

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA-APP Docket No. 03-0007
)
Philip J. Margiotta,)
)
Petitioner) **Decision and Order**

PROCEDURAL HISTORY

On February 11, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Philip James Margiotta [hereinafter Petitioner] was responsibly connected with M. Trombetta & Sons, Inc., during the period April 20, 1999, through July 7, 1999, when M. Trombetta & Sons, Inc., violated the PACA.¹ On March 20, 2003, Petitioner filed a “Petition for Review of Chief’s Determination” pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various

¹During the period April 20, 1999, through July 7, 1999, M. Trombetta & Sons, Inc., through its employee, Joseph Auricchio, made seven illegal cash payments to United States Department of Agriculture produce inspector William J. Cashin, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re M. Trombetta & Sons, Inc.*, ___ Agric. Dec. ___, slip op. (Sept. 27, 2005).

Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's February 11, 2003, determination that Petitioner was responsibly connected with M. Trombetta & Sons, Inc.

On April 15, 2003, and May 6, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] consolidated for hearing the instant proceeding with three related proceedings, a disciplinary proceeding, *In re M. Trombetta & Sons, Inc.*, PACA Docket No. D-02-0025, and two responsibly connected proceedings, *In re Stephen Trombetta*, PACA-APP Docket No. 03-0008, and *In re P.J. Margiotta*, PACA-APP Docket No. 03-0012.² On July 14 through July 18, 2003, July 21 through July 23, 2003, and August 21, 2003, the ALJ presided over a hearing in New York, New York. Mark C. H. Mandell, Law Firm of Mark C. H. Mandell, Annandale, New Jersey, represented Petitioner. David A. Richman, Office of the General Counsel, United States Department of Agriculture, represented Respondent.³

Petitioner and M. Trombetta & Sons, Inc., submitted 22 exhibits, RX A through RX V. Petitioner and M. Trombetta & Sons, Inc., called 11 witnesses: (1) Petitioner (Tr. 498-551, 574-851, 996-1163, 1338-81, 1390-1408, 1535-45); (2) Peter Silverstein

²Order Consolidating Cases for Hearing, and Amending Case Caption filed April 15, 2003, and Order Consolidating Cases for Hearing, and Amending Case Caption filed May 6, 2003.

³On January 31, 2005, Andrew Y. Stanton, Office of the General Counsel, United States Department of Agriculture, entered an appearance on behalf of Respondent, replacing David A. Richman as counsel for Respondent (Notice of Appearance filed January 31, 2005).

(Tr. 872-924); (3) Max Montalvo (Tr. 932-74); (4) Frank Falletta (Tr. 1199-1221); (5) Matthew John Andras (Tr. 1221-65); (6) Harlow E. Woodward, III (Tr. 1266-1300); (7) Stephen Trombetta (Tr. 1311-36); (8) Martin A. Shankman (Tr. 1412-23); (9) Patricia Baptiste (Tr. 1424-33); (10) Philip Lucks (Tr. 1616-38); and (11) Philip Joseph Margiotta (Tr. 1651-81).

Respondent submitted the exhibits in the certified agency record upon which Respondent based his February 11, 2003, determination, CARX, and 13 additional exhibits, CX 1 through CX 10, AX 1, AX 2, and AX 3. Respondent called three witnesses: (1) Joan Marie Colson (Tr. 25-127); (2) William J. Cashin (Tr. 127-60, 172-358); and (3) John Aloysius Koller (Tr. 359-71, 378-495, 1441-1532, 1546-96, 1683-1725). The ALJ admitted into evidence all of the parties' exhibits and also ALJX 1.

On May 11, 2005, the ALJ severed the four proceedings from one another.⁴ On January 31, 2006, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA (Initial Decision at 1, 11-12).

On March 8, 2006, Petitioner appealed to the Judicial Officer. On March 27, 2006, Respondent filed a response to Petitioner's appeal petition. On June 7, 2006, the

⁴Order Severing Cases filed May 11, 2005.

