

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA Docket No. D-99-0016
)
Geo. A. Heimos)
Produce Company, Inc.,)
)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this administrative proceeding by filing a “Complaint” on August 9, 1999. 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 the Geo. A. Heimos Produce Company, Inc. [hereinafter Respondent], made false and misleading statements for a fraudulent purpose in connection with transactions involving perishable agricultural commodities in the course of interstate

commerce by altering four United States Department of Agriculture inspection certificates; (2) requests a finding that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (3) requests the issuance of an order suspending Respondent's PACA license for 60 days or assessing Respondent a civil monetary penalty with an equivalent deterring effect of a 60-day suspension of Respondent's PACA license (Compl. ¶¶ III, IV).

On September 15, 1999, Respondent filed an "Answer to Complaint" in which Respondent: (1) denies the material allegations of the Complaint; and (2) requests dismissal of the Complaint.

On July 10, 2002, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing in St. Louis, Missouri. Eric Paul, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Stephen P. McCarron, McCarron & Diess, Washington, DC, represented Respondent.

Complainant called three witnesses and Respondent called two witnesses during the July 10, 2002, hearing. The Chief ALJ continued the hearing to August 2, 2002, taking testimony of Complainant's two remaining witnesses by telephone in Washington, DC. The Chief ALJ admitted into evidence Complainant's exhibit numbers 1 through 9 and Respondent's exhibit number 1.¹

¹The Chief ALJ placed Complainant's exhibit number 9 under seal.

On September 19, 2002, Complainant filed “Complainant’s Proposed Findings of Fact, Conclusions and Order” and Respondent filed “Brief of Respondent.” On October 11, 2002, Complainant filed “Complainant’s Reply Brief” and Respondent filed “Reply Brief of Respondent.”

On March 10, 2003, the Chief ALJ issued a “Decision and Order” [hereinafter Initial Decision and Order]: (1) concluding Respondent altered four United States Department of Agriculture inspection certificates in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (2) assessing Respondent an \$8,000 civil penalty (Initial Decision and Order at 30-31).

On April 19, 2003, Complainant appealed to the Judicial Officer. On June 13, 2003, Respondent filed “Respondent’s Reply to Appeal Petition.” On June 17, 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 sanction imposed by the Chief ALJ. Therefore, while I retain portions of the Chief ALJ’s Initial Decision and Order, I do not adopt the Chief ALJ’s Initial Decision and Order as the final Decision and Order.

Complainant’s exhibits are designated by “CX.” Transcript references are designated by “Tr.”

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[.]

....

§ 499f. Complaints, written notification, and investigations

....

(b) Disciplinary violations

Any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory and any other interested person (other than an employee of the Department of Agriculture administering this chapter) may file, in accordance with rules prescribed by the Secretary, a written notification of any alleged violation of this chapter by any commission merchant, dealer, or broker. In addition, any official certificates of the United States Government or States or Territories of the United States and trust notices filed pursuant to section 499e of this title shall constitute written notification for the purposes of conducting an investigation under subsection (c) of this section. The identity of any person filing a written notification under this subsection shall be considered to be confidential information. The identity of such person, and any portion of the notification to the extent that it would indicate the identity of such person, are specifically exempt from disclosure under section 552 of title 5 (commonly known as the Freedom of Information Act), as provided in subsection (b)(3) of such section.

....

§ 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.

....

(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.

....

§ 499l. Violations; report to Attorney General; proceedings; costs

The Secretary may report any violation of this chapter for which a civil penalty is provided to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay. The costs and expenses of such proceedings shall be paid out of the appropriation for the expenses of the courts of the United States.

....

§ 499n. Inspection of perishable agricultural commodities

....

(b) Issuance of fraudulent certificates; penalties

Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this chapter, sections 491, 493 to 497 of this title, or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true any such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a

fine of not more than \$500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court.

. . .

§ 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. §§ 499b(4), 499f(b), 499h(a), (e), 499l, 499n(b), 499p.

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**

....

DUTIES OF LICENSEES

§ 46.26 Duties of licensees.

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

7 C.F.R. § 46.26.

DECISION

Statement of Facts

Respondent, a business with approximately 50 employees, was started in 1918. The United States Department of Agriculture issued Respondent PACA license number 166807 in 1956. Respondent has renewed its PACA license annually. Respondent's address is 32 Produce Row, St. Louis, Missouri 63102. Respondent has no record of prior PACA violations. (Tr. 166-67; CX 1.)

In 1997, Complainant initiated an investigation of a Chicago produce dealer, Evergreen International, Inc., for allegedly altering United States Department of Agriculture inspection certificates. Complainant asked Respondent in the course of contacting companies which had shipped produce to Evergreen International, Inc., to supply Complainant with copies of United States Department of Agriculture inspection certificates for produce Respondent had shipped to Evergreen International, Inc. Respondent agreed to cooperate and sent copies of United States Department of Agriculture inspection certificates to Complainant. (Tr. 171-72.)

One United States Department of Agriculture inspection certificate, K-272284-1, dated January 17, 1997, related to cauliflower Respondent had purchased on a "price after sale" basis from Teixeira Farms, Inc., located in Santa Maria, California (CX 3 at 3). The bill of lading showed St. Louis, Missouri, as the agreed destination for the produce (CX 3 at 30). Instead of accepting delivery in St. Louis, Missouri, Respondent shipped the produce to Evergreen International, Inc., in Chicago, Illinois, where the United States

Department of Agriculture inspected it. Evergreen International, Inc., faxed a copy of United States Department of Agriculture inspection certificate K-272284-1 to Respondent. Respondent faxed a copy of United States Department of Agriculture inspection certificate K-272284-1 to Teixeira Farms, Inc., which showed “Heimos” and “St. Louis” as the applicant for and the location of the inspection (CX 3 at 7), whereas the original inspection certificate showed the applicant as “Evergreen International” and the inspection location as “Chicago, Illinois” (CX 3 at 3). Another United States Department of Agriculture inspection certificate, discussed in this Decision and Order, *infra*, also appeared to have been altered. In view of these apparent alterations, Complainant decided to investigate Respondent (CX 2). Complainant’s investigator, Andrew Furbee, asked Respondent’s president, James Heimos, if he was aware of the altered United States Department of Agriculture inspection certificates. According to Andrew Furbee, “[Heimos] said no, he was not and provided me access to all of his firm’s transaction records to basically see if this was an extensive problem or just an isolated couple of incidents.” (Tr. 11-12.)

Complainant investigated 200 files reflecting transactions in which Respondent applied for United States Department of Agriculture inspection and 200 files reflecting transactions in which Respondent shipped produce to a third party which applied for United States Department of Agriculture inspection. Of these transaction files, three files contained United States Department of Agriculture inspection certificates that appeared to have been altered. (Tr. 12-13.) One of these United States Department of Agriculture

inspection certificates, K-272337-7, again involved Teixeira Farms, Inc., and Evergreen International, Inc. The produce was broccoli and cauliflower which Respondent had purchased from Teixeira Farms, Inc. The terms were “price after sale” and the bill of lading showed St. Louis, Missouri, as the delivery location. (CX 4 at 1, 3, 11.) Instead of accepting delivery in St. Louis, Missouri, Respondent shipped the produce to Evergreen International, Inc., in Chicago, Illinois. Evergreen International, Inc., applied for United States Department of Agriculture inspection of the broccoli on January 29, 1997, and faxed a copy of United States Department of Agriculture inspection certificate K-272337-7 to Respondent. (Tr. 19-22.) Although Complainant alleges Respondent altered United States Department of Agriculture inspection certificate K-272337-7 to show the applicant for inspection was “Heimos” rather than “Evergreen,” the record does not show such an alteration (CX 4). The record does, however, show “Evergreen Int’l” on one copy of United States Department of Agriculture inspection certificate K-272337-7 (CX 4 at 3) and just “Evergreen” on another copy of the same inspection certificate (CX 4 at 7).

