

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PACA-APP Docket No. 02-0002  
)  
Joel Taback, )  
)  
Petitioner ) **Decision and Order**

**PROCEDURAL HISTORY**

On December 21, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Joel Taback [hereinafter Petitioner] was responsibly connected with Post & Taback, Inc., during the period September 4, 2000, through October 10, 2000, when Post & Taback, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].<sup>1</sup> On January 18, 2002, Petitioner filed a Petition for Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory

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<sup>1</sup>During the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly for perishable agricultural commodities, which Post & Taback, Inc., purchased, received, and accepted in interstate commerce in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Post & Taback, Inc.*, 62 Agric. Dec. \_\_\_\_ (Dec. 16, 2003); *In re Post & Taback, Inc.*, 63 Agric. Dec. \_\_\_\_ (Feb. 13, 2004) (Order Denying Pet. to Recons.).

Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's determination that Petitioner was responsibly connected with Post & Taback, Inc., during the period September 4, 2000, through October 10, 2000.

On September 9, 2002, Respondent issued a determination that Petitioner was responsibly connected with Post & Taback, Inc., during the period March 29, 1999, through August 5, 1999, when Post & Taback, Inc., violated the PACA.<sup>2</sup> On October 17, 2002, Petitioner filed a Petition for Review pursuant to the PACA and the Rules of Practice seeking reversal of Respondent's determination that Petitioner was responsibly connected with Post & Taback, Inc., during the period March 29, 1999, through August 5, 1999.

On December 17-19, 2002, January 28-30, 2003, and April 8-9, 2003, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing in New York, New York. The Chief ALJ consolidated the oral hearing in this proceeding with the oral hearing in *In re Post & Taback, Inc.*, PACA Docket No.

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<sup>2</sup>During the period March 29, 1999, through August 5, 1999, Post & Taback, Inc., bribed a United States Department of Agriculture inspector in order to influence the outcome of United States Department of Agriculture inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers and Post & Taback, Inc., paid unlawful gratuities to a United States Department of Agriculture inspector in connection with United States Department of Agriculture inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Post & Taback, Inc.*, 62 Agric. Dec. \_\_\_\_ (Dec. 16, 2003); *In re Post & Taback, Inc.*, 63 Agric. Dec. \_\_\_\_ (Feb. 13, 2004) (Order Denying Pet. to Recons.).

D-01-0026.<sup>3</sup> Andrew Y. Stanton and Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent in this proceeding and Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, in *In re Post & Taback, Inc.*, PACA Docket No. D-01-0026.<sup>4</sup> Paul T. Gentile, Gentile & Dickler, New York, New York, represented Petitioner in this proceeding and Post & Taback, Inc., in *In re Post & Taback, Inc.*, PACA Docket No. D-01-0026.<sup>5</sup>

On July 1, 2003, Petitioner and Respondent each filed proposed findings of fact, proposed conclusions of law, and a proposed order. On July 7, 2003, Respondent filed a reply to Petitioner's proposed findings of fact, proposed conclusions of law, and proposed order.

On July 29, 2003, the Chief ALJ issued a "Decision" [hereinafter Initial Decision and Order] in which the Chief ALJ concluded Petitioner was not responsibly connected with Post & Taback, Inc., during a period in which Post & Taback, Inc., violated the PACA (Initial Decision and Order at 3).

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<sup>3</sup>*In re Post & Taback, Inc.*, PACA Docket No. D-01-0026, is an administrative disciplinary proceeding in which I concluded that Post & Taback, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Post & Taback, Inc.*, 62 Agric. Dec. \_\_\_\_ (Dec. 16, 2003); *In re Post & Taback, Inc.*, 63 Agric. Dec. \_\_\_\_ (Feb. 13, 2004) (Order Denying Pet. to Recons.).

<sup>4</sup>See note 3.

<sup>5</sup>See note 3.

On September 22, 2003, Respondent appealed to the Judicial Officer. On December 2, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the Chief ALJ's conclusion that Petitioner was not responsibly connected with Post & Taback, Inc., during a period in which Post & Taback, Inc., violated the PACA. Therefore, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

Respondent's exhibits are designated by "CX" and exhibits included in the agency record, which is part of the record of this proceeding,<sup>6</sup> are designated by "EX."<sup>7</sup> Transcript references are designated by "Tr."

