

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA-APP Docket No. 04-0009
)
Donald R. Beucke,)
)
Petitioner) **Decision and Order**

PROCEDURAL HISTORY

On April 28, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Donald R. Beucke [hereinafter Petitioner] was responsibly connected with Garden Fresh Produce, Inc., during the period January 2002 through February 2003, when Garden Fresh Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ On June 2, 2004, Petitioner filed “Petition of Donald R. Beucke for Review of Determination Re Responsibly Connected Status” pursuant to the PACA

¹During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., purchased, received, and accepted in interstate commerce, from five produce sellers, 109 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$379,923.25, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

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] seeking reversal of Respondent's April 28, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc.

On March 1 and 2, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in San Jose, California. Effie F. Anastassiou and Paul Hart, Anastassiou & Associates, Salinas, California, represented Petitioner. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On January 19, 2006, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ concluded Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA (Initial Decision at 1, 14).

On February 8, 2006, Petitioner appealed to the Judicial Officer. On March 6, 2006, Respondent filed a response to Petitioner's appeal petition and a cross-appeal. On April 6, 2006, Petitioner filed a response to Respondent's cross-appeal. On April 27, 2006, Respondent filed a reply to Petitioner's response to Respondent's cross-appeal, and on May 15, 2006, Petitioner filed a declaration in response to Respondent's April 27, 2006, filing. On May 15, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's conclusion that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. Respondent's exhibits are designated by "RX." The transcript is divided into two volumes, one volume for each day of the 2-day hearing. References to "Tr. I" are to the volume of the transcript that relates to the March 1, 2005, segment of the hearing, and references to "Tr. II" are to the volume of the transcript that relates to the March 2, 2005, segment of the hearing.

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in

the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

....

§ 499b. Unfair conduct

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

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said

license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.] . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the

license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

....

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

- (1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

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

DECISION

Facts

Petitioner has worked in the produce business for over 25 years. Petitioner began working for his stepfather at Martindale Distributing Company, first as an inspector and later as a buyer. At one point, Petitioner was president of Martindale Distributing Company. During this period, Petitioner worked with other family members, including his stepbrothers Wayne Martindale and Edward Shane Martindale. (Tr. I at 59-60, 82-84.)

At the beginning of the year 2000, Wayne Martindale asked Petitioner to invest in Garden Fresh Produce, Inc., a produce company Wayne Martindale intended to operate in Las Vegas, Nevada. Petitioner invested \$20,000 in Garden Fresh Produce, Inc., and was listed as a 20 percent stockholder of the company. (Tr. I at 61.) Wayne Martindale and Edward Shane Martindale were also listed on the PACA license certificate as 20 percent stockholders (RX 1 at 1-2, 5-6, 9). Nevada corporate records list Petitioner as a director and vice president of marketing (RX 3 at 9, 11, 13). Petitioner was authorized to sign checks on behalf of Garden Fresh Produce, Inc., but there is no evidence that he did so after the first few months the company was operating (RX 13; Tr. I at 63). Petitioner was one of the signatories on Garden Fresh Produce, Inc.'s application for a PACA license and was listed on the application as a director, a vice president, and a 20 percent

shareholder (RX 12; Tr. I at 87-89). Petitioner was issued a stock certificate in Garden Fresh Produce, Inc., indicating that he owned 1000 shares in the company (RX 8 at 3).

Petitioner maintained his positions with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., committed willful, flagrant, and repeated violations of the PACA. Petitioner testified that Wayne Martindale ran Garden Fresh Produce, Inc., and that he (Petitioner) had virtually no role in Garden Fresh Produce, Inc.'s operations other than making his initial \$20,000 investment. (Tr. I at 60-67.) Petitioner testified that, while Garden Fresh Produce, Inc., was operating out of Las Vegas, Nevada, he maintained his position working full-time at Martindale Distributing Company in Salinas, California. He remembered attending a single meeting of the board of directors in Las Vegas, but had no recollection of receiving a stock certificate or signing the PACA license application (until his recollection was refreshed on viewing a copy of the application at the hearing) (Tr. I at 62-64, 85-88). He stated he wrote a single check on the company's behalf but otherwise wrote no checks for Garden Fresh Produce, Inc., never saw any tax or financial books or records, and had virtually no duties (Tr. I at 62-64). Petitioner stated he was never involved in any business decisions for Garden Fresh Produce, Inc. (Tr. I at 64-66). However, Petitioner ordered produce for Garden Fresh Produce, Inc. (Tr. I at 20, 65; Tr. II at 16-18, 29-30), and was involved in decision-making with respect to which of Garden Fresh Produce, Inc.'s debts to pay (Tr. II at 52, 55). Petitioner also received approximately \$1,500 in compensation for his duties as an officer of Garden Fresh

Produce, Inc., during the first year of operation of Garden Fresh Produce, Inc. (Tr. I at 65).