Respondent’s two purchases of produce from Teixeira Farms, Inc., which Respondent shipped to Evergreen International, Inc., were on an “open basis,” which means that the parties agreed on a price range within which the produce would be sold with the amount Respondent was to pay Teixeira Farms, Inc., to be determined after the produce was sold. Teixeira Farms, Inc., understood that Respondent would sell the produce on the St. Louis, Missouri, rather than the Chicago, Illinois, market since Teixeira Farms, Inc., was selling to other firms in Chicago, Illinois, on a free on board [hereinafter FOB] basis.

(Tr. 25.) David Murray, a Teixeira Farms, Inc., sales representative, explained that Teixeira would be competing against itself if it allowed Respondent to sell Teixeira's produce in Chicago, Illinois, on an "open basis" when it was selling produce to other firms in Chicago on an FOB basis (Tr. 59-65). However, David Murray also said that prices for produce on the St. Louis, Missouri, and Chicago, Illinois, markets were "close," and Andrew Furbee testified that there was no significant difference in the prices for produce on the two markets (Tr. 22, 80-81).

When Complainant contacted Teixeira, Farms, Inc., for its copy of United States Department of Agriculture inspection certificate K-272337-7, Teixeira did not have a copy and requested one from Respondent (Tr. 21-22; CX 4 at 6). The copy Respondent sent to Teixeira, Farms, Inc., showed "Evergreen" as the applicant for inspection (CX 4 at 7); other copies of United States Department of Agriculture inspection certificate K-272337-7 showed "Evergreen Int'l" as the applicant for inspection (CX 4 at 3-5). David Murray said Teixeira Farms, Inc., became aware that Respondent shipped the broccoli it purchased from Teixeira to Evergreen International, Inc., in Chicago, Illinois, only after Teixeira received CX 4 at 7 from Respondent (Tr. 66-67).

Perry Favazza, Respondent's salesperson handling these two transactions with Teixeira Farms, Inc., admitted changing the name of the applicant for inspection from Evergreen International, Inc., to the Geo. A. Heimos Produce Company, Inc., on United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7.

Perry Favazza said he did it "in order to protect the identity of my customer from the shipper and not for any monetary reasons." (CX 5.)

Perry Favazza was also Respondent's salesperson for the other two transactions with altered United States Department of Agriculture inspection certificates. The first concerned Perry Favazza's purchase of strawberries for \$3,508.80 on March 10, 1997, from Westerfield Transportation, Inc., a produce dealer located in Oklahoma City, Oklahoma (Tr. 30, 210; CX 6 at 1). On March 12, 1997, Perry Favazza requested two United States Department of Agriculture inspections of the strawberries (Tr. 31-37; CX 6 at 3-10).

The United States Department of Agriculture inspection certificate for one of the two inspections, K-393680-4, showed the following:

LOT	AVERAGE DEFECTS	including SER. DAM.	
....			
B.	07%	01%	Bruise (0 to 16%)
	<u>00%</u>	<u>00%</u>	Decay
	07%	01%	Checksum

CX 6 at 3.

Perry Favazza faxed a copy of United States Department of Agriculture inspection certificate K-393680-4 to Westerfield Transportation, Inc. However, the percent of defects on the copy of United States Department of Agriculture inspection certificate K-393680-4 sent to Westerfield Transportation, Inc., was altered to show the following:

LOT	AVERAGE DEFECTS	including SER. DAM.	
....			
B.	07%	11%	Bruise (0 to 16%)
	<u>00%</u>	<u>00%</u>	Decay
	17%	11%	Checksum

CX 6 at 5.

Westerfield Transportation, Inc., relying on both altered and unaltered United States Department of Agriculture inspection certificate K-393680-4, agreed to reduce the original \$3,508.80 price for the strawberries to \$1,273.64 (Tr. 30-31, 37, 214; CX 6 at 2).

On March 28, 1997, Perry Favazza, acting for Respondent, purchased strawberries for \$11,802.70 FOB from Andrew & Williamson Sales Co., Inc., a licensed produce grower agent located in San Diego, California. On March 31, 1997, Perry Favazza requested a United States Department of Agriculture inspection of the strawberries. (Tr. 40-49, 195-97; CX 7 at 1.) The United States Department of Agriculture inspection certificate for the inspection, K-393964-2, showed the following:

LOT	AVERAGE DEFECTS	including SER. DAM.	
	05%	00%	Bruise (0 to 12%)
	<u>00%</u>	<u>00%</u>	Decay
	05%	00%	Checksum

CX 7 at 3.

Perry Favazza sent a copy of United States Department of Agriculture inspection certificate K-393964-2 to Andrew & Williamson Sales Co., Inc. However, the percent of defects on the copy of United States Department of Agriculture inspection certificate K-393964-2 sent to Andrew & Williamson Sales Co., Inc., was altered to show the following:

LOT	AVERAGE DEFECTS	including SER. DAM.	
	25%	00%	Bruise (0 to 32%)
	<u>00%</u>	<u>00%</u>	Decay
	25%	00%	Checksum

CX 7 at 5.

Andrew & Williamson Sales Co., Inc., relying on altered United States Department of Agriculture inspection certificate K-393964-2, agreed to reduce the original \$11,802.70 price for the strawberries to \$5,799.50 (Tr. 44-45, 196-98; CX 7 at 7).

Respondent's president, James Heimos, and its controller, David Marino, were not aware of these two altered United States Department of Agriculture inspection certificates until Complainant's investigator, Andrew Furbee, notified them of the alterations in November 1997, approximately 8 months after the inspection certificates were altered.

James Heimos immediately called Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc. He offered to, and did, pay restitution to Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc. (Tr. 39, 52, 145-46, 173, 215, 218.)

Perry Favazza, while admitting that he had altered United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7, told James Heimos that he had no knowledge of the alterations of United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2 (Tr. 178). Perry Favazza apologized to James Heimos for what he had done and said he would not do it again. Respondent retained him as a salesperson, but adopted the practice of reviewing the United States Department of Agriculture inspection certificates for inspections requested by Perry Favazza. (Tr. 170, 174.) Complainant, likewise, also adopted a new policy at about this time of sending copies of United States Department of Agriculture inspection certificates directly to produce shippers (Tr. 171).

Complainant contends Respondent willfully made false and misleading statements on United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7 for the fraudulent purpose of hiding from Teixeira Farms, Inc., the shipment of produce to Evergreen International, Inc., in Chicago, Illinois, and Respondent's willful alterations of the inspection certificates constituted a breach of Respondent's implied duty to Teixeira to receive and market the produce in St. Louis, Missouri. Complainant contends Respondent willfully made false and misleading statements on United States

Department of Agriculture inspection certificates K-393680-4 and K-393964-2 for the fraudulent purpose of deceiving Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc., in order to obtain their agreement to reductions in the agreed FOB prices for produce. Complainant contends Respondent's fraudulent misrepresentations constitute willful, flagrant, and egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (Complainant's Proposed Findings of Fact, Conclusions and Order.)

