

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Perfectly Fresh Farms, Inc.;	)	PACA Docket No. D-05-0001
Perfectly Fresh Consolidation,	)	PACA Docket No. D-05-0002
Inc.; and	)	
Perfectly Fresh Specialties, Inc.,	)	PACA Docket No. D-05-0003
	)	
Respondents	)	
	)	
	)	
Jaime O. Rovelo;	)	PACA-APP Docket No. 05-0010
Jeffrey Lon Duncan; and	)	PACA-APP Docket No. 05-0011
Thomas Bennett,	)	PACA-APP Docket No. 05-0012
	)	PACA-APP Docket No. 05-0013
Petitioners	)	PACA-APP Docket No. 05-0014
	)	PACA-APP Docket No. 05-0015
	)	
	)	
	)	<b>Decision and Order as to Perfectly</b>
	)	<b>Fresh Farms, Inc.; Perfectly Fresh</b>
	)	<b>Consolidation, Inc.; Perfectly Fresh</b>
	)	<b>Specialties, Inc.; Jeffrey Lon Duncan;</b>
	)	<b>and Thomas Bennett</b>

**PROCEDURAL HISTORY**

This proceeding originated as three disciplinary proceedings along with six responsibly connected proceedings, all brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated under the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; 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]. Because the companies were inter-related, the proceedings were consolidated for hearing. On October 28, 2008, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] issued a consolidated decision in which he found that Perfectly Fresh Consolidation, Inc. [hereinafter Consolidation]; Perfectly Fresh Farms, Inc. [hereinafter Farms]; and Perfectly Fresh Specialties, Inc. [hereinafter Specialties], each committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to produce sellers for produce purchased in interstate and foreign commerce. The Chief ALJ further found: (1) Jaime Rovelo was responsibly connected with Consolidation, Farms, and Specialties; (2) Jeffrey Lon Duncan was responsibly connected with Consolidation, but was not responsibly connected with Specialties; and (3) Thomas Bennett was responsibly connected with Farms.

On January 8, 2009, Consolidation, Farms, Specialties, and Jeffrey Lon Duncan appealed the Chief ALJ's decision. On January 9, 2009, Thomas Bennett appealed the Chief ALJ's decision that he was responsibly connected with Farms when it committed willful, flagrant, and repeated violations of the PACA.<sup>1</sup> I have reviewed the record,

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<sup>1</sup>Counsel for Mr. Bennett also appealed the Chief ALJ's findings regarding Farms. However, Farms was not represented by Mr. Bennett's counsel; therefore, the arguments raised by Mr. Bennett's counsel could be struck from the record. However, in an effort to ensure Mr. Bennett receives fair treatment, I reviewed his arguments regarding Farms. The arguments have no merit.

filings, and arguments in this case. I have read the Chief ALJ's decision. I find the Chief ALJ's decision to be well-reasoned and complete. Therefore, I adopt with minor changes the Chief ALJ's decision as my own.

On October 1, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter AMS], filed separate disciplinary Complaints against Consolidation, Farms, and Specialties. Each separate Complaint alleged that one of the respondent companies, Consolidation, Farms, and Specialties, had committed willful, flagrant, and repeated violations of the PACA by failing to make full payment promptly to sellers of perishable agricultural commodities. Consolidation, Farms, and Specialties each had received a PACA license which had expired subsequent to the date of the alleged violations. Consolidation, Farms, and Specialties had each filed a voluntary bankruptcy petition after the date of the alleged violations and before the filing of the Complaints in the instant consolidated proceeding.

In particular, the three separate Complaints alleged that Consolidation, during the period November 17, 2002, through February 15, 2003, failed to make full payment promptly of the agreed purchase prices to 24 sellers in the total amount of \$373,944.19 for 286 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce; that Farms, during the period October 27, 2002, through February 21, 2003, failed to make full payment promptly of the agreed

purchase prices to 14 sellers in the total amount of \$442,023.12 for 142 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce; and that Specialties, during the period November 1, 2002, through February 20, 2003, failed to make full payment promptly of the agreed purchase prices to 28 sellers in the total amount of \$263,801.40 for 796 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate and foreign commerce.

The Complaints were finally served on Consolidation, Farms, and Specialties on May 22, 2006.<sup>2</sup> Each company answered on June 8, 2006, denying the alleged violations.

Meanwhile, on June 1, 2005, Bruce W. Summers, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the PACA Branch Chief], issued six letters informing three individuals that he found that each individual was responsibly connected with one or more of the three respondent companies at the time the alleged violations, which are the subject of the disciplinary Complaints, were committed. The PACA Branch Chief found Jaime O. Rovelo to have been responsibly connected with Consolidation, Farms, and Specialties; found Thomas Bennett to have been responsibly connected with Farms; and

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<sup>2</sup>Administrative Law Judge Peter M. Davenport granted AMS' motions for default decisions with respect to Consolidation and Specialties on March 31, 2005, and subsequently vacated his decision in an order dated April 19, 2006, upon discovery that the original Complaints, with respect to those two parties, were not properly served. Pursuant to his order, Consolidation, Farms, and Specialties were served/re-served with their respective Complaints.

found Jeffrey Lon Duncan to have been responsibly connected with Consolidation and Specialties. Mr. Rovelo, Mr. Bennett, and Mr. Duncan each filed a Petition for Review of the PACA Branch Chief's responsibly connected determinations. The three disciplinary proceedings and the six responsibly connected proceedings were consolidated for hearing pursuant to section 1.137 of the Rules of Practice (7 C.F.R. § 1.137). Following the deployment of Administrative Law Judge Peter M. Davenport to Iraq, the Chief ALJ re-assigned the matter to himself.

The Chief ALJ conducted a hearing in these consolidated proceedings in Los Angeles, California, on September 24-27, 2007. Christopher Young-Morales and Tonya Keusseyan represented AMS and the PACA Branch Chief. Christopher S. Bryan represented Consolidation, Farms, and Specialties in the disciplinary proceedings and Mr. Duncan in his responsibly connected proceeding. Douglas B. Kerr represented Mr. Bennett in his responsibly connected proceeding.<sup>3</sup> Jaime O. Rovelo did not respond to any motions or orders after filing his Petition for Review and did not appear at the hearing.

Eight witnesses, including Mr. Duncan and Mr. Bennett, testified at the hearing. Over 120 exhibits, as well as the six "official agency records" in the responsibly

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<sup>3</sup>Subsequent to the hearing, Jonathan Barry Sexton entered his appearance on behalf of Mr. Bennett. Mr. Sexton replaced Mr. Kerr. Mr. Sexton is Mr. Bennett's counsel on appeal.

connected proceedings, were received in evidence. The parties filed simultaneous opening and reply briefs, with the final brief being filed on March 7, 2008.

### **STATUTORY AND REGULATORY BACKGROUND**

The PACA governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, the PACA defines, and provides a sanction for, “unfair conduct” in transactions involving perishables agricultural commodities. Section 2(4) of the PACA provides:

#### **§ 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.

7 U.S.C. § 499b(4).

When the Secretary of Agriculture determines that a “commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title”:

**§ 499h. Grounds for suspension or revocation of license**

**(a) Authority of Secretary**

. . . 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.

7 U.S.C. § 499h(a).

The Regulations define “full payment promptly”:

**§ 46.2 Definitions.**

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”: *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

The PACA also imposes on every PACA licensee the duty to “keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business[.]” (7 U.S.C. § 499i.)

In addition to penalizing the violating merchant, dealer, or broker, the PACA also imposes severe sanctions against any person “responsibly connected” with an establishment that has had its PACA license revoked or suspended or has been found to have committed flagrant or repeated violations of section 2 of the PACA. (7 U.S.C. § 499h(b).) The PACA prohibits any PACA licensee from employing any person who was responsibly connected with any person whose license “has been revoked or is currently suspended” for as long as 2 two years, and then only upon approval of the Secretary. (*Id.*)

Section 1(a) of the PACA defines the term “responsibly connected,” as follows:

**§ 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.

7 U.S.C. § 499a(b)(9).

## **BACKGROUND**

### **A. The Investigation**

Upon receiving notification that four related companies, Consolidation, Farms, Specialties, and Perfectly Fresh Marketing, Inc. (which was also known as Perfectly Fresh Florals, LLC), had filed for bankruptcy, the PACA Branch assigned Senior Marketing Specialist Mary Kondora to investigate whether violations of the PACA had occurred. By the time she began her investigation in April 2003, the companies had all ceased doing business, and many of the assets of the companies had been purchased by another company, Hidden Villa Ranches. In late April 2003, Ms. Kondora spoke to Phil Brundt, the chief financial officer of Hidden Villa Ranches, and he informed her that Hidden Villa Ranches was in possession of all documents of the four companies. (Tr. 33-35, 163.) Ms. Kondora faxed him a Notice of Investigation (CX-5) and, in early May 2003, traveled to Los Angeles to meet with Mr. Brundt. He directed her to 50 boxes of records (Tr. 43), and she proceeded to review and copy the accounts payable for the four companies. (*Id.*) She conducted an exit interview with Gary and Erin Tice, who were officers in each of the alleged violating companies. Gary Tice indicated to Ms. Kondora that the companies owed a total of about \$1.2 or \$1.3 million in produce debt. (Tr. 46-48.)

