

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA-APP Docket No. 04-0012
)
Joseph T. Cerniglia,)
)
Petitioner) **Decision and Order**

PROCEDURAL HISTORY

On December 3, 2003, the PACA Branch filed a complaint against Fresh Solutions, Inc., alleging it was a corporation licensed under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a-499s) [hereinafter the PACA], that had violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The PACA Branch further alleged that Fresh Solutions' pending application for a new PACA license should be denied.

The proceedings were initially assigned to Administrative Law Judge [hereinafter ALJ] Leslie B. Holt, but were subsequently reassigned to ALJ Jill S. Clifton. Judge Clifton, in a teleconference with the parties, cancelled the scheduled hearing because Fresh Solutions had not filed an answer. The PACA Branch moved for a decision by reason of default. Judge Clifton ordered the PACA Branch to identify any responsibly connected proceedings that could be joined with this disciplinary proceeding against

Fresh Solutions. The PACA defines the term “responsibly connected” and imposes employment and licensing restrictions on individuals who are found responsibly connected with a corporation that violated the PACA (7 U.S.C. § 499a(b)(9);¹ 7 U.S.C. § 499d(b)(A)-(B);² 7 U.S.C. § 499h(b)³).

¹The 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.

²The 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; (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[.]

³Except 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. . . . The Secretary may approve such employment . . . 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. . . . The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order.

In a letter dated January 20, 2004, the PACA Branch notified Joseph T. Cerniglia that it made an initial determination that he was responsibly connected with Fresh Solutions, Inc., during the period from August 16, 2002, through April 29, 2003, when the disciplinary complaint alleged that Fresh Solutions, Inc., failed to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (RX 3). Mr. Cerniglia responded, in a letter dated February 19, 2004, that he resigned as an officer and a director of Fresh Solutions on January 1, 2002. He also stated that 100 percent of the stock of Fresh Solutions was transferred to Morris Lewis on the same date (RX 4).

On April 12, 2004, Judge Clifton issued a decision finding, because of its failure to pay produce vendors as alleged in the disciplinary complaint, Fresh Solutions committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Fresh Solutions, Inc.*, 63 Agric. Dec. 477 (2004). Because the company no longer held a PACA license, Judge Clifton ordered the publication of the facts and circumstances of the violations. In addition, Judge Clifton refused Fresh Solutions' application for a new PACA license finding Fresh Solutions "was not in full compliance with the PACA at the time of [its] licensing application" and "unfit to be licensed." (RX 26.) Fresh Solutions did not appeal the decision which then became final.

On July 7, 2004, James R. Frazier, Chief of the PACA Branch, issued the final determination that Mr. Cerniglia was responsibly connected with Fresh Solutions during the period of time the company violated the PACA. On August 5, 2004, Mr. Cerniglia filed a petition for review of the agency's determination.

On January 11, 2006, ALJ Victor W. Palmer conducted a hearing in Atlanta, Georgia, regarding Mr. Cerniglia's petition for review of the PACA Branch Chief's determination that he was responsibly connected with Fresh Solutions at the time the company violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture. Mr. Cerniglia represented himself *pro se*. In the course of the hearing, the PACA Branch entered 39 exhibits which are designated "RX ___." These exhibits include the original record used by the PACA Branch Chief to make his determination. Mr. Cerniglia entered 18 exhibits, 5 of which are designated "EX ___," and 13 of which were in the original record reviewed by the PACA Branch Chief and are designated as "PX ___." Two witnesses testified, Mr. Cerniglia on his own behalf and Josephine Jenkins for the PACA Branch. Transcript pages are designated "Tr. ___."

On May 4, 2006, ALJ Palmer issued his Decision and Order finding "Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc., a PACA licensee, when it

committed willful, repeated and flagrant violations of section 2(4) of the PACA”

(7 U.S.C. § 499b(4)). The ALJ held:

The evidence of record conclusively shows that Mr. Cerniglia continued to serve as the Chief Operating Officer after January 1, 2002. He participated in corporate activities that were beneficial to him and detrimental to unpaid produce distributors. He had an actual, significant nexus to Fresh Solutions, Inc. during the entire violation period. . . . [H]e therefore did not effectively resign but continued to be a *de facto* officer of the corporation when it violated Section 2 of the PACA.