Beginning in December 2002, Petitioner began receiving calls from Garden Fresh Produce, Inc.'s produce sellers, who stated Garden Fresh Produce, Inc., was not paying for produce timely. Petitioner referred the callers to Wayne Martindale and also told some of the callers they should stop doing business with Garden Fresh Produce, Inc., if payment was not timely. Petitioner placed calls to Garden Fresh Produce, Inc.'s office in Las Vegas, Nevada, to determine the status of payments, but had difficulty reaching Wayne Martindale, and, when he did talk to him, Petitioner was told that checks were in the mail, that business would be improving, or that new accounts had been obtained—information which was not true. (Tr. I at 69-73.)

There is no evidence that Petitioner had any direct involvement in the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004). Several witnesses testified that they viewed Wayne Martindale as the person running Garden Fresh Produce, Inc., and they only called Petitioner to obtain advice about contacting Wayne Martindale and to inform Petitioner of Garden Fresh Produce, Inc.'s failures to pay for produce (Tr. I at 17, 29-30, 41-42). During the violation period, Petitioner never saw Garden Fresh Produce, Inc.'s books. Before he resigned from Garden Fresh Produce, Inc., by letter dated April 4, 2003, Petitioner signed documents

accepting the resignation of two of Garden Fresh Produce, Inc.'s directors, David N. Wiles and Bruce Martindale (RX 1 at 11-13, RX 7).

Petitioner's witnesses generally corroborated Petitioner's testimony that Wayne Martindale ran Garden Fresh Produce, Inc., as far as they were concerned. Petitioner's witnesses also testified that Petitioner enjoyed a good reputation in the produce industry and had a reputation for paying the bills of Martindale Distributing Company on a timely basis.

Evert Gonzalez, a senior marketing specialist for the PACA Branch, testified that his investigation was initiated after the PACA Branch received reparation complaints initiated by produce sellers against Garden Fresh Produce, Inc. Mr. Gonzalez described his investigation, which primarily involved visiting Garden Fresh Produce, Inc.'s Las Vegas, Nevada, office. No one was at the premises when he first arrived, but he eventually gained access to the premises and requested a variety of records. (Tr. I at 136-39.) Wayne Martindale informed Mr. Gonzalez that all the principals in Garden Fresh Produce, Inc., including Petitioner, had equal authority and could sign checks and pay payables (Tr. I at 139-41).

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file and identified the documents contained in the responsibly connected file maintained by the PACA Branch (RX 1-RX 9) (Tr. I at 145-64).

Discussion

I. Introduction

Responsibly connected liability is triggered when a company has its PACA license revoked or suspended or when the company has been found to have committed flagrant or repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25.² Thus, an individual who was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.³ Petitioner was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc., during the period January 14, 2002,

²*In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

³7 U.S.C. § 499a(b)(9).

through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner failed to carry his burden of proof that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. Petitioner also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc. Moreover, as Petitioner was an owner of Garden Fresh Produce, Inc., the

defense that he was not an owner of Garden Fresh Produce, Inc., which was the alter ego of its owners, is not available to Petitioner.⁴ As Petitioner has failed to carry his burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

*II. Petitioner Was Actively Involved in Activities
Resulting in PACA Violations*

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999), as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that

⁴*In re Edward S. Martindale*, __ Agric. Dec. ___, slip op. at 9 (July 26, 2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), __ Agric. Dec. ___, slip op. at 11 (Jan. 24, 2006), *aff'd per curiam*, No. 06-11609-CC (11th Cir. Aug. 15, 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s PACA violations. Although Petitioner did not directly participate in the specific transactions resulting in Garden Fresh Produce, Inc.'s PACA violations, Petitioner directed payment of certain creditors in 2002, at a time when Petitioner knew Garden Fresh Produce, Inc., was not paying produce sellers promptly (Tr. II at 52, 55). Also, Petitioner purchased produce for Garden Fresh Produce, Inc., in 2002 (Tr. I at 20, 65; Tr. II at 16-18, 29-30). By directing the payment of certain creditors at a time when he knew Garden Fresh Produce, Inc., was not paying some of its produce sellers, Petitioner was in effect choosing which debts to pay. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), I held that choosing which debts to pay "can cause an individual to be actively involved in failure to pay promptly for produce." *Id.* at 1488. Moreover, continuing to make purchases during the period when a PACA licensee is violating the prompt payment provision of the PACA can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.