Ms. Kondora examined a large number of invoices and matching vouchers, which generally indicated that one of the three respondent companies had purchased the produce in question.<sup>4</sup> Ms. Kondora prepared a “no-pay” table for each of the three respondent companies.<sup>5</sup> According to her tables, Consolidation owed 24 produce sellers a total of \$373,944.19 for 286 lots of perishable agricultural commodities (CX-02-7<sup>6</sup>); Farms owed 14 produce sellers a total of \$442,023.12 for 142 lots of perishable agricultural commodities (CX-01-7); and Specialties owed 28 produce sellers a total of \$263,801.40 for 796 lots of perishable agricultural commodities (CX-03-7). Ms. Kondora also compared her lists to Schedule F of the consolidated voluntary bankruptcy filing made on behalf of Consolidation, Farms, and Specialties and found the amounts in the Schedule F were generally equal to or greater than the amounts included in her list with respect to those produce sellers. (Tr. 131-33.)

Ms. Kondora also secured written sworn statements from a number of the produce sellers indicating that the transactions she cited were in interstate or foreign commerce (Tr. 189-95). She verified with these produce sellers that the amounts listed in the

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<sup>4</sup>The large majority of AMS’ and the PACA Branch Chief’s exhibits consists of these paired invoices and vouchers.

<sup>5</sup>There were no apparent unpaid invoices under the name of Perfectly Fresh Marketing, Inc., or Perfectly Fresh Florals, LLC.

<sup>6</sup>CX indicates that the exhibit was offered by AMS and the PACA Branch Chief, the two digit number beginning with “0” represents the last two digits of the case docket number, and last number is the exhibit number.

vouchers were still unpaid before she prepared her no-pay list (Tr. 186-87). She also indicated that these produce sellers generally believed they were dealing with an entity they called “Perfectly Fresh” and did not realize the existence of the individual corporate entities (Tr. 184-86). Ms. Kondora also testified that Consolidation, Farms, and Specialties each had its own PACA license and each filed its own separate tax return.

A follow-up investigation conducted by Senior Marketing Specialist Josephine Jenkins confirmed that, as of July 25, 2007, Consolidation, Farms, and Specialties still owed significant amounts to the produce sellers listed in the Complaints and that approximately 52 percent of the valid PACA Trust Claims recognized by the bankruptcy court remained unpaid.

#### **B. Formation and Organization of the Perfectly Fresh Companies**

In June 2001, Gary Tice, who had a long and successful career in the produce industry, started Perfectly Fresh Marketing, Inc., with Jeffrey Lon Duncan, who had been in the produce business for about 15 years. Mr. Tice had expertise in managing and owning businesses and had more recently helped other companies for which he worked with strategic planning and with modernizing their business techniques. (Tr. 295-300.) In 2000-2001, Mr. Tice worked as a consultant for Fresh Point, where he met Mr. Duncan, whose principal job involved servicing the produce needs of cruise lines (Tr. 300-01). They worked together on special projects involving inventory and purchasing. While Mr. Tice had been a manager for many years, Mr. Duncan did not, in Mr. Tice’s

opinion, perform managerial duties. However, Mr. Tice thought Mr. Duncan's managerial skills were "quite adequate." ( Tr. 305-07.) Mr. Tice wanted Mr. Duncan as a partner to take advantage of his sales skills with cruise lines, while Mr. Tice was working on developing a relationship supplying tomatoes to Taco Bell (Tr. 307-09). Perfectly Fresh Marketing, Inc.'s PACA license indicated that 51 percent was owned by Tice, Inc., which was a company developed by Mr. Tice and his wife, Erin Tice, and that 49 percent was owned by Mr. Duncan. Mr. Tice testified that he managed the day-to-day accounts payable and receivable with Mr. Duncan. (Tr. 309.)

In July 2002, the operating agreement of Perfectly Fresh Marketing, Inc., was amended and three new related companies were created (RX 13). The allocation of ownership shares was changed to reflect the addition of a new partner, Perfectly Fresh, LLC, with a 50 percent equity share in Perfectly Fresh Marketing, Inc., while Tice, Inc., now owned 30 percent and Mr. Duncan now owned 20 percent.<sup>7</sup> Perfectly Fresh, LLC, was owned by John Norton, who was planning to invest approximately \$2 million in the new operation, principally to make improvements on the facility and to fund the new companies until they became profitable. (Tr. 317-20, 330.) John Norton was granted preferred member status, in that his capital investment would be returned to him before capital was returned to the other investors (RX 13 at 5, ¶ 3.4; Tr. 328). Gary Tice

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<sup>7</sup>However, documents filed with the four companies' bankruptcy documents indicated that Mr. Duncan owned 49 percent of Perfectly Fresh Marketing, Inc.

testified that the plan to establish the three operating companies was devised by himself, Mr. Duncan, and Mr. Tice's attorney (Tr. 325).

Specialties was formed on July 18, 2002, and received PACA license 021539 (CX-03-1, 3). That PACA license indicates that Perfectly Fresh Marketing, Inc., owned 90 percent of Specialties. The PACA license does not account for the remaining 10 percent ownership. Mr. Duncan is listed as the chief financial officer and a director, Gary Tice is listed as secretary and a director, and Erin Tice is listed as president and a director. Specialties was formed to sell produce directly to supermarkets. (Tr. 336-38.)

Consolidation was the second company formed on July 18, 2002, and received PACA license 021540 (CX-02-1, 3). The PACA license indicates that: Mr. Duncan owned 10 percent of the stock in Consolidation and was president and a director; Perfectly Fresh Marketing, Inc., owned 90 percent of the stock, with Gary Tice as the secretary and a director and Erin Tice as the chief financial officer and a director. The purpose of Consolidation was basically to sell to cruise lines, carrying on and expanding the same type of business that was Mr. Duncan's forte.

Farms was the third company formed on July 18, 2002, and received PACA license 021541 (CX-01-1, 3). That PACA license indicates that Perfectly Fresh Marketing, Inc., owned 90 percent of Farms and that Thomas Bennett owned the remaining 10 percent. Mr. Bennett was the president and a director of Farms. Gary Tice was listed as secretary and a director, and Erin Tice was listed as chief financial officer

and a director. Farms was particularly involved in establishing grower relationships, such as an exclusive agreement to distribute papayas grown by Hawaiian Pride. (Tr. 615.)

The four companies were to be run as one entity, with Perfectly Fresh Marketing, Inc., essentially managing the overall operations, and Consolidation, Farms, and Specialties handling sales, each in its own sphere of specialization (Tr. 320-22). Mr. Tice indicated that the management of Perfectly Fresh Marketing, Inc., was generally under his control, although Mr. Norton had some control (Tr. 413-14). Mr. Tice, Mr. Bennett, and Mr. Duncan all considered that the three new companies were sales entities, with Perfectly Fresh Marketing, Inc., handling all the operations including the purchasing; Perfectly Fresh Marketing, Inc., would buy all the produce and transfer it to the appropriate company; Perfectly Fresh Marketing, Inc., leased all the warehouse space; and Perfectly Fresh Marketing, Inc., handled the receiving when produce arrived at the warehouse (Tr. 354-58). None of the entities ever held a board meeting (Tr. 387).

It appears that customers knew of the companies as “Perfectly Fresh” and were not aware that in reality four different companies existed. The accounting and payment systems were designed by Mr. Roveló with input from Mr. Tice. Generally, checks from customers went first into the individual company’s bank accounts, but were then transferred into Perfectly Fresh Marketing, Inc.’s account to keep the other accounts at a virtual zero balance. (Tr. 366-69.) According to Mr. Tice, all the purchasing was done by Perfectly Fresh Marketing, Inc., even though the accounts payable documents

examined by Ms. Kondora and admitted into evidence generally linked each purchase to a specific company and even though the produce payables listed in the schedules filed with the bankruptcy court generally matched those accounts payable documents, in terms of which company purchased which lot of produce (Tr. 354).

Shortly after Consolidation, Farms, and Specialties were formed, Mr. Norton placed Jaime O. Rovelo as the head of the accounting department and chief financial officer for all four entities (Tr. 372-77). Although the PACA licenses indicate otherwise, Mr. Tice testified there was no chief financial officer before Mr. Rovelo. Mr. Rovelo wrote all the checks for the companies on a day-to-day basis, and Mr. Rovelo reported to Mr. Tice, not to Mr. Duncan or Mr. Bennett. (*Id.*) Until the businesses began to collapse in December 2002, Mr. Rovelo made the decisions on who to pay; subsequent to that date, Mr. Tice made those decisions.

