

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-02-0023
B.T. Produce Co., Inc.,)	
)	
Respondent)	
	and	
In re:)	PACA Docket No. APP-03-0009
Louis R. Bonino,)	
)	
Petitioner)	
	and	
In re:)	PACA Docket No. APP-03-0011
Nat Taubenfeld,)	
)	
Petitioner)	Decision and Order

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on August 16, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory

Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Agricultural Marketing Service alleges: (1) B.T. Produce Co., Inc. [hereinafter B.T. Produce], during the period March 1999 through August 1999, through its officer, William Taubenfeld, made illegal payments to a United States Department of Agriculture inspector in connection with 42 inspections of perishable agricultural commodities which B.T. Produce purchased, received, and accepted from 26 sellers in interstate or foreign commerce; (2) B.T. Produce, on numerous occasions prior to March 1999, made illegal payments to a United States Department of Agriculture inspector; and (3) B.T. Produce, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).¹ On September 30, 2002, B.T. Produce filed an answer denying the material allegations of the Complaint and raising five affirmative defenses.²

On March 31, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce during the period March 1999 through August 1999, and prior to that time, when B.T. Produce violated the PACA. On April 18,

¹Compl. ¶¶ III-VI.

²Answer ¶¶ 4-21.

2003, Louis R. Bonino and Nat Taubenfeld each filed a Petition for Review of Chief's Determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's March 31, 2003, determinations that they were responsibly connected with B.T. Produce.

On June 20, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re B.T. Produce Co., Inc.*, PACA Docket No. D-02-0023, with the two responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011.³

On December 8-11, 2003, February 17-20, 2004, and August 3-4, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Christopher Young-Morales and Ann Parnes, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C. H. Mandell, Annandale, New Jersey, represented B.T. Produce and Louis R. Bonino. Jeffrey M. Chebot, Whiteman, Bankes & Chebot, Philadelphia, Pennsylvania, represented B.T. Produce and Nat Taubenfeld.

³*In re Louis R. Bonino* (Order Consolidating Cases For Hearing), PACA Docket No. APP-03-0009, filed June 20, 2003; *In re Nat Taubenfeld* (Order Consolidating Cases For Hearing), PACA Docket No. APP-03-0011, filed June 20, 2003.

On December 6, 2005, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded B.T. Produce committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when William Taubenfeld paid bribes to a United States Department of Agriculture inspector in connection with 42 inspections of perishable agricultural commodities which B.T Produce purchased, received, and accepted from 26 sellers in interstate or foreign commerce; (2) concluded Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA; and (3) assessed B.T. Produce a \$360,000 civil penalty in lieu of a 180-day suspension of B.T. Produce's PACA license.⁴ On February 15, 2006, the Chief ALJ modified the sanction imposed on B.T. Produce by assessing B.T. Produce a \$360,000 civil penalty in lieu of a 90-day suspension of B.T. Produce's PACA license.⁵

On April 10, 2006, B.T. Produce, Louis R. Bonino, Nat Taubenfeld, the Agricultural Marketing Service, and the Chief appealed to the Judicial Officer. On May 2, 2006, the Agricultural Marketing Service and the Chief filed a response to B.T. Produce's, Louis R. Bonino's, and Nat Taubenfeld's appeal petitions. On May 5, 2006, Nat Taubenfeld filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On May 8, 2006, Louis R. Bonino filed a response to the

⁴Initial Decision at 1-2, 17-19, 32.

⁵Modification of Decision.

Agricultural Marketing Service's and the Chief's appeal petition, and B.T. Produce filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On May 16, 2006, the Hearing Clerk transmitted the record, except for an exhibit identified as CX 21,⁶ to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I affirm the Chief ALJ's conclusions that B.T. Produce committed violations of the PACA and that Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA. However, I reject the sanction imposed by the Chief ALJ and conclude the appropriate sanction is the revocation of B.T. Produce's PACA license. Consequently, Louis R. Bonino and Nat Taubenfeld are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Agricultural Marketing Service exhibits are designated by "CX." B.T. Produce's exhibits are designated by "RX." Transcript references are designated by "Tr."⁷

⁶CX 21 is a tape recording of an April 23, 1999, conversation between William Taubenfeld and William Cashin which the Chief ALJ received into evidence over the objection of counsel for B.T. Produce, Louis R. Bonino, and Nat Taubenfeld (Tr. 958-1030).

⁷Transcript page references in this Decision and Order differ from transcript page references in the Chief ALJ's Initial Decision. References to page numbers in this Decision and Order are determined by use of the printed official transcript on file in the Hearing Clerk's office.

The exhibits upon which the Chief relied for his responsibly connected determination related to Louis R. Bonino are designated by “RC-Bonino.” The exhibits upon which the Chief relied for his responsibly connected determination related to Nat Taubenfeld are designated by “RC-Taubenfeld.”

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

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

....

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

....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

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

(b) Refusal of license; grounds

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

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

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

....

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

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

reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(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.

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

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

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

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

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

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

.....

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed \$2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the

business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

§ 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. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b), (e), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

.....

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section—

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

.....

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

(b) Whoever—

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

(A) to influence any official act[.]

....

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

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

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

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

....

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

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

DECISION

Decision Summary

I conclude B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as a consequence of William Taubenfeld's (B.T. Produce's secretary and director) paying bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities which B.T. Produce purchased, received, and accepted in interstate or

foreign commerce. Based on this conclusion, I revoke B.T. Produce's PACA license. I also conclude Louis R. Bonino and Nat Taubenfeld were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Louis R. Bonino and Nat Taubenfeld are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Factual Background

Hunts Point Terminal Market, located in New York City, is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of B.T. Produce. The produce houses at Hunts Point Terminal Market handle large volumes of produce delivered from points throughout the world. Because produce may have been shipped from many thousands of miles away from New York City, inspections by United States Department of Agriculture inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point Terminal Market.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may request inspection at the behest of the shipper or another party. Approximately 22,000 produce inspections are conducted annually by United States Department of Agriculture inspectors at Hunts Point Terminal Market. These inspections are crucial to the successful working of the Hunts Point Terminal

Market and other produce markets, as the United States Department of Agriculture is a neutral party that examines the produce and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the produce. The United States Department of Agriculture inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the produce and can result in the renegotiation of terms regarding the sale of the produce.

As a general rule, produce must be sold as quickly as possible. This need for expedited sale is particularly true with produce that is near ripe or ripe or that has defects, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where a United States Department of Agriculture inspection is requested, immediate sale of the produce is often beneficial to the wholesaler and the shipper in order to obtain the best price for the produce. Essentially, every hour ripe or defective produce remains unsold costs someone money. However, inspection of the produce is in everyone's best interest, so that an accurate accounting of the state of the produce is available to settle possible disputes.

A 1999 investigation, known as Operation Forbidden Fruit, conducted primarily by the Federal Bureau of Investigation with the significant involvement of United States Department of Agriculture's Office of the Inspector General, identified a number of United States Department of Agriculture inspectors at the Hunts Point Terminal Market

who were receiving bribes in connection with the inspection of produce and a number of Hunts Point Terminal Market produce houses that were paying these bribes.

The Agricultural Marketing Service's principal witness, William J. Cashin, is a former United States Department of Agriculture inspector, who was caught accepting bribes and was arrested by the Federal Bureau of Investigation.⁸ To avoid a prison term, William Cashin agreed to cooperate with the investigation and to wear or carry devices allowing him to record, either through audio or audio-visual means, many of the transactions that involved the alleged offering and taking of bribes.⁹ During the course of William Cashin's participation in Operation Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, William Cashin continued his normal business activities as a United States Department of Agriculture produce inspector. At the conclusion of each business day, William Cashin would meet with Federal Bureau of Investigation and Office of the Inspector General agents to discuss the day's events, principally the transactions for which he received bribes and the amounts of the bribes. William Cashin gave the money he received as bribes during each of these meetings to Federal Bureau of Investigation

⁸Tr. 60.

⁹CX 5; Tr. 60-62.

and Office of the Inspector General agents.¹⁰ These meetings are recorded on the FBI 302 forms, many of which were received in evidence at the hearing.¹¹

William Cashin testified, for each of the 42 inspections that he conducted at B.T. Produce between the time of his arrest and his resignation, he was paid \$50 in bribes by William Taubenfeld, who at that time was the secretary and a director of B.T. Produce.¹² William Cashin stated, in connection with 60 percent to 75 percent of his inspections, he gave “help” to B.T. Produce in the form of overstating the percentage of defects, overstating the number of containers inspected, or misstating the temperatures of the load.¹³

William Taubenfeld, who is the son of Nat Taubenfeld, was indicted on October 21, 1999, for 13 counts of bribery of a public official.¹⁴ On May 16, 2000, William Taubenfeld pled guilty to a single charge of bribery of a public official in connection with three bribes he paid to William Cashin on July 14, 1999.¹⁵ In his plea, William Taubenfeld stated he paid the bribes to a United States Department of Agriculture inspector “with the expectation that on some occasions he would give me

¹⁰Tr. 61-62.

¹¹CX 6-CX 19.

¹²CX 1 at 9, 11-12, 15-16, 18-22, CX 20; Tr. 46-47.

¹³Tr. 48-53, 58-59.

¹⁴CX 3; Tr. 256-57.

¹⁵CX 4.

favorable treatment by downgrading his rating of produce that he was inspecting.”¹⁶

William Taubenfeld was sentenced to 15 months in prison, 3 years probation, and ordered to pay a \$4,000 fine and \$14,585 in restitution.¹⁷ William Taubenfeld’s connections with B.T. Produce were severed shortly after his arrest.¹⁸ William Taubenfeld did not appear at the hearing.

