

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. D-04-0015
Tuscany Farms, Inc.,)	
d/b/a Genovas,)	
)	
Respondent)	
)	
	and	
In re:)	PACA Docket No. D-04-0016
Joe Genova & Associates, Inc.,)	
)	
Respondent)	
)	
	and	
In re:)	PACA Docket No. D-06-0017
Gencon Consulting, Inc.,)	
)	
Respondent)	
)	
	and	
In re:)	PACA-APP Docket No. 06-0005
Joe A. Genova,)	
)	
Petitioner)	
)	
	and	
In re:)	PACA-APP Docket No. 06-0006
Nicole Wesner,)	
)	
Petitioner)	
)	

DECISION AND ORDER AS TO TUSCANY FARMS, INC.;
JOE GENOVA & ASSOCIATES, INC.; AND JOE A. GENOVA

On June 2, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Associate Deputy Administrator], issued a Complaint against Tuscany Farms, Inc., d/b/a Genovas [hereinafter Tuscany Farms], alleging that, during the period August 2002 through November 2002, Tuscany Farms committed willful violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to make full payment promptly to three sellers of the agreed purchase prices, in the amount of \$336,200.76 for 65 lots of perishable agricultural commodities, which Tuscany Farms purchased, received, and accepted in interstate commerce. Tuscany Farms filed an Answer denying the alleged violations.

On June 3, 2004, the Associate Deputy Administrator issued a Complaint against Joe Genova & Associates, Inc. [hereinafter Joe Genova & Associates], alleging that, during the period February 2002 through November 2002, Joe Genova & Associates committed willful violations of the PACA by failing to make full payment promptly to nine sellers of the agreed purchase prices, in the amount of \$315,807.86 for 123 lots of perishable agricultural commodities which Joe Genova & Associates purchased, received, and accepted in interstate commerce. Joe Genova & Associates filed an Answer denying the alleged violations.

On January 12, 2006, Karla D. Whalen, Acting Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Services, United States Department of Agriculture [hereinafter the Acting Chief], informed Douglas B. Kerr, counsel to Nicole Wesner, that she had determined that Ms. Wesner was responsibly connected with Tuscany Farms during the period when Tuscany Farms violated the PACA. On that same day, the Acting Chief issued a similar determination with respect to Joe A. Genova. Both Ms. Wesner and Mr. Genova filed timely Petitions to review the Acting Chief's January 12, 2006, determinations.

Also, on January 12, 2006, counsel for the Associate Deputy Administrator and the Acting Chief moved to set the matters for a consolidated hearing. On April 11, 2006, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] consolidated the two disciplinary proceedings with the two responsibly connected proceedings, as required under the rules of practice applicable to the proceedings.¹

On July 13, 2006, the Associate Deputy Administrator issued a Notice to Show Cause to Gencon Consulting, Inc. [hereinafter Gencon], providing Gencon with an opportunity to show cause why it should not be denied a license under the PACA. The Notice to Show Cause alleged that Joe Genova, Jr., the principal of Gencon, was the same

¹The rules of practice applicable to these proceedings are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151). The Chief ALJ consolidated the two disciplinary proceedings with the two responsibly connected proceedings in accordance with 7 C.F.R. § 1.137(b).

individual who was a 100 percent owner of Joe Genova & Associates at the time Joe Genova & Associates violated the PACA and was the secretary, the treasurer, a director, and a 24 percent shareholder of Tuscany Farms at the time Tuscany Farms violated the PACA. Gencon filed a timely response. While the PACA provides that the license applicant shall be given an opportunity for hearing within 60 days from the date of the license application to show cause why the license should not be refused,² the parties agreed to consolidate the Gencon hearing with the other four consolidated cases.

The Chief ALJ conducted a hearing on the five consolidated cases in Santa Ana, California, from September 12-15, 2006. Eric Paul and Jonathan Gordy represented the Associate Deputy Administrator and the Acting Chief. Douglas B. Kerr and Jonathan Barry Sexton represented Tuscany Farms, Joe Genova & Associates, Gencon, Nicole Wesner, and Joe A. Genova. The Associate Deputy Administrator and the Acting Chief called seven witnesses. These witnesses were David Studer, the lead Agricultural Marketing Service investigator, and six industry witnesses who testified they had engaged in transactions covered by the PACA with Tuscany Farms and Joe Genova & Associates without receiving full payment promptly. Tuscany Farms, Joe Genova & Associates, Gencon, Nicole Wesner, and Joe A. Genova called three witnesses, including Joe A. Genova. The Associate Deputy Administrator and the Acting Chief then called John Koller as a witness concerning what sanctions would be appropriate.

²7 U.S.C. § 499d(d).

