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UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-94-0508
	)	
JSG Trading Corp., Gloria and	)	
Tony Enterprises, d/b/a G&T	)	
Enterprises, Anthony Gentile,	)	
and Albert Lomoriello, Jr.,	)	
d/b/a Hunts Point Produce Co.,	)	
	)	
Respondents	)	
	)	
	AND	
	)	
Gloria and Tony Enterprises,	)	PACA Docket No. D-94-0526
d/b/a G&T Enterprises, and	)	
Anthony Gentile,	)	
	)	
Respondents	)	<b>Decision and Order on Remand as to JSG Trading Corp.</b>

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted the disciplinary proceeding captioned PACA Docket No. D-94-0508 pursuant to 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. §§ 46.1-.48); and the Rules of Practice Governing Formal Adjudicatory Proceedings

Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) by filing a Complaint on November 8, 1993.<sup>1</sup>

On April 8, 1994, Complainant filed an Amended Complaint alleging that JSG Trading Corp. [hereinafter Respondent] willfully, flagrantly, and repeatedly violated section 2(4) of the PACA.<sup>2</sup> Specifically, the Amended Complaint alleges that: (1) during the period from January 3, 1992, through February 24, 1993, Respondent, G&T, and Mr. Gentile engaged in a scheme in which Respondent made payments to G&T, under the direction, management, and control of Mr. Gentile, to induce G&T to purchase tomatoes from Respondent on behalf of L&P Fruit Corp. [hereinafter L&P]; and (2) during the period from December 15, 1992, through February 24, 1993, Respondent and Mr. Lomoriello engaged in a scheme whereby Respondent made payments to Mr. Lomoriello to induce him to purchase tomatoes from Respondent on behalf of American Banana Co., Inc. [hereinafter American Banana]. The Amended Complaint

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<sup>1</sup>PACA Docket No. D-94-0526 is a related disciplinary proceeding which has been concluded and forms no part of this Decision and Order on Remand as to JSG Trading Corp.

<sup>2</sup>The Amended Complaint also alleges that Gloria and Tony Enterprises, d/b/a G&T Enterprises [hereinafter G&T], Anthony Gentile, and Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA. However, as this Decision and Order on Remand as to JSG Trading Corp. relates to Respondent, I limit the references to allegations against, responses by, and filings by G&T and Messrs. Gentile and Lomoriello to those necessary to describe the status of this proceeding as it relates to Respondent.

requests revocation of Respondent's PACA license. Respondent filed an answer denying the material allegations in the Complaint and the Amended Complaint.

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a 15-day hearing in New York, New York. Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture [hereinafter USDA], Washington, DC, represented Complainant. Mark C.H. Mandell, Annandale, New Jersey, represented Respondent.<sup>3</sup> Subsequent to the hearing, Complainant and Respondent filed post-hearing briefs.

On June 17, 1997, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which, *inter alia*, the ALJ: (1) found that payments by Respondent to Messrs. Gentile and Lomoriello constituted commercial bribery; (2) found that Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA; and (3) revoked Respondent's PACA license.

On September 23, 1997, Respondent appealed to the Judicial Officer. On November 7, 1997, Complainant filed Complainant's Response to Appeal Petitions,<sup>4</sup> and

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<sup>3</sup>On July 11, 1997, Mr. John V. Esposito and Mr. Mel Cottone of the Law Offices of Cottone & Esposito, Hilton Head Island, South Carolina, entered an appearance on behalf of Respondent. Subsequently, Richard M. Adler of O'Connor & Hannan, LLP, Washington, DC, entered an appearance on behalf of Respondent.

<sup>4</sup>On February 2, 1998, Complainant filed an amended version of Complainant's Response to Appeal Petitions, which corrects incorrect transcript citations in Complainant's Response to Appeal Petitions, filed November 7, 1997.

on November 13, 1997, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

On March 2, 1998, I issued a Decision and Order as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile [hereinafter Decision and Order] in which I adopted the Initial Decision and Order as the final Decision and Order. *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria and Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999).

On April 28, 1998, Respondent filed a petition for reconsideration of the March 2, 1998, Decision and Order; on May 14, 1998, Complainant filed a reply to Respondent's petition for reconsideration; and on May 19, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the Decision and Order issued March 2, 1998.

On June 1, 1998, I denied Respondent's petition for reconsideration. *In re JSG Trading Corp.*, 57 Agric. Dec. 710 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); and on July 30, 1998, I issued a stay of the order revoking Respondent's PACA license, pending judicial review. *In re JSG Trading Corp.*, 57 Agric. Dec. 1715 (1998) (Stay Order as to JSG Trading Corp.).

Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit challenging the revocation of its PACA license. The Court granted Respondent's petition for review, stating, as follows:

In this petition for review, JSG challenges the revocation of its license, alleging that the Judicial Officer was proceeding from an incorrect legal premise, namely, that *any* payment by a produce dealer to a purchasing agent above a *de minimis* level constitutes "commercial bribery" in violation of § 2(4) of PACA. JSG argues that this *per se* standard represents a marked departure from agency precedent, and that the case should be remanded for factual findings in accordance with the correct legal standard.

We agree that, in adopting a *per se* standard to measure commercial bribery, the Judicial Officer departed from well established precedent without adequate justification. We therefore remand the case to the agency, so that it may either attempt to justify its creation of a new, *per se* standard or make explicit factual findings pursuant to established law.

*JSG Trading Corp. v. United States Dep't of Agric.*, 176 F.3d 536, 537 (D.C. Cir. 1999).

On August 2, 1999, Respondent filed Motion to Dismiss and for Entry of Judgment; or, in the Alternative, Petition for Reopening the Hearing and Record to Take Further Evidence [hereinafter Motion to Dismiss]. On September 13, 1999, Complainant, filed Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment [hereinafter Complainant's Response], in which Complainant opposes Respondent's Motion to Dismiss and requests that I issue a decision and order on remand, finding that Respondent violated section 2(4) of the PACA and revoking Respondent's PACA license. On October 20, 1999, Respondent filed Respondent JSG Trading Corp.'s Reply to Complainant's Response to JSG's Motion to Dismiss and for Entry of Judgment

[hereinafter Respondent's Reply]; and on November 4, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a ruling on Respondent's Motion to Dismiss and Complainant's request for the issuance of a decision and order on remand.

Respondent contends that the Complaint must be dismissed because the *per se* standard to measure commercial bribery cannot be justified and Complainant cannot prevail under the traditional test for commercial bribery as described in *JSG Trading Corp. v. United States Dep't of Agric., supra* (Respondent's Motion to Dismiss at 2).

I disagree with Respondent's contention that the Complaint must be dismissed. While I abandon the *per se* standard to measure commercial bribery, I find that the record establishes that Respondent engaged in activity that falls within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric., supra*. Therefore, I issue this Decision and Order on Remand as to JSG Trading Corp., in which I conclude that Respondent violated section 2(4) of the PACA.<sup>5</sup>

Complainant's exhibits are designated by "CX," Respondent's, G&T's, and Mr. Gentile's exhibits are designated by "RX," Mr. Lomoriello's exhibits are designated by "RL," and transcript references are designated by "Tr."

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<sup>5</sup>Simultaneously with this Decision and Order on Remand as to JSG Trading Corp., I am filing a Ruling Denying JSG Trading Corp.'s Motion to Dismiss.

**PERTINENT STATUTORY PROVISION AND REGULATION**

7 U.S.C.:

**TITLE 7—AGRICULTURE**

.....

**CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES**

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**§ 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.

7 U.S.C. § 499b(4) (Supp. III 1997).

7 C.F.R.:

**TITLE 7—AGRICULTURE**

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

**CHAPTER I—AGRICULTURAL MARKETING SERVICE**

.....  
**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 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.

**Introduction**

The issue presented is whether a series of payments by Respondent to purchasing agents of two separate produce buyers, L&P and American Banana, at a time when those

purchasing agents were buying tomatoes from Respondent on behalf of their respective principals, constitute willful, flagrant, and repeated violations of section 2(4) of the PACA.

Section 2(4) of the PACA prohibits commission merchants, dealers, and brokers from failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity received in interstate or foreign commerce. While section 2(4) of the PACA does not expressly prohibit payments by produce dealers to purchasing agents or employees of that dealer's produce buyers, the Judicial Officer held in *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992), and *In re Tipco, Inc.*, 50 Agric. Dec. 871 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), *cert. denied*, 506 U.S. 826 (1992), that activity that falls within the traditional definitions of commercial bribery constitutes a violation of section 2(4) of the PACA. Since the issuance of *Goodman*, the produce industry has been on notice that activity that falls within the traditional definitions of commercial bribery is prohibited by the PACA.

In *Goodman* and *Tipco*, produce dealers paid purchasing agents of supermarket chains 25 cents for each box of produce purchased from the produce dealers. The supermarket chains had no knowledge of this arrangement. The Judicial Officer found

these actions willful, flagrant, and repeated violations of section 2(4) of the PACA and revoked the produce dealers' PACA licenses, explaining:

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

'... interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him.' It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. 'No matter what the character of the competitors' goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell, the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy . . .' 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies* § 49 (3d ed. 1968).

*In re Sid Goodman & Co.*, *supra*, 49 Agric. Dec. at 1185-86; *In re Tipco, Inc.*, *supra*, 50 Agric. Dec. at 884-85 (citing *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-29 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979)).

The Judicial Officer expressed concern that commercial bribery by one firm in a market will inevitably lead to commercial bribery by many firms, in an effort to compete, as follows:

Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace.

Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

*In re Sid Goodman & Co.*, *supra*, 49 Agric. Dec. at 1186; *In re Tipco, Inc.*, *supra*, 50 Agric. Dec. at 885 (citing *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043 (1986), *remanded*, 820 F.2d 1103 (9th Cir. 1987), *reprinted in* 51 Agric. Dec. 619 (1992)).

The Judicial Officer provided the following guidelines:

The totality of the history of the PACA supports a conclusion that members of the produce industry have an obligation to deal fairly with one another--a duty to only deal with one another at arm's length. Included within this obligation is the positive duty to refrain from corrupting an employee of a person with whom it is dealing, *e.g.*, each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer. On the other hand, if the employee seeks a payment from the licensee, the licensee is affirmatively obligated to report that request to its customer, could only make payments with the customer's permission, and, even then, would risk violating PACA with anything more than a *de minimis* payment (*e.g.*, more than a pen, calendar or lighter).

*In re Tipco, Inc.*, *supra*, 50 Agric. Dec. at 882-83 (footnotes and citations omitted).

Based on these guidelines in *Tipco*, I applied a *per se* test to determine whether Respondent engaged in commercial bribery when Respondent made a series of payments to Mr. Gentile, a purchasing agent for L&P, and Mr. Lomoriello, a purchasing agent for American Banana. I concluded that, since Respondent's payments to the purchasing

agents were more than *de minimis*, Respondent had engaged in commercial bribery, in violation of section 2(4) of the PACA. *In re JSG Trading Corp.*, *supra*, 57 Agric. Dec. at 659. The United States Court of Appeals for the District of Columbia Circuit admonished that Judicial Officer's guidelines in *Tipco* are dicta and, at most, establish a risk of a PACA violation. The Court found that traditional definitions of commercial bribery, adopted in *Goodman* and *Tipco*, require both a finding that a payment or offer of payment is made to induce a purchasing agent to buy from the dealer and a finding that the payment is made surreptitiously, without the knowledge of the purchasing agent's principal. *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, 176 F.3d at 542. The Court instructed that the broad language in section 2(4) of the PACA does not bind the Secretary of Agriculture to traditional definitions of commercial bribery, but that departure from the use of traditional definitions of commercial bribery requires justification, which I did not provide in *In re JSG Trading Corp.*, *supra*.

The United States Court of Appeals for the District of Columbia Circuit remanded the case to me, requiring me either to explain the justification for using a *per se* test to determine whether Respondent violated section 2(4) of the PACA or to abandon the *per se* test and apply traditional definitions of commercial bribery to determine whether Respondent violated section 2(4) of the PACA. Moreover, the Court stated that several of the gifts given to Mr. Gentile by Mr. Goodman arguably could be promotional allowances in connection with the promotion of Respondent's product, which are

specifically permitted under the Perishable Agricultural Commodities Act Amendments of 1995 [hereinafter the PACAA-1995],<sup>6</sup> and that any explanation for the justification for employing a *per se* test for commercial bribery must be made in conjunction with those amendments. *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, 176 F.3d at 546-47.