B.T. Produce handles second rate, third rate, and distressed produce.¹⁹ Much of the produce B.T. Produce handles has been rejected by other produce houses or stores. B.T. Produce has a reputation for being able to sell lower grades of produce or produce with significant defects for good value, so that others send B.T. Produce lower quality merchandise because B.T. Produce is able to make them more money than they could make otherwise. A number of witnesses testified they were aware that produce inspected by William Cashin at B.T. Produce contained many problems, since that was why they sent the produce to B.T. Produce in the first place, and they were not surprised when they saw the United States Department of Agriculture inspection certificates. Further, these witnesses were generally pleased with the results achieved by B.T. Produce in the sale of the produce.

¹⁶RX QQ at 12.

¹⁷CX 4; Tr. 257-58.

¹⁸Tr. 709.

¹⁹Tr. 605, 699, 1786-90.

Nat Taubenfeld,²⁰ the president and a director of B.T. Produce,²¹ has been in the fruit and vegetable business since he arrived in the United States in 1949.²² In 1990, Nat Taubenfeld founded the current B.T. Produce business (he had used the same name in a previous business a few decades earlier) with Louis R. Bonino as a part owner.²³ Nat Taubenfeld worked the fruit and vegetable side of the business, while Louis R. Bonino primarily served as office manager, supervising employees and managing money.²⁴ Nat Taubenfeld brought William Taubenfeld into the business from the time of its establishment and gradually brought his son David Taubenfeld in as well.²⁵ Nat Taubenfeld gave both William Taubenfeld and David Taubenfeld shares in the business, although no compensation was involved for these transactions and no share certificates were issued.²⁶

Nat Taubenfeld stated he was unaware that his son William Taubenfeld was bribing William Cashin. He further stated he had never given money to any United States

²⁰Nat Taubenfeld's given name is Naftali, but he is referred to in his business and in this Decision and Order as Nat.

²¹CX 1; RC-Taubenfeld 1.

²²Tr. 688-90.

²³Tr. 688, 696-99.

²⁴Tr. 698.

²⁵Tr. 701-02.

²⁶Tr. 703-04.

Department of Agriculture inspector to “attempt to influence the result of that produce inspection[.]”²⁷ However, Nat Taubenfeld stated that, on a number of occasions, he gave William Cashin money, not to influence inspections, but as an act of charity in response to solicitations from William Cashin for loans to help William Cashin in his relationship with his girlfriend.²⁸ Nat Taubenfeld was not sure of the time period for these loans. William Cashin testified that Nat Taubenfeld had been paying him bribes for years, even before he established B.T. Produce.²⁹

No evidence was introduced indicating that Louis R. Bonino knew anything about the bribes William Taubenfeld paid to William Cashin. Mr. Bonino was not involved in the buying and selling of fruit and vegetables and managed the other aspects of the business. Mr. Bonino, who retired on disability as a New York City police officer and who owned a trucking business before joining Nat Taubenfeld in forming B.T. Produce, signed checks and contracts, established surveillance measures, and managed office staff at B.T. Produce.³⁰ Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce from the time it was created in

²⁷Tr. 707.

²⁸Tr. 711-12.

²⁹Tr. 42-44.

³⁰ Tr. 595-602.

1990.³¹ As part of his duties, Louis R. Bonino handled the 30 to 40 reparation cases that arose as a result of Operation Forbidden Fruit, which resulted in B.T. Produce paying reparations of \$400,000 to \$500,000.³² Mr. Bonino expressed surprise as to why anyone would pay to inflate the defects or otherwise misstate the condition of fruits and vegetables that were already known to have substantial defects and which likely had already been rejected by others before being shipped to B.T. Produce and stated he was not aware of the illegal payments.³³

Much of the hearing consisted of testimony concerning the 42 United States Department of Agriculture inspection certificates and the “help” William Cashin provided B.T. Produce with respect to the produce that was the subject of these United States Department of Agriculture inspection certificates. Since William Cashin steadfastly maintained that he had no specific memory of how he helped B.T. Produce in any particular inspections and since the Agricultural Marketing Service called no witnesses who were connected to any of the 42 inspections to testify that they had been in any way impacted by William Cashin’s actions, there is no evidence that any particular United States Department of Agriculture inspection certificate was inaccurate. On the other hand, B.T. Produce personnel testified that each of the United States Department of

³¹CX 1; RC-Bonino 1.

³²Tr. 610-12.

³³Tr. 613-14.

Agriculture inspection certificates was accurate. Moreover, their testimony was corroborated in a number of instances by testimony from the shippers of the produce that the information on the United States Department of Agriculture inspection certificates was consistent with what they expected, given what these shippers knew of the condition of the produce.

While the Agricultural Marketing Service called no witnesses, other than William Cashin, who could have corroborated that any particular United States Department of Agriculture inspection certificate was falsified, B.T. Produce's witnesses testified as to their recollection of each transaction. Not only did Nat Taubenfeld and David Taubenfeld testify regarding produce they handled that was the subject of the 42 United States Department of Agriculture inspection certificates, but office manager Robin Long; salesman Michael Bonino, who is the son of Louis R. Bonino; Steven Goodman, who was affiliated with the shipper JSG Trading Corp.; Peter Silverstein, the president of Northeast Trading, Inc.; and Harold Levy, a fruit broker at Northeast Trading, Inc.; all testified as to their roles in many of these transactions.

I find several of the transactions worth discussing in more detail. For example, Nat Taubenfeld discussed one of the first inspections included in the indictment and cited in the Complaint, which was one of three that took place on March 24, 1999. This inspection involved a load of plums from David Oppenheimer and Company which had been received by B.T. Produce 2 days earlier. On the receiving ticket, Nat Taubenfeld

noted in his own handwriting that the plums were “very ripe.”³⁴ This notation indicated to him that “the merchandise had to be moved quick, sold under any price, and not play around with it.”³⁵ The shipment was “pas” or price after sale, indicating that a final price on the merchandise was not to be calculated until B.T. Produce sold or otherwise disposed of the produce.³⁶ United States Department of Agriculture inspection certificate number K-678085-2, indicating serious damage to 18 percent of the load³⁷ was not inconsistent with Nat Taubenfeld’s observations that the plums were very ripe. While David Oppenheimer and Company suggested that the price be \$9 per box of plums, David Oppenheimer and Company agreed to an adjustment from \$9 per box to \$8 per box after factoring in the prices B.T. Produce was able to get for the plums (averaging \$8.20), along with the costs associated with repacking or discarding some of the plums. In Nat Taubenfeld’s opinion, B.T. Produce suffered a net loss on the transaction.³⁸

Another transaction is the June 14, 1999, United States Department of Agriculture inspection of cherries received by B.T. Produce from Northeast Trading, Inc.³⁹ Nat

³⁴RX A at 1; Tr. 1095.

³⁵RX A at 1; Tr. 1095.

³⁶Tr. 1089.

³⁷RX A at 6.

³⁸RX A at 3; Tr. 1097-1100.

³⁹RX Q.

Taubenfeld indicated on the bill of lading that the cherries were “soft,”⁴⁰ as opposed to the firm cherries that customers desire.⁴¹ Nat Taubenfeld testified he received an average of \$5.26 per box under the market price for these cherries and he received a \$6 reduction from Northeast Trading, Inc., as a result. Nat Taubenfeld did not dispute United States Department of Agriculture inspection certificate number K-766717-3, which indicates the cherries had 21 percent defects.⁴² Peter Silverstein, the president of Northeast Trading, Inc., testified that he had no indication there was anything wrong with United States Department of Agriculture inspection certificate number 766717-3 and the shipper did not appeal the inspection. He thought it was likely that the older cherries in this shipment were competing against younger and fresher cherries.⁴³

With respect to pricing in general, Nat Taubenfeld emphasized that shippers and B.T. Produce had a very flexible relationship and that sometimes, when a shipper receives a higher price than would be expected from the sale of produce, the understanding is that B.T. Produce would be allowed to recoup a larger profit in a later transaction, to make up for a lesser profit or a loss for a different load.⁴⁴ Nat Taubenfeld pointed out that “the

⁴⁰RX Q at 3.

⁴¹Tr. 1148.

⁴²Tr. 1150-54.

⁴³Tr. 1648-49.

⁴⁴Tr. 1089-92.

relationship between the shipper and us plays a tremendous role in our business[.]”⁴⁵

“[I]t’s one hand washes the other. Sometimes you can make a few dollars more, and sometimes the shipper says that’s what I can give you and that’s what we do.”⁴⁶ David

Taubenfeld had a more dramatic explanation—“It’s a lot of begging. There’s a lot of begging to our customers and pleading and fighting over prices and things like that.”⁴⁷

David Taubenfeld added that they often “worked for nothing” on a particular load with the idea of keeping a shipper happy, so the shipper will help them out at a later time.⁴⁸

Even though the Agricultural Marketing Service was unable to demonstrate that any particular United States Department of Agriculture inspection certificate was falsified to benefit B.T. Produce, the only probative evidence offered as to the purpose for William Taubenfeld’s bribes was favorable treatment in the form of downgrading the quality of inspected produce, on what appears to be an as-needed basis. The portrayal by B.T. Produce of its shippers as satisfied with the results of United States Department of Agriculture inspections is belied by the significant number of reparation actions against B.T. Produce and approximately \$500,000 in reparation payments by B.T. Produce

⁴⁵Tr. 1092.

⁴⁶Tr. 1100.

⁴⁷Tr. 1795.

