

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA-APP Docket No. 01-0002
)
Janet S. Orloff,)
Merna K. Jacobson, and)
Terry A. Jacobson,)
) **Order Denying Petition for**
) **Reconsideration as to**
) **Merna K. Jacobson**
Petitioners)

PROCEDURAL HISTORY

On February 21, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Merna K. Jacobson¹ [hereinafter Petitioner] was responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, when Jacobson Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].² On

¹Respondent's February 21, 2001, determination letter (CARX 14) and a number of other exhibits and filings in this proceeding refer to Petitioner as "Myrna K. Jacobson." Petitioner's name is "Merna K. Jacobson" (Amendment of Case Caption, Deadlines for Filing Outstanding Evidence, Request for Settlement Documents, and Briefing Schedule).

²During June 1999 through January 2000, Jacobson Produce, Inc., failed to make full payment promptly to 28 sellers of the agreed purchase prices in the total amount of

(continued...)

March 5, 2001, Petitioner filed a Petition for Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's determination that she was responsibly connected with Jacobson Produce, Inc., during the period Jacobson Produce, Inc., violated the PACA.

On July 12, 2001, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in New York, New York. Paul T. Gentile, Gentile & Dickler, New York, New York, represented Petitioner. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

Petitioner and Respondent filed post-hearing briefs. The ALJ then issued a "Decision" [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent's determination that Petitioner was responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, when Jacobson Produce, Inc., violated the PACA (Initial Decision and Order at 12).

²(...continued)

\$584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc., purchased, received, and accepted in interstate and foreign commerce. Jacobson Produce, Inc.'s failures to make full payment promptly constitute willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Jacobson Produce, Inc.*, 60 Agric. Dec. 381 (2001) (Consent Decision and Order (CARX 15)).

On October 16, 2002, Petitioner appealed to the Judicial Officer. On November 15, 2002, Respondent filed a response to Petitioner's appeal petition. On January 7, 2003, I issued a "Decision and Order as to Merna K. Jacobson" in which I adopted the ALJ's Initial Decision and Order with minor modifications. *In re Janet S. Orloff* (Decision as to Merna K. Jacobson), 62 Agric. Dec. ____ (Jan. 7, 2003).

On February 7, 2003, Petitioner filed "Petitioner's Petition for Reconsideration." On April 17, 2003, Respondent filed "Respondent's Response to Petitioner's Petition for Reconsideration." On April 18, 2003, the Hearing Clerk transferred the record to the Judicial Officer for reconsideration of the January 7, 2003, Decision and Order as to Merna K. Jacobson.

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

....

(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

Any 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

.....

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

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

- (1) whose license has been revoked or is currently suspended by order of the Secretary;
- (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or
- (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall

automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

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

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Petitioner raises three issues in Petitioner's Petition for Reconsideration. First, Petitioner contends she was a manager and partner of Jacobson Produce, Inc., in name only (Pet. for Recons. at 1-2).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) defines the term *responsibly connected* as affiliated with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. Petitioner was a holder of more than 10 per centum of the outstanding stock of Jacobson Produce, Inc., during the period when Jacobson Produce, Inc., violated the PACA (CARX 1 at 13-16). Thus, Petitioner meets the first sentence of the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), and the burden is on Petitioner to demonstrate by a preponderance of the evidence that she was not responsibly connected with Jacobson Produce, Inc. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. 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 PACA licensee or entity subject to a PACA license*; or (2) the petitioner was not an owner of a violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners.

Petitioner was not a partner in Jacobson Produce, Inc., and Jacobson Produce, Inc., was not a partnership.³ Instead, the evidence establishes Jacobson Produce, Inc., was a New York corporation and that, at the time Jacobson Produce, Inc., violated the PACA, Petitioner held 11.95 per centum of the outstanding stock of Jacobson Produce, Inc. (CARX 1 at 13-16, CARX 2 at 4). Thus, for the second prong of the statutory test, Petitioner must show by a preponderance of the evidence that she was only nominally a shareholder of Jacobson Produce, Inc. Since Petitioner was not a partner in Jacobson Produce, Inc., Petitioner's contention that she was only nominally a partner in Jacobson Produce, Inc., is not relevant to this proceeding. Moreover, Petitioner's contention that she was only nominally a manager of Jacobson Produce, Inc., is also irrelevant to this proceeding. Even if Petitioner were to demonstrate that she was only *nominally a*