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 ALJ's conclusion that Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA; however, I disagree with the ALJ's conclusion that Petitioner was actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

Petitioner's exhibits are designated by "RX." Respondent's exhibits are designated by "CX" and "AX." Exhibits in the agency record upon which Respondent based his February 11, 2003, responsibly connected determination as to Petitioner, which is part of the record in this proceeding,⁵ are designated by "CARX." The Administrative Law Judge's exhibit is designated "ALJX." Transcript references are designated by "Tr."

⁵7 C.F.R. § 1.136(a).

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.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

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

DECISION

Decision Summary

I conclude Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. 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)).

Findings of Fact

1. After careful consideration of all the evidence, I find credible the testimony of Joan Marie Colson; William J. Cashin; John Aloysius Koller; Petitioner; Peter Silverstein; Max Montalvo; Frank Falletta; Matthew John Andras; Harlow E. Woodward, III; Stephen Trombetta; Martin A. Shankman; Patricia Baptiste; Philip Lucks; and Philip Joseph Margiotta.

2. Petitioner is an individual who was born on August 13, 1949, and whose mailing address was, at all times material to this proceeding, 41 Bellain Avenue, Harrison, New York 10528 (Tr. 498-500, 1607-08, 1684; CARX 3; AX 1).

3. M. Trombetta & Sons, Inc., was started in the 1890s, and the fifth generation of the family is now in the business. M. Trombetta & Sons, Inc., has two facilities, one at the Hunts Point Terminal Market, New York, New York, and the other at the Bronx Terminal Market, New York, New York. At all times material to this proceeding, Petitioner was employed by M. Trombetta & Sons, Inc., as the manager of the facility at the Hunts Point Terminal Market, and Stephen Trombetta was employed by M. Trombetta & Sons, Inc., as the manager of the facility at the Bronx Terminal Market. (Tr. 499-500, 504, 1338, 1342, 1677.)

4. At all times material to this proceeding, Philip Joseph Margiotta was the holder of 60 percent of the stock of M. Trombetta & Sons, Inc.; Stephen Trombetta was

the holder of 40 percent of the stock of M. Trombetta & Sons, Inc.; and Petitioner was not a holder of stock of M. Trombetta & Sons, Inc. (Tr. 1676-77).

5. At all times material to this proceeding, Philip Joseph Margiotta was the president and treasurer of M. Trombetta & Sons, Inc.; Stephen Trombetta was the vice president of M. Trombetta & Sons, Inc.; and Petitioner was the secretary of M. Trombetta & Sons, Inc. (CX 1; CARX 1; Tr. 499, 1338, 1662, 1679).

6. Philip Joseph Margiotta retired from active participation in M. Trombetta & Sons, Inc., in 1993. At the time of the hearing, Philip Joseph Margiotta had not drawn a salary from M. Trombetta & Sons, Inc., for more than 10 years. Stephen Trombetta had visited M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility only about once during the 10 years prior to the hearing. (Tr. 1312, 1653, 1672, 1680.)

7. M. Trombetta & Sons, Inc., through its employee, Joseph Auricchio, paid unlawful bribes and gratuities to William Cashin, a United States Department of Agriculture produce inspector, at M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility during the period April 1999 through July 1999 (CX 4, CX 6-CX 9; RX N; ALJX 1).⁶

8. Joseph Auricchio was acting in the scope of his employment as M. Trombetta & Sons, Inc.'s produce salesperson when he paid unlawful bribes and gratuities to a United States Department of Agriculture produce inspector.

⁶*In re M. Trombetta & Sons, Inc.*, __ Agric. Dec. __, slip op. (Sept. 27, 2005).

Mr. Auricchio's payments of bribes and gratuities to a United States Department of Agriculture produce inspector are deemed to be M. Trombetta & Sons, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).⁷ (Tr. 363-65.)

