

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-03-0006
	)	
Robert A. Roberti, Jr., d/b/a	)	
Phoenix Fruit Co.,	)	
	)	
Respondent	)	<b>Decision and Order</b>

**PROCEDURAL HISTORY**

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a “Notice to Show Cause” on December 4, 2002. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant: (1) alleges Robert A. Roberti, Jr., d/b/a Phoenix Fruit Co. [hereinafter Respondent], engaged in practices of a character prohibited by the PACA; (2) requests a finding that Respondent is unfit to engage in the business of a commission merchant,

dealer, or broker; and (3) requests Respondent's PACA license application, filed November 5, 2002, be refused (Notice to Show Cause ¶ VIII).

On December 19, 2002, Respondent filed a "Response to Notice to Show Cause" in which Respondent: (1) denies a number of the allegations in Complainant's Notice to Show Cause; (2) asserts the accurate allegations in Complainant's Notice to Show Cause are not sufficient to withhold the issuance of a PACA license to Respondent; and (3) requests an order directing the issuance of a PACA license to Respondent.

On February 28, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted a hearing in Phoenix, Arizona. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Charles Hultstrand, Hultstrand & Goodale P.C., Mesa, Arizona, represented Respondent.

On March 31, 2003, Complainant filed "Proposed Findings of Fact, Conclusions of Law, and Order" [hereinafter Post-Hearing Brief]. On April 11, 2003, Respondent filed a "Response to Complainant's Proposed Findings of Fact, Conclusions of Law, and Order" [hereinafter Post-Hearing Response Brief].

On May 8, 2003, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order]: (1) concluding Respondent engaged in practices of a character prohibited by the PACA prior to filing an application for a PACA license on November 5, 2002; (2) concluding Respondent is not fit to receive a PACA license because Respondent

engaged in practices of a character prohibited by the PACA; and (3) denying Respondent's November 5, 2002, application for a PACA license (Initial Decision and Order at 10).

On June 9, 2003, Respondent appealed to the Judicial Officer. On June 30, 2003, Complainant filed "Complainant's Response to Respondent's Appeal Petition." On July 1, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order; except that, in addition to the Chief ALJ's conclusion that Respondent is not fit to receive a PACA license, I also conclude the Secretary of Agriculture must refuse to issue Respondent a PACA license because Respondent is or was responsibly connected with a person whose PACA license is currently under suspension. Therefore, except for minor, non-substantive changes and an additional conclusion of law, I adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's conclusions of law as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr." Respondent did not introduce any exhibits.

## **APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

7 U.S.C.:

### **TITLE 7—AGRICULTURE**

.....

### **CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES**

....

**§ 499b. Unfair conduct**

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

....

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

....

**§ 499d. Issuance of license**

....

**(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;

(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;

.....  
 (D) has failed, except in the case of bankruptcy and subject to his right of appeal under section 499g(c) of this title, to pay any reparation order issued against him within two years prior to the date of the application.

.....

**(d) Withholding license pending investigation**

The Secretary may withhold the issuance of a licence to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given the opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

**(e) Refusal of license**

The Secretary may refuse to issue a license to an applicant if he finds that the applicant, or in case the applicant is a partnership, any general

partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, has, within three years prior to the date of the application, been adjudicated or discharged as a bankrupt, or was a general partner of a partnership or officer or holder of more than 10 per centum of the stock of a corporation adjudicated or discharged as a bankrupt, and if he finds that the circumstances of such bankruptcy warrant such a refusal, unless the applicant furnishes a bond of such nature and amount as may be determined by the Secretary or other assurance satisfactory to the Secretary that the business of the applicant will be conducted in accordance with this chapter.

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#### **§ 499g. Reparation order**

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#### **(d) Suspension of license for failure to obey reparation order or appeal**

Unless the licensee against whom a reparation has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

#### **§ 499h. Grounds for suspension or revocation of license**

##### **(a) Authority of Secretary**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and

circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. §§ 499b(4), 499d(b)(A)-(B), (D), (d)-(e), 499g(d), 499h(a).

7 C.F.R.:

**TITLE 7—AGRICULTURE**

....

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE**

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

....

