, LLP, Washington, DC, entered an appearance on behalf of Respondent.

⁴On February 2, 1998, Complainant filed an amended version of Complainant's Response to Appeal Petitions, which corrects incorrect transcript citations in Complainant's Response to Appeal Petitions, filed November 7, 1997.

JSG Trading Corp.); and on July 30, 1998, I issued a stay of the order revoking Respondent's PACA license, pending judicial review. *In re JSG Trading Corp.*, 57 Agric. Dec. 1715 (1998) (Stay Order as to JSG Trading Corp.).

Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit challenging the revocation of its PACA license. The Court granted Respondent's petition for review, stating, as follows:

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

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

JSG Trading Corp. v. United States Dep't of Agric., 176 F.3d 536, 537 (D.C. Cir. 1999).

On August 2, 1999, Respondent filed Motion to Dismiss and for Entry of Judgment; or, in the Alternative, Petition for Reopening the Hearing and Record to Take Further Evidence [hereinafter Motion to Dismiss]. On September 13, 1999, Complainant, filed Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment [hereinafter Complainant's Response], in which Complainant opposes Respondent's Motion to Dismiss and requests that I issue a decision and order on remand, finding that Respondent violated section 2(4) of the PACA and revoking Respondent's PACA license. On October 20, 1999, Respondent filed Respondent JSG Trading Corp.'s Reply to Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment [hereinafter Respondent's Reply]; and on November 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Dismiss and Complainant's request for the issuance of a decision and order on remand.

Respondent contends that the Complaint must be dismissed because the *per se*

standard to measure commercial bribery cannot be justified and Complainant cannot prevail under the traditional test for commercial bribery as described in *JSG Trading Corp. v. United States Dep't of Agric.*, *supra* (Respondent's Motion to Dismiss at 2).

I disagree with Respondent's contention that the Complaint must be dismissed. While I abandon the *per se* standard to measure commercial bribery, I find that the record establishes that Respondent engaged in activity that falls within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*. Therefore, I issue this Decision and Order on Remand as to JSG Trading Corp., in which I conclude that Respondent violated section 2(4) of the PACA.⁵

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

PERTINENT STATUTORY PROVISION AND REGULATION

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

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

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with

⁵Simultaneously with this Decision and Order on Remand as to JSG Trading Corp., I am filing a Ruling Denying JSG Trading Corp.'s Motion to Dismiss.

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.

7 U.S.C. § 499b(4) (Supp. III 1997).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER I—AGRICULTURAL MARKETING SERVICE

....

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

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

....

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

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

7 C.F.R. § 46.26.

Introduction

The issue presented is whether a series of payments by Respondent to purchasing agents of two separate produce buyers, L&P and American Banana, at a time when those purchasing agents were buying tomatoes from Respondent on behalf of their respective principals, constitute willful, flagrant, and repeated violations of section 2(4) of the PACA.

Section 2(4) of the PACA prohibits commission merchants, dealers, and brokers from failing, 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 received in interstate or foreign commerce. While section 2(4) of the PACA does not expressly prohibit payments by produce dealers to purchasing agents or employees of that dealer's produce buyers, the Judicial Officer held in *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992), that activity that falls within the traditional definitions of commercial bribery constitutes a violation of section 2(4) of the PACA. Since the issuance of *Goodman*, the produce industry has been on notice that activity that falls within the traditional definitions of commercial bribery is prohibited by the PACA.

In *Goodman* and *Tipco*, produce dealers paid purchasing agents of supermarket chains 25 cents for each box of produce purchased from the produce dealers. The supermarket chains had no knowledge of this arrangement. The Judicial Officer

found these actions willful, flagrant, and repeated violations of section 2(4) of the PACA and revoked the produce dealers' PACA licenses, explaining:

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

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

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

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

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

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

The Judicial Officer provided the following guidelines:

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

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

Based on these guidelines in *Tipco*, I applied a *per se* test to determine whether Respondent engaged in commercial bribery when Respondent made a series of payments to Mr. Gentile, a purchasing agent for L&P, and Mr. Lomoriello, a purchasing agent for American Banana. I concluded that, since Respondent's payments to the purchasing agents were more than *de minimis*, Respondent had engaged in commercial bribery, in violation of section 2(4) of the PACA. *In re JSG Trading Corp.*, *supra*, 57 Agric. Dec. at 659. The United States Court of Appeals for the District of Columbia Circuit admonished that Judicial Officer's guidelines in *Tipco* are dicta and, at most, establish a risk of a PACA violation. The Court found that traditional definitions of commercial bribery, adopted in *Goodman* and *Tipco*, require both a finding that a payment or offer of payment is made to induce a purchasing agent to buy from the dealer and a finding that the payment is made surreptitiously, without the knowledge of the purchasing agent's principal. *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, 176 F.3d at 542. The Court instructed that the broad language in section 2(4) of the PACA does not bind the Secretary of Agriculture to traditional definitions of commercial bribery, but that departure from the use of traditional definitions of commercial bribery requires justification, which I did not provide in *In re JSG Trading Corp.*, *supra*.

The United States Court of Appeals for the District of Columbia Circuit remanded the case to me, requiring me either to explain the justification for using a *per se* test to determine whether Respondent violated section 2(4) of the PACA or to abandon the *per se* test and apply traditional definitions of commercial bribery to determine whether Respondent violated section 2(4) of the PACA. Moreover, the Court stated that several of the gifts given to Mr. Gentile by Mr. Goodman arguably could be promotional allowances in connection with the promotion of Respondent's product, which are specifically permitted under the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter the PACAA-1995],⁶ and that any explanation for the justification for employing a *per se* test for commercial bribery must be made in conjunction with those amendments. *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, 176 F.3d at 546-47.

I used the term "commercial bribery" in *In re JSG Trading Corp.*, *supra*, in an effort to describe Respondent's activities. However, my use of the term "commercial bribery" has resulted in the application of the vast jurisprudence related to commercial bribery to the PACA. Since the enactment of the PACA in 1930, only three PACA disciplinary cases⁷ have been appealed to the Judicial Officer that concern activities which the Judicial Officer has described as "commercial bribery." The PACA does not specifically prohibit commercial bribery, but rather prohibits commission merchants, dealers, and brokers from failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving perishable agricultural commodities received in interstate or foreign commerce.

"Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and unfair practices." *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, 176 F.3d at 537 (quoting *Tri-County Wholesale Produce Co. v. United States Dep't of Agric.*, 822 F.2d 162, 163 (D.C.

⁶Section 9(b)(3) of the PACAA-1995 amends section 2(4) of the PACA by adding the following sentence at the end of section 2(4) of the PACA: "However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act." Section 9(a) of the PACAA-1995 amends the PACA by adding a new section 1(b)(13), which reads, as follows: "(13) The term 'collateral fees and expenses' means any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity."

⁷*In re JSG Trading Corp.*, *supra*; *In re Tipco, Inc.*, *supra*; and *In re Sid Goodman & Co.*, *supra*.

Cir. 1987)). Rather than use a term, such as “commercial bribery,” to describe an activity that constitutes a violation of section 2(4) of the PACA, the focus should be on whether the scrutinized activity constitutes a failure to deal fairly, which is required by the PACA. *In re Tipco, Inc.*, *supra*, 50 Agric. Dec. at 882. Any activity by an entity subject to the PACA that the Secretary of Agriculture finds is a failure to deal fairly can constitute a violation of section 2(4) of the PACA.

I find that activity that falls within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep’t of Agric.*, *supra*, constitutes a failure to deal fairly and is a violation of section 2(4) of the PACA. That is, each commission merchant, dealer, and broker has an obligation under section 2(4) of the PACA to avoid making or offering a payment to a purchasing agent to encourage that agent to purchase produce from the commission merchant, dealer, or broker on behalf of the agent’s principal or employer, without fully informing the purchasing agent’s principal or employer of the offer or payment.

Proof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent’s principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent, raises the rebuttable presumption that the commission merchant, dealer, or broker making the payment or offer violated section 2(4) of the PACA.

The commission merchant, dealer, or broker may rebut the presumption by showing that: (1) the commission merchant, dealer, or broker did not make a payment to or offer to pay a purchasing agent; (2) the value of the payment or offer was *de minimis*; (3) the payment or offer was not intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; or (4) the purchasing agent’s principal or employer was fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent.

I have carefully reviewed the record in light of *JSG Trading Corp. v. United States Dep’t of Agric.*, *supra*, and find that the record supports a conclusion that Respondent violated section 2(4) of the PACA. Specifically, the record contains substantial evidence that: (1) Respondent made payments to Mr. Gentile, a purchasing agent for L&P, one of Respondent’s produce customers, and Mr. Lomoriello, a purchasing agent for American Banana, one of Respondent’s produce customers; (2) the value of Respondent’s payments to Mr. Gentile was more than *de minimis* and the value of Respondent’s payments to Mr. Lomoriello

was more than *de minimis*; (3) Respondent made at least some of the payments to Mr. Gentile to induce Mr. Gentile to purchase produce from Respondent and Respondent made payments to Mr. Lomoriello to induce Mr. Lomoriello to purchase produce from Respondent; and (4) the principals at L&P were not fully aware of all of the payments made by Respondent to Mr. Gentile and the principals at American Banana were not fully aware of the payments made by Respondent to Mr. Lomoriello. Respondent, Messrs. Gentile and Lomoriello, and G&T introduced evidence to show that the payments to Messrs. Gentile and Lomoriello were not intended to induce Messrs. Gentile and Lomoriello to purchase produce from Respondent and that the principals at L&P knew of the payments to Mr. Gentile and the principals at American Banana knew of the payments to Mr. Lomoriello. The evidence introduced by Respondent, Messrs. Gentile and Lomoriello, and G&T falls far short of rebutting Complainant's evidence that Respondent violated section 2(4) of the PACA.⁸

Findings of Fact

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

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

⁸I abandon the *per se* test, which I employed in *In re JSG Trading Corp.*, *supra*, to determine whether Respondent violated section 2(4) of the PACA. Therefore, I do not explain in this Decision and Order on Remand as to JSG Trading Corp. the justification for my use, in *In re JSG Trading Corp.*, *supra*, of a *per se* test to determine whether Respondent engaged in commercial bribery.

business (Tr. 78).