John Norton, the principal financial resource supporting the expansion of the companies, was seeking to compete against Ready Pac, a large supplier of produce to chain stores. Mr. Norton apparently had some issues with Ready Pac and its chief executive officer, and competing with Ready Pac was a significant aspect of his motivation for investing in Perfectly Fresh. (Tr. 317-20, 330.) Further, Erin Tice, the spouse of Gary Tice, was an officer with Ready Pac and joined Specialties (and became a co-owner of all four companies as a result of her co-ownership of Perfectly Fresh Marketing, Inc., with her husband) with the idea of using her personal relationships with

Ready Pac clients to bring those customers over to Specialties (Tr. 336-38). When Ms. Tice joined Specialties, Ready Pac became concerned that the employees she had managed at Ready Pac would move with her and Ready Pac attempted to get those employees to sign contracts. Specialties hired 15 or 16 Ready Pac employees, even though Specialties had planned to hire employees at a much slower rate as the business expanded. (Tr. 336-38.)

At around the same time, the entire warehouse where Perfectly Fresh Marketing, Inc., had rented a small amount of space became available, and Perfectly Fresh Marketing, Inc., took that over. Much of the money Mr. Norton invested was devoted to improving the warehouse. (Tr. 331-33.)

### **C. The Short Road to Bankruptcy**

The collapse of the Perfectly Fresh entities was swift, barely 5 months having elapsed between the time the respondent companies starting doing business and the bankruptcy filing. Ready Pac filed suit against Mr. Norton and the Tices for tampering with its employees. According to Mr. Tice, the chief executive officer of Ready Pac was seeking to bankrupt Perfectly Fresh. (Tr. 343.) During the litigation, which was settled in November 2002, Mr. Norton decided he wanted to be treated as a lender, rather than as an owner/shareholder (Tr. 343-45).

With funding from Mr. Norton stopped as of November 2002, Mr. Tice began an effort to attract additional investors (Tr. 349). He was never able to get to the point of



serious negotiations. He felt the companies were still in good financial condition at the end of November 2002, with Consolidation doing particularly well. (Tr. 349-50.)

However, in December 2002, with no new funding, and Farms having significant problems due to issues with Hawaiian Pride, it became difficult to pay debts. (*Id.*)

Mr. Tice testified that, at first, Mr. Rovelo made the decisions as to which produce sellers should be paid, but that sometime in December 2002, Mr. Tice made all those decisions on his own (Tr. 380-81). He further testified that Mr. Bennett and Mr. Duncan had no role in deciding who would be paid. (*Id.*)

With no funding immediately at hand, Mr. Tice retained bankruptcy counsel on behalf of all four Perfectly Fresh entities on January 31, 2003 (RX 2), and the companies filed for bankruptcy a few days later.<sup>8</sup> The same day (February 3, 2003), the four companies moved that their separate bankruptcy petitions be consolidated for “joint administration.” (RX 4.) The record contains no evidence that Mr. Bennett or Mr. Duncan participated in any aspect of the bankruptcy filings, and most of the bankruptcy documents were signed either by Gary Tice or by Jaime Rovelo.

As part of the bankruptcy filing, Consolidation, Farms, and Specialties each filed a “Schedule F, Creditors Holding Unsecured Nonpriority Claims.” These schedules included both produce and non-produce payables. Every one of the unpaid produce sellers listed in the three disciplinary Complaints is listed in the corresponding

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<sup>8</sup>Shortly before filing for bankruptcy, Perfectly Fresh Marketing, Inc., transferred its operations to Perfectly Fresh Florals, LLC, based on advice from counsel (Tr. 352-54).

Schedule F, owing an amount equal to or greater than that alleged in the disciplinary Complaints to be unpaid.

In filing for bankruptcy, Mr. Tice indicated that he thought all the produce sellers would be paid from the proceeds of the bankruptcy auction, but the attorneys representing the produce sellers negotiated for a 60 percent cash payment of the amounts owed (Tr. 405-09). Mr. Tice also stated, in a letter to Ms. Kondora (RX 1 at 5):

The employees of our company and our other principals should not be held responsible for the results of not paying for our produce within terms, it was not their decision as I had taken control. Lon Duncan, Erin Tice, Tom Bennet[t], and our employees conducted business as I directed and it would be very unfair if actions were [sic] taken against them as individuals. The only other persons having a final say in the ultimate outcome of Perfectly Fresh was John Norton and the attorneys of Rynn & Janowsky.

**D. The Petitioners in the Responsibly Connected Proceedings**

1. Jaime Rovelo—After filing his three petitions to review the determinations of the PACA Branch Chief that he was responsibly connected with Consolidation, Farms, and Specialties, Mr. Rovelo had no further contact with the Hearing Clerk's office and did not file any other documents in this matter. After he filed his petitions, Mr. Rovelo apparently relocated without notifying the Hearing Clerk and without leaving a forwarding address. He did not participate further in the proceedings. Because the petitioner carries the burden of proof in a responsibly connected proceeding and because no evidence was presented that would indicate that Mr. Rovelo was not responsibly connected with Consolidation, Farms, and Specialties, I must find that Mr. Rovelo was

responsibly connected with the three companies. In any event, the evidence demonstrated clearly that Mr. Rovelo was: the chief financial officer of each of the three respondent companies in the disciplinary proceedings; the individual who established and administered the accounting system and signed the great majority of checks; a participant in many of the decisions as to whom to pay; and the signatory of many of the bankruptcy related documents (Tr. 372-81).

2. Jeffrey Lon Duncan—Mr. Duncan is a high school graduate who has been working in the produce industry since 1986 (Tr. 703-06). He held a variety of jobs in the industry and gradually became a specialist in cruise line sales, a very exacting business given that ships are in port for a very short time and are more demanding than other customers (Tr. 708-10). Mr. Duncan testified that he had no managerial responsibilities before he joined Mr. Tice (Tr. 706). He was a participant in Perfectly Fresh Marketing, Inc., when it was first organized, and was an officer, a director, and 49 percent shareholder in Perfectly Fresh Marketing, Inc. After the operating agreement was amended in July 2002, Mr. Duncan's ownership share in Perfectly Fresh Marketing, Inc., was reduced to 20 percent. He testified that, even though he was listed as supplying capital for several companies, he did not actually invest any money. (Tr. 898.) Mr. Duncan indicated his work at Perfectly Fresh, both when it was only Perfectly Fresh Marketing, Inc., and then later when he was in charge of Consolidation, was the same work that he had been doing earlier—selling to cruise lines (Tr. 850-51).

Mr. Duncan indicated he had many discussions with Mr. Tice before they decided to join forces and form their own company and he was impressed with Mr. Tice's vast knowledge of, and success in, the produce industry (Tr. 715). Mr. Duncan stated he was not involved in filing for the PACA licenses, either for Perfectly Fresh Marketing, Inc., or Consolidation, and he was not involved with keeping the books or managing the warehouse or the employees. He did write some checks, but most of the check-writing was handled by Mr. Tice. (Tr. 833-40.)

Mr. Duncan did not have any role in bringing Mr. Norton into the business, although the modified business plan, including the decision to establish Consolidation, Farms, and Specialties was discussed with him (Tr. 833-34). Mr. Duncan understood that Mr. Norton was going to invest substantial funds in the companies and become a partner Perfectly Fresh Marketing, Inc. (*Id.*) Mr. Duncan did not recall being involved in any discussions concerning the Amended Operating Agreement that he signed in July 2002, stating he probably perused it (Tr. 846). He did not have any role in the plan to take over the Ready Pac business, but he did know about it (Tr. 853-54). When Ready Pac filed suit, neither Mr. Duncan nor Mr. Bennett was a party to the litigation (Tr. 856-57).

Mr. Duncan testified that his role in Consolidation was not managerial, but was essentially to continue the cruise produce sales business he had been working on before he came to Perfectly Fresh. He would have received more money, as a partial owner, if Consolidation was profitable. (Tr. 865.) In fact, it appears Mr. Duncan's end of the

business was profitable and Consolidation's profits were used in effect to subsidize the other companies. (Tr. 899-900.) Mr. Duncan did have check-signing authority, but apparently signed only one check in October 2002, prior to the period covered by the Complaint, probably because no one else was available to sign the check (Tr. 951).

Mr. Duncan first became aware that his suppliers were not paid in a timely manner in December 2002 or January 2003 (Tr. 890). He said when he received a call about late payment, he would get the invoice and bring it to Mr. Rovelo and tell Mr. Rovelo to take care of it. Mr. Rovelo told Mr. Duncan that produce sellers were not paid due to lack of money caused by overhead and that Gary Tice told him that he was trying to obtain additional investors and reassured him that he would find the investors. (Tr. 890-92.) Mr. Duncan had no role with respect to the decision to file for bankruptcy or the actual filing of bankruptcy papers.

3. Thomas Bennett—Mr. Bennett had been in the produce industry for 42 years at the time of the hearing. He had known Gary Tice on a professional level for 25 years. (Tr. 1085-86.) When Mr. Bennett was running Francisco Distributing as general manager, Mr. Tice, on behalf of Perfectly Fresh Marketing, Inc., was renting office space from Francisco Distributing (Tr. 1037-39). When Fresh America, the company that owned Francisco Distributing, decided to close down the Los Angeles division, and Mr. Bennett was told to shut down the company, he told Mr. Tice that the building was going to be available, and Mr. Tice successfully negotiated with the landlord

for lease of the warehouse space (Tr. 1037-38). After that, Mr. Tice offered Mr. Bennett the position as president of Farms, along with a 10 percent ownership interest in the company (Tr. 1039). Mr. Bennett did not pay anything for the shares and stated he was involved in sales and the title of president was just to allow him to deal with a higher level of personnel at the companies to which he would be selling (Tr. 1039).

