

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-02-0021
)	
Kleiman & Hochberg, Inc.,)	
)	
Respondent)	
)	
	and	
)	
Michael H. Hirsch,)	PACA Docket No. APP-03-0005
)	
Petitioner)	
)	
	and	
)	
Barry J. Hirsch,)	PACA Docket No. APP-03-0006
)	
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 July 17, 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 Kleiman & Hochberg, Inc.: (1) during the period March 1999 through August 1999, through its employee, John Thomas, made illegal payments to a United States Department of Agriculture inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate or foreign commerce, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) prior to March 1999, made illegal payments to a United States Department of Agriculture inspector on numerous occasions, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III, V-VI). On September 17, 2002, Kleiman & Hochberg, Inc., filed an answer denying the material allegations of the Complaint and raising four affirmative defenses (Answer).

On February 12, 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 Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., during the period March 26, 1999, through August 4, 1999, when Kleiman & Hochberg, Inc., violated the PACA. On March 14, 2003, Michael H. Hirsch filed a Petition for Review of

the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc. On March 14, 2003, Barry J. Hirsch filed a Petition for Review of the Chief's determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's February 12, 2003, determination that he was responsibly connected with Kleiman & Hochberg, Inc.

On April 4, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re Kleiman & Hochberg, Inc.*, PACA Docket No. D-02-0021, with the two responsibly connected proceedings, *In re Michael H. Hirsch*, PACA Docket No. APP-03-0005, and *In re Barry J. Hirsch*, PACA Docket No. APP-03-0006 (Order Consolidating Cases for Hearing).

On March 1 through March 4, and March 15 through March 18, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Charles L. Kendall and Christopher Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C.H. Mandell and David H. Gendelman represented Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch.

On December 3, 2004, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section

2(4) of the PACA (7 U.S.C. § 499b(4)) when John Thomas, Kleiman & Hochberg, Inc.'s vice president and part owner, paid bribes to a United States Department of Agriculture produce inspector in connection with 12 federal inspections of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted from eight sellers in interstate and foreign commerce; (2) concluded Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; and (3) assessed Kleiman & Hochberg, Inc., a \$180,000 civil penalty (Initial Decision at 18-19, 35).

On January 21, 2005, the Agricultural Marketing Service and the Chief appealed to the Judicial Officer. On January 24, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch appealed to, and requested oral argument before, the Judicial Officer. On March 16, 2005, the Agricultural Marketing Service and the Chief filed a response to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's appeal petition. On March 17, 2005, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On March 17, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's request for oral argument before the Judicial Officer, which the Judicial Officer may grant,

refuse, or limit,¹ is refused because the parties have thoroughly briefed the issues and oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the Chief ALJ's conclusions that Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of the PACA and Michael H. Hirsch and Barry J. Hirsch were responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA; however, I disagree with the sanction imposed on Kleiman & Hochberg, Inc., by the Chief ALJ. Therefore, I do not adopt the Chief ALJ's Initial Decision as the final Decision and Order.

The Agricultural Marketing Service exhibits are designated by "CX." Kleiman & Hochberg, Inc.'s exhibits are designated by "RX." Exhibits in the agency record upon which the Chief based his responsibly connected determination as to Michael H. Hirsch, which is part of the record in this proceeding,² are designated by "RCMH." Exhibits in the agency record upon which the Chief based his responsibly connected determination as to Barry J. Hirsch, which is part of the record in this proceeding,³ are designated by "RCBH." Transcript references are designated by "Tr."

¹7 C.F.R. § 1.145(d).

²7 C.F.R. § 1.136(a).

³See note 2.

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)(2).

DECISION

Decision Summary

I conclude Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as a consequence of its vice president and owner of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paying bribes to United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities which Kleiman & Hochberg, Inc., purchased, received, and accepted in interstate or foreign commerce. Based on this conclusion, I revoke Kleiman & Hochberg, Inc.'s PACA license. I also conclude Michael H. Hirsch and Barry J. Hirsch were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA. Accordingly, Michael H. Hirsch and

Barry J. Hirsch 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)).

Findings of Fact

1. Kleiman & Hochberg, Inc., is a New York corporation whose business and mailing address is 226-233 Hunts Point Terminal Market, Bronx, New York 10474 (Answer ¶ 3).
2. At all times material to this proceeding, Kleiman & Hochberg, Inc., was a licensee under the PACA. PACA license number 108036 was issued to Kleiman & Hochberg, Inc., on June 17, 1947. Kleiman & Hochberg, Inc., has renewed its PACA license annually. (Answer ¶ 3; CX 1.)
3. William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, from July 1979 through August 1999 (Tr. 30).
4. William Cashin began inspecting produce at Kleiman & Hochberg, Inc., in 1979. At that time, William Cashin dealt with "Seymore," a salesman employed by Kleiman & Hochberg, Inc., who, beginning in the early 1980s, paid William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. These payments were not made to the United States Department of

Agriculture for normal inspection services, but were payments made to William Cashin personally. (Tr. 38-41.)