I used the term "commercial bribery" in *In re JSG Trading Corp.*, *supra*, in an effort to describe Respondent's activities. However, my use of the term "commercial bribery" has resulted in the application of the vast jurisprudence related to commercial bribery to the PACA. Since the enactment of the PACA in 1930, only three PACA disciplinary cases<sup>7</sup> have been appealed to the Judicial Officer that concern activities which the Judicial Officer has described as "commercial bribery." The PACA does not specifically prohibit commercial bribery, but rather prohibits commission merchants, dealers, and brokers from failing, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any

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<sup>6</sup>Section 9(b)(3) of the PACAA-1995 amends section 2(4) of the PACA by adding the following sentence at the end of section 2(4) of the PACA: "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 Act." Section 9(a) of the PACAA-1995 amends the PACA by adding a new section 1(b)(13), which reads, as follows: "(13) The term 'collateral fees and expenses' means any promotional allowances, rebates, service or materials fees paid or provided, directly or indirectly, in connection with the distribution or marketing of any perishable agricultural commodity."

<sup>7</sup>*In re JSG Trading Corp.*, *supra*; *In re Tipco, Inc.*, *supra*; and *In re Sid Goodman & Co.*, *supra*.

transaction involving perishable agricultural commodities received in interstate or foreign commerce.

“Congress enacted PACA in 1930 in an effort to assure business integrity in an industry thought to be unusually prone to fraud and unfair practices.” *JSG Trading Corp. v. United States Dep’t of Agric.*, *supra*, 176 F.3d at 537 (quoting *Tri-County Wholesale Produce Co. v. United States Dep’t of Agric.*, 822 F.2d 162, 163 (D.C. Cir. 1987)).

Rather than use a term, such as “commercial bribery,” to describe an activity that constitutes a violation of section 2(4) of the PACA, the focus should be on whether the scrutinized activity constitutes a failure to deal fairly, which is required by the PACA. *In re Tipco, Inc.*, *supra*, 50 Agric. Dec. at 882. Any activity by an entity subject to the PACA that the Secretary of Agriculture finds is a failure to deal fairly can constitute a violation of section 2(4) of the PACA.

I find that activity that falls within the traditional definitions of commercial bribery, as described in *JSG Trading Corp. v. United States Dep’t of Agric.*, *supra*, constitutes a failure to deal fairly and is a violation of section 2(4) of the PACA. That is, each commission merchant, dealer, and broker has an obligation under section 2(4) of the PACA to avoid making or offering a payment to a purchasing agent to encourage that agent to purchase produce from the commission merchant, dealer, or broker on behalf of the agent’s principal or employer, without fully informing the purchasing agent’s principal or employer of the offer or payment.

Proof that: (1) a commission merchant, dealer, or broker made a payment to or offered to pay a purchasing agent; (2) the value of the payment or offer was more than *de minimis*; (3) the payment or offer was intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; and (4) the purchasing agent's principal or employer was not fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent, raises the rebuttable presumption that the commission merchant, dealer, or broker making the payment or offer violated section 2(4) of the PACA.

The commission merchant, dealer, or broker may rebut the presumption by showing that: (1) the commission merchant, dealer, or broker did not make a payment to or offer to pay a purchasing agent; (2) the value of the payment or offer was *de minimis*; (3) the payment or offer was not intended to induce the purchasing agent to purchase produce from the commission merchant, dealer, or broker making the payment or offer; or (4) the purchasing agent's principal or employer was fully aware of the payment or offer made by the commission merchant, dealer, or broker to the purchasing agent.

I have carefully reviewed the record in light of *JSG Trading Corp. v. United States Dep't of Agric., supra*, and find that the record supports a conclusion that Respondent violated section 2(4) of the PACA. Specifically, the record contains substantial evidence that: (1) Respondent made payments to Mr. Gentile, a purchasing agent for L&P, one of Respondent's produce customers, and Mr. Lomoriello, a purchasing agent for American

Banana, one of Respondent's produce customers; (2) the value of Respondent's payments to Mr. Gentile was more than *de minimis* and the value of Respondent's payments to Mr. Lomoriello was more than *de minimis*; (3) Respondent made at least some of the payments to Mr. Gentile to induce Mr. Gentile to purchase produce from Respondent and Respondent made payments to Mr. Lomoriello to induce Mr. Lomoriello to purchase produce from Respondent; and (4) the principals at L&P were not fully aware of all of the payments made by Respondent to Mr. Gentile and the principals at American Banana were not fully aware of the payments made by Respondent to Mr. Lomoriello.

Respondent, Messrs. Gentile and Lomoriello, and G&T introduced evidence to show that the payments to Messrs. Gentile and Lomoriello were not intended to induce Messrs. Gentile and Lomoriello to purchase produce from Respondent and that the principals at L&P knew of the payments to Mr. Gentile and the principals at American Banana knew of the payments to Mr. Lomoriello. The evidence introduced by Respondent, Messrs. Gentile and Lomoriello, and G&T falls far short of rebutting Complainant's evidence that Respondent violated section 2(4) of the PACA.<sup>8</sup>

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<sup>8</sup>I abandon the *per se* test, which I employed in *In re JSG Trading Corp., supra*, to determine whether Respondent violated section 2(4) of the PACA. Therefore, I do not explain in this Decision and Order on Remand as to JSG Trading Corp. the justification for my use, in *In re JSG Trading Corp., supra*, of a *per se* test to determine whether Respondent engaged in commercial bribery.

### Findings of Fact

1. Respondent, JSG Trading Corp., is a corporation organized and existing under the laws of the State of New Jersey. Respondent's business mailing address is PACA Hosing Building, Suite A, 33 Newman Springs Road, Tinton Falls, New Jersey 07724. PACA license number 880547 was issued to Respondent on January 19, 1988. This license has been renewed annually. Since January 1992, Steve Goodman has been president, treasurer, and a holder of 75 per centum of the stock of Respondent and his wife, Jill Goodman, has been vice-president, secretary, and a holder of 25 per centum of the stock of Respondent. Prior to January 1992, Jill Goodman was the sole officer and shareholder of Respondent. (CX 1B.)

2. Mr. Goodman began Respondent in 1988 (Tr. 2154). As of February 1993, Respondent had \$36,000,000 in annual sales and employed six or seven produce buyers (Tr. 77). All of the buyers had joint account arrangements with Respondent by which they earn a percentage of the profits derived from their sales (Tr. 2080-81). Mr. Goodman is Respondent's only tomato buyer and seller (Tr. 77). Mr. Goodman earns 50 per centum of the profits derived from his sales (Tr. 2079). Tomato transactions constitute about 40 per centum of Respondent's business (Tr. 78).

3. Anthony Gentile, is an individual whose business mailing address is 119 Third Avenue, Hadley, New York 12835. Mr. Gentile is not licensed under the PACA,

but, at all times material to this proceeding, was operating subject to the PACA. (Answer of Respondent Anthony Gentile to Amended Complaint ¶ 5.)

4. Gloria and Tony Enterprises, d/b/a G&T Enterprises, is a corporation organized and existing under the laws of the State of New York. G&T's business mailing address is 119 Third Avenue, Hadley, New York 12835. PACA license number 890233 was issued to G&T on November 14, 1988. (Answer of Respondent Gloria and Tony Enterprises to Amended Complaint ¶ 4.) This license expired on November 11, 1990, when G&T advised that it had ceased operation subject to the PACA and failed to pay the required annual renewal fee (CX 1). Gloria Gentile, Mr. Gentile's wife, owns 100 per centum of G&T's stock (CX 1). At all times material to this proceeding, G&T was operating subject to the PACA under the direction, management, and control of Mr. Gentile (Tr. 2948). G&T was formed for tax purposes (Tr. 448, 2829, 2948, 3216).

5. Mr. Gentile became involved in the tomato business when he was a boy and developed great expertise in buying and selling tomatoes (Tr. 2160-61). Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P, a produce dealer located at the Hunts Point Market in Bronx, New York (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, and Mr. Gentile would share profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Joint account arrangements are very common in the New York produce industry (Tr. 446, 2894). During the period in

which Mr. Gentile was the head salesman for L&P, he was "on the walk," a term used at the Hunts Point Market, which means that he was a salesman who was present on the street (Tr. 2170). While Mr. Gentile was buying tomatoes for L&P, he was considered by many at the Hunts Point Market to be the person with the most knowledge and influence in that market regarding tomatoes (Tr. 2160-61).

6. During 1986, Mr. Gentile began to establish a relationship with Mr. Goodman, who was then working for another produce dealer (Tr. 2154-55). Mr. Gentile taught Mr. Goodman the tomato business (Tr. 2930). Mr. Goodman soon sold a large volume of tomatoes to L&P through Mr. Gentile (Tr. 2170-71).

7. Mr. Gentile left "the walk" late in 1990 or early in 1991 because he became ill (Tr. 2909). However, from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446). After Mr. Gentile left "the walk," he continued to be compensated on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

8. Dirtbag Trucking Corporation [hereinafter Dirtbag] was a corporation which was formed in 1989 when Mr. Goodman decided to enter the trucking business (Tr. 2089-90). In November 1989, Mr. Goodman and Mr. Gentile each were issued 75 shares of Dirtbag's stock (RX 2; Tr. 2102-03). In January 1991, Mr. Goodman and Mr. Gentile each loaned Dirtbag \$40,000 to enable Dirtbag to purchase two trucks (RX 4 and 5; Tr. 2121, 2780). In return for the loans, Messrs. Goodman and Gentile each

obtained a security interest in Dirtbag's assets. The security agreements required Dirtbag to repay the loans by August 18, 1994 (RX 4 and 5). However, Dirtbag never repaid the loans (Tr. 2130, 2499). Dirtbag never had its own office, but was operated from Respondent's office (Tr. 2047). Dirtbag always had a cash flow problem. Respondent advanced money to Dirtbag on a number of occasions (CX 55 at 1-3; Tr. 2049), often paying Dirtbag's creditors directly (Tr. 1585). Dirtbag was never a very profitable company (Tr. 1564, 2495-96). In fact, Mr. Goodman called Dirtbag "a loser" (Tr. 2149). Mr. Goodman became very disgusted with Dirtbag because it was not making money, and he sold Dirtbag's trucks (Tr. 2050). The last truck was sold in 1994 (Tr. 2498).

9. In approximately January 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX 2; Tr. 2827). On February 20, 1991, Mrs. Gentile entered into a written agreement to sell her 75 shares of Dirtbag stock to Mr. Goodman for \$80,000 (RX 3; Tr. 2926). The agreement provides that the stock would be placed in escrow with Respondent's attorney, Mr. Mandell, and that Mr. Goodman would pay \$25,000 per year to Mrs. Gentile in monthly installments for the next 2 years. After each \$25,000 payment, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The agreement also provides that the final payment of \$30,000 would be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final \$30,000, Mr. Gentile's \$40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. (RX 3.)

Mrs. Gentile was paid the \$80,000 by either Mr. Goodman or Respondent, and she authorized three releases of 25 shares of stock each on December 30, 1991, February 14, 1993, and February 2, 1994 (RX 3 at 3-3b; Tr. 2942-43).

10. Albert Lomoriello, Jr., d/b/a Hunts Point Produce Co., is an individual whose business mailing address is 219 Eden Road, Stamford, Connecticut 06907 (Letter from Albert Lomoriello to Ms. Favors, filed November 29, 1993; Tr. 1244-45).

Mr. Lomoriello is not licensed under the PACA, but, at all times material to this proceeding, was operating subject to the PACA.

11. In approximately December 1991, Mr. Lomoriello became employed by American Banana, a produce firm located at the Hunts Point Market (Tr. 1256). Demetrius Contos, American Banana's vice-president, wanted Mr. Lomoriello to expand American Banana's business (Tr. 313-16). Mr. Lomoriello was to receive 40 per centum of the profits on the produce that he purchased and to be liable for 40 per centum of the losses (Tr. 1245-46). Mr. Lomoriello purchased tomatoes from Respondent for American Banana (Tr. 1263).

12. In approximately January 1993, USDA received a telephone complaint about Respondent (Tr. 69, 81). The caller said that Mr. Goodman had been making payments to Mr. Gentile while Mr. Gentile was buying for L&P (Tr. 84). Ms. Joan Colson, an auditor for the PACA Branch, Fruit and Vegetable Division, Agricultural Marketing Service, and Mr. David Nielson, a PACA Branch employee under

Ms. Colson's supervision, were assigned to audit Respondent for Complainant (Tr. 69-70). On February 25, 1993, Ms. Colson and Mr. Nielson met with Mr. Goodman, who provided Respondent's records (Tr. 78).

13. Respondent maintains a file jacket for each produce transaction. The file number on the jacket includes a two-letter prefix which corresponds to the buyer's initials. All documents related to the transaction are filed in the jacket and information regarding the transaction is recorded on the front and back portions of the file jacket. (Tr. 80.)