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

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

DEFINITIONS

....

**§ 46.2 Definitions.**

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

....

(m) *Dealer* means any person engaged in the business of buying or selling in wholesale or jobbing quantities in commerce and include:

....

(2) Retailers, when the invoice cost of all purchases of produce exceeds \$230,000 during a calendar year. In computing dollar volume, all purchases of fresh and frozen fruits and vegetables are to be counted, without regard to quantity involved in a transaction or whether the transaction was intrastate, interstate or foreign commerce[.]

....



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

....

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

7 C.F.R. § 46.2(m)(2), (aa)(5).

**CHIEF ADMINISTRATIVE LAW JUDGE’S  
INITIAL DECISION AND ORDER  
(AS RESTATED)**

**Statement of the Case**

Respondent filed a completed application for a PACA license on November 5, 2002.<sup>1</sup> Pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), Complainant conducted an investigation to determine whether Respondent was fit for a PACA license. Complainant completed the investigation no later than December 4, 2002.<sup>2</sup> Complainant concluded Respondent was not fit to receive a PACA license. Complainant based this conclusion on the following allegations: (1) in 1995, Respondent was president, director, and 100 percent stockholder of SWF Produce, Inc., a PACA licensee which repeatedly and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to produce sellers; (2) Respondent was found to have been responsibly connected with SWF Produce, Inc., at the time it committed repeated and flagrant

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<sup>1</sup>*In re Robert A. Roberti, Jr.*, 62 Agric. Dec. \_\_\_\_ (Feb. 14, 2003) (Ruling on Certified Question).

<sup>2</sup>See note 1.

violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) in 2001, Respondent was involved with Garden Fresh Fruit Market, Inc., a PACA licensee which repeatedly and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to produce sellers; (4) Respondent was found to have been responsibly connected with Garden Fresh Fruit Market, Inc., at the time it committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (5) Respondent was the president, director, and 100 percent stockholder of Sandia Produce, Inc., a PACA licensee issued a reparation order on June 13, 2000, requiring it to pay Ruby Robinson Co., Inc., \$13,168.10 for failure to pay for produce in violation of section 2 of the PACA (7 U.S.C. § 499b); (6) on July 19, 2000, Sandia Produce, Inc.'s PACA license was suspended because it failed to pay \$13,168.10 in accordance with the June 13, 2000, reparation order; (7) Sandia Produce, Inc.'s PACA license is currently under suspension because Sandia Produce, Inc., has not paid \$13,168.10 in accordance with the June 13, 2000, reparation order; (8) on July 17, 2001, Respondent filed for personal bankruptcy and in his bankruptcy petition, Respondent took personal responsibility for Garden Fresh Fruit Market, Inc.'s produce debts; (9) Respondent was involved with Field Fresh Fruit Market, a firm subject to PACA licencing, but which was operated without a PACA license; and (10) Respondent listed Field Fresh Fruit Market's produce creditors in his July 17, 2001, bankruptcy petition (Notice to Show Cause; Complainant's Post-Hearing Brief at 6, 10-11).

Respondent was a director, the president, and 100 percent stockholder of SWF Produce, Inc., during the period when SWF Produce, Inc., committed repeated and flagrant

violations of the PACA. However, all of SWF Produce, Inc.'s produce sellers were later paid in full. (Tr. 55-56, 86-87, 96; CX 8, CX 9, CX 10.)

Respondent was involved with Garden Fresh Fruit Market, Inc., until November 1, 1993, when he transferred all of his stock in Garden Fresh Fruit Market, Inc., to his father and resigned as president and director of Garden Fresh Fruit Market, Inc. (Tr. 87-88; CX 2 at 7-8). Later, due to the medical condition of his father, Respondent helped with the operation of Garden Fresh Fruit Market, Inc., but Respondent did not have an ownership interest in Garden Fresh Fruit Market, Inc., or act as an officer or director of Garden Fresh Fruit Market, Inc. (Tr. 104-05). On November 3, 1999, Garden Fresh Fruit Market, Inc., filed for bankruptcy. On September 6, 2001, the Chief ALJ found, during the period August 23, 1998, through June 24, 1999, Garden Fresh Fruit Market, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly for fruits and vegetables which Garden Fresh Fruit Market, Inc., received, accepted, and sold in interstate and foreign commerce.<sup>3</sup> (Tr. 25-26; CX 16, 19.)