Mr. Bennett said he considered the Tices to be his immediate supervisors (Tr. 1042). When Farms was being formed, Mr. Bennett signed all the documents that he was told to sign, without negotiating (Tr. 1044). He did not believe he had check-signing authority and testified he had never signed a check on behalf of Farms (Tr. 1045).<sup>9</sup>

When Mr. Bennett saw empty cooler space at the warehouse, he started a storage facility where outside shippers could bring their produce to Los Angeles and store it in the warehouse. He spent most of his time working with the rental clients. (Tr. 1041-42.)

Mr. Bennett stated he did not recall having any involvement in obtaining the PACA license for Farms, did not know of Mr. Norton's involvement until a few months after he began working for Farms, and did not understand how the accounting system worked or how the vouchers and invoices were coordinated (Tr. 1048-49). Mr. Bennett began hearing about slow payment issues from his salesmen in December 2002. When Mr. Bennett asked Mr. Tice or Mr. Rovelo about the slow payment of produce sellers, he was told not to worry and the receivables would catch up. (Tr. 1049-50.) Mr. Bennett

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<sup>9</sup>However, he did in fact sign a card authorizing him to write checks (Bennett RX 23).

thought he could probably have found out more about the financial condition of Farms had he asked, although he did not have access to the accounts of the entities other than Farms and was not told about them (Tr. 1050).

When it became evident to Mr. Bennett that the business was not doing well, he sensed that it was time to leave (Tr. 1055). Mr. Bennett suggested to Mr. Tice in early January 2003, that it was time for him (Bennett) to resign (Tr. 1056-57). He stated he resigned orally but that he subsequently wrote a letter to Mr. Tice's attorney asking that his name be removed from all corporate documents (Tr. 1058).<sup>10</sup> He stated that he was concerned for his reputation and did not want to be part of a sinking ship (Tr. 1056-57).

## **DISCUSSION**

### **A. Consolidation, Farms, and Specialties Violated the PACA**

With respect to the disciplinary counts, AMS and the PACA Branch Chief introduced numerous documents which Ms. Kondora discovered in well-organized boxes clearly identified as payables and which generally contained matching invoices and vouchers confirming the existence of each of the debts alleged in the Complaints. Further, AMS and the PACA Branch Chief introduced bankruptcy schedules, prepared by Consolidation, Farms, and Specialties, which confirmed that these (and other) debts existed at the time they filed for bankruptcy. In each of their answers, the respondent companies admitted they filed the bankruptcy schedules referred to in the Complaints, but

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<sup>10</sup>However, Mr. Bennett testified he did not have a copy of that letter.

also denied each and every allegation that they had failed to make full payment promptly to the sellers of the produce. Consolidation, Farms, and Specialties contend the allocation of debts among the companies was essentially an artifice and that all the debts were actually incurred by Perfectly Fresh Marketing, Inc., which is not a party to the instant consolidated proceeding. For the reasons discussed in this Decision and Order, *infra*, I reject the contention that the debts were not incurred by each of the respondent companies and find Consolidation, Farms, and Specialties each violated the PACA by failing to make full payment promptly for produce as listed in the three Complaints.

1. Consolidation's, Farms', and Specialties' own records clearly establish the unpaid debts. Each of the three respondent companies had clearly marked accounts payable files containing linked invoices and vouchers establishing the purchase of produce. While the invoices generally indicated that the produce was sold to "Perfectly Fresh," the corresponding vouchers identified which of the entities was considered the purchaser of the produce. In most cases, the quantities of the produce and the dollar amounts involved matched. Consolidation, Farms, and Specialties are in the peculiar position of denying the validity of their own records.

Gary Tice, who was clearly the single person most responsible for establishing and operating the three respondent companies, admitted in a May 16, 2003, letter to Ms. Kondora that from September 1, 2002, when the operations of the three companies started, Perfectly Fresh Marketing, Inc., did none of the actual buying and selling of



produce (RX 1). This letter is inconsistent with Mr. Tice's attempts at the hearing to explain away this statement and his contention that Perfectly Fresh Marketing, Inc., did all the buying and the other operations did all the selling. No explanation for this inconsistency was offered other than Mr. Tice's statement that in reality Perfectly Fresh Marketing, Inc., "incurred all debts." Since this statement is inconsistent with Mr. Tice's letter and the documentary evidence gathered by Ms. Kondora, it is not entitled to much credibility. Indeed, the written statement, prepared a month after Mr. Tice met with Ms. Kondora, is more consistent with the large majority of evidence received at the hearing.

The testimony of both Mr. Bennett and Mr. Duncan also supports the contention that the entities they ran were not making full payments promptly. Mr. Bennett testified he was made aware by his salesman in early December 2002 that some of Farms' vendors were not getting paid on time; he inquired of Mr. Tice, and sometimes Mr. Roveló, and was told not to worry because receivables would catch up with payables. (Tr. 1049-50.) Similarly, Mr. Duncan began receiving calls from the produce sellers complaining about slow payments in December 2002 and January 2003. When Mr. Duncan received a payment complaint from a vendor, he would get the invoice, give it to Mr. Roveló, and tell him to take care of it. (Tr. 890-92.)

One of the principal arguments made by counsel for Consolidation, Farms, Specialties, Mr. Duncan, and Mr. Bennett is that the law firm handling the bankruptcy

advised Mr. Tice and Mr. Rovelto to associate payables with receivables for each of the three entities (Tr. 402-03), because they could not have “one company with nothing but debt and three companies with nothing but assets, and it was just as I recall, it was a way to be able to put the asset to the debt.” (Tr. 461.) Mr. Tice’s testimony in this regard is simply not credible. Other than his unsupported statements, the evidence shows that the bankruptcy law firm was retained on Friday, January 31, 2003, and that the bankruptcies were filed 3 days later. If Consolidation, Farms, and Specialties are trying to imply that over that weekend an entire voucher system was created along with the more than 1,000 vouchers that were linked with the pre-existing invoices, they are unpersuasive.

Mr. Tice’s uncertain and unconvincing testimony in this regard is directly contradicted by the existence of these linked documents, which clearly establish that for each unpaid invoice there is a voucher that indicates which of the three entities purchased the produce for which payment was not forthcoming.

Thus, the accounts payable documents of Consolidation, Farms, and Specialties establish that, at the time of the investigation conducted by the PACA Branch, each company had outstanding produce debts as alleged in the Complaint.

2. The bankruptcy filings were signed under penalty of perjury. Consolidation’s, Farms’, and Specialties’ arguments that the bankruptcy filings, particularly Schedule F, do not constitute admissions of the existence of the listed debts or that they indicate that Perfectly Fresh Marketing, Inc., and not the entity filing the

Schedule F actually incurred the debt, are unconvincing and inconsistent with the documents. Moreover, these arguments are inconsistent with established United States Department of Agriculture precedent holding that documents filed in bankruptcy proceedings may constitute an admission of the filing party.

The creditors listed as holding unsecured claims in each of the Schedule F's are remarkably similar to the produce sellers listed in the accounts payable. Further, in each of their answers, Consolidation, Farms, and Specialties admitted the allegations of paragraph IV of the Complaint, which alleged, e.g., that "Respondent admits in its bankruptcy schedules that all 28 sellers listed in paragraph III of this complaint . . . hold unsecured claims for unpaid produce debt totaling of \$263,801.40. In the case of each of the 28 sellers listed, the amounts identified in the bankruptcy schedules for unpaid produce debt are greater than or equal to the amounts alleged in Paragraph III of this complaint."<sup>11</sup> While this consolidated proceeding would appear to be open and shut,<sup>12</sup> Consolidation, Farms, and Specialties, in their answers, also denied the allegations that they failed to make full payment promptly. Although Consolidation, Farms, and Specialties contend otherwise, I find the admissions in the bankruptcy filings do constitute admissions that these debts for produce did exist at the time of the filings, and

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<sup>11</sup>I quote the Specialties Complaint, but the same language, other than the number of sellers and the total indebtedness, is in all three Complaints, and the response is the same for all three answers.

<sup>12</sup>AMS and the PACA Branch Chief filed a Motion for Expedited Decision Without Hearing in the instant consolidated proceeding on this issue.

Consolidation's, Farms', and Specialties' denial in their answers of the allegations regarding making full payment promptly are in fact inconsistent with their admissions.

Documents filed in bankruptcy cases which list produce sellers holding claims for the sale of perishable agricultural commodities are deemed admissions in PACA proceedings. *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1610 (1993).

Consolidation, Farms, and Specialties contend that these and other cases cited by AMS and the PACA Branch Chief are distinguishable because only a single entity was involved in the cited cases. They argue these cases do not apply when there are multiple entities involved and application of these cases to a situation where multiple entities have allocated their debt would be an unwarranted "dramatic extension of the law."