Discussion

Respondent's Violations

The record shows, and I find, that Perry Favazza altered United States Department of Agriculture inspection certificate K-272284-1 by changing the name of the applicant for United States Department of Agriculture inspection from Evergreen International, Inc., to the Geo. A. Heimos Produce Company, Inc., and by changing the location of the inspection from Chicago, Illinois, to St. Louis, Missouri. I further find Perry Favazza made these alterations for the fraudulent purpose of deceiving Teixeira Farms, Inc., as to the market where produce was sold. With respect to United States Department of Agriculture inspection certificate K-272337-7, the evidence does not directly show that the name of the applicant for inspection and the location of the inspection were changed from Evergreen International, Inc., and Chicago, Illinois, to the Geo. A. Heimos Produce Company, Inc., and St. Louis, Missouri. However, the record does establish that some change had been made to the name of the applicant for the inspection on United States

Department of Agriculture inspection certificate K-272337-7. Perry Favazza admitted changing the name of the applicant for inspection from Evergreen International, Inc., to the Geo. A. Heimos Produce Company, Inc., and the location of inspection from Chicago, Illinois, to St. Louis, Missouri. Teixeira Farms, Inc., was not aware that the produce was sold in Chicago, Illinois. In these circumstances, I find Complainant has provided sufficient evidence to infer that United States Department of Agriculture inspection certificate K-272337-7 was altered as alleged. Respondent presented no evidence to refute this inference. Accordingly, I find Perry Favazza altered United States Department of Agriculture inspection certificate K-272337-7 for the fraudulent purpose of deceiving Teixeira Farms, Inc., as to the market where produce was sold.

With respect to the changes on United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2, reflecting the produce sold to Respondent by Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc., the record does not establish that Perry Favazza altered the inspection certificates even though he was the salesperson for these transactions. However, whether Perry Favazza or someone else altered United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2, Respondent had custody and control of the inspection certificates when the alterations were made and the alterations appear deliberate. Therefore, I infer, in the absence of contrary evidence, Respondent's employees or agents, in the scope of employment, altered United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2 to obtain reductions in the prices of the produce covered by

the inspection certificates. Accordingly, I find the alterations were made for the fraudulent purpose of deceiving Westerfield Transportation, Inc., and Andrew & Williamson Sales Co., Inc., to induce them to reduce the prices for produce they sold to Respondent.

I find the testimony of Respondent's president, James Heimos, was credible that he did not know that United States Department of Agriculture inspection certificates K-272284-1, K-272337-7, K-393680-4, and K-393964-2 had been altered until the time of Complainant's investigation. However, under the PACA's codified agency provision,² Respondent is accountable for the actions of its employees and agents even if Respondent's officers, directors, and owners are unaware of their conduct.³ I therefore conclude Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) when, for a fraudulent purpose, it made false and misleading statements on United States Department of Agriculture inspection certificates K-272284-1, K-272337-7, K-393680-4, and K-393964-2.

The Sanction for Respondent's PACA Violations

Complainant seeks a 60-day suspension of Respondent's PACA license or, as an alternative to a suspension of Respondent's PACA license, a \$123,000 civil monetary penalty which Complainant contends is equivalent to a 60-day suspension of Respondent's PACA license (Complainant's Proposed Findings of Fact, Conclusions and Order at 32).

²7 U.S.C. § 499p.

³*In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 747 (1994), *appeal dismissed*, No. 94-4118 (2d Cir. Apr. 16, 1996).

Respondent requests the assessment of a civil penalty of less than \$8,000 (Brief of Respondent at 12).

Congress enacted the PACA to regulate and control the handling of fresh fruits and vegetables in interstate and foreign commerce. The enactment of the PACA was occasioned by the severe losses that shippers and growers were suffering because of the unfair practices of commission merchants, dealers, and brokers. The primary purpose of the PACA was to provide protection from these “sharp practices of financially irresponsible and unscrupulous” persons by establishing a licensing system for commission merchants, brokers, and dealers with sanctions for violations through license suspension or revocation.⁴

The United States Department of Agriculture enforces the PACA through its Agricultural Marketing Service and imposes sanctions for violations to deter PACA violations. The Agricultural Marketing Service enforces the PACA “in a very tough and harsh manner, with the overwhelming support and approval of the industry.”⁵ License revocation or suspension is intended “to protect the public interest” against violations. “If administrative sanctions are too lenient, rather than being a deterrent, they will be a stimulant to violations by others. Since . . . the purpose of a suspension order is to ‘assure

⁴*In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 710 (1994), *aff’d*, 50 F.3d 52 (D.C. Cir. 1995).

⁵*In re H & J Brokerage, Inc.*, 45 Agric. Dec. 1154, 1189 (1986).

a proper adherence to the provisions of the Act,’ the deterrent effect on the respondent and on the regulated industry must be considered.”⁶

The imposition of tough sanctions is also considered necessary to achieve the Congressional purpose when it enacts a remedial statute administered by the United States Department of Agriculture that grants a person the “privilege” of engaging in a regulated business.⁷ Congress amended the PACA in 1995 to provide that a civil penalty may be assessed for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu of license suspension or revocation.⁸ The legislative history relevant to this 1995 amendment of the PACA establishes that Congress viewed a civil penalty as a less stringent sanction than license revocation or suspension and provides one example of a violation of the PACA in which a civil penalty, rather than license revocation or suspension, might be appropriate, as follows:

Section 11—Imposition of civil penalty in lieu of suspension or revocation

Section 11 authorizes USDA to assess civil monetary penalties not to exceed \$2000 for violation of Section 2 in lieu of license suspension or revocation for each violation or each day it continues. Currently, if an entity operating within PACA is found to employ a person responsibly connected with a violating entity the only recourse available to USDA is to initiate a revocation hearing for the entity’s license. This provision allows USDA to take a less stringent step by assessing a civil penalty on the entity in lieu of license revocation in cases where entities are found employing a person

⁶*In re American Fruit Purveyors, Inc.*, 30 Agric. Dec. 1542, 1595 (1971).

⁷*In re James J. Miller*, 33 Agric. Dec. 53, 65-74 (1974), *aff’d per curiam*, 498 F.2d 1088 (5th Cir. 1974); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 843, 850-51 (1972).

⁸7 U.S.C. § 499h(e).

responsibly connected with a violating entity. However, USDA is required to give consideration to the business size, number of employees, seriousness, nature and amount of the violation when assessing the amount of the penalty.

H.R. Rep. No. 104-207, at 10-11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 457-58.

Mr. Lon F. Hatamiya, the Administrator, Agricultural Marketing Service, at the time, supported expansion of authority to assess civil penalties during the March 16, 1995, hearing conducted on the PACA:

MR. HATAMIYA. . . .

. . . .

In addition, PACA's monetary penalties need revision. PACA currently authorizes monetary penalties only for misbranding violations. In all other disciplinary actions, USDA's only recourse is suspending or revoking a PACA license. The monetary penalty, rather than putting the violator out of business, would often better serve the public interest.

