UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-01-0026
	)	
Post & Taback, Inc.,	)	
	)	
Respondent	)	**Order Denying Petition to Reconsider**

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 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 Respondent made illegal payments to United States Department of Agriculture inspectors on numerous occasions prior to March 29, 1999; (4) alleging 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.

Complainant and Respondent filed post-hearing briefs, and 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).

Complainant and Respondent appealed to the Judicial Officer, and on December 16, 2003, I issued a "Decision and Order" in which I: (1) concluded that 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) concluded that 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; and (3) ordered the publication of the facts and circumstances set forth in the Decision and Order.[1]

On January 22, 2004, Respondent filed a "Petition to Reconsider." On February 10, 2004, Complainant filed "Complainant's Opposition to Respondent's Petition to Reconsider." On February 12, 2004, the Hearing Clerk transferred the record to the Judicial Officer for reconsideration of the December 16, 2003, Decision and Order.

Complainant's exhibits are designated by "CX" and transcript references are designated by "Tr."

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises three issues in Respondent's Petition to Reconsider. First, Respondent contends I erroneously concluded that at the commencement of the hearing Respondent owed its produce sellers at least $479,602.33 for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate commerce. Respondent asserts its produce sellers brought an action against Respondent for non-payment. After a judgment against Respondent, Respondent paid the judgment in full; thereby extinguishing Respondent's debt to Respondent's produce sellers prior to the commencement of the hearing in this proceeding. Respondent contends the doctrine of res judicata requires a finding that Respondent paid its produce debts in full before the date of the hearing. (Respondent's Pet. to Recons. at 1-3, 5.)

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[1] *In re Post & Taback, Inc.*, 62 Agric. Dec. ___ , slip op. at 56 (Dec. 16, 2003).

Respondent, citing 73A NY Jur. 2d *Judgments* § 328, states, under the doctrine of res judicata or claim preclusion, an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue as to the parties in all other actions. The doctrine of res judicata gives binding effect to the judgment of a court of competent jurisdiction and prevents parties from subsequently relitigating any questions that were necessarily decided therein. (Respondent's Pet. to Recons. at 2.)

I agree with Respondent that, under the doctrine of res judicata, a final judgment on the merits in a prior suit bars parties (or their privies) from litigating questions decided in that prior action.[2] However, the doctrine of res judicata does not preclude Complainant from litigating the issue of Respondent's failure to pay its produce sellers prior to the commencement of the hearing in this proceeding because Complainant was not a party to the action brought by Respondent's produce sellers. Moreover, the instant proceeding is a disciplinary action instituted against Respondent for alleged violations of the PACA, whereas Respondent's produce sellers' cause of action was for non-payment for produce. A PACA disciplinary proceeding does not deal with the relationship of a respondent to its

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[2]*See 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).

produce sellers for the purpose of seeking compensation for the produce sellers 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.[3] Therefore, I reject Respondent's contention that the judgment in the action instituted against Respondent by Respondent's produce sellers and Respondent's payment of that judgment requires a finding in this proceeding that Respondent paid its produce debts in full before the date of the hearing.

Finally, the record establishes that not all of Respondent's produce sellers were parties to the action against Respondent for non-payment for produce. Moreover, many of Respondent's produce sellers who were parties to the action against Respondent agreed to accept 75 cents on the dollar for their claims against Respondent. (CX 64-65a.) The Judicial Officer has long held that a produce seller's acceptance of partial payment in full satisfaction of a debt does not constitute full payment in accordance with the PACA.[4]

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

[4]*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 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.

(continued...)

Therefore, I reject Respondent's contention that, as of the date of the hearing, Respondent made full payment for perishable agricultural commodities that Respondent purchased in interstate commerce.

Second, Respondent contends Complainant did not prove bribery and the Judicial Officer's finding that Respondent's employee, Mark Alfisi, committed bribery, is error (Respondent's Pet. to Recons. at 3-4).

Complainant introduced evidence to show 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 fruits 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

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[4](...continued)
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).

bribery in violation of 18 U.S.C. § 371 with respect to one count of the indictment (CX 68). Mark Alfisi appealed his conviction to the United States Court of Appeals for the Second Circuit which affirmed the conviction.[5]

Moreover, a United States Department of Agriculture inspector, William J. Cashin, testified that, after Mark Alfisi's employment by Respondent, he (Cashin) 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 the 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 more 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

[5]*United States v. Alfisi*, 308 F.3d 144 (2d Cir. 2002).

Agriculture inspection certificates that the produce was over the good delivery marks (Tr. Dec. 19, 2002, at 80).

Respondent failed to rebut Complainant's evidence that Mark Alfisi had committed bribery; therefore, I found, *inter alia*, that the record contained substantial evidence that Mark Alfisi paid bribes to a public official in amounts totaling $1,760 in violation of 18 U.S.C. § 201(b). Nothing in Respondent's Petition to Reconsider convinces me that my finding that 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, is error.

Third, Respondent contends it is not responsible for its employee's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector. Respondent asserts the Judicial Officer misconstrued and misinterpreted section 16 of the PACA (7 U.S.C. § 499p) and suggests that *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584 (6th Cir. 2003), was wrongly decided. (Respondent's Pet. to Recons. at 4.)

I disagree with Respondent's contention that it is not responsible for its employee's payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector. 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 unambiguously 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 and bribery and would not have condoned the unlawful gratuities and bribery had they known of them.[6] 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

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[6]*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).

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 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).

Respondent provides no basis for its contention that I misconstrued and misinterpreted section 16 of the PACA (7 U.S.C. § 499p). I find the plain language supports my view that, 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. Moreover, both the Court in *H.C. MacClaren, Inc. v. United States Dep't of Agric.* and the Court in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, construe section 16 of the PACA (7 U.S.C. § 499p) as providing that a willful violation of the PACA by a PACA licensee's employee is deemed the willful violation of the PACA licensee. Respondent raises no meritorious argument to support its suggestion that *H.C. MacClaren, Inc. v. United States Dep't of Agric.* was wrongly decided.

For the foregoing reasons and the reasons set forth in *In re Post & Taback, Inc.*, 62 Agric. Dec. ___ (Dec. 16, 2003), Respondent's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.[7] Respondent's Petition to Reconsider was timely filed and automatically stayed the December 16, 2003, Decision and Order. Therefore, since Respondent's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Post & Taback, Inc.*, 62 Agric. Dec. ___ (Dec. 16, 2003), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

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[7]*In re Janet S. Orloff*, 62 Agric. Dec. 281, 292 (2003) (Order Denying Pet. for Recons. as to Merna K. Jacobson); *In re PMD Produce Brokerage Corp.*, 61 Agric. Dec. 389, 404 (2002) (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

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 *In re Post & Taback, Inc.*, 62 Agric. Dec. ___ (Dec. 16, 2003), and in this Order Denying Petition to Reconsider shall be published, effective 60 days after service of this Order on Respondent.

Done at Washington, DC

February 13, 2004

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William G. Jenson
Judicial Officer