9. M. Trombetta & Sons, Inc., was responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee who paid the unlawful bribes and gratuities to a United States Department of Agriculture produce inspector in connection with federal inspections of perishable agricultural commodities.⁸

10. At all times material to this proceeding, Petitioner oversaw M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. Petitioner bought produce on behalf of M. Trombetta & Sons, Inc., negotiated with the shippers, managed the transactions with the shippers, settled with the shippers, and sometimes arranged transportation. Petitioner observed the produce as it was received from shippers and sold to customers. Petitioner ensured M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was clean and neat and the produce at M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was not lost due to negligence. Petitioner decided which shippers to pay and,

⁷*In re M. Trombetta & Sons, Inc.*, __ Agric. Dec. __, slip op. at 27 (Sept. 27, 2005). See *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003).

⁸*Post & Taback, Inc. v. Department of Agric.*, 123 F. App'x 406 (D.C. Cir. 2005).

after consultation with the shippers, how much to pay them. (Tr. 499, 1340, 1342-44, 1369-70.)

11. Petitioner observed the work of the foreman (who watches the porters) and the other employees. Petitioner was responsible for addressing any union problems. Petitioner supervised the office employees, to ensure that M. Trombetta & Sons, Inc.'s purchases and sales were properly recorded. Petitioner hired the sales staff, including Joseph Auricchio. Petitioner supervised the sales staff and advised them what product was coming into M. Trombetta & Sons, Inc., and what Petitioner thought the market would be for the various perishable agricultural commodities handled by M. Trombetta & Sons, Inc. (Tr. 505, 1343-47.)

12. Joseph Auricchio was one of M. Trombetta & Sons, Inc.'s employees monitored by Petitioner. Petitioner was not aware that Mr. Auricchio paid bribes to a United States Department of Agriculture produce inspector until Mr. Auricchio pled guilty to bribery in 2000. (Tr. 508, 525-30, 550, 1358; ALJX 1.)

13. Petitioner worked through the union to terminate two employees of M. Trombetta & Sons, Inc., who had engaged in theft. Petitioner terminated Joseph Auricchio from employment with M. Trombetta & Sons, Inc., after Petitioner learned that Mr. Auricchio pled guilty to paying bribes to a United States Department of Agriculture produce inspector. (Tr. 1152, 1344-45.)

14. Petitioner signed, as corporate secretary, M. Trombetta & Sons, Inc.'s PACA license renewal applications for 2001-2002 (CARX 1 at 7), 2000-2001 (CARX 1

at 11), 1999-2000 (CARX 1 at 15), 1998-1999 (CARX 1 at 19), and 1997-1998 (CARX 1 at 23) (Tr. 1362-63).

15. Petitioner was authorized by M. Trombetta & Sons, Inc., to sign checks and was on the signature card of M. Trombetta & Sons, Inc.'s bank. Petitioner signed most of the checks generated by M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. (Tr. 1338-39; CARX 5 at 3, CARX 8.)

16. Among M. Trombetta & Sons, Inc.'s checks signed by Petitioner were checks in payment for M. Trombetta & Sons, Inc.'s annual PACA license renewals, covering the years 1997-1998 through 2001-2002 (CARX 1 at 8, 12, 16, 20, 24).

17. On April 8, 1998, and March 22, 1999, Petitioner, identifying himself as secretary of M. Trombetta & Sons, Inc., signed two renewal applications for M. Trombetta & Sons, Inc.'s New York State Farm Products Dealer License, covering the periods May 1, 1998, through April 30, 1999, and May 1, 1999, through April 30, 2000 (CARX 6).

18. The April 1999, 145th edition of The Blue Book identified Petitioner as supervisor of sales for M. Trombetta & Sons, Inc. (CARX 9).

Discussion

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a

holder of more than 10 percent of the outstanding stock of a corporation or association.⁹ The record establishes Petitioner was the secretary of M. Trombetta & Sons, Inc., during the period April 1999 through July 1999, when M. Trombetta & Sons, Inc., willfully, flagrantly, and repeatedly 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 M. Trombetta & Sons, Inc., despite his being an officer of M. Trombetta & Sons, 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 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.

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

⁹7 U.S.C. § 499a(b)(9).

first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), 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 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.