. . . .

MR. BISHOP. You want flexibility in the assessment of fees?

MR. HATAMIYA. . . .

. . . .

Another area that we think needs some revision is an area of monetary penalties. The only penalty that we can impose right now is a total revocation or suspension of a license. We believe that putting somebody out of business is not in the best public interest, that imposing penalties may be a better resulting action.

MR. BISHOP. You want a fine?

MR. HATAMIYA. Yes, Essentially, yes.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 12, 34 (1995).

Mr. Hatamiya also submitted a written statement, which was made part of the record of the hearing, stating that license suspension or revocation is appropriate for egregious violations of the PACA, as follows:

A second area of possible revision in the PACA involves the law's penalties. PACA currently authorizes monetary penalties and administrative actions only for misbranding violations. In all other areas of administrative disciplinary action the PACA only provides authority for suspending or revoking a PACA license. Certainly, those very powerful sanctions are at times the appropriate sanctions for egregious violations of the law. However, in other areas, the public interest could better be served by not forcing the violator out of business, but by imposing a monetary penalty instead.

Perishable Agricultural Commodities Act: Hearing on H.R. 1103 Before the Subcomm. on Risk Management and Specialty Crops of the House Comm. on Agriculture, 104th Cong. 106 (1995).

The former Administrator of the Agricultural Marketing Service's statements make clear that, although the United States Department of Agriculture supported the 1995 amendments to the PACA which authorize the Secretary of Agriculture to assess a civil penalty in lieu of license revocation or suspension, license revocation or license suspension would be appropriate for "egregious" violations of the PACA.

“Egregious” is defined as “conspicuously bad.”⁹ The intentional falsification of a United States Department of Agriculture inspection certificate for a fraudulent purpose meets this definition of “egregious.” The alteration of a United States Department of Agriculture inspection certificate is particularly egregious because inspection certificates play a critical role in the produce industry. James Westerfield, the president of Westerfield Transportation, Inc., at the time Respondent underpaid Westerfield Transportation, Inc., as a result of Respondent’s alteration of United States Department of Agriculture inspection certificate K-393680-4, testified regarding the important role of United States Department of Agriculture inspection certificates, as follows:

[BY MR. PAUL:]

Q. On quality problems, when an adjustment was sought on quality grounds at time of delivery, did you require some sort of evidence of the actual condition before agreeing to a price adjustment?

[BY MR. WESTERFIELD:]

A. Absolutely.

Q. What evidence did you require?

A. US federal inspection.

Q. Was there any evidence of actual physical condition at time of delivery other than an official USDA inspection that you would accept as a basis for price adjustments?

⁹Merriam-Webster’s Collegiate Dictionary 369 (10th ed. 1997).

A. At one period -- and I can remember one load or lot -- I was asked for a 75 percent deduction per Perry, due to the condition of the berries on arrival.

Q. And you agreed to that without an inspection?

A. Yes, sir.

Q. Did you ever ask for a large adjustment and agree to that without an inspection?

A. No, sir.

Q. Do you send copies of inspection certificates to growers?

A. Yes, sir.

....

Q. How important was it to Westerfield Transportation that there were true and correct findings on USDA inspection reports that are received?

A. Ultimately very important.

Q. And was the reliance placed on USDA inspection reports any different at the other firms you've been associated with before and after Westerfield Transportation?

A. No. I've always set the same grounds as far as that's concerned.

Tr. 208-09.

Similarly, Jeff Boles, a salesperson for Andrew & Williamson Sales Co., Inc., the produce supplier Respondent underpaid as a result of its alteration of United States Department of Agriculture inspection certificate K-393964-2, testified that accurate United States Department of Agriculture inspection certificates are “[e]xtremely

important” to Andrew & Williamson Sales Co., Inc. (Tr. 194). The important role of United States Department of Agriculture inspection certificates is reflected in section 14(b) of the PACA (7 U.S.C. § 499n(b)) which makes the alteration of a United States Department of Agriculture inspection certificate a criminal offense.

The record establishes that Respondent, for a fraudulent purpose, through at least one of its employees or agents, willfully made false or misleading statements by altering four United States Department of Agriculture inspection certificates in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. 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 provides that, 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. Respondent’s employee or employees were acting within the scope of their employment when they knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law,

the knowing and willful violations by Respondent's employee or employees are deemed to be knowing and willful violations by Respondent.¹⁰

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Complainant's sanction witness, Josephine Jenkins, a marketing specialist with the Trade Practices Section, Agricultural Marketing Service, with 10 years experience in more than 100 disciplinary proceedings, and an administrative official charged with the responsibility for achieving the congressional purpose of the PACA, recommended a 60-day suspension of Respondent's PACA license or a \$123,000 civil penalty, which Complainant calculated to be the equivalent of a 60-day suspension of Respondent's PACA license (CX 9; Tr. 83-84). Josephine Jenkins based her recommendation on the nature of Respondent's violations, the harm caused by Respondent's violations, and the size of

¹⁰*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *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).

Respondent's business (Tr. 85, 94). Josephine Jenkins testified that Respondent's continued employment of Perry Favazza, after Respondent's president learned of Perry Favazza's alterations of United States Department of Agriculture inspection certificates, is an aggravating circumstance (Tr. 97-98, 114). However, Josephine Jenkins identified four mitigating circumstances: (1) there is no evidence that Respondent's employee or employees who actually committed the violations were owners of Respondent (Tr. 85, 113); (2) Respondent's owners did not know of the violations prior to Complainant's investigation (Tr. 86, 113); (3) Respondent had no history of previous PACA violations (Tr. 85, 113-14, 130); and (4) Respondent returned its ill-gotten gains to Westerfield Transportation, Inc., and Andrews and Williamson Sales, Co., Inc., the firms which suffered quantifiable financial harm because of Respondent's alterations of United States Department of Agriculture inspection certificates (Tr. 97).

The purpose of a sanction in a PACA administrative disciplinary proceeding is to deter the violator and other potential violators from future violations of the PACA. Respondent, as a matter of law, is responsible for the unlawful conduct of its agents, officers, and other persons acting for or employed by Respondent. Perry Favazza's and perhaps other employees' alterations of United States Department of Agriculture inspection certificates constitute egregious violations of the PACA. I agree with Complainant's sanction witness that Respondent's continued employment of Perry Favazza, after Respondent's president learned of Perry Favazza's alterations of United States Department of Agriculture inspection certificates, is an aggravating circumstance. I also

find that the circumstances which Complainant's sanction witness characterized as mitigating are indeed mitigating circumstances. In addition, I find Respondent's cooperation with the investigation of its violations of the PACA and Respondent's corrective action to ensure that violations of the PACA do not occur in the future are mitigating circumstances.

I conclude that a 48-day suspension of Respondent's PACA license is an appropriate sanction under the circumstances in this proceeding. Despite the egregious nature of Respondent's violations, in light of Complainant's sanction witness' recommendation in favor of a civil penalty in lieu of PACA license suspension, the number of Respondent's violations, the period during which the violations occurred, and the mitigating circumstances, I provide Respondent with the option of paying a civil monetary penalty in lieu of having its PACA license suspended for 48 days. The record establishes that the assessment of a \$98,400 civil penalty against Respondent has a deterrent effect equivalent to a 48-day suspension of Respondent's PACA license (CX 9).