*III. Petitioner Was Not Merely a Nominal Officer,
Director, or Shareholder*

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20 percent shareholder, director, and vice president. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.⁵ The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

Petitioner was a co-founder of Garden Fresh Produce, Inc., who invested \$20,000 as part of the initial capitalization of Garden Fresh Produce, Inc. Petitioner's relationship to Garden Fresh Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on

⁵*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner is an experienced, savvy individual who has worked in the produce business for over 25 years, who has worked for years with some or all of the principals in Garden Fresh Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 20 percent owner does not serve in a nominal capacity.⁶

There is no evidence that Petitioner was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, and a

⁶*Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

co-owner in an attempt to establish a profitable business. Petitioner presumably would have shared in the company's profits when there were some. Petitioner participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh Produce, Inc., the record indicates Petitioner exercised authority consistent with his positions as 20 percent owner, a director, and a vice president to counteract or obviate the fault of others only by responding to telephone calls made by unpaid produce sellers. That Petitioner chose not to take further action to counteract or obviate the fault of others does not establish that his role was nominal.

Petitioner's Appeal Petition

Petitioner raises six issues in "Petitioner Beucke's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner's Appeal Petition]. First, Petitioner contends the facts established in the record do not support the Chief ALJ's conclusion that Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s PACA violations (Petitioner's Appeal Pet. at 3, 10-15).

Petitioner states the Chief ALJ found there is no evidence that Petitioner was directly involved in any of the transactions resulting in Garden Fresh Produce, Inc.'s PACA violations (Petitioner's Appeal Pet. at 11). I infer Petitioner contends the Chief ALJ could not properly conclude Petitioner was actively involved in the activities

resulting in Garden Fresh Produce, Inc.'s violations of the PACA and also find Petitioner was not directly involved in any of the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

I disagree with Petitioner's contention. The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA does not require that the petitioner must have been directly involved in the violative transactions.⁷ Thus, I do not find that, in order to conclude Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I must first find Petitioner actually purchased the produce for which Garden Fresh Produce, Inc., failed to make full payment promptly. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488-89 (1998), I found erroneous an administrative law judge's conclusion that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of the PACA, as follows:

The ALJ is correct that purchasing produce when there are insufficient funds leads directly to PACA payment violations, but I agree with Respondent that the ALJ's conclusion erroneously assumes that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of PACA. The ALJ gives no authority for this assumption and I do not believe such a conclusion can be supported.

⁷See *In re Edward S. Martindale*, ___ Agric. Dec. ___, slip op. at 24 (July 26, 2006); *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999).

On the contrary, I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce.

I concluded the petitioner, Lawrence D. Salins, was actively involved in the activities resulting in Sol Salins, Inc.'s violations of the PACA even though the petitioner did not purchase any produce. *In re Lawrence D. Salins*, 57 Agric. Dec. 1454 (1998).

Petitioner also contends he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA because: (1) he did not handle any of Garden Fresh Produce, Inc.'s finances; (2) Garden Fresh Produce, Inc., was located in Las Vegas, Nevada, and Petitioner did not have an office at the Las Vegas, Nevada, facility; (3) Petitioner did not make decisions regarding Garden Fresh Produce, Inc., debt payments; and (4) Petitioner did not participate in corporate decisions (Petitioner's Appeal Pet. at 11-13).