During the hearing, counsel for Nicole Wesner stipulated that she was responsibly connected with Tuscany Farms. (Tr. 689.)

On August 24, 2007, the Chief ALJ issued a Decision addressing the five consolidated cases. In the Decision, the Chief ALJ concluded: (1) Tuscany Farms and Joe Genova & Associates willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly for produce it purchased; (2) Nicole Wesner and Joe A. Genova were responsibly connected with Tuscany Farms during the time Tuscany Farms violated the PACA; and (3) Gencon failed to show cause why the Secretary of Agriculture should not refuse Gencon a PACA license. On October 26, 2007, Tuscany Farms, Joe Genova & Associates, and Joe A. Genova filed a timely appeal of the Chief ALJ's Decision.³

I have carefully reviewed the Chief ALJ's Decision and the filings submitted by all parties. I have read the transcript of all four days of the hearing and examined each document placed into evidence. Based on my review of the record, I find the Chief ALJ's Decision is supported by the evidence and well reasoned. Therefore, I adopt the Chief ALJ's Decision as my own decision in its entirety. I write to address the issues raised on appeal.

³Neither Nicole Wesner nor Gencon appealed the Chief ALJ's Decision. Therefore, the Decision of the Chief ALJ, regarding Ms. Wesner and Gencon, is final.

APPEAL ISSUES

In their Appeal Petition, Tuscany Farms, Joe Genova & Associates, and Joe A. Genova raise two issues. First, they argue that no credible evidence was presented to show that Tuscany Farms and Joe Genova & Associates violated the PACA. (Appeal Pet. at 2.) I find this argument without merit. Tuscany Farms and Joe Genova & Associates correctly note that the Associate Deputy Administrator must prove the allegations that Tuscany Farms and Joe Genova & Associates violated the PACA by a “preponderance of the evidence” standard. (Appeal Pet. at 2.)

Preponderance of Evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a whole shows that the fact sought to be proved is more probable than not. [Citation omitted.] With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability.

Black’s Law Dictionary 1064 (5th ed. 1979). To apply this standard, I balance the weight of the evidence entered into the record by the Associate Deputy Administrator with the weight of the evidence entered by Tuscany Farms and Joe Genova & Associates.

The Associate Deputy Administrator entered evidence into the record demonstrating that Tuscany Farms and Joe Genova & Associates owed significant debt to produce suppliers. This evidence included:

- A list, provided by counsel for Tuscany Farms and Joe Genova & Associates, that identified all of Tuscany Farms’ and Joe Genova & Associates’ vendors, including the amount of money owed to these vendors by Tuscany Farms and Joe Genova & Associates. (CX 7.)

- The accounts payable printout for Tuscany Farms and Joe Genova & Associates. (CX 8-CX 9.)
- Copies of invoices and other documents evidencing transactions in produce between Tuscany Farms and three different vendors and between Joe Genova & Associates and nine different vendors. (CX 10-CX 21.)
- The testimony of six representatives of produce companies owed money by Tuscany Farms and Joe Genova & Associates. (Tr. 133-250, 307-69, 457-531, 691-721.)

Tuscany Farms and Joe Genova & Associates called two witnesses to testify regarding accounts payable for Tuscany Farms and Joe Genova & Associates. First, Salvatore Mangano, the comptroller at Joe Genova & Associates, testified that, due to a failure in the software program designed to track the finances of Tuscany Farms and Joe Genova & Associates, including the payables and receivable, huge numbers of exception reports⁴ were generated that indicated that Tuscany Farms and Joe Genova & Associates owed far less money than alleged. (Tr. 614-15.) However, no such exception reports were provided to the Agricultural Marketing Service investigator. (Tr. 907.)

Furthermore, during the hearing, no exception reports or any other documents supporting Mr. Mangano's claim that the amounts owed by Tuscany Farms and Joe Genova & Associates were lower than the amounts shown in invoices and accounts payable statements were offered into evidence by Tuscany Farms or Joe Genova & Associates.

⁴The exception reports are documents that would list purported adjustments to invoices.

Second, Paul Roper, a business consultant “retained to create reliable data for the financial statements” (Tr. 724), stated that “the raw data from which the accounting firm was trying to prepare financial statements and balance the books was simply incomprehensible.” (Tr. 725.) Mr. Roper discussed the existence of exception reports but found that “it wasn’t a complete and accurate list.” (Tr. 727.) Mr. Roper also indicated that he found the exception reports “unreliable.” (Tr. 762-63.) Neither Mr. Mangano nor Mr. Roper testified that produce suppliers were not owed money by Tuscany Farms and Joe Genova & Associates.

