

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PACA-APP Docket No. 04-0014  
)  
Donald R. Beucke, )  
)  
Petitioner )  
)  
and  
In re: ) PACA-APP Docket No. 04-0020  
)  
Keith K. Keyeski, )  
)  
Petitioner ) **Decision and Order**

**PROCEDURAL HISTORY**

On August 13, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Keith K. Keyeski [hereinafter Petitioner Keyeski] was responsibly connected with Bayside Produce, Inc., during the period December 2002 through February 2003, when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s)

[hereinafter the PACA].<sup>1</sup> On August 17, 2004, Respondent issued a determination that Donald R. Beucke [hereinafter Petitioner Beucke] was responsibly connected with Bayside Produce, Inc., during the period December 2002 through February 2003, when Bayside Produce, Inc., violated the PACA<sup>2</sup> and when Bayside Produce, Inc., failed to pay three reparation awards issued against it.<sup>3</sup>

On August 25, 2004, Petitioner Beucke instituted PACA-APP Docket No. 04-0014 by filing “Petition of Donald R. Beucke for Review of Determination Re Responsibly Connected Status” pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent’s August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc. On September 13, 2004, Petitioner Keyeski instituted PACA-APP Docket No. 04-0020 by filing “Petition for Review” pursuant to the PACA and the Rules

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<sup>1</sup>During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., purchased, received, and accepted in interstate commerce, from 22 produce sellers, 74 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$163,102.70, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

<sup>2</sup>See note 1.

<sup>3</sup>One reparation order issued against Bayside Produce, Inc., became effective August 26, 2003, the other two reparation orders issued against Bayside Produce, Inc., became final September 2, 2003.

of Practice seeking reversal of Respondent's August 13, 2004, determination that Petitioner Keyeski was responsibly connected with Bayside Produce, Inc.

On October 12 and 13, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] presided over a hearing in San Jose, California. Effie F. Anastassiou and Paul Hart, Anastassiou & Associates, Pismo Beach and Salinas, California, represented Petitioner Beucke. Paul W. Moncrief, Lombardo & Gilles, P.C., Salinas, California, represented Petitioner Keyeski. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On December 20, 2005, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order [hereinafter Initial Decision] in which the ALJ concluded Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA (Initial Decision at 2, 12).

On January 23, 2006, Petitioner Beucke and Petitioner Keyeski appealed to the Judicial Officer. On February 15, 2006, Respondent filed a response to Petitioner Beucke's appeal petition and Petitioner Keyeski's appeal petition. On April 7, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's conclusion that Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA. References

to the transcript are designated “Tr.” References to Petitioner Beucke’s exhibits are designated “CX.” References to Petitioner Keyeski’s exhibits are designated “KK.” References to Respondent’s exhibits are designated “RX” and “EX.”

## APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

### TITLE 7—AGRICULTURE

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#### CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

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##### § 499a. Short title and definitions

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##### **(b) Definitions**

For purposes of this chapter:

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(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

**§ 499b. Unfair conduct**

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

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**§ 499d. Issuance of license**

**(a) Authority to do business; termination; renewal**

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required)[.] . . .

**(b) Refusal of license; grounds**

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

....

**(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase**

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a

reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

....

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

##### **(a) Authority of Secretary**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

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

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

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found

to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

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



## DECISION

### Preliminary Statement

Responsibly connected liability is triggered when a company has its PACA license revoked or suspended or when the company has been found to have committed flagrant or repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., 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 of the agreed purchase prices to 22 produce sellers for 74 lots of perishable agricultural commodities, in the total amount of \$163,102.70.<sup>4</sup> Thus, an individual who was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA 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)).

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.<sup>5</sup> Petitioner Beucke was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002,

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<sup>4</sup>*In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

<sup>5</sup>7 U.S.C. § 499a(b)(9).

through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner Beucke to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Keyeski was a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner Keyeski to demonstrate by a preponderance of the evidence that he was not responsibly connected with Bayside Produce, Inc., despite being a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not

an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner Beucke failed to carry his burden of proof that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. Petitioner Beucke also failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Petitioner Keyeski failed to carry his burden of proof that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. Petitioner Keyeski also failed to carry his burden of proof that he was only nominally a holder of more than 10 percent of the outstanding stock of Bayside Produce, Inc. Moreover, as Petitioner Beucke and Petitioner Keyeski were owners of Bayside Produce, Inc., the defense that they were not owners of Bayside Produce, Inc., which was the alter ego of its owners, is not available to Petitioner Beucke or Petitioner Keyeski.<sup>6</sup> As Petitioner Beucke and Petitioner Keyeski have failed to carry their burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner

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<sup>6</sup>*In re Donald R. Beucke*, \_\_ Agric. Dec. \_\_\_, slip op. at 13-14 (Sept. 28, 2006); *In re Edward S. Martindale*, \_\_ Agric. Dec. \_\_\_, slip op. at 9 (July 26, 2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), \_\_ Agric. Dec. \_\_\_, slip op. at 11 (Jan. 24, 2006), *aff'd per curiam*, 2006 WL 2351839 (11th Cir. Aug. 15, 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Accordingly, Petitioner Beucke and Petitioner Keyeski are 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)).

### **Facts**

During the period when Bayside Produce, Inc., was violating the PACA, Petitioner Beucke was the vice president, the secretary, and a director of Bayside Produce, Inc.

(RX 1). Petitioner Keyeski had been a vice president and a director of Bayside Produce, Inc., but resigned those positions prior to November 23, 2002 (EX 1 at 3; KK 5).

