

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-01-0026
)
Post & Taback, Inc.,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a “Complaint” on August 17, 2001. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Subsequently, Complainant filed a “First Amended Complaint” [hereinafter Amended Complaint]: (1) alleging that Post & Taback, Inc. [hereinafter Respondent], during the period September 4, 2000, through February 20, 2001, failed to make full

payment promptly to 58 sellers of the agreed purchase prices in the total amount of \$2,351,432.86 for 424 transactions of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce; (2) alleging that, during the period March 29, 1999, through August 5, 1999, Respondent, through its employee, Mark Alfisi, made illegal payments to a United States Department of Agriculture inspector in connection with 65 inspections of perishable agricultural commodities that Respondent purchased from 26 sellers in interstate and foreign commerce; (3) alleging that Respondent made illegal payments to United States Department of Agriculture inspectors on numerous occasions prior to March 29, 1999; (4) alleging that Respondent willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (5) requesting the issuance of an order revoking Respondent's PACA license (Amended Compl. ¶¶ III-VII).

On August 9, 2002, Respondent filed an "Answer to Amended Complaint" in which Respondent denies the material allegations of the Amended Complaint.

On December 17-19, 2002, January 28-30, 2003, and April 8-9, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing in New York, New York. Andrew Y. Stanton and Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent.

On July 1, 2003, Complainant filed “Complainant’s Proposed Findings of Fact, Conclusions and Order” and Respondent filed “Proposed Findings of Fact and Conclusions of Law.” On July 7, 2003, Complainant filed “Complainant’s Reply Brief.”

On July 28, 2003, the Chief ALJ issued a “Decision and Order” [hereinafter Initial Decision and Order]: (1) finding Respondent owed 58 produce creditors \$2,351,432.86 for 424 transactions of perishable agricultural commodities that Respondent purchased in interstate commerce during the period September 4, 2000, through February 20, 2001; (2) finding, as of the date the hearing began in December 2002, at least \$479,602.33 of Respondent’s produce purchases had not been paid; (3) finding, during the period April 1999 through August 1999, Respondent’s employee, Mark Alfisi, bribed a United States Department of Agriculture inspector by making payments in the amount of \$1,760 to the inspector in order to influence the outcome of United States Department of Agriculture inspections of fresh fruits and vegetables; (4) finding Respondent’s employee, Mark Alfisi, used fraudulent information obtained from bribing a United States Department of Agriculture inspector to make false and misleading statements to produce sellers; (5) concluding Respondent engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to its produce creditors; and (6) ordering publication of the findings of fact and conclusion of law (Initial Decision and Order at 10-11).

On September 22, 2003, Complainant appealed to the Judicial Officer, and on September 23, 2003, Respondent appealed to the Judicial Officer. On October 14, 2003,

Complainant filed “Complainant’s Opposition to Respondent’s Appeal Petition.” On October 31, 2003, the Hearing Clerk transmitted the record, except Respondent’s exhibit 20,¹ to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, except Respondent’s exhibit 20,² I disagree with the Chief ALJ’s conclusion that Respondent is not responsible for its employee’s payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Therefore, while I retain most of the Chief ALJ’s Initial Decision and Order, I do not adopt the Chief ALJ’s Initial Decision and Order as the final Decision and Order.

Complainant’s exhibits are designated by “CX.” Respondent’s exhibits are designated by “RX.” Transcript references are designated by “Tr.”

¹I explain the Hearing Clerk’s failure to transmit Respondent’s exhibit 20 in this Decision and Order, *infra*.

²I explain my failure to consider Respondent’s exhibit 20 in this Decision and Order, *infra*.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

.....

§ 499b. Unfair conduct

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

.....

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

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§ 499e. Liability to persons injured

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(c) Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents; preservation of trust; jurisdiction of courts

(1) It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in, such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest.

(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. The provisions of this subsection shall not apply to transactions between a cooperative association, as defined in section 1141j(a) of title 12, and its members.

(3) The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been

dishonored. The written notice to the commission merchant, dealer, or broker shall set forth information in sufficient detail to identify the transaction subject to the trust. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.

(4) In addition to the method of preserving the benefits of the trust specified in paragraph (3), a licensee may use ordinary and usual billing or invoice statements to provide notice of the licensee's intent to preserve the trust. The bill or invoice statement must include the information required by the last sentence of paragraph (3) and contain on the face of the statement the following: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."

(5) The several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust.

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§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

....

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

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

7 U.S.C. §§ 499b(4), 499e(c), 499h(a), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

.....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

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

.....

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

(b) Whoever—

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

official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

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

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

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

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

....

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

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or

agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

....

shall be fined under this title or imprisoned for not more than two years, or both.

....

CHAPTER 19—CONSPIRACY

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)-(2), (c)(1), 371.

7 C.F.R.:

TITLE 7—AGRICULTURE

....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

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

....

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

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

DEFINITIONS

....

§ 46.2 Definitions.

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

....

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

....

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

7 C.F.R. § 46.2(aa)(5).

DECISION

Statement of Facts

Alleged Failure to Make Full and Prompt Payment

The United States Department of Agriculture issued Respondent, a New York corporation, PACA license number 182992. Respondent operated its business under that PACA license at 253-256 B NYC Terminal Market (Hunts Point), Bronx, New York 10474, during the times of the violations alleged in the Amended Complaint. Respondent's PACA license automatically terminated on September 10, 2002, when Respondent failed to pay the required annual PACA license renewal fee. (Amended Compl. ¶ II; Answer to Amended Compl. ¶ II; Tr. Dec. 18, 2002, at 69-71.)

In January 2001, several of Respondent's unpaid produce creditors filed a civil action against Respondent in the United States District Court for the Southern District of New York under the statutory trust established in section 5(c) of the PACA (7 U.S.C. § 499e(c)) (CX 64). Respondent ceased business in or about February 2001.

In June 2001, Carolyn Shelby, a marketing specialist employed by the Agricultural Marketing Service, initiated an investigation of Respondent's produce transactions. Respondent provided Ms. Shelby with documents including its accounts payable and unpaid invoices. These documents showed Respondent owed 58 produce sellers \$2,351,432.86 for 424 transactions of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce during the period September 4, 2000, through February 20, 2001. (CX 3-CX 62.)

In May 2002, the United States District Court for the Southern District of New York found Respondent in default of its duty to its produce creditors under the PACA trust and supervised the payment of Respondent's assets to the produce creditors who were parties to the suit. The produce creditors were offered 75 cents on the dollar for their claims in return for waiving any further proceedings. Not all the produce creditors elected to pursue their claims in the court action. In some instances, the debts determined by the United States District Court for the Southern District of New York were the same as those set forth in Appendix A of the Amended Complaint; while, in other instances, the amounts differed. (CX 64-CX 65a; Tr. Dec. 17, 2002, at 66-71.)

In December 2002, during the week prior to commencement of the hearing in this proceeding, Ms. Shelby contacted Respondent's unpaid produce creditors and determined that full payment had not been made to them and that at least \$479,602.33 still remained unpaid (Tr. Dec. 17, 2002, at 82).