14. Ms. Colson and Mr. Nielson examined Respondent's file jackets relating to Respondent's sales to L&P and found 81 file jackets that raised questions about improper payments (CX 8-CX 42; Tr. 109). All 81 of these file jackets concern sales of tomatoes to L&P by Mr. Goodman and the numbers on each of these file jackets are prefixed "SG" for "Steve Goodman" (Tr. 80). Each file jacket has handwritten notations on its front and back covers and contains documents pertinent to the transactions to which the file jacket relates (Tr. 80, 131-32). These file jackets also contain a total of 35 checks or check skirts showing payments from Respondent to "A. Gentile" (Tr. 111-13). The reverse side of the checks are endorsed "A. Gentile, payable to JSG Trading" (Tr. 122). These endorsements were actually written by Marsha Levine, Respondent's bookkeeper (Tr. 1705).

15. The top portion of the back cover of each of the 81 file jackets show revenues from the produce transactions to which the file jacket relates and the bottom portion of the back cover of each of the 81 file jackets show expenses related to the produce transactions to which the file jacket relates. The expenses sections list checks issued to "A. Gentile." The notations regarding these checks correspond to actual checks payable to "A. Gentile" or the check skirts applicable to checks payable to "A. Gentile" which were found in the file jackets. (Tr. 127-30.)

16. At first, Mr. Goodman told Ms. Colson and Mr. Nielson that "A. Gentile" was a fictitious name and that he (Mr. Goodman) would give receipts to Ms. Levine for various functions, such as having his car washed, and she would expense them to the files using the name, or notation, "A. Gentile" (Tr. 129, 1038-39). Mr. Goodman later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039). Mr. Goodman stated that Respondent utilized "A. Gentile," a person's name, on the checks to enable Ms. Levine to endorse and redeposit the checks (Tr. 1039).

17. Mr. Goodman told Ms. Colson that the use of checks to "A. Gentile," which were redeposited into Respondent's account, was his method of keeping track of, or making up, losses that he incurred from sales to L&P. Mr. Goodman also told Ms. Colson that if a file contained checks to Mr. Gentile that were not redeposited into

Respondent's account, that money was for services that Mr. Gentile had provided to him. (Tr. 242.)

18. Some of the file jackets reflecting Respondent's sales to L&P contain a slip of paper on which the check to "A. Gentile" is noted (e.g., CX 13B at 8; Tr. 137).

Ms. Levine told Ms. Colson and Mr. Nielson that she wrote this information to indicate Respondent's expense for the file jacket (Tr. 137).

19. Ms. Colson prepared a table reflecting the numbers of Respondent's files that she randomly selected, the numbers of the checks issued by Respondent that they contain, and the total amounts that each file shows as payments to "A. Gentile" (CX 7; Tr. 110).

20. When asked by Ms. Colson about notations written in the corners of the backs of file jackets, such as "Tony \$2.00" (CX 13B at 1; Tr. 132-33), Mr. Goodman stated that he makes many notes on his file jackets (Tr. 132-33). With respect to each of these files, the number of boxes of tomatoes in the load multiplied by the amount noted on the back of the file jacket associated with the name "Tony" equals the amount of money shown on the file jacket as an expense relating to "A. Gentile" (Tr. 145-46).

21. Respondent maintains a Closed File Journal (CX 53). Each week, after one of Respondent's files was closed, Ms. Levine would summarize that file's information in the journal (Tr. 226). The "Open SC" column refers to "open split commissions" (Tr. 226). Mr. Goodman stated that the "Open SC" column reflects what he paid to someone

who provided a service to him (Tr. 227). All of the references to payments to "A. Gentile" in Respondent's file jackets are noted in Respondent's Closed File Journal under the "Open SC" column corresponding to the date that the transaction occurred (Tr. 228). The relationships between payments to "A. Gentile" recorded in the file jackets and the listings in the "Open SC" column in Respondent's Closed File Journal are set forth in a table prepared by Ms. Colson (CX 52; Tr. 228-35).

22. Respondent also maintains a General Ledger Chart of Accounts (CX 6; Tr. 106-07). This computer-generated record lists accounts contained in Respondent's general ledger, the number assigned to each account, and a description of the account (Tr. 107). Account number 108 is "LOANS & EXCHANGES" (CX 6). This account records loans made by Respondent (Tr. 2053-54).

23. Respondent also maintains a General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146). This computer-generated document describes how Respondent's financial transactions are maintained in Respondent's general ledger (Tr. 1765). Respondent's General Ledger Journal Entry Edit Report reflects that Ms. Levine recorded 16 of the 35 checks made payable to "A. Gentile" in Respondent's loans and exchanges account as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3).

24. Ms. Colson obtained a spreadsheet from Ms. Levine or from Respondent's accountant, Mr. Daily, which details the 1992 transactions in Respondent's loans and exchanges account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns, reflecting various individuals or firms to whom Respondent had loaned money (Tr. 2054-56). The eight "A. Gentile" checks issued in 1992 which are described in the General Ledger Journal Entry Edit Report as "L/E Tony" and a \$38,475.30 boat payment to Midlantic Bank, are noted in the column headed "L&P," and reflect a reduction of Mr. Gentile's debt payable to Respondent (CX 55 at 1-3; Tr. 161, 215-16).

25. Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about Respondent's loans and exchanges account and the spreadsheet that reflected that account (CX 55 at 1-3). Ms. Colson took notes during that conversation (CX 76). Mr. Daily told Ms. Colson that "L/E" in Respondent's records refers to Respondent's loans and exchanges account and "Tony" refers to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily stated that Mr. Gentile had a loan with Respondent (CX 76; Tr. 158) and that Mr. Daily included the amounts of the checks for "L/E Tony" in the spreadsheet under the column headed "L&P" (CX 76; Tr. 160, 1617-21). On April 1, 1993, Ms. Colson requested Mr. Daily to provide an audit trail for the spreadsheet (CX 77; Tr. 159). Mr. Daily enclosed this information in a May 13, 1993, letter (CX 75). The audit trail restates the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

26. Respondent maintains an Accounts Receivable Aged Analysis Report, a computer-generated report showing the status of Respondent's accounts receivable for its customers on a monthly basis (CX 51; Tr. 252). The report indicates that when L&P was rebilled for a product (such as on CX 25B at 1, where L&P was rebilled from \$5,001.35 to \$3,251.75), the rebilled price would be noted in the Accounts Receivable Aged Analysis Report for L&P, and a credit memo would be issued canceling L&P's accounts receivable for the original price (CX 51 at 117; Tr. 254). None of the 16 "A. Gentile" checks found by Ms. Colson that are referenced in the General Ledger Journal Entry Edit Report as "L/E Tony" are listed in Respondent's Accounts Receivable Aged Analysis Report (Tr. 258). All of the remaining 19 "A. Gentile" checks found by Ms. Colson (such as on CX 25B at 1 for \$129.60), are listed in the Accounts Receivable Aged Analysis Report for L&P, with the amount of the check noted as a "customer charge" and the check itself noted as "payment received" (Tr. 256-57).

27. Respondent's General Ledger Journal Entry Edit Reports for 1992 and 1993 show that Respondent issued checks as payments to Mr. Gentile (Tr. 171-93). These checks are described in the General Ledger Journal Entry Edit Reports as follows: check number 3941 for \$467.59 as "Steve's Loan, Tony's Boat" (CX 54 at 1-2); check number 1847 for \$38,475.30 as "L/E Tony" (CX 54 at 3-5); check number 3899 for \$806.51 as "Steve's Loan Tony's Car" (CX 54 at 6-9); check number 3975 for \$806.51 as "Steve's Loan Tony's Car" (CX 54 at 10-14); check number 4051 for \$800 as "L/E Dirtbag for

Tony's Car" (CX 54 at 14-17); and check number 2151 for \$3,317 as "Steve's Loan Tony's Watch" (CX 54 at 18). Respondent's General Ledger Journal Entry Edit Reports also show Respondent's payment of \$6,400 as "L/E Tony" (CX 54 at 19).

28. Respondent's records show that Respondent's check number 1847, dated June 5, 1992, was issued to Midlantic National Bank for \$38,475.30 (CX 54 at 3; Tr. 182). Midlantic National Bank's records reveal that this check was in payment for a boat loan owed by Mr. Goodman (CX 73; Tr. 186). The boat was a Trojan model that Mr. Goodman had purchased in 1987 for approximately \$45,000 to \$50,000 (Tr. 2791). Beginning in November or December 1990, Mr. Goodman allowed Mr. Gentile to use the boat with the understanding that Mr. Gentile would pay for the boat's maintenance (Tr. 2791). In August 1992, Mr. Goodman sold the boat, then titled to Mr. Goodman's wife, Jill, to Mr. Gentile for \$10,000 (CX 57). The boat needed work but was described by Mrs. Gentile as "nicely laid out" (Tr. 2930). Mr. Gentile told Louis Beni, secretary-treasurer of L&P, that he was getting a very good price for the boat (Tr. 2888).

29. Respondent's records contain check numbers 3899 and 3975 issued to Mercedes-Benz Credit Corporation and check number 4051 issued to Dirtbag for "L/E Dirtbag for Tony's Car" (CX 54 at 6, 10, 14-15; Tr. 198). Documents obtained from Mercedes-Benz Credit Corporation show that a new 1990 Mercedes 300 SEL was leased to Mr. Gentile on May 11, 1990, for 48 months, with monthly payments of \$798.99, for a total of \$38,351.52 (CX 56 at 3-5; Tr. 198-99). Although a corporate resolution was

prepared by Dirtbag and signed by Mr. Goodman and Mr. Gentile, which authorized Mr. Gentile to lease the car on behalf of Dirtbag (CX 56 at 2), the documents reflecting the lease do not mention Dirtbag. When Mr. Goodman presented the leased Mercedes to Mr. Gentile, Mr. Goodman placed a large red ribbon on it (Tr. 2828, 2838-39). Mr. Beni knew that Mr. Gentile obtained the Mercedes through Dirtbag (Tr. 2883, 2901).

30. Respondent's check number 2151, dated July 28, 1992, for \$3,317, was issued to a jewelry store in payment for a Rolex watch which Mr. Goodman gave to Mr. Gentile. Mr. Goodman testified that the watch was a gift. (RX 40; Tr. 2478-80.) Mr. Beni knew about Mr. Goodman's gift of the watch to Mr. Gentile (Tr. 2835-36).

31. Respondent's payroll records for 1992 show that Mrs. Gentile received wages (CX 50 at 1-2; Tr. 265-66). Two of the check stubs for these payments to Mrs. Gentile contain the letters "comm" which refers to "commission" (CX 50 at 3-12; Tr. 268).

32. After Ms. Colson left Respondent's premises and returned to Washington, DC, she found that several of Respondent's file jackets relating to sales to L&P contain statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). Two of the file jackets containing statements from G&T also contain adding machine tapes (CX 44B at 20, CX 46 at 5) which reflect amounts that correspond to the total of the packages noted in the G&T statements multiplied by 5 cents per package (Tr. 272-83). File jacket number SG 4222 in which a G&T statement was

found shows a payment to "A. Gentile" which corresponds to the total on the adding machine tape (CX 44B at 1-2; Tr. 281). The "A. Gentile" notation also corresponds to the amount of the check payable to Mrs. Gentile found in the file and the amount noted in Respondent's payroll records as wages paid to Mrs. Gentile (CX 44A at 1, CX 50 at 1; Tr. 281-82). Many of Respondent's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jacket numbers containing the notations "Tony 5¢" are the same numbers as those in G&T's statements (Tr. 283). The checks to Mrs. Gentile and their relationships to the files noted in G&T's statements are listed in a table prepared by Ms. Colson (CX 43).

33. Respondent's records also contain 22 file jackets concerning Respondent's sales of tomatoes to American Banana which have notations on the backs of the file jackets similar to those reflecting sales to L&P (CX 63A-CX 69A; Tr. 549-51). The notations indicate that payments per box were made to "Al" as well as to "HPT" or "Hunts Point Produce" in an amount equal to the amount of the notation multiplied by the number of boxes sold to American Banana. The file jackets contain seven of Respondent's checks totaling \$9,733.45 made payable to Hunts Point Produce Co. (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4; Tr. 550, 553-54).

34. These 22 file jackets also contain several invoices from Hunts Point Produce Co. to Respondent in amounts that correspond to the amounts of the checks

issued to Hunts Point Produce Co. The Hunts Point Produce Co. invoices contain Respondent's file numbers which correspond to the file numbers that were written on checks payable to Hunts Point Produce Co. or check skirts applicable to checks payable to Hunts Point Produce Co. that were found in the file jackets (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5; Tr. 554-59). Ms. Colson prepared a table that summarizes this information (CX 62).

35. Ms. Colson recognized that the address of Hunts Point Produce Co. was also Mr. Lomoriello's address (Tr. 559-60). In answer to Ms. Colson's question as to why Mr. Lomoriello was receiving money from Respondent, Mr. Goodman replied that Mr. Lomoriello gave inside information to Mr. Goodman and performed various tasks for him at the Hunts Point Market (Tr. 559-60).