Petitioner Keyeski did however continue to manage the San Diego, California, office of Bayside Produce, Inc., until December 13, 2002. Petitioner Beucke and Petitioner Keyeski each held 33 $\frac{1}{3}$  percent of the outstanding shares of Bayside Produce, Inc. (RX 1; EX 1 at 3; KK 1).

Petitioner Beucke and Petitioner Keyeski argue they were not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA, asserting the financial aspects of the business were handled exclusively by Wayne Martindale, the president of Bayside Produce, Inc., and owner of the 33 $\frac{1}{3}$  percent of the shares of the corporation not owned by Petitioner Beucke and Petitioner Keyeski. The testimony of numerous witnesses called by Petitioner Beucke and Petitioner Keyeski supports their

position only to the extent that it establishes Wayne Martindale was the individual that those that did business with Bayside Produce, Inc., regarded as responsible for payment of invoices.

Petitioner Beucke and Petitioner Keyeski have significant experience and lengthy involvement with the produce industry. Petitioner Beucke has approximately 26 years of experience in the produce industry, starting initially as a field inspector and later progressing to the positions of buyer and broker (Tr. 213-14). Petitioner Beucke has served as the president of Martindale Distributing Company, a produce business founded by his late stepfather, Dale Martindale (Tr. 218, 312), and as vice president of another produce company, Garden Fresh Produce, Inc. In addition to his ownership interest in Bayside Produce, Inc.,<sup>7</sup> Petitioner Beucke owned 33 $\frac{1}{3}$  percent of the outstanding stock of Martindale Distributing Company and 20 percent of the outstanding stock of Garden Fresh Produce, Inc. (Tr. 312-14; RX 1).

Petitioner Beucke acknowledged that he was authorized to sign and did sign Bayside Produce, Inc., checks (Tr. 234-35),<sup>8</sup> but testified he only signed checks when directed to do so by Wayne Martindale or Edward Shane Martindale, both of whom are

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<sup>7</sup>Petitioner Beucke testified that he initially owned 50 percent of the outstanding stock of Bayside Produce, Inc., before he and Wayne Martindale each sold enough shares to Petitioner Keyeski to enable Petitioner Keyeski to acquire a one-third interest in Bayside Produce, Inc. (Tr. 312-14).

<sup>8</sup>CX 39 contains 20 checks written by Petitioner Beucke during the period November 23, 2002, through February 7, 2003, on Bayside Produce, Inc.'s Community Bank of Central California account, including two payable to himself (Tr. 239-40).

his stepbrothers, or Kathy Walker, the executive coordinator of Bayside Produce, Inc. (Tr. 235-40). Petitioner Beucke testified his involvement with Bayside Produce, Inc., was limited to purchases and sales for one account, Produce People, and that he last took an order from Produce People in February 2003 (Tr. 243-47). Petitioner Beucke resigned as vice president and director of, and from any position of employment with, Bayside Produce, Inc., by letter dated April 11, 2003, and executed a document entitled “Resignation and Acknowledgment of Stock Redemption” dated October 23, 2003, which surrendered his shares in Bayside Produce, Inc., effective April 4, 2003 (CX 6, CX 7).

Petitioner Keyeski started his career in the produce business in 1985 or 1986 working in the warehouse and later working in sales. Petitioner Keyeski had become acquainted with Wayne Martindale and Petitioner Beucke through his industry contacts and sometime around August of 1997 started working for them out of his home and later opening an office for Bayside Produce, Inc., in San Diego, California. Petitioner Keyeski testified that he joined Bayside Produce, Inc., in an arrangement that was “[b]asically a three-way partnership” with “equal duties, equal opportunity, equal money, equal everything.” (Tr. 358-62, 393.) Except for writing checks for produce and other major expenses, Petitioner Keyeski ran Bayside Produce, Inc.’s day-to-day operation in the San Diego, California, office.<sup>9</sup> Once Petitioner Keyeski managed to accumulate a necessary

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<sup>9</sup>Bayside Produce, Inc., did have an account at Bank of America on which Petitioner Keyeski was able to write checks; however, only a minimal balance was  
(continued...)

\$7,000 investment, he became a shareholder, a director, and an officer of Bayside Produce, Inc., in February 2000; however, Petitioner Keyeski testified nothing really changed after he became a shareholder, director, and officer of the corporation (Tr. 361-68; RX 4). The San Diego, California, operation grew significantly and by 2002 the San Diego operation generated the bulk of Bayside Produce, Inc.'s sales (Tr. 376).<sup>10</sup> In October 2002, by then convinced that Wayne Martindale was not "pulling his weight" and unhappy with the monetary return from his own efforts, Petitioner Keyeski contacted William Trask, an attorney, for advice (Tr. 374). Mr. Trask drafted a letter for Petitioner Keyeski to Wayne Martindale and Petitioner Beucke dated October 18, 2002, which confirmed his verbal notice of October 8, 2002, that he was resigning as vice president and as a director of Bayside Produce, Inc., and that, effective December 31, 2002,<sup>11</sup> he would be resigning all positions at Bayside Produce, Inc. Petitioner Keyeski's October 18, 2002, letter also proposed that Petitioner Beucke, Wayne Martindale, and Petitioner Keyeski continue to contribute to the business as usual and suggested three alternatives, one of which was Petitioner Keyeski's offer to purchase Bayside Produce,

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<sup>9</sup>(...continued)  
maintained in the account which was used only for payroll, rent, and incidental expenses (Tr. 362-63).