Alleged Unlawful Payments

In 1997, Respondent hired Mark Alfisi as a buyer to run its fruit department. Respondent paid Mark Alfisi a salary and bonus. William J. Cashin, a United States Department of Agriculture inspector, conducted inspections of produce purchased by Mark Alfisi for Respondent. William J. Cashin described his function as a United States Department of Agriculture inspector, as follows:

[BY MR. STANTON:]

Q. Mr. Cashin, what were your general duties as a U.S.D.A. produce inspector consequently?

[BY MR. CASHIN:]

A. In general terms, my job was to examine various fruits and vegetables, to be a disinterested third party and if they applied, to apply the U.S. standards for the various products.

Q. Now, what is the purpose in general of the U.S.D.A. produce inspection?

A. In general, the purpose was to prepare -- to examine the product, again, as a disinterested third party, and to prepare a document known as a certificate, basically to settle disputes between shippers, receivers, brokers and receivers and transportation companies.

Q. And how is the inspection used to settle disputes if you know?

A. It's my understanding that whoever called for the inspection, usually referring to the applicant, he would take the inspection by either fax or phone call, tell the parties involved the results and then they would renegotiate prices.

Tr. Dec. 19, 2002, at 65-66.

William J. Cashin had been secretly accepting money from produce wholesalers located at Hunts Point since 1980. William J. Cashin testified that, after Mark Alfisi's employment by Respondent, he began accepting \$50 payments from Mark Alfisi for each inspection he conducted for Mark Alfisi and that "[i]t was my understanding that he was giving me money helping him with various loads of produce that were reflected on the certificates. . . . I knew Mark from a previous place in the market and we had the same arrangement there and basically it was carried over to Post & Taback." William J. Cashin testified that under this arrangement the percentages of defects in the inspected produce

were to go over the “good delivery marks” and that “[i]t was my understanding that by having the amounts over the good delivery marks they could renegotiate prices with the shippers.” He would also vary the temperature of the produce and report fewer boxes than were actually in a load so that the price could be renegotiated by produce buyers. William J. Cashin testified he gave Mark Alfisi “help” on 60 to 70 percent of his inspections. (Tr. Dec. 19, 2002, at 77-82.) William J. Cashin also said that sometimes Alan and Dana Taback, Respondent’s officials, pointed out decay or other problems with produce and that he would report on the United States Department of Agriculture inspection certificates that the produce was over the good delivery marks (Tr. Dec. 19, 2002, at 80).

In March 1999, William J. Cashin was arrested by agents from the Federal Bureau of Investigation and the United States Department of Agriculture’s Office of the Inspector General. He was charged with bribery and conspiracy to commit bribery by taking money from produce wholesalers at the Hunts Point market. William J. Cashin entered into an agreement with the United States Attorney for the Southern District of New York in which William J. Cashin agreed, *inter alia*, to assist the Federal Bureau of Investigation and United States Department of Agriculture’s Office of the Inspector General with their investigation of the Hunts Point produce market. William J. Cashin agreed to carry audio and video recording devices to surreptitiously record his contacts with various persons employed by produce companies, including his contacts with Mark Alfisi. (Tr. Dec. 19, 2002, at 58-60, 63-64, 83-85.) Subsequently, the United States District Court for the Southern District of New York found Mark Alfisi guilty of giving unlawful gratuities, in the

total amount of \$1,400, to a United States Department of Agriculture inspector; bribing a public official by making cash payments to a United States Department of Agriculture inspector between April 1999 and August 1999, in the total amount of \$1,760, in order to influence the outcome of inspections of fresh fruit and vegetables; and conspiracy to commit bribery (CX 67-CX 68).

The audio and video recordings were played at the hearing (RX 4-RX 17). They covered the period March 1999 through August 1999. However, William J. Cashin could not associate the tapes with specific instances where he received payments from Mark Alfisi, except for testifying that, overall, his inspection reports “helped” Mark Alfisi about 60 to 70 percent of the time (Tr. Dec. 19, 2002, at 81-82).

Discussion

Alleged Failure to Make Full and Prompt Payment

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful for any commission merchant, dealer, or broker to fail to make full payment promptly for perishable agriculture commodities received in interstate or foreign commerce. The Secretary of Agriculture may revoke a commission merchant’s, dealer’s, or broker’s PACA license if the commission merchant, dealer, or broker fails to comply with the PACA’s prompt payment requirement by the date of the hearing or within 120 days after the complaint is filed, whichever is sooner.³ If the commission merchant’s, dealer’s, or

³*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (1998).

broker's PACA license is not in effect at the time a sanction for failure to comply with PACA's prompt payment requirement is imposed, the Secretary of Agriculture may publish the facts and circumstances of the violation.

Respondent had paid some of its produce creditors pursuant to the order of the United States District Court for the Southern District of New York in the trust action discussed in this Decision and Order, *supra*. However, most of Respondent's produce creditors received only 75 cents on the dollar. Such partial payment does not constitute full payment.⁴ As of the date that the hearing began in December 2002, Respondent still owed its produce creditors at least \$479,602.33. The exact amount Respondent owed, which is more than *de minimis*, is not important for purposes of finding a violation.⁵

Accordingly, I find Respondent failed to make full payment promptly to its produce creditors and Respondent was not in full compliance with the PACA either within 120 days after the Complaint was filed or by the date the hearing began. Respondent's failure to make full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA

⁴*In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 734 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

⁵*In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 590 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3).

(7 U.S.C. § 499b(4)). As Respondent's PACA license has terminated, the facts and circumstances of Respondent's violations shall be published.

Alleged Unlawful Payments

At the hearing, Respondent contended that, notwithstanding the United States District Court for the Southern District of New York's judgment against Mark Alfisi after a trial in *United States v. Alfisi*, No. 01-0868 (S.D.N.Y. May 7, 2001), an independent determination had to be made in this proceeding whether Mark Alfisi bribed a United States Department of Agriculture inspector. Respondent also suggested that Mark Alfisi's payments were not bribes but gratuities to the United States Department of Agriculture inspector for such purposes as conducting timely inspections.

I disagree with Respondent's contention that Complainant must introduce evidence independent of the United States District Court for the Southern District of New York's judgment, to show that Mark Alfisi bribed William J. Cashin. The Administrative Procedure Act provides, with respect to the admission of evidence, that:

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

....

(d) . . . Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

5 U.S.C. § 556(d).

Similarly, section 1.141(h)(1)(iv) of the Rules of Practice provides for the admission of evidence, as follows:

§ 1.141 Procedure for hearing.

.....

(h) *Evidence*—(1) *In general*. . . .

.....