3. Anthony Gentile, is an individual whose business mailing address is 119 Third Avenue, Hadley, New York 12835. Mr. Gentile is not licensed under the PACA, but, at all times material to this proceeding, was operating subject to the PACA. (Answer of Respondent Anthony Gentile to Amended Complaint ¶ 5.)

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

5. Mr. Gentile became involved in the tomato business when he was a boy and developed great expertise in buying and selling tomatoes (Tr. 2160-61). Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P, a produce dealer located at the Hunts Point Market in Bronx, New York (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, and Mr. Gentile would share profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Joint account arrangements are very common in the New York produce industry (Tr. 446, 2894). During the period in which Mr. Gentile was the head salesman for L&P, he was "on the walk," a term used at the Hunts Point Market, which means that he was a salesman who was present on the street (Tr. 2170). While Mr. Gentile was buying tomatoes for L&P, he was considered by many at the Hunts Point Market to be the person with the most knowledge and influence in that market regarding tomatoes (Tr. 2160-61).

6. During 1986, Mr. Gentile began to establish a relationship with Mr. Goodman, who was then working for another produce dealer (Tr. 2154-55). Mr. Gentile taught Mr. Goodman the tomato business (Tr. 2930). Mr. Goodman soon sold a large volume of tomatoes to L&P through Mr. Gentile (Tr. 2170-71).

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

447).

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

9. In approximately January 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX 2; Tr. 2827). On February 20, 1991, Mrs. Gentile entered into a written agreement to sell her 75 shares of Dirtbag stock to Mr. Goodman for \$80,000 (RX 3; Tr. 2926). The agreement provides that the stock would be placed in escrow with Respondent's attorney, Mr. Mandell, and that Mr. Goodman would pay \$25,000 per year to Mrs. Gentile in monthly installments for the next 2 years. After each \$25,000 payment, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The agreement also provides that the final payment of \$30,000 would be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final \$30,000, Mr. Gentile's \$40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. (RX 3.) Mrs. Gentile was paid the \$80,000 by either Mr. Goodman or Respondent, and she authorized three releases of 25 shares of stock each on December 30, 1991, February 14, 1993, and February 2, 1994 (RX 3 at 3-3b; Tr. 2942-43).

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

11. In approximately December 1991, Mr. Lomoriello became employed by American Banana, a produce firm located at the Hunts Point Market (Tr. 1256).

Demetrius Contos, American Banana's vice-president, wanted Mr. Lomoriello to expand American Banana's business (Tr. 313-16). Mr. Lomoriello was to receive 40 per centum of the profits on the produce that he purchased and to be liable for 40 per centum of the losses (Tr. 1245-46). Mr. Lomoriello purchased tomatoes from Respondent for American Banana (Tr. 1263).

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

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

14. Ms. Colson and Mr. Nielson examined Respondent's file jackets relating to Respondent's sales to L&P and found 81 file jackets that raised questions about improper payments (CX 8-CX 42; Tr. 109). All 81 of these file jackets concern sales of tomatoes to L&P by Mr. Goodman and the numbers on each of these file jackets are prefixed "SG" for "Steve Goodman" (Tr. 80). Each file jacket has handwritten notations on its front and back covers and contains documents pertinent to the transactions to which the file jacket relates (Tr. 80, 131-32). These file jackets also contain a total of 35 checks or check skirts showing payments from Respondent to "A. Gentile" (Tr. 111-13). The reverse side of the checks are endorsed "A. Gentile, payable to JSG Trading" (Tr. 122). These endorsements were actually written by Marsha Levine, Respondent's bookkeeper (Tr. 1705).

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

16. At first, Mr. Goodman told Ms. Colson and Mr. Nielson that "A. Gentile" was a fictitious name and that he (Mr. Goodman) would give receipts to

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

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

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

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

20. When asked by Ms. Colson about notations written in the corners of the backs of file jackets, such as "Tony \$2.00" (CX 13B at 1; Tr. 132-33), Mr. Goodman stated that he makes many notes on his file jackets (Tr. 132-33). With respect to each of these files, the number of boxes of tomatoes in the load multiplied by the amount noted on the back of the file jacket associated with the name "Tony" equals the amount of money shown on the file jacket as an expense relating to "A. Gentile" (Tr. 145-46).

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

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

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

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

25. Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about Respondent's loans and exchanges account and the spreadsheet that reflected that account (CX 55 at 1-3). Ms. Colson took notes during that conversation (CX 76). Mr. Daily told Ms. Colson that "L/E" in Respondent's records refers to Respondent's loans and exchanges account and "Tony" refers to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily stated that Mr. Gentile had a loan with Respondent (CX 76; Tr. 158) and that Mr. Daily included the amounts of the checks for "L/E Tony" in the spreadsheet under the column headed "L&P" (CX 76; Tr. 160, 1617-21). On April 1, 1993, Ms. Colson requested Mr. Daily to provide an audit trail for the spreadsheet (CX 77; Tr. 159). Mr. Daily enclosed this information in a May 13, 1993, letter (CX 75). The audit trail restates the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

26. Respondent maintains an Accounts Receivable Aged Analysis Report, a computer-generated report showing the status of Respondent's accounts receivable for its customers on a monthly basis (CX 51; Tr. 252). The report

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

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

28. Respondent's records show that Respondent's check number 1847, dated June 5, 1992, was issued to Midlantic National Bank for \$38,475.30 (CX 54 at 3; Tr. 182). Midlantic National Bank's records reveal that this check was in payment for a boat loan owed by Mr. Goodman (CX 73; Tr. 186). The boat was a Trojan model that Mr. Goodman had purchased in 1987 for approximately \$45,000 to \$50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). In August 1992, Mr. Goodman sold the boat, then titled to Mr. Goodman's wife, Jill, to Mr. Gentile for \$10,000 (CX 57). The boat needed work but was described by Mrs. Gentile as "nicely laid out" (Tr. 2930). Mr. Gentile told Louis Beni, secretary-treasurer of L&P, that he was getting a very good price for the boat (Tr. 2888).

29. Respondent's records contain check numbers 3899 and 3975 issued to Mercedes-Benz Credit Corporation and check number 4051 issued to Dirtbag for "L/E Dirtbag for Tony's Car" (CX 54 at 6, 10, 14-15; Tr. 198). Documents obtained from Mercedes-Benz Credit Corporation show that a new 1990 Mercedes 300 SEL was leased to Mr. Gentile on May 11, 1990, for 48 months, with monthly

payments of \$798.99, for a total of \$38,351.52 (CX 56 at 3-5; Tr. 198-99). Although a corporate resolution was prepared by Dirtbag and signed by Mr. Goodman and Mr. Gentile, which authorized Mr. Gentile to lease the car on behalf of Dirtbag (CX 56 at 2), the documents reflecting the lease do not mention Dirtbag. When Mr. Goodman presented the leased Mercedes to Mr. Gentile, Mr. Goodman placed a large red ribbon on it (Tr. 2828, 2838-39). Mr. Beni knew that Mr. Gentile obtained the Mercedes through Dirtbag (Tr. 2883, 2901).

30. Respondent's check number 2151, dated July 28, 1992, for \$3,317, was issued to a jewelry store in payment for a Rolex watch which Mr. Goodman gave to Mr. Gentile. Mr. Goodman testified that the watch was a gift. (RX 40; Tr. 2478-80.) Mr. Beni knew about Mr. Goodman's gift of the watch to Mr. Gentile (Tr. 2835-36).

31. Respondent's payroll records for 1992 show that Mrs. Gentile received wages (CX 50 at 1-2; Tr. 265-66). Two of the check stubs for these payments to Mrs. Gentile contain the letters "comm" which refers to "commission" (CX 50 at 3-12; Tr. 268).

32. After Ms. Colson left Respondent's premises and returned to Washington, DC, she found that several of Respondent's file jackets relating to sales to L&P contain statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). Two of the file jackets containing statements from G&T also contain adding machine tapes (CX 44B at 20, CX 46 at 5) which reflect amounts that correspond to the total of the packages noted in the G&T statements multiplied by 5 cents per package (Tr. 272-83). File jacket number SG 4222 in which a G&T statement was found shows a payment to "A. Gentile" which corresponds to the total on the adding machine tape (CX 44B at 1-2; Tr. 281). The "A. Gentile" notation also corresponds to the amount of the check payable to Mrs. Gentile found in the file and the amount noted in Respondent's payroll records as wages paid to Mrs. Gentile (CX 44A at 1, CX 50 at 1; Tr. 281-82). Many of Respondent's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jacket numbers containing the notations "Tony 5¢" are the same numbers as those in G&T's statements (Tr. 283). The checks to Mrs. Gentile and their relationships to the files noted in G&T's statements are listed in a table prepared by Ms. Colson (CX 43).