(Respondents' and Petitioners' Reply Brief at 3-5.) However, I agree with AMS and the PACA Branch Chief that the cases actually do support a finding that, when a bankruptcy filer acknowledges the existence, under oath, of certain debts, then the bankruptcy filer has admitted that those debts exist and generally cannot deny them in subsequent proceedings.

Likewise, I reject the notion raised by Consolidation, Farms, Specialties, and Mr. Duncan in their reply brief (Respondents' and Petitioners' Reply Brief at 3-6) that the statement in each Schedule F that "Creditors listed on the attached sheets with an asterisk (\*) are creditors who may have statutory trust interests in the receipts generated by the

operation of the debtor's business pursuant to . . . [the PACA]" constitutes "clear" evidence that the produce sellers listed in each Schedule F were not produce sellers of the company that listed them as a creditor. Just because those who sold produce to the various entities thought they were selling to "Perfectly Fresh" and might not have known there were separate entities, does not change the fact that the purchases were in fact made by the specific entities and recorded as such in the entities' own books. Similarly, the fact that the cases were consolidated at the companies' request for ease in administration in the bankruptcy court was obviously nothing more than a procedural matter; if the court considered the consolidation an indicator that the bankruptcy schedules filed by each company meant something other than what the Schedule F plainly indicated, such a finding by the bankruptcy court is not anywhere in the evidence submitted in this consolidated proceeding.

3. I also find considerable merit in the assertion, raised by AMS and the PACA Branch Chief, that Consolidation, Farms, and Specialties should be estopped from claiming that their own records, and particularly their own bankruptcy filings, have a meaning other than that indicated on the face of their records and bankruptcy filings. The doctrine of judicial estoppel bars a party from asserting a position that is contrary to one the party has asserted under oath in a prior proceeding, where the prior court adopted the contrary position "either as a preliminary matter or as part of a final disposition."

*Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990). Judicial estoppel is

an “equitable doctrine that preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment.” (*Id.*) Judicial estoppel, however, should be “applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement.” (*Id.*)

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the United States Supreme Court laid out the three principal factors a court must examine to determine whether judicial estoppel should apply. “First, a party’s later position must be ‘clearly inconsistent’ with its earlier position.” (*Id.* at 750.) I find Consolidation’s, Farms’, and Specialties’ position in the disciplinary proceedings—that all the debts were incurred by Perfectly Fresh Marketing, Inc.—is inconsistent with the bankruptcy filings where each of the companies acknowledged its produce debts. “Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled.’” *Id.*, citing *Edwards v. Aetna Life Insurance*, 690 F. 2d 595, 599 (6th Cir. 1982). Here, if I find that all the debts were only owed by Perfectly Fresh Marketing, Inc., and that Consolidation, Farms, and Specialties are debt free, I would be making a finding utterly inconsistent with the documents Consolidation, Farms, and Specialties filed with the

bankruptcy court, as well as with the decision of the bankruptcy court itself. “A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” (*Id.*) Here, if I were to find Consolidation, Farms, and Specialties in fact did not owe produce sellers, then they would not be liable for violations of the PACA, a position that would make it difficult for AMS and the PACA Branch Chief to ensure that they carry out their statutory mandate of policing the produce industry. Consolidation, Farms, and Specialties cannot be allowed to list one set of creditors in the bankruptcy court and totally repudiate that list in the instant consolidated proceeding. This inconsistency would undermine the integrity of the judicial process.

4. The violations were willful, flagrant, and repeated. Consolidation, Farms, and Specialties vigorously contend that, even if there were violations, they were not willful or flagrant. However, long-standing case law interpreting these terms makes clear that the violations do meet the criteria of being willful and flagrant, as well as obviously being repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person “intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute,” his acts are regarded as willful. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 551-53 (1998); *In re Frank Tambone, Inc.*, 53 Agric. Dec. 703, 713-14 (1994). The fact that each of the three respondent companies continued to order and receive, and not pay for, produce, putting numerous

growers and sellers at risk, establishes they were clearly operating in disregard of the payment requirements of the PACA and committing willful violations. Principals of the companies involved, including Mr. Tice, Mr. Bennett, and Mr. Duncan, knew that payments were not being made in a timely fashion. Mr. Bennett and Mr. Duncan, in particular, did little more than inquire of Mr. Rovelo and Mr. Tice concerning the status of payments to their produce sellers and took no actions to correct the situation.

Consolidation's, Farms', and Specialties' attempts to find new investors and concern about paying the produce sellers back in full does not alter the fact that their conduct, particularly the continued purchase of produce when they were already facing financial uncertainty, meets the definition of "willful" as previously construed under the PACA.

Likewise, the conduct of Consolidation, Farms, and Specialties was flagrant as that term is used in the PACA. In determining whether a violation is flagrant, I factor in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 551 (1998). The number of violations (286 for Consolidation, 142 for Farms, and 796 for Specialties), the amount unpaid (over \$373,000 for Consolidation, over \$442,000 for Farms, and over \$263,000 for Specialties) and the multi-month period over which these violations occurred establish that the violations were flagrant. Likewise, the large number of violations establishes that they were repeated.



5. The investigation was conducted in a proper fashion. Consolidation, Farms, and Specialties attacked aspects of the investigation, both in terms of methodology and thoroughness. The PACA Branch investigation in this case followed the same general methodology employed in numerous other non-payment cases and has been approved in my decisions as well as by the courts. Receipt by the PACA Branch of either bankruptcy or reparation filings is frequently a trigger for the commencement of an investigation. Consolidation, Farms, and Specialties contended in their reply brief that it was “amazing” for AMS to rely on Ms. Kondora’s findings to establish that Consolidation, Farms, and Specialties had entered into the transactions that are the subject of these consolidated matters because Ms. Kondora had no first-hand knowledge of Consolidation’s, Farms’, and Specialties’ operations. (Reply Brief at 8.) Of course, such first-hand knowledge would have been somewhat difficult to obtain, given that Consolidation, Farms, and Specialties had ceased doing business by the time the investigation was commenced.

Instead, Ms. Kondora ascertained the location of the records of the companies, painstakingly reviewed and copied records, determined that each unpaid invoice was linked with a voucher identifying the specific Perfectly Fresh company that purchased the produce, interviewed both Gary and Erin Tice, received letters from Gary Tice, contacted and prepared affidavits for a number of the produce sellers who confirmed that the purchases were made in interstate commerce and were still unpaid, and prepared no-pay tables indicating which produce sellers were not paid by the respective entity and in what

amount. That the produce sellers Ms. Kondora talked with did not necessarily know which Perfectly Fresh entity with which they were dealing, or that these produce sellers generally did not even know that there was more than one Perfectly Fresh entity, does not alter the fact that the produce sellers confirmed that the particular Perfectly Fresh entity with which they dealt owed them money. This information, combined with each entity's own voucher and invoice records, and the filings made under oath with the bankruptcy court, strongly support the no-pay tables Ms. Kondora created. I find no basis for concluding that Ms. Kondora's investigation was inappropriate.

**B. The Responsibly Connected Cases**

**1. Jaime Rovelo Was Responsibly Connected With Consolidation, Farms, and Specialties**

Jaime Rovelo was notified by the PACA Branch Chief that he was found to be responsibly connected with Consolidation, Farms, and Specialties. In June 2005, Mr. Rovelo filed a petition challenging all three determinations. Subsequent to that filing, Mr. Rovelo had no further participation in these proceedings. Since the burden of proof is on the petitioner in a responsibly connected proceeding, and since Mr. Rovelo did not introduce any evidence that would refute the PACA Branch Chief's determinations, the Chief ALJ found that Mr. Rovelo was responsibly connected with Consolidation, Farms, and Specialties. Mr. Rovelo did not appeal the Chief ALJ's decision; therefore, the responsibly connected determinations regarding Mr. Rovelo are not before me.

## **2. Jeffrey Lon Duncan Was Responsibly Connected With Consolidation**

Jeffrey Lon Duncan, who was president, a board member, and a 10 percent shareholder in Consolidation (he was also a 20 percent shareholder in Perfectly Fresh Marketing, Inc., which owned 90 percent of Consolidation), has not met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of the PACA and (2) was only nominally a director and officer of a violating PACA licensee or entity subject to license. As the Petitioner, the burden of proof, by a preponderance of the evidence, lies with Mr. Duncan.

Mr. Duncan is a high school graduate who has spent his entire career, beginning in 1986, in the produce business. He was initially involved as a 49 percent owner of Perfectly Fresh Marketing, Inc., when that company was established and signed the Amended Operating Agreement that changed the organization of that company on July 28, 2002, and reduced his share of ownership to 20 percent, with the addition of John Norton to the ownership team. When establishing Perfectly Fresh Marketing, Inc., Consolidation, Farms, and Specialties, Mr. Duncan relied heavily on the expertise and experience of Gary Tice. Both Mr. Duncan and Mr. Tice portrayed Mr. Duncan as somewhat naive in the area of founding and managing a business. Mr. Duncan testified he signed whatever documents Mr. Tice or the attorney told him to sign and all he really did with Consolidation was to continue the business he was most familiar with—servicing the needs of cruise lines. Mr. Duncan stated he might have perused the Amended

Operating Agreement, but he believed Mr. Tice and his attorney would not take advantage of him (Tr. 846-49). Mr. Duncan was in his office most days and managed the cruise business.