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

7 C.F.R. § 1.141(h)(1)(iv).

Further, courts have consistently held that hearsay evidence is admissible in proceedings conducted under the Administrative Procedure Act.⁶ Moreover, responsible

⁶*See, e.g., Richardson v. Perales*, 402 U.S. 389, 409-10 (1971) (stating that even though inadmissible under the rules of evidence applicable to court procedure, hearsay evidence is admissible under the Administrative Procedure Act); *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995) (stating that the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any oral or documentary evidence except irrelevant, immaterial, or unduly repetitious evidence; thus, hearsay evidence is not inadmissible *per se*); *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 49 (D.C. Cir.) (stating that administrative agencies are not barred from reliance on hearsay evidence, which need only bear satisfactory indicia of reliability), *cert. denied*, 516 U.S. 824 (1995); *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994) (holding that documentary evidence which is reliable and probative is admissible in an administrative proceeding, even though it is hearsay); *Woolsey v. NTSB*, 993 F.2d 516, 520 n.11 (5th Cir. 1993) (stating that the only limit on hearsay evidence in an administrative context is that it bear satisfactory indicia of reliability; it is not the hearsay nature *per se* of the proffered evidence that is significant, it is the probative value, reliability, and fairness of its use that are determinative), *cert. denied*, 511 U.S. 1081 (1994); *Keller v. Sullivan*, 928 F.2d 227, 230 (7th Cir. 1991) (stating that hearsay statements are admissible in administrative hearings, as long as they are relevant and material); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990) (stating that hearsay evidence is admissible in administrative proceedings, so long as the admission of evidence meets the test of fundamental fairness

(continued...)

hearsay has long been admitted in the United States Department of Agriculture's administrative proceedings.⁷

The Federal Rules of Evidence are not applicable to administrative proceedings conducted under the Administrative Procedure Act in accordance with the Rules of Practice.⁸ However, even if the Federal Rules of Evidence were applicable to this

⁶(...continued)

and probity); *Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 846 (6th Cir. 1990) (stating that hearsay evidence is admissible in an administrative proceeding, provided it is relevant and material); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1025 (3d Cir. 1986) (stating that hearsay evidence is freely admissible in administrative proceedings); *Sears v. Department of the Navy*, 680 F.2d 863, 866 (1st Cir. 1982) (stating that it is well established that hearsay evidence is admissible in administrative proceedings); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138-39 (D.C. Cir. 1982) (stating that hearsay evidence is admissible in administrative proceedings and depending on reliability, can be substantial evidence).

⁷*In re Judie Hansen*, 57 Agric. Dec. 1072, 1110-11 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1066-67 (1998); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 86 (1997) (Order Denying Pet. for Recons.); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 868 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 821 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Jim Fobber*, 55 Agric. Dec. 60, 69 (1996); *In re Richard Marion, D.V.M.*, 53 Agric. Dec. 1437, 1463 (1994); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1466 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 427 n.39 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983); *In re Richard L. Thornton*, 38 Agric. Dec. 1425, 1435 (Remand Order), *final decision*, 38 Agric. Dec. 1539 (1979); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1894 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975).

⁸*In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1339 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), decision on remand, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, No. 96-6589 (11th

(continued...)

proceeding, the United States District Court for the Southern District of New York's judgment against Mark Alfisi would be admissible under Rule 803(22) which provides, as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(22) Judgment of previous conviction.—Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Fed. R. Evid. 803(22).

Mark Alfisi was convicted after trial of giving unlawful gratuities to a public official which is punishable by imprisonment for not more than 2 years,⁹ bribery of a public official

⁸(...continued)

Cir. Mar. 27, 1997) (unpublished); *In re Unique Nursery & Garden Center* (Decision as to Valkering U.S.A., Inc.), 53 Agric. Dec. 377, 407 (1994), *aff'd*, 48 F.3d 305 (8th Cir. 1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1182, 1196 (1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1060, 1079 (1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994).

⁹18 U.S.C. § 201(c).

which is punishable by imprisonment for not more than 15 years,¹⁰ and conspiracy to commit bribery which is punishable by imprisonment for not more than 5 years.¹¹

I, therefore, conclude the United States District for the Southern District of New York's judgment against Mark Alfisi (CX 68) is admissible and Complainant is not, independent of the Court's judgment, required to prove that Mark Alfisi gave unlawful gratuities to a public official in violation of 18 U.S.C. § 201(c), bribed a public official in violation of 18 U.S.C. § 201(b), and conspired to commit bribery in violation of 18 U.S.C. § 371.

The PACA does not specifically provide that giving unlawful gratuities to a public official in violation of 18 U.S.C. § 201(c), bribing a public official in violation of 18 U.S.C. § 201(b), and conspiring to commit bribery in violation of 18 U.S.C. § 371, are violations of the PACA. However, PACA states that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of

¹⁰18 U.S.C. § 201(b).

¹¹18 U.S.C. § 371.

any undertaking in connection with any transaction involving any perishable agricultural commodity.¹²

Mark Alfisi's unlawful gratuities, bribery, and conspiracy to commit bribery were integral parts of his fraudulent scheme to use falsified United States Department of Agriculture inspection certificates to obtain an advantage in the renegotiation of prices with produce sellers. Conspiracy to commit bribery and bribery of a United States Department of Agriculture inspector to obtain fraudulent information for the purpose of making false or misleading statements to members of the produce industry and payment of unlawful gratuities to a United States Department of Agriculture inspector are corrupt practices that threaten the integrity of the inspection system, erode the produce industry's trust in the inspection system, and violate the duty of all commission merchants, brokers, and dealers to deal fairly with other members of the produce industry. Mark Alfisi's unlawful gratuities, conspiracy to commit bribery, and bribery are, therefore, violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent argues that its principals did not know of Mark Alfisi's violations, that Mark Alfisi acted outside the scope of his employment, and that Respondent is therefore not responsible for Mark Alfisi's actions. The evidence is insufficient to establish that Respondent's principals had actual knowledge of Mark Alfisi's unlawful actions. However, the knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is

¹²7 U.S.C. § 499(b)(4).

not limited to that which is known by its officers, owners, and directors. The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Mark Alfisi was acting within the scope of his employment when he knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Mark Alfisi are deemed to be knowing and willful violations by Respondent.¹³

Respondent suggests that because William J. Cashin had large expenditures, he extorted the money from Mark Alfisi. However, there is no evidence to support a finding of extortion. Respondent also argues that Complainant acted in "complicity" with William J. Cashin by allowing him to accept unlawful payments while surreptitiously recording the transactions and that William J. Cashin will still be eligible for a pension

¹³*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. ___, slip op. at 26-27 (Oct. 29, 2003); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994), *aff'd*, 91 F.3d 173 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

despite his unlawful activities and the termination of his employment with Complainant.

The record does not show that Mark Alfisi was induced to make unlawful payments or that he was doing anything that he had not been doing before William J. Cashin agreed to cooperate with law enforcement officials. Respondent has not offered any evidence that there is any impropriety in William J. Cashin's eligibility for a pension. I, therefore, find that Complainant did not act in complicity with William J. Cashin.

Complainant's Appeal Petition

Complainant raises six issues in Complainant's Appeal Petition. First, Complainant contends the Chief ALJ erroneously concluded that Mark Alfisi's unlawful payments to William J. Cashin did not constitute PACA violations by Respondent (Complainant's Appeal Pet. at 5-14).