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<sup>6</sup>See 7 C.F.R. § 1.136(a).

<sup>7</sup>The court reporter marked the entire agency record RX 18, and the Chief ALJ admitted RX 18 into evidence. The agency record includes 13 separate exhibits marked "Exhibit No.1" through "Exhibit No.13" (Tr. Apr. 9, 2003, at 30, 39).

**APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

7 U.S.C.:

**TITLE 7—AGRICULTURE**

....

**CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES**

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**§ 499a. Short title and definitions**

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**(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.

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#### **§ 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**

Any 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**

....

**(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.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(b).

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

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**§ 46.2 Definitions.**

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

....

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

....

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

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”: *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

## DECISION

### Summary

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, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.<sup>8</sup> The record establishes that Petitioner was the president and a director of Post & Taback, Inc., and a holder of 36 percent of the outstanding stock of Post & Taback, Inc., when Post & Taback, Inc., violated the PACA. The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Post & Taback, Inc., despite his positions as president and director and his ownership of 36 percent of the outstanding shares of Post & Taback, 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

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<sup>8</sup>7 U.S.C. § 499a(b)(9).

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, officer, director, or 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 that Petitioner carried his burden of proof that: (1) he was not actively involved in the activities resulting in Post & Taback, Inc.'s failures to make full payment promptly for perishable agricultural commodities in accordance with the PACA; and (2) he was not actively involved in activities resulting in Post & Taback, Inc.'s payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector

in connection with the inspection of perishable agricultural commodities in violation of the PACA. However, Petitioner failed to carry his burden of proving that he was only nominally an officer, director, or shareholder of Post & Taback, Inc. Further, as a holder of 36 percent of the outstanding shares of Post & Taback, Inc., Petitioner cannot show that he was not an owner of Post & Taback, Inc., which was the *alter ego* of the owners of Post & Taback, Inc.

### **Findings of Fact**

1. Post & Taback, Inc., was incorporated in the State of New York on June 1, 1959. At all times material to this proceeding, Post & Taback, Inc.'s business address was 253-256 B NYC Terminal Market, Bronx, New York 10474. (CX 1 at 1, 4, and 5.)

2. Post & Taback, Inc., first received a PACA license in 1959. At all times material to this proceeding, Post & Taback, Inc., held PACA license number 182992. Post & Taback, Inc.'s PACA license automatically terminated on September 10, 2002, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Post & Taback, Inc., failed to pay the annual PACA license renewal fee. (CX 1; Tr. Dec. 17, 2002, at 51; Tr. Dec. 18, 2002, at 70-71.)

3. During the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly to five produce sellers in the total amount of \$31,932.95 for six lots of perishable agricultural commodities that Post & Taback, Inc., purchased, received, and accepted in interstate commerce (CX 3-CX 8). Specifically, Post & Taback, Inc., failed to make full payment promptly to: (a) Rose

Valley Group, Inc., Woodland, California, in the amount of \$1,080 for honeydews (CX 3 at 1, CX 4); (b) All-Star Truck Brokers, Inc., Immokalee, Florida, in the amount of \$2,570.45 for egg plant (CX 3 at 1, CX 5 at 1-3); (c) Maxwell Farms, Lee, Maine, in the amount of \$9,057.60 for two lots of broccoli (CX 3 at 1, CX 6 at 1-6); (d) Sunnyside Packing Company, Selma, California, in the amount of \$9,922.50 for Kabocha squash (CX 3 at 1, CX 7 at 1-4); and (e) Mayrsohn International, Inc., Hialeah, Florida, in the amount of \$9,302.40 for lemons (CX 3 at 1, CX 8).

4. In 1997, Post & Taback, Inc., hired Mark Alfisi to be a produce buyer (Tr. Dec. 19, 2002, at 76-77; Tr. Apr. 9, 2003, at 23-25).

5. Prior to March 1999, Mark Alfisi made illegal payments to a United States Department of Agriculture inspector in order to influence the outcome of United States Department of Agriculture inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers (Tr. Dec. 19, 2002, at 77-82).