33. Respondent's records also contain 22 file jackets concerning Respondent's sales of tomatoes to American Banana which have notations on the backs of the file jackets similar to those reflecting sales to L&P (CX 63A-CX 69A; Tr. 549-51). The notations indicate that payments per box were made to "Al" as well as to "HPT" or "Hunts Point Produce" in an amount equal to the amount of the notation multiplied by the number of boxes sold to American Banana. The file

jackets contain seven of Respondent's checks totaling \$9,733.45 made payable to Hunts Point Produce Co. (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4; Tr. 550, 553-54).

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

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

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

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

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

Discussion of the Evidence

I. Respondent's Payments to Mr. Gentile.

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

Respondent's payments to and transfer of items of value to Mr. Gentile included: (1) the use of a boat and eventual purchase of that boat at a price substantially below its value; (2) a gift of a Mercedes automobile; (3) a gift of a Rolex watch; (4) payments to Mr. Gentile through Mrs. Gentile; and (5) 35 checks issued to Mr. Gentile. Each of these payments and items had a value that was more than *de minimis*.

A. The Boat, The Mercedes, and The Rolex Watch.

Complainant did not introduce sufficient evidence to prove that: (1) Respondent's allowing Mr. Gentile to use a boat or sale of the boat at a price below its value was designed to induce Mr. Gentile to purchase tomatoes from Respondent; (2) Respondent's gift of a Mercedes to Mr. Gentile was designed to induce Mr. Gentile to purchase tomatoes from Respondent; or (3) Respondent's gift of a Rolex watch to Mr. Gentile was designed to induce Mr. Gentile to purchase tomatoes from Respondent. Further, I find that Mr. Beni, a principal of L&P, knew of the sale of the boat at a price below its value, knew of the gift of the Mercedes, and knew of the gift of the Rolex watch. Thus, I do not find that Respondent's allowing Mr. Gentile use of the boat, Respondent's sale of the boat to Mr. Gentile for a price below its value, Respondent's gift of the Mercedes, or Respondent's gift of the Rolex watch constitute violations of section 2(4) of the PACA.

B. Respondent's Payments to Mrs. Gentile.

Respondent's payroll records for 1992 indicate that Mrs. Gentile received wages from Respondent (CX 50 at 1-2; Tr. 265-66). Two of the check stubs relating to checks issued to Mrs. Gentile indicate that the checks were written for "comm" which Ms. Levine stated refers to "commission" (CX 50 at 3-12; Tr. 268).

Ms. Levine explained that Mrs. Gentile was paid for providing services to Respondent as an informant (Tr. 270-71).

The amounts of the checks to Mrs. Gentile relate to deductions of 5 cents for each box of tomatoes sold by Respondent to L&P. In several of Respondent's file jackets relating to sales to L&P, Ms. Colson found what appeared to be statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). In two of the file jackets that contain G&T statements, Ms. Colson found adding machine tapes (CX 44B at 20, CX 46 at 5) that seemed to add packages, corresponding to the number of packages noted in the G&T statements, and multiply the total number of packages by 5 cents per package (Tr. 272-83). Ms. Colson also noticed that file jacket number SG 4222 in which a G&T statement was found shows a payment to "A. Gentile" which corresponds to the amount on the adding machine tape (CX 44B at 1-2; Tr. 281). The amounts of the "A. Gentile" payments shown on the file jackets also correspond to the amounts of checks to Mrs. Gentile noted in Respondent's payroll records (Tr. 281-82). Ms. Colson further noticed that many of Respondent's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jackets containing the notations "Tony 5¢" have the same numbers as those on the statements of G&T (CX 44B at 1-2; Tr. 283).

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

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

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

The record does contain evidence that 75 shares of Dirtbag stock were transferred by Mrs. Gentile to Mr. Goodman. In early 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX 2 at 7-9a; Tr. 2827), and on February 20, 1991, Mrs. Gentile agreed in writing to sell the 75 shares to Mr. Goodman for \$80,000 (RX 3 at 1; Tr. 2926). The agreement (RX 3 at 1) provided that the stock would be placed in escrow with Respondent's attorney and that Mr. Goodman would pay \$25,000 per year to Mrs. Gentile in monthly installments for the next 2 years. After the payment of each \$25,000, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The final payment of \$30,000 was to be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final \$30,000, Mr. Gentile's \$40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. Mrs. Gentile authorized three releases of 25 shares of stock each on December 30, 1991, February 14, 1993, and February 2, 1994 (RX 3 at 3-3b; Tr. 2942-43).

As the United States Court of Appeals for the District of Columbia Circuit states in *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, 176 F.3d at 540, neither Complainant nor Respondent offered a valuation expert regarding the value of Dirtbag. However, there was considerable testimony from Mr. Daily, Ms. Levine, and Mr. Goodman attesting to Dirtbag's constant financial problems (Tr. 1564, 1984-85, 2049, 2148-49, 2495-96). Mr. Gentile had only loaned Dirtbag \$40,000 and had invested approximately \$7,000 in a new truck (Tr. 2782-83). Respondent's payments, therefore, would have included a profit of approximately \$33,000.

Mr. Goodman acknowledged that, if Respondent sold more tomatoes to L&P during the period that the 5 cents per box deductions were to be made, Mrs. Gentile would receive the \$80,000 more quickly (Tr. 2495). Mr. Gentile, thus, had an incentive to purchase as many of Respondent's tomatoes as possible.

I find that Complainant introduced substantial evidence to show that Respondent's payment to Mrs. Gentile, by deducting 5 cents for each box of tomatoes that Mr. Gentile purchased on behalf of L&P, was intended to induce Mr. Gentile to buy tomatoes from Respondent. Respondent's evidence that these payments were for Mrs. Gentile's services or for Dirtbag stock is not credible and

does not rebut the evidence that Respondent's payments were intended to induce Mr. Gentile to purchase tomatoes from Respondent.

C. Respondent's Payment to G&T.

On January 30, 1992, Respondent issued a check made payable to G&T in the amount of \$5,600 (RX 34). Ms. Levine contended this check was in payment for services rendered by Mrs. Gentile to Respondent and Mr. Goodman, although Ms. Levine never knew what kind of services these were (Tr. 2042-43). Mrs. Gentile said the \$5,600 was for checking out tomato fields in Florida, where she and Mr. Gentile had their winter home (Tr. 2911). However, Mrs. Gentile admitted that she and Mr. Goodman never had any written agreement as to exactly what she would do and how much she would be paid (Tr. 2932-34). No documentation was ever provided to justify the \$5,600 payment.

I find that Complainant introduced substantial evidence to show that Respondent's payment of \$5,600 to Mrs. Gentile was intended to induce Mr. Gentile to buy tomatoes from Respondent. Respondent's evidence that the \$5,600 payment was for Mrs. Gentile's services is not credible and does not rebut the evidence that Respondent's payment was intended to induce Mr. Gentile to purchase tomatoes from Respondent.

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

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

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

information to indicate Respondent's expenses for the file jacket (Tr. 137).

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

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

Mr. Goodman told Ms. Colson that the checks payable to "A. Gentile," which were deposited into Respondent's account, were his way of keeping track of, and making up, losses that he incurred from sales to L&P and that if checks payable to Mr. Gentile were not deposited into Respondent's account, they were for services that Mr. Gentile had provided to him (Tr. 242).

Ms. Colson asked Mr. Goodman about notations written in the corners on the back of the 35 file jackets (CX 13B at 1; Tr. 132-33). Mr. Goodman again was evasive, stating that he made many notes on his file jackets (Tr. 132-33). The number of boxes of tomatoes in the load, multiplied by the amount noted on the back of the file jacket, associated with the name "Tony" equals the amount on the file jacket shown as an expense to "A. Gentile" (Tr. 145-46).

1. The 35 Checks Were Treated as a Profit Split Between Mr. Goodman and Mr. Gentile and 16 of the Checks Were Treated as a Reduction of the Debt Which Mr. Gentile Owed to Respondent.

Respondent's records show that the 35 "A. Gentile" checks obtained by Ms. Colson were treated as a profit split between Mr. Goodman and Mr. Gentile.

Further, 16 of the 35 checks were shown in Respondent's records as reducing the debt owed by Mr. Gentile to Respondent.

Respondent's Closed File Journal contains a column entitled "Open SC" which refers to "open split commissions." At the end of each week, Ms. Levine would reduce Mr. Goodman's profit by the amounts set forth in the "A. Gentile" checks (Tr. 1890-97). All 35 of the "A. Gentile" checks were noted in Respondent's Closed File Journal under the "Open SC" column corresponding to the dates of the transactions (Tr. 228-29). This evidence establishes that Respondent was treating these 35 checks to "A. Gentile" as a sharing of Mr. Goodman's profit.

Further, Ms. Colson found that 16 of the 35 checks were treated in Respondent's records as payments to reduce a debt that Mr. Gentile owed to Respondent. In Respondent's General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146), a computer-generated document that reflects how Respondent's financial transactions are recorded in Respondent's general ledger (Tr. 1765), Ms. Colson found that the 16 checks were entered into one of Respondent's accounts described as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3). The number of the account under which the 16 checks were entered is "108," which is identified in Respondent's General Ledger Chart of Accounts as loans and exchanges (CX 6).