⁴⁸Tr. 1936.

generated by Operation Forbidden Fruit.⁴⁹ Certainly, even if produce which was expected by the shipper to be seconds or worse was falsely downgraded by the United States Department of Agriculture inspector, the shipper would have lower price expectations and the shipper would most likely view B.T. Produce as having done an apparently exceptional job of selling damaged goods, which view could inure to B.T. Produce's benefit in terms of future business.⁵⁰

David Nielsen, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified as to his role in the investigation of B.T. Produce. His methodology basically consisted of reviewing documents provided to the PACA Branch by the Federal Bureau of Investigation and the United States Department of Agriculture's Office of the Inspector General.⁵¹ He examined the B.T. Produce PACA license files and the complaint history of B.T. Produce, as well as the documents that were supplied to him.⁵² David Nielsen went to B.T. Produce's premises on March 26, 2001, as part of his investigation, particularly seeking out the purchase and sales records related to the United States Department of Agriculture inspection certificates that he had been given by the Federal

⁴⁹Tr. 610-12.

⁵⁰Tr. 1302-06.

⁵¹Tr. 247.

⁵²Tr. 252.

Bureau of Investigation and the Office of the Inspector General. He spent about 2 weeks on site in March and April 2001, and returned for another 2 weeks several months later.⁵³

While Mr. Nielsen testified that he produced a report of investigation concluding that B.T. Produce violated the PACA by paying bribes to a United States Department of Agriculture inspector to falsify 42 United States Department of Agriculture inspection certificates, he based that conclusion on the documents he had received from the Federal Bureau of Investigation and the Office of the Inspector General. Mr. Nielsen admitted under cross-examination that B.T. Produce had no records indicating any evidence of falsification of United States Department of Agriculture inspection certificates and no records supporting a finding that B.T. Produce paid bribes.⁵⁴ Likewise, although David Nielsen stated in his report that the 42 United States Department of Agriculture inspection certificates were used to obtain price adjustments, his report was not accurate.⁵⁵ David Nielsen also admitted that in other areas the conclusions in his investigation report were

⁵³Tr. 279.

⁵⁴Tr. 284-87.

⁵⁵Tr. 290-91.

not accurate⁵⁶ and that his statement in his investigation report about falsification was an assumption based on “my understanding of the information that I had been given.”⁵⁷

John A. Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified as the Agricultural Marketing Service’s sanctions witness. Mr. Koller testified that the payment of bribes by B.T. Produce “to a produce inspector, constitutes willful, repeated and flagrant violations of the PACA.”⁵⁸ Mr. Koller further testified that bribing an inspector “corrupts the inspection process”⁵⁹ and violates the fair trade practices provision of the PACA. He testified that the payment of bribes by William Taubenfeld constituted bribery by B.T. Produce since William Taubenfeld was an officer and employee of B.T. Produce

⁵⁶Specifically, Mr. Nielsen testified B.T. Produce made no adjustment on the produce B.T. Produce received from Trinity Fruit Sales Co., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX I; Tr. 308); B.T. Produce made no adjustment on the produce B.T. Produce received from Garden Fresh Distribution Services, Inc., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX G; Tr. 310); and B.T. Produce made no adjustment on the produce B.T. Produce received from Mission Produce, Inc., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX T; Tr. 310).

⁵⁷Tr. 321.

⁵⁸Tr. 490.

⁵⁹Tr. 491.

and since his actions were within the scope of his employment.⁶⁰ Mr. Koller pointed out that, when pleading guilty in court, William Taubenfeld admitted that the bribes were made with an expectation of favorable treatment on some occasions.⁶¹

Mr. Koller recommended that an appropriate sanction would be revocation of B.T. Produce's PACA license.⁶² He stated that civil penalties were not appropriate here, because "bribery payments being made to a produce inspector to obtain false information on the inspection . . . undermines the credibility of the inspection certificate itself, and . . . the inspection process and its credibility."⁶³ Mr. Koller also stated revocation was warranted because of the length of time the bribery had continued and because "USDA has consistently recommended license revocation in the case of bribery. . . ."⁶⁴ Even in instances in which a bribe was paid and the particular United States Department of Agriculture inspection certificate was accurate, the bribe payer benefits, according to Mr. Koller, because the bribe payer could benefit at a later time⁶⁵ and because bribery

⁶⁰Tr. 491.

⁶¹RX QQ; Tr. 496-97.

⁶²Tr. 499.

⁶³Tr. 502.

⁶⁴Tr. 503.

⁶⁵Tr. 516.

creates an “unlevel playing field.”⁶⁶ Indeed, in his guilty plea, William Taubenfeld stated the purpose of his illegal payments was for future benefits. However, Mr. Koller also admitted that the Agricultural Marketing Service was not able to identify a single one of the 42 United States Department of Agriculture inspections certificates that had been falsified.⁶⁷

Findings of Fact

1. B.T. Produce is a New York corporation whose business and mailing address is 163-166 Row A, Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to the instant proceeding, B.T. Produce was a PACA licensee.⁶⁸

2. William J. Cashin was employed as a produce inspector by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, at the Hunts Point Terminal Market, New York, from July 1979 through August 1999.⁶⁹

3. William Cashin participated in a scheme whereby he received bribes for the conduct of United States Department of Agriculture produce inspections. On March 23, 1999, William Cashin was arrested by agents of the Federal Bureau of Investigation and

⁶⁶Tr. 591.

⁶⁷Tr. 533.

⁶⁸CX 1.

⁶⁹Tr. 36.

the United States Department of Agriculture's Office of the Inspector General. After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau of Investigation with its investigation of bribery at Hunts Point Terminal Market.⁷⁰

4. With the approval of the Federal Bureau of Investigation and the United States Department of Agriculture's Office of the Inspector General, William Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. William Cashin surreptitiously recorded interactions with individuals at different produce houses using audio or audio-visual recording devices. At the end of each day, William Cashin gave the Federal Bureau of Investigation agents his tapes, gave the Federal Bureau of Investigation any bribes he received, and recounted his activities. The Federal Bureau of Investigation agents would prepare a FBI 302 report summarizing what William Cashin told them about that day's activities.⁷¹

5. Beginning in 1994, and more specifically, during the period March 24, 1999, through August 12, 1999, William Taubenfeld paid bribes to William Cashin. In particular, during the period March 24, 1999, through August 12, 1999, B.T. Produce, through William Taubenfeld, made the following payments to William Cashin, a United States Department of Agriculture produce inspector, in connection with 42 inspections of

⁷⁰CX 5; Tr. 60-62.

⁷¹CX 6-CX 19; Tr. 61-62.

perishable agricultural commodities that B.T. Produce purchased, received, and accepted from 26 produce sellers in interstate or foreign commerce:

a. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 24, 1999, inspection of apples shipped to B.T. Produce by Victor Joseph & Son, Inc., reflected on United States Department of Agriculture inspection certificate number K-678083-7.

b. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 24, 1999, inspection of plums shipped to B.T. Produce by Dole Fresh Fruit Company, reflected on United States Department of Agriculture inspection certificate number K-678084-5.

c. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 24, 1999, inspection of plums shipped to B.T. Produce by David Oppenheimer and Company, reflected on United States Department of Agriculture inspection certificate number K-678085-2.

d. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 23, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on

United States Department of Agriculture inspection certificate number

K-679809-4.

e. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 24, 1999, inspection of lettuce shipped to B.T. Produce by Sun America Produce, reflected on United States Department of Agriculture inspection certificate number K-765852-9.

f. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 24, 1999, inspection of mangos shipped to B.T. Produce by Deschino Produce & Imports, Inc., reflected on United States Department of Agriculture inspection certificate number K-765853-7.

g. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 24, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-765854-5.

h. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of mangos shipped to B.T. Produce by Diazteca Company, Inc.,

reflected on United States Department of Agriculture inspection certificate number K-765859-4.

i. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of cherries shipped to B.T. Produce by Trinity Fruit Sales Co., reflected on United States Department of Agriculture inspection certificate number K-765860-2.

j. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of hashiya and persimmons shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-765861-0.

k. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 25, 1999, inspection of pears shipped to B.T. Produce by Victor Joseph & Son, Inc., reflected on United States Department of Agriculture inspection certificate number K-765863-6.

l. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 4, 1999, inspection

of berries shipped to B.T. Produce by Fresh Harvest Int'l, reflected on United States Department of Agriculture inspection certificate number K-766504-5.

m. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 4, 1999, inspection of apples shipped to B.T. Produce by Dole Fresh Fruit Company, reflected on United States Department of Agriculture inspection certificate number K-766507-8.

n. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 10, 1999, inspection of papaya and mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-766702-5.

o. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-766714-0.

p. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of onions shipped to B.T. Produce by Quality First Marketing, Inc.,

reflected on United States Department of Agriculture inspection certificate number K-766715-7.

q. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Primavera Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-766716-5.

r. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-766717-3.

s. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Sunniland Fruit, Inc., reflected on United States Department of Agriculture inspection certificate number K-766718-1.

t. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 14, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc.,

reflected on United States Department of Agriculture inspection certificate number K-766719-9.

u. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of nectarines shipped to B.T. Produce by Kingsburg Apple Sales, reflected on United States Department of Agriculture inspection certificate number K-768355-0.

v. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-768356-8.

w. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of mangos shipped to B.T. Produce by Mission Produce, Inc., reflected on United States Department of Agriculture inspection certificate number K-768357-6.

x. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 8, 1999, inspection of nectarines shipped to B.T. Produce by Wileman Bros. & Elliott, Inc., reflected

on United States Department of Agriculture inspection certificate number K-768358-4.

y. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 14, 1999, inspection of plums and nectarines shipped to B.T. Produce by Wileman Bros. & Elliott, Inc., reflected on United States Department of Agriculture inspection certificate number K-768729-6.

z. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 14, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-768730-4.

aa. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 14, 1999, inspection of mangos shipped to B.T. Produce by Mission Produce, Inc., reflected on United States Department of Agriculture inspection certificate number K-768731-2.

bb. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on

United States Department of Agriculture inspection certificate number

K-768956-5.