6. During the period April 1999 through August 1999, Mark Alfisi bribed a public official by making cash payments in the total amount of \$1,760 to a United States Department of Agriculture inspector in order to influence the outcome of United States Department of Agriculture inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers (CX 67-CX 68).

7. During the period March 29, 1999, through June 18, 1999, Mark Alfisi gave unlawful gratuities to a public official by making cash payments in the total amount of \$1,400 to a United States Department of Agriculture inspector in connection with United

States Department of Agriculture inspections of perishable agricultural commodities that Post & Taback, Inc., purchased from produce sellers (CX 67-CX 68).

8. Mark Alfisi used the fraudulent information obtained from unlawful payments made to a United States Department of Agriculture inspector to make false and misleading statements to Post & Taback, Inc.'s perishable agricultural commodity sellers (Tr. Dec. 19, 2002, at 78-82).

9. Petitioner first joined Post & Taback, Inc., in 1958 or 1959 (Tr. Apr. 9, 2003, at 21-22).

10. During the period 1997 to October 11, 2000, Petitioner was the president and a director of Post & Taback, Inc., and a holder of 36 percent of the outstanding stock of Post & Taback, Inc. Petitioner resigned as Post & Taback, Inc.'s president and director and tendered his stock to Post & Taback, Inc., on October 11, 2000. (CX 1; EX 2-EX 4, EX 10 at 3, EX 12 at 1; Tr. Apr. 9, 2003, at 27-28, 32-36, 49-50.)

11. As president of Post & Taback, Inc., Petitioner hired and fired employees and signed the bank signature card for Post & Taback, Inc.'s account with Marine Midland Bank. Petitioner was a guarantor of Post & Taback, Inc.'s business line of credit with HSBC. Petitioner was a trustee of Post & Taback, Inc.'s retirement trust. Petitioner was listed as a principal on Post & Taback, Inc.'s produce dealer licenses for the State of Texas, the State of Florida, and the State of New York. Petitioner regularly came to Post & Taback, Inc.'s place of business. Petitioner examined Post & Taback, Inc.'s produce.

Petitioner sold produce for Post & Taback, Inc. (EX 3 at 5-9, EX 10 at 3, EX 11 at 1, EX 12 at 1, and EX 13 at 2; Tr. Apr. 9, 2003, at 33-34, 63-65.)

12. Petitioner did not buy produce for Post & Taback, Inc.; Petitioner was not in charge of Post & Taback, Inc.'s finances; and Petitioner did not examine Post & Taback, Inc.'s books (Tr. Apr. 9, 2003, at 62-65).

### **Conclusions of Law**

1. Post & Taback, Inc.'s failures to make full payment promptly with respect to the transactions described in Finding of Fact 3 are willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), the acts of Post & Taback, Inc.'s employee, Mark Alfisi, within the scope of his employment, are deemed the acts of Post & Taback, Inc.

3. Post & Taback, Inc.'s payment of bribes and unlawful gratuities described in Findings of Fact 5, 6, and 7 are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Petitioner proved by a preponderance of the evidence that he was not actively involved in the activities resulting in Post & Taback, Inc.'s willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, director, and shareholder of Post & Taback, Inc.

6. Petitioner failed to prove by a preponderance of the evidence that he was not an owner of Post & Taback, Inc., which was the *alter ego* of the owners of Post & Taback, Inc.

7. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Post & Taback, Inc., during the period when Post & Taback, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

### **Respondent's Appeal Petition**

Respondent raises three issues in Respondent's Appeal Petition. First, Respondent contends the Chief ALJ erroneously failed to conclude that Post & Taback, Inc., engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector during the period March 29, 1999, through August 5, 1999 (Respondent's Appeal Pet. at 3).