I find Petitioner carried his burden of proof that he was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). However, I find Petitioner failed to carry his burden of proof that he was only nominally an officer of M. Trombetta & Sons, Inc. Further, while Petitioner demonstrated he was not an owner of M. Trombetta & Sons, Inc., he did not demonstrate that M. Trombetta & Sons, Inc., was the alter ego of its two owners, Philip Joseph Margiotta and Stephen Trombetta.

In order for a petitioner to demonstrate that he or she was only nominally an officer of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating corporation during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their

status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others.¹⁰

The record establishes Petitioner had an actual, significant nexus with M. Trombetta & Sons, Inc., during the violation period. Petitioner actively managed M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. At all times material to this proceeding, Petitioner oversaw M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. Petitioner bought produce on behalf of M. Trombetta & Sons, Inc., negotiated with the shippers, managed the transactions with the shippers, settled with the shippers, and sometimes arranged transportation. Petitioner observed the produce as it was received from shippers and sold to customers. Petitioner ensured M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was clean and neat and the produce at M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility was not lost due to negligence. Petitioner decided which shippers to pay and, after consultation with the shippers, how much to pay them. (Tr. 499, 1340, 1342-44, 1369-70.)

Petitioner observed the work of the foreman and the other employees. Petitioner was responsible for addressing any union problems. Petitioner supervised the office employees, to ensure that M. Trombetta & Sons, Inc.'s transactions were properly

¹⁰*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).

recorded. Petitioner hired the sales staff. Petitioner supervised the sales staff and advised them what product was coming into M. Trombetta & Sons, Inc., and what Petitioner thought the market would be for the various perishable agricultural commodities handled by M. Trombetta & Sons, Inc. (Tr. 505, 1343-47.)

Petitioner worked through the union to terminate two employees of M. Trombetta & Sons, Inc., who had engaged in theft. Petitioner also terminated Joseph Auricchio from employment with M. Trombetta & Sons, Inc., after Mr. Auricchio pled guilty to bribing a United States Department of Agriculture produce inspector. (Tr. 1152, 1344-45.)

Petitioner signed, as corporate secretary, M. Trombetta & Sons, Inc.'s PACA license renewal applications for 2001-2002 (CARX 1 at 7), 2000-2001 (CARX 1 at 11), 1999-2000 (CARX 1 at 15), 1998-1999 (CARX 1 at 19), and 1997-1998 (CARX 1 at 23) (Tr. 1362-63). Petitioner was authorized by M. Trombetta & Sons, Inc., to sign checks and was on the signature card of M. Trombetta & Sons, Inc.'s bank. Petitioner signed most of the checks generated by M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility. (Tr. 1338-39; CARX 5 at 3, CARX 8.) Among M. Trombetta & Sons, Inc.'s checks signed by Petitioner were checks in payment for M. Trombetta & Sons, Inc.'s annual PACA license renewals, covering the years 1997-1998 through 2001-2002 (CARX 1 at 8, 12, 16, 20, 24).

On April 8, 1998, and March 22, 1999, Petitioner, identifying himself as secretary of M. Trombetta & Sons, Inc., signed two renewal applications for M. Trombetta & Sons, Inc.'s New York State Farm Products Dealer License, covering the periods May 1, 1998,

through April 30, 1999, and May 1, 1999, through April 30, 2000. The April 1999, 145th edition of The Blue Book identified Petitioner as supervisor of sales for M. Trombetta & Sons, Inc. (CARX 6 , CARX 9.)

Under the statutory definition of the term *responsibly connected*, the fact that Petitioner was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA does not exonerate him unless he also proves by a preponderance of the evidence that his position at M. Trombetta & Sons, Inc., was nominal. Petitioner has not demonstrated by a preponderance of the evidence that he was only the nominal secretary of M. Trombetta & Sons, Inc.

Petitioner's Appeal Petition

Petitioner raises seven issues in "Petitioner's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145 From the Decision of the Hon. Jill S. Clifton, A.L.J., Dated January 31, 2006" [hereinafter Petitioner's Appeal Petition]. First, Petitioner contends the ALJ erroneously found Petitioner was actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA (Petitioner's Appeal Pet. at 2-3).