36. Respondent's Closed File Journal, under the "Open SC" column, reflects the amounts of the checks written by Respondent to Hunts Point Produce Co. (CX 53; Tr. 604-05). Ms. Colson prepared a table showing the references in Respondent's Closed File Journal for the payments to Hunts Point Produce Co. (CX 71; Tr. 629-30).

37. Ms. Colson and another PACA official interviewed Mr. Contos, American Banana's vice-president. Mr. Contos stated that Mr. Lomoriello was compensated by

receiving 40 per centum of the profits on his transactions (Tr. 607). Mr. Contos stated that if Mr. Lomoriello was receiving payments from Respondent for produce sold to American Banana, he (Mr. Contos) expected Mr. Lomoriello to repay American Banana 60 per centum of the money that he had received from Respondent (Tr. 607).

38. Ms. Colson and her associate, Mr. Summers, also interviewed Patrick Prisco, L&P's president (Tr. 637). Mr. Prisco was unaware that Respondent's payments to Mr. Gentile were being recorded in Respondent's files associated with Respondent's sales to L&P (Tr. 458-64).

### **Discussion of the Evidence**

#### **I. Respondent's Payments to Mr. Gentile.**

Complainant has provided extensive evidence that in 1992 and early 1993, Respondent made a series of payments and transferred items of value to Mr. Gentile either directly, or through his wife, Gloria Gentile, or through G&T, a corporation owned by Mrs. Gentile and established only for tax purposes (Tr. 448, 2829, 2948, 3216). At the time that these payments were made, Mr. Gentile was buying tomatoes from Respondent for L&P (Tr. 2170-71).

Respondent's payments to and transfer of items of value to Mr. Gentile included:

(1) the use of a boat and eventual purchase of that boat at a price substantially below its value; (2) a gift of a Mercedes automobile; (3) a gift of a Rolex watch; (4) payments to

Ms. Levine, Mr. Goodman ordered Respondent's employees to write "Tony 5¢" on every L&P file jacket to pay Mrs. Gentile for Mr. Goodman's purchase of her stock in Dirtbag (Tr. 1715).

However, Respondent's claim that the checks to Mrs. Gentile were for her Dirtbag stock is inconsistent with the fact that the checks are listed in Respondent's payroll records as wages and the fact that two of the check stubs indicate that the checks issued to pay Mrs. Gentile were for commissions. At the hearing, Ms. Levine stated that noting the checks to Mrs. Gentile on Respondent's payroll records was an error (Tr. 1941).

However, this explanation was never given to Ms. Colson. This alleged error also came as a complete surprise to Mr. Daily, who testified that he had sent 1099 tax forms to Mrs. Gentile in 1991 and 1992, based upon his assumption that she was a salaried employee of Respondent (Tr. 1541-42, 1595). In mid-1993, after Mr. Daily submitted Respondent's tax return for 1992, he was told by Ms. Levine that Mrs. Gentile was not an employee (Tr. 1561-62). Ms. Levine testified that when Mr. Daily heard this, he "went through the roof" because the 1099 tax forms had been improperly issued (Tr. 1940). Mr. Daily then was requested to file an amended personal tax return for Mr. Goodman, which he did just before the hearing (Tr. 1601-02).

Ms. Levine's contention that she erred in noting Mrs. Gentile's "wages" in Respondent's payroll records is further contradicted by her testimony that, as of late 1992, before she allegedly learned of her error in treating the payments to Mrs. Gentile as

Mr. Gentile through Mrs. Gentile; and (5) 35 checks issued to Mr. Gentile. Each of these payments and items had a value that was more than *de minimis*.

**A. The Boat, The Mercedes, and The Rolex Watch.**

Complainant did not introduce sufficient evidence to prove that: (1) Respondent's allowing Mr. Gentile to use a boat or sale of the boat at a price below its value was designed to induce Mr. Gentile to purchase tomatoes from Respondent; (2) Respondent's gift of a Mercedes to Mr. Gentile was designed to induce Mr. Gentile to purchase tomatoes from Respondent; or (3) Respondent's gift of a Rolex watch to Mr. Gentile was designed to induce Mr. Gentile to purchase tomatoes from Respondent. Further, I find that Mr. Beni, a principal of L&P, knew of the sale of the boat at a price below its value, knew of the gift of the Mercedes, and knew of the gift of the Rolex watch. Thus, I do not find that Respondent's allowing Mr. Gentile use of the boat, Respondent's sale of the boat to Mr. Gentile for a price below its value, Respondent's gift of the Mercedes, or Respondent's gift of the Rolex watch constitute violations of section 2(4) of the PACA.

**B. Respondent's Payments to Mrs. Gentile.**

Respondent's payroll records for 1992 indicate that Mrs. Gentile received wages from Respondent (CX 50 at 1-2; Tr. 265-66). Two of the check stubs relating to checks issued to Mrs. Gentile indicate that the checks were written for "comm" which Ms. Levine stated refers to "commission" (CX 50 at 3-12; Tr. 268). Ms. Levine

explained that Mrs. Gentile was paid for providing services to Respondent as an informant (Tr. 270-71).

The amounts of the checks to Mrs. Gentile relate to deductions of 5 cents for each box of tomatoes sold by Respondent to L&P. In several of Respondent's file jackets relating to sales to L&P, Ms. Colson found what appeared to be statements from G&T (CX 44A at 4, CX 45A at 4, CX 46 at 4, CX 47A at 4, CX 48A at 4, CX 49A at 3; Tr. 271). In two of the file jackets that contain G&T statements, Ms. Colson found adding machine tapes (CX 44B at 20, CX 46 at 5) that seemed to add packages, corresponding to the number of packages noted in the G&T statements, and multiply the total number of packages by 5 cents per package (Tr. 272-83). Ms. Colson also noticed that file jacket number SG 4222 in which a G&T statement was found shows a payment to "A. Gentile" which corresponds to the amount on the adding machine tape (CX 44B at 1-2; Tr. 281). The amounts of the "A. Gentile" payments shown on the file jackets also correspond to the amounts of checks to Mrs. Gentile noted in Respondent's payroll records (Tr. 281-82). Ms. Colson further noticed that many of Respondent's file jackets, reflecting sales to L&P, contain a notation "Tony 5¢" (Tr. 282). The file jackets containing the notations "Tony 5¢" have the same numbers as those on the statements of G&T (CX 44B at 1-2; Tr. 283).

After Ms. Colson presented this evidence at the hearing, Ms. Levine provided a completely different explanation for the checks payable to Mrs. Gentile. According to

wages, Ms. Levine was aware that Mr. Lomoriello could not be entered in Respondent's books as a wage earning employee, or else Respondent would be required to send a 1099 tax form to Mr. Lomoriello (Tr. 1965).

The record does contain evidence that 75 shares of Dirtbag stock were transferred by Mrs. Gentile to Mr. Goodman. In early 1991, Mr. Gentile transferred his 75 shares of stock in Dirtbag to Mrs. Gentile (RX 2 at 7-9a; Tr. 2827), and on February 20, 1991, Mrs. Gentile agreed in writing to sell the 75 shares to Mr. Goodman for \$80,000 (RX 3 at 1; Tr. 2926). The agreement (RX 3 at 1) provided that the stock would be placed in escrow with Respondent's attorney and that Mr. Goodman would pay \$25,000 per year to Mrs. Gentile in monthly installments for the next 2 years. After the payment of each \$25,000, 25 shares of Mrs. Gentile's Dirtbag stock would be released from escrow to Mr. Goodman. The final payment of \$30,000 was to be made by January 31, 1994, at which time the remaining 25 shares of Dirtbag stock would be released from escrow. Upon payment of the final \$30,000, Mr. Gentile's \$40,000 loan to Dirtbag would be released or assigned to Mr. Goodman. Mrs. Gentile authorized three releases of 25 shares of stock each on December 30, 1991, February 14, 1993, and February 2, 1994 (RX 3 at 3-3b; Tr. 2942-43).

As the United States Court of Appeals for the District of Columbia Circuit states in *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, 176 F.3d at 540, neither Complainant nor Respondent offered a valuation expert regarding the value of Dirtbag.

However, there was considerable testimony from Mr. Daily, Ms. Levine, and Mr. Goodman attesting to Dirtbag's constant financial problems (Tr. 1564, 1984-85, 2049, 2148-49, 2495-96). Mr. Gentile had only loaned Dirtbag \$40,000 and had invested approximately \$7,000 in a new truck (Tr. 2782-83). Respondent's payments, therefore, would have included a profit of approximately \$33,000.

Mr. Goodman acknowledged that, if Respondent sold more tomatoes to L&P during the period that the 5 cents per box deductions were to be made, Mrs. Gentile would receive the \$80,000 more quickly (Tr. 2495). Mr. Gentile, thus, had an incentive to purchase as many of Respondent's tomatoes as possible.

I find that Complainant introduced substantial evidence to show that Respondent's payment to Mrs. Gentile, by deducting 5 cents for each box of tomatoes that Mr. Gentile purchased on behalf of L&P, was intended to induce Mr. Gentile to buy tomatoes from Respondent. Respondent's evidence that these payments were for Mrs. Gentile's services or for Dirtbag stock is not credible and does not rebut the evidence that Respondent's payments were intended to induce Mr. Gentile to purchase tomatoes from Respondent.

**C. Respondent's Payment to G&T.**

On January 30, 1992, Respondent issued a check made payable to G&T in the amount of \$5,600 (RX 34). Ms. Levine contended this check was in payment for services rendered by Mrs. Gentile to Respondent and Mr. Goodman, although Ms. Levine never knew what kind of services these were (Tr. 2042-43). Mrs. Gentile said the \$5,600 was

for checking out tomato fields in Florida, where she and Mr. Gentile had their winter home (Tr. 2911). However, Mrs. Gentile admitted that she and Mr. Goodman never had any written agreement as to exactly what she would do and how much she would be paid (Tr. 2932-34). No documentation was ever provided to justify the \$5,600 payment.

I find that Complainant introduced substantial evidence to show that Respondent's payment of \$5,600 to Mrs. Gentile was intended to induce Mr. Gentile to buy tomatoes from Respondent. Respondent's evidence that the \$5,600 payment was for Mrs. Gentile's services is not credible and does not rebut the evidence that Respondent's payment was intended to induce Mr. Gentile to purchase tomatoes from Respondent.

**D. The 35 Checks to "A. Gentile."**

Respondent's payments to Mr. Gentile also include 35 checks, totaling \$62,535.60 (CX 7), which Respondent issued to "A. Gentile." Respondent refers to these checks as "circular checks" because they were redeposited to Respondent's bank account. However, Respondent's records show that the 35 checks were treated as if Mr. Goodman was sharing his profit with Mr. Gentile. Further, 16 of the checks were shown in Respondent's records as reducing the debt that Mr. Gentile owed to Respondent.

The 35 checks to "A. Gentile" were found in file jackets that Ms. Colson examined (CX 8-CX 42; Tr. 109-13). All of the file jackets concern sales of tomatoes by Respondent to L&P. Mr. Goodman represented Respondent in all of the transactions since all of the file numbers contain the prefix "SG" (Tr. 80). Each file jacket contains

handwritten notations and supporting documents (CX 8-CX 42; Tr. 132). The reverse sides of the 35 checks contain the endorsement "A. Gentile, payable to JSG Trading," which Ms. Levine wrote (Tr. 122, 1705). Some of the file jackets also contain a slip of paper on which the payment to "A. Gentile" is noted (CX 13B at 8; Tr. 137). Ms. Levine told Ms. Colson that she recorded this information to indicate Respondent's expenses for the file jacket (Tr. 137).

The top portion of the back cover of each of the 81 file jackets show revenues from the produce transactions to which the file jacket relates and the bottom portion of the back cover of each of the 81 file jackets show expenses related to the produce transactions to which the file jacket relates (Tr. 127). The revenues sections show the amounts that Respondent's customer was billed for the produce and how much the customer paid (Tr. 127-28). The expenses sections show from whom Respondent purchased the produce, the date of purchase, the seller's invoice number, the date that Respondent made payment, Respondent's check number, and the amount of the check. The expenses sections also show incidental expenses, such as freight. The expenses sections for the files in question show payments to "A. Gentile" in the same amounts as the checks to "A. Gentile" found by Ms. Colson (Tr. 128-30).

When Ms. Colson asked Mr. Goodman what "A. Gentile" listed on the file jackets meant, Mr. Goodman was evasive. At first, he stated that he would give Ms. Levine receipts for various functions, such as having his car washed, and she would expense

them to the files and that "A. Gentile" was a fictitious name (Tr. 129, 1038-39). He later admitted that "A. Gentile" was the name of a person, but insisted that "L&P" or any name, even that of Ms. Colson, could be substituted for "A. Gentile" (Tr. 1039):

Mr. Goodman told Ms. Colson that the checks payable to "A. Gentile," which were deposited into Respondent's account, were his way of keeping track of, and making up, losses that he incurred from sales to L&P and that if checks payable to Mr. Gentile were not deposited into Respondent's account, they were for services that Mr. Gentile had provided to him (Tr. 242).