5. After "Seymore" retired from Kleiman & Hochberg, Inc., in the mid 1980s, William Cashin dealt with John Thomas when he performed inspections at Kleiman & Hochberg, Inc. Beginning in the late 1980s or early 1990s, John Thomas began making payments to William Cashin and other United States Department of Agriculture inspectors in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. John Thomas began by paying United States Department of Agriculture inspectors \$25 for each inspection of perishable agricultural commodities, but in the 1990s, John Thomas increased the payments to \$50 for each inspection. John Thomas continued making payments to William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc, until August 4, 1999. These payments were not made to the United States Department of Agriculture for normal inspection services, but were payments made to William Cashin and other United States Department of Agriculture inspectors personally. (Tr. 41-48, 509-18.)

6. During the time in which John Thomas made payments to William Cashin in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc., John Thomas was the vice president and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (CX 1; Tr. 41-42, 243).

7. On March 23, 1999, William Cashin was arrested by agents of the Federal Bureau of Investigation and the United States Department of Agriculture, 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 into payments to United States Department of Agriculture produce inspectors by PACA licensees located at the Hunts Point Terminal Market. (Tr. 50-52; CX 19.)

8. With the approval of the Federal Bureau of Investigation and the United States Department of Agriculture, Office of the Inspector General, William Cashin continued to perform his duties as a United States Department of Agriculture produce inspector in the same fashion as before his arrest. William Cashin surreptitiously recorded interactions with individuals at different produce houses using audio, audio/video, or video recording devices. At the end of each day, William Cashin would give Federal Bureau of Investigation agents his tapes, turn in any money he received from PACA licensees, and recount his activities. The Federal Bureau of Investigation agents would prepare a “302” report summarizing what William Cashin told them about that day’s activities. (Tr. 51-56; CX 10.)

9. During the period March 26, 1999, through August 4, 1999, Kleiman & Hochberg, Inc., through John Thomas, Kleiman & Hochberg, Inc.’s vice president and 31.6 percent stockholder, made the following payments to a United States Department of Agriculture produce inspector in connection with 12 inspections of perishable agricultural commodities that Kleiman & Hochberg, Inc., purchased, received, and accepted from eight produce sellers in interstate or foreign commerce:

a. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 26, 1999, inspection of oranges shipped to Kleiman & Hochberg, Inc., by DNE World Food Sales reflected on United States Department of Agriculture Inspection Certificate Number K-678087-8.

b. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the March 26, 1999, inspection of pears shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-678088-6.

c. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 15, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by Central American Produce, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679411-9.

d. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 15, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by I. Kunik Co. reflected on United States Department of Agriculture Inspection Certificate Number K-679412-7.

e. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 20, 1999, inspection of pears shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679420-0.

f. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 29, 1999, inspection of grapes shipped to Kleiman & Hochberg, Inc., by Fisher Brothers Sales, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-679825-0.

g. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the April 29, 1999, inspection of strawberries shipped to Kleiman & Hochberg, Inc., by Dole Fresh Vegetables, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-680301-9.

h. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 28, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-766208-3.

i. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the May 28, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-766209-1.

j. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 16, 1999, inspection of cantaloups shipped to Kleiman & Hochberg, Inc., by Robert Ruiz, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-767028-4.

k. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the June 16, 1999, inspection of cherry tomatoes shipped to Kleiman & Hochberg, Inc., by Northeast Trading, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-767030-0.

l. Kleiman & Hochberg, Inc., paid William Cashin, a United States Department of Agriculture produce inspector, \$50 in connection with the August 4, 1999, inspection of sweet cherries shipped to Kleiman & Hochberg, Inc., by Stemilt Growers, Inc., reflected on United States Department of Agriculture Inspection Certificate Number K-769886-3.

(Tr. 61-70; CX 10-CX 18; RX A-RX L.)

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

[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, JOHN THOMAS, 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 Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>AMOUNT OF BRIBE</u>
ONE	3/26/99	\$100
TWO	4/19/99	\$100
THREE	4/22/99	\$50
FOUR	4/29/99	\$100
FIVE	5/28/99	\$100
SIX	6/24/99	\$50
SEVEN	8/5/99	\$50

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

CX 8A.

The bribes charged in the indictment cover the payments John Thomas made to William Cashin in connection with the 12 inspections of perishable agricultural commodities identified in Finding of Fact 9. (CX 10-CX 18.)

11. On October 17, 2001, John Thomas pled guilty to one count in an information which superceded the indictment referred to in Finding of Fact 10. Specifically, John Thomas pled guilty to bribery of public officials (18 U.S.C. § 201(b)).