ALJ Decision and Order at 19.

On June 2, 2006, Mr. Cerniglia filed a timely appeal of the ALJ’s Decision and Order. I have reviewed the record. After giving careful consideration to the evidence before me, I affirm the decision of the ALJ and find Joseph T. Cerniglia was responsibly connected with Fresh Solutions when it committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in the amount of \$351,968.50.

FINDINGS OF FACT

Joseph T. Cerniglia lives in Alpharetta, Georgia (Tr. 18). In 1972, he graduated from the University of West Georgia with a degree in history and environmental science. Mr. Cerniglia then went to work at his father’s produce business, Cerniglia Produce Co., Inc. (Tr. 54.) When that company incorporated in 1976, he became one of the officers and owner of 10 percent of the company stock (Tr. 58). In 1989, Cerniglia Produce’s

PACA license was revoked for violating the PACA by failing to pay for produce. *In re Cerniglia Produce Co.*, 48 Agric Dec. 1133 (1989). Mr. Cerniglia then went to work for Collins Brothers, the company that purchased Cerniglia Produce. (Tr. 55, 59.) He worked for Collins Brothers until the PACA Branch issued the determination that he was responsibly connected with Cerniglia Produce Co., Inc., when it violated the PACA, and he became subject to the PACA's employment restrictions that barred a PACA licensee from employing him (Tr. 59).

In 1993, Mr. Cerniglia started the business that would eventually become Fresh Solutions in the basement of his home. He incorporated the business in 1994 and first obtained a PACA license in or about 1995 (Tr. 18).⁴ During 1995, Mr. Cerniglia met Jonathan Scott Green. Mr. Green became a "partner" in the business and became the chief executive officer. In addition, Mr. Green's father, John Green, also became a partner in the company. (Tr. 89.) The senior Mr. Green helped with sales (Tr. 95). In 1996, the company was renamed Fresh Solutions, Inc. (EX 5 at 3).

Mr. Cerniglia started Fresh Solutions, Inc., as a company that would help chain restaurants buy produce in a better manner (Tr. 60). He acted as a consultant working with national chain restaurants and would "advise them on how to purchase fresh produce, suggest purchasing strategies and a list of criteria for the selection of produce

⁴Although Mr. Cerniglia testified that he incorporated Fresh Solutions in 1994, information provided on the company's application for a PACA license indicates the company incorporated in Georgia on May 30, 1996 (RX 2).

vendors[.]” (Tr. 82.) For his services, Mr. Cerniglia would receive 3 percent of the purchase price of the produce his customers bought (Tr. 83-84).

After the Greens joined Fresh Solutions, Jonathan Scott Green managed the financial aspects of the company while John Green helped with sales to restaurants and Mr. Cerniglia managed the operations and produce matters (Tr. 95-97). The Greens brought in new customers who wanted different services. Fresh Solutions revised its business plan so that it would take title to the selected produce although it was shipped directly from the distributor to the restaurant. Fresh Solutions would then invoice the restaurant and pay the distributor for the produce. Fresh Solutions utilized 70 or 80 produce distributors throughout the country. (Tr. 87-88.) As part of the new plan, Fresh Solutions attempted to develop hand-held devices to allow chain restaurants to order produce on-line while checking inventories. This effort was not successful. (Tr. 114-16.)

In July of 1996, there were five shareholders of Fresh Solutions, each owning 20 percent of the company. The shareholders were Joseph Cerniglia, Joseph Cerniglia, Sr., Jonathan Scott Green, John Green, and Windsor Jordan (PX 8).⁵ At that time, Jonathan Scott Green was the chief executive officer and president of Fresh Solutions, and Mr. Cerniglia was the chief operating officer and secretary (RX 42 at 40). Two years later, additional shares of Fresh Solutions were issued and ownership was redistributed so that Mr. Cerniglia owned 45 percent, Jonathan Scott Green owned

⁵Mr. Jordan introduced the Greens to Mr. Cerniglia but did not participate in the operation of the company (Tr. 91-93).

33 percent, John Green owned 20 percent, and Windsor Jordan owned 2 percent (EX 1).

In 2000-2001, corporate ownership changed again with two new shareholders, Morris Lewis and Mason McGowin, each obtaining 20 percent of the company's shares.