The Chief ALJ found that, since Respondent's principals did not authorize Mark Alfisi's violations of the PACA and had no actual knowledge of Mark Alfisi's violations of the PACA, Respondent did not violate the PACA (Initial Decision and Order at 8-9). I disagree with the Chief ALJ's conclusion; under the PACA, Mark Alfisi's violations of the PACA are deemed Respondent's violations of the PACA.

The relationship between a PACA licensee and its employees, acting within the scope of their employment, is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall *in every case* be deemed the act of the

commission merchant, dealer, or broker as that of the agent, officer, or other person.

Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

Respondent's employee, Mark Alfisi, was acting within the scope of employment when he knowingly and willfully paid unlawful gratuities to a public official and bribed a public official to falsify United States Department of Agriculture inspection certificates. Thus, as a matter of law, the knowing and willful violations by Mark Alfisi are deemed to be knowing and willful violations by Respondent, even if Respondent's officers, directors, and owners had no actual knowledge of the unlawful gratuities, conspiracy, and bribery and would not have condoned the unlawful gratuities, conspiracy, and bribery had they known of them.¹⁴ The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action between a corporate PACA licensee and the corporate PACA licensee's employees in a case involving alterations of United States Department of Agriculture inspection certificates by employees of a corporate PACA licensee, as follows:

MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting

¹⁴*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. ___, slip op. at 37-38 (Oct. 29, 2003); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 16, 1996).

within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, “the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.” 7 U.S.C. § 499p. According to the Sixth Circuit, acts are “willful” when “knowingly taken by one subject to the statutory provisions in disregard of the action’s legality.” *Hodgins v. United States Dep’t of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). “Actions taken in reckless disregard of statutory provisions may also be considered ‘willful.’” *Id.* (quotation and citations omitted). The MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions’ legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

H.C. MacClaren, Inc. v. United States Dep’t of Agric., 342 F.3d 584, 591 (6th Cir. 2003).

Similarly, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123 (2d Cir. 2003), the Court found that bribes made by a produce wholesaler’s employee to a United States Department of Agriculture inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are, under the PACA, deemed the acts of the produce wholesaler, as follows:

Lastly, we address Koam’s equitable argument that our failure to find in its favor would penalize Koam “simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections).” . . . We view the equities differently from Koam, as its argument distorts the facts in at least three ways. . . . Third, Koam’s attempt to distance itself from Friedman’s criminality fails. Friedman was hardly a “faithless servant,” since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, “the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act omission, or failure of such commission merchant, dealer, or

broker” 7 U.S.C. § 499p. Thus, Friedman’s acts--bribing USDA inspectors--are deemed the acts of Koam.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 129-30 (2d Cir. 2003).

The Chief ALJ relies on *In re JSG Trading Corp.* (Decision on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041 (1999); *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991); and *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), as support for his conclusion that a PACA licensee must have actual knowledge of its employee’s illegal payments and condone the illegal payments in order to conclude that the PACA licensee has itself violated the PACA (Initial Decision and Order at 9).

JSG Trading Corp., *Tipco, Inc.*, and *Sid Goodman & Co.* each involve a PACA licensee’s illegal payments to a produce buyer’s purchasing agent to induce the purchasing agent to purchase produce from the PACA licensee. None of the three cases hold, as the Chief ALJ states, that the PACA licensee must have actual knowledge that its employee made illegal payments or that the PACA licensee must have condoned its employee’s illegal payments in order to conclude that the PACA licensee violated the PACA.

Second, Complainant contends the Chief ALJ erroneously failed to find that Mark Alfisi paid unlawful gratuities to William J. Cashin during the period March 1999 through August 1999 (Complainant’s Appeal Pet. at 14-15).

Complainant alleges that Respondent’s employee, Mark Alfisi, paid unlawful gratuities to a United States Department of Agriculture inspector during the period March 29, 1999, through August 5, 1999 (Amended Compl. ¶¶ IV-V). The evidence

establishes that the grand jury indicted Mark Alfisi on one count of conspiracy to commit bribery and on 13 counts of bribing a United States Department of Agriculture inspector, in amounts totaling \$3,160, during the period March 29, 1999, through August 5, 1999. The indictment states that the object of the conspiracy to commit bribery and the bribery was to influence the outcome of inspections of fresh fruit and vegetables at Respondent's facility.

(CX 67.) After trial, Mark Alfisi was convicted of: (1) giving unlawful gratuities in amounts totaling \$1,400 to a public official in violation of 18 U.S.C. § 201(c) with respect to six counts of the indictment; (2) paying bribes to a public official in amounts totaling \$1,760 in violation of 18 U.S.C. § 201(b) with respect to seven counts of the indictment; and (3) conspiracy to commit bribery in violation of 18 U.S.C. § 371 with respect to one count of the indictment (CX 68).

Despite the evidence supporting a finding that Respondent's employee paid unlawful gratuities to United States Department of Agriculture inspector William J. Cashin, the Chief ALJ did not make a finding with respect to these unlawful gratuities and did not explain his failure to find that Mark Alfisi paid these unlawful gratuities. Based on the record before me, I find that during the period March 29, 1999, through June 18, 1999, Mark Alfisi paid unlawful gratuities to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities that Respondent purchased from produce sellers.

Third, Complainant asserts Respondent's payments of unlawful gratuities to a United States Department of Agriculture inspector and payments of bribes to a United States

Department of Agriculture inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are serious violations of the PACA (Complainant's Appeal Pet. at 15-18).

I agree with Complainant's assertion that Respondent's payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are serious violations of the PACA.

Produce sellers often ship perishable agricultural commodities great distances to produce buyers. The value of perishable agricultural commodities may be greatly affected by the condition and quality of the produce. An objective and impartial produce inspection and an accurate determination of condition and quality of produce are essential to the proper adjustment of produce price. United States Department of Agriculture inspectors provide these objective and impartial produce inspections and accurate determinations of the condition and quality of produce. The United States Department of Agriculture's inspection system is based upon the trust that produce buyers and sellers have in the ability, objectivity, impartiality, and integrity of United States Department of Agriculture inspectors.

A produce buyer's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector

and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, unlawful gratuities and bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust in the entire inspection system.

Basil Coale, a senior marketing specialist employed by the Agricultural Marketing Service, testified as to the impact on the produce industry of unlawful payments to United States Department of Agriculture inspectors, as follows:

. . . [The] Fresh Products branch of the USDA issues over 150,000 [inspection] certificates in a given year. And the industry uses these certificates to quickly and equitably resolve their disputes directly amongst themselves. Making illegal payments to an inspector undermines the credibility of the inspection process. Any lack of confidence in the inspection process could impact how hundreds, literally hundreds of disputes across the country in any given day are resolved. In addition, produce markets tend to be very competitive. And if one supplier -- excuse me. If one firm on that market is making illegal payments to an inspector, then other firms may feel compelled to do the same thing just to compete. And that can undermine the credibility of the entire market.