I agree with Petitioner's contention that the ALJ erroneously found Petitioner was actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA. Petitioner demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

M. Trombetta & Sons, Inc.'s former employee, Joseph Auricchio, acted alone in paying the unlawful bribes and gratuities to a United States Department of Agriculture produce inspector. There is no evidence suggesting that anyone at M. Trombetta & Sons, Inc., other than Mr. Auricchio, was involved in paying the unlawful bribes and gratuities. Mr. Auricchio did not implicate Petitioner (RX N; ALJX 1). The evidence does not prove that anyone at M. Trombetta & Sons, Inc., other than Mr. Auricchio, knew Mr. Auricchio was illegally paying money to a United States Department of Agriculture produce inspector.

A determination from the related disciplinary case, which was consolidated with the instant proceeding for hearing, refers to the lack of culpability of anyone within M. Trombetta & Sons, Inc., except Joseph Auricchio, as follows:

Considering all of the evidence, [M. Trombetta & Sons, Inc.], but for the actions of Joseph Auricchio, appears to have been trustworthy, honest, and fair-dealing. For the purpose of this Decision and Order, I find no culpability on the part of anyone within [M. Trombetta & Sons, Inc.] other than Joseph Auricchio. Of particular significance is that United States Department of Agriculture produce inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years and had been inspecting at [M. Trombetta & Sons, Inc.'s] place of business for about 20 years, collected no bribes from [M. Trombetta & Sons, Inc.] until Joseph Auricchio started to work as a salesperson for [M. Trombetta & Sons, Inc.] in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working for [M. Trombetta & Sons, Inc.] Nevertheless, I hold [M. Trombetta & Sons, Inc.] responsible for the actions of Joseph Auricchio, just as if [M. Trombetta & Sons, Inc.] itself had performed each of Mr. Auricchio's acts.

In re M. Trombetta & Sons, Inc., __ Agric. Dec. __, slip op. at 29 (Sept. 27, 2005).

The record contains no evidence that Petitioner knew of, or contributed to, the payment of unlawful bribes and gratuities by M. Trombetta & Sons, Inc.'s employee Joseph Auricchio (Tr. 1152-53, 1358, 1360). Moreover, when Mr. Auricchio suggested bribing a United States Department of Agriculture produce inspector in order to obtain expedited inspection of perishable agricultural commodities, Petitioner emphatically explained to Mr. Auricchio that M. Trombetta & Sons, Inc., did not engage in that behavior and, if Mr. Auricchio did engage in that behavior, his employment with M. Trombetta & Sons, Inc., would be terminated (Tr. 521, 524-25).

Joseph Auricchio worked in a partially glass sales booth (a portable room made out of metal and glass), located in the downstairs section of M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility (Tr. 509, 515, 1126, 1150, 1345, 1348). The record establishes that Petitioner monitored M. Trombetta & Sons, Inc.'s employees, including Joseph Auricchio, at the Hunts Point Terminal Market facility (Tr. 520-27, 1161, 1346-58). Nevertheless, Mr. Auricchio was able to pay unlawful bribes and gratuities to a United States Department of Agriculture produce inspector without being observed (Tr. 137-38, 538-39, 543-44, 549-51, 1114-31).

The activities that resulted in a violation of the PACA are not limited to Joseph Auricchio's activities of wrongdoing. Being actively involved in innocent activities can result in a violation of the PACA; however, I find, under the circumstances in the instant proceeding, Petitioner's management of M. Trombetta & Sons, Inc.'s Hunts Point

Terminal Market facility alone is not sufficient to constitute active involvement in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

Second, Petitioner contends the record contains no evidence that M. Trombetta & Sons, Inc., "was operating as the alter-ego of Petitioner" (Petitioner's Appeal Pet. at 3).