Tuscany Farms and Joe Genova & Associates raise three points in arguing their appeal. First, they state that Tuscany Farms and Joe Genova & Associates “had ceased operations before the Government’s investigation.” (Appeal Pet. at 2.) The cessation of the operation of the two companies before the Agricultural Marketing Service commenced its investigation into the failure of the companies to make full payment promptly for produce, is not relevant to the decision whether the companies violated the PACA. Cessation of operations does not exempt a company from the statutory requirements of the PACA. Furthermore, Tuscany Farms and Joe Genova & Associates’ contention that, prior to shutting down, the companies “reached accord and satisfactions on each and every debt” (Appeal Pet. at 3) offers them no solace.⁵ An accord is:

⁵Tuscany Farms and Joe Genova & Associates’ claim that there were “genuine disputes due to discrepancies” in documentation is belied by testimony from their vendors. *See, e.g.*, testimony of Lawrence Heidecker (Tr. 475).

An agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing is entitled to accept.

Black's Law Dictionary 16 (5th ed. 1979). I have long held, even though the creditor is willing to accept less than owed from a debtor, such an agreement does not meet the requirements of full payment promptly under the PACA. *See In re Kanowitz Fruit and Produce Co.*, 56 Agric. Dec. 917, 928 n.7 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999).)

Tuscany Farms and Joe Genova & Associates' second point is that "Government witness testimony was unreliable." (Appeal Pet. at 4.) I read the entire hearing transcript and examined each document in relation to the testimony concerning that document. The testimony of Tuscany Farms and Joe Genova & Associates' witnesses, Mr. Mangano and Mr. Roper, showed a dysfunctional, poorly run company. I found the testimony of Joe A. Genova to be very evasive and unreliable. Based on my review of the transcript and exhibits, I find the testimony of the government witnesses to be reliable. Therefore, I relied on the testimony of the government witnesses significantly more than Tuscany Farms and Joe Genova & Associates' witnesses.

Tuscany Farms and Joe Genova & Associates' final point was that "[t]he evidence collected by the Government was incomplete." (Appeal Pet. at 7.) The Agricultural Marketing Service could only collect documents to which it was given access. Tuscany Farms and Joe Genova & Associates are more likely to have documents to support their position than the government. The Associate Deputy Administrator presented his case

using invoices and testimony of creditors to make a prima facie case. Tuscany Farms and Joe Genova & Associates then had the opportunity to rebut the prima facie case with their own evidence. Here the rebuttal evidence could have been the exception reports mentioned above, credit memoranda, or any other evidence demonstrating Tuscany Farms and Joe Genova & Associates owed no money to their produce suppliers. Tuscany Farms and Joe Genova & Associates failed to present any such evidence.

Balancing the evidence in the record, both testimony and documents, and taking into account the claims that some evidence was not accurate, the weight of the evidence causes me conclude that it is more probable than not that Tuscany Farms and Joe Genova & Associates failed to make full payment promptly to companies that sold them perishable agricultural commodities. Therefore, I conclude that Tuscany Farms and Joe Genova & Associates each violated the PACA.

I deny the appeal, and I find that, during the period August 2002 through November 2002, Tuscany Farms willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to three sellers of the agreed purchase prices, in the amount of \$336,200.76 for 65 lots of perishable agricultural commodities which Tuscany Farms purchased, received, and accepted in interstate commerce. I further find that, during the period February 2002 through November 2002, Joe Genova & Associates willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to nine sellers of the agreed purchase prices, in the amount of \$315,807.86 for

123 lots of perishable agricultural commodities which Joe Genova & Associates purchased, received, and accepted in interstate commerce.

The second issue raised on appeal is whether Joe A. Genova was responsibly connected with Tuscan Farms during the time when Tuscan Farms committed willful, flagrant, and repeated violations of the PACA. The Chief ALJ found that Mr. Genova was responsibly connected and I agree. Mr. Genova's arguments on appeal raise no issues that were not addressed by the Chief ALJ. As I stated above, 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 is 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, § 12(a), 109 Stat. 424.) The amendment now gives an individual who is found to be responsibly connected the opportunity to demonstrate that he is "not responsible" for the violation of

the PACA. (H. R. Rep. No. 104-207, at 11 (1995), *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 this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee . . . or was not an owner of a violating licensee . . . which was the alter ego of its owners.

(7 U.S.C. § 499a(b)(9).)

In 1998, the United States Court of Appeals for the District of Columbia Circuit reviewed my first application of the revised definition. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194 (D.C. Cir. 1998), *reprinted in* 57 Agric. Dec. 1465 (1998), *final decision on remand*, 58 Agric. Dec. 604 (1999). The Court articulated the 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).) The evidence in the record amply supports a finding that Mr. Genova was an officer and holder of 24 percent of the outstanding stock of Tuscany Farms.