Complainant contends Respondent's name ("Robert Roberti, Jr.") appears on Garden Fresh Fruit Market, Inc.'s November 3, 1999, bankruptcy petition and the appearance of Respondent's name on the November 3, 1999, bankruptcy petition establishes that Respondent took personal responsibility for Garden Fresh Fruit Market, Inc.'s produce

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<sup>3</sup>*In re Garden Fresh Fruit Market, Inc.*, 60 Agric. Dec. 889 (2001).

debts. Respondent also listed Garden Fresh Fruit Market, Inc.'s produce creditors on his July 17, 2001, bankruptcy petition. Information in Complainant's computer database further indicates Respondent continued to be associated with Garden Fresh Fruit Market, Inc. (Tr. 13, 22-29; CX 5 at 16-34, CX 19 at 2.)

The record shows that Respondent's name is typed on Garden Fresh Fruit Market, Inc.'s November 3, 1999, bankruptcy petition (CX 19 at 2). Respondent, however, testified he did not sign this bankruptcy petition and the signature is that of his father, Robert Roberti, Sr. (Tr. 88). The signature above the typed name is clearly not the same as the other examples of Respondent's signature that appear in the record but, rather, the signature on Garden Fresh Fruit Market, Inc.'s November 3, 1999, bankruptcy petition appears to be that of Respondent's father.<sup>4</sup>

With respect to the listing of Garden Fresh Fruit Market, Inc.'s creditors in Respondent's July 17, 2001, bankruptcy petition, Respondent testified he was sued by one of Garden Fresh Fruit Market, Inc.'s creditors and his attorney advised him to include Garden Fresh Fruit Market, Inc., creditors in his bankruptcy petition but to identify their claims as "contingent," "unliquidated," and "disputed" (Tr. 88-89; CX 5 at 16-34). Under Rule 3003(c)(2) of the Federal Rules of Bankruptcy Procedure, any creditor whose claim is scheduled as disputed, contingent, or unliquidated must file a proof of claim.

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<sup>4</sup>Compare the signatures in CX 19 at 2 with the signatures in CX 2 at 4, 7, and 8.

Respondent was determined to be responsibly connected with Garden Fresh Fruit Market, Inc., at the time of its violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, Respondent was not served with this responsibly-connected determination, and the record does not otherwise establish that Respondent knew of this determination. (Tr. 39-40; CX 18.)

As for Field Fresh Fruit Market, Respondent testified he was involved with Field Fresh Fruit Market, a retail store, for 6 to 8 months in 1996 or 1997 and Field Fresh Fruit Market's produce purchases reached \$15,000 a week (Tr. 92-95). However, Field Fresh Fruit Market's weekly purchases before reaching that amount are not shown.

Finally, with respect to Sandia Produce, Inc., Respondent admits: (1) he was president and owner of Sandia Produce, Inc.; (2) Sandia Produce, Inc., was unable to pay all its creditors and one creditor, Ruby Robinson Co., Inc., obtained a reparation award in the amount of \$13,168.10 in 2000 for Sandia Produce, Inc.'s failure to pay for produce; (3) Sandia Produce, Inc., did not pay this reparation award to Ruby Robinson Co., Inc.; and (4) based on Sandia Produce, Inc.'s failure to pay the reparation award to Ruby Robinson Co., Inc., Sandia Produce, Inc.'s PACA license was suspended on July 19, 2000 (Tr. 89-91; Respondent's Response to Notice to Show Cause ¶ III(c); Respondent's Post-Hearing Response Brief at 6).

Respondent testified that he had wanted to pay Ruby Robinson Co., Inc., "something" but that "they said they wanted the full amount paid in full. I didn't have it. I listed them as a creditor. We filed our bankruptcy." (Tr. 90.)