Mr. Cerniglia's ownership decreased to 29 percent and Jonathon Scott Green's ownership interest became 31 percent (RX 1 at 4).

By the end of 2001, Mason McGowin and Morris Lewis had invested \$1,735,000 in Fresh Solutions and Mr. Lewis guaranteed a \$1 million loan for Fresh Solutions (RX 24 at 5). In 2001, Fresh Solutions, Inc., reported a net loss of \$2,267,291 (RX 24). As a condition for continuing to fund the corporation, Mr. Lewis proposed a scheme by which he would receive the tax benefit of the net loss suffered by Fresh Solutions (RX 42 at 295). The scheme required the other shareholders, including Mr. Cerniglia, to transfer their ownership interests in the corporation to Mr. Lewis. In addition, Mr. Cerniglia and the other officers decided to resign their corporate officer positions and to cease being directors. The scheme allowed Mr. Lewis to convert Fresh Solutions into an S Corporation and transfer Fresh Solutions' net income or loss to his personal income tax liability (RX 42 at 295-300). Mr. Cerniglia was told that, after the time required by law to allow the tax benefit for Mr. Lewis, the stock "would be redistributed back to where it was." (RX 42 at 295-96; Tr. 155-56.)

To facilitate Mr. Lewis' tax scheme, the directors of Fresh Solutions, Inc., held a meeting on December 28, 2001, at which Joseph T. Cerniglia and Jonathan Scott Green

resigned as officers and directors of the corporation effective midnight January 1, 2002 (RX 8). Further, Mr. Cerniglia transferred his stock certificates to Morris Lewis on January 1, 2002 (RX 7 at 1-4). Finally, the stock ledger of Fresh Solutions indicates that as of January 1, 2002, all of the outstanding shares of stock of Fresh Solutions were held by Morris Lewis (PX 8).

Prior to the December 28, 2001, meeting, Mr. Cerniglia was an officer and director of Fresh Solutions (Tr. 10, 20, 99; EX 1). Mr. Cerniglia's titles varied over time. In the July 2, 1998, Minutes of Annual Meeting of the Shareholders and Directors of Fresh Solutions, Inc., he is identified as "Treasurer and CFO and Secretary." (EX 1 at 2.) Even though Mr. Cerniglia recorded and signed those minutes, he claims he was never the chief financial officer of Fresh Solutions (Tr. 99). In addition, on Fresh Solutions' PACA license application, which Mr. Cerniglia signed on August 1, 2001, he is identified as "COO." (RX 1 at 4.) Furthermore, Mr. Cerniglia owned 29 percent of the shares of Fresh Solutions (Tr. 229).

After the December 28, 2001, meeting, Mr. Cerniglia frequently held himself out as an officer of Fresh Solutions. On October 8, 2003, Mr. Cerniglia signed Fresh Solutions' new application for a PACA license. He identified himself as secretary, treasurer, chief operating officer, director, and the company's largest shareholder, with 29 percent of the company stock (RX 2). Fresh Solutions' corporate registration (current as of September 12, 2003) with the State of Georgia lists Mr. Cerniglia as the company's

chief financial officer (RX 11). On March 21, 2003, Mr. Cerniglia signed a Master Agreement for Information Technology Services and the accompanying Statement of Work on behalf of Fresh Solutions with Automated Solutions Consulting Group, Inc. [hereinafter ASC].⁶ He signed as the Fresh Solutions' chief operating officer. (RX 32, RX 33.) Furthermore, the produce industry viewed Mr. Cerniglia as an officer of Fresh Solutions. In a June 2, 2003, article in the produce industry newspaper, *The Packer*, Mr. Cerniglia, who is identified as Fresh Solutions' chief operating officer, discussed the company's financial difficulties and plans to pay its debt (RX 23). Red Book Credit Services, a produce industry information service, listed Mr. Cerniglia as chief operating officer of Fresh Solutions in its March 2002 publication (RX 22).

Throughout 2002, Mr. Cerniglia's responsibilities with Fresh Solutions remained identical to what they were prior to his relinquishing his officer and director positions and transferring his stock to facilitate Mr. Lewis' tax scheme (Tr. 128-30). In 2002, Mr. Cerniglia's salary increased by \$13,000 to over \$117,000 (Tr. 255; PX 9). He continued to receive a car allowance of \$550 per month and still used a company expense account (Tr. 256-58). In August 2002, he received a 30-day loan for \$40,000 from the company to assist in purchasing a new house (Tr. 258-59).