The evidence establishes that Petitioner was involved in Garden Fresh Produce, Inc.'s finances, payment decisions, and corporate decision-making. Petitioner was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000 (Tr. I at 60-61); Petitioner signed Garden Fresh Produce, Inc.'s application for a PACA license (RX 12; Tr. I at 87-88); Petitioner signed the board of directors' resolutions accepting the resignation letters of directors David N. Wiles and Bruce W. Martindale (RX 1 at 11-13, RX 7); Petitioner ordered produce for Garden Fresh Produce, Inc. (Tr. I at 20, 65; Tr. II at

16-18, 29-30); and Petitioner was involved in decisions regarding which of Garden Fresh Produce, Inc.'s debts to pay (Tr. II at 52, 55). Petitioner had equal authority with all the other principals of Garden Fresh Produce, Inc.; Petitioner was authorized to sign checks, pay payables, negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc.; and Petitioner, along with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 6 at 4-5; Tr. I at 139-41). Moreover, while I agree with Petitioner's assertions that Garden Fresh Produce, Inc., was located in Las Vegas, Nevada, and that Petitioner did not have an office in Las Vegas, Nevada, I do not find that Petitioner's proof of these facts is sufficient to conclude that Petitioner proved by a preponderance of the evidence that Petitioner was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Petitioner also argues that his circumstance is similar to that of the petitioner in *Maldonado v. Department of Agriculture*, 154 F.3d 1086 (9th Cir. 1998), who the Court held was not responsibly connected with W. Fay, a company which had violated the PACA. However, the question in *Maldonado* was whether the petitioner, a putative officer of W. Fay, was only a nominal officer. Therefore, I find *Maldonado* inapposite to the question of Petitioner's active involvement in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Second, Petitioner contends the Chief ALJ erroneously concluded Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA based upon Petitioner's failure to prevent Wayne Martindale's misconduct (Petitioner's Appeal Pet. at 3, 15-20).

I agree with Petitioner's contention that the Chief ALJ erroneously based his conclusion that Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA on Petitioner's failure to counteract or obviate the fault of Wayne Martindale. The Chief ALJ, citing *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 388 (2000), states "[t]he failure to exercise powers inherent in [Petitioner's] various positions with Garden Fresh, 'because he chose not to use the powers he had' has previously been found a basis for finding active participation." (Initial Decision at 12.) However, the passage from *Thomas* quoted by the Chief ALJ relates to issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

Even if I accept Petitioner's claim that he acted at the direction of Mr. Giuffrida, that does not negate Petitioner's actual, significant nexus to Sanford Produce Exchange, Inc. As the Court stated in *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987), in determining whether or not an individual is nominal, "the crucial inquiry is whether an individual has an 'actual significant nexus with the violating company,' rather than whether the individual has exercised real authority." Petitioner cannot avoid responsibility for the violations Sanford Produce Exchange, Inc., committed while he was president, simply because he chose not to use the powers he had.

In re Anthony L. Thomas, 59 Agric. Dec. 367, 387-88 (2000).

Similarly, the Chief ALJ quotes *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994), to support his conclusion that Petitioner's inaction constitutes active involvement in the activities resulting in a violation of the PACA (Initial Decision at 12). *Bell* makes clear that the passage quoted by the Chief ALJ relates to the issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could only establish by proving that he lacked "an actual, significant nexus with the violating company." *Minotto*, 711 F.2d at 409. Where responsibility was not based on the individual's "personal fault", *id.* at 408, it would have to be based at least on his "failure to 'counteract or obviate the fault of others'", *id.*

Bell v. Department of Agriculture, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (footnote omitted).

While I disagree with the Chief ALJ's assertion that Petitioner's acts of omission support the conclusion that Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I do not hold that an act of omission can never constitute active involvement in the activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Petitioner's acts of omission do not constitute active involvement in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA.

Third, Petitioner contends the Chief ALJ erroneously concluded Petitioner was not a nominal officer, director, and shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated the PACA (Petitioner's Appeal Pet. at 3, 20-24).

I agree with the Chief ALJ's conclusion that Petitioner failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of Garden Fresh Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.⁸ The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

During the period when Garden Fresh Produce, Inc., violated the PACA, Petitioner owned a substantial percentage of the outstanding stock of Garden Fresh Produce, Inc.

⁸See note 5.

Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.⁹ Petitioner has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Garden Fresh Produce, Inc.

Moreover, Petitioner had the appropriate business experience to be a corporate officer and director. At the time of the March 2005 hearing, Petitioner had over 25 years of experience in the produce business. Petitioner began working at Martindale Distributing Company, a business run by Petitioner's stepfather in Salinas, California. Petitioner started in Martindale Distributing Company as a produce inspector and later became a buyer. At one point, Petitioner was the president of Martindale Distributing Company. (Tr. I at 59-60, 82-84.) Petitioner was also an officer, a director, and a stockholder of Bayside Produce, Inc. (Tr. I at 95, 102-03).