cc. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-768957-3.

dd. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of limes shipped to B.T. Produce by Produce Plus, reflected on United States Department of Agriculture inspection certificate number K-768958-1.

ee. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of cherries and apples shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-768959-9.

ff. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of mangos shipped to B.T. Produce by New Zealand Gourmet, reflected

on United States Department of Agriculture inspection certificate number K-768960-7.

gg. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 21, 1999, inspection of cherries shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-768961-5.

hh. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 30, 1999, inspection of mangos shipped to B.T. Produce by Coast Tropical, reflected on United States Department of Agriculture inspection certificate number K-769369-3.

ii. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 30, 1999, inspection of mangos shipped to B.T. Produce by Tavilla Sales Co., reflected on United States Department of Agriculture inspection certificate number K-769397-1.

jj. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the July 30, 1999, inspection of pears shipped to B.T. Produce by Fruit Patch, Inc., reflected on

United States Department of Agriculture inspection certificate number

K-769398-9.

kk. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 3, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-769883-0.

ll. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 3, 1999, inspection of oranges shipped to B.T. Produce by Paul Steinberg Associates, reflected on United States Department of Agriculture inspection certificate number K-769884-8.

mm. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 6, 1999, inspection of mangos shipped to B.T. Produce by Dade South Fruits & Vegetables, Inc., reflected on United States Department of Agriculture inspection certificate number K-769899-6.

nn. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 6, 1999, inspection of plums shipped to B.T. Produce by Kingsburg Apple Sales, reflected

on United States Department of Agriculture inspection certificate number K-769900-2.

oo. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 6, 1999, inspection of mangos shipped to B.T. Produce by Turino, reflected on United States Department of Agriculture inspection certificate number K-770151-9.

pp. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 9, 1999, inspection of tomatoes shipped to B.T. Produce by Quality First Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-770160-0.⁷²

6. During the period in which he paid bribes to William Cashin, William Taubenfeld was employed by, and was the secretary and a director of, B.T. Produce.⁷³

7. William Taubenfeld paid bribes to William Cashin with the expectation that William Cashin would downgrade the quality of the produce he was inspecting, on an as-needed basis, to benefit B.T. Produce.⁷⁴

⁷²CX 6-CX 19; RX A-RX OO; Tr. 41-56, 58-59.

⁷³CX 1; CX 20 at 71-75.

⁷⁴RX QQ.

8. There is no evidence that any of the 42 United States Department of Agriculture inspection certificates cited in the Complaint were falsified.

9. B.T. Produce's position was improved by William Cashin's falsification of United States Department of Agriculture inspection certificates, on an as-needed basis, in exchange for bribes.⁷⁵

10. On October 21, 1999, an indictment, in which the grand jury charged William Taubenfeld with 13 counts of bribery of a public official, in violation of 18 U.S.C. § 201(b), was filed in the United States District Court for the Southern District of New York. The indictment charges that William Taubenfeld:

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

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	3/24/99	\$150
TWO	4/23/99	\$50
THREE	5/24/99	\$150
FOUR	5/25/99	\$200
FIVE	6/4/99	\$100
SIX	6/14/99	\$400
SEVEN	7/8/99	\$200
EIGHT	7/14/99	\$150
NINE	7/21/99	\$300
TEN	7/30/99	\$150
ELEVEN	8/3/99	\$100

⁷⁵Tr. 48-53, 58-59.

TWELVE	8/6/99	\$150
THIRTEEN	8/12/99	\$100

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)⁷⁶

The bribes charged in the indictment cover the payments William Taubenfeld made to William Cashin in connection with the 42 inspections of perishable agricultural commodities identified in Finding of Fact 5.⁷⁷

11. On May 16, 2000, William Taubenfeld pled guilty to Count 8 of the indictment referred to in Finding of Fact 10. Specifically, William Taubenfeld pled guilty to bribery of a public official (18 U.S.C. § 201(b)). William Taubenfeld was sentenced to 15 months in prison, 3-years probation, and ordered to pay a \$4,000 fine and \$14,585 in restitution.⁷⁸

12. During the period in which William Taubenfeld paid bribes to William Cashin, Nat Taubenfeld was the president and a director of B.T. Produce. Nat Taubenfeld was intimately involved in the day-to-day operations of B.T. Produce, particularly in the area of buying and selling of produce.⁷⁹

13. During the period in which William Taubenfeld paid bribes to William Cashin, Louis R. Bonino was the vice president, a director, and a holder of more than

⁷⁶CX 3.

⁷⁷CX 6-CX 19.

⁷⁸CX 4.

⁷⁹CX 1; RC-Taubenfeld 1; Tr. 700-01.

10 percent of the outstanding stock of B.T. Produce. Louis R. Bonino was involved in the day-to-day operations of B.T. Produce, principally managing the office aspect of operations.⁸⁰

14. There is no evidence that Nat Taubenfeld or Louis R. Bonino knew William Taubenfeld was bribing William Cashin.

Conclusions of Law

1. Payment of bribes to a United States Department of Agriculture produce inspector in connection with the inspection of produce constitutes a failure to perform an implied duty in connection with transactions involving perishable agricultural commodities in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), William Taubenfeld's payment of bribes to a United States Department of Agriculture produce inspector constitutes violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by B.T. Produce.

3. B.T. Produce committed 42 willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by paying bribes to a United States Department of Agriculture produce inspector.

4. The appropriate sanction for B.T. Produce's 42 violations of the PACA is revocation of B.T. Produce's PACA license.

⁸⁰CX 1.

5. Louis R. Bonino was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Louis R. Bonino is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

6. Nat Taubenfeld was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Nat Taubenfeld is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Discussion

I. Introduction

I find William Taubenfeld, an officer and a director of B.T. Produce, paid bribes to William Cashin in each of the 42 instances alleged in the Complaint. I further find bribery of a United States Department of Agriculture produce inspector violates the PACA and B.T. Produce's violations were willful, flagrant, and repeated. I find B.T. Produce is liable for these violations. I further find, while there is no evidence that any of the 42 United States Department of Agriculture inspection certificates that are the subject of this proceeding were falsified, the evidence shows William Taubenfeld paid the bribes with the expectation that B.T. Produce would receive help from William Cashin in

the form of falsified United States Department of Agriculture inspection certificates on an as-needed basis, and William Cashin actually provided B.T. Produce help in the form of falsified United States Department of Agriculture inspection certificates on an as-needed basis. I conclude the purposes of the PACA can best be achieved by the revocation of B.T. Produce's PACA license. Therefore, Louis R. Bonino and Nat Taubenfeld are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

II. B.T. Produce Violated the PACA

A. William Taubenfeld Bribe a USDA Inspector

The evidence clearly establishes that William Taubenfeld made \$50 payments to William Cashin in the 42 instances alleged in the Complaint. While William Taubenfeld pled guilty to only a single count of bribery based on three inspections for which he paid bribes on July 14, 1999, William Cashin's undisputed testimony, as corroborated in the FBI's 302 forms, along with William Taubenfeld's guilty plea, leave little doubt that William Taubenfeld's bribing William Cashin was part of a long-standing practice. It is likewise undisputed that William Taubenfeld was the secretary and a director of B.T. Produce at the time the violations alleged in the Complaint were committed.

B. B.T. Produce Is Liable for William Taubenfeld's PACA Violations

Section 16 of the PACA (7 U.S.C. § 499p) states, in every case, 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 employment or office, shall be deemed the act of the commission merchant, dealer, or broker. There is no disputing that William Taubenfeld paid bribes to William Cashin in connection with 42 inspections of perishable agricultural commodities and that the purpose for the bribes was to benefit B.T. Produce.

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.⁸¹ As long as William Taubenfeld was acting within the scope of his employment, which he clearly was, PACA violations committed by him are deemed to be violations by B.T. Produce.

Even if other officers, directors, and shareholders in B.T. Produce, as well as B.T. Produce's employees, were unaware of William Taubenfeld's PACA violations, the absence of actual knowledge is insufficient to rebut the burden imposed by section 16 of the PACA (7 U.S.C. § 499p). As a matter of law, PACA violations by an employee are violations by the PACA licensee, even if the PACA licensee's officers, directors, and owners had no actual knowledge of the violations and would not have condoned them.⁸² If a PACA licensee can be held responsible for the acts of an employee, who was not an officer, a director, or an owner, even where the company's officers, directors, and owners

⁸¹*In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. ___, slip op. at 24 (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 820 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁸²*In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. ___, slip op. at 25 (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is an officer and a director, whether or not the other officers and directors had actual knowledge of the violative conduct. The clear and specific language of the PACA would be defeated by any other interpretation.

C. Bribery of a USDA Inspector Violates the PACA

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity received in interstate or foreign commerce. I have consistently interpreted this provision to hold that a payment of a bribe to a United States Department of Agriculture produce inspector in connection with a produce inspection is a violation of the PACA.⁸³ Both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the Second Circuit have affirmed this interpretation.⁸⁴ A produce buyer's payment of bribes to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the

⁸³*In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. __ (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁸⁴*Coosemans Specialties, Inc. v. Department of Agric.*, No. 06-1199, 2007 WL 1029049 at *5 (D.C. Cir. Apr. 6, 2007); *G & T Terminal Packaging Co. v. U.S. Dep't of Agric.*, 468 F.3d 86, 96-97 (2d Cir. 2006).

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, 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.

D. B.T. Produce's PACA Violations Were Willful, Flagrant, and Repeated

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.⁸⁵ William Taubenfeld, and therefore B.T. Produce, knew the payments to William Cashin in connection with the 42 inspections involved in this proceeding were illegal, but essentially decided that he needed to make these payments for the benefit of B.T. Produce's business. Clearly, B.T. Produce made a business decision to violate the PACA. B.T. Produce's payments to William Cashin were clearly intentional.