⁶In February 2004, following Mr. Cerniglia's resignation from Fresh Solutions, his wife, together with the wife of the president of ASC, started a new produce firm under the name Fresh Works. Mr. Cerniglia worked for that firm for a short period of time. (Tr. 119-20.)

Mr. Cerniglia had signature authority on four of Fresh Solutions' checking accounts (RX 27, RX 28, RX 29, RX 30), including exclusive signature authority on one account which was opened in 1994 (RX 27). Mr. Cerniglia had a stamp of his signature made to facilitate check issuance. The accounting department used the stamp to sign checks (Tr. 20-21). Most of the checks issued by Fresh Solutions during the period August 16, 2002, through April 29, 2003, when Fresh Solutions was found to have violated the PACA by failing to make payment for produce, were signed using the signature stamp (Tr. 21). However, on occasion, Mr. Cerniglia exercised his signature authority by personally signing checks, including signing checks issued during the violation period (RX 19 at 24, 75, 105).

Shortly before Fresh Solutions' violation period began on August 16, 2002, three checks were issued payable to "Fresh Solutions, Inc." These checks totaled almost \$120,000⁷ and were signed with Mr. Cerniglia's signature stamp (RX 19 at 22, 299, 310). The checks were deposited into the one Fresh Solutions bank account on which Mr. Cerniglia was sole signatory (Tr. 75-81). In January 2003, prior to entering into the Master Agreement for Information Technology Services, Mr. Cerniglia personally signed two checks payable to ASC which totaled \$7,000 (RX 19 at 105, 157).

⁷Check number 10080 was issued on July 11, 2002, in the amount of \$10,000; check number 10091 was issued on July 18, 2002, in the amount of \$55,000; and check number 10140 was issued on August 15, 2002, in the amount of \$54,714.53.

Despite expectations by Mr. Cerniglia that his shares in Fresh Solutions would be reissued to him after Mr. Lewis implemented his tax scheme, that never happened (RX 42 at 295-96; Tr. 155). On May 16, 2003, Morris Lewis, as holder of all the outstanding shares of Fresh Solutions and chairman of the company, presided over a special meeting of the shareholders. At the meeting, he removed all directors from their positions; he appointed himself as sole director of the corporation; and he placed restrictions on “the corporation, its Officers, Directors, Employees and/or agents,” prohibiting them from entering into contracts or hiring or employing anyone so as to create obligations or indebtedness (RX 36). After the May 16, 2003, meeting, Mr. Cerniglia’s salary was significantly decreased (Tr. 49-52; PX 10a, PX 10b). Even though his salary was decreased, Mr. Cerniglia continued to represent Fresh Solutions, Inc., before the PACA Branch, and on October 2, 2003, signed a letter to the PACA Branch advising that Fresh Solutions, Inc., was diligently working to pay and resolve the debts it owed to produce vendors (EX 3 at 2). On February 23, 2004, Mr. Cerniglia resigned from Fresh Solutions (RX 42 at 8-9, 33; Tr. 245). On March 2, 2004, Mr. Cerniglia, along with Jonathan Scott Green and E. Mason McGowin, notified the PACA Branch that there had been a change in ownership of Fresh Solutions and that the change had taken effect on January 1, 2002 (RX 43).

On March 9, 2004, Fresh Solutions, Inc., by and through its sole shareholder, director, and president, Morris C. Lewis, III, filed a voluntary petition under Chapter 7 for bankruptcy protection from its unpaid creditors (RX 17).

DISCUSSION

In 1934, Congress amended the PACA to provide that the Secretary could, with notice, revoke the license of any PACA licensee that employed an individual “who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked within one year of the date prior to such notice.” Pub. L. No. 73-159, ch. 120, § 5, 48 Stat. 586. However, Congress did not define the term “responsibly connected” until 1962, when it amended the PACA to define “responsibly connected” to mean “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.” (7 U.S.C. § 499a(b)(9) (1994).)

In the 1995 amendments to the PACA, Congress gave to the person who met the statutory definition of “responsibly connected” the opportunity to challenge the initial finding and, if successful, avoid the employment sanctions.