Complainant's Appeal Petition

Complainant raises seven issues in Complainant's Appeal Petition. First, Complainant contends the Chief ALJ erroneously refers to Respondent as the "George A. Heimos Produce Company, Inc." in the Initial Decision and Order (Complainant's Appeal Pet. at 6).

The Chief ALJ refers to Respondent as the "George A. Heimos Produce Company, Inc." and the "George Heimos Produce Company, Inc." (Initial Decision and Order at 1, 2,

27, and 31). Complainant alleges and Respondent admits Respondent's corporate name is the "Geo. A. Heimos Produce Company, Inc." (Compl. ¶ II; Answer to Compl. ¶ 1). Moreover, the record establishes that Respondent's corporate name is the "Geo. A. Heimos Produce Company, Inc." Respondent has no objection to the correction of the Chief ALJ's references to Respondent as the "George A. Heimos Produce Company, Inc.," and the "George Heimos Produce Company, Inc." (Respondent's Reply to Appeal Pet. at 8). Therefore, I do not adopt the Chief ALJ's references to Respondent; however, I find the Chief ALJ's inaccurate references to Respondent harmless error.

Second, Complainant contends the Chief ALJ's rejection of suspension of Respondent's PACA license as an appropriate sanction is error (Complainant's Appeal Pet. at 6-10).

I agree with Complainant's contention that the Chief ALJ's rejection of PACA license suspension as an appropriate sanction for Respondent's violations of the PACA, is error. As fully explained in this Decision and Order, *supra*, Respondent's willful alterations of United States Department of Agriculture inspection certificates for fraudulent purposes are egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Congress amended the PACA in 1995 to provide that a civil penalty may be assessed for a violation of section 2 of the PACA (7 U.S.C. § 499b) in lieu of license suspension or

revocation.¹¹ The legislative history relevant to this 1995 amendment of the PACA establishes that Congress viewed a civil penalty as a less stringent sanction than license revocation or suspension and that license suspension or revocation is appropriate for egregious violations of the PACA.

Respondent responds that the Chief ALJ correctly concluded that PACA license suspension is not an appropriate sanction in this proceeding based upon the Chief ALJ's finding that Complainant failed to show Respondent had acted unscrupulously or was financially irresponsible (Respondent's Reply to Appeal Pet. at 8-9).

The Chief ALJ correctly found one of the primary purposes of the PACA is to protect produce shippers and growers from financially irresponsible and unscrupulous commission merchants, dealers, and brokers. However, the Chief ALJ erroneously suggested Respondent was not financially irresponsible or unscrupulous. (Initial Decision and Order at 10-11, 23.)

“Unscrupulous” means “not scrupulous.”¹² “Scrupulous” means “acting in strict regard for what is considered right or proper.”¹³ The record does not support the Chief

¹¹7 U.S.C. § 499h(e).

¹²Merriam-Webster’s Collegiate Dictionary 1296 (10th ed. 1997):

unscrupulous . . . *adj* . . . : not scrupulous : UNPRINCIPLED . . .

¹³Merriam-Webster’s Collegiate Dictionary 1051 (10th ed. 1997):

scrupulous . . . *adj* . . . 1 : having moral integrity : acting in strict regard for what is considered right or proper 2 : punctiliously exact . . .

(continued...)

ALJ's suggestion that the willful alteration of a United States Department of Agriculture inspection certificate for a fraudulent purpose is an act that is considered "right or proper." I find Respondent's willful alterations of United States Department of Agriculture inspection certificates K-272284-1, K-272337-7, K-393680-4, and K-393964-2 for fraudulent purposes, unscrupulous.

Further, Respondent's willful alterations of United States Department of Agriculture inspection certificates resulting in losses of \$8,238.36 to Respondent's produce suppliers establish Respondent is not financially responsible.¹⁴

Respondent also asserts "[t]o the extent Complainant is arguing that an ALJ must follow its recommendation as to a sanction, this is clearly wrong." (Respondent Reply to Appeal Pet. at 10.)

¹³(...continued)

The Oxford English Dictionary, vol. XIV, 755 (2d ed. 1991):

scrupulous

....
3. Careful to follow the dictates of conscience; giving heed to the scruples of conscience so as to avoid doing what is wrong; strict in matters of right and wrong.

....
4. Of actions, etc.: Rigidly directed by the dictates of conscience; characterized by a strict and minute regard for what is right.

¹⁴See *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 590 (6th Cir. 2003) (stating a PACA dealer's alteration of United States Department of Agriculture inspection certificates and falsification of accounts of sale resulting in losses to shippers in excess of \$136,000 indicate that the PACA dealer is not a financially responsible dealer).

I agree with Respondent that the Chief ALJ is not required to adopt Complainant's sanction recommendation. The United States Department of Agriculture's sanction policy provides that recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute should be given "appropriate weight."¹⁵ The recommendations of administrative officials are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.¹⁶

¹⁵*In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

¹⁶*In re Excel Corporation*, 62 Agric. Dec. ___, slip op. at 59 (Jan. 3, 2003); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. Aug. 22, 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001), *aff'd*, No. 02-15602, 2003 WL 21259771 (9th Cir. May 29, 2003); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table),

(continued...)

Respondent further asserts Complainant's attempt to justify its recommended 60-day suspension of Respondent's PACA license based on *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733 (2001), is misplaced. Respondent notes: (1) H.C. MacClaren, Inc., altered 53 United States Department of Agriculture inspection certificates and falsified eight accounts of sale, whereas Respondent only altered four United States Department of Agriculture inspection certificates; (2) three of H.C. MacClaren, Inc.'s employees altered United States Department of Agriculture inspection certificates and falsified accounts of sale, whereas probably only one of Respondent's employees altered United States Department of Agriculture inspection certificates; (3) as a result of the alterations of United States Department of Agriculture inspection certificates and the falsification of accounts of sale, H.C. MacClaren, Inc., underpaid produce shippers approximately \$130,000, whereas, as a result of the alterations of United States Department of Agriculture inspection certificates, Respondent only underpaid produce shippers \$8,238.36; (4) H.C. MacClaren, Inc.'s violations of the PACA occurred over a period of approximately 29 months, whereas Respondent's violations of the PACA only occurred

¹⁶(...continued)

2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

over a period of approximately 3 months; and (5) the record contains no basis for concluding that Respondent should have known of the alterations of United States Department of Agriculture inspection certificates. (Respondent's Reply to Appeal Pet. at 10-11.)

I agree with Respondent's point that the facts in *In re H.C. MacClaren, Inc.*, are not identical to the facts in the instant proceeding. However, Complainant does not argue that the facts in *In re H.C. MacClaren, Inc.*, are identical to the facts in the instant proceeding. Instead, Complainant cites *In re H.C. MacClaren, Inc.*, to support Complainant's contention that Respondent's alterations of United States Department of Agriculture inspection certificates are willful and egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Complainant's Appeal Pet. at 7).