Ms. Colson asked Mr. Goodman about notations written in the corners on the back of the 35 file jackets (CX 13B at 1; Tr. 132-33). Mr. Goodman again was evasive, stating that he made many notes on his file jackets (Tr. 132-33). The number of boxes of tomatoes in the load, multiplied by the amount noted on the back of the file jacket, associated with the name "Tony" equals the amount on the file jacket shown as an expense to "A. Gentile" (Tr. 145-46).

**1. The 35 Checks Were Treated as a Profit Split Between Mr. Goodman and Mr. Gentile and 16 of the Checks Were Treated as a Reduction of the Debt Which Mr. Gentile Owed to Respondent.**

Respondent's records show that the 35 "A. Gentile" checks obtained by Ms. Colson were treated as a profit split between Mr. Goodman and Mr. Gentile. Further, 16 of the 35 checks were shown in Respondent's records as reducing the debt owed by Mr. Gentile to Respondent.

Respondent's Closed File Journal contains a column entitled "Open SC" which refers to "open split commissions." At the end of each week, Ms. Levine would reduce Mr. Goodman's profit by the amounts set forth in the "A. Gentile" checks (Tr. 1890-97). All 35 of the "A. Gentile" checks were noted in Respondent's Closed File Journal under the "Open SC" column corresponding to the dates of the transactions (Tr. 228-29). This evidence establishes that Respondent was treating these 35 checks to "A. Gentile" as a sharing of Mr. Goodman's profit.

Further, Ms. Colson found that 16 of the 35 checks were treated in Respondent's records as payments to reduce a debt that Mr. Gentile owed to Respondent. In Respondent's General Ledger Journal Entry Edit Report (CX 13A at 3; Tr. 146), a computer-generated document that reflects how Respondent's financial transactions are recorded in Respondent's general ledger (Tr. 1765), Ms. Colson found that the 16 checks were entered into one of Respondent's accounts described as "L/E Tony" (CX 13A at 3, CX 14A at 3, CX 17A at 3, CX 28A at 3, CX 29A at 3, CX 30A at 3, CX 31A at 3, CX 32A at 3, CX 33A at 3, CX 34A at 3, CX 35A at 3, CX 36A at 3, CX 37A at 3, CX 38A at 3, CX 39A at 3, and CX 42A at 3). The number of the account under which the 16 checks were entered is "108," which is identified in Respondent's General Ledger Chart of Accounts as loans and exchanges (CX 6).

During Ms. Colson's investigation, she obtained a spreadsheet from Ms. Levine or from Mr. Daily detailing the 1992 transactions in Respondent's loans and exchanges

account (CX 55 at 1-3; Tr. 158, 1605). The spreadsheet contains 13 columns reflecting various individuals or firms to whom Respondent had loaned money (Tr. 2054-56). One of these columns is entitled "L&P" (Tr. 160-01, 1617-21). Ms. Colson found that the eight checks issued in 1992 to "A. Gentile" described in the General Ledger Journal Entry Edit Report as "L/E Tony" and the \$38,475.30 boat payment to Midlantic Bank, are noted in the 1992 spreadsheet as a reduction of Mr. Gentile's debt payable to Respondent (CX 55 at 1-3; Tr. 161, 215-16).

Ms. Colson telephoned Mr. Daily on March 11, 1993, with questions about Respondent's loans and exchanges account and the spreadsheet that reflects the account (CX 55 at 1-3). Ms. Colson took notes during this conversation (CX 76). Mr. Daily stated that with respect to "L/E Tony," "L/E" referred to Respondent's loans and exchanges account and "Tony" referred to Mr. Gentile (CX 76; Tr. 149-50). Mr. Daily told Ms. Colson that Mr. Gentile had a loan payable to Respondent (CX 76; Tr. 158). The references to "L/E Tony" contained in Respondent's general ledger were set forth in the column in the spreadsheet under the heading "L&P" (CX 76). Mr. Daily also provided an audit trail which supported the information contained in the spreadsheet (CX 55 at 4-6; Tr. 166).

At the hearing, Mr. Daily claimed that when Ms. Colson asked him what "L/E Tony" meant, he told her "these entries look like there's a loan to Tony, but that I would have to look into it" (Tr. 1520). However, Ms. Colson's notes of their March 11, 1993,

telephone conversation indicate that Mr. Daily unambiguously stated that the "L/E" reference designated a loan to Mr. Gentile. The notes read: "Q. If the check stub denotes 'L/E Tony' then this would be a loan to Mr. Gentile and show up under L&P on the L/E schedule. - That's correct." (CX 76.)

Mr. Daily also testified at the hearing that, after Ms. Colson's investigation, he spoke with Ms. Levine about the "L/E Tony" references and he decided to remove them from the "L&P" column in the spreadsheet (Tr. 1532, 1656-57). However, Mr. Daily never informed Complainant that the information contained in the spreadsheet or in the audit trail would be changed to remove the "L/E Tony" references from the "L&P" column (Tr. 634-35, 1657), nor did Respondent ever make available or submit into evidence a revised version of the spreadsheet reflecting these alleged changes (Tr. 1660). I, therefore, conclude that Mr. Daily treated the "L/E Tony" references as reductions of debts that Mr. Gentile owed to Respondent.

It is clear that 16 of the 35 "A. Gentile" checks were treated by Respondent as reductions of Mr. Gentile's debt payable to Respondent. The other 19 checks also constitute a sharing of Mr. Goodman's profits on the sales of tomatoes to L&P. I find that Complainant introduced substantial evidence to establish that Respondent issued each of these checks to induce Mr. Gentile to purchase tomatoes from Respondent.

**2. Respondent's Contention that the Checks Payable to "A. Gentile" Were Issued to Adjust L&P's "Clips" is Not Credible.**

Respondent contends that the checks were not issued to induce Mr. Gentile to purchase tomatoes from Respondent. Specifically, Respondent contends that the checks payable to "A. Gentile" relate to an arrangement with L&P regarding "clips." Ms. Levine testified that the checks payable to "A. Gentile" were used by Respondent as part of a system to adjust L&P's files because of L&P's "clipping" of Respondent's invoices. A "clip" would result in L&P paying less than Respondent's invoice price. Ms. Levine testified as follows:

[BY MR. MANDELL:]

Q. Would you tell us what clips are in your understanding.

[BY MS. LEVINE:]

A. Okay.

Q. With regard to L&P.

A. Yes. As I understand it what was happening was he would -- they would make let's say or how can I explain it. They would take some money off -- they would underpay us on one invoice and then Mr. Goodman would add that onto a different file and we were keeping track like that. This is how we had set up the system. What we were doing we were taking a check and now this was one. This was a check that we were making up a clip.

So we cut the check but we re-deposited it. We kept the money. We just kept track. We had a journal that we kept track. We had a list that we were keeping track of clips of how much L&P owed us. Usually they owed us and that is why we were doing it like this.

Q. Miss Levine, why were you doing this with checks?

A. Well, because Mr. Goodman wanted to keep a record. This way if we ever had any problem we could always say well these are the checks that we had. On this particular file we made up \$320. This way we always had a check and we kept them and they came to us in our bank statement and we always were able to find them. We said we had this check, this check, this check, this check and this is how much they totaled up.

Tr. 1705-06.

Ms. Levine stated that when one of Respondent's customers had a problem with a load and "clips" an invoice and Respondent did not object to the "clip," Respondent would rebill the customer at a lower price (Tr. 249-50, 2063-64).

However, Ms. Levine's attempt to explain how the alleged "clip" system was maintained is not credible. She claimed that she maintained a journal to record L&P's clips balance, that a first journal had been thrown away, and that a second journal became wet when Respondent's basement was flooded early in 1995 (Tr. 1706, 1793-95). She testified that she tried to reconstruct the second journal by copying its figures into another journal because Mr. Mandell, Respondent's attorney, said the information was needed, but she was unable to reconstruct the second journal (Tr. 1772). However, Ms. Levine did not show the alleged second journal to Ms. Colson in February 1993, before it was allegedly damaged by the flood, even though she was served with a demand letter to provide relevant records (Tr. 1798). Further, Ms. Levine did not retain the remains of the journal allegedly damaged by the flood even though the Complaint in this matter had been

filed, and she had been told by Respondent's attorney that such a journal would be important evidence (Tr. 1772, 1803-08). Ms. Levine testified that, in attempting to reconstruct the damaged second journal, she began with the most recent clip balance allegedly still owed by L&P, \$10,092.65, and worked backward in time (RX 20 at 27; Tr. 1808-09). Ms. Levine stated that the most recent clip balance was provided to her on a piece of paper by Mr. Goodman; however, that piece of paper was never provided at the hearing (Tr. 1809-13). Without any tangible written evidence that Respondent maintained such a balance, either in a journal or other written record, the "clips" explanation simply is not believable.

The credibility of this alleged arrangement is further weakened by the inability of either Mr. Goodman or Ms. Levine to explain its operation with any clarity.

Mr. Goodman testified:

[BY MR. STANTON:]

Q. Well, this file, [CX] 13[B at 1], indicates a \$3200 circular check to A. Gentile under the expenses portion of the file[,] correct?

[BY MR. GOODMAN:]

A. Okay.

Q. It looks like from the file jacket, that this \$3200 which you say is equal to the amount of the make-up, correct; is that basically your understanding of how this worked?

A. Pretty close to it, yes.

Q. That this \$3200 is being taken away from your commissions?

A. Yes.

Q. Well, if that's the case, then how does this --

A. Wait a minute, excuse me. Marsha Levine needs to explain to you the pluses and adds to my commissions. I'm not going to testify to that because I get confused myself sometimes and she was up here and she explained it to you and she can do a much more accurate job of explaining it than I can.

Tr. 2804.

Mr. Goodman's lack of specific knowledge of how "clips" worked is inconsistent with his meticulous style of record keeping. He testified:

I knew there was some sort of list that she was keeping, but again I knew of no journals. A few times I saw like those yellow pieces of paper. I knew she was keeping some kind of record, and I knew because one time we spoke about it, and she said what happens when I come off of this page. I said to her when the page is done throw it away, because we are not looking to keep a balance from day one that we always had our files. If we ever wanted to go back to find out a figure, we could just take all of the files from whatever, add them up and there is the total add them up and subtract the pluses and minuses.

Tr. 2181.

Ms. Levine also was unable to explain how the system worked. When asked how an "A. Gentile" check that was redeposited into Respondent's account could have affected the balance owed between Respondent and L&P, she was unable to give an adequate explanation. Finally, Mr. Mandell objected on the ground that the questions seemed to "confuse the witness":

[BY MR. STANTON:]

Q. Let's see. How about GS4300. Was that just a make up?

[BY MS. LEVINE:]

A. Yes. That is just a make up.

Q. That is a make up for what 3120?

A. Yes, that is correct.

Q. Now and it is noted in your table [(RX 20)] at page 22 where you have minus 3120?

A. That is correct.

Q. That means that the amount of money that L&P owed JSG at that point was reduced by 3120?

A. That is correct.

Q. So JSG in this particular transaction gained an extra 3120 from L&P in some fashion?

A. Yes.

Q. Now --

A. It is not that we gained. We got back money that they had ---

Q. That had lost on other ---.

A. Right.

Q. Now if you look at this file jacket [(CX 14)], it indicates at the bottom an A. Gentile circular check for 3120 [(CX 14B at 1)].

A. Yes.

Q. And that is under expenses for that particular file.

A. That is correct.

Q. So it looks like it increased the expenses of JSG on that file.

A. Yes.

Q. Now this is what the problem is for me. If this is supposed to be a make up which results in more money coming to JSG from L&P on this particular file, why does it look like on this file that less money the 31[2]0 less money is coming to JSG on this file?

A. Well what I would do is that check somewhere got redeposited probably on another file somewhere on that file we made more money than we were supposed to.

Q. On the other file?

A. Wherever file I wrote, there is no way for me to tell what file I deposited that check on.

Q. The circular check?

A. Yes. I had to redeposit it somewhere.

Q. Okay. So that would balance out the circular check.

A. That would increase -- yes.

Q. The circular check didn't really mean anything anyway because it resulted in no gain or loss.

A. That is right.

Q. So by balancing out the circular check, you might decrease the amount of expenses to JSG overall by 3120 by adding the amount of the circular check somewhere on another file jacket; right?

A. When I deposited it, it increased our sales I guess you would say.

Q. The revenues or sales right.

A. Yes.

Q. By 3120 so that would balance out this 3120 negative amount on this file [(CX 14)].

A. That is correct.

Q. But that still wouldn't result in any kind of overall increase to JSG making up for previous loans by L&P would it?

A. We were just getting back the money we were supposed to get.

Q. But if this is a make up, you are supposed to be getting extra money to decrease the loan balance of L&P; isn't that right?

MR. MANDELL: I am going to object because the question seems to confuse the witness.