Tr. Apr. 8, 2003, at 101-02.

I have addressed the harm that results from bribery in other contexts. For instance, in *JSG Trading Corp.*, I addressed the harm to fair competition caused by produce sellers' bribery of purchasing agents, 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 JSG Trading Corp. (Decision on Remand as to JSG Trading Corp.), 58 Agric. Dec. 1041, 1048 (1999) (quoting *In re Tipco, Inc.*, 50 Agric. 871, 885 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1186 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *remanded*, 820 F.2d 1103 (9th Cir. 1987), *reprinted in* 51 Agric. Dec. 961 (1992)).

Bribes and unlawful gratuities paid by PACA licensees to United States Department of Agriculture inspectors can similarly harm fair competition. Produce companies competing with PACA licensees that pay bribes and unlawful gratuities to United States Department of Agriculture inspectors will have a competitive disadvantage vis-a-vis the bribing PACA licensee, which will presumably receive preferential treatment by United States Department of Agriculture inspectors and pay less for produce as a result of falsified inspection results.

In *In re Greenville Packing Co.*, 59 Agric. Dec. 194 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002), as in the instant proceeding, the respondent's employee had been convicted of bribing a United States Department of Agriculture inspector. The

Administrator, Food Safety and Inspection Service, United States Department of Agriculture, instituted an administrative proceeding against Greenville Packing Co., under the Federal Meat Inspection Act, as amended, and the Poultry Products Inspection Act, as amended, seeking to withdraw United States Department of Agriculture inspection services from Greenville Packing Co. In *Greenville*, I addressed the harmful effects of bribery on the United States Department of Agriculture meat and poultry inspection system, as follows:

Bribery goes to the heart of the FMIA and the PPIA. The United States Court of Appeals for the Sixth Circuit has recognized that “[b]ribing an inspector does strike at the heart of the meat inspection program and cannot be tolerated.” *Utica Packing Co. v. Block*, 781 F.2d 71, 78 (6th Cir. 1986). In addition, Mr. Van Blargan testified as to the significance of bribery in regard to the inspection system:

[B]ribery goes to the heart of the inspection system. We assign inspectors into that establishment to be impartial. They must be independent figures. They have to take independent action with regard to the effect of their actions as it relates to the industry.

If they accept bribes, . . . it compromises their integrity, their integrity as well as the integrity of the inspection system and the confidence that consumers put in the product that bears the mark of inspection.

In re Greenville Packing Co., 59 Agric. Dec. at 208.

Similarly, the payment of unlawful gratuities and bribes to a United States Department of Agriculture produce inspector strikes at the heart of the perishable agricultural commodities inspection system -- the United States Department of Agriculture produce inspector’s accurate and impartial assessment of the quality and condition produce.

The payment of unlawful gratuities and bribes to a United States Department of Agriculture produce inspector negates impartiality, or gives the appearance of negating impartiality, and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by United States Department of Agriculture inspectors.

Commission merchants, dealers, and brokers have a duty to refrain from paying unlawful gratuities in connection with the inspection of perishable agricultural commodities, a duty to refrain from paying bribes to influence the outcome of United States Department Agriculture inspections of perishable agricultural commodities, and a duty to refrain from paying unlawful gratuities or bribes which will or could undermine the trust a produce seller places in the accuracy of the United States Department of Agriculture inspection or the integrity of the United States Department of Agriculture inspector.

Fourth, Complainant asserts Respondent's payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector are willful, flagrant, and repeated violations of the PACA (Complainant's Appeal Pet. at 19-20).

I agree with Complainant's assertion that Respondent's payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector are willful, flagrant, and repeated violations of the PACA.

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.¹⁵ The record establishes that Mark Alfisi

¹⁵See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't 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 JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001), *aff'd*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *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 dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *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*, 526 U.S. 1098 (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, 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) ("‘Wilfully’ could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent

(continued...)

intentionally paid unlawful gratuities and bribes to William J. Cashin in connection with United States Department of Agriculture inspections of perishable agricultural commodities in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The relationship between a PACA licensee and its employees acting within the scope of their employment is governed by section 16 of the PACA (7 U.S.C. § 499p) which provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

¹⁵(...continued)

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.

Mark Alfisi was acting within the scope of his employment when he willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, willful violations by Respondent's employee are deemed to be willful violations by Respondent.¹⁶

Further, I conclude that Respondent's violations were flagrant. A violation of law is flagrant if it is "conspicuously bad or objectionable" or so bad that it "can neither escape notice nor be condoned."¹⁷ The payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are conspicuously bad and objectionable acts that cannot escape notice or be condoned because, as discussed in this Decision and Order, *supra*, they corrupt the United States Department of Agriculture's produce inspection system and disrupt the produce industry.

Moreover, I conclude that, as a matter of law, Respondent's violations are repeated because repeated means more than one.¹⁸ Mark Alfisi paid William J. Cashin multiple

¹⁶See note 13.

¹⁷Merriam-Webster's Collegiate Dictionary 441 (10th ed. 1997).

¹⁸See, e.g., *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating that violations are repeated under the PACA if they are not done simultaneously); *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 fall 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 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 violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972)

(continued...)

unlawful gratuities and bribes in connection with numerous inspections of perishable agricultural commodities (CX 67-CX 68).

Fifth, Complainant asserts that the appropriate sanction for Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is the publication of the facts and circumstances of the violations (Complainant's Appeal Pet. at 21-22).

I agree with Complainant's assertion that the publication of the facts and circumstances of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is appropriate.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

Complainant's sanction witness, Basil Coale, an administrative official charged with the responsibility for achieving the congressional purpose of the PACA, recommended

¹⁸(...continued)

(finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated); *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), *cert. denied*, 389 U.S. 835 (1967).

publication of the facts and circumstances of Respondent's failure to make full payment promptly and Respondent's payments of unlawful gratuities and bribes in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Tr. Apr. 8, 2003, at 96-103). Basil Coale based his recommendation on the number of violations, the seriousness of the violations, the impact that these types of violations have on the produce industry, and the need to deter Respondent and other potential violators from similar violations of the PACA (Tr. Apr. 8, 2003, at 101-02).

The purpose of a sanction in a PACA administrative disciplinary proceeding is to deter the violator and other potential violators from future violations of the PACA. Respondent, as a matter of law, is responsible for the unlawful conduct of its agents, officers, and other persons acting for or employed by Respondent. As discussed in this Decision and Order, *supra*, Mark Alfisi's payment of unlawful gratuities and bribes to a United States Department of Agriculture inspector constitute serious violations of the PACA.

If Respondent had a PACA license, revocation of Respondent's PACA license would be the appropriate sanction in this proceeding. However, Respondent's PACA license terminated on September 10, 2002, due to Respondent's failure to pay the required annual license fee (Tr. Dec. 18, 2002, at 70-71). Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture is authorized to publish the facts and circumstances of the violation. In light of the termination of Respondent's PACA

license, the seriousness of Respondent's willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the recommendation of the administrative officials charged with carrying out the purposes of the PACA, I conclude that the appropriate sanction for Respondent's violations of the PACA is the publication of the facts and circumstances of Respondent's violations.