<sup>10</sup>According to Petitioner Keyeski, Petitioner Beucke generated income for Bayside Produce, Inc., but Wayne Martindale did not (Tr. 371-72).

<sup>11</sup>Petitioner Keyeski verbally amended the effective date of his resignation from all positions at Bayside Produce, Inc., to December 13, 2002 (KK5).

Inc. (Tr. 374-75; KK 5). Petitioner Keyeski did not receive a written response to his October 18, 2002, letter, but sometime in November 2002 Wayne Martindale advised that he had conferred with Petitioner Beucke and that they wanted to retain Bayside Produce, Inc. (Tr. 375-78). Thereafter, Petitioner Keyeski's contact with Wayne Martindale became difficult, with little or no information being provided by Wayne Martindale (Tr. 377-78). As he had suggested in his October 18, 2002, letter, Petitioner Keyeski continued to run Bayside Produce, Inc.'s San Diego, California, office and processed orders as usual until December 13, 2002 (Tr. 385). On December 15, 2002, Petitioner Keyeski obtained his own PACA license and commenced operation from Bayside Produce, Inc.'s former San Diego, California, location as New Horizon Distributing, Inc. (Tr. 380-81). Still anticipating some return from his investment, as he thought Bayside Produce, Inc., was financially sound, Petitioner Keyeski retained his shares in Bayside Produce, Inc., until March 2003 (KK 1, KK 2).<sup>12</sup>

The evidence introduced through multiple witnesses called by Petitioner Beucke and Petitioner Keyeski demonstrates that the produce sellers that dealt with Bayside Produce, Inc., lodged the blame for Bayside Produce, Inc.'s payment problems on Wayne Martindale's misconduct and not on either Petitioner Beucke or Petitioner Keyeski. Those witnesses professed to remain willing to do business with both Petitioner Beucke

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<sup>12</sup>Petitioner Keyeski's letter of March 11, 2003, requested that minutes of the corporation be forwarded to him that reflected that he was not affiliated with Bayside Produce, Inc., "other than as a shareholder" after December 14, 2002 (KK 1).



and Petitioner Keyeski. Both Petitioner Beucke and Petitioner Keyeski are regarded as honorable and have contributed significant amounts of money to attempt to correct Bayside Produce, Inc.'s failures to pay for produce in accordance with the PACA. There is no evidence that either Petitioner Beucke or Petitioner Keyeski personally engaged in any affirmative action designed to leave produce suppliers unpaid. Neither Petitioner Beucke nor Petitioner Keyeski however acted upon the reports to them that invoices were not being paid in a timely manner.<sup>13</sup> The failure to exercise their oversight obligations owed by them to Bayside Produce, Inc., as shareholders, if not as officers and directors, does not establish that Petitioner Beucke's and Petitioner Keyeski's roles were nominal.

### **Discussion**

#### *I. Petitioner Beucke and Petitioner Keyeski Were Actively Involved in Activities Resulting in Bayside Produce, Inc.'s PACA Violations*

The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999), as follows:

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<sup>13</sup>Petitioner Keyeski denied hearing any reports of nonpayment until the second or third week of January 2003, which was after he had resigned as vice president and director of Bayside Produce, Inc. (Tr. 385). Petitioner Keyeski however remained a shareholder until March 2003, noting in his letter dated March 11, 2003, that "as of December 14, 2002, other than as a shareholder, I was not affiliated in any way with Bayside Produce, Inc." (KK 1).

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Petitioner Beucke did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35). Petitioner Beucke was authorized to draw funds on Bayside Produce, Inc.'s Community Bank of Central California account number 1361955 and, during the period November 23, 2002, through February 7, 2003, Petitioner Beucke signed 20 checks on that account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow money from Community Bank of Central California for a loan dated January 31, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

Petitioner Keyeski did not meet his burden of showing, by a preponderance of the evidence, that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s PACA violations. Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., on at least four occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44). In addition, during the period November 23, 2002, through December 13, 2002, Petitioner Keyeski was the general manager of Bayside Produce, Inc.'s San Diego, California, office. Petitioner Keyeski controlled all aspects of Bayside Produce, Inc.'s San Diego, California, operation, except for depositing receivables and paying for produce purchases. Petitioner Keyeski's duties included managing payroll and paying rent and other incidental expenses.

Petitioner Beucke's and Petitioner Keyeski's purchases of produce for which Bayside Produce, Inc., failed to pay produce sellers in accordance with the PACA constitutes active involvement in activities resulting in Bayside Produce, Inc.'s violations of the PACA. Moreover, by payment of certain creditors, Petitioner Beucke and Petitioner Keyeski were in effect choosing which debts to pay. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), I held that choosing which debts to pay "can cause an individual to be actively involved in failure to pay promptly for produce." *Id.* at 1489.

*II. Petitioner Beucke Was Not Merely a Nominal Officer, Director, and Shareholder of Bayside Produce, Inc.; Petitioner Keyeski Was Not Merely a Nominal Shareholder of Bayside Produce, Inc.*

Petitioner Beucke did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 33 $\frac{1}{3}$  percent shareholder, director, secretary, and vice president of Bayside Produce, Inc. Similarly, Petitioner Keyeski did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 33 $\frac{1}{3}$  percent shareholder of Bayside Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.<sup>14</sup> The record establishes Petitioner Beucke and Petitioner Keyeski each had an actual, significant nexus with Bayside Produce, Inc., during the violation period.