I agree with Petitioner's contention that the record contains no evidence that M. Trombetta & Sons, Inc., was operating as Petitioner's alter ego. However, I do not find Petitioner's contention relevant to this proceeding. The second prong of the two-prong responsibly connected test requires a petitioner to 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. The record establishes that Philip Joseph Margiotta and Stephen Trombetta were the only owners of M. Trombetta & Sons, Inc. Therefore, Petitioner's contention that the record contains no evidence that M. Trombetta & Sons, Inc., was operating as Petitioner's alter ego does not address the second alternative of the second prong of the responsibly connected test, and the issue of whether M. Trombetta & Sons, Inc., was Petitioner's alter ego is not relevant to this proceeding.

Third, Petitioner contends he was only a nominal officer of M. Trombetta & Sons, Inc. (Petitioner's Appeal Pet. at 4-5).

I disagree with Petitioner's contention that he was only a nominal officer of M. Trombetta & Sons, Inc. In order for a petitioner to demonstrate that he or she was only nominally an officer of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating corporation during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others.¹¹

The record establishes Petitioner had an actual, significant nexus with M. Trombetta & Sons, Inc., during the violation period. As discussed in this Decision and Order, *supra*, at all times material to this proceeding, Petitioner managed M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility and executed numerous documents and issued numerous checks in his capacity as secretary of M. Trombetta & Sons, Inc. (Tr. 499, 505, 1152, 1338-40, 1342-47, 1362-63, 1369-70; CARX 1, CARX 5, CARX 6, CARX 8, CARX 9).

¹¹See note 10.

Fourth, Petitioner contends a finding that he is responsibly connected with M. Trombetta & Sons, Inc., would subject him to employment restrictions in violation of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States (Petitioner's Appeal Pet. at 6).

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.¹²

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.¹³ Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a

¹²*Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

¹³H.R. Rep. No. 1041 (1930).

sufficient nexus to the violating commission merchant, dealer, or broker so that an officer may be deemed *responsibly connected* and subject to employment sanctions in the PACA.¹⁴ Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Petitioner's due process rights by arbitrarily interfering with Petitioner's chosen occupation.

Contrary to Petitioner's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.¹⁵ A number of courts have rejected constitutional challenges to employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.¹⁶

¹⁴*Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

¹⁵*Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

¹⁶*Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee who has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to

(continued...)

Fifth, Petitioner asserts the government of the United States knew on April 20, 1999, that Petitioner had no knowledge of Joseph Auricchio's illegal payments to a United States Department of Agriculture produce inspector, and, under this circumstance, the government of the United States was obligated under the Administrative Procedure Act (5 U.S.C. § 558(c)) to inform Petitioner of Mr. Auricchio's activities and to provide Petitioner with an opportunity to bring M. Trombetta & Sons, Inc., into compliance with the PACA (Petitioner's Appeal Pet. at 6-7).

As an initial matter, the record does not establish that the government of the United States knew on April 20, 1999, that Petitioner had no knowledge of Joseph Auricchio's illegal payments to a United States Department of Agriculture produce inspector. However, even if I found that the government of the United States knew on April 20, 1999, that Petitioner had no knowledge of Mr. Auricchio's illegal payments, I would not conclude that the government was obligated under the Administrative Procedure Act (5 U.S.C. § 558(c)) to provide Petitioner with notice of facts which may warrant license revocation and an opportunity to achieve compliance with the PACA, as Petitioner asserts.

¹⁶(...continued)

achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee who failed to pay a reparation award from employment in the field of marketing perishable agricultural commodities is not unconstitutional).

The Administrative Procedure Act provides, before institution of agency proceedings for the revocation of a license, the licensee must be given notice of the facts which may warrant revocation and an opportunity to demonstrate or achieve compliance, except in cases of willfulness (5 U.S.C. § 558(c)).

Petitioner is not a PACA licensee. This responsibly connected proceeding concerns merely Respondent's February 11, 2003, determination that Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA; it does not concern the revocation of a PACA license held by Petitioner. Therefore, with respect to this responsibly connected proceeding, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance in 5 U.S.C. § 558(c), inapposite.¹⁷

Sixth, Petitioner asserts the irrebuttable presumption that he was responsibly connected with M. Trombetta & Sons, Inc., is unconstitutional (Petitioner's Appeal Pet. at 7-10).

