

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of October, one thousand nine hundred and ninety-nine.

PRESENT:

Hon. Roger J. Miner,  
Hon. John M. Walker, Jr.,  
Hon. Robert A. Katzmann,  
Circuit Judges.

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IRENE T. RUSSO d/b/a JAY BROKERS,  
Petitioner,

v.

99-4065

UNITED STATES DEPARTMENT OF AGRICULTURE,  
Respondent.

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APPEARING FOR PETITIONER: IRENE T. RUSSO, *pro se*, Orangeburg, NY.

APPEARING FOR RESPONDENT: LIBBI J. BASHEIN, Attorney, Office of the General Counsel, U.S.

Department of Agriculture (James Michael Kelly, Associate General Counsel, Margaret M. Breinholt, Acting Assistant General Counsel, on the brief), Washington, DC.

Petition for review of an order of the Secretary, United States Department of Agriculture (Jenson, J.O.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the Secretary be and it hereby is AFFIRMED.

Petitioner *pro se* Irene Russo d/b/a Jay Brokers ("petitioner") petitions for review of a March 23, 1999 order of the Secretary of the Department of Agriculture (the "DOA") revoking petitioner's license under the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. §§ 499a-499s.

On appeal, petitioner raises the following arguments: (1) the Secretary's decision that petitioner committed wilful, repeated, and flagrant violations of section 2(4) of PACA was not supported by substantial evidence, (2) the Secretary's failure to give written notice of its investigation to petitioner violated section 6(c) of PACA, as amended, (3) the DOA committed violations of the Jencks Act, (4) improper communications were made between a DOA witness and other witnesses, and (5) the Administrative Law Judge (the "ALJ") was biased.

The Secretary's findings of fact must be upheld on review by this court if they are supported by substantial evidence. See *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 91 (2d Cir. 1997). We have carefully reviewed the record and find that the Secretary's findings were amply supported by both documentary and testimonial evidence.

The basic structure of the fraudulent consignment scheme is not disputed. Joseph Russo, petitioner's husband, worked as a sales representative for Produce Distributors, Inc. ("PDI"), arranging consignment sales of produce. A28, 240, 385-86. PDI would represent to growers that a larger percentage of their produce had been dumped as spoiled or damaged than was the case, thereby under-representing the proceeds of its sale. PDI would then pocket the difference. A28, A55-56. The DOA presented evidence of 41 separate fraudulent transactions, and six "prototype" transactions were explored in detail at the hearing before the ALJ. A28-33, A57-66. PDI's financial records and canceled checks presented at the hearing showed that for each one of the fraudulent transactions, PDI would pay petitioner forty percent of its total profits, including the portion due to fraud. A112-29, 214-19. The financial records also showed that Joseph Russo's salary and PDI's expenses in listing him as an employee were deducted from the forty percent paid over to petitioner. A237-39. Petitioner actively participated in the fraudulent transactions, personally writing notes to several of the growers asking them to accept less money for their produce than was actually collected by PDI. A142-44, 149-51, 154, 208-212. There was testimonial evidence from PDI's billing clerk, one of its salesmen and the son of its president, and PDI's certified public accountant that they believed PDI was involved in a joint venture with petitioner. A395-400, 408, 387-89. The investigator for the DOA testified that PDI kept files on each of the fraudulent transactions. The jacket of each file included the notation "J/V," which according to PDI's office manager, stood for "joint venture." Next to that notation on each file were the notations "Jay B," which stood for "Jay Brokers," and "Produce," which stood for PDI.

Written next to the notation "Jay B" on each file folder was an amount equal to forty percent of the particular transaction, and an amount equal to sixty percent was written next to the notation "Produce." A137, 140-41, 228.

After reviewing the record, we find that the evidence against petitioner was not just substantial, but overwhelming. We therefore reject petitioner's first argument.

Petitioner's second argument is that the Secretary's failure to give written notification of its investigation to petitioner violated section 6(c) of PACA, 7 U.S.C. § 499f(c)(3). A notification requirement was added to the statute when PACA was amended pursuant to the Perishable Agricultural Commodities Act Amendments of 1995, effective November 15, 1995. Pub. L. No. 104-48, §§ 7(b), 109 Stat. 424, 428-29. The DOA initiated the investigation of PDI in May 1995, and expanded the investigation to include petitioner in June 1995, several months before the notification provision became effective. Given the strong presumption against the retroactive application of legislation, *see, e.g., Henderson v. INS*, 157 F.3d 106, 129 (2d Cir. 1998), we see no reason to apply the amendment to section 6(c) retroactively. Statutes are not ordinarily afforded retroactive application unless "Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). Therefore we find there was no violation of the notification requirement.

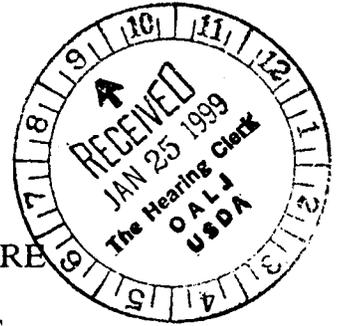
We have considered petitioner's other arguments and find them to be without merit.

The order of the Secretary is hereby **AFFIRMED**.

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UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PACA Docket No. D-97-0013  
)  
Produce Distributors, Inc., )  
and Irene T. Russo, d/b/a )  
Jay Brokers, )  
)  
Respondents ) **Decision and Order as to**  
**Irene T. Russo, d/b/a Jay Brokers**

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on January 3, 1997.

The Complaint: (1) alleges that during the period June 24, 1993, through April 14, 1995, Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers [hereinafter Respondents], failed to account truly and correctly to 16 consignors, the net proceeds for 40 lots of perishable agricultural commodities, which Respondents received, accepted, and sold on behalf of the consignors, in interstate commerce (Compl. ¶ V(a)); (2) alleges that during the period June 24, 1993, through October 21, 1994, Respondents created false and inaccurate accounts of sales and altered existing accounts of sales for perishable agricultural commodities received, accepted, and sold on behalf of seven

consignors for the fraudulent purpose of concealing from the consignors the accurate net proceeds amounts due them from the sale of their produce on a consignment basis (Compl. ¶ V(b)); (3) alleges that Respondents altered the contents of two United States Department of Agriculture, Agricultural Marketing Service, inspection certificates issued on October 18, 1993, and July 8, 1994, respectively, by changing the information reported on the inspection certificates as they pertained to either the shipper's identity or percentage of decay and defects (Compl. ¶ V(c)); and (4) requests a finding that Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and the issuance of an order revoking Respondents' PACA licenses (Compl. at 5).<sup>1</sup>

Produce Distributors, Inc., filed an Answer on February 18, 1997, in which it denied the material allegations of the Complaint and raised two factual defenses and four affirmative defenses. Irene T. Russo, d/b/a Jay Brokers, filed an Answer on February 28, 1997, in which she denied the material allegations of the Complaint and raised six factual defenses and three affirmative defenses.

The ALJ presided over a hearing on January 27-30, March 4-5, and April 15, 1998, in New York, New York. Kimberly D. Hart, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., represented Complainant. David L. Durkin, of Olsson, Frank & Weeda, Washington, D.C., represented Produce

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<sup>1</sup>On January 15, 1998, Complainant filed a Motion to Amend Complaint to correct a typographical error that appears on Exhibits A and B of the Complaint, and Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] granted Complainant's Motion to Amend Complaint (Order Amending Complaint). References in this Decision and Order to "Complaint" are to the Complaint as amended by the ALJ's January 15, 1998, Order Amending Complaint.

Distributors, Inc.<sup>2</sup> Lawrence A. Omansky and Daniel Cherner, New York, New York, represented Irene T. Russo, d/b/a Jay Brokers.

On June 15, 1998, Complainant filed Complainant's Proposed Findings of Fact, Conclusions, Order and Supporting Brief; on June 16, 1998, Produce Distributors, Inc., filed Notice stating that it had surrendered its PACA license (PACA License No. 771923), effective March 1, 1998, and that the Notice is filed in lieu of a full brief on the merits; on June 19, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Memorandum of Law [hereinafter Respondent Russo's Brief]; on July 8, 1998, Complainant filed Complainant's Reply Brief; and on July 10, 1998, Irene T. Russo, d/b/a Jay Brokers, filed Respondent Russo's Post-Hearing Reply Memorandum of Law [hereinafter Respondent Russo's Reply Brief].