(CX 9.) The superceding information to which John Thomas pled guilty states, as follows:

From in or about 1990 through on or about October 27, 1999, in the Southern District of New York, JOHN THOMAS, the defendant, unlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to public officials, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to United States Department of Agriculture produce inspectors in order to obtain expedited inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York.

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

CX 8 at 2. John Thomas was sentenced to 2 years' probation and a \$10,000 fine (CX 9).

12. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (Tr. 1278; CX 1; RCMH 1).

13. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was actively involved in the day-to-day management of Kleiman & Hochberg, Inc. Michael H. Hirsch's active involvement in the management of Kleiman & Hochberg, Inc., included the purchase, sale, and examination of perishable agricultural commodities; "[taking] care of credit, accounts receivable, and general daily problems of the business"; responsibility for inventory; applying for United States Department of Agriculture inspections of perishable agricultural commodities; interacting with United States Department of Agriculture produce inspectors; dealing with companies that shipped perishable agricultural commodities to Kleiman & Hochberg, Inc.; making

price-after-sale arrangements with shippers of perishable agricultural commodities; reviewing and sending accountings to shippers; establishing procedures for the daytime operation of Kleiman & Hochberg, Inc.; ensuring that Kleiman & Hochberg, Inc., was run "smoothly" and "properly"; and, along with Barry J. Hirsch, running the daytime operations of Kleiman & Hochberg, Inc. (Tr. 1189, 1220, 1265-67, 1270-72, 1277-78.)

14. During the period in which John Thomas paid bribes to William Cashin, Michael H. Hirsch was usually at Kleiman & Hochberg, Inc.'s place of business from 7:30 a.m. to between 4:00 p.m. and 6:00 p.m. (Tr. 1266).

15. Michael H. Hirsch had no knowledge that John Thomas paid bribes to William Cashin or any other United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. (Tr. 519, 1267-69, 1274-75).

16. During the period in which John Thomas paid bribes to William Cashin, Barry J. Hirsch was the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. (Tr. 1181, 1214-15; CX 1; RCBH 1).

17. During the period in which John Thomas paid bribes to William Cashin, Barry J. Hirsch was actively involved in the day-to-day management of Kleiman & Hochberg, Inc. Barry J. Hirsch's active involvement in the management of Kleiman & Hochberg, Inc., included checking on the inventory of perishable agricultural commodities; ensuring that the inventory of perishable agricultural commodities was properly stored and rotated; buying, selling, and examining perishable agricultural

commodities; establishing procedures for the daytime operation of Kleiman & Hochberg, Inc.; monitoring the activities of Kleiman & Hochberg, Inc., employees; ensuring that shippers of perishable agricultural commodities were paid promptly; settling disputed claims with shippers; applying for United States Department of Agriculture inspections of perishable agricultural commodities; examining accountings sent to shippers; ensuring that Kleiman & Hochberg, Inc., was run “smoothly” and “properly”; and, along with Michael H. Hirsch, running the daytime operations of Kleiman & Hochberg, Inc.

(Tr. 1181-82, 1189-95, 1208-11, 1215-22.)

18. Barry J. Hirsch had no knowledge that John Thomas paid bribes to William Cashin or any other United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities for Kleiman & Hochberg, Inc. (Tr. 519, 1198-1205, 1211-14).

Conclusions of Law

1. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), John Thomas' payments of bribes to United States Department of Agriculture produce inspectors are deemed the acts of Kleiman & Hochberg, Inc.

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

3. Michael H. Hirsch was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Barry J. Hirsch was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Discussion

I. Kleiman & Hochberg, Inc., Willfully, Flagrantly, and Repeatedly Violated the PACA

A. John Thomas, an Officer and Major Stockholder of Kleiman & Hochberg, Inc., Paid Bribes to United States Department of Agriculture Produce Inspectors

Both John Thomas and William Cashin freely acknowledged that John Thomas made \$50 payments to William Cashin in connection with 12 inspections of perishable agricultural commodities that Kleiman & Hochberg, Inc., purchased, received, and accepted from produce sellers. There was no dispute that these 12 payments were representative of a long-standing practice that went back until the late 1980s or early 1990s. John Thomas even testified that he paid William Cashin an additional \$150 for three inspections of perishable agricultural commodities that were not included in the Complaint. It is likewise undisputed that John Thomas was the vice president of Kleiman

& Hochberg, Inc., and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., at the time he paid William Cashin and other United States Department of Agriculture produce inspectors. (CX 1; Tr. 41-48, 243, 509-18.)