Sixth, Complainant contends the Chief ALJ erroneously denied Complainant's motion requesting that the Chief ALJ reconsider his ruling requiring Complainant to submit William J. Cashin's unredacted amended tax returns to accompany the record. Complainant asserts the release of the personal information on the amended tax returns "would be an unwarranted invasion of Mr. Cashin's personal privacy, and more dangerously, the release could place Mr. Cashin at grave risk of personal harm." (Complainant's Appeal Pet. at 22-28.)

In April 1999, William J. Cashin entered into a cooperation agreement with the United States Attorney for the Southern District of New York in which, *inter alia*, William J. Cashin agreed to file amended tax returns for the years 1992 through 1998, which would reflect amounts he received in unlawful gratuities and bribes, and to pay past taxes owed to the Internal Revenue Service (CX 72). William J. Cashin testified that, in accordance with this cooperation agreement, he paid all past taxes owed to the Internal Revenue Service. Complainant introduced documents evidencing William J. Cashin's payments to the Internal Revenue Service. (CX 73; Tr. Apr. 8, 2003, at 56-59.) Respondent requested production of William J. Cashin's amended tax returns "so that they can be reviewed to see whether or

not the witness has testified accurately and truthfully.” (Tr. Apr. 8, 2003, at 75-76.)

Complainant objected to Respondent’s request and offered to withdraw Complainant’s evidence regarding William J. Cashin’s tax payments and have the portion of William J. Cashin’s testimony regarding the payment of past taxes stricken from the record in order to avoid having to supply William J. Cashin’s amended tax returns. Nonetheless, the Chief ALJ instructed the witness to produce the amended tax returns. (Tr. Apr. 8, 2003, at 80-94.)

On April 9, 2003, Complainant renewed his objection to Respondent’s request for the production of William J. Cashin’s amended tax returns (Tr. Apr. 9, 2003, at 3-19). Complainant proposed redaction of the amended tax returns. The Chief ALJ accepted Complainant’s proposed redactions and the redacted amended tax returns were marked “RX 19” and admitted into evidence. (Tr. Apr. 9, 2003, at 2, 81-90, 109, 138.) Respondent moved that an unredacted version of William J. Cashin’s amended tax returns be available for appellate review, as follows:

MR. GENTILE: . . . I would ask that the unredacted tax returns be in some way safeguarded for review because we have objected to the extent of the redactions that you have placed there, and for an appellate court to review the propriety of that act, they need to be preserved somehow, they can be sealed or whatever[.]

Tr. Apr. 9, 2003, at 129.

The Chief ALJ instructed the court reporter to mark the unredacted version of William J. Cashin’s amended income tax returns “RX 20” and indicated that he would admit RX 20 into evidence under seal (Tr. Apr. 9, 2003, at 129-30). Complainant objected to the

admission of RX 20 on the grounds that the United States Department of Agriculture has no method by which to prevent the release of documents admitted into evidence under seal and the release of the information in RX 20 would constitute an unwarranted invasion of William J. Cashin's privacy and would present a risk to William J. Cashin's safety (Tr. Apr. 9, 2003, at 130-32). The Chief ALJ overruled Complainant's objections and admitted RX 20 into evidence under seal, as follows:

MR. STANTON: Your Honor, our position with respect to putting these unredacted documents under seal is this. We have to object strongly, strenuously to this procedure, and the reason why is that there is nothing in the rules of practice or any rule or regulation of the department that we know of that considers the possibility of documents being under seal, so if the documents are with the Department of Agriculture, and let's say somebody makes a FOIA request there's no way that we could prevent those documents from being released. Now if there was something that would provide any sense of security so we'd know that the general public couldn't see these documents then it would be a different story, but we don't know of anything of that nature. So it seems to me as long as these documents are with the department they can be released, and this is no security at all so we have to object to their admission in any way.

ADMINISTRATIVE LAW JUDGE: Under FOIA under privacy you couldn't protect them. There's nothing in the rules of practice that has happened before where there's been confidential information by businesses that didn't want information released to the public that they placed under seal the information that is not for public consumption.

MR. STANTON: I don't know that there's anything in the rules of practice that provides for it though.

ADMINISTRATIVE LAW JUDGE: There's nothing in the rules of practice providing that. It's just a procedure that has been used in other cases.

MR. STANTON: Unless there's something that would guarantee that they wouldn't be released. Even under the Privacy Act, there are exceptions to the Privacy Act, Your Honor, and we're very concerned about Mr. Cashin's privacy.

ADMINISTRATIVE LAW JUDGE: I appreciate that. I'm concerned about it too.

MR. STANTON: And he's testified in criminal trials. He could be a target of revenge in some way and that's obviously why we're concerned about it. So unless there's some guarantee that this information won't be made available we can't agree to it. We just can't do it.

ADMINISTRATIVE LAW JUDGE: *Well, notwithstanding, I will order that RX-20 be placed under seal and made part of the record, be at least sealed. The reporter will make it in a separate sealed envelope accompanying the record.*

MR. STANTON: Well, Your Honor, I've been instructed I'm not to comply with this order.

ADMINISTRATIVE LAW JUDGE: All right.

MR. STANTON: Unless there's a guarantee of security of these documents.

ADMINISTRATIVE LAW JUDGE: I can't require you to comply with it, Mr. Stanton. I have no authority to order you to comply. I can order you, but I have no way of enforcing that order.

MR. GENTILE: Well, I suggest that there is a way. If you would be good enough to order it, he refuses to do it, we'll make an application to hold him in contempt. It's an outrage that the Department of Agriculture would say to you they won't follow your order. That's an outrage.

ADMINISTRATIVE LAW JUDGE: Well, whatever you want to do, you may do, Mr. Gentile.

MR. GENTILE: Well, make the order. Make the order and have them in contempt. I'll go into federal court tomorrow.

ADMINISTRATIVE LAW JUDGE: *I've ordered that. I said that they'll be made part of the record. If he doesn't want to comply with it, then you do what you want to do, but I've issued the ruling that it will be made part of the record.*

MR. STANTON: Your Honor, can you say for the record there will be any consequences as a result of not complying with your order?

ADMINISTRATIVE LAW JUDGE: As I said, there's no consequences that I can impose. Now whether there's other consequences, I don't know. I don't know what the procedures are but there's nothing I can do. There's nothing in the rules of practice that gives me any authority to do anything. *So make RX-20 -- the ruling is that RX-20 will be placed under seal and made part of the record.*

MR. STANTON: Your Honor, can I request that we have an opportunity to file a memorandum of law on this issue before making a final ruling on it?

ADMINISTRATIVE LAW JUDGE: No, but you can file your -- I don't want to hold things up. You can file your memorandum of law asking me to reconsider my ruling.