Tr. 3129-32.

The credibility of this arrangement is also seriously compromised by Mr. Goodman's admitted alteration of documents in anticipation of the hearing. When the hearing reconvened on March 19, 1996, Respondent introduced into evidence copies of hundreds of Respondent's file jackets to assist Ms. Levine in explaining how L&P's alleged clip balance was maintained (RX 53). Included among these file jackets were many in which certain amounts were shown as being deducted from L&P's clip balance

by means of the notation "clip." Ms. Levine testified how these file jackets reflected the ongoing nature of Respondent's arrangement with L&P.

However, upon cross-examination of Ms. Levine, it became clear that the word "clip," on at least 12 of these file jackets (SG 4131, 4152, 4211, 4242, 4273, 4314, 4399, 4718, 4876, 5115, 5128, and 5145), had been added after Ms. Colson's investigation. Mr. Goodman later admitted that he personally wrote the word "clip" on the file jackets during the hearing process:

BY MR. MANDELL:

Q. First of all Mr. Goodman, you were of course present during Miss Levine's testimony and you were reviewing documents with me from RX-53 and some of Complainant's exhibits which show the word clip that appear in some documents and not in others. Can you tell us anything about that?

[BY MR. GOODMAN:]

A. Yes. I wrote the word clip.

Q. When did you do it and why did you do it. I realize it is a compound question.

A. Okay. It was done I believe sometime during the hearing process when we knew we needed this compilation made up and I told Marsha to gather up all of the files or no I take that back. It goes back before the hearing and I gathered up all of the filings, I had seen all of the files and I ---

JUDGE BERNSTEIN: In preparing for the hearing?

THE WITNESS: In preparing for the hearing.

JUDGE BERNSTEIN: Okay.

THE WITNESS: And there were just -- I was shuffling these same files into so many different categories that it was just getting lost, confused and ridiculous. So I took the files that were clipped files, I wrote on the files not changing anything the word clip. So this way as I shuffled them around, I could always keep them in piles. I tried to get files that were shared loads that involved clips. So I had files that belonged in two different places. So by writing that, I could always keep track of what was what.

BY MR. MANDELL:

Q. Now Mr. Goodman, did you write anything else on the files?

A. No.

Tr. 3168-70.

Mr. Goodman thus admitted that he altered documents prior to the hearing which his counsel intended to move into evidence. Furthermore, Mr. Goodman did not admit to these alterations until the matter was raised during Ms. Levine's cross-examination. These admitted alterations not only undercut Respondent's contentions with respect to the alleged "clip" arrangements with L&P, but they also detract from Respondent's credibility in general.

I also found unbelievable Mr. Goodman's testimony as to why 5 cents per box was utilized as a "clip." Mr. Goodman answered his lawyer's questions about that as follows:

[BY MR. MANDELL:]

Q. All right. I understand about the length of time but who arrived at the five cents per box out of your commission. Why not 10. Why not 20. Why not some other figure, do you remember?

[BY MR. GOODMAN:]

A. No, I don't as a matter of fact.

Q. Huh?

A. I don't remember. I don't know how that came about.

Q. Pardon.

A. Well first off I know that I wouldn't have wanted to make it too high because I wouldn't want it to have affected my bonus all that much but the difference between a nickel and a dime really doesn't matter. I just think it just came about. It was simple and easy.

Q. Didn't have anything to do with the prior situation where you were trying to make up Tony's clips did it?

A. You know it was easy to -- the one nice thing about the nickel for the clips was like I told you whenever we tried to make a half we got wacked back. So a nickel always sailed through pretty easily. Maybe that had something to do with it. It just made sense. It was just something we were [sic] used and we just kept on going with it.

Tr. 2591-92.

Mr. Goodman's explanation as to why L&P's officials had no written record of the "clips" also defies credibility. He stated:

... Neither Pat Prisco nor Tony Gentile on a file by file basis ever sat there and went over it file by file as far as where we added or subtracted -- well, they always knew their deductions, but they didn't keep track of how I got my money back because he knew I was keeping track and also you just couldn't do it. You had to be very cautious -- not cautious, wrong word.

Tr. 2372.

And to the same effect, Mr. Goodman answered:

[BY MR. MANDELL:]

Q. Did you have any conversations with anyone at L&P about the \$3 make-up?

[BY MR. GOODMAN:]

A. Well, not specifically on a file by file basis, but Pat Prisco and I had many conversations about the clips, and the pluses and the minuses and the deductions and so forth like that. He was well aware of what we were doing.

I'm not going to say I spoke to Patty on a weekly basis because I did not. Tony Gentile had full control of L&P's tomato business. Tony and I certainly spoke about it often. We fought like cats and dogs about it and again, Pat Prisco and I had many conversations.

Patty, on occasion, although he never asked me, "Well, how much is it today, how much is it tomorrow, you know, where's my balance," but he knew how hard the deductions were, the clips were.

As a matter of fact Patty, one day we were talking and he said [sic], "Steve, I know exactly what you're doing, nobody could get the kind of adjustments on clean files, no inspections, that you and Tony worked out without me knowing that I'm giving it back to you someplace else," we had that conversation many times.

Tr. 2269-70.

I find that Respondent's evidence that these payments to Mr. Gentile were designed to adjust L&P's "clips" is not credible and does not rebut the evidence that Respondent's payments were intended to induce Mr. Gentile to buy tomatoes from Respondent.

**E. Principals at L&P Were Unaware of Respondent's Payments.**

Mr. Prisco, the president of L&P, testified that he did not know that Mr. Gentile received payments from Respondent based on the number of boxes of tomatoes that Mr. Gentile purchased from Respondent, as follows:

[BY MR. STANTON:]

[Q]. The Complainant, PACA, has made many allegations regarding the relationship between Tony Gentile and JSG and one of the allegations is that during that period, JSG was paying Tony Gentile a certain amount per box on boxes of tomatoes which JSG sold to L&P.

This is an allegation that's being made in this case. Are you aware that this allegation is being made?

[BY MR. PRISCO:]

A. Yes, I am.

Q. And, as evidence of this allegation, the PACA Complainant, has submitted into evidence in this proceeding numerous copies of JSG file jackets regarding sales to L&P, and I'd like you to turn to Complainant's Exhibit Number 8, page 1, 8(b), page 1.

Mr. Prisco, this document, as well as many others, has been submitted into evidence as a copy of a JSG file jacket reflecting sales to L&P during 1992 and early 1993.

Now, one of the things Complainant has alleged is that handwritten notations on the bottom corner were indications of payments per box regarding sales made to L&P by JSG that were actually going to Tony Gentile.

Now, assuming these allegations are true, were you ever aware that there were these notations on the file jacket, first of all?

A. First of all, the first time I saw them was a couple of months ago, so I couldn't possibly be aware of it.

Q. But certainly during 1992 and 1993 you weren't aware of them?

A. No, I would have no – you know, I wouldn't be able to see this.

Q. Assuming it's true and that these notations do indicate that payments were being made on these files per box basis to Tony Gentile, were you aware that such payments were made, if, in fact, it's true?

A. No.

Q. And I'm talking about during the time of the transactions during 1992 and 1993?

A. No.

....

Q. Turn to Exhibit 13(b), page 1, do you see that? . . . .

A. Okay.

....

BY MR. STANTON:

Q. It's been alleged that the notations in the area on the corner of that circle, indicate a certain payment to A. Gentile. If that's true, were you aware of that?

A. No.

Q. It's also been alleged that the payment to A. Gentile in this particular file, took place by means of reducing a debt that Tony Gentile owed to JSG and that allegedly is reflected by Exhibit 13(a), Page 3, which is the first document you were looking at.

A. Okay.

Q. If that is true, did you know about that?

A. No.

Q. Now, if any of your employees at L&P knew about that arrangement at the time, 1992 through 1993, would that have come to your attention?

A. Certainly.

Q. Did it come to your attention at all?

A. No.

....

Q. Take a look at page one of 44(b).

A. I'm familiar with that check, \$1,239.

Q. And it's been alleged that that check resulted from a per box payment reflected by the Tony, five cent notation on the file jacket that ultimately resulted in a \$1,239 check to Gloria Gentile.

Now, the per box payment was on boxes of tomatoes sold by JSG to L&P. Now, if that were true, is that something that – an arrangement that you would know about?

A. Is it something, I would know about?

Q. Right, or did know about?

A. It was something that I did not know – if it were true, I did not know about it.

Q. And, if anyone at L&P would have known about such arrangement, would they have informed you during 1992?

A. They certainly would have.

....

Q. And, its been alleged and testified to by Ms. Colson, that everyone of these entries reflects a particular load of tomatoes sold by JSG to L&P, and it's also been alleged that the quantity involved in each of these loads, as listed in the fifth column from the left, is the basis for a five cents per box payment, which led to that check to Gloria Gentile.

Now, would you have been aware, assuming it's true; would you been [sic] aware of the existence of this Gloria and Tony Enterprises statement to JSG?

A. No.

Q. If anybody at L&P had been aware of it would they have brought it to you [sic] attention?

A. Yes.

Tr. 457-58, 462-64, 501-04.

In addition, Mr. Prisco signed a sworn statement in which he stated that G&T was not authorized to receive payments from L&P's produce suppliers and that he was not aware of any payments to Mr. Gentile or G&T by L&P's produce suppliers, as follows:

I Patrick Prisco, president of L&P Fruit Corp., state that:

- 1) Gloria and Tony Enterprises is a joint venture with L&P Fruit and as such has the authority to purchase tomatoes on behalf of L&P Fruit Corp.
- 2) Gloria and Tony Enterprises was not authorized to receive any compensation from L&P Fruit Corp.'s suppliers on behalf of L&P Fruit Corp.
- 3) Prior to March 25<sup>th</sup> 1993, I was unaware of any payments made to Mr. Gentile or Gloria and Tony Enterprises by any suppliers in connection with L&P Fruit Corp.[']s purchases. I

am aware of payments made to Mr. Gentile or Gloria and Tony Enterprises by companies dealing with L&P Fruit Corp. that were unrelated to produce purchases.

CX-4.

I find that Complainant introduced substantial evidence to establish that the principals at L&P were not aware that Respondent made payments to Mr. and Mrs. Gentile and G&T. Mr. Goodman testified that Mr. Prisco generally knew of the "clips" (Tr. 2269-70, 2372). However, as discussed in this Decision and Order on Remand as to JSG Trading Corp., *supra*, Mr. Goodman's testimony regarding "clips" is not credible, and Respondent did not offer evidence to show that the principals at L&P were aware of each payment to Mr. and Mrs. Gentile and G&T. Respondent's evidence that the principals at L&P knew of the payments is not sufficient to rebut Complainant's evidence that the principals at L&P were not fully aware of Respondent's payments to Mr. and Mrs. Gentile and G&T.

## II. Respondent's Payments to Mr. Lomoriello.

Mr. Lomoriello was employed as a purchasing agent by American Banana in December 1991 and left its employ in 1993 (Tr. 315). From December 1992 through February 1993, Respondent issued seven checks to Mr. Lomoriello totaling \$9,733.45. I find that \$9,733.45 is not *de minimis*.

Respondent and Mr. Lomoriello claim that these checks were not issued to induce Mr. Lomoriello to purchase tomatoes from Respondent, but rather were issued for

Mr. Lomoriello's services not involving American Banana. However, the record does not reveal what specifically Mr. Lomoriello did for Mr. Goodman or Respondent to earn \$9,733.45. Mr. Goodman testified that he began to ask Mr. Lomoriello to do things for him at the Hunts Point Market (Tr. 2192). However, Mr. Goodman admitted that there was never any written agreement setting forth what Mr. Lomoriello would do and the payments that he would receive (Tr. 2193).

Ms. Colson found 22 file jackets that relate to Respondent's sales of tomatoes to American Banana which contain notations that are similar to those on the backs of file jackets reflecting sales to L&P (CX 63-69; Tr. 550-51). The notations indicate that payments per box were being made to "Al," "HPT," or "Hunts Point Produce" in an amount equivalent to the amount of the notation multiplied by the number of boxes sold to American Banana. Ms. Colson found Hunts Point Produce Co. invoices in the file jackets for amounts corresponding to the payments to "Al," "HPT," or "Hunts Point Produce" listed on the file jackets. She also found seven of Respondent's checks totaling \$9,733.45, made payable to Hunts Point Produce Co. (CX 63A at 1, CX 64A at 1, CX 65A at 1, CX 66A at 1, CX 67A at 1, CX 68A at 1, CX 69A at 4). The amounts on the Hunts Point Produce Co. invoices also correspond to the amounts of the checks made payable to Hunts Point Produce Co. and the Hunts Point Produce Co. invoices contain Respondent's file numbers which correspond to the file numbers written on the checks payable to Hunts Point Produce Co. or written on the check skirts applicable to checks

payable to Hunts Point Produce Co. (CX 63B at 3-4, CX 63C at 4-5, CX 64B at 3-4, CX 64C at 3-4, CX 65B at 4-5, CX 65C at 4-5, CX 65D at 4-5, CX 65E at 3-4, CX 65F at 3-4, CX 65G at 3-4, CX 66B at 4-5, CX 66C at 4-5, CX 66D at 3-4, CX 67B at 3-4, CX 67C at 3-4, CX 67D at 4-5, CX 68B at 6-7, CX 68C at 4-5, CX 68D at 4-5, CX 68E at 4-5, CX 69A at 4-5). Examination of these invoices reveals that only the earliest Hunts Point Produce Co. invoice, dated December 14, 1992, states how much money per box was being paid to Mr. Lomoriello (CX 63B at 4). When Ms. Colson examined Respondent's Closed File Journal, she found the amounts of the checks written by Respondent to Hunts Point Produce Co. listed in the "Open SC" column (CX 52; Tr. 604-05).