⁸⁵*See, e.g., Allred's Produce v. U.S. 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. U.S. 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).

Likewise, B.T. Produce'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.⁸⁶ The payment of a bribe to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities is a conspicuously bad and objectionable act that cannot escape notice or be condoned because it undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of the United States Department of Agriculture produce inspector. Here, where the purpose of the bribes undisputedly would be to benefit B.T. Produce to the detriment of its shippers, sellers, or growers, B.T. Produce's long-standing practice of bribing William Cashin easily meets the definition of flagrant under applicable case law.

Moreover, I conclude, as a matter of law, B.T. Produce's violations of the PACA are repeated because repeated means more than one.⁸⁷ The Agricultural Marketing

⁸⁶*In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. ___, slip op. at 30 (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 829 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁸⁷*See, e.g., Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating violations are repeated under the PACA if they are not done simultaneously); *Farley & Calfee v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 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

(continued...)

Service demonstrated that William Taubenfeld bribed William Cashin 42 times during the period March 1999 through August 1999, and that this practice had begun long before Operation Forbidden Fruit.

Thus, I conclude B.T. Produce committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

III. The Appropriate Sanction for B.T. Produce's Violations Is License Revocation

Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated a provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture may publish the facts and circumstances of the violation, suspend the violator's PACA license, or assess a civil penalty. Further, if the violation is flagrant or repeated, the Secretary of Agriculture may revoke the PACA license of the offender.⁸⁸

The Agricultural Marketing Service requests revocation of B.T. Produce's PACA license as an appropriate sanction for B.T. Produce's PACA violations. B.T. Produce, on

⁸⁷(...continued)

PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding, because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA), *cert. denied*, 389 U.S. 835 (1967).

⁸⁸7 U.S.C. § 499h(a), (e).

the other hand, urges that, if I find it has violated the PACA, I assess B.T. Produce a civil penalty of \$2,000 for each of the instances of bribery, for a total civil penalty of \$84,000.

While the Agricultural Marketing Service failed to show any particular instance in which William Cashin falsified a United States Department of Agriculture inspection certificate as a result of the bribes he was paid by William Taubenfeld, the evidence establishes that the bribes served as a type of retainer for future favors on an as-needed basis, to the benefit of B.T. Produce and to the detriment of shippers, sellers, or growers. William Taubenfeld admitted in his plea that the purpose of the bribes was to get William Cashin to downgrade produce on occasion.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993):

[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.

I have considered and discussed the nature of the violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate sanction. My views accord with those of John Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, who testified that bribery of United States Department of

Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the Agricultural Marketing Service recommends PACA license revocation as the only adequate sanction. Mr. Koller explained the Agricultural Marketing Service's recommendation for PACA license revocation as follows:

[BY MS. PARNES:]

Q. Are you aware of the sanctions that Complainant recommends in this case?

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of it?

A. I have participated in the sanction recommendation, preparation of the sanction recommendation.

Q. What is that sanction recommendation?

A. A revocation of Respondent's PACA license.

Q. And what is the basis of this sanction recommendation?

A. There's several factors that are in consideration for this recommendation. One factor is that several bribery payments have been made in this case, and the evidence overwhelmingly shows that -- the evidence overwhelming shows that Respondent, through William Taubenfeld made bribery payments to a produce inspector.

And the FBI has documented that 42 inspections, over a five-month period of time, have been affected by these bribery payments. As an aggravating factor, Mr. Cashin has already testified that he had been receiving bribery payments from Respondent as far back as 1994.

Another factor is that the trade relies on the inspection to be accurate and impartial, so they can use that inspection for resolving any disputes, and approximately 150,000 inspections are performed each year by the Fresh Products Branch, and it's important that these inspections that are performed are accurate.

If there's any suspicion that these inspections have been tainted by bribery payments made to a produce inspector to affect the outcome of that inspection is something of concern, or is a concern.

If when an inspection has been fraudulently obtained, this effects [sic] the overall inspection process. It undermines the inspection process, and it also effects [sic] the credibility of the inspection certificate as well, in terms of it being an impartial and accurate reflection of the quality and condition of the product.

And if there's any questions on the part of the shipper, as to the credibility of that inspection, this would effect [sic] the ability of resolving hundreds of disputes that could be resolved each day, as well as tons [sic] of thousands of dollars with illegal adjustments being -- occurring in the transactions.

Another consideration or factor is the competitiveness. When you have someone who is paying bribes to a produce inspector, in order to get false information on the inspection, and price adjustments to the transaction, this provides an unfair advantage, and other wholesalers in the market, in order to compete, may feel that they have to make the bribery payments as well.

For example, if you have a wholesaler in the Hunts Point Market who is bribing a produce inspector to obtain false information and obtain price adjustments to the transaction, then other wholesalers on the market may well feel that in order to compete they will pay bribes to the inspectors as well.

Another consideration or another factor is that the Department strongly believes that a strong sanction will not only deter Respondent, but will deter other members of the industry from considering making or contemplating making a bribery payment to a produce inspector, and that is a serious violation, a serious violation in making these bribery payments.

Q. And does the fact that Mr. Cashin's [sic] a USDA employee and he was the one who was receiving the bribes, does that have any impact on the Complainant's sanction recommendation?

A. No.

Q. Why is that?

A. Complainant feels that bribery payments to a produce -- whether the bribery payments are made to another member of the industry or to a produce inspector, it is a serious violation. And the fact that bribery payments are being made to a produce inspector does not excuse a PACA licensee from making those bribery payments.

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

A. No.

Q. Why not?

A. In this case where you have bribery payments being made to a produce inspector to obtain false information on the inspection, that undermines the credibility of the inspection certificate itself, and these bribery payments, as well, undermine the inspection process and its credibility. And that is a serious violation, and that the appropriate -- and it would be appropriate for a civil penalty and the sanction imposed in this matter.

Another consideration is that the bribery payments did occur over a long period of time, and again, the competitiveness concern here, is that when you have bribery payments being made to a produce inspector, you know, it is an advantage to those who are making those bribery payments, and for those firms that are law abiding and not making those bribery payments, it's competitively hard for them to compete.

And another consideration here, is that bribery payments to a produce inspector are a serious violation of the PACA, and the appropriate sanction to deter this from occurring would be to have a license revocation on a licensee who has committed bribery payments.

And finally, it has been -- USDA has consistently recommended license revocation in the case of bribery and where these serious types of violations has occurred.

Tr. 499-503.

I find William Taubenfeld's payments of bribes to a United States Department of Agriculture produce inspector, within the scope of his employment, are deemed to be the actions of B.T. Produce and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.⁸⁹ While sanctions in similar cases are not required to be uniform,⁹⁰ I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

⁸⁹*In re Coosemans Specialties, Inc.*, ___ Agric. Dec. ___ (Apr. 20, 2006), *aff'd*, No. 06-1199, 2007 WL 1029049 (D.C. Cir. Apr. 6, 2007); *In re Kleiman & Hochberg, Inc.*, ___ Agric. Dec. ___ (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

⁹⁰*Harry Klein Produce Corp. v. U.S. Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

IV. Louis R. Bonino and Nat Taubenfeld Were Responsibly Connected

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.⁹¹ The record establishes Nat Taubenfeld was the president and a director of B.T. Produce during the period when B.T. Produce violated the PACA.⁹² The record also establishes Louis R. Bonino was the vice president, a director, and a holder of 30 percent of the outstanding stock of B.T. Produce during the period when B.T. Produce violated the PACA.⁹³ The burden is on Louis R. Bonino and Nat Taubenfeld to demonstrate by a preponderance of the evidence that they were not responsibly connected with B.T. Produce despite their positions at, and ownership of, B.T. Produce.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the

⁹¹7 U.S.C. § 499a(b)(9).

⁹²CX 1, CX 20 at 71-75.

⁹³CX 1, CX 20 at 71-75.

petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

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

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

I find Louis R. Bonino and Nat Taubenfeld each carried his burden of proof that he was not actively involved in the activities resulting in B.T. Produce's violations of the PACA. However, I find Nat Taubenfeld failed to carry his burden of proof that he was only nominally an officer and a director of B.T. Produce. I also find Louis R. Bonino failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce.

In order for a petitioner to demonstrate that he or she was only nominally an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and shareholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and failed to counteract or obviate the fault of others.⁹⁴

The record establishes Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce during the violation period. Nat Taubenfeld is the co-founder of B.T. Produce and has been the president, a director, and the individual in charge of the produce end of B.T. Produce since its inception.⁹⁵ He has participated in the day-to-day management of B.T. Produce from the day he co-founded it, principally running the night shift, buying and selling produce. Nat Taubenfeld communicated to B.T. Produce personnel how he expected them to conduct B.T. Produce's business, had a

⁹⁴*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

⁹⁵CX 1; RC-Taubenfeld 1; Tr. 678-80, 684, 698-701, 716-17.

role in hiring and firing personnel, and signed checks.⁹⁶ His role included requesting inspections from United States Department of Agriculture inspectors and seeking and obtaining price adjustments based on the results of inspections.⁹⁷ Nat Taubenfeld brought both of his sons into the business.⁹⁸

Nat Taubenfeld failed to meet his burden that he was only nominally the president and director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, that he was considered by company personnel to be the head of B.T. Produce, and that he was involved in many or most of the decisions involving the produce end of B.T. Produce.⁹⁹

Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce since he co-founded B.T. Produce with Nat Taubenfeld in 1990.¹⁰⁰ Louis R. Bonino was directly involved in the day-to-day operations of B.T. Produce running the office side of the business.¹⁰¹ Louis R. Bonino's responsibilities included signing checks; handling cash; signing contracts; hiring, firing, and training employees; and overseeing security. He personally was present at

⁹⁶RC-Taubenfeld 6; Tr. 705-07, 721.