I disagree with Petitioner's assertion that he is irrebuttably presumed to have been responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., violated the PACA. Under the PACA, an individual who is affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or

¹⁷*In re Coosemans Specialties, Inc.*, __ Agric. Dec. __, slip op. at 39-40 (Apr. 20, 2006).

association is presumed to be responsibly connected with that commission merchant, dealer, or broker. However, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that 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 may rebut the presumption that he or she is responsibly connected. Specifically, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test by which 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 may rebut the presumption that he or she is responsibly connected with the commission merchant, dealer, or broker. As discussed in this Decision and Order, *supra*, Petitioner failed to prove by a preponderance of the evidence that he met the second prong of the two-prong test.

Seventh, Petitioner contends any sanction imposed on him for Joseph Auricchio's payments to a United States Department of Agriculture produce inspector violates the due process clause of the Fifth Amendment to the Constitution of the United States.

Petitioner asserts Mr. Auricchio's payments were not authorized by M. Trombetta & Sons, Inc., Mr. Auricchio's payments did not benefit M. Trombetta & Sons, Inc., and Mr. Auricchio's payments did not harm any of M. Trombetta & Sons, Inc.'s shippers. Petitioner contends, under these circumstances, finding Petitioner responsibly connected would not have any rational basis because it would be unrelated to the goal of the PACA to promote fair trade. (Petitioner's Appeal Pet. at 11-15.)

Even if Mr. Auricchio's payments were not authorized by M. Trombetta & Sons, Inc., Mr. Auricchio's payments did not benefit M. Trombetta & Sons, Inc., and Mr. Auricchio's payments did not harm M. Trombetta & Sons, Inc.'s shippers, these circumstances would not be relevant to the determination of whether Petitioner was responsibly connected. While the overall purpose of the PACA is to suppress unfair and fraudulent practices in the produce industry,¹⁸ the purpose of the PACA responsibly connected provisions is to prevent circumvention of the sanctions imposed for violations of the PACA. The purpose of the responsibly connected provisions of the PACA was explained by the United States Court of Appeals for the District of Columbia Circuit , as follows:

As originally enacted in 1930, Section 8 empowered the Secretary to suspend or revoke the authority of a licensee to do business under the Act, but contained no provision enabling restrictions on future employment of those who were violators in an employee capacity. Thus, for example, a violator could circumvent the Act by the subterfuge of acting as an "employee" of a dummy corporation newly licensed. By enactment of what is now Section 8(b) in 1934 and amendment thereof in 1956, the Secretary was authorized to revoke a license when the licensee, after notice from the Secretary, continued to employ in a "responsible position" one whose own license had been revoked or suspended or one who had been "responsibly connected" with a licensee who incurred revocation or suspension. These charges, however, left to the Secretary the task of ascertaining what in the way of new employment constituted a "responsible position," and who in the way of old employment had been "responsibly connected" with a violating licensee.

It was to ameliorate the problems incidental to such determination that Congress in 1962 again amended Section 8(b). . . .

¹⁸*Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966).

....

Simultaneously with the 1962 amendment of Section 8(b), Congress added the present Section 1(9) as a new provision of the Act. The explanation for this addition was sparse. When the Committee reported the bill out favorably, it stated merely that Section 1(9) would give the term “responsibly connected” and others “specific meaning, thus avoiding possible confusion as to interpretations.”

Quinn v. Butz, 510 F.2d 743, 753-54 (D.C. Cir. 1975) (footnotes omitted).

Therefore, in determining whether a person is responsibly connected, the focus is on whether the person meets the criteria set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)). This approach is entirely consistent with the purpose of the responsibly connected provisions of the PACA, to prevent the partnership, corporation, or association that has violated the PACA from circumventing the suspension or revocation sanctions issued under the PACA by continuing to operate within the perishable agricultural commodities industry through individuals who were responsibly connected with the partnership, corporation, or association when the partnership, corporation, or association violated the PACA.