Respondent listed Ruby Robinson Co., Inc.'s reparation award claim for \$13,168.10 in Respondent's July 17, 2001, bankruptcy petition. However, like the claims by Garden Fresh Fruit Market, Inc.'s produce creditors, Respondent identified Ruby Robinson Co., Inc.'s claim as "contingent," "unliquidated," and "disputed" (CX 5 at 38).

Respondent was discharged in bankruptcy in October 2001 (Tr. 107). Respondent testified that, in August or September 2002, he contacted Ruby Robinson Co., Inc., to try to make arrangements to pay the "\$13,000 debt," but that Ruby Robinson Co., Inc., "wanted approximately \$22,000 or \$23,000 paid in a cashier's check" (Tr. 90-91). Respondent also testified that Sandia Produce, Inc., owed two other creditors between \$6,000 and \$10,000 (Tr. 108).

### **Discussion**

Complainant failed to show by a preponderance of the evidence that Respondent was involved with Garden Fresh Fruit Market, Inc., when it willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period August 23, 1998, through June 24, 1999. Respondent's name on Garden Fresh Fruit Market, Inc.'s bankruptcy petition is obviously an error and the information in Complainant's database is unreliable, secondhand information based on documents that were not presented at the hearing (Tr. 30-31). Complainant never served Respondent with the determination that Respondent was responsibly connected with Garden Fresh Fruit Market, Inc. Reliance on Complainant's responsibly-connected determination would therefore violate Respondent's right to due process. Respondent's alleged connection with Garden Fresh Fruit Market,

Inc., for purposes of considering whether Respondent is fit to be granted a PACA license is accordingly disregarded.

The record does not show that Field Fresh Fruit Market, a retail operation, was required to have a PACA license. Section 46.2(m)(2) of the Regulations (7 C.F.R. § 46.2(m)(2)) provides that a retailer is not a dealer required to be licensed until its invoice cost of all produce purchases exceeds \$230,000 during a calendar year. Even though a projection of Field Fresh Fruit Market's eventual weekly purchases would exceed this amount, Complainant did not show that Field Fresh Fruit Market's produce purchases had reached that volume during the 6 to 8 months of Respondent's operation of Field Fresh Fruit Market. The record therefore fails to show Respondent was associated with Field Fresh Fruit Market at a time that it failed to have a required PACA license.

Respondent argues, pursuant to section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)), his failure to pay a reparation order is not applicable to his fitness to receive a PACA license because the June 13, 2000, reparation order was not issued within 2 years of his application for a PACA license and he is also subject to the bankruptcy exception under section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)) (Respondent's Post-Hearing Response Brief at 5-6).

Respondent further argues that despite being adjudged bankrupt within 3 years of his application, he may still receive a license under section 4(e) of the PACA (7 U.S.C. § 499d(e)) if he posts a bond, but that the Secretary of Agriculture has refused to set a bond amount (Respondent's Post-Hearing Response Brief at 2, 5).

Even though the June 13, 2000, reparation order against Respondent was issued more than 2 years prior to the date of Respondent's PACA license application and notwithstanding the bankruptcy exception in section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)), Respondent is not thereby entitled to a PACA license by simply posting a bond. Complainant may, pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), refuse to issue a PACA license if Complainant finds the applicant "unfit" because the applicant "prior to the date of the filing of the application engaged in any practice of the character prohibited by" the PACA.

In this case, Respondent had engaged in such practices prior to filing his PACA license application on November 5, 2002. Respondent was the president, a director, and sole stockholder of, and responsibly connected with, SWF Produce, Inc., a firm that engaged in repeated and flagrant violations of the PACA. To Respondent's credit, he eventually paid SWF Produce, Inc.'s creditors. However, the fact remains that SWF Produce, Inc., had engaged in repeated and flagrant violations of the PACA during a period in which Respondent was responsibly connected with SWF Produce, Inc. That circumstance may therefore be considered by Complainant as a "practice of the character prohibited by" the PACA in determining whether Respondent is fit to engage in the business of a commission merchant, dealer, or broker.