On October 21, 1998, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded that Respondents made false statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (2) concluded that Respondents were involved in a joint venture in which Respondents shared profits resulting from their violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); (3) found that Respondents' violations of section 2(4) of the PACA

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<sup>2</sup>On March 3, 1998, Produce Distributors, Inc., filed Notice stating that it: (1) would not offer further evidence or witnesses; (2) would not participate in the examination of witnesses; and (3) surrendered its PACA license (PACA License No. 771923), effective March 1, 1998.

(7 U.S.C. § 499b(4)) were willful, flagrant, and repeated; and (4) revoked Respondents' PACA licenses (Initial Decision and Order at 5, 24).

On November 10, 1998, Irene T. Russo, d/b/a Jay Brokers, appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the United States Department of Agriculture's [hereinafter USDA] adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).<sup>3</sup> On December 10, 1998, Complainant filed Complainant's Response to Respondent Irene Russo d/b/a Jay Brokers' Appeal Petition [hereinafter Complainant's Response].

Produce Distributors, Inc., did not appeal the Initial Decision and Order, which was served on Produce Distributors, Inc., on December 9, 1998. In accordance with the Initial Decision and Order (Initial Decision and Order at 24) and section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the Initial Decision and Order became final and effective as to Produce Distributors, Inc., on January 13, 1999. On January 20, 1999, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision as to Irene T. Russo, d/b/a Jay Brokers.

Based upon a careful consideration of the record in this proceeding and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion of the appropriate sanction.

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<sup>3</sup>The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

Complainant's exhibits are designated by the letters "CX." The portion of the transcript that relates to those segments of the hearing conducted on January 27-30 and March 4-5, 1998, are in six volumes containing pages numbered 1 through 1131. The portion of the transcript that relates to that segment of the hearing conducted on April 15, 1998, is in a single volume containing pages numbered 1 through 83. References in this Decision and Order to "Tr." are to the six volumes of the transcript that relate to the January 27-30 and March 4-5, 1998, segments of the hearing, and references in this Decision and Order to "Tr. Vol. II" are to the volume of the transcript that relates to the April 15, 1998, segment of the hearing.

#### **PERTINENT STATUTORY PROVISION**

7 U.S.C.:

#### **TITLE 7—AGRICULTURE**

.....

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

.....

#### **§ 499b. Unfair conduct**

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

.....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and

correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title[.]

7 U.S.C. § 499b(4) (1994).

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

**Findings of Fact**

1. Respondent, Produce Distributors, Inc., is a corporation organized and existing under the laws of the State of New Jersey. Produce Distributors, Inc.'s address is 600 South Livingston Avenue, Suite 102, Livingston, New Jersey 07039 (CX 1, CX 3).
2. At all times relevant to this proceeding, Produce Distributors, Inc., was licensed under the PACA, holding license number 771923. Produce Distributors, Inc., is no longer licensed under the PACA (Complainant's Response at 3; Produce Distributors, Inc.'s Notice, filed March 3, 1998; Produce Distributors, Inc.'s Notice, filed June 16, 1998).
3. Respondent Irene T. Russo is an individual, doing business as Jay Brokers, whose address is 81 Edgewood Drive, Orangeburg, New York 10962 (CX 4).
4. At all times relevant to this proceeding, Jay Brokers was licensed under the PACA, holding license number 891361. Jay Brokers' license was renewed annually and is subject to renewal on or before June 8, 1999 (CX 2).
5. In May 1995, USDA initiated an investigation of Produce Distributors, Inc., based on four reparation complaints made against Produce Distributors, Inc. USDA

dispatched Roberta L. Rucker, a senior marketing specialist, to examine the records of Produce Distributors, Inc. Ms. Rucker first visited Produce Distributors, Inc.'s office on May 24, 1995 (Tr. 29).

6. In June 1995, USDA expanded its investigation to a longer time period and to include Jay Brokers (Tr. 42-43). USDA did not notify Produce Distributors, Inc., or Irene T. Russo, in writing, that the investigation had been expanded and would include Jay Brokers. Ms. Rucker examined and photocopied documents and interviewed individuals at Produce Distributors, Inc., and Jay Brokers. (Tr. 29-41, 47-49, 54-56.)

7. Ms. Rucker found irregularities in documents in Jay Brokers' files on some joint venture transactions, such as files in which there were two accounts of sales with the gross proceeds, net proceeds, and deductions differing; files that contained blank photocopies of customers' letterheads; and files that contained copies of accounts of sales on thermal paper with changes made in ink (Tr. 44).

8. Produce Distributors, Inc.'s records indicate that documents were falsified by Joseph Russo or Irene T. Russo, or both Joseph Russo and Irene T. Russo, to mislead produce consignors as to the amounts of profits involved in transactions and that produce inspection reports were falsified by Joseph Russo or Irene T. Russo, or both Joseph Russo and Irene T. Russo.

9. Produce Distributors, Inc.'s president, Thomas Gangemi, Jr., told Ms. Rucker that Produce Distributors, Inc., was involved in a joint venture arrangement with Joseph Russo in which Produce Distributors, Inc., would assume 60 per centum of

any profit or loss and Jay Brokers would assume 40 per centum of any profit or loss on the sale of produce by Produce Distributors, Inc. (Tr. 29-31; Tr. Vol. II at 6).

10. Produce Distributors, Inc.'s records show that Produce Distributors, Inc.'s profits in the transactions at issue in this proceeding were apportioned 60 percent to Produce Distributors, Inc., and 40 percent to Jay Brokers (Tr. 34-35; e.g., CX 16 at 46, CX 18 at 28, CX 20 at 22, CX 33 at 39, CX 36 at 79, CX 38 at 48, CX 41 at 40).

11. The records with respect to the transactions at issue in this proceeding contain numerous memoranda from Irene T. Russo to the produce consignors or customers proposing modifications of prices and records of other communications between Irene T. Russo and the produce consignors and customers (e.g. CX 16 at 7, 15, 48, CX 18 at 7, CX 24 at 20, CX 26 at 17, CX 28 at 2, 20, 22, 23, CX 29 at 5, CX 33 at 30, CX 35 at 3, CX 43 at 5, CX 45 at 4, CX 48 at 6).

12. The records with respect to the transactions at issue in this proceeding also contain numerous memoranda signed by Irene T. Russo and faxed from Jay Brokers' fax number that instructed Produce Distributors, Inc., as to fraudulent amounts to remit to produce consignors and amounts to bill customers in the produce transactions (Tr. 37-40).

13. Based upon the evidence that Irene T. Russo actively participated in the transactions at issue in this proceeding and that Jay Brokers received 40 per centum of Produce Distributors, Inc.'s profits for the transactions at issue in this proceeding, I find that Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, were involved in a joint venture in the transactions at issue in this proceeding.

14. Although Joseph Russo was listed in Produce Distributors, Inc.'s records as an employee, the identification of Joseph Russo as a Produce Distributors, Inc., employee was a subterfuge. In fact, Joseph Russo, together with his wife, Irene T. Russo, was involved in the joint venture with Produce Distributors, Inc., and he was listed falsely as an employee in Produce Distributors, Inc.'s records for his personal convenience.

15. Based upon the evidence, I find that Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, made false and misleading statements to the consignors in the transactions at issue in order to gain profits in connection with their joint venture.

#### **Conclusions of Law**

1. Respondents Irene T. Russo, d/b/a Jay Brokers, and Produce Distributors, Inc., acting as dealers and/or commission merchants, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making false and misleading statements to consignors for a fraudulent purpose in connection with the handling of produce on a consignment basis.

2. Respondents Irene T. Russo, d/b/a Jay Brokers, and Produce Distributors, Inc., were involved in a joint venture in connection with these violations in which profits resulting from these joint venture transactions were shared 60 per centum to Produce Distributors, Inc., and 40 per centum to Irene T. Russo, d/b/a Jay Brokers.