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<sup>14</sup>*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

Petitioner Beucke was a co-founder of Bayside Produce, Inc., who invested \$7,000 as part of the initial capitalization of Bayside Produce, Inc. (RX 1-RX 3). Petitioner Beucke's relationship to Bayside Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner Beucke is an experienced, savvy individual who has worked in the produce business for approximately 26 years, who has worked for years with some or all of the principals in Bayside Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was responsibly connected is a strong indication that a 33 $\frac{1}{3}$  percent owner does not serve in a nominal capacity.<sup>15</sup>

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<sup>15</sup>*Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the

(continued...)

There is no evidence that Petitioner Beucke was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, the secretary, and a co-owner in an attempt to establish a profitable business. Petitioner Beucke presumably would have shared in Bayside Produce, Inc.'s profits when there were some. Petitioner Beucke participated in a number of corporate matters, including the initial board of directors' meeting on September 15, 1997 (RX 2), the board of directors' meeting on February 22, 2000 (RX 4), allowing himself to be authorized to draw funds on Bayside Produce, Inc.'s Bank of America account number 01719-21437 (RX 23), allowing himself to be authorized to draw funds on Bayside Produce, Inc.'s Community Bank of Central California account number 1361955 (RX 24 at 17), signing Bayside Produce, Inc.'s resolution to borrow from Community Bank of Central California (RX 24 at 18-25), purchasing produce on behalf of Bayside Produce, Inc. (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35), and deciding which Bayside Produce, Inc., debts to pay (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). The record indicates Petitioner Beucke failed to exercise authority consistent with his positions as 33⅓ percent owner, a director, the secretary, and a vice president to counteract or obviate

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

petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

the fault of others. That Petitioner Beucke chose not to take action to counteract or obviate the fault of others does not establish that his role was nominal.

In approximately August 1997, Petitioner Keyeski entered into an arrangement with Wayne Martindale and Petitioner Beucke with respect to Bayside Produce, Inc., that was “[b]asically a three-way partnership, . . . equal duties, equal opportunity, equal money, equal everything.” (Tr. 358-59.) In February 2000, after Petitioner Keyeski invested \$7,000 in Bayside Produce, Inc., Petitioner Keyeski attended a Bayside Produce, Inc., board of directors’ meeting in which he became a vice president, a director, and holder of 33⅓ percent of the outstanding shares of Bayside Produce, Inc. (RX 4; EX 6). Petitioner Keyeski’s relationship to Bayside Produce, Inc., is much different than an individual who is listed as an owner, an officer, or a director because his or her spouse or parent put him or her on corporate records and who has no involvement in the corporation or experience in the produce business. Rather, Petitioner Keyeski is an experienced, savvy individual who has worked in the produce business since 1985 or 1986, who has worked for years with some or all of the principals in Bayside Produce, Inc., and who is fully aware of the significance of having a valid PACA license and the importance of complying with the prompt payment provision of the PACA. Congress’ utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient

to trigger the presumption that the owner was responsibly connected is a strong indication that a 33⅓ percent owner does not serve in a nominal capacity.<sup>16</sup>

There is no evidence that Petitioner Keyeski was other than a voluntary investor, who undertook the responsibilities associated with being a director, a vice president, and a co-owner in an attempt to establish a profitable business. Petitioner Keyeski presumably would have shared in Bayside Produce, Inc.'s profits when there were some. Petitioner Keyeski participated in a number of corporate matters, including the board of directors' meeting on February 22, 2000 (RX 4), controlling all aspects of Bayside Produce, Inc.'s San Diego, California, office as general manager, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397), purchasing produce on behalf of Bayside Produce, Inc. (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44), and managing payroll and paying rent and other incidental expenses related to Bayside Produce, Inc.'s San Diego, California, operation (Tr. 364-65, 397). The record establishes Petitioner Keyeski resigned as director and officer of Bayside Produce, Inc., prior to Bayside Produce, Inc.'s violations of the PACA. However, Petitioner Keyeski retained his ownership of 33⅓ percent of the outstanding stock of Bayside Produce, Inc., until March 2003 because of what Petitioner Keyeski believed to be its economic value (KK 1; Tr. 190-91). Moreover, Petitioner Keyeski continued his role as general manager of Bayside Produce, Inc.'s San Diego, California, office until December 13, 2002

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<sup>16</sup>See note 15.



(Tr. 364-65, 397). The record indicates Petitioner Keyeski failed to exercise authority consistent with his position as 33⅓ percent owner to counteract or obviate the fault of others. That Petitioner Keyeski chose not to take action to counteract or obviate the fault of others does not establish that his role was nominal.

### **Petitioner Beucke's and Petitioner Keyeski's Appeal Petitions**

Petitioner Beucke and Petitioner Keyeski raise 12 issues in “Petitioner Beucke’s Appeal Petition to Department Judicial Officer and Supporting Brief” [hereinafter Petitioner Beucke’s Appeal Petition] and “Petitioner Keyeski’s Appeal Petition to Department Judicial Officer and Supporting Brief” [hereinafter Petitioner Keyeski’s Appeal Petition].

First, Petitioner Beucke and Petitioner Keyeski state the ALJ used an incorrect legal standard as the basis for his determination that they were responsibly connected with Bayside Produce, Inc. Specifically, Petitioner Beucke and Petitioner Keyeski assert the ALJ based his conclusion that they were responsibly connected with Bayside Produce, Inc., on the findings that Petitioner Beucke and Petitioner Keyeski were actively involved with Bayside Produce, Inc., when Bayside Produce, Inc., was committing violations of the PACA. (Petitioner Beucke’s Appeal Pet. at 4, 14-15; Petitioner Keyeski’s Appeal Pet. at 2, 4-5.)