B. Kleiman & Hochberg, Inc., is Liable for John Thomas' Bribery

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

John Thomas, the vice president and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., testified that he paid bribes to United States Department of Agriculture produce inspectors in order to ensure United States Department of Agriculture inspections of perishable agricultural commodities for Kleiman & Hochberg, Inc., were not delayed (Tr. 509-12). John Thomas stated the money used to pay the bribes came out of his own pocket (Tr. 547). John Thomas also stated, and Michael H. Hirsch and Barry J. Hirsch confirmed, that John Thomas acted without Michael H. Hirsch's or Barry J. Hirsch's knowledge or approval (Tr. 519, 1198-1205, 1211-14, 1267-69, 1274-75). However, the purpose behind the bribes, even

as expressed by John Thomas, was to benefit Kleiman & Hochberg, Inc., as the alleged threat of delayed United States Department of Agriculture produce inspections would harm Kleiman & Hochberg, Inc., as an entity. Even though John Thomas, as a nearly one-third owner of Kleiman & Hochberg, Inc., would obviously share in any benefit that Kleiman & Hochberg, Inc., received, it is evident that the bribes were designed to benefit Kleiman & Hochberg, Inc., in the conduct of its business. As long as John Thomas was acting within the scope of his employment, which he clearly was, acts committed by him are deemed to be acts committed by Kleiman & Hochberg, Inc. Thus, as a matter of law, the knowing and willful bribes by John Thomas are deemed to be knowing and willful bribes by Kleiman & Hochberg, Inc.⁴

Even if Michael H. Hirsch and Barry J. Hirsch were unaware of John Thomas' payment of bribes, 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, violations by an officer and owner are violations by the employer even if the employer's other officers and owners had no actual knowledge of the violations and would not have condoned

⁴*Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406, 408 (D.C. Cir. 2005); *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. ___, slip op. at 20-21 (Sept. 27, 2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ___, slip op. at 15 (Sept. 8, 2005), appeal docketed, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 782-83 (2003), appeal dismissed, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994), aff'd, 91 F.3d 173 (D.C. Cir. 1996), cert. denied, 519 U.S. 1116 (1997); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), appeal dismissed, No. 94-4118 (2d Cir. Apr. 16, 1996).

them.⁵ The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

C. Bribery of United States Department of Agriculture Produce Inspectors Violates the PACA

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.⁶

John Thomas testified he bribed United States Department of Agriculture produce inspectors as alleged in the Complaint, but contends he paid the bribes only to obtain

⁵See *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003) (stating, pursuant to the PACA, knowing and willful violations by an employee are deemed to be knowing and willful violations of the employing PACA licensee, even if the PACA licensee's officers, directors, and owners had no actual knowledge of the violations), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

⁶7 U.S.C. § 499b(4).

prompt inspections of Kleiman & Hochberg, Inc.'s perishable agricultural commodities (Tr. 509-12). Even if John Thomas only bribed United States Department of Agriculture inspectors in exchange for prompt inspections, Kleiman & Hochberg, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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 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, even if it is only to obtain prompt inspection of perishable agricultural commodities, 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 bribes to United States Department of Agriculture produce inspectors.⁷

D. Kleiman & Hochberg, Inc.’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.⁸ John Thomas, and therefore Kleiman & Hochberg, Inc., knew the bribes paid

⁷*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. ____ (Sept. 27, 2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____ (Sept. 8, 2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff’d*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

⁸See, e.g., *Allred’s Produce v. United States Dep’t of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep’t of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep’t of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 828 (2003), *aff’d*, 123 Fed. Appx. 406 (D.C. Cir. 2005); *In re JSG Trading Corp.* (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; (4) Request for Pardon or Lesser Sanction), 61 Agric. Dec. 409, 430 (2002); *In re PMD Produce Brokerage Corp.* (Decision and Order on Remand), 60 Agric. Dec. 780, 789 (2001), *aff’d*, No. 02-1134, 2003 WL 21186047 (D.C. Cir. May 13, 2003); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 755 (2001), *aff’d*, 342 F.3d 584 (6th Cir. 2003); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 593 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1602 (1998); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813, 827 (1998), *appeal dismissed sub nom. Litvin v. United States Dep’t of Agric.*, No. 98-1991 (1st Cir. Nov. 9, 1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527,

(continued...)

to William Cashin in the 12 inspections involved in this proceeding, as well as the countless additional payments over the previous decade, were illegal, but essentially decided that he needed to make these payments for the benefit of Kleiman & Hochberg,

⁸(...continued)

552, (1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997), *appeal dismissed*, No. 98-5456 (11th Cir. July 39, 1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock's Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

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

Inc. Clearly, John Thomas made a business decision to violate the PACA, rather than to pursue alternative measures. Kleiman & Hochberg, Inc.’s payments to United States Department of Agriculture produce inspectors were clearly intentional.

Likewise, Kleiman & Hochberg, Inc.’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.”⁹ The payment of a bribe to a United States Department of Agriculture produce 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, as discussed in this Decision and Order, *supra*, it 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. The long-standing practice of Kleiman & Hochberg, Inc., bribing William Cashin and other United States Department of Agriculture produce inspectors, easily meets the definition of flagrant under applicable case law.