#### **I. The False and Misleading Statements**

In a "Notice" filed on June 16, 1998, Produce Distributors, Inc., appeared to admit the alleged violations. Produce Distributors, Inc.'s Notice states, in applicable part: "on

the last day of testimony in the above-captioned matter, Thomas Gangemi, Jr., the President and sole employee of Respondent, admitted that Respondent was liable for the acts and omissions of Joe Russo, a former agent of Respondent. All of the transactions detailed in the complaint in this matter involved Joe Russo." The Notice also states that Produce Distributors, Inc., had already surrendered its PACA license and would not file a brief.

Some of Mr. Gangemi, Jr.'s testimony to which Produce Distributors, Inc.'s Notice, filed June 16, 1998, may refer includes, "my opinion is that Joe Russo is the worst scourge on the produce industry and has victimized both Jay Brokers and Thomas Gangemi and Produce Distributors" (Tr. Vol. II at 24) and "I surrendered my license in contrition on March 1 and I say I've been victimized by Joe Russo, but it was my error -- my error -- my error in judgment in bringing him into my organization. I don't know what else to say." (Tr. Vol. II at 31.)

After Mr. Gangemi made that statement, the ALJ stated, "Let me say that I appreciate your accepting responsibility for these actions, even though you've testified that directly, you were not involved, but you accept responsibility for the actions of your agent and employee. I think that's very commendable on your part." Mr. Gangemi replied, "Well, I can't avoid it. Legally, I'm responsible. He's my employee." (Tr. Vol. II at 31.)

Produce Distributors, Inc., presented no defense with respect to either the issue of its violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint, or the issue of its relationship with Joseph Russo. However, Irene T. Russo

denied that the alleged violations took place and denied that she was involved in a joint venture with Produce Distributors, Inc., in connection with the alleged violations.

Included in Complainant's evidence are 41 exhibits, each containing documents with regard to one transaction in which Respondents are alleged to have violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CX 16-39, CX 41-56, CX 58). Complainant's investigator, Roberta L. Rucker, marked on the reverse side of many of the documents, the office from which the documents were obtained. In the interest of avoiding redundancy, Complainant presented detailed testimony by Ms. Rucker and other witnesses regarding the documents in six prototype transactions (CX 16, CX 28, CX 33, CX 36, CX 38, CX 41), and Complainant represented that the violations in the other 35 transactions were similar to those in one or more of the prototype transactions (Tr. 110). Respondents presented no evidence to dispute Complainant's contention that the other 35 transactions evidence conduct similar to that in one or more of the six prototype transactions. I have examined the exhibits in connection with the 35 other transactions and find that they support the conclusion that Respondents violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) in these 35 transactions in a manner similar to Respondents' violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) in the six prototype transactions.

Joseph Russo represented Produce Distributors, Inc., in all 41 of these transactions. Joseph Russo is married to Irene T. Russo (Tr. 800-01). Irene T. Russo operated a produce business under the name of "Jay Brokers" from an office in her home (Tr. 799-800). Joseph Russo worked on the Produce Distributors, Inc., transactions at

issue from this home office (Tr. 800-01). Irene T. Russo also assisted Joseph Russo in his work in these transactions, and Irene T. Russo participated in these transactions. Forty percent of the profits from these transactions was paid by Produce Distributors, Inc., to Jay Brokers, after deducting from the 40 percent, salaries and employer expenses in connection with listing Joseph Russo in Produce Distributors, Inc.'s records as a Produce Distributors, Inc., employee (Tr. 51-53).

In all of the 41 transactions, Produce Distributors, Inc., represented by Joseph Russo, sold produce on a consignment basis on behalf of consignors. Thus, Produce Distributors, Inc., acted in a fiduciary relationship as agent for the consignors. Based upon falsified documents that originated from the Russos' office and based upon memoranda, faxes, and telephone calls from Joseph Russo and Irene T. Russo, the consignors were led to believe that less money was received for the produce than was actually received, and based upon these falsified documents and representations, the consignors agreed to accept less money than Produce Distributors, Inc., actually received. The differences between the amounts of money that Produce Distributors, Inc., actually received and the smaller amounts of money that were misrepresented to the consignors as having been received were considered to be profits by Produce Distributors, Inc., and these "profits" were divided 60 percent to Produce Distributors, Inc., and 40 percent to Jay Brokers.

The six prototype transactions are as follows:

**1. The Isaak Brothers Transaction (CX 16)**

This transaction involved 1,716 cartons of peaches sold by Produce Distributors, Inc., for Isaak Brothers on June 24, 1993 (CX 16 at 1). The produce was resold by Produce Distributors, Inc., to B.T. Produce Co., Inc. (CX 16 at 15). Jay Brokers submitted a copy of an account of sales to Isaak Brothers from B.T. Produce Co., Inc., on July 30, 1993, that showed that only 33 of the 1,716 cartons were sold and that the other 1,683 cartons were dumped (Tr. 112; CX 16 at 15). The gross proceeds for the sale were reported as being \$352 and the cost was shown to exceed the proceeds for a loss of \$13,629 (CX 16 at 15). On September 20, 1993, Jay Brokers faxed a memorandum signed by "Irene" to Lee Isaak requesting that the file be closed at "zero billing" and "zero return," based upon the information provided in the account of sales forwarded to Isaak Brothers by Jay Brokers. Based upon this representation, Lee Isaak agreed (Tr. 111; CX 16 at 7).

The documents in B.T. Produce Co., Inc.'s records indicate that Produce Distributors, Inc., invoiced B.T. Produce Co., Inc., for \$9,106 for the produce, an amount that was subsequently reduced to \$5,674 (Tr. 113; CX 16 at 25, 32). Isaak Brothers was not paid any of this money. The \$5,674 was apportioned between Produce Distributors, Inc., and Jay Brokers on a 60/40 basis (Tr. 116-17, 122; CX 16 at 46). "J/V" is noted on the jacket of Produce Distributors, Inc.'s file next to "Jay B" and "Produce" which Taryn Hertzberg, Produce Distributors, Inc.'s bookkeeper, explained represented payments under a joint venture agreement (Tr. 117; CX 16 at 46). Produce Distributors, Inc.'s records indicate that Jay Brokers was paid \$2,269.60 (40 per centum of the \$5,674 paid

by B.T. Produce Co., Inc.) and Produce Distributors, Inc., was paid \$3,404.40 (60 per centum of the \$5,674 paid by B.T. Produce Co., Inc.) (CX 16 at 46).

Lee Isaak testified at the hearing that his decision to authorize closing the file with no proceeds returned to Isaak Brothers was based upon representations made to him by Irene T. Russo and Joseph Russo that there were negative net proceeds from the sale of the produce and that more than 95 percent of the produce was dumped. Mr. Isaak stated that he was unaware that B.T. Produce Co., Inc., paid Produce Distributors, Inc., \$5,674 for the same produce. (Tr. 633-38.)

## **2. The Sun Pacific Transaction (CX 28)**

This transaction involved the sale of grapes by Produce Distributors, Inc., for Sun Pacific Enterprises on September 22, 1994, for a contract price of \$12,841.50 (CX 28 at 8). The produce was resold by Produce Distributors, Inc., to L&P Fruit Corporation and was inspected upon arrival (CX 28 at 10-11). Produce Distributors, Inc., invoiced L&P Fruit Corporation for \$6,632.90 for the produce (Tr. 140-41; CX 28 at 18). Jay Brokers' records included a copy of another account of sales on L&P Fruit Corporation's letterhead reflecting net proceeds of \$3,432 (Tr. 144-45; CX 28 at 26). In response to a memorandum signed by "Irene" to Sun Pacific Enterprises requesting authorization to accept a reduced price for the produce, Sun Pacific Enterprises agreed (Tr. 137-38; CX 28 at 2, 23, 26).

The jacket of Produce Distributors, Inc.'s file shows that Produce Distributors, Inc., received \$6,632.90 from L&P Fruit Corporation, but remitted \$3,173.50 to Sun

Pacific Enterprises and allocated the difference between these amounts of \$3,459.40 between "Jay B" and "Produce" as profit on a 60/40 basis (CX 28 at 28).