In *In re H.C. MacClaren, Inc.*, I found that the intentional alterations of United States Department of Agriculture inspection certificates for fraudulent purposes that cause produce shippers monetary loss are egregious violations of the PACA and concluded that, as a matter of law, the knowing and willful alterations by H.C. MacClaren, Inc.'s employees are knowing and willful violations by H.C. MacClaren, Inc.¹⁷ Therefore, I do not find Complainant's reliance on *In re H.C. MacClaren, Inc.*, to support Complainant's contention that Respondent's alterations of United States Department of Agriculture inspection

¹⁷*In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 747-49 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003).

certificates are willful and egregious violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), is misplaced.

Respondent further argues only a civil penalty may be assessed against Respondent because Respondent did not willfully violate the PACA, as follows:

Another reason why license suspension is not proper is because this is not a case of willfulness with respect to Heimos. As explained by the Chief ALJ, there can be no license suspension unless the violative act is willful. . . . Clearly, Favazza's conduct in altering the inspection was willful. However, it is equally clear that Heimos had no knowledge of Favazza's wrongful conduct, nor any reason to know of the alterations. Section 16 of the PACA, 7 U.S.C. § 499p, indicates that licensees are liable for the acts of their agents. Therefore, Heimos is liable for Favazza's violations in altering the inspections. But § 499p does not say that the licensee is deemed to have the same state of mind as its agent. The Heimos company did not intend that Favazza do this, nor did the Heimos company carelessly allow Favazza to do this. Hence, it would be unlawful to impute willfulness to Heimos under § 499p, and without the finding of willfulness, there is no authority for the suspension of Heimos' license. Instead, this is a case in which notice is required before a license can be suspended. Thus, a civil money penalty is the correct disposition under both the PACA and the APA.

Respondent's Reply to Appeal Pet. at 11-12.

I disagree with Respondent's contention that Respondent's employee's willfulness cannot be attributed to Respondent. The knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors. 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 provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a commission merchant, dealer,

or broker, within the scope of his or her employment or office, shall in every case be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees. Respondent's employee or employees were acting within the scope of employment when they knowingly and willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Thus, as a matter of law, the knowing and willful violations by Respondent's employee or employees are deemed to be knowing and willful violations by Respondent.¹⁸ The United States Court of Appeals for the Sixth Circuit addressed this precise issue 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

¹⁸*H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 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).

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).

Third, Complainant contends the Chief ALJ improperly relied upon Respondent’s self-serving testimony as to the detrimental effect on Respondent of a 60-day suspension of Respondent’s PACA license (Complainant’s Appeal Pet. at 10-14).

The PACA does not require consideration of the detrimental effect of a PACA license suspension when determining the sanction to be imposed for violations of the PACA. Respondent correctly argues the legislative history relevant to the 1995 amendments of the PACA establishes that one of the purposes of section 8(e) of the PACA (7 U.S.C. § 499h(e)), which provides for the assessment of a civil penalty for a violation of section 2 of the PACA (7 U.S.C. § 499b), in lieu of license suspension or revocation, is to avoid putting the violating PACA licensee out of business (Respondent’s Reply to Appeal Pet. at 13). However, the legislative history relevant to this 1995 amendment of the PACA also establishes that Congress viewed a civil penalty as a less stringent sanction than license revocation or suspension appropriate for violations of the PACA that are not “egregious.” The Chief ALJ found Respondent’s alterations of United States Department

of Agriculture inspection certificates egregious. I agree with the Chief ALJ's finding regarding the seriousness of Respondent's violations. Therefore, under the circumstances in this proceeding, suspension of Respondent's PACA license is appropriate and necessary to deter future violations of the PACA and the effect on Respondent of a suspension of Respondent's PACA license is not relevant to this proceeding. Despite the egregious nature of Respondent's violations, in light of Complainant's sanction witness' recommendation, the number of Respondent's violations, the period during which the violations occurred, and the mitigating circumstances, I provide Respondent with the option of paying a \$98,400 civil monetary penalty in lieu of having its PACA license suspended.

Fourth, Complainant contends the \$8,000 civil penalty assessed by the Chief ALJ is not adequate to deter Respondent and others in the regulated industry from future violations of the PACA (Complainant's Appeal Pet. at 14-16).

A civil penalty must be sufficient to deter the PACA violator and other members of the regulated industry from violations of the PACA. The imposition of too lenient a sanction could act as a stimulant to PACA violations because potential violators might view the prospect of the assessment of a small civil penalty for egregious violations that are likely to go undiscovered as a reasonable business risk or a cost of doing business.

The Secretary of Agriculture may not conduct random investigations of PACA violations, but must first receive a written notification of an alleged PACA violation from an interested person or an officer or agency of a state or territory having jurisdiction over

commission merchants, dealers, or brokers in the state or territory.¹⁹ The rapid pace at which the produce business is conducted makes unlikely a produce shipper's discovery of an alteration of a United States Department of Agriculture inspection certificate; therefore, a violator can alter United States Department of Agriculture inspection certificates for a fraudulent purpose in a manner that produces an economic or operational benefit to the violator with a low risk that the produce shipper will discover the alteration and report the alteration to the Secretary of Agriculture for investigation. The low risk of discovery of the alteration of a United States Department of Agriculture inspection certificate, the economic or operational gain that can result from the alteration of a United States Department of Agriculture inspection certificate, and the egregious nature of the violation, require a severe sanction for the alteration of a United States Department of Agriculture inspection certificate in order to deter the violator and other potential violators from future alterations of United States Department of Agriculture inspection certificates for fraudulent purposes.

Complainant's sanction witness, Josephine Jenkins, testified that the assessment of an \$8,000 civil penalty against Respondent would not be an adequate deterrent, as follows:

[BY MR. PAUL:]

Q. Now, if the determination was made in this case that the only sanction authorized under the Act was \$2,000 times four or \$8,000, would the assessment of an \$8,000 civil penalty constitute an adequate deterrent for the -- for the violations?

¹⁹7 U.S.C. § 499f(b).

[BY MS. JENKINS:]

A. The agency doesn't feel that that would be an effective deterrent. It would consider it a serious sanction. We feel that possibly Respondent could view it as just a minor expense, the cost of doing business, and again these are serious violations that strike at the heart of the industry's trust.

Tr. 92.

I agree with Josephine Jenkins' assessment that, under the circumstances in this proceeding, an \$8,000 civil penalty for Respondent's four violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not a sufficient sanction to deter Respondent and others from future violations of the PACA. Therefore, I do not adopt the \$8,000 civil penalty assessed by the Chief ALJ.

Respondent contends it had no actual knowledge of and did not approve of alterations of United States Department of Agriculture inspection certificates by its "rogue employee." Respondent contends the action needed to deter alterations of United States Department of Agriculture inspection certificates is the prosecution of the actual wrong-doer, Perry Favazza, under section 14(b) of the PACA (7 U.S.C. § 499n(b)).
(Respondent's Reply to Appeal Pet. at 14.)

I agree with Respondent that prosecution of individuals who alter United States Department of Agriculture inspection certificates under section 14(b) of the PACA (7 U.S.C. § 499n(b)) would deter future violations of the PACA. However, prosecution of a PACA licensee's employee who actually alters a United States Department of Agriculture

inspection certificate is not a necessary prerequisite to the imposition of a sanction against a PACA licensee for its violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Moreover, Respondent's lack of actual knowledge of its employee's alterations of United States Department of Agriculture inspection certificates is not a defense to Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Under 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, is deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person.²⁰ Hence, Respondent's employees' willful alterations of United States Department of Agriculture inspection certificates are deemed Respondent's willful alterations of United States Department of Agriculture inspection certificates even if Respondent's officers, directors, and owners had no actual knowledge of the alterations and would not have condoned the alterations had they known of the alterations.