Under the Amended Operating Agreement, Mr. Duncan was appointed president and a director, and was made 10 percent owner, of Consolidation. He testified he never made any capital investment in Consolidation; therefore, any documentation indicating that he had paid for his shares would be incorrect. He stated he would share in the profits once Consolidation became profitable. (Tr. 865.)

James Hinderer, a department head at Produce International who sold produce to Perfectly Fresh and dealt almost exclusively with Mr. Duncan, understood Mr. Duncan was taking care of his own cruise accounts and stated Mr. Duncan had his own strong customer base. Mr. Hinderer also speculated that his company stopped selling to Perfectly Fresh relatively early, but stated he thinks Produce International was paid in full because Mr. Duncan “took care of us.” (Tr. 801.) He speculated that Mr. Duncan “exerted pressure somehow” to keep the payments coming. (Tr. 802.)

When Consolidation’s produce sellers began complaining about slow payments in December 2002 or January 2003, Mr. Duncan would get the invoices and give them to Mr. Rovelo and tell him to take care of the customer (Tr. 890-92). Even though he knew Consolidation was not making payments promptly, he continued working on his sales (Tr. 893-94). Mr. Duncan indicated he did not decide which produce sellers should be

paid, but he gave Mr. Rovelo individual invoices and asked him to take care of things. No evidence was introduced as to whether Mr. Rovelo did, in fact, pay the produce sellers that Mr. Duncan requested be paid.

I find Jeffrey Lon Duncan was actively involved in activities resulting in violations of the PACA. While he clearly was not a principal decision maker for Consolidation, his participation in the day-to-day management of Consolidation, particularly including continuing to order produce after he knew Consolidation's produce sellers were not paid either fully or promptly, is sufficient to constitute active involvement. In *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999), I held:

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.

In particular, the buying and selling of produce at a time when produce sellers are not getting paid pursuant to the requirements of the PACA has been held to constitute involvement in activities resulting in a violation of the PACA. *In re Janet S. Orloff* (Order Denying Pet. for Reconsideration), 62 Agric. Dec. 281, 290-92 (2003). That Mr. Duncan had employees working under his direction who continued to order produce for Consolidation during this period, as evidenced by Consolidation's own

invoice/voucher system and the filings in bankruptcy court, is further evidence of Mr. Duncan's participation in activities resulting in a violation of the PACA. Each of the unpaid obligations listed in Consolidation's own records and in its bankruptcy filing constituted a debt incurred when Mr. Duncan was managing the sales operations of Consolidation. In this position, Mr. Duncan inherently exercised "judgment, discretion, or control" as those terms are used in *Norinsberg*.

Even if Mr. Duncan were to be found not actively involved in the activities that resulted in violations of the PACA, he failed to meet his burden of proving that he was only a nominal president and director of Consolidation. Mr. Duncan, whose entire 15-year career (as of the time Perfectly Fresh Marketing, Inc., was formed) was in the produce industry, voluntarily entered a business relationship with Gary Tice, an experienced businessman with expertise in the produce business, and elected to rely substantially on Mr. Tice's judgment and expertise. Mr. Duncan was hardly a novice in the business, and although much has been made of Mr. Tice's dominance in decision-making matters, I find Mr. Duncan was not in the position of someone who is given a title with no expectation of working in the business. Someone who is listed as an owner because his or her spouse or parent put them on corporate records and had no involvement in the corporation or experience in the produce business may be found to be nominal. *Minotto v. U.S. Dep't of Agric.*, 711 F. 2d 406, 409 (D.C. Cir. 1983). However,

Mr. Duncan was an experienced operator who entered into a business with Mr. Tice in order to earn more money when the business became profitable.

That Mr. Duncan chose not to exercise the authority inherent in his three positions of president, director, and shareholder does not relieve him of the duty to do so and does not sustain his claim that his position was nominal. He was no mere figurehead, but in fact ran the cruise business that Consolidation was established to conduct. He had the authority to sign checks, although it is clear that with the exception of one check he signed shortly before the violative period, he did not handle the check-writing duties.

### **3. Jeffrey Lon Duncan Was Not Responsibly Connected With Specialties**

Unlike with Consolidation, where Mr. Duncan ran the day-to-day operations of the cruise supply business, Mr. Duncan had no apparent day-to-day involvement in Specialties. Specialties was considered the business of Erin Tice, who left her prior position with Ready Pac to engage in a similar business running Specialties. Mr. Duncan had no direct ownership in Specialties and owned 18 percent of Specialties indirectly through his 20 percent ownership in Perfectly Fresh Marketing, Inc., which owned 90 percent of Specialties. While he is listed as the chief financial officer and a director on the PACA application, it is undisputed that Jaime Rovelo acted as chief financial officer during the period when Specialties violated the PACA and that no board of directors meetings of Specialties ever occurred. The record contains no evidence that Mr. Duncan was even aware he was listed as a director or chief financial officer of Specialties. Other

than his indirect 18 percent ownership of the company, Mr. Duncan appears to have no relationship with Specialties. Furthermore, I do not find, based on the facts before me, that indirect ownership meets the responsibly connected ownership requirement of the PACA, *i.e.*, “holder of more than 10 per centum of the outstanding stock of a corporation or association.” (7 U.S.C. § 499a(b)(9).)

The record contains no evidence that Mr. Duncan ordered any produce on behalf of Specialties, and the record is overwhelmingly clear that he had no expertise in this specialized aspect of the produce business. Unlike the business of supplying cruise ships, where Mr. Duncan was unquestionably the expert and manager of the business and where Mr. Duncan or those under his direction continued to order produce well after he knew produce suppliers were not being paid fully and promptly, Specialties presents a situation in which Mr. Duncan had no control over pertinent events. The employees at Specialties were employed by Erin Tice and had no connection with Mr. Duncan.

While Mr. Duncan did not oppose the creation of Specialties and was aware that many of Erin Tice’s Ready Pac employees joined Specialties, he clearly had no power or authority over the situation given the fact that Gary Tice and Mr. Norton wielded the majority vote of Perfectly Fresh Marketing, Inc., and that he had no knowledge of, or planned role in, the business. Mr. Duncan was only an indirect shareholder in Specialties and he neither acted as nor was aware of his listed titles as chief financial officer and director of Specialties. The fact that Mr. Duncan had absolutely no discernible role in the



operation of Specialties supports a finding that he was only a nominal director and officer of Specialties.

#### **4. Thomas Bennett Was Responsibly Connected With Farms**

Thomas Bennett, who was a 10 percent shareholder, president, and a director of Farms, has not met his two-step burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of the PACA and (2) was only nominally a director and officer of a violating licensee or entity subject to license. As the Petitioner, the burden of proof, by a preponderance of the evidence, lies with Mr. Bennett.

Mr. Bennett had been in the produce industry for 42 years at the time of the hearing. He had built and sold a restaurant chain, had been a produce buyer for 11 years at Sysco, and then ran Francisco Distributing for 11 years. He had known Gary Tice on a professional level. Mr. Tice (actually Perfectly Fresh Marketing, Inc.) was leasing space from Francisco Distributing when Mr. Bennett was told that Francisco Distributing was closing down; Mr. Bennett told Mr. Tice that the whole building would be available. In addition to leasing the additional space, Mr. Tice offered positions to Mr. Bennett and some of the sales force that he had managed at Francisco Distributing. Mr. Bennett was offered the position of president of Farms, along with a 10 percent ownership share in the new company. He never actually invested any money nor did he ever see any physical manifestation of the shares he owned. He did sign a number of corporate documents

when Farms started up, basically signing whatever documents Mr. Tice and Mr. Tice's attorney told him to sign. Mr. Bennett signed a card authorizing him to sign checks, although he had no recollection of that fact and there is no evidence that he ever signed a check.

While he classified his work at Farms as "kind of a glorified babysitting job" (Tr. 1041), it is evident that he had a major role in the day-to-day business of Farms. He came in most mornings at 5 and checked the markets, mostly with regard to citrus, Hawaiian papayas, and chilies. Mr. Bennett stated he was given the title of president to give him the apparent authority to call higher officials of potential clients. He did not generally contact clients, but managed the sales staff who worked for him and did contact the clients. When Mr. Bennett realized that Farms had excess storage space, he started an outside storage business on behalf of Farms and spent more time working on that enterprise than on Farms' produce business. (Tr. 1041-42.) Mr. Bennett stated he first heard about slow payments from his salesmen in December 2002, and he would inform Mr. Tice or Mr. Rovelo who told him not to worry. He testified he probably could have found out more about the financial condition of Farms and the other companies had he asked. (Tr. 1049-50.) David Hewitt, one of Farms' former employees, confirmed that Mr. Bennett hired him (Mr. Hewitt was one of the Francisco Distributing employees that Mr. Bennett brought to Farms), was his manager, and oversaw the operations of Farms. Mr. Hewitt stated that Mr. Bennett apparently reported to others. (Tr. 604-07, 612.)