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 was not an owner of a violating licensee . . . which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

In 1998, the United States Court of Appeals for the District of Columbia Circuit, in *Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194 (D.C. Cir. 1998), first examined the revised definition. The Court articulated the test for determining if an individual is responsibly connected. First, there is an initial determination whether the individual meets the statutory definition of “responsibly connected.” The Court indicated, if the individual fits the definition, the burden shifts to the individual to demonstrate, by a preponderance of the evidence, that the individual was not actively involved in the activities resulting in the violation of the PACA and that the individual was a nominal officer, nominal director, or nominal shareholder of the violating company. As an alternative to proving that the individual was nominal, the individual could prove he was not an owner of the violating company and that the violating company was the alter ego of the company’s owners. *Norinsberg*, 162 F.3d at 1197.

Mr. Cerniglia’s primary argument, that he should not be deemed responsibly connected and, thus, subject to PACA’s employment restrictions, is that he “was not a stockholder of Fresh Solutions, nor was he an officer or director of Fresh Solutions.” (Appeal Pet. at 2.) He further claims that he “transferred his stock in Fresh Solutions and resigned his positions as an officer and director many months prior to Fresh Solutions’ PACA violations.” *Id.* Assuming, *arguendo*, that Mr. Cerniglia resigned from all his officer and director positions at Fresh Solutions and divested himself of all his ownership interest in the company, he failed to notify the PACA Branch that he was no longer an

officer, director, or shareholder of Fresh Solutions. The PACA regulations mandate that notice of such corporate changes be sent promptly to the PACA Branch.

§ 46.13 Address, ownership, changes in trade name, changes in number of branches, changes in members of partnership, and bankruptcy.

The licensee shall:

(a) Promptly report to the Director in writing;

.....

(2) Any change in officers, directors, members, managers, holders of more than 10 percent of the outstanding stock in a corporation, with the percentage of stock held by such person, and holders of more than 10 percent of the ownership stake in a limited liability company, and the percentage of ownership in the company held by each such person[.]

7 C.F.R § 46.13(a)(2). While the regulation imposes the burden of notifying the PACA Branch about changes on the licensee, an individual hoping to avoid a responsibly connected determination must ensure the notice of his or her changes reaches the agency, even if that requires the individual to personally notify the PACA Branch. It is reasonable for the PACA Branch to treat each individual who is identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee as responsibly connected until the PACA Branch receives notice otherwise. As a general rule, I find that any individual identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee is, for purposes of the PACA, an officer, director, or shareholder of the licensee until such time that the PACA Branch receives written notice that the person is no longer

an officer, director, or holder of more than 10 percent of the outstanding stock of the licensee.

The PACA Branch did not receive notice that Mr. Cerniglia resigned as an officer and director of Fresh Solutions and that he divested his ownership interest in the company until March 2, 2004 (RX 43). Therefore, the PACA Branch correctly concluded that, for purposes of the PACA, Joseph T. Cerniglia was an officer, director, and holder of more than 10 percent of the outstanding stock of Fresh Solutions, Inc., during the period from August 16, 2002, through April 29, 2003, when Fresh Solutions, Inc., failed to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Furthermore, as ALJ Palmer held, Mr. Cerniglia continued to serve as an officer of Fresh Solutions until the March 2, 2004, resignation.

The evidence of record conclusively shows that Mr. Cerniglia continued to serve as the Chief Operating Officer after January 1, 2002. He participated in corporate activities that were beneficial to him and detrimental to unpaid produce distributors. He had an actual, significant nexus to Fresh Solutions, Inc. during the entire violation period. . . . [H]e therefore did not effectively resign but continued to be a *de facto* officer of the corporation when it violated Section 2 of the PACA.

ALJ Decision and Order at 19. Examples of evidence demonstrating Mr. Cerniglia's continuing role as an officer of Fresh Solutions include the following:

- Testimony from Mr. Cerniglia that his responsibilities remained the same after he allegedly relinquished his officer and director positions and transferred his stock to facilitate Mr. Lewis' tax scheme (Tr. 128-30).