Fifth, Complainant contends the Chief ALJ erroneously held that Respondent's four violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) were not continuing violations under the PACA. Complainant contends: (1) Respondent's false and misleading statements on United States Department of Agriculture inspection certificate K-393680-4 continued 247 days from the time Respondent sent altered United States Department of Agriculture inspection certificate K-393680-4 to Westerfield Transportation, Inc., until Respondent

²⁰7 U.S.C. § 499p. See also *H.C. MacClaren, Inc. v. United States Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003).

made full payment to Westerfield Transportation, Inc., on November 14, 1997; (2) Respondent's false and misleading statements on United States Department of Agriculture inspection certificate K-393964-2 continued 228 days from the time Respondent sent altered United States Department of Agriculture inspection certificate K-393964-2 to Andrew & Williamson Sales Co., Inc., until Respondent made full payment to Andrew & Williamson Sales Co., Inc.; and (3) Respondent's false and misleading statements on United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7 continued approximately 7 months from the time Respondent sent altered United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7 to Teixeira, Farms, Inc., in January 1997, until Respondent informed Teixeira Farms, Inc., of the correct information in August 1997. (Complainant's Appeal Pet. at 16-19.)

Respondent contends the Chief ALJ correctly concluded Respondent's violations of the PACA were not continuing violations. Respondent asserts the alteration of a United States Department of Agriculture inspection certificate is a transaction that is completed at the time the alteration is made. (Respondent's Reply to Appeal Pet. at 15-17.)

The Chief ALJ held Respondent's alterations of four United States Department of Agriculture inspection certificates were not continuing violations and Respondent's "unlawful acts were completed at the time the alterations were made[.]" Thus, the Chief ALJ concluded the maximum civil monetary penalty that could be assessed against

Respondent under section 8(e) of the PACA (7 U.S.C. § 499h(e)) is \$2,000 for each of Respondent's four violations. (Initial Decision and Order at 24, 27.)

The Chief ALJ erroneously held Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) occurred only during the time Respondent's employee or employees were physically altering United States Department of Agriculture inspection certificates K-272284-1, K-272337-7, K-393680-4, and K-393964-2. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes unlawful a commission merchant's, dealer's, or broker's false or misleading statements for a fraudulent purpose; generally, the violation begins at the time the commission merchant, dealer, or broker makes a false or misleading statement for a fraudulent purpose and ends when the fraud is revealed.²¹ Under the circumstances in this proceeding, I find each of Respondent's violations began when Respondent made the false statement, for a fraudulent purpose, on the United States Department of Agriculture inspection certificate in question and continued until Respondent informed the recipient of the false statement that the statement was in fact false and provided the recipient of the false statement with a correct statement.

²¹See generally, *Beauty Time, Inc. v. Vu Skin Systems, Inc.*, 118 F.3d 140, 146-47 (3d Cir. 1997) (stating, when underlying events are based in fraud or deceit, the statute of limitations is tolled until such time as the fraud has been revealed or should have been discovered); *Kicklighter v. New York Life Ins. Co.*, 145 F.2d 548, 549-50 (5th Cir. 1944) (stating fraud continues during the whole of its concealment inseparable from the original wrong); *Gee v. CBS, Inc.*, 471 F. Supp. 600, 622-23 (E.D. Pa. 1979) (holding fraud continues until revealed or until it should have been discovered by the due diligence of the victim of the fraud), *aff'd*, 612 F.2d 572 (3d Cir. 1979) (Table).

Moreover, the assessment of an \$8,000 civil penalty against Respondent would not be sufficient to deter Respondent and other potential violators from future violations of the PACA. Therefore, if I had agreed with the Chief ALJ's holding that the maximum civil penalty that could be assessed against Respondent is \$8,000, I would not have provided Respondent with the option of paying a civil penalty.

Sixth, Complainant contends the Chief ALJ erroneously declined to find that Respondent's continued employment of Perry Favazza constitutes an aggravating factor in determining the appropriate sanction in this proceeding. Complainant asserts that Respondent's continuing employment of Perry Favazza constitutes an express disregard of the seriousness of the PACA violations that are the subject of this proceeding.

(Complainant's Appeal Pet. at 19-22.)

The Chief ALJ concluded that Respondent's continued employment of Perry Favazza, after Respondent's president learned that Perry Favazza had altered United States Department of Agriculture inspection certificates, was not an aggravating factor to be considered when determining the appropriate sanction. The Chief ALJ based his conclusion on Complainant's failure to "take action" against Perry Favazza. (Initial Decision and Order at 25-26.)

I reject the Chief ALJ's conclusion that a PACA licensee's retention of an employee who violates the PACA is not an aggravating factor to be considered when determining the appropriate sanction. The Chief ALJ's conclusion is not consistent with *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733 (2001), in which I held that H.C. MacClaren, Inc.'s

retention of salespersons, after H.C. MacClaren, Inc.'s principals learned of their PACA violations, is an aggravating factor to be considered when determining the appropriate sanction. Complainant's failure to take action against an employee who commits violations of the PACA does not negate or lessen the aggravating nature of a PACA licensee's retention of an employee who commits a violation of the PACA. The United States Court of Appeals for the Sixth Circuit affirmed *In re H.C. MacClaren, Inc.*, concluding that a PACA licensee's retention of a violating employee may be considered when determining the severity of a sanction, as follows:

[W]hile retention of employees who commit violations of PACA is not directly prohibited by PACA, the retention of such employees may be considered relevant in determining whether license suspension or revocation is required to deter future violations.

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

Respondent disagrees with Complainant's assertion that Respondent did not take Perry Favazza's violations of the PACA seriously. Respondent states it took appropriate action consonant with the belief that Perry Favazza's violations were serious.
(Respondent's Reply to Appeal Pet. at 17-18.)

Respondent's restitution of the amounts it underpaid its produce suppliers because of the alterations of United States Department of Agriculture inspection certificates and the corrective action Respondent took to deter future violations of the PACA by Perry Favazza are mitigating circumstances. However, these mitigating circumstances do not negate Respondent's retention of Perry Favazza which I find to be an aggravating

circumstance. I considered both the mitigating and aggravating circumstances when determining the sanction in this proceeding.

Respondent also asserts Perry Favazza is not barred by the PACA from working for Respondent and the conclusion that Respondent's retention of Perry Favazza is an aggravating circumstance to be considered when determining the appropriate sanction penalizes Respondent for engaging in a lawful activity. Further, Respondent argues, since the PACA explicitly addresses who may or may not be employed by PACA licensees if there has been a violation of the PACA, it would be contrary to the PACA to penalize Respondent for retaining Perry Favazza. (Respondent's Reply to Appeal Pet. at 18.)

Nothing in the PACA prohibits the Secretary of Agriculture from taking aggravating and mitigating circumstances into account when fashioning a sanction authorized under the PACA. The United States Department of Agriculture's sanction policy has long provided that the sanction is determined by examining all relevant circumstances.²²

Seventh, Complainant contends the appropriate sanction for four repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is the imposition of a 60-day suspension of Respondent's PACA license or a fully equivalent civil penalty (Complainant's Appeal Pet. at 22-29).