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.¹⁰ At the beginning of the year 2000, Petitioner, along with several others, founded Garden Fresh Produce, Inc. Petitioner invested \$20,000 in Garden Fresh Produce, Inc., and became a 20 percent shareholder, a director, and a vice president of the new company. Petitioner signed the original PACA license application and was given

⁹See note 6.

¹⁰*In re Edward S. Martindale*, ___ Agric. Dec. ___, slip op. at 30 (July 26, 2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

authority to sign checks. Petitioner remained a stockholder, a director, and a vice president until he submitted his resignation and reassigned his stock in April 2003. (RX 1 at 1-2, 5-6, 9, RX 3 at 9, 11, 13, RX 8 at 3, RX 12, RX 13; Tr. I at 61, 87-89.)

Petitioner purchased produce on behalf of Garden Fresh Produce, Inc. Petitioner made decisions about which Garden Fresh Produce, Inc., debts to pay. Petitioner took calls for Garden Fresh Produce, Inc., and became aware in 2002 that produce sellers were complaining about Garden Fresh Produce, Inc.'s failures to pay for produce timely. Petitioner referred callers to Wayne Martindale to attempt to resolve Garden Fresh Produce, Inc.'s failures to pay. Even though Petitioner knew Garden Fresh Produce, Inc., had financial problems, he did not ask to see financial statements or bank statements, relying on statements from Wayne Martindale that Garden Fresh Produce, Inc.'s finances were improving.

Before Petitioner resigned from Garden Fresh Produce, Inc., Petitioner signed documents accepting the resignation of two directors, David N. Wiles and Bruce Martindale (RX 1 at 11-13, RX 7). At all times material to this proceeding, all the principals in Garden Fresh Produce, Inc., including Petitioner, had equal authority and could sign checks and pay payables (Tr. I at 139-41). At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and Petitioner, along with

the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 6 at 4-5).

In short, I find Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc. Petitioner was a major stockholder of Garden Fresh Produce, Inc.; Petitioner had the appropriate business experience to be a corporate officer and director; and Petitioner participated in corporate decision-making.

Fourth, Petitioner contends the Chief ALJ erroneously concluded, because Petitioner owned 20 percent of the stock in Garden Fresh Produce, Inc., Petitioner had to make a particularly compelling case in order to establish that he was not responsibly connected (Petitioner's Appeal Pet. at 3, 24-27).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first alternative of the second prong of the responsibly-connected test, a petitioner, who is a holder of more than 10 percent of the outstanding stock of a company, must demonstrate by a preponderance of the evidence that he or she was only nominally a shareholder of the company. Petitioner bases his contention that the Chief ALJ held Petitioner to a higher standard of proof than preponderance of the evidence on the following statement: “[t]he fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof.” (Initial Decision

at 12-13.) I do not find that the Chief ALJ's reference to "a particular compelling case" indicates the Chief ALJ applied the incorrect standard of proof in this proceeding.

The Chief ALJ correctly cites section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as the statutory provision applicable in this proceeding (Initial Decision at 7). Moreover, the Chief ALJ explicitly applies the standard of proof in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), stating: "[e]ven if [Petitioner] was not actively involved in the violations, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director, and vice president." (Initial Decision at 12.) The Chief ALJ does not apply an alternative standard of proof in this proceeding. Therefore, I reject Petitioner's contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that he was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc.

Fifth, Petitioner contends the Chief ALJ erroneously failed to address Petitioner's argument that any employment prohibition resulting from the instant proceeding began August 25, 2004, the date the Chief ALJ filed *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004) (Petitioner's Appeal Pet. at 3, 27-30).

I agree with Petitioner's contention that the Chief ALJ did not address Petitioner's argument that the bar on Petitioner's employment by PACA licensees began August 25, 2004. However, in accordance with the terms of the Initial Decision, the bar on

Petitioner's employment by PACA licensees would have become effective 35 days after service of the Initial Decision on Petitioner had Petitioner not appealed the Chief ALJ's decision to the Judicial Officer (Initial Decision at 14). I find this effective date clearly establishes that the Chief ALJ rejected Petitioner's contention regarding the timing of the employment bar, and I find no purpose would be served by remanding this proceeding to the Chief ALJ to address Petitioner's timing issue.