**3. The John Simon Produce Transaction (CX 33)**

John Simon Produce Co. sold 2,100 watermelons through Produce Distributors, Inc., at the original contract price of \$5,510.75 on May 13, 1994 (CX 33 at 3, 20). The produce was sold to Frankie Boy Produce Corporation. John Simon Produce Co. received a typewritten account of sales from Frankie Boy Produce Corporation indicating gross proceeds of \$1,864.74 minus a deduction for "COMM. & Repack" of \$511.66, resulting in net proceeds of \$1,353.08 (CX 33 at 13). John Simon Produce Co. issued an adjusted invoice for \$1,353.08 (CX 33 at 20-22). Jay Brokers' records contain a copy of the adjusted invoice for \$1,353.08. However, its copy of the adjusted invoice contains a note from "Irene" instructing that Frankie Boy Produce Corporation be billed \$1,864.74 (CX 33 at 30), and Frankie Boy Produce Corporation paid Produce Distributors, Inc., \$1,864.74 (Tr. 159; CX 33 at 25). Ms. Rucker found a blank copy of Frankie Boy Produce Corporation's letterhead with the same fax imprint contained in the typewritten account of sales found in Jay Brokers' records for this transaction (CX 33 at 37-38; Tr. 160-62). It appears that Frankie Boy Produce Corporation's account was copied on the blank letterhead and used to create the false typewritten account of sales that was submitted to John Simon Produce Co. (Tr. 162). Thus, the false account represented to John Simon Produce Co. that Produce Distributors, Inc., received \$1,353.08, whereas Produce Distributors, Inc., actually received \$1,864.74. The \$511.66 was split between "Jay B" and "Produce" on a 60/40 basis. (Tr. 163-64; CX 33 at 39, 41-42.) The amount

of \$204.66, which corresponds to 40 per centum of the \$511.66, is the same amount reflected on Produce Distributors, Inc.'s invoice number 263900 and check number 1453, which Produce Distributors, Inc., issued to Jay Brokers on August 17, 1994 (Tr. 165-68; CX 33 at 44).

Theresa Llorente, a representative of John Simon Produce Co. who negotiated the transaction, testified that Joseph Russo told her that there were charges for commission and to repack the watermelons (Tr. 472). Ms. Llorente stated that she would have expected that Frankie Boy Produce Corporation might have commission and repack charges; however, she was unaware that Produce Distributors, Inc., and Jay Brokers divided the money that they falsely represented were commission and repack charges (Tr. 493-94, 497-98; CX 33 at 39).

#### **4. The Sun World Transaction (CX 36)**

On July 15, 1994, Sun World sold 2,979 cartons of grapefruit through Produce Distributors, Inc., for an original contract price of \$13,518.37 (CX 36 at 1-2). Produce Distributors, Inc., resold the fruit to L&P Fruit Corporation, and the produce was inspected upon arrival (CX 36 at 4-5). Sun World received a faxed copy of an account of sales for the produce reflecting gross proceeds of \$13,768, deductions of \$11,698.55, and net proceeds of \$2,069.45 (Tr. 172, 521; CX 36 at 11-12). Based upon Produce Distributors, Inc.'s representations that these were the net proceeds from the sales, Sun World issued a corrected invoice to Produce Distributors, Inc., for \$2,069.45 (Tr. 172, 521-22; CX 36 at 13) and another corrected invoice for \$2,055.51 (CX 33 at 82).

L&P Fruit Corporation's records reveal a different account of sales which show net proceeds of \$8,023.45 (Tr. 174-75; CX 36 at 65-66).

Jay Brokers' records contain copies of these two different accounts of sales (Tr. 177-79; CX 36 at 75-78). Another irregularity was that L&P Fruit Corporation's records contain an invoice from Produce Distributors, Inc., to L&P Fruit Corporation billing L&P Fruit Corporation \$8,805.26, which was \$781.81 more than the \$8,023.45 reflected on the account of sales (Tr. 176; CX 36 at 67). L&P Fruit Corporation paid \$8,805.26 to Produce Distributors, Inc., and Produce Distributors, Inc., remitted \$2,055.51 to Sun World. Produce Distributors, Inc., and Jay Brokers divided the difference on a 60/40 basis. (Tr. 181; CX 36 at 79.)

#### **5. The Sun World Transaction (CX 38)**

Sun World sold 3,040 cartons of grapefruit to Produce Distributors, Inc., at the original contract price of \$15,814.70 on or about July 28, 1994. Produce Distributors, Inc., resold the produce to L&P Fruit Corporation. (CX 38 at 1-2.) The produce was inspected upon arrival at L&P Fruit Corporation (CX 38 at 5-6). An account of sales on L&P Fruit Corporation letterhead was submitted to Sun World by Jay Brokers reflecting net proceeds of \$1,588.35 (Tr. 215-16; CX 38 at 7-8). Based upon this account of sales, Sun World issued a corrected invoice for \$1,695.50 (CX 38 at 17). Sun World received a check from Produce Distributors, Inc., dated September 7, 1994, which included \$1,695.50 for the invoice in question (Tr. 216; CX 38 at 18). A copy of an account of sales obtained from L&P Fruit Corporation's records differed from the account of sales submitted to Sun World by Jay Brokers. The account in L&P Fruit Corporation's

records shows net proceeds of \$4,551.35, instead of the \$1,588.35 reported to Sun World (Tr. 217-19; CX 38 at 17-18, 35-36). Jay Brokers' records reveal copies of two different accounts of sales on L&P Fruit Corporation's letterhead for the same produce, one showing net proceeds of \$1,588.35 and the other showing net proceeds of \$4,551.35 (Tr. 220-21; CX 38 at 43-46). Produce Distributors, Inc.'s records show that finally L&P Fruit Corporation was invoiced and paid \$5,367, but that Sun World was paid only \$1,695.50. The difference of \$3,671.50 was divided between Produce Distributors, Inc., and Jay Brokers on a 60/40 basis. (Tr. 224; CX 38 at 47-48.) A copy of a stub of a check issued by Produce Distributors, Inc., to Jay Brokers on November 9, 1994, contains an amount which exactly matches the 40 per centum allocated to Jay Brokers by Produce Distributors, Inc., for this transaction (CX 38 at 54).

**6. The Pacific International Marketing Transaction (CX 41)**

This transaction involves the sale of 1,716 cartons of grapes by Pacific International Marketing to Produce Distributors, Inc., at the original contract price of \$25,959.30. The produce was sold to B.T. Produce, Co., Inc. (CX 41 at 1). The produce was inspected on July 7, 1994, and reinspected on July 8, 1994 (CX 41 at 11-12). The July 8, 1994, inspection report submitted to Pacific International Marketing shows a total of 29 percent average defects, including 8 percent serious damage of which 3 percent represented decay (CX 41 at 12). A copy of the July 8, 1994, inspection report was not found in B.T. Produce, Co., Inc.'s records. A slightly different version of the July 8, 1994, inspection report was found in Jay Brokers' records. The version of the July 8, 1994, inspection report found in Jay Brokers' records shows 27 per centum average

defects, including 6 per centum serious damage of which only 1 per centum was for decay (CX 41 at 38). A copy of the inspection report obtained from USDA Inspection Service indicates that the inspection report submitted to Pacific International Marketing had been altered in three places (Tr. 183-86; CX 41 at 47). B.T. Produce, Co., Inc.'s records contain a copy of a July 7, 1994, inspection report, but not the July 8, 1994, inspection report that had been altered (CX 41 at 33).

The jacket of Produce Distributors, Inc.'s file shows that B.T. Produce, Co., Inc., paid \$13,932.50 to Produce Distributors, Inc., for the produce, but Produce Distributors, Inc., remitted only \$13,003.50 to Pacific International Marketing and allocated the difference of \$929 on a 60/40 basis; \$557.40 to Produce Distributors, Inc., and \$371.60 to Jay Brokers (Tr. 198; CX 41 at 40).