Moreover, I conclude, as a matter of law, Kleiman & Hochberg, Inc.’s violations are repeated because repeated means more than one.¹⁰ John Thomas paid William Cashin

⁹Merriam-Webster’s Collegiate Dictionary 441 (10th ed. 1997).

¹⁰See, e.g., *Allred’s Produce v. United States Dep’t of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating violations are repeated under the PACA if they are not done simultaneously); *Farley & Calfee v. United States Dep’t of Agric.*, 941 F.2d 964, 968 (9th (continued...)

and other United States Department of Agriculture produce inspectors multiple bribes in connection with numerous inspections of perishable agricultural commodities over approximately a 10-year period.

Thus, I conclude Kleiman & Hochberg, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

II. The Appropriate Sanction Against Kleiman & Hochberg, Inc., Is License Revocation

John A. Koller, a senior marketing specialist employed by the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, testified that bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the United States Department of Agriculture recommends PACA license revocation as the only adequate sanction. Mr. Koller explained the United States Department of Agriculture's recommendation for PACA license revocation as follows:

¹⁰(...continued)

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 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).

[BY MR. KENDALL:]

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

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of it?

A. I participated in development of the sanction recommendation.

Q. Have you heard the evidence presented at this hearing for this point?

A. Yes, I have.

Q. Are you now prepared to provide Complainant's sanction recommendation in this case?

A. Yes.

....

Q. At this point what is the sanction recommendation in this case?

A. That would be a license revocation.

Q. What's the basis for Complainant's sanction recommendation?

A. The basis of Complainant's sanction recommendation is on various factors. One of the factors is that bribery payments did occur. As an aggregate factor Mr. Thomas' plea and Mr. Cashin's testimony shows that the bribery payments occurred as far back as 1990. The role of the inspection certificate as another factor is relied upon on the industry in terms of being able to resolve contract disputes quickly.

Approximately 150,000 inspections are performed each year by the Fresh Products Branch. It is important that - and essential that the information that is reflected on these inspections are accurate and impartial. If there's any indication or any suspicion that the inspection has been tainted because of a bribery payment being made in order to obtain false information on the inspection undermines the role of that certificate.

If there's any question about the credibility of inspection and the process in which that inspection was performed in terms of how it reflects an impartial review in terms of the quality and condition of the product, would undermine the whole process and be disruptive.

If there's a question about that on the part of the shipper in terms of the reliability of the inspection would be detrimental to the whole process, and affect how disputes are resolved - hundreds of disputes are resolved - each day. As well as resolving thousands of dollars in unjustified price adjustments.

Another factor is where you have a wholesaler who's paying bribes to a produce inspector to obtain false information. Other wholesalers may feel that they have to make bribery payments as well. For example, what I mean by that is if you have a wholesaler on the market - on Hunts Point Market - who is making bribery payments to a produce inspector and they are able to use the results of that inspection to negotiate price adjustments to the transaction related to that inspection that would lower prices, then they would be in a position to sell the product at a lesser price. When you have other wholesalers on the market who would be selling the same product see that this is the only way that they can compete is by making bribery payments to a produce inspector, they may feel that that's what they'll have to do.

This would have an affect on the whole market in terms of its credibility, whether you've got firms that - where you have firms making bribery payments, but also in terms of firms that aren't making bribery payments, it would affect them.

Also, the Department, for this type of violation, a strong sanction of license revocation is - would be appropriate in this case. Because not only would it deter Respondent, but it would also deter other members of the industry from contemplating making a serious violation such as that of making bribery payments to a produce inspector.

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

A. No.

Q. Why not?

A. The Department believes that this violation is a serious violation under the PACA. That whether these bribery payments - in terms of bribery payments, whether these bribery payments were made to someone else in the industry or whether the bribery payments were made to a produce inspector, a violation of the Respondent making these bribery payments does not excuse that firm from that violation.

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

A. No.

Q. Why not?

A. In terms of the seriousness of this violation a civil penalty would not be appropriate. By making bribery payments to a produce inspector is a serious violation and it affects the industry as a whole. A license revocation would be a revocation to seek - and, also, the industry needs to be put on notice that making bribery payments is not something that can be allowed.

Also, it has been consistent policy of the Department to recommend a license revocation in the situations where you have a serious violation of bribery payments taking place.

Tr. 349-53.

I find John Thomas' payment of bribes to United States Department of Agriculture produce inspectors within the scope of his employment are deemed to be the actions of Kleiman & Hochberg, Inc., 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 United States Department of Agriculture produce inspectors 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.¹¹ While sanctions in similar cases are not required to be uniform,¹² I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

III. Michael H. Hirsch and Barry J. Hirsch 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.¹³ The record establishes Michael H. Hirsch was the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section

¹¹*In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. ____ (Sept. 27, 2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ____ (Sept. 8, 2005), *appeal docketed*, No. 05-5634 (2d Cir. Oct. 18, 2005); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

¹²*Harry Klein Produce Corp. v. United States 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).