Sixth, Petitioner contends the Chief ALJ erroneously failed to conclude that any employment prohibition imposed on Petitioner began August 25, 2004, the date the Chief ALJ filed *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004). Petitioner argues the plain language of section 8(b) of the PACA (7 U.S.C. § 499h(b)) requires that the Secretary of Agriculture impose the employment prohibition on responsibly connected individuals beginning on the date the person with whom the individuals are responsibly connected is found to have violated the PACA. Thus, under Petitioner's reading of the PACA, the bar on Petitioner's employment by PACA licensees began August 25, 2004, even though a final determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc., had not been issued. (Petitioner's Appeal Pet. at 3, 27-30.)

Petitioner's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would thwart the remedial purposes of the PACA. Using Petitioner's interpretation of the PACA, principals of a violating PACA licensee would, in many cases, avoid the employment bar because the period of employment bar would conclude before a

determination is made that the principals were responsibly connected. The United States Court of Appeals for the Second Circuit stated that section 8(b) of the PACA (7 U.S.C. § 499h(b)) is designed to prevent circumvention of the PACA by forbidding responsibly connected persons from employment by PACA licensees, as follows:

Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose licenses had been revoked and who, by the subterfuge of acting as an “employee” of a nominal licensee nevertheless continued in business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry.

Zwick v. Freeman, 373 F.2d 110, 118 (2d Cir.) (footnote omitted), *cert. denied*, 389 U.S. 835 (1967). Petitioner’s reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would result in the very circumvention of the PACA that section 8(b) of the PACA (7 U.S.C. § 499h(b)) was designed to prevent.

Petitioner cites two cases, *Frank Tambone, Inc. v. United States Dep’t of Agric.*, 50 F.3d 52 (D.C. Cir. 1995), and *Farley and Calfee, Inc. v. U.S. Dep’t of Agric.*, 941 F.2d 964 (9th Cir. 1991), in support of his argument that an employment bar must commence as soon as a PACA licensee is found to have violated the PACA. In *Tambone*, the Court addressed the timing of a license bar where a company had been without a license prior to the final determination that the company had violated the PACA, as follows:

The Judicial Officer rendered his decision on February 2, 1994. By that time Tambone, Inc. already had been without a license for more than a

year. The order has not yet become effective; publication will result in a prospective bar under § 499d(b)(B), preventing the company from obtaining a license for two years. The bar will run from the effective date of this publication order, which will occur after we render our decision here. Why the bar necessarily should be entirely prospective—why, in other words, the effective date cannot be made retroactive—is a matter the Judicial Officer did not address, doubtless because no one raised the point. Even before *S.S. Farms*, at least one ALJ made the effective date of a publication order retroactive. See *Farley & Calfee*, 941 F.2d at 966. But, as we have said, the point was not raised in the administrative proceedings and it has not been argued here.

Frank Tambone, Inc. v. United States Dep't of Agric., 50 F.3d 52, 56 n.† (D.C. Cir. 1995).

Tambone does not address the timing of an employment bar imposed on responsibly connected individuals. *Tambone* merely stands for the proposition that the bar on an applicant obtaining a PACA license runs from the effective date of a court order finding that the applicant has flagrantly or repeatedly violated the PACA. The Court declined to address the issue of retroactive application of the license bar. I find *Tambone* inapposite.

Farley and Calfee, Inc. v. U.S. Dep't of Agric., 941 F.2d 964 (9th Cir. 1991), involved the application of the employment bar to an individual who had been determined to be responsibly connected with a company prior to the final determination that the company had violated the PACA. The instant proceeding involves the application of the employment bar to an individual who is determined to be responsibly connected with a

company after the final determination that the company had violated the PACA. I find *Farley and Calfee* inapposite.

Respondent's Cross Appeal

Respondent asserts the instant proceeding and *In re Edward S. Martindale*, ___ Agric. Dec. ___ (July 26, 2006), were consolidated for hearing. Respondent contends the Chief ALJ erroneously held the March 1, 2005, hearing in the instant proceeding and the March 2, 2005, hearing in *Martindale* were severed and erroneously refused to consider evidence introduced during the March 2, 2005, segment of the consolidated hearing. (Respondent's Reply to Petitioner Buecke's Appeal to the Judicial Officer at 25-27.)