The six prototype transactions and the other 35 transactions provide overwhelming evidence that Respondents Irene T. Russo, d/b/a Jay Brokers, and Produce Distributors, Inc., made false and misleading statements for a fraudulent purpose and that they failed to truly and accurately account to consignors for the net proceeds resulting from the sale of their produce on a consignment basis.

Ms. Rucker's undisputed testimony was that the usual and customary fee paid by consignors to a "middle man" is 25 cents per carton (Tr. 132-33). However, after deducting such usual and customary fees, Respondents received approximately \$43,000 in "profits" as a result of their misrepresentations to their consignors.

Respondents clearly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The representatives of the five produce consignors who testified confirmed that they had absolutely no knowledge that the actual net proceeds were not accurately reported to them and that they relied upon Produce Distributors, Inc.'s representations in agreeing to accept less money than was actually received by Produce Distributors, Inc. All of these representatives testified that Produce Distributors, Inc., had taken advantage of their firms in the fraudulent transactions and that their growers had been deprived of money that rightfully belonged to them (e.g. Tr. 387-90, 407-09, 493-94, 498-99, 534-36, 559-65, 573-77, 630-32, 635-36, 651-53).

While neither Joseph Russo nor Irene T. Russo admit that they altered the accounts of sales or the inspection certificates, the majority of the altered documents were contained in Jay Brokers' files; and Joseph Russo and Irene T. Russo were actively involved in negotiating the transactions for Produce Distributors, Inc., and in handling the paperwork. I conclude that Joseph Russo or Irene T. Russo or both Joseph Russo and Irene Russo, as agents for Produce Distributors, Inc., intentionally altered the accounts of sales and inspection certificates.

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires that false and misleading statements be made for a "fraudulent purpose." The fraudulent purpose was to mislead Respondents' consignors to accept lesser amounts of money than Produce Distributors, Inc., received.

Respondents knew, or should have known, that these fraudulent actions violated the PACA. Respondents have been active in the produce industry as PACA licensees for many years (Tr. 800; CX 1, CX 2).

Produce Distributors, Inc., is responsible for the acts of Joseph Russo and Irene T. Russo. Produce Distributors, Inc., hired Joseph Russo as its agent and "employee" and allowed Joseph Russo to use its company name and credit rating in connection with these transactions. Produce Distributors, Inc., also received and retained substantial profits from the fraudulent transactions. Produce Distributors, Inc., cannot escape liability by claiming that it never questioned the records submitted to it by Joseph and Irene T. Russo. Produce Distributors, Inc., had an obligation to ensure that its actions and transactions conformed with the requirements of the PACA.

These violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are serious because they involve breaches of fiduciary duty by an agent to its principal. Produce Distributors, Inc., as an agent, owed its consignors a high degree of care, honesty, and loyalty. *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 145-46, 170 (1987), *aff'd*, 831 F.2d 403 (2d Cir. 1987); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732 (1978); *In re Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 695-96, 701 (1965), *aff'd*, 364 F.2d 889 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

Respondents' violations were willful, repeated, and flagrant. A violation is willful "if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements." *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 629 (1996). Joseph Russo and Irene T. Russo, as Produce Distributors, Inc.'s agents, intentionally altered accounts of sales and inspection certificates, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and they also acted with careless disregard of PACA's requirements.

Repeated violations are those occurring more than once. *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1640 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978). Respondents violated the PACA in 41 separate transactions. Respondents' violations were flagrant because of the number of violations, the amount of money involved, and the length of time during which the violations occurred.

## II. The Joint Venture

There is no question in my mind that Irene T. Russo participated in a joint venture with Produce Distributors, Inc., in connection with the fraudulent transactions at issue.

Irene T. Russo actively participated in the transactions and Jay Brokers received 40 per centum of Produce Distributors, Inc.'s fraudulent gains after Produce Distributors, Inc., deducted its expenses of listing Joseph Russo as a Produce Distributors, Inc., employee.

Many of the transaction files contain copies of notes written by Irene T. Russo to the participants, often asking suppliers to accept less money for their produce based upon falsified documents (e.g., CX 16 at 7, CX 18 at 7, CX 24 at 20, CX 26 at 17, CX 29 at 5, CX 35 at 3, CX 43 at 5, CX 45 at 4, CX 48 at 6).

At the bottom of the jackets of Produce Distributors, Inc.'s files for the relevant transactions are the letters "J/V" which stand for "joint venture." Adjacent to the letters "J/V" are written "Jay B" which stands for "Jay Brokers" and "Produce" which stands for "Produce Distributors, Inc." Adjacent to "Jay B" is an amount equal to 40 per centum of

Produce Distributors, Inc.'s profit in the transaction and adjacent to "Produce" is an amount equal to 60 per centum of the profit (e.g., CX 16 at 46, CX 28 at 28, CX 33 at 39, CX 43 at 24, CX 55 at 44).

Other relevant documentary evidence includes a balance sheet for Produce Distributors, Inc., as of December 31, 1993, and December 31, 1994. The balance sheet was reconstructed by Ms. Rucker who examined it, but was not permitted to photocopy it. Ms. Rucker testified that the balance sheet lists payables in connection with a joint venture to either "JB" or "Jay Brokers" (CX 7 at 2; Tr. 70-73). Produce Distributors, Inc.'s aged payables ledger as of May 24, 1995, also lists payables to "JB" or "Jay Brokers" (CX 10 at 3-4; Tr. 87-88). Additionally, Produce Distributors, Inc.'s check register and canceled checks show payments by Produce Distributors, Inc., to Jay Brokers in amounts corresponding to Jay Brokers' share of the joint venture profits in various transactions at issue in this proceeding (CX 15, CX 59; Tr. 95-98).

Several representatives of firms involved in the transactions at issue in this proceeding testified. Some testified that they believed that Irene T. Russo was actively involved in the transactions; others testified that they did not have that impression. Thus, Susan Neill Lucas, president of Susan Neill Fresh Fruit Company, testified that she received faxed messages signed "Irene" originating from Jay Brokers (Tr. 387, 410; CX 18 at 7). Theresa Llorente, a sales associate for John Simon Produce Company, also testified about significant dealings with Irene T. Russo (CX 33 at 33; Tr. 496). Lee Isaac, a fruit broker for Isaac Brothers, testified that he dealt with Joseph Russo at times

and with Irene T. Russo at other times, and he believed that Irene T. Russo worked for Produce Distributors, Inc. (Tr. 639-40).

However, Bernadine Andrade, a product manager for Sun World, stated that her conversations with Irene T. Russo about the transactions of her firm were not significant (Tr. 517). Similarly, Corky Meyers, Frank Porcaro, and John Kohl, other industry representatives, testified that they were not aware of any such joint venture (Tr. 609-11, 754-55, 870).

I do not accord much weight to the impressions of these representatives because their testimonies are conflicting and these individuals would not necessarily know whether or not Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers, were involved in a joint venture.

I attach more weight to the abundance of documents in the transaction files signed by Irene T. Russo, to Produce Distributors, Inc.'s records that show the joint venture, and to the testimony of several employees and representatives of Produce Distributors, Inc., who were in a position to know about the joint venture. These individuals believed that there was such a joint venture.

Carol Dowe, Produce Distributors, Inc.'s billing clerk, testified that she believed that there was such a joint venture and that Produce Distributors, Inc.'s bookkeeper, Taryn Hertzberg, told her to record sales handled by Joseph Russo as a joint venture by Produce Distributors, Inc., and Jay Brokers in Produce Distributors, Inc.'s books and records. Ms. Dowe testified that in Produce Distributors, Inc.'s records, "J/V" meant "joint venture" and "JB" meant "Jay Brokers." She also testified about conversations that

she had with Irene T. Russo regarding the transactions (Tr. 974, 976, 978-82, 984-88, 991, 996).

Ms. Rucker testified that Taryn Hertzberg, Produce Distributors, Inc.'s office manager, also described the transactions as being joint venture transactions (Tr. 41). Ms. Hertzberg told Ms. Rucker that "J/V" in Produce Distributors, Inc.'s books stood for "joint venture" (Tr. 117). Ms. Hertzberg also told Ms. Rucker that Produce Distributors, Inc., maintained a ledger which recorded the balance owed to Jay Brokers for its share of the profits in the transactions (Tr. 51). Ms. Hertzberg also confirmed to Ms. Rucker that Joseph Russo's gross salary and Produce Distributors, Inc.'s expenses of listing him as an employee were deducted from the 40 percent that was paid to Jay Brokers (Tr. 51-52). Although this testimony is hearsay, hearsay testimony is admissible in these proceedings, and I accord significant weight to this testimony because Respondents could have called Ms. Hertzberg to contradict this testimony, but did not do so.