¹³7 U.S.C. § 499a(b)(9).

2(4) of the PACA (7 U.S.C. § 499b(4)). The record also establishes Barry J. Hirsch was the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., during the period when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Michael H. Hirsch and Barry J. Hirsch to demonstrate by a preponderance of the evidence that they were not responsibly connected with Kleiman & Hochberg, Inc., despite their positions at, and ownership of, Kleiman & Hochberg, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, 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 is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

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

I find Michael H. Hirsch carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). I also find Barry J. Hirsch carried his burden of proof that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I find Michael H. Hirsch failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. I also find Barry J. Hirsch failed to carry his burden of proof that he was only nominally an officer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc.

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.¹⁴

The record establishes Michael H. Hirsch and Barry J. Hirsch each had an actual, significant nexus with Kleiman & Hochberg, Inc., during the violation period. Michael H. Hirsch and Barry J. Hirsch assert they actively managed Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the PACA.¹⁵ This fact refutes any possible contention that either Michael H. Hirsch or Barry J. Hirsch could prove he was not responsibly connected by demonstrating he was only nominal. Under the statutory definition of the term *responsibly connected*, the fact that Michael H. Hirsch and Barry J. Hirsch were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA does not exonerate them unless they also prove by a preponderance of the evidence that their positions at, and ownership of, Kleiman &

¹⁴*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States 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).

¹⁵See Petitioners' Brief and Supplemental Proposed Findings of Fact, Conclusions of Law, and Order at 1 (stating in proposed finding of fact 1 "Barry Hirsch was the Treasurer and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint in PACA Docket No. D-02-0021"; stating in proposed finding of fact 2 "Michael Hirsch was the President and 32% stockholder of Kleiman & Hochberg, Inc., and in active management of the company during the period covered by the Complaint in PACA Docket No. D-02-0021").

Hochberg, Inc., were nominal. Michael H. Hirsch has not established by a preponderance of the evidence that he was only nominally the president, a director, and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc. Barry J. Hirsch has not established by a preponderance of the evidence that he was only nominally the treasurer and a holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc.

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

The Agricultural Marketing Service and the Chief raise two issues in “Complainant’s and Respondent’s Appeal to the Decision and Order.” First, the Agricultural Marketing Service and the Chief contend the Chief ALJ’s assessment of a civil penalty, is error.

The Chief ALJ assessed Kleiman & Hochberg, Inc., a \$180,000 civil penalty (Initial Decision at 35). While the Chief ALJ found Kleiman & Hochberg, Inc.’s payment of bribes to United States Department of Agriculture inspectors serious violations of the PACA, he found that revocation of Kleiman & Hochberg, Inc.’s PACA license was not warranted because John Thomas paid the bribes to obtain expedited United States Department of Agriculture inspections of perishable agricultural commodities for Kleiman & Hochberg, Inc., rather than to gain a competitive advantage over shippers or growers (Initial Decision at 25).

John Thomas’ motivation for the payment of bribes to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities is not relevant to the sanction to be imposed against Kleiman &

Hochberg, Inc. A PACA licensee's payment to a United States Department of Agriculture produce inspector to obtain an expedited inspection of perishable agricultural commodities negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence produce industry members and consumers place in the quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from paying United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities. A PACA licensee's payment of bribes to a United States Department of Agriculture produce inspector, whether the payment is designed to obtain an expedited inspection or to obtain an economic advantage over shippers and growers, undermines 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.

The record establishes that Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to United States Department of Agriculture produce inspectors for approximately 10 years. Kleiman & Hochberg, Inc.'s violations of the PACA are egregious. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to United States Department of Agriculture produce inspectors 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.¹⁶ I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding. Therefore, I revoke Kleiman & Hochberg, Inc.'s PACA license.

Second, the Agricultural Marketing Service and the Chief contend the Chief ALJ's finding that Michael H. Hirsch and Barry J. Hirsch were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA, is error.

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

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

I agree with the Chief ALJ that Michael H. Hirsch and Barry J. Hirsch demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA. In their

¹⁶See note 11.

appeal petition, the Agricultural Marketing Service and the Chief cite numerous portions of the record which establish that Michael H. Hirsch and Barry J. Hirsch were actively involved in the day-to-day management of Kleiman & Hochberg, Inc.; however, there is no evidence that Michael H. Hirsch or Barry J. Hirsch participated in activities resulting in John Thomas' payment of bribes to United States Department of Agriculture produce inspectors. More to the point, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch proved by a preponderance of the evidence that Michael H. Hirsch and Barry J. Hirsch were not actively involved in activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA.