Section 1.137(b) of the Rules of Practice explicitly provides, where there is no pending proceeding alleging a licensee's violation of the PACA, but multiple petitions for review of determinations of responsible connection with that licensee have been filed, the petitions for review must be consolidated for hearing, as follows:

**§ 1.137 Amendment of complaint, petition for review, or answer;
joinder of related matters.**

. . . .

(b) *Joinder*. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, any petitions for review of determination by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, but there have been filed more than one petition for

review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. § 1.137(b).

The proceeding alleging Garden Fresh Produce, Inc., violated the PACA, had been decided on August 25, 2004, and was not pending on March 1 and 2, 2005, when the Chief ALJ conducted the hearing in the instant proceeding and in *Martindale*. Two petitions for review of Respondent's determinations of responsible connection with Garden Fresh Produce, Inc., had been filed, one by Petitioner, on June 2, 2004, the other by Edward S. Martindale on June 14, 2004. The Rules of Practice are binding on administrative law judges;¹¹ therefore, the Chief ALJ was required by section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)) to consolidate for hearing Petitioner's and Edward S. Martindale's petitions for review of Respondent's determinations that they were responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA.

Moreover, the Chief ALJ appears to have consolidated the instant proceeding and *Martindale*, as required by section 1.137(b) of the Rules of Practice (7 C.F.R. § 1.137(b)). In a Notice of Hearing filed February 11, 2005, the Chief ALJ explicitly notifies the

¹¹*In re William J. Reinhart*, 59 Agric. Dec. 721, 740-41 (2000), *aff'd per curiam*, 39 F. App'x 954, 2002 WL 1492097 (6th Cir. July 10, 2002), *cert. denied*, 538 U.S. 979 (2003); *In re Far West Meats*, 55 Agric. Dec. 1033, 1036 n.4 (1996) (Ruling on Certified Question); *In re Hermiston Livestock Co.*, 48 Agric. Dec. 434 (1989).

parties of single 3-day hearing to be conducted in the instant proceeding and in *Martindale* and a single transcript of that hearing, as follows:

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA-APP Docket No. 04-0009
Donald R. Beucke,)	
)	
Petitioner)	
	and	
)	PACA-APP Docket No. 04-0010
Edward S. Martindale,)	
)	
Petitioner)	

NOTICE OF HEARING

The hearing will be held as follows:

Date: _____ March 1-3, 2005

Time: 9 a.m., local time

Location: U.S. District Court
280 S 1st Street
Clerk's Office, Room 2112
San Jose, CA

Anticipated Duration: Three Days

Exhibits are to be pre-marked, on the lower right corner, as CX-1, CX-2, *et seq.* (for Complainant's exhibits) and RX-1, RX-2, *et seq.* (for Respondent's exhibits). Multi-page exhibits are to be paginated. Please place numbers on the bottom of the pages. At least two copies of a party's proposed exhibits should be brought to the hearing.

Practice that the instant proceeding and *Martindale* be consolidated for hearing,¹² and no record of the Chief ALJ's order severing the proceedings for hearing, I must conclude that the instant proceeding and *Martindale* were consolidated for hearing.

My conclusion that the instant proceeding and *Martindale* were consolidated for hearing does not affect the disposition of this proceeding. In order to prevail, Petitioner must prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA and that he was only a nominal vice president, director, and 20 percent shareholder of Garden Fresh Produce, Inc. While I base my conclusion that Petitioner failed to prove that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA on evidence introduced during the March 2, 2005, segment of the hearing, I do not base my conclusion that Petitioner failed to prove that he was only a nominal vice president, director, and 20 percent shareholder of Garden Fresh Produce, Inc., on evidence introduced during the March 2, 2005, segment of the hearing.

Findings of Fact

1. Petitioner was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. Petitioner invested \$20,000 in Garden Fresh Produce, Inc., and was the vice president of marketing, a director, and a 20 percent shareholder of

¹²7 C.F.R. § 1.137(b).

Garden Fresh Produce, Inc. (RX 1 at 1-2, 5, 9, RX 3 at 9, 11, 13, RX 12 at 2; Tr. I at 60-61, 87-89.)