I find Thomas Bennett was actively involved in the activities resulting in violations of the PACA. As the president of Farms, he managed significant aspects of the business, as well as the outside storage business which he apparently pursued on his own initiative. While some of the transactions that resulted in failure to pay occurred after his apparent resignation,<sup>13</sup> a significant number of these purchases were made while he was serving as president of Farms. Like Mr. Duncan, Mr. Bennett allowed his employees to continue ordering produce even after he became aware that his produce sellers were getting paid slowly, if at all. This activity, in itself, constitutes active involvement.

Even if Mr. Bennett could be found not to be actively involved in activities resulting in violations of the PACA, he would only avoid responsibly connected status if his positions as president and director in Farms were nominal. I find his position as president was not nominal as that term is used and interpreted in the PACA case law. I make no ruling on his position as director since it is not clear whether he even knew he was a director and there were no meetings of the board of directors while he was affiliated with Farms.

With his lifetime of experience in the produce business, Mr. Bennett was a knowledgeable and seasoned veteran, who should have understood the obligations that the PACA imposes upon a significant shareholder and officer in a produce company. Like, Mr. Duncan, Mr. Bennett was hardly the type of unknowledgeable, powerless

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<sup>13</sup>He stated he resigned in early January 2003, but there is no evidence supporting a specific date.

individual the court was contemplating in the *Minotto* decision. In fact, Mr. Bennett alerted Mr. Tice that some office space in the building that Perfectly Fresh Marketing, Inc., was leasing was going to be vacated by Francisco Distributing, his then current employer. As a result of ensuing discussions with Mr. Tice, Mr. Bennett became the president of, and 10 percent shareholder in, Farms and found immediate employment for many of the people who worked for him at Francisco Distributing, who would otherwise be terminated when that operation ceased. Such was the extent of Mr. Bennett's participation in the operation of Farms that, on his own, he sub-let space on behalf of Farms to other produce businesses that were looking for storage space. This action in itself belies that he was acting in a nominal capacity for Farms. In addition, as a 10 percent shareholder, Mr. Bennett was presumably in line to get a percentage of profits once Farms became profitable.

I am mindful that Mr. Bennett played a lesser overall role with respect to Farms than Mr. Duncan did with respect to both Consolidation and Perfectly Fresh Marketing, Inc., and that both Mr. Bennett and Mr. Duncan were rather gullible and trusting for individuals with their years of experience in the produce industry. However, neither Mr. Bennett nor Mr. Duncan was able to demonstrate that he was not actively involved in activities resulting in a violation of the PACA. And neither Mr. Bennett nor Mr. Duncan was able to demonstrate that his role as president was nominal.

## ISSUES ON APPEAL

Consolidation, Farms, and Specialties argue on appeal that there is not substantial evidence to support the Chief ALJ's decision that they violated the PACA. The companies rely extensively on the testimony of Gary Tice to support their version of the case. The problem the companies have with this position is that the Chief ALJ found that Mr. Tice's testimony was contradictory, inconsistent, unsupported and it lacked credibility. After reviewing Mr. Tice's testimony and the other evidence, I agree with the Chief ALJ.

Furthermore, Consolidation, Farms, and Specialties, on appeal, do nothing more than rehash their unsuccessful arguments made before the Chief ALJ. They provide no new reasoning, argument, or support for me to reverse the Chief ALJ's decision. As I note in this Decision and Order, *supra*, the Chief ALJ amply discussed the reasons why Consolidation, Farms, and Specialties violated the PACA. I include those discussions in this decision.

However, I do find important a discussion of the companies' position that Perfectly Fresh Marketing, Inc., made all purchases, and therefore, Perfectly Fresh Marketing, Inc., is the firm that failed to make payments in accordance with the PACA. This argument provides Consolidation, Farms, and Specialties little comfort. The business structure established for the Perfectly Fresh family of companies appears to be a scheme and device which attempts to insulate Consolidation, Farms, and Specialties and

their officers and shareholders, from any liability for violations under the PACA. I find Perfectly Fresh Marketing, Inc., in essence, serves as the respondent companies' agent and the responsibility for payments under the PACA rests not only with Perfectly Fresh Marketing, Inc., but also flows through Perfectly Fresh Marketing, Inc., and rests with Consolidation, Farms, and Specialties. Therefore, I find the Chief ALJ correctly held that Consolidation, Farms, and Specialties committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to sellers of perishable agricultural commodities.

The Chief ALJ found that Mr. Duncan and Mr. Bennett were responsibly connected and I agree. Their arguments on appeal raise no issues that were not addressed by the Chief ALJ. As I state in this Decision and Order, *supra*, I adopt the Chief ALJ's well-reasoned decision as my own. However, I take a moment to discuss the concept of responsibly connected and the standard applied for making the determination whether an individual was responsibly connected with a company that violated the PACA.

The PACA imposes licensing and employment restrictions on any person found to be responsibly connected with a licensee who violated the PACA. (7 U.S.C. §§ 499d(b), 499h(b).) "The term 'responsibly connected' means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (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).)

In 1995, Congress amended the definition of “responsibly connected.” (Perishable Agricultural Commodities Act Amendments of 1995, Pub. L. No. 104-48, 109 Stat. 424.) The amendment now gives an individual who is found to be responsibly connected, based on the records at the agency, the opportunity to demonstrate that he is “not responsible” for the violation of the PACA. (H.R. Rep. No. 104-207, at 11, *reprinted in* 1995 U.S.C.C.A.N. 453, 458.)

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 [the PACA] and 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 reviewed my first application of the revised definition. *Norinsberg v. U.S. Dep’t of Agric.*, 162 F.3d 1194 (1998). The Court articulated the basic test for determining if an individual is responsibly connected. First, the United States Department of Agriculture makes an initial determination whether the individual is “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).)

Next, the Court indicated that, if the individual fits the statutory 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. In the alternative to proving that the individual nominally held the statutory role, 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.

In the *Norinsberg* remand decision, I presented 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. 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.

*In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999).

Applying this standard to Mr. Duncan, he is responsibly connected and subject to the licensing and employment restrictions unless he demonstrates by a preponderance of the evidence:

1. that he was not actively involved in any of the activities resulting in the PACA violations; and



2. that he was either a nominal shareholder, nominal director, and nominal officer of Consolidation or that Consolidation was the alter ego of its other owners.<sup>14</sup>

Similarly, Mr. Bennett must satisfy the requirements of this test regarding his relationship with Farms if he is to avoid a responsibly connected determination.

The Chief ALJ's discussion of prong one, the actively involved test, is complete and needs no expansion. Mr. Duncan, Mr. Bennett, and other participants in responsibly connected proceedings fail to comprehend the critical component of being nominal – that the individual becomes the officer, director, or shareholder for the convenience and benefit of the company or the owners of the company, not because of his own ambition or entrepreneurial desires. “In order to prove that one was only a nominal officer or director, one must establish that one lacked any ‘actual, significant nexus with the violating company[.]’” *Hart v. Department of Agric.*, 112 F.3d 1228, 1231 (D.C. Cir. 1997), quoting *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983).

Mr. Duncan and Mr. Bennett each was the president of his respective company. Each owned 10 percent of the shares of the company.<sup>15</sup> Mr. Duncan was a founding

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<sup>14</sup>The two prongs of the test are joined by the conjunctive “and.” If Mr. Duncan fails to show that he was not actively involved, he cannot meet his burden and he will be deemed responsibly connected. Equally so, if his ownership interest and his position as a corporate officer are not nominal, even if he could prove that he was not actively involved, he would fail the statutory test and be deemed responsibly connected.

<sup>15</sup>These ownership interests bar Mr. Duncan and Mr. Bennett from utilizing the “alter ego” defense. I have consistently held that the “alter ego” defense is not available to individuals who have an ownership interest in the violating company. *See In re*

member of the Perfectly Fresh family of companies. When Mr. Duncan and Mr. Tice founded Consolidation, Farms, and Specialties as subsidiaries of Perfectly Fresh Marketing, Inc., Mr. Duncan became president of Consolidation. This appointment of Mr. Duncan as president was done not to make it easier for Mr. Tice and Perfectly Fresh Marketing, Inc., but rather with entrepreneurial intent. Under this circumstance, I find Mr. Duncan had an “actual, significant nexus with” Consolidation.

Mr. Bennett assisted Mr. Tice in obtaining a facility for Perfectly Fresh Marketing, Inc., that was being vacated by Mr. Bennett’s employer. Mr. Tice offered Mr. Bennett the president’s job at Farms and allowed Mr. Bennett to hire and manage a sales force and initiate a storage business for the benefit of Farms. These actions show Mr. Bennett had an “actual, significant nexus with” Farms.