During Ms. Colson's investigation, she obtained a spreadsheet from Ms. Levine or from Mr. Daily detailing the 1992 transactions in Respondent's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns reflecting various individuals or firms to whom Respondent had loaned money (Tr. 2054-56). One of these columns is entitled "L&P" (Tr. 160-01, 1617-21). Ms. Colson found that the eight checks issued in 1992 to "A. Gentile" described in the General Ledger Journal Entry Edit Report as "L/E Tony" and the \$38,475.30 boat payment to Midlantic Bank, are noted in the 1992 spreadsheet as a reduction of Mr. Gentile's debt payable to Respondent (CX 55 at 1-3; Tr. 161, 215-16).

Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about Respondent's loans and exchanges account and the spreadsheet that reflects the account (CX 55 at 1-3). Ms. Colson took notes during this conversation (CX 76). Mr. Daily stated that with respect to "L/E Tony," "L/E" referred to Respondent's loans and exchanges account and "Tony" referred to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily told Ms. Colson that Mr. Gentile had a loan payable to Respondent (CX 76; Tr. 158). The references to "L/E Tony" contained in Respondent's general ledger were set forth in the column in the spreadsheet under the heading

"L&P" (CX 76). Mr. Daily also provided an audit trail which supported the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

At the hearing, Mr. Daily claimed that when Ms. Colson asked him what "L/E Tony" meant, he told her "these entries look like there's a loan to Tony, but that I would have to look into it" (Tr. 1520). However, Ms. Colson's notes of their March 11, 1993, telephone conversation indicate that Mr. Daily unambiguously stated that the "L/E" reference designated a loan to Mr. Gentile. The notes read: "Q. If the check stub denotes 'L/E Tony' then this would be a loan to Mr. Gentile and show up under L&P on the L/E schedule. - That's correct." (CX 76.)

Mr. Daily also testified at the hearing that, after Ms. Colson's investigation, he spoke with Ms. Levine about the "L/E Tony" references and he decided to remove them from the "L&P" column in the spreadsheet (Tr. 1532, 1656-57). However, Mr. Daily never informed Complainant that the information contained in the spreadsheet or in the audit trail would be changed to remove the "L/E Tony" references from the "L&P" column (Tr. 634-35, 1657), nor did Respondent ever make available or submit into evidence a revised version of the spreadsheet reflecting these alleged changes (Tr. 1660). I, therefore, conclude that Mr. Daily treated the "L/E Tony" references as reductions of debts that Mr. Gentile owed to Respondent.

It is clear that 16 of the 35 "A. Gentile" checks were treated by Respondent as reductions of Mr. Gentile's debt payable to Respondent. The other 19 checks also constitute a sharing of Mr. Goodman's profits on the sales of tomatoes to L&P. I find that Complainant introduced substantial evidence to establish that Respondent issued each of these checks to induce Mr. Gentile to purchase tomatoes from Respondent.

2. Respondent's Contention that the Checks Payable to "A. Gentile" Were Issued to Adjust L&P's "Clips" is Not Credible.

Respondent contends that the checks were not issued to induce Mr. Gentile to purchase tomatoes from Respondent. Specifically, Respondent contends that the checks payable to "A. Gentile" relate to an arrangement with L&P regarding "clips." Ms. Levine testified that the checks payable to "A. Gentile" were used by Respondent as part of a system to adjust L&P's files because of L&P's "clipping" of Respondent's invoices. A "clip" would result in L&P paying less than Respondent's invoice price. Ms. Levine testified as follows:

[BY MR. MANDELL:]

Q. Would you tell us what clips are in your understanding.

[BY MS. LEVINE:]

A. Okay.

Q. With regard to L&P.

A. Yes. As I understand it what was happening was he would -- they would make let's say or how can I explain it. They would take some money off -- they would underpay us on one invoice and then Mr. Goodman would add that onto a different file and we were keeping track like that. This is how we had set up the system. What we were doing we were taking a check and now this was one. This was a check that we were making up a clip.

So we cut the check but we re-deposited it. We kept the money. We just kept track. We had a journal that we kept track. We had a list that we were keeping track of clips of how much L&P owed us. Usually they owed us and that is why we were doing it like this.

Q. Miss Levine, why were you doing this with checks?

A. Well, because Mr. Goodman wanted to keep a record. This way if we ever had any problem we could always say well these are the checks that we had. On this particular file we made up \$320. This way we always had a check and we kept them and they came to us in our bank statement and we always were able to find them. We said we had this check, this check, this check, this check and this is how much they totaled up.

Tr. 1705-06.

Ms. Levine stated that when one of Respondent's customers had a problem with a load and "clips" an invoice and Respondent did not object to the "clip," Respondent would rebill the customer at a lower price (Tr. 249-50, 2063-64).

However, Ms. Levine's attempt to explain how the alleged "clip" system was maintained is not credible. She claimed that she maintained a journal to record L&P's clips balance, that a first journal had been thrown away, and that a second

journal became wet when Respondent's basement was flooded early in 1995 (Tr. 1706, 1793-95). She testified that she tried to reconstruct the second journal by copying its figures into another journal because Mr. Mandell, Respondent's attorney, said the information was needed, but she was unable to reconstruct the second journal (Tr. 1772). However, Ms. Levine did not show the alleged second journal to Ms. Colson in February 1993, before it was allegedly damaged by the flood, even though she was served with a demand letter to provide relevant records (Tr. 1798). Further, Ms. Levine did not retain the remains of the journal allegedly damaged by the flood even though the Complaint in this matter had been filed, and she had been told by Respondent's attorney that such a journal would be important evidence (Tr. 1772, 1803-08). Ms. Levine testified that, in attempting to reconstruct the damaged second journal, she began with the most recent clip balance allegedly still owed by L&P, \$10,092.65, and worked backward in time (RX 20 at 27; Tr. 1808-09). Ms. Levine stated that the most recent clip balance was provided to her on a piece of paper by Mr. Goodman; however, that piece of paper was never provided at the hearing (Tr. 1809-13). Without any tangible written evidence that Respondent maintained such a balance, either in a journal or other written record, the "clips" explanation simply is not believable.

The credibility of this alleged arrangement is further weakened by the inability of either Mr. Goodman or Ms. Levine to explain its operation with any clarity. Mr. Goodman testified:

[BY MR. STANTON:]

Q. Well, this file, [CX] 13[B at 1], indicates a \$3200 circular check to A. Gentile under the expenses portion of the file[,] correct?

[BY MR. GOODMAN:]

A. Okay.

Q. It looks like from the file jacket, that this \$3200 which you say is equal to the amount of the make-up, correct; is that basically your understanding of how this worked?

A. Pretty close to it, yes.

Q. That this \$3200 is being taken away from your commissions?

A. Yes.

Q. Well, if that's the case, then how does this --

A. Wait a minute, excuse me. Marsha Levine needs to explain to you the pluses and adds to my commissions. I'm not going to testify to that because I get confused myself sometimes and she was up here and she explained it to you and she can do a much more accurate job of explaining it than I can.

Tr. 2804.

Mr. Goodman's lack of specific knowledge of how "clips" worked is inconsistent with his meticulous style of record keeping. He testified:

I knew there was some sort of list that she was keeping, but again I knew of no journals. A few times I saw like those yellow pieces of paper. I knew she was keeping some kind of record, and I knew because one time we spoke about it, and she said what happens when I come off of this page. I said to her when the page is done throw it away, because we are not looking to keep a balance from day one that we always had our files. If we ever wanted to go back to find out a figure, we could just take all of the files from whatever, add them up and there is the total add them up and subtract the pluses and minuses.

Tr. 2181.

Ms. Levine also was unable to explain how the system worked. When asked how an "A. Gentile" check that was redeposited into Respondent's account could have affected the balance owed between Respondent and L&P, she was unable to give an adequate explanation. Finally, Mr. Mandell objected on the ground that the questions seemed to "confuse the witness":

[BY MR. STANTON:]

Q. Let's see. How about GS4300. Was that just a make up?

[BY MS. LEVINE:]

A. Yes. That is just a make up.

Q. That is a make up for what 3120?

A. Yes, that is correct.

Q. Now and it is noted in your table [(RX 20)] at page 22 where you have minus 3120?

A. That is correct.

Q. That means that the amount of money that L&P owed JSG at that point was reduced by 3120?

A. That is correct.

Q. So JSG in this particular transaction gained an extra 3120 from L&P in some fashion?

A. Yes.

Q. Now --

A. It is not that we gained. We got back money that they had ---

Q. That had lost on other ---

A. Right.

Q. Now if you look at this file jacket [(CX 14)], it indicates at the bottom an A. Gentile circular check for 3120 [(CX 14B at 1)].

A. Yes.

Q. And that is under expenses for that particular file.

A. That is correct.

Q. So it looks like it increased the expenses of JSG on that file.

A. Yes.

Q. Now this is what the problem is for me. If this is supposed to be a make up which results in more money coming to JSG from L&P on this particular file, why does it look like on this file that less money the 31[2]0 less money is coming to JSG on this file?

A. Well what I would do is that check somewhere got redeposited probably on another file somewhere on that file we made more money than we were supposed to.