Thomas Gangemi, III, the son of Produce Distributors, Inc.'s president who had worked as a salesman for Produce Distributors, Inc., testified that, based upon his conversations with his father and based upon Produce Distributors, Inc.'s paperwork, he also concluded that Produce Distributors, Inc., was involved in a joint venture with Jay Brokers (Tr. 1034), as follows:

[MR. OMANSKY:]

Q. Did you have any joint venture deals with any other sales people?

[MR. THOMAS GANGEMI, III:]

A. No. Just, you know, the Russos.

Q. Okay. And did Irene ever say she had a joint venture with Produce Distributors?

A. I don't recall.

Q. And any information you did have about any possible or alleged joint venture, that all came from your father?

A. It all came the day they came in the office. And it was explained this is Joey and Irene Russo; they're going to be working for us on a joint venture deal. That was it.

Q. Well, who explained that to you?

A. My father.

Q. And was Irene present when this --

A. Yes, they were both present.

Tr. 1045.

Mr. Gangemi, III, further testified regarding the relationship between Irene T. and Joseph Russo, as follows:

They're, you know, a team. It was -- it always was a team to me, the Russos. It was never, you know, one or the other. It was just the Russos.

Tr. 1046.

Paul Martucci, Produce Distributors, Inc.'s certified public accountant, also testified that Produce Distributors, Inc.'s employees told him that Produce Distributors, Inc., and Jay Brokers were involved in a joint venture (Tr. 946-50). He understood that there was no difference between Irene T. Russo and Joseph Russo in connection with the work performed for Produce Distributors, Inc. (Tr. 962-63). Mr. Martucci confirmed that in Produce Distributors, Inc.'s records, any expenses to Produce Distributors, Inc.,

that resulted from listing Joseph Russo as a Produce Distributors, Inc., employee were offset against payments made by Produce Distributors, Inc., to Jay Brokers (Tr. 959-61).

The final two witnesses were Produce Distributors, Inc.'s president, Thomas Gangemi, Jr., and Irene T. Russo. Their testimonies are important.

Mr. Gangemi, Jr., testified that he was involved in a joint venture with Joseph Russo and not with Irene T. Russo with regard to the transactions at issue in this proceeding; that Joseph Russo requested that Joseph Russo be listed on Produce Distributors, Inc.'s books as an employee; and that Joseph Russo requested that his 40 percent share of the profits be paid to Jay Brokers after Produce Distributors, Inc., deducted Joseph Russo's gross salary and Produce Distributors, Inc.'s employee-related expenses (Tr. Vol. II at 6-8, 33). Mr. Gangemi, Jr., stated that if Ms. Rucker understood him to say otherwise, "it was inaccurate" (Tr. Vol. II at 6, 14). When asked why his employees assumed that there was such a joint venture, Mr. Gangemi, Jr., stated:

. . . That could have been supported by the constant messages they received signed Irene and the communications, telephone communications, you know. They could have assumed that.

Tr. Vol. II at 16.

Irene T. Russo's testimony was frequently incredible. She stated that she wrote and signed the many notes contained in the transaction files, "[b]ecause my husband has the most horrible handwriting in the world, and nobody could read it" (Tr. 804). When questioned why Ms. Dowe claimed that, on numerous occasions, Irene T. Russo was the one speaking to Ms. Dowe and not Joseph Russo, Ms. Russo said that she was doing this to help her husband (Tr. 1055). I find unbelievable that Ms. Russo, who testified that

she had a produce business of her own, would be so deeply involved in consistently renegotiating the transactions at issue merely to help her husband because he had poor handwriting.

When asked if Joseph Russo ever mentioned the 60/40 split to her, Ms. Russo again answered in a manner that strained credibility. She answered:

He said he had -- he was working for Buddy [Thomas Gangemi, Jr.] and that him and Buddy were -- you know, they set up a deal and that this is -- you know, this is what it was.

Tr. 1060.

Ms. Russo's explanation of why Jay Brokers was receiving amounts of money "coincidentally" equal to 40 per centum of the profits in the transactions in question, after Mr. Russo's salary and salary expenses were deducted, was even more incredible. She explained that these payments by Produce Distributors, Inc., to Jay Brokers were to cover office expenses incurred by Joseph Russo for sharing her home office, such as the use of the telephone and fax machine (Tr. 1065-68). However, she stated that there was no agreement as to how much would be paid for these expenses and she had no idea how any such amount was to be determined (Tr. 1064-65). Furthermore, she did not know whether she was to submit any documentation to anyone for any such expenses (Tr. 1064).

When Ms. Russo was asked to explain a check that Jay Brokers received from Produce Distributors, Inc., for \$8,200, she could not explain what use of telephones, fax machine, or office expenses this covered. She answered:

Well, I know I was complaining about the phone bill and, you know, I had heat, I had the -- and I told him, I said it's not enough. I told my

husband it's not enough money to compensate for all this use of phones and the fax machine. And I said we need a little extra. So I know he spoke to Buddy [Thomas Gangemi, Jr]. And he said, please, you know, help us out; we need a little extra into the -- to be paid. And Buddy was always there.

Tr. 1067-68.

When asked how much her telephone bills increased as a result of the use of Jay Brokers' telephones for the Produce Distributors, Inc., work, Ms. Russo again did not make sense. Her answer:

They increased on a large -- maybe \$500.00 to \$600.00 higher than -- maybe up to a \$1,000.00 sometimes. Joe was constantly on the phone. I mean, he would be calling long distance, hang up and redial the number again and hit the wrong number and redial it again.

Tr. 1103.

When asked why the checks were sent erratically rather than being paid as bills were incurred, Ms. Russo answered:

Well, like I said, you know, I told Joe if the funds were running low, we need to be reimbursed back up on these expenses. So --

Tr. 1103.

The weight of the evidence overwhelmingly supports the conclusion that Irene T. Russo, d/b/a Jay Brokers, was involved in a joint venture with Produce Distributors, Inc., with regard to the transactions at issue. Ms. Russo actively participated in the transactions, and she received a share of the profits from the transactions. The exhibits show Ms. Russo's active participation and correlate the payments to Jay Brokers' share of the profits in the transactions at issue. Key Produce Distributors, Inc., employees, Ms. Dowe and Ms. Hertzberg; Produce Distributors, Inc.'s certified public accountant, Mr.

Martucci; and Thomas Gangemi, III, the son of Produce Distributors, Inc.'s president, all concluded that there was such a joint venture. Produce Distributors, Inc.'s records labelled the transactions as a joint venture between Produce Distributors, Inc., and Jay Brokers. The testimony of Thomas Gangemi, Jr., is not inconsistent with the existence of such a joint venture. He testified that he had such a joint venture agreement with Joseph Russo and that Joseph Russo requested that payment be made to Irene T. Russo's company. As stated in this Decision and Order, *supra*, Ms. Russo's explanation that the payments to Jay Brokers are not payments of Jay Brokers' share of the profits, but are reimbursement for office expenses, is not credible. The large amounts of the payments would seem absurdly high as a reimbursement for telephone bills. Furthermore, Ms. Russo was unable to quantify such expenses, there was no agreement regarding such expenses, and there were no bills or documentation for such expenses. Thus, in view of the active involvement of Irene T. Russo in the transactions in question and the compensation which she received, I conclude that there was a joint venture between Respondents, as alleged in the Complaint.

### **III. The Issue of Expanding the Investigation**

Section 6(c) of the PACA provides, as follows:

**§ 499f. Complaints, written notifications, and investigations**

.....