The Agricultural Marketing Service and the Chief also contend Michael H. Hirsch and Barry J. Hirsch were each actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of the PACA by virtue of the ownership of more than 10 percent of the outstanding stock of Kleiman & Hochberg, Inc. The Agricultural Marketing Service and the Chief essentially urge that I hold that any individual that 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 by adding a rebuttable presumption standard which explicitly allows 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 that 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.”¹⁷ 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 were only nominal officers, directors, or shareholders and that they were uninvolved in the violation.”¹⁸ Michael H. Hirsch and Barry J. Hirsch each carried his burden of proof

¹⁷H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

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

that he was not actively involved in the activities resulting in Kleiman & Hochberg, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

**Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's,
and Barry J. Hirsch's Appeal Petition**

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch raise six issues in "Respondent's and Petitioners' Joint Appeal Petition To the Judicial Officer Pursuant To 7 C.F.R. § 1.145 From the Decision of the Hon. Marc R. Hillson, C.A.L.J., Dated December 3, 2004." First, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., did not violate the PACA because John Thomas did not pay bribes to United States Department of Agriculture produce inspectors, but, instead, was the victim of extortion by a corps of corrupt United States Department of Agriculture employees installed for more than a decade at the Hunts Point Terminal Market.

As an initial matter, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that John Thomas did not pay bribes to United States Department of Agriculture produce inspectors. The record contains substantial evidence that John Thomas paid bribes to United States Department of Agriculture inspectors, including evidence of John Thomas' plea of guilty to bribery of public officials over

¹⁸(...continued)
465-66.

approximately a 10-year period (CX 8-CX 9). The information to which John Thomas pled guilty states, as follows:

From in or about 1990 through on or about October 27, 1999, in the Southern District of New York, JOHN THOMAS, the defendant, unlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to public officials, with intent to influence official acts, to wit, JOHN THOMAS, the defendant, made cash payments to United States Department of Agriculture produce inspectors in order to obtain expedited inspections of fresh fruit and vegetables conducted at Kleiman & Hochberg, Inc., Hunts Point Terminal Market, Bronx, New York.

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

CX 8 at 2.

Moreover, even if I found that all of John Thomas' payments to United States Department of Agriculture produce inspectors were made as a result of extortion by United States Department of Agriculture employees (which I do not so find), I would conclude that Kleiman & Hochberg, Inc., violated the PACA. 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, whether a bribe or the result of extortion, undermines the trust produce

sellers place in the integrity of the United States Department of Agriculture inspector and the accuracy of the United States Department of Agriculture inspection certificate.¹⁹

The extortion cited by Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch (Tr. 509-11) is not a “reasonable cause,” under section 2(4) of the PACA (7 U.S.C. § 499b(4)), for Kleiman & Hochberg, Inc.’s failure to perform the implied duty to refrain from paying United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities.

Second, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch argue that Kleiman & Hochberg, Inc., did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)), because John Thomas’ payments to United States Department of Agriculture produce inspectors had no effect on Kleiman & Hochberg, Inc.’s produce transactions or Kleiman & Hochberg, Inc.’s produce suppliers. John Thomas testified that his payments of bribes to United States Department of Agriculture produce inspectors were designed only to obtain expedited United States Department of Agriculture inspections of perishable agricultural commodities. Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch have consistently argued that no produce supplier was economically disadvantaged by John Thomas’ payments to United States Department of Agriculture produce inspectors.

¹⁹*In re G & T Terminal Packaging Co.*, 64 Agric. Dec. ___, slip op. at 19 (Sept. 8, 2005), appeal docketed, No. 05-5634 (2d Cir. Oct. 18, 2005).

Bribery of a United States Department of Agriculture produce inspector, even if the bribery does not economically disadvantage any produce seller or grower, 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 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 payments to United States Department of Agriculture produce inspectors, even if the payments are only designed to obtain prompt inspection of perishable agricultural commodities, undermines 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. Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that Kleiman & Hochberg, Inc., did not violate the PACA because no produce supplier was economically disadvantaged as a result of John Thomas' payments to United States Department of Agriculture produce inspectors.

Third, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend John Thomas' payments to United States Department of Agriculture produce inspectors were not within the scope of John Thomas' employment with Kleiman & Hochberg, Inc.; therefore, Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture produce inspectors.

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;²⁰ (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.²¹

The record clearly establishes that John Thomas was within the scope of his employment with Kleiman & Hochberg, Inc., when he paid bribes to United States Department of Agriculture produce inspectors. John Thomas paid bribes to United States Department of Agriculture produce inspectors at Kleiman & Hochberg, Inc.'s place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by Kleiman & Hochberg, Inc. John Thomas was authorized to apply for United States Department of

²⁰Rarely 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.

²¹See generally Restatement (Second) of Agency § 228 (1958).