³Aaron Gisser, the 50 percent owner, chief financial officer, chief executive officer, president, and secretary of Jacobson Produce, Inc., testified that he considered Petitioner a "partner" rather than his "employee" and that he did not have authority to fire Petitioner (Tr. 132-33). However, Petitioner is Aaron Gisser's sister-in-law and Petitioner's relationship by marriage to Aaron Gisser appears to account for Aaron Gisser's testimony characterizing their business relationship a partnership. The record contains no other evidence that Petitioner was a partner or that Jacobson Produce, Inc., was a partnership.

manager of Jacobson Produce, Inc., she would not meet the second prong of the statutory test.

Petitioner points out that other shareholders of Jacobson Produce, Inc., such as Ken Jacobson and Larry Gisser, managed Jacobson Produce, Inc., departments, but Respondent did not determine they were responsibly connected with Jacobson Produce, Inc. Even if I were to find that Respondent erroneously failed to make a determination that other persons affiliated with or connected with Jacobson Produce, Inc., were responsibly connected with Jacobson Produce, Inc. (which I do not so find), that finding would not be relevant to Petitioner's affiliation or connection with Jacobson Produce, Inc., or to the disposition of this proceeding.

Moreover, in order to meet the first sentence of the definition of *responsibly connected*, a shareholder must hold more than 10 per centum of the outstanding stock of the corporation. During the period when Jacobson Produce, Inc., violated the PACA, four people owned more than 10 percent of Jacobson Produce, Inc. Aaron Gisser owned 50 percent of Jacobson Produce, Inc.; Janet S. Orloff owned 12.63 percent of Jacobson Produce, Inc.; Terry A. Jacobson owned 12.63 percent of Jacobson Produce, Inc.; and Petitioner owned 11.95 percent of Jacobson Produce, Inc. (CARX 1 at 13-16.) The record contains no evidence that either Kenneth D. Jacobson or Larry Gisser was a holder of more than 10 per centum of the outstanding stock of Jacobson Produce, Inc., during the relevant period. To the contrary, the record establishes that Kenneth D. Jacobson had owned 12.63 percent of Jacobson Produce, Inc., until March 16, 1994, when he became a

9.9 percent shareholder (CARX 1 at 29), and Larry Gisser did not own more than 10 percent of the outstanding stock of Jacobson Produce, Inc. (CARX 1 at 12, 13, 15).

Second, Petitioner contends my finding that Petitioner knew or should have known that Jacobson Produce, Inc., was not paying its bills, is error (Pet. for Recons. at 2).

I disagree with Petitioner's contention that a finding that Petitioner knew or should have known that Jacobson Produce, Inc., was not paying its bills, was error. The record establishes Petitioner knew or should have known Jacobson Produce, Inc., was not paying its bills. Petitioner received telephone calls from produce sellers requesting payments that were due and owing from Jacobson Produce, Inc., for perishable agricultural commodities (Tr. 145-46, 148, 162-63). Petitioner loaned Jacobson Produce, Inc., \$100,000 in July or August 1999, because Jacobson Produce, Inc., was not able to pay its bills (Tr. 133-37, 148, 151-54, 165), and Petitioner testified that she knew Jacobson Produce, Inc., needed the loan because it was unable to pay its bills, as follows:

[BY MR. RUDOLPH:]

Q. Did he tell you what the money was going to go for?

[BY MS. JACOBSON:]

A. Well, it was obvious, you know, that we needed a little influx of money so that we -- we needed money to operate.

Q. Why was it obvious that you needed some money, your company needed some money?

A. Because, I guess, of the bills that were coming in.

Q. You knew that the bills weren't being paid?

A. Well, I heard them -- I heard the bookkeeper make excuses, you know, whatever, and so in that way I knew that they were really late.

Q. What did you think about the bookkeeper making excuses, the bills not coming up?

A. I didn't make any judgments. I just felt that my -- we were a little strapped for cash, which happens, you know, at different times a year. You have more money at certain times and less money at other times. I felt it was just a temporary thing.

Tr. 153.