The Chief ALJ found that, during the period April 1999 through August 1999, Mark Alfisi, an employee of Post & Taback, Inc., bribed a public official by making cash payments to a United States Department of Agriculture inspector in order to influence the outcome of inspections of fruits and vegetables. Moreover, the Chief ALJ found that Mark Alfisi used the fraudulent information obtained from bribing the United States Department of Agriculture inspector to make false and misleading statements to produce sellers. However, the Chief ALJ also found that Post & Taback, Inc.'s officials did not authorize and had no knowledge of Mark Alfisi's bribery. The Chief ALJ concluded that,

since Post & Taback, Inc.'s officials had no knowledge of the bribery and did not authorize the bribery, Post & Taback, Inc., did not violate the PACA by the payment of bribes to a United States Department of Agriculture inspector. (The Chief ALJ's initial Decision and Order at 6-10 filed July 28, 2003, in *In re Post & Taback, Inc.*, PACA Docket No. 01-0026.<sup>9</sup>)

I disagree with the Chief ALJ's conclusion that Post & Taback, Inc., did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the payment of bribes to a United States Department of Agriculture inspector because Post & Taback, Inc.'s officials did not authorize the bribery and did not know of the bribery.

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

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<sup>9</sup>See note 3.

Post & Taback, Inc.'s employee, Mark Alfisi, was acting within the scope of employment when he knowingly and willfully paid unlawful gratuities to a public official and bribed a public official to falsify United States Department of Agriculture inspection certificates. Thus, as a matter of law, the knowing and willful violations by Mark Alfisi are deemed to be knowing and willful violations by Post & Taback, Inc., even if Post & Taback, Inc.'s officers, directors, and owners had no actual knowledge of the unlawful gratuities and bribery and would not have condoned the unlawful gratuities and bribery had they known of them.<sup>10</sup> 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,

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<sup>10</sup>*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. \_\_\_\_, slip op. at 37-38 (Oct. 29, 2003), *appeal docketed*, No. 03-4008 (8th Cir. Dec. 16, 2003); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 16, 1996).

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

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

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

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

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

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

I find the plain language of section 16 of the PACA (7 U.S.C. § 499p) supports my view that PACA provides an identity of action between a PACA licensee and the PACA licensee’s agents and employees. Moreover, both the Court in *H.C. MacClaren, Inc. v. United States Dep’t of Agric.* and the Court in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, construe section 16 of the PACA (7 U.S.C. § 499p) as providing that a willful violation of the PACA by a PACA licensee’s employee is deemed the willful violation of the PACA licensee. Therefore, I conclude that, during the period March 29, 1999, through August 1999, Post & Taback, Inc., engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector. As discussed in this Decision and Order, *supra*, Petitioner was responsibly connected with Post & Taback, Inc., during the period March 29, 1999, through August 1999. Therefore, Petitioner was responsibly connected with Post & Taback, Inc., during the period that Post & Taback, Inc., engaged in willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by the payment of bribes and unlawful gratuities to a United States Department of Agriculture inspector.

Second, Respondent contends the Chief ALJ erroneously found that the record contained no reliable evidence establishing the dates that Post & Taback, Inc., accepted

produce for which it failed to make full payment promptly during the period that Petitioner was responsibly connected with Post & Taback, Inc. (Respondent's Appeal Pet. at 3-6).

I disagree with the Chief ALJ. Respondent introduced substantial evidence which establishes that during the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly to five produce sellers in the total amount of \$31,932.95 for six lots of perishable agricultural commodities that Post & Taback, Inc., purchased, received, and accepted in interstate commerce (CX 3-CX 8).

Carolyn Shelby, a marketing specialist with the Agricultural Marketing Service, United States Department of Agriculture, testified that she conducted an investigation at Post & Taback, Inc.'s place of business and that Post & Taback, Inc.'s employees provided her with numerous unpaid invoices for produce. Ms. Shelby explained that she determined the dates Post & Taback, Inc., accepted produce by examining Post & Taback, Inc.'s receiving records. Ms. Shelby testified that she determined the dates Post & Taback, Inc.'s payments were due by the payment terms found on the face of each invoice. Ms. Shelby further testified, if no payment terms were on an invoice, she used the prompt payment requirement of 10 days<sup>11</sup> to calculate when Post & Taback, Inc.'s payment was due. Ms. Shelby stated that she included the dates Post & Taback, Inc.,

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<sup>11</sup>See 7 C.F.R. § 46.2(aa)(5).

accepted produce and the dates Post & Taback, Inc.'s payments were due in a table.

Respondent introduced this table into evidence.<sup>12</sup> (Tr. Dec. 17, 2002, at 53-58.)