Ms. Levine testified that Mr. Goodman asked her to pay Mr. Lomoriello, although she did not know what services Mr. Lomoriello was rendering to Respondent (Tr. 1962). Ms. Levine said that she asked Mr. Lomoriello for some blank invoices that she could prepare to show that Mr. Lomoriello was not Respondent's employee (Tr. 1962, 1965). After she received the invoices and was told by Mr. Goodman what amounts to pay, Ms. Levine noted the payments to Mr. Lomoriello on American Banana files and completed a Hunts Point Produce Co. invoice to reflect the amounts to be paid to Mr. Lomoriello (Tr. 1968).

Although Ms. Levine claims that her actions were not done in furtherance of recording payments for buying tomatoes from Respondent, she stated that Mr. Lomoriello

was quite upset when he received the December 14, 1992, invoice (CX 63B at 4), since it appeared to him as if he was receiving a "kickback." She testified:

When Al received this, he was slightly upset and he told me I should never send him an invoice like this again because it looks like I'm getting a kickback. Those were his -- actually he didn't say it as nicely as that, but I won't say what he said.

Tr. 1969.

Ms. Levine communicated Mr. Lomoriello's comments to Mr. Goodman (Tr. 2036). After being made aware that Mr. Lomoriello was upset that Respondent's payments to him were documented in a way that suggested that the payments were kickbacks, Respondent did not stop making payments to Mr. Lomoriello (Tr. 2037), but made the nature of the payments less obvious by not stating on the invoices how much per box each file was being charged (Tr. 2037).

Respondent and Mr. Lomoriello have not provided any credible evidence of what services Mr. Lomoriello performed for the money that he was paid by Respondent. Ms. Colson testified that in the course of her investigation, on March 11, 1993, when she asked to see Mr. Lomoriello's records, Mr. Lomoriello stated they were at his home and that he would provide them to her on the following day (Tr. 608-09). However, on the following day, when Ms. Colson met with Mr. Lomoriello, the only records that he produced were two deposit tickets (CX 70), supposedly reflecting his deposit of the funds received from Respondent (Tr. 630-31).

However, at the hearing, Mr. Lomoriello disclosed what he alleged were notes that he had written in 1992 and 1993 in response to Mr. Goodman's requests for his assistance (RL 19-25; Tr. 1179-81). These notes appear to be on paper containing an American Banana letterhead. Mr. Lomoriello explained: "RL - RL-20 is a piece of paper that Mimi Contos, American Banana has a pile of American Banana letterhead on the side of the copy machine that when you write notes to people it would be done on his letterhead. . . ." (Tr. 1180).

Mr. Lomoriello said that the notes were in the back of his file cabinet at his home, and he did not provide them to Ms. Colson in March 1993 because he did not find them until early 1995 (Tr. 1194-95, 1202). Upon cross-examination, Mr. Lomoriello stated that he obtained the American Banana stationery on which the notes were written (RL 19-25) from the desk of American Banana's bookkeeper, Carlos Valencia:

[BY MR. STANTON:]

Q. The documents -- the blank documents on which you wrote the notes, RL-19 through RL-25, you obtained them from American Banana, right?

[BY MR. LOMORIELLO:]

A. The blank documents, that's American Banana stuff, yeah -- yes.

Q. Now, explain again where you -- actually in American Banana you obtained them from?

A. Carlos keeps them on his desk. You have to ask him, he gives you the papers and you -- there are [sic] pretty tight in that office there so

you got to ask for a pencil and he keeps everything locked up that he feels is worth any kind of money whatsoever and you got to ask for a piece of paper most of the time to do things.

Tr. 1196-97.

The question arose as to why American Banana's letterhead in RL 19-25 was completely different from American Banana's letterhead found on notes in Respondent's files (CX 65G at 7; CX 66B at 14). Mr. Lomoriello suggested that American Banana had stationery with different letterheads and stated that Carlos Valencia would know about American Banana stationery (Tr. 1225-28).

However, Mr. Valencia testified that the letterhead used for the alleged notes (RL 19-25) was identical to the letterhead used for American Banana's invoices (e.g., RL 1) and the only letterhead that American Banana used for correspondence was the letterhead on notes found in Respondent's files (CX 65G at 7; CX 66B at 14).

BY MR. LOMORIELLO:

Q. The letterhead on RL-19 and the letterhead on CX 65(g), page 7, they are a little different aren't they, Mr. Valencia?

[BY MR. VALENCIA:]

A. Yes, very much, yes.

Q. But both of these letterheads --

JUDGE BERNSTEIN: Wait, wait. Is the letterhead in RL-19 an American Banana Company letterhead that's been used by American Banana?

THE WITNESS: No.

JUDGE BERNSTEIN: Have you ever seen that letterhead in RL-19 before?

THE WITNESS: Yes.

JUDGE BERNSTEIN: Can you explain about it?

THE WITNESS: I seen this on the invoice that we sent to the customers.

.....

JUDGE BERNSTEIN: And, you've seen that -- let me see if I can understand your answer. That letterhead was used by American Banana, as I understand your answer?

THE WITNESS: It's been used on the statements that we send out to the customers. It is the headlines of the statements.

Tr. 1485-86.

When Mr. Lomoriello asked Mr. Valencia whether he kept a folder with photocopy paper containing American Banana's letterheads on his desk, as Mr. Lomoriello had testified earlier, Mr. Valencia vociferously denied that any paper with such letterheads were ever left outside his locked filing cabinet (Tr. 1490-92).

Upon examining one of American Banana's invoices (RL 1) and Mr. Lomoriello's exhibits (RL 19-25), Mr. Valencia concluded that the purported American Banana letterhead could have been created by simply placing a piece of white paper over all but the letterhead of a typical American Banana invoice and copying the document in a copier (Tr. 1493-94). I conclude that is exactly what occurred -- that Mr. Lomoriello

manufactured this evidence to support his contention that the payments that he received from Respondent were not kickbacks.

Respondent also introduced into evidence other file jackets (RX 50 at 1-3 (SG 5206), RX 50 at 4-6 (SG 5176), RX 50 at 7-9 (SG 5175), RX 50 at 10-13 (SG 5298), RX 50 at 14-16 (SG 5304), RX 50 at 17-19 (SG 5476), RX 50 at 20-22 (SG 5480) and RX 50 at 23-25 (SG 5521)) which contain handwritten notations on the flaps allegedly referring to tasks performed by Mr. Lomoriello for Respondent in 1992 and 1993. However, I strongly suspect that the writings on the flaps of these file jackets were made after the transactions ended, as they appear in a different color ink than the other writings on the backs of the file jackets (Tr. 3006-34). Further, the reference to "AI" in (RX 50 at 18) (SG 5476) appears to be an attempt to write Mr. Lomoriello's name over an existing notation to make it appear as if Mr. Lomoriello was involved in the transaction (Tr. 3036). Considering the other evidence of falsification and alteration of documents, it is not unlikely that these file jacket flaps allegedly containing notes by Mr. Goodman involving Mr. Lomoriello were also altered in anticipation of the hearing. I, therefore, find this evidence to be unreliable.

Mr. Goodman and Mr. Lomoriello testified that the payments were for various services that Mr. Lomoriello performed for Respondent in other matters. Yet there was no reliable evidence that the payments to Mr. Lomoriello were charged to any other files associated with his alleged services. Given the meticulous nature of Mr. Goodman's

notations of expenses on associated files, it is also unbelievable that these payments would be randomly charged to files totally unrelated to Mr. Lomoriello's alleged services. I, therefore, conclude that Respondent made these payments to Mr. Lomoriello totaling \$9,733.45 to induce Mr. Lomoriello to purchase tomatoes from Respondent.

Mr. Contos, the vice-president of American Banana, testified that he did not know that Mr. Lomoriello received payments from Respondent based on the number of boxes of tomatoes that Mr. Lomoriello purchased from Respondent, as follows:

[BY MR. STANTON:]

Q. Now, Mr. Contos, assume for the sake of argument that Complainant's allegations are true and JSG was, in fact, paying Al Lomoriello or Hunts Point Produce a certain amount per box on boxes of tomatoes which JSG sold to American Banana.

If we assume that these allegations are true, were you aware of this business arrangement?

[BY MR. CONTOS:]

A. No, sir.

Q. Now, would you have been made aware of this type of business arrangement if anybody else at American Banana knew about it?

A. No.

Q. You wouldn't have been made aware - I mean, I'm not asking if you were made aware of it, but if anybody else employed by American Banana knew about it, would they have told you?

A. Yes, but nobody told me anything about that, nobody knew, as far as I'm concerned, nobody mentioned to me that he was getting that money from JSG. I don't know.

Q. What's the name of the President of American Banana?

A. Alfred Allega.

Q. Alfred Allega, A-l-l-e-g-a?

A. He's my partner, yes, A-l-l-e-g-a, but he had nothing to do because we have two places, one is outside. We have three partners, I take care of Hunts Point Market inside the market and my other two partners, they take care of Fort Wayne and Hunts Point. I have two warehouses and I take this place, you know Hunts Point, and my partners got nothing to do with this.

In other words, it's the same company, but we run separately, you know, those two places. I'm running Hunts Point Market inside and they're running the other places.

Q. With regard to business dealings at Hunts Point that American Banana had with Al Lomoriello, who was - in your company, who was in charge of supervising that relationship?

A. I was.

Q. You were?

A. Yeah, like I told you before, I was taking care of Hunts Point and Al Lomoriello was with me. He had nothing to do with the other place outside the market, because like I explained to you, we have two places, one inside the market, Hunts Point and one outside.

.....

BY MR. LOMORIELLO:

.....

Q. Do you remember the day Ms. Colson came to American Banana, the lady sitting over there?

A. Yes.

Q. She came in, she asked to speak to you and you went to your office and closed the door and you spoke for a while with her?

A. Yes.

Q. Do you remember that?

A. Yes.

Q. Can you tell me what she told you that day, can you tell the Court what she told you that day?

A. She told me that she was looking for something and she was looking to see the records, that she wanted to know –

....

THE WITNESS: Yes, she came over and she was looking for the papers to see how come he was getting commission from JSG and she wanted to know what's happening and I didn't know anything about that Mr. Lomoriello was getting commission from JSG, which I didn't know and she wanted to find out and I told her, I don't know.

Tr. 322-24, 415-16.

I find that Complainant introduced substantial evidence to establish that the principals at American Banana were not aware that Respondent made payments to Mr. Lomoriello. Respondent's evidence that the principals at American Banana knew of the payments is not sufficient to rebut Complainant's evidence that the principals at American Banana were not fully aware of Respondent's payments to Mr. Lomoriello.

### III. *Quid Pro Quo* Agreement.

Respondent contends that *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, makes clear that, in order to meet the traditional test for commercial bribery,

Complainant must establish the existence of a specific *quid pro quo* agreement attached to the giving of the alleged consideration (Respondent's Motion to Dismiss at 4, 6; Respondent's Reply at 4).

However, I agree with Complainant's position (Complainant's Response at 16) that *JSG v. United States Dep't of Agric., supra*, does not require proof of the existence of a written or oral agreement between the parties alleged to have violated section 2(4) of the PACA, in order to meet the traditional test for commercial bribery. Instead, the Court indicates that the traditional test for commercial bribery typically contains only two elements, intent to induce and secrecy:

It is clear that the test for commercial bribery employed by the agency in *Goodman* and *Tipco* requires a finding of both intent to induce and secrecy. These requirements are not surprising, given that commercial bribery statutes typically contain at least these two elements. *See, e.g.*, N.Y. PENAL LAW §§ 180.00, 180.03 (McKinney 1999) ("A person is guilty of commercial bribing . . . when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with the intent to influence his conduct in relation to his employer's or principal's affairs."); 720 ILL. COMP. STAT. ANN. 5/29A-1 (West 1998) ("A person commits commercial bribery when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."); *see also* 2 Rudolph Callman, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 12.01, at 1 n.0.50; § 12.01, at 8-9 (4<sup>th</sup> ed. 1996 & Supp. 1999); BLACK'S LAW DICTIONARY 270 (6<sup>th</sup> ed. 1990) (defining commercial bribery as "[a] form of corrupt and unfair trade practice in which an employee accepts a gratuity to act against the best interests of his employer").