⁹⁷Tr. 1281, 1298.

⁹⁸Tr. 701-03.

⁹⁹Tr. 669, 684, 1281, 1298.

¹⁰⁰CX 1; RC-Bonino 1.

¹⁰¹Tr. 595, 605-06, 652-53.

B.T. Produce's business address 3 to 4 days a week.¹⁰² Louis R. Bonino directly handled reparation complaints filed against B.T. Produce.¹⁰³

Louis R. Bonino failed to meet his burden that he was only nominally an officer and a director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, he had substantial responsibilities in many aspects of the business, and he had authority over employees. Moreover, Louis R. Bonino failed to meet his burden of proof that he was only nominally a holder of more than 10 percent of the outstanding stock of B.T. Produce.

Requests for Oral Argument

B.T. Produce, Nat Taubenfeld, and Louis R. Bonino request oral argument before the Judicial Officer. B.T. Produce's, Nat Taubenfeld's, and Louis R. Bonino's requests for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,¹⁰⁴ are refused because the parties have thoroughly briefed the issues and oral argument would appear to serve no useful purpose.

¹⁰²Tr. 633.

¹⁰³Tr. 611-12.

¹⁰⁴7 C.F.R. § 1.145(d).

Appeal Petitions

B.T. Produce's Appeal Petition

B.T. Produce raises six issues in its appeal petition.¹⁰⁵ First, B.T. Produce contends the Chief ALJ's finding of fact number 8 is not supported by sufficient evidence.¹⁰⁶

The Chief ALJ found “[t]he evidence supports a finding that there were transactions where B.T.’s position was improved by the falsification of inspections as a result of bribes paid to Cashin.”¹⁰⁷ I agree with the Chief ALJ's finding and reject B.T. Produce's contention that the Chief ALJ's finding is not supported by substantial evidence. William Cashin testified that, pursuant to his understanding with William Taubenfeld, he (Mr. Cashin) would “help” B.T. Produce on United States Department of Agriculture inspection certificates covering particular loads of produce in exchange for \$50 payments. William Cashin testified he was paid for each inspection he conducted for B.T. Produce, and he would provide “help” 60 percent to 75 percent of the time.¹⁰⁸ William Cashin's testimony that he falsified United States Department of Agriculture

¹⁰⁵B.T. Produce filed “Respondent's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R § 1.145(a) from the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, *As Modified*, February 6, 2006” [hereinafter B.T. Produce's Appeal Petition].

¹⁰⁶B.T. Produce's Appeal Pet. at 2-5.

¹⁰⁷Initial Decision at 18 (Finding of Fact 8).

¹⁰⁸Tr. 44-60.

inspection certificates issued in connection with the inspection of produce for B.T. Produce is corroborated by William Taubenfeld's guilty plea in which William Taubenfeld admitted he paid bribes to William Cashin to induce him to falsify United States Department of Agriculture inspection certificates.¹⁰⁹

Nat Taubenfeld provided further testimony supporting William Cashin's testimony that he gave "help" to B.T. Produce. Nat Taubenfeld testified that, when B.T. Produce received produce, B.T. Produce would start selling the produce immediately, before William Cashin performed an inspection.¹¹⁰ However, for every United States Department of Agriculture inspection certificate introduced as evidence, the amount of produce noted on the inspection certificate is the same as the full amount of produce received by B.T. Produce, as indicated by the bill of sale.¹¹¹ Nat Taubenfeld testified that he told William Cashin to write the original count on the United States Department of Agriculture inspection certificates even if some of the produce had already been sold and was therefore not inspected.¹¹²

Many of the United States Department of Agriculture inspection certificates for which William Taubenfeld paid bribes indicate the produce inspected contained serious

¹⁰⁹CX 3, CX 4; RX QQ; Tr. 585.

¹¹⁰Tr. 1279, 1283.

¹¹¹CX 7-CX 19; RX A-RX Z, RX AA-RX OO; Tr. 1283.

¹¹²Tr. 1284.

defects. The payments B.T. Produce made to shippers for this produce reflect the defects indicated on the United States Department of Agriculture inspection certificates.

However, in many cases, B.T. Produce sold the produce near market price,¹¹³ at market price,¹¹⁴ or above market price.¹¹⁵ I find B.T. Produce's frequent ability to sell produce near, at, or above market prices suggests that the produce had fewer defects than stated on the United States Department of Agriculture inspection certificates and the United States Department of Agriculture inspection certificates were falsified.

Second, B.T. Produce contends the Agricultural Marketing Service failed to prove B.T. Produce violated the PACA because the Agricultural Marketing Service did not introduce any evidence that William Taubenfeld's payments to William Cashin resulted in the falsification of United States Department of Agriculture inspection certificates or harm to B.T. Produce's shippers.¹¹⁶

As discussed in this Decision and Order, *supra*, I disagree with B.T. Produce's contention that there is no evidence that William Taubenfeld's payments to William Cashin resulted in the falsification of United States Department of Agriculture inspection certificates or harm to B.T. Produce's shippers. However, even if I were to find no

¹¹³RX A-RX B, RX D, RX F-RX J, RX N, RX SS.

¹¹⁴RX R, RX W-RX Y, RX LL, RX SS.

¹¹⁵RX E, RX II, RX SS; Tr. 1279-81.

¹¹⁶B.T. Produce's Appeal Pet. at 6-21.

evidence of falsification of United States Department of Agriculture inspection certificates and no evidence of harm to B.T. Produce's shippers, I would still find William Taubenfeld's payments to a United States Department of Agriculture inspector violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The PACA does not expressly provide that a payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2) to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.¹¹⁷

Bribery of a United States Department of Agriculture produce inspector, whatever the motive, in and of itself, negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce

¹¹⁷7 U.S.C. § 499b(4).

inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of unlawful gratuities or bribes to United States Department of Agriculture produce inspectors.¹¹⁸

Third, B.T. Produce contends William Taubenfeld's payments to William Cashin were not within the scope of William Taubenfeld's employment with B.T. Produce; therefore, B.T. Produce did not violate the PACA.¹¹⁹

¹¹⁸*In re Coosemans Specialties, Inc.*, ___ Agric. Dec. ___ (Apr. 20, 2006), *aff'd*, No. 06-1199, 2007 WL 1029049 (D.C. Cir. Apr. 6, 2007); *In re Kleiman & Hochberg, Inc.*, ___ Agric. Dec. ___ (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

¹¹⁹B.T. Produce's Appeal Pet. at 19-21.

Generally, the factors considered to determine whether conduct of an employee or agent is within the scope of employment are: (1) whether the conduct is of the kind the employee or agent was hired to perform;¹²⁰ (2) whether the conduct occurs during working hours; (3) whether the conduct occurs on the employment premises; and (4) whether the conduct is actuated, at least in part, by a purpose to serve the employer or principal.¹²¹

The record establishes that William Taubenfeld was within the scope of his employment with B.T. Produce when he paid bribes to William Cashin. William Taubenfeld paid bribes to William Cashin at B.T. Produce's place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by B.T. Produce. William Taubenfeld was authorized to apply for United States Department of Agriculture inspections of perishable agricultural commodities and the bribes William Taubenfeld paid to William Cashin were intended to benefit B.T. Produce.¹²² Therefore, I find William Taubenfeld was acting within the scope of his employment when he paid William Cashin.

¹²⁰Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

¹²¹*See generally* Restatement (Second) of Agency § 228 (1958).

¹²²Tr. 44-52.

Fourth, B.T. Produce contends the Agricultural Marketing Service failed to provide B.T. Produce with notice and an opportunity to achieve compliance with the PACA prior to instituting the disciplinary action against B.T. Produce on August 16, 2002, in violation of the Administrative Procedure Act.¹²³

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to achieve compliance, except in cases of willfulness, as follows:

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

.....

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c).

¹²³B.T. Produce's Appeal Pet. at 21-27.

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.¹²⁴ The record establishes that William Taubenfeld intentionally made unlawful payments to William Cashin in connection with produce inspections, and thereby acted willfully. Therefore, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is inapposite.

B.T. Produce argues that, while William Taubenfeld willfully violated the PACA, William Taubenfeld's willfulness cannot be imputed to B.T. Produce; therefore, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is applicable to B.T. Produce.¹²⁵

I disagree with B.T. Produce's contention that William Taubenfeld's willful violations of the PACA cannot be imputed to B.T. Produce. The relationship between a commission merchant, dealer, or broker 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

¹²⁴See note 85.

¹²⁵B.T. Produce's Appeal Pet. at 23.

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.

B.T. Produce's employee, secretary, and director, William Taubenfeld, was acting within the scope of employment when he knowingly and willfully bribed William Cashin. Thus, as a matter of law, the knowing and willful violations by William Taubenfeld are deemed to be knowing and willful violations by B.T. Produce, even if B.T. Produce's other officers and directors had no actual knowledge of the bribery and would not have condoned the bribery had they known of it.¹²⁶ 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 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

¹²⁶*H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 790 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *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).

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. U.S. 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).

Therefore, I conclude 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 and William Taubenfeld’s willful violations of the PACA are B.T. Produce’s willful violations of the PACA. Consequently, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is not applicable to B.T. Produce.

Fifth, B.T. Produce contends the Chief ALJ’s construction of section 16 of the PACA (7 U.S.C. § 499p) unconstitutionally makes B.T. Produce liable for William Taubenfeld’s payments to William Cashin, where B.T. Produce, even with the exercise of the utmost supervision, could not discover or control William Taubenfeld’s activities.¹²⁷

B.T. Produce does not cite any authority in support of its position that a corporation’s liability for the acts, omissions, or failures of its agents, officers, and employees is unconstitutional. Section 16 of the PACA (7 U.S.C. § 499p) unambiguously provides that the act, omission, or failure 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, omission, or failure of the commission merchant, dealer, or broker. Liability under section 16 of the PACA

¹²⁷B.T. Produce’s Appeal Pet. at 27-29, 35-40.