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first prong of the responsibly-connected test, a petitioner must demonstrate by a

preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. Petitioner Beucke and Petitioner Keyeski base their contention that the ALJ erroneously used an incorrect legal standard on the ALJ's findings that "Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA" and "Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA" (Initial Decision at 11). I do not find the ALJ's findings that Petitioner Beucke and Petitioner Keyeski were actively involved with Bayside Produce, Inc., when Bayside Produce, Inc., violated the PACA indicates the ALJ applied an incorrect legal standard when concluding Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc.

The ALJ correctly cites section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) as the statutory provision applicable in this proceeding (Initial Decision at 3). Moreover, the ALJ, citing *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1487-88 (1998), states the first prong of the two-prong test requires a petitioner to demonstrate by a preponderance of the evidence that the petitioner was not actively involved in the activities resulting in a violation of the PACA (Initial Decision at 3-4). Finally, the ALJ cites case law relevant to the proper statutory standard. After reading the entire Initial Decision, I find the ALJ's findings that "Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA" and "Petitioner Keyeski was actively involved with

Bayside during at least a portion of the time it was committing violations of the PACA” (Initial Decision at 11) are merely the ALJ’s shorthand manner of stating Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.’s violations of the PACA and the ALJ applied the proper legal standard when concluding Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc.

Second, Petitioner Beucke and Petitioner Keyeski contend the facts established in the record do not support the ALJ’s conclusion that Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.’s PACA violations. Petitioner Beucke and Petitioner Keyeski assert the record supports the ALJ’s finding that there is no evidence Petitioner Beucke or Petitioner Keyeski engaged in any affirmative action designed to leave suppliers unpaid. (Petitioner Beucke’s Appeal Pet. at 4, 15-19; Petitioner Keyeski’s Appeal Pet. at 2, 6-8.)

I agree with the ALJ’s finding that the record does not contain evidence that Petitioner Beucke or Petitioner Keyeski engaged in activities designed to leave Bayside Produce, Inc.’s produce suppliers unpaid. However, evidence that a petitioner has not engaged in activities designed to leave produce suppliers unpaid is not sufficient to prove by a preponderance of the evidence that the petitioner was not actively involved in activities resulting in a violation of the prompt payment provision of the PACA. The record establishes that Petitioner Beucke and Petitioner Keyeski purchased produce on

behalf of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the PACA (Tr. 161-64, 167-68, 248-52, 300-05, 323-24; CX 16, CX 21, CX 23, CX 26, CX 28, CX 32, CX 33, CX 35, CX 41, CX 44). Purchasing produce when there are insufficient funds to pay for that produce leads to a violation of the prompt payment provision of the PACA,<sup>17</sup> even if the person purchasing the produce fully intends to make full payment promptly in accordance with the PACA. The record also establishes that during the period November 23, 2002, through February 7, 2003, Petitioner Beucke signed checks on Bayside Produce Inc.'s Community Bank of Central California account (Tr. 239-40; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619), and during the period November 23, 2002, through December 13, 2002, Petitioner Keyeski was the general manager of Bayside Produce, Inc.'s San Diego, California, office. Petitioner Keyeski controlled all aspects of Bayside Produce, Inc.'s San Diego, California, operation, except for depositing receivables and paying for produce purchases. Petitioner Keyeski's duties included managing payroll and paying rent and other incidentals. By the payment of certain creditors, Petitioner Beucke and Petitioner Keyeski were in effect choosing which debts to pay; thus, Petitioner

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<sup>17</sup>*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488 (1998).

Beucke and Petitioner Keyeski were actively involved in activities resulting in Bayside Produce, Inc.'s violations of the prompt payment provision of the PACA.<sup>18</sup>

Petitioner Beucke also argues that his circumstance is similar to that of the petitioner in *Maldonado v. Department of Agric.*, 154 F.3d 1086 (9th Cir. 1998), who the Court held was not responsibly connected with W. Fay, a company which had violated the PACA. However, the question in *Maldonado* was whether the petitioner, a putative officer of W. Fay, was only a nominal officer. Therefore, I find *Maldonado* inapposite to the question of Petitioner Beucke's active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA.

Third, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously concluded they were responsibly connected with Bayside Produce, Inc., based on the theory that Petitioner Beucke and Petitioner Keyeski failed to constrain Wayne Martindale's misconduct and that such failure resulted in Bayside Produce, Inc.'s PACA violations (Petitioner's Beucke's Appeal Pet. at 4, 19-22; Petitioner Keyeski's Appeal Pet. at 8-9).

The ALJ states Petitioner Beucke's and Petitioner Keyeski's "failure . . . to constrain and halt the misconduct of Wayne Martindale did leave suppliers unpaid." (Initial Decision at 7.) Based on that statement, I infer the ALJ concluded Petitioner Beucke's and Petitioner Keyeski's failure to constrain Wayne Martindale's misconduct

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<sup>18</sup>*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1489 (1998).

constitutes active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA. I disagree with the ALJ. Generally, active involvement in activities resulting in a violation of the PACA requires more than an act of omission.<sup>19</sup> While I disagree with the ALJ's assertion that Petitioner Beucke's and Petitioner Keyeski's acts of omission support the conclusion that Petitioner Beucke and Petitioner Keyeski were actively involved in the activities resulting in Bayside Produce, Inc.'s violations of the PACA, I do not hold that an act of omission can never constitute active involvement in the activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Petitioner Beucke's and Petitioner Keyeski's acts of omission do not constitute active involvement in the activities resulting in Bayside Produce, Inc.'s violations of the PACA.