Q. On the other file?

A. Wherever file I wrote, there is no way for me to tell what file I deposited that check on.

Q. The circular check?

A. Yes. I had to redeposit it somewhere.

Q. Okay. So that would balance out the circular check.

A. That would increase -- yes.

Q. The circular check didn't really mean anything anyway because it resulted in no gain or loss.

A. That is right.

Q. So by balancing out the circular check, you might decrease the amount of expenses to JSG overall by 3120 by adding the amount of the circular check somewhere on another file jacket; right?

A. When I deposited it, it increased our sales I guess you would say.

Q. The revenues or sales right.

A. Yes.

Q. By 3120 so that would balance out this 3120 negative amount on this file [(CX 14)].

A. That is correct.

Q. But that still wouldn't result in any kind of overall increase to JSG making up for previous loans by L&P would it?

A. We were just getting back the money we were supposed to get.

Q. But if this is a make up, you are supposed to be getting extra money to decrease the loan balance of L&P; isn't that right?

MR. MANDELL: I am going to object because the question seems to confuse the witness.

Tr. 3129-32.

The credibility of this arrangement is also seriously compromised by Mr. Goodman's admitted alteration of documents in anticipation of the hearing. When the hearing reconvened on March 19, 1996, Respondent introduced into evidence copies of hundreds of Respondent's file jackets to assist Ms. Levine in explaining how L&P's alleged clip balance was maintained (RX 53). Included among these file jackets were many in which certain amounts were shown as being deducted from L&P's clip balance by means of the notation "clip." Ms. Levine testified how these file jackets reflected the ongoing nature of Respondent's arrangement with L&P.

However, upon cross-examination of Ms. Levine, it became clear that the word "clip," on at least 12 of these file jackets (SG 4131, 4152, 4211, 4242, 4273, 4314, 4399, 4718, 4876, 5115, 5128, and 5145), had been added after Ms. Colson's investigation. Mr. Goodman later admitted that he personally wrote the word "clip" on the file jackets during the hearing process:

BY MR. MANDELL:

Q. First of all Mr. Goodman, you were of course present during Miss Levine's testimony and you were reviewing documents with me from RX-53 and some of Complainant's exhibits which show the word clip that appear in some documents and not in others. Can you tell us anything about that?

[BY MR. GOODMAN:]

A. Yes. I wrote the word clip.

Q. When did you do it and why did you do it. I realize it is a compound question.

A. Okay. It was done I believe sometime during the hearing process when we knew we needed this compilation made up and I told Marsha to gather up all of the files or no I take that back. It goes back before the hearing and I gathered up all of the filings, I had seen all of the files and I

JUDGE BERNSTEIN: In preparing for the hearing?

THE WITNESS: In preparing for the hearing.

JUDGE BERNSTEIN: Okay.

THE WITNESS: And there were just -- I was shuffling these same files into so many different categories that it was just getting lost, confused and ridiculous. So I took the files that were clipped files, I wrote on the files not changing anything the word clip. So this way as I shuffled them around, I could always keep them in piles. I tried to get files that were shared loads that involved clips. So I had files that belonged in two different places. So by writing that, I could always keep track of what was what.

BY MR. MANDELL:

Q. Now Mr. Goodman, did you write anything else on the files?

A. No.

Tr. 3168-70.

Mr. Goodman thus admitted that he altered documents prior to the hearing which his counsel intended to move into evidence. Furthermore, Mr. Goodman did not admit to these alterations until the matter was raised during Ms. Levine's cross-examination. These admitted alterations not only undercut Respondent's

contentions with respect to the alleged "clip" arrangements with L&P, but they also detract from Respondent's credibility in general.

I also found unbelievable Mr. Goodman's testimony as to why 5 cents per box was utilized as a "clip." Mr. Goodman answered his lawyer's questions about that as follows:

[BY MR. MANDELL:]

Q. All right. I understand about the length of time but who arrived at the five cents per box out of your commission. Why not 10. Why not 20. Why not some other figure, do you remember?

[BY MR. GOODMAN:]

A. No, I don't as a matter of fact.

Q. Huh?

A. I don't remember. I don't know how that came about.

Q. Pardon.

A. Well first off I know that I wouldn't have wanted to make it too high because I wouldn't want it to have affected my bonus all that much but the difference between a nickel and a dime really doesn't matter. I just think it just came about. It was simple and easy.

Q. Didn't have anything to do with the prior situation where you were trying to make up Tony's clips did it?

A. You know it was easy to -- the one nice thing about the nickel for the clips was like I told you whenever we tried to make a half we got wacked back. So a nickel always sailed through pretty easily. Maybe that had something to do with it. It just made sense. It was just something we were [sic] used and we just kept on going with it.

Tr. 2591-92.

Mr. Goodman's explanation as to why L&P's officials had no written record of the "clips" also defies credibility. He stated:

. . . Neither Pat Prisco nor Tony Gentile on a file by file basis ever sat there and went over it file by file as far as where we added or subtracted -- well, they always knew their deductions, but they didn't keep track of how I got my money back because he knew I was keeping track and also you just couldn't do it. You had to be very cautious -- not cautious, wrong word.

Tr. 2372.

And to the same effect, Mr. Goodman answered:

[BY MR. MANDELL:]

Q. Did you have any conversations with anyone at L&P about the \$3 make-up?

[BY MR. GOODMAN:]

A. Well, not specifically on a file by file basis, but Pat Prisco and I had many conversations about the clips, and the pluses and the minuses and the deductions and so forth like that. He was well aware of what we were doing.

I'm not going to say I spoke to Patty on a weekly basis because I did not. Tony Gentile had full control of L&P's tomato business. Tony and I certainly spoke about it often. We fought like cats and dogs about it and again, Pat Prisco and I had many conversations.

Patty, on occasion, although he never asked me, "Well, how much is it today, how much is it tomorrow, you know, where's my balance," but he knew how hard the deductions were, the clips were.

As a matter of fact Patty, one day we were talking and he sad [sic], "Steve, I know exactly what you're doing, nobody could get the kind of adjustments on clean files, no inspections, that you and Tony worked out without me knowing that I'm giving it back to you someplace else," we had that conversation many times.

Tr. 2269-70.

I find that Respondent's evidence that these payments to Mr. Gentile were designed to adjust L&P's "clips" is not credible and does not rebut the evidence that Respondent's payments were intended to induce Mr. Gentile to buy tomatoes from Respondent.

E. Principals at L&P Were Unaware of Respondent's Payments.

Mr. Prisco, the president of L&P, testified that he did not know that Mr. Gentile received payments from Respondent based on the number of boxes of tomatoes that Mr. Gentile purchased from Respondent, as follows:

[BY MR. STANTON:]

[Q]. The Complainant, PACA, has made many allegations regarding the relationship between Tony Gentile and JSG and one of the allegations is that during that period, JSG was paying Tony Gentile a certain amount per box on boxes of tomatoes which JSG sold to L&P.

This is an allegation that's being made in this case. Are you aware that this allegation is being made?

[BY MR. PRISCO:]

A. Yes, I am.

Q. And, as evidence of this allegation, the PACA Complainant, has submitted into evidence in this proceeding numerous copies of JSG file jackets regarding sales to L&P, and I'd like you to turn to Complainant's Exhibit Number 8, page 1, 8(b), page 1.

Mr. Prisco, this document, as well as many others, has been submitted into evidence as a copy of a JSG file jacket reflecting sales to L&P during 1992 and early 1993.

Now, one of the things Complainant has alleged is that handwritten notations on the bottom corner were indications of payments per box regarding sales made to L&P by JSG that were actually going to Tony Gentile.

Now, assuming these allegations are true, were you ever aware that there were these notations on the file jacket, first of all?

A. First of all, the first time I saw them was a couple of months ago, so I couldn't possibly be aware of it.

Q. But certainly during 1992 and 1993 you weren't aware of them?

A. No, I would have no -- you know, I wouldn't be able to see this.

Q. Assuming it's true and that these notations do indicate that payments were being made on these files per box basis to Tony Gentile, were you aware that such payments were made, if, in fact, it's true?

A. No.

Q. And I'm talking about during the time of the transactions during 1992 and 1993?

A. No.

....

Q. Turn to Exhibit 13(b), page 1, do you see that?

A. Okay.

....

BY MR. STANTON:

Q. It's been alleged that the notations in the area on the corner of that circle, indicate a certain payment to A. Gentile. If that's true, were you aware of that?

A. No.

Q. It's also been alleged that the payment to A. Gentile in this particular file, took place by means of reducing a debt that Tony Gentile owed to JSG

and that allegedly is reflected by Exhibit 13(a), Page 3, which is the first document you were looking at.

A. Okay.

Q. If that is true, did you know about that?

A. No.

Q. Now, if any of your employees at L&P knew about that arrangement at the time, 1992 through 1993, would that have come to your attention?

A. Certainly.

Q. Did it come to your attention at all?

A. No.

....

Q. Take a look at page one of 44(b).

A. I'm familiar with that check, \$1,239.

Q. And it's been alleged that that check resulted from a per box payment reflected by the Tony, five cent notation on the file jacket that ultimately resulted in a \$1,239 check to Gloria Gentile.

Now, the per box payment was on boxes of tomatoes sold by JSG to L&P. Now, if that were true, is that something that – an arrangement that you would know about?

A. Is it something, I would know about?

Q. Right, or did know about?

A. It was something that I did not know – if it were true, I did not know about it.

Q. And, if anyone at L&P would have known about such arrangement, would they have informed you during 1992?

A. They certainly would have.

....