MR. STANTON: We would like that opportunity, Your Honor.

ADMINISTRATIVE LAW JUDGE: You may do that. You may file it.

MR. STANTON: Do you want to give us a date by which we should get that in?

ADMINISTRATIVE LAW JUDGE: Well, I don't want to delay briefing in the case so if you want to file it any time you wish until briefs are due.

MR. GENTILE: Well, I need the opportunity to take action against them so I mean we need to foreclose this thing. They're taking the position that they don't have to follow your order.

ADMINISTRATIVE LAW JUDGE: All right.

MR. GENTILE: It seems that they must not comprehend things -- you're a Judge. You're going to be hold it secret. It goes to other judges.

ADMINISTRATIVE LAW JUDGE: All right. Okay, Mr. Gentile, let's see, the 9th, to give you time. If you want to do it by April 21, give me your memorandum or motion for reconsideration by April 21, and then, Mr. Gentile, you will have then until the 2nd of May to file your response. Any other matters before we set briefing dates?

Tr. Apr. 9, 2003, at 131-35 (emphasis added).¹⁹

¹⁹After the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision, I discovered that the Hearing Clerk failed to transmit RX 20. On inquiry, the Hearing Clerk informed the Office of the Judicial Officer's legal technician that Complainant's counsel had possession of RX 20. On December 4, 2003, I requested that Complainant's counsel provide me with RX 20. Complainant's counsel informed me that he had possession of William J. Cashin's unredacted amended tax returns, but that the unredacted amended tax returns are not part of the record. Complainant's counsel declined to provide me with William J. Cashin's unredacted amended tax returns. I find Complainant's position that William J. Cashin's unredacted amended tax returns are not part of the record perplexing. The record establishes that the Chief ALJ instructed the court reporter to mark William J. Cashin's unredacted amended tax returns RX 20 and admitted RX 20 into evidence (Tr. Apr. 9, 2003, at 2, 131-35).

Generally, the entire record must be transmitted to the Office of the Judicial Officer before I can decide a case. However, RX 20, as described in the record, is not

(continued...)

On May 23, 2003, Complainant filed “Complainant’s Motion to Reconsider Ruling Placing Documents Under Seal.” Complainant requested, *inter alia*, that the Chief ALJ withdraw his order “that Complainant provide Mr. Cashin’s unredacted amended tax returns for placement under seal unless procedures are established that would guarantee that this information will not be released to the general public, so as to protect Mr. Cashin’s personal safety” (Complainant’s Motion to Reconsider Ruling Placing Documents Under Seal at 7).

The Chief ALJ denied Complainant’s Motion to Reconsider Ruling Placing Documents Under Seal stating:

At the hearing I ruled that Cashin’s unredacted amended tax returns that purportedly showed his tax payments to the Internal Revenue Service for the unlawful money he received were not admissible. However, I also ruled that Respondent could make an offer of proof and that the rejected exhibits would be sealed and accompany the record. In a post hearing motion, Complainant asked that I reconsider the ruling on the ground that even if the documents were placed under seal Cashin would not be adequately protected from persons who may seek to obtain his social security number and current address. The Rules of Practice, 7 C.F.R. § 1.141, provide “(7) *Offer of proof*. Whenever evidence is excluded by the Judge, the party offering such evidence may make an offer of proof, which shall be included in the transcript or recording . . . If the evidence consists of an exhibit, it shall be

¹⁹(...continued)

relevant to Respondent’s willful, flagrant, and repeated failures to make full payment promptly to its produce sellers in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, my consideration of RX 20 would not alter the disposition of this proceeding. Moreover, as Respondent argues, RX 20 is relevant only to William J. Cashin’s credibility (Tr. Apr. 8, 2003, at 75-76), and I find the record sans RX 20 is sufficient to determine William J. Cashin’s credibility. Therefore, I find no reason to dismiss the proceeding or delay the proceeding merely because Complainant has declined to provide me with RX 20.

marked for identification and inserted in the hearing record . . .”
Complainant’s motion for reconsideration is denied.

Initial Decision and Order at 5 n.1.

As an initial matter, the record does not indicate that Respondent made an offer of proof with respect to RX 20; therefore, I reject the Chief ALJ’s reasons for denying Complainant’s Motion to Reconsider Ruling Placing Documents Under Seal.

Moreover, while administrative law judges have authority to restrict access to evidence by placing evidence under seal²⁰ and administrative law judges and the Judicial Officer have long exercised the authority to place evidence under seal,²¹ evidence placed under seal could be inadvertently released to the public, as Complainant suggests. My review of *The Hearing Clerk’s Office Procedures Manual* reveals no procedures designed to prevent the inadvertent release of evidence placed under seal. Therefore, based on the significant threat that release of RX 20 could pose to William J. Cashin’s safety, I conclude that the Chief ALJ’s order that Complainant submit RX 20, without specifying procedures

²⁰See 7 C.F.R. § 1.144(c). Cf. *Midway Farms v. United States Dep’t of Agric.*, 188 F.3d 1136, 1140-41 (9th Cir. 1999) (stating it is within the inherent powers of the administrative law judge to conduct hearings *in camera* upon a showing of good cause and to impose protective conditions upon materials submitted *in camera*).

²¹See *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. ___, slip op. at 3 n.1 (Oct. 29, 2003) (stating that the chief administrative law judge placed complainant’s exhibit number 9 under seal); *In re Miguel A. Machado* (Remand Order), 42 Agric. Dec. 793, 794 (1983) (containing the Judicial Officer’s order that an investigative report and the administrative law judge’s determination regarding the release of the investigative report be sealed, delivered to the Hearing Clerk, and available for review only by the Judicial Officer and any reviewing court).

in addition to placing RX 20 under seal,²² is error. Complainant shall maintain RX 20 in a manner designed to prevent the inadvertent release of RX 20. Complainant shall maintain RX 20 in this manner until the Judicial Officer or a court of competent jurisdiction orders Complainant to submit RX 20 to the Hearing Clerk, the Judicial Officer, or the court. Complainant or Respondent may propose procedures for the Hearing Clerk's maintenance of RX 20 in a manner that would reduce the risk of the inadvertent release of RX 20 to an acceptable level.

Respondent's Appeal Petition

Respondent raises one issue in Respondent's Appeal Petition. Respondent contends the Chief ALJ's finding that Respondent owed its produce creditors \$479,602.33 as of the date the hearing began, is error. Respondent asserts the \$479,602.33 debt found by the Chief ALJ to have been unpaid at the time of the hearing had been extinguished by a prior proceeding between Respondent and its produce creditors; therefore, this case is a "slow-pay" case, not a "no-pay" case, and the case should be dismissed. (Respondent's Appeal Pet. at 3-6.)

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.²³ In any PACA disciplinary proceeding in which it is shown that a respondent has

²²See, for example, the procedures adopted to prevent the inadvertent release of documents in *In re Miguel A. Machado*, 42 Agric. Dec. 793 (1983).