Fourth, Petitioner Beucke contends the ALJ erroneously concluded Petitioner Beucke was not a nominal officer, director, and shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated the PACA (Petitioner Beucke's Appeal Pet. at 4, 23-26).

I agree with the ALJ's conclusion that Petitioner Beucke failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a

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<sup>19</sup>See generally *In re Donald R. Beucke*, \_\_\_ Agric. Dec. \_\_\_, slip op. at 22-23 (Sept. 28, 2006) (discussing the Judicial Officer's disagreement with the Chief Administrative Law Judge's assertion that the petitioner's acts of omission support the conclusion that the petitioner was actively involved in the activities resulting in violations of the PACA).

stockholder of Bayside Produce, Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.<sup>20</sup> The record establishes Petitioner Beucke had an actual, significant nexus with Bayside Produce, Inc., during the violation period.

During the period when Bayside Produce, Inc., violated the PACA, Petitioner Beucke owned 33⅓ percent of the outstanding stock of Bayside Produce, Inc. Petitioner Beucke's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.<sup>21</sup> Petitioner Beucke has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Bayside Produce, Inc.

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<sup>20</sup>See note 14.

<sup>21</sup>See note 15.

Moreover, Petitioner Beucke had the appropriate business experience to be a corporate officer and director. At the time of the October 2005 hearing, Petitioner Beucke had approximately 26 years of experience in the produce industry. Petitioner Beucke began working at Martindale Distributing Company. Petitioner Beucke started in Martindale Distributing Company as a field inspector and later progressing to the positions of buyer and broker. At one point, Petitioner Beucke was the president of Martindale Distributing Company and held 33⅓ percent of the outstanding shares of Martindale Distributing Company. Petitioner Beucke was also the vice president and a holder of 20 percent of the outstanding stock of Garden Fresh Produce, Inc. (Tr. 213-14, 218, 312-14.)

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.<sup>22</sup> In 1997, Petitioner Beucke, along with Wayne Martindale, founded Bayside Produce, Inc. Petitioner invested \$7,000 in Bayside Produce, Inc., and became a 50 percent shareholder, a director, the vice president, and the secretary of the new company. Petitioner Beucke remained a stockholder, a director, a vice president, and the secretary until he submitted his resignation and reassigned his stock in April 2003. (RX 1-RX 6; Tr. 222, 313-14.)

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<sup>22</sup>*In re Donald R. Beucke*, \_\_ Agric. Dec. \_\_\_\_, slip op. at 25 (Sept. 28, 2006); *In re Edward S. Martindale*, \_\_ Agric. Dec. \_\_\_\_, slip op. at 30 (July 26, 2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).



Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which produce suppliers were not paid in accordance with the prompt payment provision of the PACA (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35). Petitioner Beucke's name and signature appeared on the bank signature card for Bayside Produce, Inc.'s Bank of America account number 01719-21437, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003 (RX 23). Petitioner Beucke's name and signature appeared on the bank authorizations for Bayside Produce, Inc.'s Community Bank of Central California account number 1361955, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003. During that period, Petitioner Beucke signed 20 checks on the account, including two checks payable to himself (Tr. 239-40; RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619). Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow under loan number 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

Petitioner Beucke made decisions about which Bayside Produce, Inc., debts to pay. Petitioner Beucke became aware in December 2002 that Bayside Produce, Inc., was not making full payment promptly for produce (Tr. 72, 268-70). Even though Petitioner

Beucke knew Bayside Produce, Inc., was failing to pay for produce in accordance with the prompt payment provision of the PACA, Petitioner Beucke continued purchasing produce and issuing checks on Bayside Produce, Inc.'s Community Bank of Central California account.

In short, I find Petitioner Beucke had an actual, significant nexus with Bayside Produce, Inc. Petitioner Beucke was a major stockholder of Bayside Produce, Inc.; Petitioner Beucke had the appropriate business experience to be a corporate officer and director; and Petitioner Beucke participated in corporate decision-making.

Fifth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to address their assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10).

I agree with Petitioner Beucke and Petitioner Keyeski that the ALJ did not address their assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States. However, I find, based upon the ALJ's disposition of the proceeding, the ALJ rejected Petitioner Beucke's and Petitioner Keyeski's assertions that Respondent violated the Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States. I find no purpose would be served by remanding this proceeding to the ALJ to address Petitioner Beucke's and Petitioner Keyeski's assertions that Respondent violated the

Rules of Practice and the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Sixth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude Respondent violated the Rules of Practice. Petitioner Beucke and Petitioner Keyeski contend Respondent failed, prior to instituting the formal disciplinary complaint against Bayside Produce, Inc., on April 26, 2004, to provide Petitioner Beucke and Petitioner Keyeski with written notice of the facts involved and to provide Petitioner Beucke and Petitioner Keyeski an opportunity to correct Bayside Produce, Inc.'s PACA violations, as required by section 1.133 of the Rules of Practice (7 C.F.R. § 1.133). (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10.)

Section 1.133(b)(3) of the Rules of Practice provides that the administrator<sup>23</sup> attempt to effect settlement of proceedings, as follows:

**§ 1.133 Institution of proceedings.**

....