**(c) Investigation of complaints and notifications**

**(1) Commencing or expanding an investigation**

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under

subsection (a) of this section or a written notification made under subsection (b) of this section, the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

**(2) Issuance of complaint by Secretary; process**

In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued. The Secretary shall have the complaint served by registered mail or certified mail or otherwise on the person concerned and afford such person an opportunity for a hearing thereon before a duly authorized examiner of the Secretary in any place in which the subject of the complaint is engaged in business. . . .

**(3) Special notification requirements for certain investigations**

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) of this section or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall promptly notify the subject of the investigation whenever the Secretary terminates the investigation.

The investigation in this matter was initiated in May 1995. Produce Distributors, Inc., was notified of the investigation on May 24, 1995 (Tr. 292). In June 1995, Complainant expanded the time period of the investigation from an 8-month time period to a 2-year time period and also expanded the investigation to include Jay Brokers (Tr. 46, 322). The investigation was also expanded in March 1996 and in April 1997 (Tr. 287-89). When the investigation was expanded to include Jay Brokers and each time the scope of the investigation was expanded, USDA did not notify Produce Distributors, Inc., or Irene T. Russo, d/b/a Jay Brokers, in writing, of the expansion of the investigation.

Respondent Irene T. Russo, d/b/a Jay Brokers, contends that because Complainant failed to notify Respondents, in writing, that the investigation had been expanded, Complainant failed to comply with section 6(c)(3) of the PACA (7 U.S.C. § 499f(c)(3)), and therefore, the Complaint must be dismissed.

However, section 6(c) of the PACA was not amended to require notification of investigation until November 15, 1995,<sup>4</sup> after the investigation of Respondents was begun. Therefore, in accordance with *In re Allred's Produce*, 56 Agric. Dec. 1884, 1917 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998), I find that, since the beginning of this investigation preceded the enactment of the November 1995 amendment of section 6(c) of the PACA, the requirement for written notification of the expansion of the investigation does not apply to the investigation at issue in this proceeding.

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<sup>4</sup>Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, § 7(b), 109 Stat. 424, 428-29.

#### IV. Miscellaneous Comments

Irene T. Russo, d/b/a Jay Brokers, argues that New York State partnership law should be applied with respect to the joint venture (Respondent Russo's Reply Brief at 33-36). However, Complainant alleges that a joint venture was involved and not a partnership. Therefore, the definitions in the New York State partnership law are inapplicable.

I also disagree with Respondent Irene T. Russo's arguments that there cannot be a joint venture "[a]bsent [a] 'holding out [of the joint venture] to third parties' (the general public)" (Respondent Russo's Reply Brief at 38). Irene T. Russo, d/b/a Jay Brokers, cites no authority for this proposition and I have found no such authority. A joint venture can be entered into and effectuated without publicizing the joint venture; there is no requirement that a joint venture be publicized.<sup>5</sup>

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<sup>5</sup>Courts that have addressed the elements of a joint venture have not included as an element of a joint venture that it must be publicized either to third persons or to the general public, as Irene T. Russo contends. See, e.g., *United States v. USX Corp.*, 68 F.3d 811, 826 (3d Cir. 1995) (stating that the *sine qua non* of a joint venture is a contract, express or implied, between the parties; other requisite elements of a joint venture are: (1) the contribution by each party of money, property, effort, knowledge, or some other asset to a common undertaking, (2) the existence of a joint property interest in the subject matter of the venture, (3) the right of mutual control or management over the venture, and (4) an agreement to share profits or losses of the venture); *Itel Containers Int'l Corp. v. Atlantrafik Express Service, Ltd.*, 909 F.2d 698, 701 (2d Cir. 1990) (stating that in order to form a joint venture: (1) two or more persons must enter into a specific agreement to carry on an enterprise for profit; (2) their agreement must evidence their intent to be joint venturers; (3) each must make a contribution of property, financing, skill, knowledge, or effort; (4) each must have some degree of joint control over the venture; and (5) there must be provision for the sharing of both profits and losses); *Richardson v. Walsh Constr. Co.*, 334 F.2d 334, 336 (3d Cir. 1964) (stating that a joint venture is an association of persons or corporations who by contract, express or implied, agree to engage in a common enterprise for their mutual profit; the essential elements of  
(continued...)

Complainant does not need to prove that the altered produce records were actually altered by Irene T. Russo herself. The evidence leads to the conclusion that the

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<sup>5</sup>(...continued)

a joint venture are: (a) a joint proprietary interest in, and a right to mutual control over, the enterprise; (b) a contribution by each of the parties of capital, materials, services, or knowledge; and (c) a right to participate in the expected profits); *McGhan v. Ebersol*, 608 F. Supp. 277, 282 (S.D.N.Y. 1985) (stating that, under New York law, a joint venture is defined as an association to carry out a single business enterprise for profit; a common enterprise for mutual benefit; or a combination of property, efforts, skill, and judgment in a common undertaking; in order to find a joint venture, the crucial factors to be considered are the intent of the parties, express or implied, whether there was joint control and management of the business, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge); *Sherrier v. Richard*, 564 F. Supp. 448, 457 (S.D.N.Y. 1983) (stating that, under New York law, a joint venture is generally defined as a special combination of two or more persons wherein, through some specific venture, profit is jointly sought without any actual partnership or corporation designation; the crucial factors to be considered are the intent of the parties, express or implied, whether there was joint control and management of the business, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge); *Williams v. Forbes*, 571 N.Y.S.2d 818, 819 (N.Y. App. Div. 1991) (stating that a joint venture is an association of two or more persons to carry out a single business enterprise for a profit, for which purpose they combine their property, money, effects, skill, and knowledge; and indispensable to the creation of a joint venture is sharing in the profits and losses of the business); *Mendelson v. Feinman*, 531 N.Y.S.2d 326, 328 (N.Y. App. Div. 1988) (stating that when determining whether a joint venture exists, the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the company, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge); *Ackerman v. Landes*, 493 N.Y.S.2d 59, 60 (N.Y. App. Div. 1985) (stating that a joint venture is generally defined as a special combination of two or more persons wherein, through some specific venture, profit is jointly sought without any actual partnership or corporation designation; the essential elements are an agreement manifesting the intent of the parties to be associated as joint venturers, a contribution by the coventurers to the joint undertaking (i.e., a combination of property, financial resources, effort, skill, or knowledge), some degree of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses); *Ramirez v. Goldberg*, 439 N.Y.S.2d 959, 961 (N.Y. App. Div. 1981) (stating that when determining whether a joint venture exists, the factors to be considered are the intent of the parties (express or implied), whether there was joint control and management of the business, whether there was sharing of profits and losses, and whether there was a combination of property, skill, or knowledge).

documents were altered at the Russo home office on behalf of Produce Distributors, Inc., and Irene T. Russo was involved in the joint venture with Produce Distributors, Inc., with regard to the transactions at issue in this proceeding.

Irene T. Russo, d/b/a Jay Brokers, also argues that she had no motive to falsify certificates of inspection (Respondent Russo's Brief at 44). Her motive was financial gain.

Irene T. Russo, d/b/a Jay Brokers, argues that a negative inference must be drawn against Complainant because Complainant failed to call Produce Distributors, Inc.'s bookkeeper or office manager, Taryn Hertzberg, as a witness to corroborate statements that Ms. Rucker testified that Ms. Hertzberg made. However, Irene T. Russo, d/b/a Jay Brokers, also failed to call Ms. Hertzberg to contradict such statements.

Additionally, Ms. Rucker did not recant her testimony that Produce Distributors, Inc., was involved in a joint venture with Jay Brokers, as Irene T. Russo, d/b/a Jay Brokers, contends (Respondent Russo's Brief at 16). Furthermore, I found Ms. Rucker to be an extremely credible witness.

#### **V. The Appropriate Sanction**

I agree with Complainant that, given the Respondents' serious breaches of their fiduciary relationships, the alteration of numerous documents, the willfulness, and the repeated and flagrant nature of the violations, the only appropriate sanction is revocation of the PACA licenses of both Respondents, Produce Distributors, Inc., and Irene T. Russo, d/b/a Jay Brokers.

### ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Irene T. Russo, d/b/a Jay Brokers, raises three issues in her Appeal for Reconsideration on Docket No. D-97-0013 [hereinafter Appeal Petition]. First, Irene T. Russo, d/b/a Jay Brokers, contends that the ALJ erroneously found that Jay Brokers and Produce Distributors, Inc., engaged in a joint venture (Appeal Pet. at 1). Specifically, Respondent Irene T. Russo, d/b/a Jay Brokers, contends that the ALJ's credibility determinations, as they relate to testimony concerning the existence of a joint venture between Jay Brokers and Produce Distributors, Inc., are error (Appeal Pet. at 1-2).

I disagree with the contention by Irene T. Russo, d/b/a Jay Brokers, that the ALJ's credibility determinations are error. The Judicial Officer is not bound by an administrative law judge's credibility determinations and may make separate determinations of witnesses' credibility, subject only to court review for substantial evidence. *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983).<sup>6</sup> The

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<sup>6</sup>See also *In re David M. Zimmerman*, 57 Agric. Dec. \_\_\_, slip op. at 21-24 (Nov. 18, 1998); *In re IBP, inc.*, 57 Agric. Dec. \_\_\_, slip op. at 48 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 688 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 90 (1997) (Order Denying Pet. for Recons.); *In re Garelick Farms, Inc.*, 56 Agric. Dec. 37, 78-79 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 245 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 860-61 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 852 (1996); *In re William Joseph Vergis*, 55 Agric. Dec. 148, 159 (1996); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1271-72 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re Kim Bennett*, 52 Agric. Dec. (continued...)

Administrative Procedure Act provides that, on appeal from an administrative law judge's initial decision, the agency has all the powers it would have in making an initial decision, as follows:

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<sup>6</sup>(...continued)

1205, 1206 (1993); *In re Christian King*, 52 Agric. Dec. 1333, 1342 (1993); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 890-93 (1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir.), 1992 WL 14586, *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Rosia Lee Ennes*, 45 Agric. Dec. 540, 548 (1986); *In re Gerald F. Upton*, 44 Agric. Dec. 1936, 1942 (1985); *In re Dane O. Petty*, 43 Agric. Dec. 1406, 1421 (1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986); *In re Eldon Stamper*, 42 Agric. Dec. 20, 30 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992); *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, 1797-98 (1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1500-01 (1981), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21). *See generally* *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (stating that the substantial evidence standard is not modified in any way when the Board and the hearing examiner disagree); *JCC, Inc. v. Commodity Futures Trading Comm'n*, 63 F.3d 1557, 1566 (11th Cir. 1995) (stating that agencies have authority to make independent credibility determinations without the opportunity to view witnesses firsthand and are not bound by an administrative law judge's credibility findings); *Dupuis v. Secretary of Health and Human Services*, 869 F.2d 622, 623 (1st Cir. 1989) (*per curiam*) (stating that while considerable deference is owed to credibility findings by an administrative law judge, the Appeals Council has authority to reject such credibility findings); *Pennzoil v. Federal Energy Regulatory Comm'n*, 789 F.2d 1128, 1135 (5th Cir. 1986) (stating that the Commission is not strictly bound by the credibility determinations of an administrative law judge); *Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) (stating that the Board has the authority to make credibility determinations in the first instance and may even disagree with a trial examiner's finding on credibility); 3 Kenneth C. Davis, *Administrative Law Treatise* § 17:16 (1980 & Supp. 1989) (stating that the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses).

**§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

.....

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

5 U.S.C. § 557(b).

Moreover, the Attorney General's Manual on the Administrative Procedure Act describes the authority of the agency on review of an initial or recommended decision, as follows:

*Appeals and review. . . .*

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision—as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. See *National Labor Relations Board v. Elkland Leather Co.*, 114 F.2d 221, 225 (C.C.A. 3, 1940), certiorari denied, 311 U.S. 705.

Attorney General's Manual on the Administrative Procedure Act 83 (1947).

However, the consistent practice of the Judicial Officer is to give great weight to the findings by, and particularly the credibility determinations of, administrative law

judges, since they have the opportunity to see and hear witnesses testify.<sup>7</sup> The ALJ explained in great detail his reasons for his credibility determinations regarding the testimony concerning the existence of a joint venture between Produce Distributors, Inc., and Jay Brokers (Initial Decision and Order at 14-21). The record supports the ALJ's credibility determinations, and I do not find that the ALJ erred.

Second, Irene T. Russo, d/b/a Jay Brokers, contends that the ALJ erred by finding that she was motivated to violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) by financial gain (Appeal Pet. at 2).

The ALJ does address Irene T. Russo's motive for her violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), as follows:

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<sup>7</sup>*In re David M. Zimmerman*, 57 Agric. Dec. \_\_\_, slip op. at 23-24 (Nov. 18, 1998); *In re IBP, inc.*, 57 Agric. Dec. \_\_\_, slip op. at 47 (July 31, 1998), *appeal docketed*, No. 98-3104 (8th Cir. Aug. 12, 1998); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 689 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1510 (1997), *appeal docketed*, No. 98-1155-JTM (D. Kan. 1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1364-65 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 89 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1229 (1996), *aff'd*, 151 F.3d 735 (7th Cir. 1998); *In re Floyd Stanley White*, 47 Agric. Dec. 229, 279 (1988), *aff'd per curiam*, 865 F.2d 262, 1988 WL 133292 (6th Cir. 1988); *In re King Meat Packing Co.*, 40 Agric. Dec. 552, 553 (1981); *In re Mr. & Mrs. Richard L. Thornton*, 38 Agric. Dec. 1425, 1426 (1979) (Remand Order); *In re Steve Beech*, 37 Agric. Dec. 869, 871-72 (1978); *In re Unionville Sales Co.*, 38 Agric. Dec. 1207, 1208-09 (1979) (Remand Order); *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1736 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1979); *In re Edward Whaley*, 35 Agric. Dec. 1519, 1521 (1976); *In re Dr. Joe Davis*, 35 Agric. Dec. 538, 539 (1976); *In re American Commodity Brokers, Inc.*, 32 Agric. Dec. 1765, 1772 (1973); *In re Cardwell Dishmon*, 31 Agric. Dec. 1002, 1004 (1972); *In re Sy B. Gaiber & Co.*, 31 Agric. Dec. 474, 497-98 (1972); *In re Louis Romoff*, 31 Agric. Dec. 158, 172 (1972).

Respondent Russo also argues that Irene Russo had no motive to falsify certificates of inspection. Her motive is one of the strongest in the world - financial gain.

Initial Decision and Order at 23.

The record supports the ALJ's statement regarding Ms. Russo's motive for her violations of the PACA. However, the motive for Irene T. Russo's violations of section 2(4) of the PACA is not relevant to whether she violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and even if I found that the ALJ erred with respect to Irene T. Russo's motive, that error would not affect the determination that Irene T. Russo, d/b/a Jay Brokers, violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) or the sanction to be imposed for her violations.

Third, Irene T. Russo, d/b/a Jay Brokers, contends that she did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that she should never have been involved in the investigation that resulted in Complainant filing the Complaint (Appeal Pet. at 3).

I disagree with the contention that Irene T. Russo, d/b/a Jay Brokers, did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)), as alleged in the Complaint. The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard,<sup>8</sup> and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the

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<sup>8</sup>*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, at 92-104 (1981).

PACA is preponderance of the evidence.<sup>9</sup> I have carefully reviewed the record in this proceeding, and I agree with the ALJ that Complainant has proved its case by much more than a preponderance of the evidence.

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

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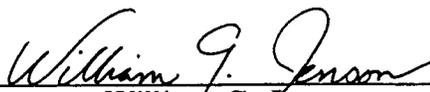
<sup>9</sup>*In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *appeal docketed*, No. 98-1342 (D.C. Cir. July 24, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, No. 97-4224 (2d Cir. Oct. 29, 1998); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 49 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94-4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94-70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

**Order**

Jay Brokers' PACA license is revoked, effective 61 days after service of this Order on Irene T. Russo, d/b/a Jay Brokers.

Done at Washington, D.C.

January 25, 1999

A handwritten signature in cursive script, reading "William G. Jenson", is written over a horizontal line.

William G. Jenson  
Judicial Officer