I find nothing in the record rebutting Ms. Shelby's testimony regarding the dates Post & Taback, Inc., accepted the produce in question or the dates Post & Taback, Inc.'s payments for the produce were due. Therefore, I conclude the Chief ALJ's finding that the record contains no reliable evidence establishing the dates that Post & Taback, Inc., accepted produce for which it failed to make full payment promptly during the period that Petitioner was responsibly connected with Post & Taback, Inc., error. Instead, I find, during the period September 4, 2000, through October 10, 2000, Post & Taback, Inc., failed to make full payment promptly to five produce sellers in the total amount of \$31,932.95 for six lots of perishable agricultural commodities that Post & Taback, Inc., purchased, received, and accepted in interstate commerce (CX 3-CX 8). Specifically, Post & Taback, Inc., failed to make full payment promptly to: (a) Rose Valley Group, Inc., Woodland, California, in the amount of \$1,080 for honeydews which Post & Taback, Inc., accepted on August 25, 2000, and for which Post & Taback, Inc.'s payment was due on September 4, 2000 (CX 3 at 1, CX 4); (b) All-Star Truck Brokers, Inc., Immokalee, Florida, in the amount of \$2,570.45 for egg plant which Post & Taback, Inc., accepted on September 25, 2000, and for which Post & Taback, Inc.'s payment was due on October 5, 2000 (CX 3 at 1, CX 5 at 1-3); (c) Maxwell Farms, Lee, Maine, in the

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<sup>12</sup>See CX 3.

amount of \$4,780.80 for broccoli which Post & Taback, Inc., accepted on September 25, 2000, and for which Post & Taback, Inc.'s payment was due on October 5, 2000 (CX 3 at 1, CX 6 at 1-3); (d) Maxwell Farms, Lee, Maine, in the amount of \$4,276.80 for broccoli which Post & Taback, Inc., accepted on September 28, 2000, and for which Post & Taback, Inc.'s payment was due on October 8, 2000 (CX 3 at 1, CX 6 at 1-3); (e) Sunnyside Packing Company, Selma, California, in the amount of \$9,922.50 for Kabocha squash which Post & Taback, Inc., accepted on September 25, 2000, and for which Post & Taback, Inc.'s payment was due on October 5, 2000 (CX 3 at 1, CX 7 at 1-4); and (f) Mayrsohn International, Inc., Hialeah, Florida, in the amount of \$9,302.40 for lemons which Post & Taback, Inc., accepted on September 26, 2000, and for which Post & Taback, Inc.'s payment was due on October 7, 2000 (CX 3 at 1, CX 8).

Third, Respondent contends Petitioner was responsibly connected with Post & Taback, Inc., during the period of Post & Taback, Inc.'s violations of the PACA from March 29, 1999, through August 5, 1999, when Post & Taback, Inc., paid bribes and unlawful gratuities to a United States Department of Agriculture inspector and from September 4, 2000, through October 10, 2000, when Post & Taback, Inc., failed to make full payment promptly of \$31,932.95 to five produce sellers for the purchases of six lots of perishable agricultural commodities (Respondent's Appeal Pet. at 6-10).

As fully explained in this Decision and Order, *supra*, I agree with Respondent's contention that Petitioner was responsibly connected with Post & Taback, Inc., during the period of Post & Taback, Inc.'s violations of the PACA from March 29, 1999, through

August 5, 1999, when Post & Taback, Inc., paid bribes and unlawful gratuities to a United States Department of Agriculture inspector and from September 4, 2000, through October 10, 2000, when Post & Taback, Inc., failed to make full payment promptly of \$31,932.95 to five produce sellers for the purchases of six lots of perishable agricultural commodities. I find no reason to reiterate the reasons for my conclusion that Petitioner was responsibly connected with Post & Taback, Inc., during the period of Post & Taback, Inc.'s violations of the PACA.

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

#### **ORDER**

I affirm Respondent's December 21, 2001, and September 9, 2002, determinations that Petitioner was responsibly connected with Post & Taback, Inc., when Post & Taback, Inc., violated the PACA. Accordingly, Petitioner 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)).

This Order shall become effective 60 days after service of this Order on Petitioner.

Done at Washington, DC

February 27, 2004

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William G. Jenson  
Judicial Officer