(7 U.S.C. § 499p) attaches even where the corporate PACA licensee did not condone or even know of the PACA violations of its agents, officers, or employees,¹²⁸ and I am unable to locate any case holding the imposition of liability under section 16 of the PACA (7 U.S.C. § 499p) is unconstitutional. Therefore, I reject B.T. Produce's unsupported contention that holding a corporation liable for the acts, omissions, or failures of its agents, officers, and employees is unconstitutional.

Sixth, B.T. Produce contends the Agricultural Marketing Service's construction of section 16 of the PACA (7 U.S.C. § 499p) creates an unconstitutional irrebuttable presumption that B.T. Produce is liable for William Taubenfeld's payments to William Cashin.¹²⁹

Section 16 of the PACA (7 U.S.C. § 499p) does not create an irrebuttable presumption, as B.T. Produce asserts. B.T. Produce could avoid liability under the PACA for William Taubenfeld's bribery either by showing William Taubenfeld was not acting for, or employed by, B.T. Produce at the time he bribed William Cashin or by showing

¹²⁸*In re KOAM Produce, Inc.*, ___ Agric. Dec. ___, slip op. at 22 (June 2, 2006) (holding KOAM Produce, Inc., liable for its employee's payment of bribes to a United States Department of Agriculture inspector, even though the evidence failed to prove that anyone else at KOAM Produce, Inc., knew the employee was illegally paying money to the United States Department of Agriculture inspector), *appeal docketed*, No. 06-4838 (2d Cir. Oct. 19, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869, 1886-87 (2005) (holding M. Trombetta & Sons, Inc., liable for its employee's payment of bribes to a United States Department of Agriculture inspector, even though the evidence failed to prove that anyone else at M. Trombetta & Sons, Inc., knew the employee was illegally paying money to the United States Department of Agriculture inspector).

¹²⁹B.T. Produce's Appeal Pet. at 29-35.

that William Taubenfeld's bribes were not made within the scope of his employment or office. Therefore, I reject B.T. Produce's contention that B.T. Produce was irrebuttably presumed to be liable for William Taubenfeld's bribery.

Louis R. Bonino's and Nat Taubenfeld's Appeal Petitions

Louis R. Bonino and Nat Taubenfeld raise six issues in their appeal petitions.¹³⁰

First, Louis R. Bonino and Nat Taubenfeld contend they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.¹³¹

The Chief ALJ found Louis R. Bonino and Nat Taubenfeld demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.¹³² As discussed in this Decision and Order, I agree with the Chief ALJ's finding and Louis R. Bonino's and Nat Taubenfeld's contentions that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.

¹³⁰Louis R. Bonino filed "Petitioner Louis R. Bonino's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145(a) for the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, *As Modified*, February 6, 2006" [hereinafter Bonino's Appeal Petition]. Nat Taubenfeld filed "Petitioner Nat Taubenfeld's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145(a) for the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, *As Modified*, February 6, 2006" [hereinafter Taubenfeld's Appeal Petition].

¹³¹Bonino's Appeal Pet. at 2-3; Taubenfeld's Appeal Pet. at 2-5.

¹³²Initial Decision at 30-32.

Second, Louis R. Bonino contends the record is bereft of any evidence that B.T. Produce was operating as the alter ego of Louis R. Bonino.¹³³

The second prong of the two-prong responsibly connected test requires a petitioner to demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The record establishes Louis R. Bonino was an owner of B.T. Produce; therefore, the defense that Louis R. Bonino was not an owner of B.T. Produce, which was the alter ego of its owners, is not available to Louis R. Bonino.¹³⁴

Third, Louis R. Bonino and Nat Taubenfeld contend they were nominal officers of B.T. Produce.¹³⁵

¹³³Bonino's Appeal Pet. at 4.

¹³⁴*In re Donald R. Beucke*, __ Agric. Dec. ___, slip op. at 14 (Sept. 28, 2006), appeal docketed, No. 06-75358 (9th Cir. Dec. 1, 2006); *In re Edward S. Martindale*, __ Agric. Dec. ___, slip op. at 9 (July 26, 2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), __ Agric. Dec. ___, slip op. at 11 (Jan. 24, 2006), *aff'd per curiam*, 195 F. App'x 850 (11th Cir. 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

¹³⁵Bonino's Appeal Pet. at 4-5; Taubenfeld's Appeal Pet. at 5-6.

In order for a petitioner to show that he or she was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of a corporation or association, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in a violation of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.¹³⁶ The record establishes Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce during the violation period.

During the period when B.T. Produce violated the PACA, Louis R. Bonino owned 30 percent of the outstanding stock of B.T. Produce. Louis R. Bonino's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal

¹³⁶See note 94.

shareholder.¹³⁷ Louis R. Bonino has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of B.T. Produce.

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.¹³⁸ Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce since he co-founded B.T. Produce

¹³⁷*Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. U.S. Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Donald R. Beucke*, __ Agric. Dec. ___, slip op. at 21 (Nov. 8, 2006) (stating Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was substantially connected is a strong indication that a 33⅓ percent owner does not serve in a nominal capacity), *appeal docketed*, No. 07-70033 (9th Cir. Jan. 4, 2007); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

¹³⁸*In re Donald R. Beucke*, __ Agric. Dec. ___, slip op. at 32 (Nov. 8, 2006), *appeal docketed*, No. 07-70033 (9th Cir. Jan. 4, 2007); *In re Donald R. Beucke*, __ Agric. Dec. ___, slip op. at 25 (Sept. 28, 2006), *appeal docketed*, No. 06-75358 (9th Cir. Dec. 1, 2006); *In re Edward S. Martindale*, __ Agric. Dec. ___, slip op. at 30 (July 26, 2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

with Nat Taubenfeld in 1990.¹³⁹ Louis R. Bonino was directly involved in the day-to-day operations of B.T. Produce running the office side of the business.¹⁴⁰ Louis R. Bonino's responsibilities included signing checks; handling cash; signing contracts; hiring, firing, and training employees; and overseeing security. He personally was present at B.T. Produce's business address 3 to 4 days a week.¹⁴¹ Louis R. Bonino directly handled reparation complaints filed against B.T. Produce.¹⁴²

Nat Taubenfeld is the co-founder of B.T. Produce and has been the president, a director, and the individual in charge of the produce end of B.T. Produce since its inception.¹⁴³ He has participated in the day-to-day management of B.T. Produce from the day he co-founded it, principally running the night shift, buying and selling produce. Nat Taubenfeld communicated to B.T. Produce personnel how he expected them to conduct B.T. Produce's business, had a role in hiring and firing personnel, and signed checks.¹⁴⁴ His role included requesting inspections from United States Department of Agriculture

¹³⁹CX 1; RC-Bonino 1.

¹⁴⁰Tr. 595, 605-06, 652-53.

¹⁴¹Tr. 633.

¹⁴²Tr. 611-12.

¹⁴³CX 1; RC-Taubenfeld 1; Tr. 678-80, 684, 698-701, 716-17.

¹⁴⁴RC-Taubenfeld 6; Tr. 705-07, 721.

inspectors and seeking and obtaining price adjustments based on the results of inspections.¹⁴⁵ Nat Taubenfeld brought both of his sons into the business.¹⁴⁶

Nat Taubenfeld failed to meet his burden that he was only nominally the president and a director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, that he was considered by company personnel to be the head of B.T. Produce, and that he was involved in many or most of the decisions involving the produce end of B.T. Produce.¹⁴⁷

Louis R. Bonino and Nat Taubenfeld each failed to meet his burden that he was only nominally an officer and a director of B.T. Produce, as it is clear that Louis R. Bonino and Nat Taubenfeld were intimately involved in the day-to-day workings of B.T. Produce, they each had substantial responsibilities in many aspects of the business, and they had authority over employees. In short, I find Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce.

Fourth, Louis R. Bonino and Nat Taubenfeld contend the imposition of employment restrictions based on finding them responsibly connected with B.T. Produce during the period when B.T. Produce violated the PACA would violate their right under

¹⁴⁵Tr. 1281, 1298.

¹⁴⁶Tr. 701-03.

¹⁴⁷Tr. 669, 684, 1281, 1298.

the Administrative Procedure Act to notice and opportunity to demonstrate or achieve compliance with the PACA.¹⁴⁸

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the *licensee* must be given notice of facts warranting revocation and an opportunity to demonstrate or achieve compliance with all lawful requirements, except in cases of willfulness.¹⁴⁹ Neither Louis R. Bonino nor Nat Taubenfeld is a PACA licensee. The responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011, concern merely the determinations that Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA; they do not concern the withdrawal, suspension, revocation, or annulment of a PACA license held by Louis R. Bonino or Nat Taubenfeld. Therefore, with respect to the responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) inapposite.

Fifth, Louis R. Bonino and Nat Taubenfeld contend the imposition of employment restrictions based on finding them responsibly connected with B.T. Produce during the

¹⁴⁸Bonino's Appeal Pet. at 6-10; Taubenfeld's Appeal Pet. at 19-22.

¹⁴⁹5 U.S.C. § 558(c).

period when B.T. Produce violated the PACA would violate their rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁵⁰

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.¹⁵¹

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.¹⁵² Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission merchant, dealer, or broker that

¹⁵⁰Bonino's Appeal Pet. at 6-10, 14-18; Taubenfeld's Appeal Pet. at 6-9, 14-19.