More recently, Respondent, through Sandia Produce, Inc., another firm he owned and operated, failed to pay a reparation award. Respondent argues that this failure to pay no longer applies in deciding whether he should be issued a PACA license because the



June 13, 2000, reparation order was issued over 2 years before Respondent filed his PACA license application and because of his bankruptcy. However, as a result of Respondent's failure to pay the reparation award, Sandia Produce, Inc.'s PACA license was suspended. The suspension of Sandia Produce, Inc.'s PACA license has not been lifted. Section 4(b)(A) of the PACA (7 U.S.C. § 499d(b)(A)) provides that the Secretary of Agriculture shall refuse to issue a PACA license to an applicant who is or was responsibly connected with a person "whose license is currently under suspension." Further, the failure to pay the reparation order constitutes a "practice of the character prohibited by" the PACA under section 4(d) of the PACA (7 U.S.C. § 499d(d)).

Respondent has apparently still not complied with the United States Department of Agriculture's June 13, 2000, reparation order. The bankruptcy exception in section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)) contemplates that the reparation award will be listed in the bankruptcy petition and then be discharged with the bankrupt's other debts.<sup>5</sup> At the hearing, Respondent did not deny that he owed Ruby Robinson Co., Inc., \$13,168.10. Nevertheless, Respondent listed the reparation award in his July 17, 2001, bankruptcy petition as a contingent, unliquidated, and disputed claim when it was, indeed, none of these. Respondent did not explain why his undisputed debt to Ruby Robinson Co., Inc., was to be treated the same as the disputed claims from Garden Fresh Fruit Market, Inc.'s creditors. Respondent, moreover, did not contend that his bankruptcy discharged his debt to Ruby

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<sup>5</sup>See, e.g., *Jerome Kantro Co. v. L. George Co.*, 28 Agric. Dec. 493 (1969).

Robinson Co., Inc., but rather indicated in his testimony that he and Ruby Robinson Co., Inc., regarded the debt as continuing even after his October 2001 discharge in bankruptcy.

Respondent's failure to explain the reason for the way he treated his undisputed debt to Ruby Robinson Co., Inc., in his bankruptcy petition thus leaves unresolved the question whether the debt is still outstanding. I infer the reparation award has not been paid and Respondent has therefore failed to comply with the United States Department of Agriculture's reparation order. In view of these circumstances, and Respondent's prior association with SWF Produce, Inc., Respondent has failed to show that he is fit to receive a PACA license.

#### **Findings of Fact**

1. Respondent is an individual whose business address is 2241 East Marquette Drive, Gilbert, Arizona 85234.
2. Respondent filed a completed application for a PACA license on November 5, 2002.
3. Respondent was president and 100 percent stockholder of, and responsibly connected with, SWF Produce, Inc., a PACA licensee, at the time SWF Produce, Inc., engaged in repeated and flagrant violations of the PACA.
4. Respondent was president and 100 percent stockholder of Sandia Produce, Inc. On June 13, 2000, the United States Department of Agriculture ordered Sandia Produce, Inc., to pay Ruby Robinson Co., Inc., a reparation award of \$13,168.10 based upon Sandia Produce, Inc.'s failure to pay for perishable agricultural commodities.

5. The amount of the reparation award referenced in paragraph 4 of these findings of fact was liquidated and was not contingent or disputed.

6. Respondent filed a petition for personal bankruptcy on July 17, 2001. In his petition for personal bankruptcy, Respondent listed the reparation award to Ruby Robinson Co., Inc., as a contingent, unliquidated, and disputed claim.

7. In October 2001, Respondent was discharged in bankruptcy. Respondent's discharge in bankruptcy did not discharge the debt Respondent owed to Ruby Robinson Co., Inc.

8. Respondent has not paid the reparation award referenced in paragraph 4 of these findings of fact.

9. Respondent has not complied with the United States Department of Agriculture's reparation order referenced in paragraph 4 of these findings of fact.

10. On July 19, 2000, Sandia Produce, Inc.'s PACA license was suspended because of its failure to pay the reparation award referenced in paragraph 4 of these findings of fact. The suspension of Sandia Produce, Inc.'s PACA license has not been lifted.

### **Conclusions of Law**

1. Respondent engaged in practices of a character prohibited by the PACA prior to filing an application for a PACA license. Pursuant to section 4(d) of the PACA (7 U.S.C. § 499d(d)), Respondent is not fit to receive a PACA license because of his practices of a character prohibited by the PACA.