²²*In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

For the reasons set forth in this Decision and Order, *supra*, I conclude that a 48-day suspension of Respondent's PACA license or, in lieu of a 48-day suspension of Respondent's PACA license, a civil penalty with an equivalent deterring effect is an appropriate sanction under the circumstances in this proceeding. The record establishes that the assessment of a \$98,400 civil penalty against Respondent has an equivalent deterring effect of a 48-day suspension of Respondent's PACA license (CX 9).

Findings of Fact

1. Respondent, the Geo. A. Heimos Produce Company, Inc., is a business with approximately 50 employees. Respondent's mailing address is 32 Produce Row, St. Louis, Missouri 63102.
2. At all times material to this proceeding, Respondent was licensed under the PACA. The United States Department of Agriculture issued Respondent PACA license number 166807 in 1956. Respondent has renewed its PACA license annually.
3. On January 14, 1997, Respondent, acting through its salesperson, Perry Favazza, purchased cauliflower and celery from Teixeira Farms, Inc., a shipper located in Santa Maria, California. The terms of sale were "price after sale" and the shipping destination was "St. Louis, MO."
4. Respondent, through its salesperson, Perry Favazza, shipped the produce referenced in paragraph 3 of these findings of fact to Evergreen International, Inc., a Chicago, Illinois, produce dealer.

5. On January 17, 1997, Evergreen International, Inc., obtained a United States Department of Agriculture inspection of the cauliflower referenced in paragraph 3 of these findings of fact and sent a copy of the applicable United States Department of Agriculture inspection certificate, K-272284-1, to Respondent. The name and address of the applicant for inspection, as entered by the inspector, on United States Department of Agriculture inspection certificate K-272284-1 were "Evergreen International" and "Chicago, Illinois."

6. Respondent's salesperson, Perry Favazza, altered the name and address of the applicant for inspection on United States Department of Agriculture inspection certificate K-272284-1 to "Heimos" and "St. Louis," and sent a copy of altered United States Department of Agriculture inspection certificate K-272284-1 to Teixeira Farms, Inc.

7. On January 25, 1997, Respondent, acting through its salesperson Perry Favazza, purchased broccoli and cauliflower from Teixeira Farms, Inc. The terms of sale were "price after sale" and the shipping destination was "St. Louis, Mo."

8. Respondent, through its salesperson Perry Favazza, shipped the produce referenced in paragraph 7 of these findings of fact to Evergreen International, Inc., a Chicago, Illinois, produce dealer.

9. On January 29, 1997, Evergreen International, Inc., obtained a United States Department of Agriculture inspection of the broccoli referenced in paragraph 7 of these findings of fact and sent a copy of the applicable United States Department of Agriculture inspection certificate, K-272337-7, to Respondent. The name and address of the applicant

for inspection, as entered by the inspector, on United States Department of Agriculture inspection certificate K-272337-7 were "Evergreen Int'l" and "Chicago, IL."

10. Respondent's salesperson, Perry Favazza, admitted that he altered the name and address of the applicant for inspection on United States Department of Agriculture inspection certificate K-272337-7 to "Heimos" and "St. Louis."

11. On March 10, 1997, Respondent, acting through its salesperson, Perry Favazza, purchased strawberries from Westerfield Transportation, Inc., an Oklahoma City, Oklahoma, produce dealer. The agreed FOB price for the strawberries was \$3,508.80.

12. On March 12, 1997, Respondent, acting through its salesperson, Perry Favazza, requested two United States Department of Agriculture inspections of the strawberries referenced in paragraph 11 of these findings of fact. The inspection revealed on United States Department of Agriculture inspection certificate K-393680-4 that the strawberries had the following defects:

LOT	AVERAGE DEFECTS	including SER. DAM.	
. . .			
B.	07%	01%	Bruise (0 to 16%)
	<u>00%</u>	<u>00%</u>	Decay
	07%	01%	Checksum

13. An agent or employee of Respondent altered United States Department of Agriculture inspection certificate K-393680-4 to show the following:

LOT	AVERAGE DEFECTS	including SER. DAM.
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....

B.	07%	11%	Bruise (0 to 16%)
	<u>00%</u>	<u>00%</u>	Decay
	17%	11%	Checksum

14. Westerfield Transportation, Inc., relied on both the altered copy of United States Department of Agriculture inspection certificate K-393680-4 and an unaltered copy of United States Department of Agriculture inspection certificate K-393680-4 when it agreed to grant Respondent a \$2,235.16 reduction in the original \$3,508.80 FOB price to \$1,273.64.

15. On March 28, 1997, Respondent, acting through its salesperson, Perry Favazza, purchased strawberries from Andrew & Williamson Sales Co., Inc., a licensed produce grower agent located in San Diego, California. The agreed FOB price for the strawberries was \$11,802.70.

16. On March 31, 1997, Respondent, acting through its salesperson, Perry Favazza, requested a United States Department of Agriculture inspection of the strawberries referenced in paragraph 15 of these findings of fact. The inspection revealed on United States Department of Agriculture inspection certificate K-393964-2 that the strawberries had the following defects:

LOT	AVERAGE DEFECTS	including SER. DAM.	
	05%	00%	Bruise (0 to 12%)
	<u>00%</u>	<u>00%</u>	Decay
	05%	00%	Checksum

17. An agent or employee of Respondent altered United States Department of Agriculture inspection certificate K-393964-2 to show the following:

LOT	AVERAGE DEFECTS	including SER. DAM.	
	25%	00%	Bruise (0 to 32%)
	<u>00%</u>	<u>00%</u>	Decay
	25%	00%	Checksum

18. Perry Favazza sent a copy of altered United States Department of Agriculture inspection certificate K-393964-2 to Andrew & Williamson Sales Co., Inc.

19. Andrew & Williamson Sales Co., Inc., relied on the altered copy of United States Department of Agriculture inspection certificate K-393964-2 when it agreed to grant Respondent a \$6,003.20 reduction in the original \$11,802.70 FOB price to \$5,799.50.

Conclusions of Law

Respondent, through the alterations of United States Department of Agriculture inspection certificates K-272284-1 and K-272337-7 for a fraudulent purpose by its employee or agent, Perry Favazza, and the alterations of United States Department of Agriculture inspection certificates K-393680-4 and K-393964-2 for a fraudulent purpose by one or more of Respondent's agents or employees, willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

1. Respondent's PACA license is suspended for 48 days, effective 61 days after service of this Order on Respondent; *Provided, however,* That Respondent's PACA license shall not be suspended if Respondent pays a civil penalty in accordance with paragraph 2 of this Order.
2. Respondent is assessed a \$98,400 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

James Frazier
United States Department of Agriculture
Agricultural Marketing Service
Fruit and Vegetable Division
PACA Branch
Room 2095 South Building
1400 Independence Avenue, SW
Washington, DC 20250-0242

Respondent's payment of the civil penalty shall be forwarded to, and received by, James Frazier within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to PACA Docket No. D-99-0016. In the event James Frazier does not receive a certified check or money order in accordance with paragraph 2 of this Order, Respondent's PACA license shall be suspended for 48 days beginning 61 days after service of this Order on Respondent.

Done at Washington, DC

October 29, 2003

William G. Jenson
Judicial Officer