Next, the Court held, 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 a violation of the PACA and that

the individual was a nominal officer, nominal director, and nominal shareholder of the violating company. In the alternative to proving that the individual was only a nominal officer, nominal director, and nominal shareholder of the violating company, 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 Joe A. Genova, he is responsibly connected with Tuscany Farms and subject to the licensing and employment restrictions, unless he demonstrates by a preponderance of the evidence that: (1) he was not actively involved in any of the activities resulting in Tuscany Farms' PACA violations; and (2) he was either a

nominal shareholder and nominal officer of Tuscany Farms or he was not an owner of Tuscany Farms which was the alter ego of its owners.⁶

The Chief ALJ's discussion of prong one, the actively involved test, is complete and needs no expansion. I only add that Mr. Genova's claims of ignorance of, and lack of involvement with, the operations of Tuscany Farms are significantly discounted because his testimony lacked credibility.

"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. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983). It is important to note that under the PACA, no court has found an individual who owns more than 10 percent of a violating company to be a "nominal" shareholder. In fact, the United States Court of Appeals for the District of Columbia Circuit noted that for such substantial shareholders, "the likelihood of their being found 'nominal' was remote." *Bell v. Department of Agric.*, 39 F.3d 1199, 1202 (D.C. Cir. 1994). I agree with the United States Court of Appeals for the District of Columbia Circuit and hold that under the PACA, absent rare and extraordinary circumstances, ownership of more than 10 percent

⁶The two prongs of the test are joined by the conjunctive "and." If Joe A. Genova 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 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 with Tuscany Farms.

of the outstanding shares of a licensed entity preclude a finding that the holder of that substantial of an interest in the PACA licensee is a nominal shareholder.

Joe A. Genova owned 24 percent of Tuscany Farms.⁷ There is no dispute about that. Therefore, as the owner of more than 10 percent of the outstanding stock of Tuscany Farms, a company that willfully, flagrantly, and repeatedly violated the PACA, Joe A. Genova is responsibly connected with Tuscany Farms and subject to the licensing and employment restrictions under the PACA.

CONCLUSIONS

1. During the period August 2002 through November 2002, Tuscany Farms willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to three sellers of the agreed purchase prices, in the amount of \$336,200.76 for 65 lots of perishable agricultural commodities which Tuscany Farms purchased, received, and accepted in interstate commerce. The appropriate sanction for Tuscany Farms, since it is no longer in business, is publication of the facts and circumstances of its violations.

2. During the period February 2002 through November 2002, Joe Genova & Associates willfully, flagrantly, and repeatedly violated the PACA by failing to make full payment promptly to nine sellers of the agreed purchase prices, in the amount of

⁷This ownership interest bars Mr. Genova 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 Benjamin Sudano and Brian Sudano*, 63 Agric. Dec 388, 411 n.5 (2004), *aff’d per curiam*, 131 F. App’x 404 (4th Cir. 2005).

\$315,807.86 for 123 lots of perishable agricultural commodities which Joe Genova & Associates purchased, received, and accepted in interstate commerce. The appropriate sanction for Joe Genova & Associates, since it is no longer in business, is publication of the facts and circumstances of its violations.

3. Joe A. Genova was responsibly connected with Tuscany Farms during the time Tuscany Farms committed violations of the PACA. As such, he is subject to the licensing and employment restrictions of the PACA.

ORDER

1. Tuscany Farms 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 the violations committed by Tuscany Farms shall be published, effective 60 days after service of this Order on Tuscany Farms.

2. Joe Genova & Associates 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 the violations committed by Joe Genova & Associates shall be published, effective 60 days after service of this Order on Joe Genova & Associates.

3. I affirm the Acting Chief's January 12, 2006, determination that Joe A. Genova was responsibly connected with Tuscany Farms during the time Tuscany Farms willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Joe A. Genova 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 Joe A. Genova.

RIGHT TO JUDICIAL REVIEW

Tuscany Farms, Joe Genova & Associates, and Joe A. Genova have the right to seek judicial review of the Order in this Decision and Order as to Tuscany Farms, Joe Genova & Associates, and Joe A. Genova in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Tuscany Farms, Joe Genova & Associates, and Joe A. Genova must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Tuscany Farms, Joe Genova & Associates, and Joe A. Genova.⁸ The date of entry of the Order in this Decision and Order as to Tuscany Farms, Joe Genova & Associates, and Joe A. Genova is October 15, 2008.

Done at Washington, DC

October 15, 2008

William G. Jenson
Judicial Officer

⁸28 U.S.C. § 2344.