2. Respondent is a person who is or was responsibly connected with a person (Sandia Produce, Inc.) whose PACA license is currently under suspension. Pursuant to section 4(b)(A) of the PACA (7 U.S.C. § 499d(b)(A)), the Secretary of Agriculture must refuse a PACA license to Respondent because he is a person who is or was responsibly connected with a person whose PACA license is currently under suspension.

#### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Respondent raises two issues in Respondent's "Memorandum of Points and Authorities" [hereinafter Appeal Petition] attached to his "Notice of Appeal." First, Respondent contends the Chief ALJ's reliance on the June 13, 2000, reparation order issued against Sandia Produce, Inc., in determining that a PACA license should not be issued to Respondent, is error. Respondent contends Sandia Produce, Inc.'s \$13,168.10 debt to Ruby Robinson Co., Inc., for produce, which resulted in the June 13, 2000, reparation order, was discharged in bankruptcy and pursuant to section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)), grounds for refusal to issue a license "only extend for a two year period following the bankruptcy." Similarly, Respondent contends SWF Produce, Inc.'s failure to pay its debts 10 years ago is "not consistent with the specific grounds for refusal of a license found" in section 4(b) of the PACA (7 U.S.C. § 499d(b)), "the statute which has only a two or three year limitation." (Appeal Pet. at 2-3.)

As an initial matter, I disagree with Respondent's construction of section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)). However, Respondent's construction of section 4(b)(D) of the PACA (7 U.S.C. § 499d(b)(D)) is not relevant to this proceeding because the

Chief ALJ does not rely upon section 4(b) of the PACA (7 U.S.C. § 499d(b)) as the statutory basis for his conclusion that Respondent is not fit to receive a PACA license.

Instead, the Chief ALJ concluded Respondent is not fit to receive a PACA license because Respondent engaged in practices of a character prohibited by the PACA prior to the date of Respondent's filing the PACA license application. The Chief ALJ's conclusion is expressly based upon section 4(d) of the PACA (7 U.S.C. § 499d(d)). (Initial Decision and Order at 10.) Except that a practice of the character prohibited by the PACA must precede the date of the filing of the PACA license application, section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides no limitation on the timing of a practice that may be considered when determining whether a PACA license applicant is unfit to engage in the business of a commission merchant, dealer, or broker. Therefore, I reject Respondent's contention that the Chief ALJ erroneously relied on section 4(b) of the PACA (7 U.S.C. § 499d(b)) as the statutory basis for his conclusion that Respondent is unfit to receive a PACA license.

Second, Respondent contends SWF Produce, Inc.'s failure to pay its debts 10 years ago "is . . . legally insufficient evidence upon which to base a finding that the Respondent is 'unfit' to hold a PACA license." (Appeal Pet. at 3.)

I disagree with Respondent's contention that SWF Produce, Inc.'s failure to pay produce sellers, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), is a legally insufficient basis for finding Respondent unfit to engage in the business of a commission merchant, dealer, or broker. Section 4(d) of the PACA (7 U.S.C. § 499d(d)) provides that the Secretary of Agriculture may find a PACA license applicant unfit to engage in the

business of a commission merchant, dealer, or broker because the applicant engaged in a practice of the character prohibited by the PACA. SWF Produce, Inc., committed repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CX 10). A violation of the PACA is, by definition, a “practice of the character prohibited by” the PACA. Respondent was a director, the president, and sole stockholder of SWF Produce, Inc., at the time SWF Produce, Inc., committed violations of the PACA and takes full responsibility for SWF Produce, Inc.’s PACA violations (Tr. 96; CX 8, CX 9). SWF Produce, Inc.’s practices and Respondent’s connection with SWF Produce, Inc., at the time SWF Produce, Inc., engaged in those practices form a legally sufficient basis for finding Respondent unfit to engage in the business of a commission merchant, dealer, or broker.

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

**ORDER**

1. Respondent’s application for a PACA license filed November 5, 2002, is denied.
2. This Order shall become effective immediately upon service on Respondent.

Done at Washington, DC

August 12, 2003

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William G. Jenson  
Judicial Officer