Agriculture inspections of perishable agricultural commodities and the bribes John Thomas paid to United States Department of Agriculture produce inspectors were intended to benefit Kleiman & Hochberg, Inc. (Tr. 345-46, 392-93, 509, 518, 554; CX 10.) Therefore, I reject Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's contention that John Thomas was not acting within the scope of his employment when he paid United States Department of Agriculture produce inspectors.

Fourth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend Kleiman & Hochberg, Inc., is not liable for John Thomas' payments to United States Department of Agriculture produce inspectors because Michael H. Hirsch and Barry J. Hirsch did not know of John Thomas' violations until after his arrest in October 1999.

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

Kleiman & Hochberg, Inc.'s vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., John Thomas, was acting within the

scope of employment when he knowingly and willfully bribed United States Department of Agriculture produce inspectors. Thus, as a matter of law, the knowing and willful violations by John Thomas are deemed to be knowing and willful violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc.'s other officers and part owners had no actual knowledge of the bribery.²² 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 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

²²*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003), *aff'd*, 123 Fed. Appx. 406 (D.C. Cir. 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 789-91 (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).

Sixth Circuit, acts are “willful” when “knowingly taken by one subject to the statutory provisions in disregard of the action’s legality.” *Hodgins v. United States Dep’t of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). “Actions taken in reckless disregard of statutory provisions may also be considered ‘willful.’” *Id.* (quotation and citations omitted). The MacClaren employees admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions’ legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

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

Similarly, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123 (2d Cir. 2003), the Court found that bribes made by a produce wholesaler’s employee to a United States Department of Agriculture produce 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).

John Thomas, the vice president and holder of 31.6 percent of the outstanding stock of Kleiman & Hochberg, Inc., paid bribes to United States Department of Agriculture produce inspectors. As a matter of law, the violations by Kleiman & Hochberg, Inc.'s officer and part owner are deemed to be violations by Kleiman & Hochberg, Inc., even if Kleiman & Hochberg, Inc.'s other officers and part owners had no actual knowledge of John Thomas' bribes and would not have condoned those bribes had they known of them.²³ The clear language of section 16 of the PACA (7 U.S.C. § 499p) would be defeated by any other interpretation.

Fifth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend once John Thomas pled guilty to bribing United States Department of Agriculture produce inspectors, Kleiman & Hochberg, Inc.'s liability for John Thomas' bribery became a foregone conclusion and an unconstitutional irrebuttable presumption.

Section 16 of the PACA (7 U.S.C. § 499p) does not create an irrebuttable presumption, as Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch assert. Kleiman & Hochberg, Inc., could avoid liability under the PACA for John Thomas' bribery either by showing John Thomas was not acting for or employed by Kleiman & Hochberg, Inc., at the time he bribed United States Department of Agriculture produce inspectors or by showing that John Thomas' bribes were not made within the scope of his employment or office. Therefore, I reject Kleiman & Hochberg, Inc.'s,

²³See note 5.

Michael H. Hirsch's, and Barry J. Hirsch's contention that once John Thomas pled guilty to bribing United States Department of Agriculture produce inspectors, Kleiman & Hochberg, Inc., was irrebuttably presumed to be liable for John Thomas' bribery.

Sixth, Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch contend the imposition of employment sanctions violates Michael H. Hirsch's and Barry J. Hirsch's constitutional right to engage in their chosen occupation.

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.²⁴

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.²⁵ 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

²⁴*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States 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).

²⁵H.R. Rep. No. 1041 (1930).

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 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.²⁶ 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 Michael H. Hirsch's or Barry J. Hirsch's due process rights by arbitrarily interfering with Michael H. Hirsch's or Barry J. Hirsch's chosen occupation.

Contrary to Kleiman & Hochberg, Inc.'s, Michael H. Hirsch's, and Barry J. Hirsch's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.²⁷ A number of courts have rejected constitutional challenges to 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.²⁸

²⁶*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

²⁷*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).

²⁸*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
(continued...)

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

ORDER

1. Kleiman & Hochberg, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Kleiman & Hochberg, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Kleiman & Hochberg, Inc.

2. I affirm the Chief's February 12, 2003, determination that Michael H. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Michael H. Hirsch is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the

²⁸(...continued)

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 determined to be responsibly connected with a PACA licensee who 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).

PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Michael H. Hirsch.

3. I affirm the Chief's February 12, 2003, determination that Barry J. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Barry J. Hirsch 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 Barry J. Hirsch.

RIGHT TO JUDICIAL REVIEW

Kleiman & Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch 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, 2343-2350. Kleiman &

Hochberg, Inc., Michael H. Hirsch, and Barry J. Hirsch must seek judicial review within 60 days after entry of the Order in this Decision and Order.²⁹ The date of entry of the Order in this Decision and Order is April 5, 2006.

Done at Washington, DC

April 5, 2006

William G. Jenson
Judicial Officer

²⁹See 28 U.S.C. § 2344.