Petitioner contends that Congress, when it amended the PACA in 1995 by establishing the two-prong test in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), did not account for circumstances present in this case, where the violating employee acted without authorization and in a manner undetectable by the PACA licensee’s management. Petitioner asserts that, holding him responsibly connected under these circumstances “is therefore not rationally related to the [1995] amendment’s purpose of exonerating

non-culpable corporate principals to find as responsibly connected the manager who, even with oversight, could not have uncovered and prevented the alleged violations.”

(Petitioner’s Appeal Pet. at 13-14.)

I agree with Petitioner that section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995, establishing the two-prong responsibly connected test, did not specifically address the factual circumstances surrounding M. Trombetta & Sons, Inc.’s PACA violations. However, my agreement with Petitioner’s assertion does not mean that holding Petitioner responsibly connected under the facts of this case would violate the purpose of the Perishable Agricultural Commodities Act Amendments of 1995, as the actual purpose of the Perishable Agricultural Commodities Act Amendments of 1995 differs from the purpose asserted by Petitioner. As noted in the section-by-section analysis of the relevant House Report, the purpose of section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 is “to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation.”¹⁹ The House Report includes the United States Department of Agriculture’s comments regarding the amendment to the definition of the term *responsibly connected*, as follows:

¹⁹H.R. Rep. No. 104-207, at 11 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

H.R. 1103, as amended, also would amend the current definition of “responsibly connected” in the Act to allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation.

H.R. Rep. No. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

Thus, the purpose of section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 is to provide each alleged responsibly connected person the opportunity to rebut the presumption of responsible connection based on his or her position with a violating company by meeting certain criteria. This responsibly connected proceeding has been conducted consistent with section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995.

Petitioner contends section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 is unconstitutional if applied in the way urged by Respondent, as this would resurrect the “per se” rule (Petitioner’s Appeal Pet. at 15). However, the “per se” rule, which held that a person was automatically responsibly connected if he or she was a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the stock of a corporation or association, has not been in effect since enactment of the Perishable Agricultural Commodities Act Amendments of 1995. In accordance with the PACA and the Rules of Practice, a person alleged to be responsibly connected has the right to a hearing to present evidence that he or she was not responsibly connected. Petitioner has fully availed himself of this right in the course of the instant proceeding. I find Petitioner was responsibly connected with M. Trombetta & Sons, Inc.,

when M. Trombetta & Sons, Inc., violated the PACA because Petitioner has failed to present sufficient evidence to rebut the presumption of responsible connection stemming from his position as secretary of M. Trombetta & Sons, Inc., based on the criteria in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), not because Petitioner has been automatically considered responsibly connected under a “per se” rule.

Conclusions of Law

1. During the period April 1999 through July 1999, M. Trombetta & Sons, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to perform its duty to maintain fair trade practices required by the PACA.

2. Petitioner proved by a preponderance of the evidence that he was not actively involved in the activities resulting in M. Trombetta & Sons, Inc.’s willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

3. During the period April 1999 through July 1999, Petitioner was the secretary of M. Trombetta & Sons, Inc. Petitioner failed to prove by a preponderance of the evidence that he was only a nominal officer of M. Trombetta & Sons, Inc.

4. Petitioner proved by a preponderance of the evidence that he was not an owner of M. Trombetta & Sons, Inc.

5. Petitioner failed to prove by a preponderance of the evidence that M. Trombetta & Sons, Inc., was the alter ego of its owners, Philip Joseph Margiotta and Stephen Trombetta.

6. Petitioner was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, Inc., willfully, flagrantly, and repeatedly 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 February 11, 2003, determination that Petitioner was responsibly connected with M. Trombetta & Sons, Inc., when M. Trombetta & Sons, 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.²⁰ The date of entry of the Order in this Decision and Order is June 21, 2006.

Done at Washington, DC

June 21, 2006

William G. Jenson
Judicial Officer

²⁰See 28 U.S.C. § 2344.