.....

Even assuming that Mr. Goodman's gifts to Mr. Gentile were made not out of pure friendship, but rather in an effort to curry favor with Mr. Gentile, it is not immediately obvious how the marketplace is disturbed—or how Mr. Goodman is violating any implied duty under the PACA—if Mr. Gentile's employer is aware of the gifts, and there is no specific *quid pro quo* agreement between Mr. Goodman and Mr. Gentile. . . . In other words, without a finding of secrecy and intent to induce, there appears to be nothing to distinguish an illegal bribe from a simple promotional gift.

*JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, 176 F.3d at 542-43, 545.

Thus, I do not find that proof of a specific written or oral agreement between Respondent and Mr. Gentile or Respondent and Mr. Lomoriello is prerequisite to my finding that Respondent violated section 2(4) of the PACA.

Even if I found that the elements of traditional commercial bribery, as described in *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, include the existence of a *quid pro quo* agreement, I would find that Respondent engaged in activity that meets the traditional test for commercial bribery. Complainant did not introduce evidence of a specific written or oral agreement between Respondent and Mr. Gentile or between Respondent and Mr. Lomoriello, in which the parties agreed that, in exchange for payments from Respondent, Mr. Gentile and/or Mr. Lomoriello would purchase tomatoes from Respondent rather than Respondent's competitors. However, Complainant introduced substantial evidence that Respondent made a series of payments to Messrs. Gentile and Lomoriello to induce Messrs. Gentile and Lomoriello to purchase tomatoes from Respondent and substantial evidence that the principals at L&P were not aware of

all of Respondent's payments to Mr. Gentile and the principals at American Banana were not aware of Respondent's payments to Mr. Lomoriello. Moreover, Complainant introduced substantial evidence that many of these payments were directly dependent on the number of boxes of tomatoes that Messrs. Gentile and Lomoriello purchased from Respondent. Based on these facts, I infer that Respondent and Mr. Gentile and Respondent and Mr. Lomoriello had *quid pro quo* agreements in which, in exchange for Respondent's payments, Messrs. Gentile and Lomoriello agreed to purchase tomatoes from Respondent.

#### **IV. Collateral Fees and Expenses.**

Respondent contends that *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, requires that I consider Respondent's payments to Messrs. Gentile and Lomoriello in light of the PACAA-1995, which allows the good faith offer, solicitation, payment, or receipt of collateral fees and expenses. Respondent asserts that there is nothing in the record that demonstrates that Respondent's payments were other than collateral fees and expenses made in good faith. (Respondent's Motion to Dismiss at 12.)

I disagree with Respondent's contention that *JSG Trading Corp. v. United States Dep't of Agric.*, *supra*, requires me to consider whether Respondent's payments to Messrs. Gentile and Lomoriello were good faith collateral fees and expenses paid in accordance with the PACA.

The Court states that “[s]everal of the gifts given to Mr. Gentile by Mr. Goodman arguably could be considered ‘promotional allowances’ made in good faith (*i.e.*, not in secret), and in connection with the marketing of JSG’s product.” The Court instructed that, “[o]n remand, the agency must explain its justification, if it has one, for employing a *per se* test for commercial bribery, and it must do so in conjunction with the 1995 amendment to PACA. The agency is free, of course, to abandon the *per se* approach, and apply the traditional commercial bribery test employed in *Goodman and Tipco*.” *JSG Trading Corp. v. United States Dep’t of Agric.*, *supra*, 176 F.3d at 546.

Since I abandon the *per se* test for commercial bribery, the Court’s instruction that I explain the justification for the *per se* test for commercial bribery, in conjunction with the provision of the PACAA-1995 that allows the good faith payment of collateral fees and expenses, does not apply to this Decision and Order on Remand as to JSG Trading Corp. Moreover, as fully explicated in this Decision and Order on Remand as to JSG Trading Corp., *supra*, I find Respondent made payments to induce Messrs. Gentile and Lomoriello to purchase tomatoes from Respondent and that the principals at L&P were not fully aware of all of Respondent’s payments to Mr. Gentile and the principals at American Banana were not fully aware of Respondent’s payments to Mr. Lomoriello (*i.e.*, Respondent’s payments were not “made in good faith” and therefore could not have been good faith payments of collateral fees and expenses allowed under the PACAA-1995).

**V. Messrs. Gentile and Lomoriello Were Not Partners or Independent Brokers.**

Respondent contends that Messrs. Gentile and Lomoriello were partners in limited joint venture arrangements with L&P and American Banana, respectively. Respondent contends that, as a matter of law, Respondent's payments to Messrs. Gentile and Lomoriello could not constitute an activity that falls within the traditional definitions of commercial bribery because knowledge of payment to one partner must be attributed to the other partners and such payments could not be considered secret. Alternatively, Respondent asserts that Messrs. Gentile and Lomoriello were independent brokers and that payments to independent brokers are permissible under the PACA. (Respondent's Reply at 15-19.)

Starting in approximately 1985, and continuing until approximately 1991, Mr. Gentile was the head salesman, managed the sales operation, and was the tomato buyer at L&P (Tr. 442). Mr. Gentile had a joint account arrangement with L&P, in accordance with which Mr. Gentile shared profits and losses with L&P on the tomatoes that he purchased (Tr. 445). Mr. Gentile became ill in late 1990 or early 1991 and from that time through the date of the hearing, Mr. Gentile continued to purchase tomatoes for L&P from his home (Tr. 446, 2909). L&P continued to compensate Mr. Gentile on a joint account basis, but at a reduced rate of 15 per centum of the profits and losses (Tr. 447).

Mr. Gentile described himself as being employed by L&P (Tr. 2819). Mr. Prisco, the president of L&P, described Mr. Gentile as an employee of L&P and stated that L&P uses joint account arrangements with salespersons because the joint account arrangement gives a salesperson an incentive to work hard (Tr. 442-47). Mr. Beni, the secretary-treasurer of L&P, testified that Mr. Gentile was a salesperson for L&P and that L&P paid Mr. Gentile a salary for his fruit sales and had a joint account arrangement with Mr. Gentile with respect to his tomato sales (Tr. 2890, 2892-93). Mr. Beni testified that joint account arrangements are used because they give people "an incentive to sell more stuff" (Tr. 2893). Mr. Beni testified that his partner at L&P was in charge of the office, and when asked who his partner was, Mr. Beni identified his partner as Mr. Prisco (Tr. 2890-91).

Mr. Lomoriello became employed by American Banana in approximately December 1991 (Tr. 1256). Mr. Lomoriello had a joint account arrangement with American Banana in accordance with which Mr. Lomoriello shared profits and losses with American Banana on the produce that he purchased (Tr. 1245-46).

Mr. Contos, American Banana's vice-president, described Mr. Lomoriello as working for American Banana as a night salesperson and described himself as supervising Mr. Lomoriello (Tr. 314, 323). While Mr. Lomoriello characterized himself as an independent contractor, who sold services to American Banana (Tr. 1244), and a partner (Tr. 1277-78), he also described his duties at American Banana, which description

supports Mr. Contos' view that Mr. Lomoriello was a salesperson working for American Banana (Tr. 1258-66). Mr. Contos testified that the president of American Banana was Alfred Allega and testified that he (Mr. Contos) had two partners. Mr. Contos identified Mr. Allega as one of those partners, but did not identify the other partner. (Tr. 323-24.)

A partnership is an association of two or more persons to carry on business for a profit.<sup>9</sup> An essential element of partnership is sharing of profit and losses<sup>10</sup> and sharing of profits and losses generally constitutes prima face evidence of the existence of a partnership.<sup>11</sup> However, the fact that an individual shares profits and losses is not dispositive of partnership status<sup>12</sup> and whether partnership status exists turns on several factors, including the intention of the parties that they be partners, sharing in profits and

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<sup>9</sup>*Bickhardt v. Ratner*, 871 F. Supp. 613, 620 (S.D.N.Y. 1994).

<sup>10</sup>*ACLI Government Securities, Inc. v. Rhoades*, 813 F. Supp. 255, 257 (S.D.N.Y.), *aff'd*, 14 F.3d 591 (2d Cir. 1993); *Steinbeck v. Gerosa*, 175 N.Y.S.2d 1, 13 (N.Y.), *appeal dismissed*, 358 U.S. 39 (1958); *Scharf v. Crosby*, 502 N.Y.S.2d 891, 892 (N.Y. App. Div. 1986) (mem.); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 711-12 (N.Y. App. Div. 1983); *Bennett v. Pierce Industries, Inc.*, 281 N.Y.S.2d 674, 676 (N.Y. App. Div. 1967) (per curiam); *Reynolds v. Searle*, 174 N.Y.S. 137, 138 (N.Y. App. Div. 1919).

<sup>11</sup>*Kellogg v. Kellogg*, 564 N.Y.S.2d 631, 633 (N.Y. App. Div. 1991); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 712 (N.Y. App. Div. 1983).

<sup>12</sup>*Martin v. Peyton*, 246 N.Y. 213, 128 (N.Y. 1927); *Kellogg v. Kellogg*, 564 N.Y.S.2d 631, 633 (N.Y. App. Div. 1991); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Boyarsky v. Froccaro*, 516 N.Y.S.2d 775, 777 (N.Y. App. Div. 1987) (mem.); *Missan v. Schoenfeld*, 465 N.Y.S.2d 706, 712 (N.Y. App. Div. 1983); *Ramirez v. Goldberg*, 439 N.Y.S.2d 959, 961 (N.Y. App. Div. 1981); *Barschi v. Euben*, 426 N.Y.S.2d 802 (N.Y. App. Div.) (mem.), *appeal denied*, 433 N.Y.S.2d 1027 (N.Y. 1980).

losses, exercising joint control over the business, making capital investment, and possessing an ownership interest in the partnership.<sup>13</sup>

The party alleging the existence of a partnership bears the burden of proof on the issue.<sup>14</sup> The record does not support a finding that Mr. Gentile was a partner with L&P or the principals at L&P or a finding that Mr. Lomoriello was a partner with American Banana or the principals at American Banana. Instead, the record establishes that the joint account arrangements that Messrs. Gentile and Lomoriello had with L&P and American Banana, respectively, were merely methods by which L&P and American Banana compensated Messrs. Gentile and Lomoriello, respectively, for services. I find that Mr. Gentile was a purchasing agent working for a principal, L&P, and that Mr. Lomoriello was a purchasing agent working for a principal, American Banana.

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<sup>13</sup>*Bickhardt v. Ratner*, 871 F. Supp. 613, 620 (S.D.N.Y. 1994); *ACLI Government Securities, Inc. v. Rhoades*, 813 F. Supp. 255, 256 (S.D.N.Y.), *aff'd*, 14 F.3d 591 (2d Cir. 1993); *Televideo Systems, Inc. v. Mayer*, 139 F.R.D. 42, 48 (S.D.N.Y. 1991) (mem.); *Kyle v. Brenton*, 584 N.Y.S.2d 698, 699 (N.Y. App. Div. 1992) (mem.); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Farmer v. State Tax Commission of New York*, 535 N.Y.S.2d 453, 455-56 (N.Y. App. Div. 1988); *Brodsky v. Stadlen*, 526 N.Y.S.2d 478, 479 (N.Y. App. Div. 1988) (mem.); *Alleva v. Alleva Dairy*, 514 N.Y.S.2d 422, 423 (N.Y. App. Div. 1987); *M.I.F. Securities Co. v. R.C. Stamm & Co.*, 463 N.Y.S.2d 771, 774 (N.Y. App. Div.), *aff'd*, 471 N.Y.S.2d 84 (1983).

<sup>14</sup>*Televideo Systems, Inc. v. Mayer*, 139 F.R.D. 42, 48 (S.D.N.Y. 1991) (mem.); *Blaustein v. Lazar Borck & Mensch*, 555 N.Y.S.2d 776, 777 (N.Y. App. Div. 1990) (mem.); *Ramirez v. Goldberg*, 439 N.Y.S.2d 959, 961 (N.Y. App. Div. 1981); *Moscatelli v. Nordstrom*, 337 N.Y.S.2d 575, 576 (N.Y. App. Div. 1972) (mem).

### Conclusion of Law

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA.

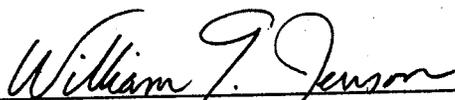
For the foregoing reasons, the following Order should be issued.

### Order

JSG Trading Corp.'s PACA license is revoked, effective 61 days after service of this Order on JSG Trading Corp.

Done at Washington, DC

November 29, 1999



William G. Jenson  
Judicial Officer