- Fresh Solutions' October 2003 application for a PACA license identifying Mr. Cerniglia as secretary, treasurer, chief operating officer, director, and the company's largest shareholder (RX 2). Mr. Cerniglia signed the application certifying the "answers given to the foregoing questions are true." (RX 2 at 3.)
- Fresh Solutions' corporate registration with the State of Georgia that lists Mr. Cerniglia as a corporate officer as of September 2003 (RX 11).
- A contract for computer services, signed by Mr. Cerniglia as the corporation's chief operating officer on March 21, 2003. This contract was with a firm run by an individual whose wife would later start a business with Mr. Cerniglia's wife. (RX 32, RX 33.)
- Bank account signature cards showing Mr. Cerniglia had signature authority on four of Fresh Solutions' checking accounts (RX 27, RX 28, RX 29, RX 30), including exclusive signature authority on one account (RX 27).
- Fresh Solutions' continued reliance on Mr. Cerniglia's signature authority to conduct business (RX 19).
- A letter dated October 2, 2003, signed by Mr. Cerniglia to the PACA Branch advising that Fresh Solutions, Inc., was diligently working to pay and resolve the debts it owed to produce vendors (EX 3 at 2).
- Trade publications, including articles for which Mr. Cerniglia was interviewed, identifying him as chief operating officer (RX 22, RX 23).

As support for his argument that he no longer held any positions with or ownership interest in Fresh Solutions, Mr. Cerniglia entered into evidence copies of stock certificates endorsed for transfer to Mr. Lewis (PX 1-PX 6); Fresh Solutions' stock register (PX 8); minutes of the December 28, 2001, board of directors meeting (PX 7); copies of Mr. Cerniglia's W-2 Wage and Tax Statement for the years 2002 and 2003 (PX 9, PX 10a, PX 10b); and selected pages of Fresh Solutions' and Morris Lewis' tax

returns (RX 10 at 1, 8, 33). Mr. Cerniglia's reliance on these documents as proof that he was no longer an officer, director, or shareholder of Fresh Solutions is misplaced. Courts have long held that, even though an individual may not formally hold an officer position, his actions can make him a *de facto* officer and responsible for the actions of the company. *Neckles v. United States*, 579 F.2d 938, 940 (5th Cir. 1978); *O'Neill v. C.I.R.*, 271 F.2d 44, 49 (9th Cir. 1959). Mr. Cerniglia held himself out as an officer of Fresh Solutions, but more importantly he acted as an officer of Fresh Solutions. Therefore, I find Joseph T. Cerniglia was a *de facto* officer of Fresh Solutions during the time the corporation violated the PACA.

Mr. Cerniglia's effort to distinguish *In re Anthony L. Thomas*, 59 Agric. Dec. 367 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001), is misplaced. The teaching from the *Thomas* decision is that the PACA Branch may look beyond the formalities to an individual's actions and activities with a licensee to determine the individual's true role in a violating company. Without this ability to examine the details of a PACA licensee's corporate governance, unscrupulous individuals would have a safe haven to avoid enforcement of the PACA.

Mr. Cerniglia, in his appeal, did not address the balance of the *Norinsberg* test used to determine if an individual is responsibly connected. Therefore, he waives any argument that he was not actively involved, that he was a nominal officer, director, or shareholder, or that there was an alter ego that actually ran the company.

In the remand decision, *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999), I discussed the two-prong test an individual must meet to demonstrate that he was not responsibly connected with a violating company.

First, a petitioner must demonstrate by a preponderance of the evidence that the petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (“and”), a petitioner’s failure to meet the first prong of the statutory test results in the petitioner’s failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or (2) the petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.

Id. at 608-09. The question before me is whether Mr. Cerniglia was actively involved in the activities resulting in Fresh Solutions’ violations of the PACA. I find he was. In *Norinsberg*, I established the standard to determine active involvement. “A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only.” *Id.* at 610-11.

Mr. Cerniglia participated in activities that directly caused Fresh Solutions to miss payments to produce vendors. In August 2002, the month Fresh Solutions first missed payments for produce, Mr. Cerniglia borrowed \$40,000 from the company in order to