2. Petitioner signed Garden Fresh Produce, Inc.'s application for a PACA license and was authorized to sign checks on behalf of Garden Fresh Produce, Inc., although there is no evidence that he signed any checks other than in the period shortly after Garden Fresh Produce, Inc., was formed (RX 12, RX 13; Tr. I at 63, 87-89).

3. On October 8, 2002, Petitioner signed the board of directors' resolution accepting the resignation letter of director David N. Wiles (RX 7).

4. On March 18, 2003, Petitioner signed the board of directors' resolution accepting the resignation letter of director Bruce W. Martindale (RX 1 at 11-13).

5. Petitioner resigned from his positions as a director and vice president of Garden Fresh Produce, Inc., on April 4, 2003. Petitioner also assigned his stock in the company back to Garden Fresh Produce, Inc., on April 4, 2003. (RX 1 at 17-19, 21.)

6. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., failed to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25. *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

7. During the period January 14, 2002, through February 26, 2003, Petitioner was a director, a vice president, and 20 percent stockholder of Garden Fresh Produce, Inc. (RX 1 at 1-2, 5-6, 9, 17-20).

8. The record does not contain evidence that Petitioner was directly involved in any of the transactions described in Finding of Fact number 6.

9. At all times material to this proceeding, Petitioner had the same authority as all other principals in Garden Fresh Produce, Inc., including the authority to sign checks and pay payables (Tr. I at 139-41).

10. At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and, with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 6 at 4-5).

11. Petitioner purchased produce for Garden Fresh Produce, Inc., and some of Petitioner's produce purchases occurred in 2002, when Garden Fresh Produce, Inc., was in violation of the prompt payment provision of the PACA (Tr. I at 20, 65; Tr. II at 16-18, 29-30).

12. Petitioner was involved in decision-making with respect to which of Garden Fresh Produce, Inc.'s debts to pay, and some of Petitioner's decision-making occurred in 2002, when Garden Fresh Produce, Inc., was in violation of the prompt payment provision of the PACA (Tr. II at 52, 55).

13. Petitioner notified the PACA Branch by letter dated April 28, 2003, that he was no longer connected with Garden Fresh Produce, Inc. In that letter, Petitioner

requested that the United States Department of Agriculture remove his name from Garden Fresh Produce, Inc.'s PACA license. (RX 1 at 17.)

14. Petitioner has extensive experience in the produce industry. At the time of the March 2005 hearing, Petitioner had worked in the produce industry for over 25 years; Petitioner had held a number of positions, including president at Martindale Distributing Company; Petitioner had co-founded Garden Fresh Produce, Inc.; Petitioner was a stockholder, an officer, and a director of Bayside Produce, Inc.; and Petitioner was thoroughly knowledgeable in produce industry operations. (Tr. I at 59-60, 82-84, 95, 102-03.)

15. With respect to his employment at Martindale Distributing Company, Petitioner enjoys a good reputation in the produce business, including timely payment for produce.

16. Petitioner received approximately \$1,500 from Garden Fresh Produce, Inc., for his services in the first year of Garden Fresh Produce, Inc.'s operations (Tr. I at 65).

17. At all times material to this proceeding, Petitioner should have known that Garden Fresh Produce, Inc., was not making full payment promptly for produce. Beginning no later than December 2002, Petitioner knew that Garden Fresh Produce, Inc., was not making full payment promptly for produce. A number of Garden Fresh Produce, Inc.'s produce sellers, who were not being paid promptly by Garden Fresh Produce, Inc., contacted Petitioner in order to obtain payment for produce. (Tr. I at 69-73.) Petitioner

did not sufficiently exercise his authority as 20 percent shareholder, a vice president, and a director to prevent or correct the violations committed by Garden Fresh Produce, Inc.

Conclusions of Law

1. Petitioner was a 20 percent shareholder, a director, and a vice president of Garden Fresh Produce, Inc., from its inception in April 2000, until he resigned from Garden Fresh Produce, Inc., in April 2003.

2. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25. *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

3. Petitioner failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period January 14, 2002, through February 26, 2003.

4. Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner failed to prove by a preponderance of the evidence that he was not an owner of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

ORDER

I affirm Respondent's April 28, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner.

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹³ The date of entry of the Order in this Decision and Order is September 28, 2006.

Done at Washington, DC

September 28, 2006

William G. Jenson
Judicial Officer

¹³28 U.S.C. § 2344.