Petitioner also contends she had no authority to pay Jacobson Produce, Inc.'s debts (Pet. for Recons. at 2). The record does not support Petitioner's contention that she had no authority to pay bills. To the contrary, the record establishes Petitioner was a signatory on one Jacobson Produce, Inc., bank account and authorized to sign checks if Aaron Gisser was not available (CARX 7; Tr. 125-26).

Third, Petitioner contends she was not actively involved in Jacobson Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA.

The PACA does not define the term *actively involved in the activities resulting in a violation of the PACA*, and there is no legislative history revealing Congressional intent with respect to the meaning of the term. However, the standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA is set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), 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.

58 Agric. Dec. at 610-11.

Petitioner was the manager of, and a buyer for, Jacobson Produce, Inc.'s frozen foods department. During the period in which Petitioner managed the frozen foods department and bought produce, Jacobson Produce, Inc., failed to pay 28 sellers the agreed

purchase prices in the total amount of \$584,326.83 for 153 lots of perishable agricultural commodities, which Jacobson Produce, Inc., purchased, received, and accepted in interstate and foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

These failures to pay, in violation of the PACA, included Jacobson Produce, Inc.'s failures to pay for 31 lots of frozen foods purchased, received, and accepted from four produce suppliers: Maine Frozen Foods; Paris Foods Corporation; Endico Potatoes, Inc.; and Reddy Raw, Inc. (CARX 2 at 5-6; Tr. 51-52). Petitioner was the buyer of, or was responsible for buying, in or about June 1999, one lot of frozen mixed vegetables for which Maine Frozen Foods was not promptly paid \$12,542.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about September 1999 through November 1999, four lots of frozen mixed vegetables for which Paris Foods Corporation was not promptly paid \$36,344.40, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about October 1999 through November 1999, 16 lots of frozen potatoes for which Endico Potatoes, Inc., was not promptly paid \$29,610.43, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner was the buyer of, or was responsible for buying, in or about November 1999 through December 1999, 10 lots of frozen mixed fruits and vegetables for which Reddy Raw, Inc., was not promptly paid \$48,907.35, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (CARX 2 at 5-6; Tr. 51-52.)

Petitioner's purchase of, or responsibility for the purchase of, these 31 lots of frozen foods is active involvement in activities that resulted in Jacobson Produce, Inc.'s failures to

pay for perishable agricultural commodities in willful, repeated, and flagrant violation of section 2(4) the PACA (7 U.S.C. § 499b(4)).

Moreover, Petitioner did not demonstrate by a preponderance of the evidence that her participation in the purchase of frozen foods was limited to the performance of ministerial functions only. To the contrary, the record establishes Petitioner was the manager of the frozen foods department and either purchased or was responsible for the purchase of frozen foods during the period when Jacobson Produce, Inc., violated the PACA. Petitioner, as a buyer for and manager of Jacobson Produce, Inc.'s frozen foods department, decided whether to make purchases of frozen foods on behalf of Jacobson Produce, Inc., and chose to do so even though she knew or should have known that Jacobson Produce, Inc., was not paying produce suppliers for perishable agricultural commodities in accordance with the PACA.

For the foregoing reasons and the reasons set forth in *In re Janet S. Orloff* (Decision as to Merna K. Jacobson), 62 Agric. Dec. ____ (Jan. 7, 2003), Petitioner's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.⁴ Petitioner's Petition for

⁴*In re PMD Produce Brokerage Corp.*, 61 Agric. Dec. 389, 404 (2002) (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand); *In re Mangos Plus, Inc.*, 59 Agric. Dec. 883, 890 (2000) (Order Denying Pet. for Recons.); *In re Kirby Produce*

Reconsideration was timely filed and automatically stayed the January 7, 2003, Decision and Order as to Merna K. Jacobson. Therefore, since Petitioner's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Janet S. Orloff* (Decision as to Merna K. Jacobson), 62 Agric. Dec. ____ (Jan. 7, 2003), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration as to Merna K. Jacobson.

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

ORDER

I affirm Respondent's February 21, 2001, determination that Petitioner was responsibly connected with Jacobson Produce, Inc., during June 1999 through January 2000, a period during which Jacobson Produce, Inc., violated the PACA.

⁴(...continued)

Co., 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet. for Recons. as to JSG Trading Corp.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

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)).

This Order shall become effective 60 days after service of this Order on Petitioner.

Done at Washington, DC

April 24, 2003

William G. Jenson
Judicial Officer