(b) *Filing of complaint or petition for review.* . . .

....

(3) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise

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<sup>23</sup>The term *administrator* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the administrator of the agency administering the statute involved or any officer or employee of the agency to whom authority has been delegated, or may be delegated, to act for the administrator. The statute involved in the administrative disciplinary proceeding instituted against Bayside Produce, Inc., is the PACA, and the administrator of the agency administering the PACA is the Administrator, Agricultural Marketing Service, United States Department of Agriculture.

requires, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a “license” as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

7 C.F.R. § 1.133(b)(3).

As an initial matter, Respondent is not the Administrator, Agricultural Marketing Service, United States Department of Agriculture, and Respondent is not the United States Department of Agriculture employee who was delegated authority to institute the disciplinary proceeding against Bayside Produce, Inc.<sup>24</sup> Therefore, even if I were to find Petitioner Beucke and Petitioner Keyeski were entitled to written notice of the facts regarding the disciplinary proceeding instituted against Bayside Produce, Inc., and an opportunity to demonstrate or achieve Bayside Produce, Inc.’s compliance with the PACA, I would not find Respondent responsible for providing Petitioner Beucke and Petitioner Keyeski with the notice and opportunity to demonstrate or achieve compliance, as Petitioner Beucke and Petitioner Keyeski assert.

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<sup>24</sup>The Chief Administrative Law Judge states *In re Bayside Produce, Inc.*, was instituted by a complaint filed on April 26, 2004, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1030 (2004).

Further, I find section 1.133(b)(3) of the Rules of Practice (7 C.F.R. § 1.133(b)(3)) inapplicable to the disciplinary proceeding instituted against Bayside Produce, Inc. The requirement in section 1.133(b)(3) of the Rules of Practice (7 C.F.R. § 1.133(b)(3)) that the administrator attempt to effect a settlement is not applicable to cases involving willfulness. The Chief Administrative Law Judge explicitly concluded that Bayside Produce, Inc., willfully violated the prompt payment provision in section 2(4) of the PACA (7 U.S.C. § 499b(4)).<sup>25</sup> Therefore, I reject Petitioner Beucke's and Petitioner Keyeski's contention that Respondent failed to comply with section 1.133 of the Rules of Practice (7 C.F.R. § 1.133).

Petitioner Beucke and Petitioner Keyeski also contend Respondent failed to join the instant responsibly connected proceeding with the disciplinary proceeding instituted against Bayside Produce, Inc., as required by section 1.137 of the Rules of Practice (7 C.F.R. § 1.137) (Petitioner Beucke's Appeal Pet. at 31; Petitioner Keyeski's Appeal Pet. at 10).

Section 1.137(b) of the Rules of Practice requires the administrative law judge to consolidate for hearing any proceeding alleging a PACA licensee's violation of the PACA, with any petitions for review of determinations of responsible connection with that PACA licensee, as follows:

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<sup>25</sup>*In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1031 (2004).

**§ 1.137 Amendment of complaint, petition for review, or answer;  
joinder of related matters.**

.....

(b) *Joinder*. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. § 1.137(b).

As an initial matter, Respondent was not the judge<sup>26</sup> in the disciplinary proceeding instituted against Bayside Produce, Inc. Therefore, even if I were to find the disciplinary proceeding instituted against Bayside Produce, Inc., and the instant proceeding were required to be consolidated for hearing, I would not find Respondent had any duty to consolidate the proceedings, as Petitioner Beucke and Petitioner Keyeski assert.

The Chief Administrative Law Judge issued a decision without hearing by reason of default in the disciplinary proceeding instituted against Bayside Produce, Inc., for violations of the payment provision of the PACA on August 25, 2004, and the decision

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<sup>26</sup>The term *judge* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as any administrative law judge appointed pursuant to 5 U.S.C. § 3105 and assigned to the proceeding involved.

became final on September 29, 2004.<sup>27</sup> Since the Chief Administrative Law Judge never conducted a hearing in the disciplinary proceeding instituted against Bayside Produce, Inc., I reject Petitioner Beucke's and Petitioner Keyeski's contention that *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004), was required to be consolidated for hearing with the instant proceeding.

Further, Petitioner Beucke and Petitioner Keyeski contend Respondent failed to serve the proposed default decision in *In re Bayside Produce, Inc.*, on Petitioner Beucke and Petitioner Keyeski, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) (Petitioner Beucke's Appeal Pet. at 31-32; Petitioner Keyeski's Appeal Pet. at 10).

Section 1.139 of the Rules of Practice requires that the Hearing Clerk serve the respondent with any proposed default decision, as follows:

**§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

7 C.F.R. § 1.139.

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<sup>27</sup>*In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029, 1031-32 (2004).

Respondent was not the Hearing Clerk<sup>28</sup> and Petitioner Beucke and Petitioner Keyeski were not the respondents<sup>29</sup> in the disciplinary proceeding instituted against Bayside Produce, Inc. Therefore, I reject Petitioner Beucke's and Petitioner Keyeski's contention that Respondent was required to serve Petitioner Beucke and Petitioner Keyeski with the proposed default decision filed in *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

Seventh, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude Respondent violated the due process clause of the Fourteenth Amendment to the Constitution of the United States (Petitioner Beucke's Appeal Pet. at 4, 26-33; Petitioner Keyeski's Appeal Pet. at 2, 10).