²³7 U.S.C. § 499b(4).

failed to pay in accordance with the PACA and is not in full compliance²⁴ with the PACA within 120 days after the complaint is served on that respondent or the date of the hearing, whichever occurs first, the case is 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, is 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 compliance²⁵ with the PACA within 120 days after the complaint is served on that respondent or the date of the hearing, whichever occurs first, the case is 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 is assessed against the PACA licensee or the PACA licensee’s license is suspended.²⁶ Therefore, even if I were to find that the instant case is a “slow-pay” case, I would not dismiss this case, as Respondent requests.

Moreover, the facts in this proceeding do not support a conclusion that this case is a “slow-pay” case. Respondent contends this is a “slow-pay” case because Respondent made full payment to its produce creditors. Respondent asserts its produce creditors brought an

²⁴Full 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.

²⁵See note 24.

²⁶See note 3.

action in the United States District Court for the Southern District of New York against Respondent for non-payment and the Court entered a judgment against Respondent. Respondent asserts that it paid the judgment in full; thereby extinguishing Respondent's debt to Respondent's produce creditors before the instant case became a "no-pay" case. Respondent contends the doctrine of res judicata requires a finding that Respondent paid its produce debts in full before the date of the hearing and within 120 days after Respondent was served with the Complaint and requires the conclusion that this case is a "slow-pay" case. (Respondent's Appeal Pet. at 2-5.)

Under the doctrine of res judicata, a final judgment on the merits in a prior suit bars parties or their privies from litigating issues that were or could have been raised in that action.²⁷ Complainant was not a party to the action brought by Respondent's produce creditors in the United States District Court for the Southern District of New York. Moreover, the instant proceeding is a disciplinary action instituted against Respondent for alleged violations of the PACA, whereas Respondent describes its produce creditors' cause of action as "actions for non-payment." A PACA disciplinary proceeding does not deal with the relationship of a respondent to its produce creditors for the purpose of seeking

²⁷*Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996); *Flaherty v. Lang*, 199 F.3d 607, 612 (2d Cir. 1999); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999); *Irish Lesbian and Gay Organization v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998); *Computer Associates International, Inc. v. Altai, Inc.*, 126 F.3d 365, 369 (2d Cir. 1997), *cert. denied*, 523 U.S. 1106 (1998); *Harborside Refrigerated Services, Inc. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992); *Sure-Snap Corp. v. State Street Bank and Trust Co.*, 948 F.2d 869, 874 (2d Cir. 1991).

compensation for the produce creditors but, instead, involves the relationship of the respondent to the public, at least that part of the public in the business of selling and buying perishable agricultural commodities.²⁸ Therefore, I reject Respondent's contentions that *res judicata* applies to the instant proceeding and that the judgment in the action instituted in the United States District Court for the Southern District of New York against Respondent by Respondent's produce creditors requires the conclusion that this case is a "slow-pay" case and not a "no-pay" case.

Finally, the record establishes that not all of Respondent's produce creditors were parties to the action against Respondent in the United States District Court for the Southern District of New York. Moreover, many of Respondent's produce creditors who were parties to the action against Respondent agreed to accept 75 cents on the dollar for their claims against Respondent. (CX 64-CX 65a.) While the United States District Court for the Southern District of New York ordered partial payment in accordance with these agreements and Respondent paid the judgment in full, the Judicial Officer has long held that a produce creditor's acceptance of partial payment in full satisfaction of a debt does not constitute full payment in accordance with the PACA.²⁹ Therefore, I agree with the Chief

²⁸*In re Edward M. Hall*, 12 Agric. Dec. 725, 733 (1953); *In re James L. (Lonnie) Cecil*, 7 Agric. Dec. 1105, 1112 (1948).

²⁹*In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 723-24 (1994), *aff'd*, 50 F.3d 52 (D.C. Cir. 1995); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 619 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 625-27 (1989); *In re Joe Phillips & Associates, Inc.*, 48 Agric. Dec. 583, 588 (1989), *aff'd*, 923 F.2d 862, 1991 WL 7136 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847 (1991) (not to be cited as precedent under 9th Circuit Rule

(continued...)

ALJ's finding that, as of the date of the hearing, Respondent had failed to make full payment for perishable agricultural commodities that Respondent purchased in interstate commerce and I reject Respondent's contention that this case is a "slow-pay" case. Instead, I find that this case is a "no-pay" case.

Findings of Fact

1. During the period of the violations alleged in the Amended Complaint, Respondent was a New York corporation whose business address was 253-256 B NYC Terminal Market (Hunts Point), Bronx, New York 10474.
2. During the period of the violations alleged in the Amended Complaint, Respondent operated under PACA license number 182992.
3. During the period September 4, 2000, through February 20, 2001, Respondent failed to make full payment promptly to 58 produce sellers in the total amount

²⁹(...continued)

36-3); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241, 1250 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 590 (1983); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1163-65 (1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1136 (1981); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685 (1980), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (Table), *printed in* 41 Agric. Dec. 88 (1982); *In re Baltimore Tomato Co.*, 39 Agric. Dec. 412, 414 (1980); *In re Hal Merdler Produce, Inc.*, 37 Agric. Dec. 809, 810 (1978); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1633 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1884 (1975); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 733-40 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

of \$2,351,432.86 for 424 transactions of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce.

4. Respondent ceased operations in or about February 2001.
5. Respondent's PACA license terminated on September 10, 2002.
6. During the week prior to commencement of the hearing in this proceeding, a

United States Department of Agriculture investigator contacted Respondent's unpaid produce sellers to determine the status of the debts listed in the Amended Complaint. This investigation revealed that Respondent continued to owe its produce sellers at least \$479,602.33 for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce. Respondent had not made full payment for its perishable agricultural commodity purchases as of the date of the hearing.

7. In 1997, Respondent hired Mark Alfisi to be a produce buyer.
8. Prior to March 1999, Mark Alfisi made illegal payments to a United States

Department of Agriculture inspector in order to influence the outcome of United States Department of Agriculture inspections of perishable agricultural commodities that Respondent purchased from produce sellers.

9. During the period April 1999 through August 1999, Mark Alfisi bribed a public official by making cash payments in the total amount of \$1,760 to a United States Department of Agriculture inspector in order to influence the outcome of United States Department of Agriculture inspections of perishable agricultural commodities that Respondent purchased from produce sellers.

10. During the period March 29, 1999, through June 18, 1999, Mark Alfisi gave unlawful gratuities to a public official by making cash payments in the total amount of \$1,400 to a United States Department of Agriculture inspector in connection with United States Department of Agriculture inspections of perishable agricultural commodities that Respondent purchased from produce sellers.

11. Mark Alfisi used the fraudulent information obtained from unlawful payments made to a United States Department of Agriculture inspector to make false and misleading statements to Respondent's perishable agricultural commodity sellers.

Conclusions of Law

1. Respondent engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to its produce sellers.

2. Respondent engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector.

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

ORDER

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

Done at Washington, DC

December 16, 2003

William G. Jenson
Judicial Officer