Another aspect of the concept of nominal that is rarely, if ever, discussed is disparate levels of power and authority between the nominal officer and the individual who appoints him. Lilly Minotto was a secretary who was made director of a PACA licensee to ensure that a quorum existed for board meetings. *Minotto*, 711 F.2d at 408; Jean-Pierre Bell was a salesman who was made president of a PACA licensee to mediate disputes between the two owners, *Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994); Carl Quinn was a truck driver who was made vice president of a PACA licensee to

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<sup>15</sup>(...continued)

*Benjamin Sudano*, 63 Agric. Dec 388, 411 n.5 (2004), *aff’d per curiam*, 131 F. App’x 404 (4th Cir. 2005).

satisfy the statutory requirement for specific numbers of officers, *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975); and Michael Norinsberg was the son of the president of a PACA licensee who was made secretary and treasurer of the corporation so somebody was available to sign checks. *Norinsburg*, 162 F.3d at 1198. In each of these cases, the nominal officer had no power and was an officer in name only to solve a corporate need. Mr. Duncan and Mr. Bennett were real officers, even if they chose not to exercise that authority. As the United States Court of Appeals for the District of Columbia Circuit noted, a situation in which the affiliation is purely nominal and the so-called officer had no powers at all is radically different from one in which a genuine officer simply does not use the powers of his office. *Quinn*, 510 F.2d at 756.

Mr. Duncan and Mr. Bennett had the burden to overcome this evidence. They failed to do so. Therefore, Mr. Duncan was a true, not nominal, officer of Consolidation and was responsibly connected with Consolidation and Mr. Bennett was a true, not nominal, officer of Farms and was responsibly connected with Farms.

### **FINDINGS OF FACT**

1. Perfectly Fresh Marketing, Inc., was a California corporation established in June 2001 to engage in the produce business. Initially, 51 percent of Perfectly Fresh Marketing, Inc., was owned by Tice, Inc. (which was owned by Gary and Erin Tice), and 49 percent was owned by Jeffrey Lon Duncan.

2. In July 2002, the operating agreement of Perfectly Fresh Marketing, Inc., was amended so that 50 percent of the company was owned by Perfectly Fresh, LLC, a holding company controlled by John Norton, 30 percent was owned by Tice, Inc., and 20 percent was owned by Jeffrey Lon Duncan. Gary Tice, John Norton, and Jeffrey Lon Duncan each signed the Amended Operating Agreement on July 18, 2002.

3. Perfectly Fresh Farms, Inc., a California corporation 90 percent owned by Perfectly Fresh Marketing, Inc., and 10 percent owned by Thomas Bennett, was the holder of PACA license 021541 from August 2002 until the PACA license expired on August 21, 2003.

4. During the period October 27, 2002, through February 21, 2003, Perfectly Fresh Farms, Inc., failed to make full payment promptly to 14 sellers of 142 lots of perishable agricultural commodities that were purchased, received, and accepted in interstate commerce, in the amount of \$442,023.12.

5. Perfectly Fresh Consolidation, Inc., a California corporation 90 percent owned by Perfectly Fresh Marketing, Inc., and 10 percent owned by Jeffrey Lon Duncan, was the holder of PACA license 021540 from August 2002 until the PACA license expired on August 21, 2003.

6. During the period November 17, 2002, through February 15, 2003, Perfectly Fresh Consolidation, Inc., failed to make full payment promptly to 24 sellers of

286 lots of perishable agricultural commodities that were purchased, received, and accepted in interstate commerce, in the amount of \$373,944.19.

7. Perfectly Fresh Specialties, Inc., a California corporation 90 percent owned by Perfectly Fresh Marketing, Inc. (and whose PACA license did not account for the remaining 10 percent ownership), was the holder of PACA license 021539 from August 2002 until the PACA license expired on August 21, 2003.

8. During the period November 1, 2002, through February 20, 2003, Perfectly Fresh Specialties, Inc., failed to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities that were purchased, received, and accepted in interstate commerce, in the amount of \$263,801.40.

9. Thomas Bennett was president of, and a 10 percent shareholder in, Perfectly Fresh Farms, Inc., during much of the time period when Perfectly Fresh Farms, Inc., was ordering produce and failing to fully and promptly pay for such produce. As of the date of the hearing, Thomas Bennett had been employed in the produce industry for 45 years. He was actively involved in the day-to-day operations of Perfectly Fresh Farms, Inc., throughout the period he was employed there. He signed numerous corporate documents and was involved in decisions consistent with a position of responsibility.

10. Jeffrey Lon Duncan was president of, and a 10 percent shareholder in, Perfectly Fresh Consolidation, Inc., from the time when Perfectly Fresh Consolidation, Inc., was created through the time it filed for bankruptcy. As of the date of the hearing,

Jeffrey Lon Duncan had been employed in the produce industry for over 20 years. He was actively involved in the day-to-day operations of Perfectly Fresh Consolidation, Inc., throughout the period of its existence, signing numerous corporate documents, including the Amended Operating Agreement, occasionally signing checks, and was involved in decisions consistent with a position of responsibility.

11. Jeffrey Lon Duncan was not actively involved in the operations of Perfectly Fresh Specialties, Inc., during the time that Perfectly Fresh Specialties, Inc., committed violations of the PACA. Even though the PACA license application listed Mr. Duncan as chief financial officer and a director of Perfectly Fresh Specialties, Inc., his role with that company, if any, was purely nominal.

### **CONCLUSIONS OF LAW**

1. Perfectly Fresh Farms, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to 14 sellers of 142 lots of perishable agricultural commodities in the amount of \$442,023.12, during the period October 27, 2002, through February 21, 2003.

2. The appropriate sanction for Perfectly Fresh Farms, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations of the PACA.

3. Perfectly Fresh Consolidation, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to 24 sellers of 286 lots of

perishable agricultural commodities in the amount of \$373,944.19, during the period November 17, 2002, through February 15, 2003.

4. The appropriate sanction for Perfectly Fresh Consolidation, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations of the PACA.

5. Perfectly Fresh Specialties, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities in the amount of \$263,801.40, during the period November 1, 2002, through February 20, 2003.

6. The appropriate sanction for Perfectly Fresh Specialties, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations of the PACA.

7. Thomas Bennett was responsibly connected with Perfectly Fresh Farms, Inc., during the time Perfectly Fresh Farms, Inc., committed violations of the PACA. As such, Mr. Bennett is subject to the licensing and employment restrictions of the PACA.

8. Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., during the time Perfectly Fresh Consolidation, Inc., committed violations of the PACA. As such, Mr. Duncan is subject to the licensing and employment restrictions of the PACA.

9. Jeffrey Lon Duncan was not responsibly connected with Perfectly Fresh Specialties, Inc., during the time Perfectly Fresh Specialties, Inc., committed violations of the PACA.

### **ORDER**

1. Perfectly Fresh Consolidation, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Consolidation, Inc.

2. Perfectly Fresh Farms, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Perfectly Fresh Farms, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Farms, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Farms, Inc.

3. Perfectly Fresh Specialties, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Perfectly Fresh Specialties, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Specialties,



Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Specialties, Inc.

4. Thomas Bennett was responsibly connected with Perfectly Fresh Farms, Inc., when Perfectly Fresh Farms, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Thomas Bennett 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. Bennett.

5. Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., when Perfectly Fresh Consolidation, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Jeffrey Lon Duncan 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. Duncan.

#### **RIGHT TO JUDICIAL REVIEW**

Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Farms, Inc.; Perfectly Fresh Specialties, Inc.; Thomas Bennett; and Jeffrey Lon Duncan each 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. Judicial Review must be

sought within 60 days after entry of the Order in this Decision and Order.<sup>16</sup> The date of entry of the Order in this Decision and Order is June 12, 2009.

Done at Washington, DC

June 12, 2009

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William G. Jenson  
Judicial Officer

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<sup>16</sup>28 U.S.C. § 2344.

In re: Perfectly Fresh Farms, Inc.  
PACA Docket No. D-05-0001  
Perfectly Fresh Consolidation, Inc.  
PACA Docket No. D-05-0002 and  
Perfectly Fresh Specialties, Inc.  
PACA Docket No. D-05-0003  
Jaime O. Rovelo,  
PACA-APP Docket No. 05-0013  
Jeffrey Lon Duncan  
PACA-APP Docket No. 05-0014  
Thomas Bennett  
PACA-APP Docket No. 05-0015  
Decision and Order as to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.;  
Perfectly Fresh Specialities, Inc.; Jeffrey Lon Duncan; and Thomas Bennett.  
Filed June 12, 2009.

Christopher Young-Morales, for the Associate Deputy Administrator, AMS.  
Jonathan Barry Sexton, Orange, CA, for Petitioner Thomas Bennett.  
Christopher F. Bryan, Los Angeles, CA, for Respondents Perfectly Fresh Consolidation,  
Inc.; Perfectly Fresh Farms, Inc.; Perfectly Fresh Specialties, Inc.; and Petitioner Jeffrey  
Lon Duncan.  
Initial decision issued by Marc R. Hillson, Chief Administrative Law Judge.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

PACA – Responsibly connected – Willful, flagrant and repeated violations – Failure to  
pay full payment promptly – Facts and circumstances published – Licensing restrictions –  
Employment restrictions – Right to judicial review – Preponderance of the evidence –  
Nominal – Alter ego.