¹⁵¹*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¹⁵²H.R. Rep. No. 1041 (1930).

has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to employment sanctions in the PACA.¹⁵³ Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Louis R. Bonino's or Nat Taubenfeld's due process rights by arbitrarily interfering with their chosen occupations.

Contrary to Louis R. Bonino's and Nat Taubenfeld's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.¹⁵⁴ A number of courts have rejected constitutional challenges to the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.¹⁵⁵

¹⁵³*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

¹⁵⁴*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

¹⁵⁵*Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons

(continued...)

Sixth, Louis R. Bonino and Nat Taubenfeld assert the irrebuttable presumption that they were responsibly connected with B.T. Produce is unconstitutional.¹⁵⁶

I disagree with Louis R. Bonino's and Nat Taubenfeld's assertion that they are irrebuttably presumed to have been responsibly connected with B.T. Produce when B.T. Produce violated the PACA. Under the PACA, an individual who is affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association is presumed to be responsibly connected with that commission merchant, dealer, or broker. However, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association may rebut the presumption that he or she is responsibly connected. Specifically, section 1(b)(9) of

¹⁵⁵(...continued)

determined to be responsibly connected with a PACA licensee that has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee, who failed to pay a reparation award, from employment in the field of marketing perishable agricultural commodities, is not unconstitutional).

¹⁵⁶Bonino Appeal Pet. at 10-14; Taubenfeld Appeal Pet. at 6-14.

the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test by which a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association may rebut the presumption that he or she is responsibly connected with the commission merchant, dealer, or broker. As discussed in this Decision and Order, *supra*, Louis R. Bonino and Nat Taubenfeld failed to prove by a preponderance of the evidence that they met the second prong of the two-prong test.

The Agricultural Marketing Service's and the Chief's Appeal Petition

The Agricultural Marketing Service and the Chief raise three issues in “Complainant’s and Respondent’s Appeal of the Decision and Order” [hereinafter the Agricultural Marketing Service’s and the Chief’s Appeal Petition]. First, the Agricultural Marketing Service and the Chief contend the sanction imposed by the Chief ALJ against B.T. Produce is not in accord with the United States Department of Agriculture’s sanction policy or United States Department of Agriculture precedent and the Chief ALJ erroneously took collateral effects of the revocation of B.T. Produce’s PACA license into account when determining the sanction to be imposed upon B.T. Produce. The Agricultural Marketing Service and the Chief urge that I revoke B.T. Produce’s PACA license.¹⁵⁷

I agree with the Agricultural Marketing Service and the Chief that the sanction imposed by the Chief ALJ against B.T. Produce is not in accord with the United States

¹⁵⁷The Agricultural Marketing Service’s and the Chief’s Appeal Pet. at 11-23.

Department of Agriculture's sanction policy set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), or United States Department of Agriculture precedent.

I have considered and discussed the nature of B.T. Produce's PACA violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate sanction. I find the nature of B.T. Produce's violations, as they relate to the purposes of the PACA, justify revocation of B.T. Produce's PACA license. In addition, the Agricultural Marketing Service, the agency charged with the responsibility for achieving the congressional purpose of the PACA, recommends the imposition of license revocation as the appropriate sanction for B.T. Produce's PACA violations. John Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified that bribery of a United States Department of Agriculture produce inspector is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the Agricultural Marketing Service recommends PACA license revocation as the only adequate sanction. After examining the relevant circumstances and the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the PACA, I conclude revocation of B.T. Produce's PACA license is in accord with the United States Department of Agriculture's sanction policy

and the sanction imposed by the Chief ALJ is not in accord with the United States Department of Agriculture's sanction policy.

Moreover, the Chief ALJ's assessment of a \$360,000 civil penalty, in lieu of a 90-day suspension of B.T. Produce's PACA license, is not in accord with United States Department of Agriculture precedent. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.¹⁵⁸

Further still, the Chief ALJ's reliance on collateral effects of the revocation of B.T. Produce's PACA license, when determining the sanction to be imposed upon B.T. Produce, is error. The Chief ALJ states, when determining the sanction to impose on B.T. Produce, he considered collateral effects of license revocation on B.T. Produce's employees, as follows:

In imposing a civil penalty, rather than license revocation, I did give consideration to the impact on Respondent's employees. The fact that 35-40 employees who were not involved in the acts of bribery, and who had no basis to believe that any criminal acts were being committed, would lose

¹⁵⁸See note 89.

their jobs, and the fact that the significant majority of these employees are minorities, Tr. 599, 661, 664, supports the imposition of a civil penalty, which has more of an impact on company ownership than its non-culpable employees.

Initial Decision at 27-28. However, collateral effects of a respondent's PACA license revocation are neither relevant to a determination whether a respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) nor relevant to the sanction to be imposed for violating section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Secretary of Agriculture routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's employees.¹⁵⁹ The adverse impact of license revocation on B.T. Produce's employees is unfortunate, but it is not relevant to this proceeding.

¹⁵⁹*In re JSG Trading Corp.* (Order Denying Pet. for Recons.), 57 Agric. Dec. 710, 728 (1998) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's customers, community, or employees); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1903 (1997) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees and the effect of revocation of the respondent's PACA license on employment of 30 persons and on small and medium-sized businesses which rely on respondent is irrelevant), *aff'd*, 178 F.3d 743 (5th Cir.), *reprinted in* 58 Agric. Dec. 991, *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997) (holding the harm suffered by the respondent's 25 employees from a sanction other than a civil penalty is a collateral effect which is not relevant to the sanction to be imposed), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating hardship to a respondent's community, customers, or employees which might result from a disciplinary order is given no weight in determining the sanction); *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees), *aff'd*, 831 F.2d 403 (2d Cir. 1987).

Second, the Agricultural Marketing Service and the Chief state, assuming for the sake of argument that a civil penalty is the appropriate sanction in this proceeding, the Chief ALJ did not correctly apply the formula mandated by the PACA to arrive at the \$360,000 civil penalty the Chief ALJ assessed against B.T. Produce. The Agricultural Marketing Service and the Chief contend, if a civil penalty were appropriate, B.T. Produce should be assessed a civil penalty of at least \$3,650,000.¹⁶⁰

I conclude revocation of B.T. Produce's PACA license is warranted in law and justified by the facts. Therefore, I find no purpose would be served by addressing the methodology used by the Chief ALJ to determine the amount of the civil penalty which he assessed against B.T. Produce or the amount of the civil penalty which the Chief ALJ should have assessed against B.T. Produce had a civil penalty been an appropriate sanction.

Third, the Agricultural Marketing Service and the Chief contend the Chief ALJ's finding that Louis R. Bonino and Nat Taubenfeld were not actively involved in the activities resulting in B.T. Produce's violations of the PACA, is error.¹⁶¹

I agree with the Chief ALJ that Louis R. Bonino and Nat Taubenfeld demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA. In their appeal petition, the

¹⁶⁰The Agricultural Marketing Service's and the Chief's Appeal Pet. at 23-24.

¹⁶¹The Agricultural Marketing Service's and the Chief's Appeal Pet. at 24-28.

Agricultural Marketing Service and the Chief cite portions of the record which establish that Louis R. Bonino and Nat Taubenfeld were actively involved in the day-to-day management of B.T. Produce. While I find that Louis R. Bonino and Nat Taubenfeld were actively involved in the day-to-day management of B.T. Produce, I reject the Agricultural Marketing Service's and the Chief's suggestion that an individual's active involvement in day-to-day management is, by itself, sufficient to establish that the individual was also actively involved in the activities resulting in a violation of the PACA. I find Louis R. Bonino and Nat Taubenfeld, although actively involved in the day-to-day management of B.T. Produce, proved by a preponderance of the evidence that they were not actively involved in activities resulting in B.T. Produce's violations of the PACA.

The Agricultural Marketing Service and the Chief also contend Louis R. Bonino was actively involved in the activities resulting in B.T. Produce's violations of the PACA by virtue of the ownership of more than 10 percent of the outstanding stock of B.T. Produce. The Agricultural Marketing Service and the Chief essentially urge that I hold that any individual who owns more than 10 percent of the outstanding stock of a corporation is *per se* responsibly connected with that corporation. However, Congress has rejected the *per se* approach urged by the Agricultural Marketing Service and the Chief.

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended to allow an individual who is a holder of more than 10 percent of the outstanding stock of a corporation to rebut his or her status as responsibly connected with the corporation. Specifically, section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) by adding a sentence to the definition which reads as follows:

A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [the PACA] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The applicable House of Representatives Report states the purpose of the 1995 amendment to the definition of *responsibly connected* is “to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation.”¹⁶² The House of Representatives Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would “allow individuals an opportunity to demonstrate that they

¹⁶²H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

were only nominal officers, directors, or shareholders and that they were uninvolved in the violation.”¹⁶³ Louis R. Bonino carried his burden of proof that he was not actively involved in the activities resulting in B.T. Produce’s violations of the PACA.

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

ORDER

1. B.T. Produce has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). B.T. Produce’s PACA license is revoked, effective 60 days after service of this Order on B.T. Produce.

2. I affirm the Chief’s March 31, 2003, determination that Louis R. Bonino was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Louis R. Bonino is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Louis R. Bonino.

3. I affirm the Chief’s March 31, 2003, determination that Nat Taubenfeld was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Nat Taubenfeld is subject to the licensing restrictions under section 4(b) of the PACA and the

¹⁶³H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Nat Taubenfeld.

RIGHT TO JUDICIAL REVIEW

B.T. Produce, Louis R. Bonino, and Nat Taubenfeld have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. B.T. Produce, Louis R. Bonino, and Nat Taubenfeld must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁶⁴ The date of entry of the Order in this Decision and Order is May 4, 2007.

Done at Washington, DC

May 4, 2007

William G. Jenson
Judicial Officer

¹⁶⁴See 28 U.S.C. § 2344.