Q. And, its been alleged and testified to by Ms. Colson, that everyone of these entries reflects a particular load of tomatoes sold by JSG to L&P, and it's also been alleged that the quantity involved in each of these loads, as listed in the fifth column from the left, is the basis for a five cents per box payment, which led to that check to Gloria Gentile.

Now, would you have been aware, assuming it's true; would you been [sic] aware of the existence of this Gloria and Tony Enterprises statement to JSG?

A. No.

Q. If anybody at L&P had been aware of it would they have brought it to you [sic] attention?

A. Yes.

Tr. 457-58, 462-64, 501-04.

In addition, Mr. Prisco signed a sworn statement in which he stated that G&T was not authorized to receive payments from L&P's produce suppliers and that he was not aware of any payments to Mr. Gentile or G&T by L&P's produce suppliers, as follows:

I Patrick Prisco, president of L&P Fruit Corp., state that:

- 1) Gloria and Tony Enterprises is a joint venture with L&P Fruit and as such has the authority to purchase tomatoes on behalf of L&P Fruit Corp.
- 2) Gloria and Tony Enterprises was not authorized to receive any compensation from L&P Fruit Corp.'s suppliers on behalf of L&P Fruit Corp.
- 3) Prior to March 25th 1993, I was unaware of any payments made to

Mr. Gentile or Gloria and Tony Enterprises by any suppliers in connection with L&P Fruit Corp.[']s purchases. I am aware of payments made to Mr. Gentile or Gloria and Tony Enterprises by companies dealing with L&P Fruit Corp. that were unrelated to produce purchases.

CX-4.

I find that Complainant introduced substantial evidence to establish that the principals at L&P were not aware that Respondent made payments to Mr. and Mrs. Gentile and G&T. Mr. Goodman testified that Mr. Prisco generally knew of the "clips" (Tr. 2269-70, 2372). However, as discussed in this Decision and Order on Remand as to JSG Trading Corp., *supra*, Mr. Goodman's testimony regarding "clips" is not credible, and Respondent did not offer evidence to show that the principals at L&P were aware of each payment to Mr. and Mrs. Gentile and G&T. Respondent's evidence that the principals at L&P knew of the payments is not sufficient to rebut Complainant's evidence that the principals at L&P were not fully aware of Respondent's payments to Mr. and Mrs. Gentile and G&T.

II. Respondent's Payments to Mr. Lomoriello.

Mr. Lomoriello was employed as a purchasing agent by American Banana in December 1991 and left its employ in 1993 (Tr. 315). From December 1992 through February 1993, Respondent issued seven checks to Mr. Lomoriello totaling \$9,733.45. I find that \$9,733.45 is not *de minimis*.

Respondent and Mr. Lomoriello claim that these checks were not issued to induce Mr. Lomoriello to purchase tomatoes from Respondent, but rather were issued for Mr. Lomoriello's services not involving American Banana. However, the record does not reveal what specifically Mr. Lomoriello did for Mr. Goodman or Respondent to earn \$9,733.45. Mr. Goodman testified that he began to ask Mr. Lomoriello to do things for him at the Hunts Point Market (Tr. 2192). However, Mr. Goodman admitted that there was never any written agreement setting forth what Mr. Lomoriello would do and the payments that he would receive (Tr. 2193).

Ms. Colson found 22 file jackets that relate to Respondent's sales of tomatoes to American Banana which contain notations that are similar to those on the backs of file jackets reflecting sales to L&P (CX 63-69; Tr. 550-51). The notations indicate that payments per box were being made to "A1," "HPT," or "Hunts Point Produce" in an amount equivalent to the amount of the notation multiplied by the number of boxes sold to American Banana. Ms. Colson found Hunts Point Produce Co. invoices in the file jackets for amounts corresponding to the payments

to "Al," "HPT," or "Hunts Point Produce" listed on the file jackets. She also found seven of Respondent's checks totaling \$9,733.45, made payable to Hunts Point Produce Co. (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4). The amounts on the Hunts Point Produce Co. invoices also correspond to the amounts of the checks made payable to Hunts Point Produce Co. and the Hunts Point Produce Co. invoices contain Respondent's file numbers which correspond to the file numbers written on the checks payable to Hunts Point Produce Co. or written on the check skirts applicable to checks payable to Hunts Point Produce Co. (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5). Examination of these invoices reveals that only the earliest Hunts Point Produce Co. invoice, dated December 14, 1992, states how much money per box was being paid to Mr. Lomoriello (CX 63B at 4). When Ms. Colson examined Respondent's Closed File Journal, she found the amounts of the checks written by Respondent to Hunts Point Produce Co. listed in the "Open SC" column (CX 52; Tr. 604-05).

Ms. Levine testified that Mr. Goodman asked her to pay Mr. Lomoriello, although she did not know what services Mr. Lomoriello was rendering to Respondent (Tr. 1962). Ms. Levine said that she asked Mr. Lomoriello for some blank invoices that she could prepare to show that Mr. Lomoriello was not Respondent's employee (Tr. 1962, 1965). After she received the invoices and was told by Mr. Goodman what amounts to pay, Ms. Levine noted the payments to Mr. Lomoriello on American Banana files and completed a Hunts Point Produce Co. invoice to reflect the amounts to be paid to Mr. Lomoriello (Tr. 1968).

Although Ms. Levine claims that her actions were not done in furtherance of recording payments for buying tomatoes from Respondent, she stated that Mr. Lomoriello was quite upset when he received the December 14, 1992, invoice (CX 63B at 4), since it appeared to him as if he was receiving a "kickback." She testified:

When Al received this, he was slightly upset and he told me I should never send him an invoice like this again because it looks like I'm getting a kickback. Those were his -- actually he didn't say it as nicely as that, but I won't say what he said.

Tr. 1969.

Ms. Levine communicated Mr. Lomoriello's comments to Mr. Goodman (Tr.

2036). After being made aware that Mr. Lomoriello was upset that Respondent's payments to him were documented in a way that suggested that the payments were kickbacks, Respondent did not stop making payments to Mr. Lomoriello (Tr. 2037), but made the nature of the payments less obvious by not stating on the invoices how much per box each file was being charged (Tr. 2037).

Respondent and Mr. Lomoriello have not provided any credible evidence of what services Mr. Lomoriello performed for the money that he was paid by Respondent. Ms. Colson testified that in the course of her investigation, on March 11, 1993, when she asked to see Mr. Lomoriello's records, Mr. Lomoriello stated they were at his home and that he would provide them to her on the following day (Tr. 608-09). However, on the following day, when Ms. Colson met with Mr. Lomoriello, the only records that he produced were two deposit tickets (CX 70), supposedly reflecting his deposit of the funds received from Respondent (Tr. 630-31).

However, at the hearing, Mr. Lomoriello disclosed what he alleged were notes that he had written in 1992 and 1993 in response to Mr. Goodman's requests for his assistance (RL 19-25; Tr. 1179-81). These notes appear to be on paper containing an American Banana letterhead. Mr. Lomoriello explained: "RL - RL-20 is a piece of paper that Mimi Contos, American Banana has a pile of American Banana letterhead on the side of the copy machine that when you write notes to people it would be done on his letterhead. . . ." (Tr. 1180).

Mr. Lomoriello said that the notes were in the back of his file cabinet at his home, and he did not provide them to Ms. Colson in March 1993 because he did not find them until early 1995 (Tr. 1194-95, 1202). Upon cross-examination, Mr. Lomoriello stated that he obtained the American Banana stationery on which the notes were written (RL 19-25) from the desk of American Banana's bookkeeper, Carlos Valencia:

[BY MR. STANTON:]

Q. The documents -- the blank documents on which you wrote the notes, RL-19 through RL-25, you obtained them from American Banana, right?

[BY MR. LOMORIELLO:]

A. The blank documents, that's American Banana stuff, yeah -- yes.

Q. Now, explain again where you -- actually in American Banana you

obtained them from?

A. Carlos keeps them on his desk. You have to ask him, he gives you the papers and you -- there are [sic] pretty tight in that office there so you got to ask for a pencil and he keeps everything locked up that he feels is worth any kind of money whatsoever and you got to ask for a piece of paper most of the time to do things.

Tr. 1196-97.

The question arose as to why American Banana's letterhead in RL 19-25 was completely different from American Banana's letterhead found on notes in Respondent's files (CX 65G at 7; CX 66B at 14). Mr. Lomoriello suggested that American Banana had stationery with different letterheads and stated that Carlos Valencia would know about American Banana stationery (Tr. 1225-28).

However, Mr. Valencia testified that the letterhead used for the alleged notes (RL 19-25) was identical to the letterhead used for American Banana's invoices (e.g., RL 1) and the only letterhead that American Banana used for correspondence was the letterhead on notes found in Respondent's files (CX 65G at 7; CX 66B at 14).

BY MR. LOMORIELLO:

Q. The letterhead on RL-19 and the letterhead on CX 65(g), page 7, they are a little different aren't they, Mr. Valencia?

[BY MR. VALENCIA:]

A. Yes, very much, yes.

Q. But both of these letterheads --

JUDGE BERNSTEIN: Wait, wait. Is the letterhead in RL-19 an American Banana Company letterhead that's been used by American Banana?

THE WITNESS: No.

JUDGE BERNSTEIN: Have you ever seen that letterhead in RL-19 before?

THE WITNESS: Yes.

JUDGE BERNSTEIN: Can you explain about it?