purchase a new house (Tr. 258-59).⁸ In January 2003, during the time Fresh Solutions failed to make produce payments, Mr. Cerniglia personally signed two checks payable to ASC, a computer company run by an individual whose wife started a business with Mr. Cerniglia's wife (RX 19 at 105, 157). On March 21, 2003, Mr. Cerniglia entered into a contract on behalf of Fresh Solutions with ASC. Between July 11, 2002, and August 15, 2002, the day before Fresh Solutions' first violation of the PACA, three checks totaling almost \$120,000 were issued by Fresh Solutions and deposited in the account over which Mr. Cerniglia had exclusive control (RX 19 at 22, 299, 310). Mr. Cerniglia neither explained why the money was deposited in this account nor addressed when or why he, as sole signatory on this account, removed the funds from this account (Tr. 80-81). Each of these activities by Mr. Cerniglia deprived Fresh Solutions of money needed to pay its produce vendors. Each activity occurred just before or during the time period of August 16, 2002, through April 29, 2003, when Fresh Solutions, Inc., failed to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Therefore, I find Mr. Cerniglia was actively involved in the activities resulting in Fresh Solutions' violations of the PACA.

A finding that an officer, director, or holder of more than 10 percent of a company's stock was actively involved in the activities resulting in a violation of the

⁸Mr. Cerniglia repaid the loan in approximately 30 days (Tr. 259).

PACA is sufficient to hold that the individual is responsibly connected with the violating company. However, I also find Mr. Cerniglia was not a nominal officer of Fresh Solutions. The test to determine if an individual is a nominal officer is whether the individual had “an actual, significant nexus with the violating company during the violation period.” *Thomas*, 59 Agric. Dec. at 380-81. The factors examined for this test are similar to those examined to determine if an individual is a *de facto* officer. I look at the role an individual had in the violating company to determine if he participated with the company as an officer.

Perhaps, most telling here is that Mr. Cerniglia’s responsibilities did not change from the time period during which he acknowledges he was an officer of the company through the time period he claims to have no longer been an officer of Fresh Solutions. Mr. Cerniglia continued to have signature authority on the company’s checking accounts and signed checks after he allegedly resigned as an officer and through the violation period; he entered into contracts for Fresh Solutions after he claims to have resigned; he completed and signed a PACA license application as an officer, although he now claims that he was not an officer; he continued to hold himself out as an officer and spokesperson for Fresh Solutions, during the time the company violated the PACA and after he allegedly resigned; and his compensation increased after he claims to have resigned as an officer. All these activities demonstrate that he had an actual, significant nexus with Fresh Solutions during the violation period. Therefore, I find Mr. Cerniglia

was not merely a nominal officer of Fresh Solutions during the time the company violated the PACA.

CONCLUSIONS OF LAW

Joseph T. Cerniglia was an officer, director, and more than 10 percent shareholder of Fresh Solutions from the time the company was first incorporated until January 1, 2002. From January 1, 2002, until March 2, 2004, when he notified the PACA Branch of the changes to Fresh Solutions' ownership and corporate governance, he was a *de facto* officer of the company. In addition, because Mr. Cerniglia failed to notify the PACA Branch of the changes, the PACA Branch was reasonable in treating Mr. Cerniglia as an officer, director, and more than 10 percent shareholder of Fresh Solutions, as Fresh Solutions' PACA license indicated, until he notified the PACA Branch that he was no longer part of the company.

From August 16, 2002, through April 29, 2003, Fresh Solutions, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay \$351,968.50 for 1,483 lots of perishable agricultural commodities purchased from eight produce vendors. *In re Fresh Solutions, Inc.*, 63 Agric. Dec. 477 (2004).

Mr. Cerniglia failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Fresh Solutions, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period from August 16, 2002, through April 29, 2003. Furthermore, Mr. Cerniglia failed to prove by a preponderance of the

evidence that he was only nominally an officer, a director, and a shareholder of Fresh Solutions during the same time frame.

Joseph T. Cerniglia was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) with Fresh Solutions, Inc., during the period August 16, 2002, through April 29, 2003, when Fresh Solutions, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

For the foregoing reasons, the following Order is issued.

ORDER

I affirm the PACA Branch's July 7, 2004, determination that Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc., when Fresh Solutions, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Mr. Cerniglia 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 Mr. Cerniglia.

RIGHT TO JUDICIAL REVIEW

Mr. Cerniglia 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. Mr. Cerniglia must seek judicial review within 60 days after entry of the Order in this Decision and Order.⁹ The date of entry of the Order in this Decision and Order is June 6, 2007.

Done at Washington, DC

June 6, 2007

William G. Jenson
Judicial Officer

⁹28 U.S.C. § 2344.