THE WITNESS: I seen this on the invoice that we sent to the customers.

....

JUDGE BERNSTEIN: And, you've seen that -- let me see if I can understand your answer. That letterhead was used by American Banana, as I understand your answer?

THE WITNESS: It's been used on the statements that we send out to the customers. It is the headlines of the statements.

Tr. 1485-86.

When Mr. Lomoriello asked Mr. Valencia whether he kept a folder with photocopy paper containing American Banana's letterheads on his desk, as Mr. Lomoriello had testified earlier, Mr. Valencia vociferously denied that any paper with such letterheads were ever left outside his locked filing cabinet (Tr. 1490-92).

Upon examining one of American Banana's invoices (RL 1) and Mr. Lomoriello's exhibits (RL 19-25), Mr. Valencia concluded that the purported American Banana letterhead could have been created by simply placing a piece of white paper over all but the letterhead of a typical American Banana invoice and copying the document in a copier (Tr. 1493-94). I conclude that is exactly what occurred -- that Mr. Lomoriello manufactured this evidence to support his contention that the payments that he received from Respondent were not kickbacks.

Respondent also introduced into evidence other file jackets (RX 50 at 1-3 (SG 5206), RX 50 at 4-6 (SG 5176), RX 50 at 7-9 (SG 5175), RX 50 at 10-13 (SG 5298), RX 50 at 14-16 (SG 5304), RX 50 at 17-19 (SG 5476), RX 50 at 20-22 (SG 5480) and RX 50 at 23-25 (SG 5521)) which contain handwritten notations on the flaps allegedly referring to tasks performed by Mr. Lomoriello for Respondent in 1992 and 1993. However, I strongly suspect that the writings on the flaps of these file jackets were made after the transactions ended, as they appear in a different color ink than the other writings on the backs of the file jackets (Tr. 3006-34). Further, the reference to "Al" in (RX 50 at 18) (SG 5476) appears to be an attempt to write Mr. Lomoriello's name over an existing notation to make it appear as if

Mr. Lomoriello was involved in the transaction (Tr. 3036). Considering the other evidence of falsification and alteration of documents, it is not unlikely that these file jacket flaps allegedly containing notes by Mr. Goodman involving Mr. Lomoriello were also altered in anticipation of the hearing. I, therefore, find this evidence to be unreliable.

Mr. Goodman and Mr. Lomoriello testified that the payments were for various services that Mr. Lomoriello performed for Respondent in other matters. Yet there was no reliable evidence that the payments to Mr. Lomoriello were charged to any other files associated with his alleged services. Given the meticulous nature of Mr. Goodman's notations of expenses on associated files, it is also unbelievable that these payments would be randomly charged to files totally unrelated to Mr. Lomoriello's alleged services. I, therefore, conclude that Respondent made these payments to Mr. Lomoriello totaling \$9,733.45 to induce Mr. Lomoriello to purchase tomatoes from Respondent.

Mr. Contos, the vice-president of American Banana, testified that he did not know that Mr. Lomoriello received payments from Respondent based on the number of boxes of tomatoes that Mr. Lomoriello purchased from Respondent, as follows:

[BY MR. STANTON:]

Q. Now, Mr. Contos, assume for the sake of argument that Complainant's allegations are true and JSG was, in fact, paying Al Lomoriello or Hunts Point Produce a certain amount per box on boxes of tomatoes which JSG sold to American Banana.

If we assume that these allegations are true, were you aware of this business arrangement?

[BY MR. CONTOS:]

A. No, sir.

Q. Now, would you have been made aware of this type of business arrangement if anybody else at American Banana knew about it?

A. No.

Q. You wouldn't have been made aware -- I mean, I'm not asking if you

were made aware of it, but if anybody else employed by American Banana knew about it, would they have told you?

A. Yes, but nobody told me anything about that, nobody knew, as far as I'm concerned, nobody mentioned to me that he was getting that money from JSG. I don't know.

Q. What's the name of the President of American Banana?

A. Alfred Allega.

Q. Alfred Allega, A-l-l-e-g-a?

A. He's my partner, yes, A-l-l-e-g-a, but he had nothing to do because we have two places, one is outside. We have three partners, I take care of Hunts Point Market inside the market and my other two partners, they take care of Fort Wayne and Hunts Point. I have two warehouses and I take this place, you know Hunts Point, and my partners got nothing to do with this.

In other words, it's the same company, but we run separately, you know, those two places. I'm running Hunts Point Market inside and they're running the other places.

Q. With regard to business dealings at Hunts Point that American Banana had with Al Lomoriello, who was – in your company, who was in charge of supervising that relationship?

A. I was.

Q. You were?

A. Yeah, like I told you before, I was taking care of Hunts Point and Al Lomoriello was with me. He had nothing to do with the other place outside the market, because like I explained to you, we have two places, one inside the market, Hunts Point and one outside.

....

BY MR. LOMORIELLO:

....

Q. Do you remember the day Ms. Colson came to American Banana, the lady sitting over there?

A. Yes.

Q. She came in, she asked to speak to you and you went to your office and closed the door and you spoke for a while with her?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. Can you tell me what she told you that day, can you tell the Court what she told you that day?

A. She told me that she was looking for something and she was looking to see the records, that she wanted to know –

....

THE WITNESS: Yes, she came over and she was looking for the papers to see how come he was getting commission from JSG and she wanted to know what's happening and I didn't know anything about that Mr. Lomoriello was getting commission from JSG, which I didn't know and she wanted to find out and I told her, I don't know.

Tr. 322-24, 415-16.

I find that Complainant introduced substantial evidence to establish that the principals at American Banana were not aware that Respondent made payments to Mr. Lomoriello. Respondent's evidence that the principals at American Banana knew of the payments is not sufficient to rebut Complainant's evidence that the principals at American Banana were not fully aware of Respondent's payments to Mr. Lomoriello.

III. *Quid Pro Quo* Agreement.

Respondent contends that *JSG Trading Corp. v. United States Dep't of Agric., supra*, makes clear that, in order to meet the traditional test for commercial bribery, Complainant must establish the existence of a specific *quid pro quo* agreement attached to the giving of the alleged consideration (Respondent's Motion to Dismiss at 4, 6; Respondent's Reply at 4).

However, I agree with Complainant's position (Complainant's Response at 16) that *JSG v. United States Dep't of Agric., supra*, does not require proof of the existence of a written or oral agreement between the parties alleged to have violated section 2(4) of the PACA, in order to meet the traditional test for commercial bribery. Instead, the Court indicates that the traditional test for commercial bribery typically contains only two elements, intent to induce and secrecy:

It is clear that the test for commercial bribery employed by the agency in *Goodman* and *Tipco* requires a finding of both intent to induce and secrecy. These requirements are not surprising, given that commercial bribery statutes typically contain at least these two elements. *See, e.g., N.Y. PENAL LAW* §§ 180.00, 180.03 (McKinney 1999) ("A person is guilty of commercial bribing . . . when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with the intent to influence his conduct in relation to his employer's or principal's affairs."); 720 ILL. COMP. STAT. ANN. 5/29A-1 (West 1998) ("A person commits commercial bribery when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."); *see also* 2 Rudolph Callman, *THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES* § 12.01, at 1 n.0.50; § 12.01, at 8-9 (4th ed. 1996 & Supp. 1999); *BLACK'S LAW DICTIONARY* 270 (6th ed. 1990) (defining commercial bribery as "[a] form of corrupt and unfair trade practice in which an employee accepts a gratuity to act against the best interests of his employer").

....

Even assuming that Mr. Goodman's gifts to Mr. Gentile were made not out of pure friendship, but rather in an effort to curry favor with

Mr. Gentile, it is not immediately obvious how the marketplace is disturbed—or how Mr. Goodman is violating any implied duty under the PACA—if Mr. Gentile's employer is aware of the gifts, and there is no specific *quid pro quo* agreement between Mr. Goodman and Mr. Gentile. . . . In other words, without a finding of secrecy and intent to induce, there appears to be nothing to distinguish an illegal bribe from a simple promotional gift.

JSG Trading Corp. v. United States Dep't of Agric., *supra*, 176 F.3d at 542-43, 545.

Thus, I do not find that proof of a specific written or oral agreement between Respondent and Mr. Gentile or Respondent and Mr. Lomoriello is prerequisite to my finding that Respondent violated section 2(4) of the PACA.

Even if I found that the elements of traditional commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, include the existence of a *quid pro quo* agreement, I would find that Respondent engaged in activity that meets the traditional test for commercial bribery. Complainant did not introduce evidence of a specific written or oral agreement between Respondent and Mr. Gentile or between Respondent and Mr. Lomoriello, in which the parties agreed that, in exchange for payments from Respondent, Mr. Gentile and/or Mr. Lomoriello would purchase tomatoes from Respondent rather than Respondent's competitors. However, Complainant introduced substantial evidence that Respondent made a series of payments to Messrs. Gentile and Lomoriello to induce Messrs. Gentile and Lomoriello to purchase tomatoes from Respondent and substantial evidence that the principals at L&P were not aware of all of Respondent's payments to Mr. Gentile and the principals at American Banana were not aware of Respondent's payments to Mr. Lomoriello. Moreover, Complainant introduced substantial evidence that many of these payments were directly dependent on the number of boxes of tomatoes that Messrs. Gentile and Lomoriello purchased from Respondent. Based on these facts, I infer that Respondent and Mr. Gentile and Respondent and Mr. Lomoriello had *quid pro quo* agreements in which, in exchange for Respondent's payments, Messrs. Gentile and Lomoriello agreed to purchase tomatoes from Respondent.

IV. Collateral Fees and Expenses.

Respondent contends that *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, requires that I consider Respondent's payments to Messrs. Gentile and Lomoriello in light of the PACAA-1995, which allows the good faith offer,

solicitation, payment, or receipt of collateral fees and expenses. Respondent asserts that there is nothing in the record that demonstrates that Respondent's payments were other than collateral fees and expenses made in good faith. (Respondent's Motion to Dismiss at 12.)

I disagree with Respondent's contention that *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, requires me to consider whether Respondent's payments to Messrs. Gentile and Lomoriello were good faith collateral fees and expenses paid in accordance with the PACA.

The Court states that "[s]everal of the gifts given to Mr. Gentile by Mr. Goodman arguably could be considered 'promotional allowances' made in good faith (*i.e.*, not in secret), and in connection with the marketing of JSG's product." The Court instructed that, "[o]n remand, the agency must explain its justification, if it has one, for employing a *per se* test for commercial bribery, and it must do so in conjunction with the 1995 amendment to PACA. The agency is free, of course, to abandon the *per se* approach, and apply the traditional commercial bribery test employed in *Goodman and Tipco*." *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, 176 F.3d at 546.

Since I abandon the *per se* test for commercial bribery, the Court's instruction that I explain the justification for the *per se* test for commercial bribery, in conjunction with the provision of the PACAA-1995 that allows the good faith payment of collateral fees and expenses, does not apply to this Decision and Order on Remand as to JSG Trading Corp. Moreover, as fully explicated in this Decision and Order on Remand as to JSG Trading Corp., *supra*, I find Respondent made payments to induce Messrs. Gentile and Lomoriello to purchase tomatoes from Respondent and that the principals at L&P were not fully aware of all of Respondent's payments to Mr. Gentile and the principals at American Banana were not fully aware of Respondent's payments to Mr. Lomoriello (*i.e.*, Respondent's payments were not "made in good faith" and therefore could not have been good faith payments of collateral fees and expenses allowed under the PACAA-1995).

V. Messrs. Gentile and Lomoriello Were Not Partners or Independent Brokers.

Respondent contends that Messrs. Gentile and Lomoriello were partners in limited joint venture arrangements with L&P and American Banana, respectively. Respondent contends that, as a matter of law, Respondent's payments to Messrs. Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery because knowledge of payment to one partner must be attributed to the other partners and such payments could not be

considered secret. Alternatively, Respondent asserts that Messrs. Gentile and Lomoriello were independent brokers and that payments to independent brokers are permissible under the PACA. (Respondent's Reply at 15-19.)

Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, in accordance with which Mr. Gentile shared profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Mr. Gentile became ill in late 1990 or early 1991 and from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446, 2909). L&P continued to compensate Mr. Gentile on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

Mr. Gentile described himself as being employed by L&P (Tr. 2819). Mr. Prisco, the president of L&P, described Mr. Gentile as an employee of L&P and stated that L&P uses joint account arrangements with salespersons because the joint account arrangement gives a salesperson an incentive to work hard (Tr. 442-47). Mr. Beni, the secretary-treasurer of L&P, testified that Mr. Gentile was a salesperson for L&P and that L&P paid Mr. Gentile a salary for his fruit sales and had a joint account arrangement with Mr. Gentile with respect to his tomato sales (Tr. 2890, 2892-93). Mr. Beni testified that joint account arrangements are used because they give people "an incentive to sell more stuff" (Tr. 2893). Mr. Beni testified that his partner at L&P was in charge of the office, and when asked who his partner was, Mr. Beni identified his partner as Mr. Prisco (Tr. 2890-91).

Mr. Lomoriello became employed by American Banana in approximately December 1991 (Tr. 1256). Mr. Lomoriello had a joint account arrangement with American Banana in accordance with which Mr. Lomoriello shared profits and losses with American Banana on the produce that he purchased (Tr. 1245-46).

Mr. Contos, American Banana's vice-president, described Mr. Lomoriello as working for American Banana as a night salesperson and described himself as supervising Mr. Lomoriello (Tr. 314, 323). While Mr. Lomoriello characterized himself as an independent contractor, who sold services to American Banana (Tr. 1244), and a partner (Tr. 1277-78), he also described his duties at American Banana, which description supports Mr. Contos' view that Mr. Lomoriello was a salesperson working for American Banana (Tr. 1258-66). Mr. Contos testified that the president of American Banana was Alfred Allega and testified that he (Mr. Contos) had two partners. Mr. Contos identified Mr. Allega as one of those partners, but did not identify the other partner. (Tr. 323-24.)

A partnership is an association of two or more persons to carry on business for

a profit.⁹ An essential element of partnership is sharing of profit and losses¹⁰ and sharing of profits and losses generally constitutes prima face evidence of the existence of a partnership.¹¹ However, the fact that an individual shares profits and losses is not dispositive of partnership status¹² and whether partnership status exists turns on several factors, including the intention of the parties that they be partners, sharing in profits and losses, exercising joint control over the business, making capital investment, and possessing an ownership interest in the partnership.¹³

The party alleging the existence of a partnership bears the burden of proof on the issue.¹⁴ The record does not support a finding that Mr. Gentile was a partner with L&P or the principals at L&P or a finding that Mr. Lomoriello was a partner

⁹*Bickhardt v. Ratner*, 871 F. Supp. 613, 620 (S.D.N.Y. 1994).

¹⁰*ACLI Government Securities, Inc. v. Rhoades*, 813 F. Supp. 255, 257 (S.D.N.Y.), *aff'd*, 14 F.3d 591 (2d Cir. 1993); *Steinbeck v. Gerosa*, 175 N.Y.S.2d 1, 13 (N.Y.), *appeal dismissed*, 358 U.S. 39 (1958); *Scharf v. Crosby*, 502 N.Y.S.2d 891, 892 (N.Y. App. Div. 1986) (mem.); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 711-12 (N.Y. App. Div. 1983); *Bennett v. Pierce Industries, Inc.*, 281 N.Y.S.2d 674, 676 (N.Y. App. Div. 1967) (per curiam); *Reynolds v. Searle*, 174 N.Y.S. 137, 138 (N.Y. App. Div. 1919).

¹¹*Kellogg v. Kellogg*, 564 N.Y.S.2d 631, 633 (N.Y. App. Div. 1991); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 712 (N.Y. App. Div. 1983).

¹²*Martin v. Peyton*, 246 N.Y. 213, 128 (N.Y. 1927); *Kellogg v. Kellogg*, 564 N.Y.S.2d 631, 633 (N.Y. App. Div. 1991); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Boyarsky v. Froccaro*, 516 N.Y.S.2d 775, 777 (N.Y. App. Div. 1987) (mem); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 712 (N.Y. App. Div. 1983); *Ramirez v. Goldberg*, 439 N.Y.S.2d 959, 961 (N.Y. App. Div. 1981); *Barschi v. Euben*, 426 N.Y.S.2d 802 (N.Y. App. Div.) (mem.), *appeal denied*, 433 N.Y.S.2d 1027 (N.Y. 1980).

¹³*Bickhardt v. Ratner*, 871 F. Supp. 613, 620 (S.D.N.Y. 1994); *ACLI Government Securities, Inc. v. Rhoades*, 813 F. Supp. 255, 256 (S.D.N.Y.), *aff'd*, 14 F.3d 591 (2d Cir. 1993); *Televideo Systems, Inc. v. Mayer*, 139 F.R.D. 42, 48 (S.D.N.Y. 1991) (mem.); *Kyle v. Brenton*, 584 N.Y.S.2d 698, 699 (N.Y. App. Div. 1992) (mem.); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Farmer v. State Tax Commission of New York*, 535 N.Y.S.2d 453, 455-56 (N.Y. App. Div. 1988); *Brodsky v. Stadlen*, 526 N.Y.S.2d 478, 479 (N.Y. App. Div. 1988) (mem.); *Alleva v. Alleva Dairy*, 514 N.Y.S.2d 422, 423 (N.Y. App. Div. 1987); *M.I.F. Securities Co. v. R.C. Stamm & Co.*, 463 N.Y.S.2d 771, 774 (N.Y. App. Div.), *aff'd*, 471 N.Y.S.2d 84 (1983).

¹⁴*Televideo Systems, Inc. v. Mayer*, 139 F.R.D. 42, 48 (S.D.N.Y. 1991) (mem.); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Ramirez v. Goldberg*, 439 N.Y.S.2d 959, 961 (N.Y. App. Div. 1981); *Moscatelli v. Nordstrom*, 337 N.Y.S.2d 575, 576 (N.Y. App. Div. 1972) (mem).

with American Banana or the principals at American Banana. Instead, the record establishes that the joint account arrangements that Messrs. Gentile and Lomoriello had with L&P and American Banana, respectively, were merely methods by which L&P and American Banana compensated Messrs. Gentile and Lomoriello, respectively, for services. I find that Mr. Gentile was a purchasing agent working for a principal, L&P, and that Mr. Lomoriello was a purchasing agent working for a principal, American Banana.

Conclusion of Law

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA.

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

Order

JSG Trading Corp.'s PACA license is revoked, effective 61 days after service of this Order on JSG Trading Corp.