The due process clause of the Fourteenth Amendment to the Constitution of the United States, by its terms, is applicable to the states and is not applicable to the federal government. The United States Department of Agriculture is an executive department of the government of the United States;<sup>30</sup> it is not a state. Therefore, as a matter of law, Respondent could not have violated the due process clause of the Fourteenth Amendment

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<sup>28</sup>The term *Hearing Clerk* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the Hearing Clerk, United States Department of Agriculture, Washington, DC 20250.

<sup>29</sup>The term *respondent* is defined in section 1.132 of the Rules of Practice (7 C.F.R. § 1.132) as the party proceeded against. The party proceeded against in *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004), was Bayside Produce, Inc.

<sup>30</sup>See 5 U.S.C. §§ 101, 551(1).



to the Constitution of the United States, as Petitioner Beucke and Petitioner Keyeski contend.<sup>31</sup>

Eighth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to address their assertion that any employment prohibition resulting from the instant proceeding began August 25, 2004, the date the Chief Administrative Law Judge filed *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004) (Petitioner Beucke's Appeal Pet. at 5, 33-36; Petitioner Keyeski's Appeal Pet. at 2, 10).

I agree with Petitioner Beucke's and Petitioner Keyeski's contention that the ALJ did not address their assertion that the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees began August 25, 2004. However, in accordance with the terms of the Initial Decision, the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees would have become effective as to Petitioner Beucke 35 days after service of the Initial Decision on Petitioner Beucke and as to Petitioner Keyeski 35 days after service of the Initial Decision on Petitioner Keyeski had Petitioner Beucke and Petitioner Keyeski not appealed the ALJ's decision to the Judicial Officer (Initial Decision at 12). I find this effective date clearly establishes that the ALJ rejected Petitioner Beucke's and Petitioner Keyeski's contention regarding the timing of the

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<sup>31</sup>*In re Glenn Mealman*, \_\_\_ Agric. Dec. \_\_\_, slip op. at 5 (Oct. 3, 2005) (Order Denying Pet. to Reconsider); *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 303-04 (2005).

employment bar, and I find no purpose would be served by remanding this proceeding to the ALJ to address Petitioner Beucke's and Petitioner Keyeski's timing issue.

Ninth, Petitioner Beucke and Petitioner Keyeski contend the ALJ erroneously failed to conclude that any employment prohibition imposed on Petitioner Beucke and Petitioner Keyeski began August 25, 2004, the date the Chief Administrative Law Judge filed *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004). Petitioner Beucke and Petitioner Keyeski argue the plain language of section 8(b) of the PACA (7 U.S.C. § 499h(b)) requires that the Secretary of Agriculture impose the employment prohibition on responsibly connected individuals beginning on the date the person with whom the individuals are responsibly connected is found to have violated the PACA. Thus, under Petitioner Beucke's and Petitioner Keyeski's reading of the PACA, the bar on Petitioner Beucke's and Petitioner Keyeski's employment by PACA licensees began August 25, 2004, even though a final determination that Petitioner Beucke and Petitioner Keyeski were responsibly connected with Bayside Produce, Inc., had not been issued. (Petitioner Beucke's Appeal Pet. at 5, 33-36; Petitioner Keyeski's Appeal Pet. at 2, 10.)

Petitioner Beucke's and Petitioner Keyeski's reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would thwart the remedial purposes of the PACA. Using Petitioner Beucke's and Petitioner Keyeski's interpretation of the PACA, principals of a violating PACA licensee would, in many cases, avoid the employment bar because the period of employment bar would conclude before a determination is made that the principals were

responsibly connected. The United States Court of Appeals for the Second Circuit stated that section 8(b) of the PACA (7 U.S.C. § 499h(b)) is designed to prevent circumvention of the PACA by forbidding responsibly connected persons from employment by PACA licensees, as follows:

Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose licenses had been revoked and who, by the subterfuge of acting as an “employee” of a nominal licensee nevertheless continued in business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry.

*Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.) (footnote omitted), *cert. denied*, 389 U.S. 835 (1967). Petitioner Beucke’s and Petitioner Keyeski’s reading of section 8(b) of the PACA (7 U.S.C. § 499h(b)) would result in the very circumvention of the PACA that section 8(b) of the PACA (7 U.S.C. § 499h(b)) was designed to prevent.

Petitioner Beucke and Petitioner Keyeski cite two cases, *Frank Tambone, Inc. v. U.S. Dep’t of Agric.*, 50 F.3d 52 (D.C. Cir. 1995), and *Farley and Calfee, Inc. v. U.S. Dep’t of Agric.*, 941 F.2d 964 (9th Cir. 1991), in support of their argument that an employment bar must commence as soon as a PACA licensee is found to have violated the PACA. In *Tambone*, the Court addressed the timing of a license bar where a company had been without a license prior to the final determination that the company had violated the PACA, as follows:

The Judicial Officer rendered his decision on February 2, 1994. By that time Tambone, Inc. already had been without a license for more than a year. The order has not yet become effective; publication will result in a prospective bar under § 499d(b)(B), preventing the company from obtaining a license for two years. The bar will run from the effective date of this publication order, which will occur after we render our decision here. Why the bar necessarily should be entirely prospective—why, in other words, the effective date cannot be made retroactive—is a matter the Judicial Officer did not address, doubtless because no one raised the point. Even before *S.S. Farms*, at least one ALJ made the effective date of a publication order retroactive. See *Farley & Calfee*, 941 F.2d at 966. But, as we have said, the point was not raised in the administrative proceedings and it has not been argued here.

*Frank Tambone, Inc. v. U.S. Dep't of Agric.*, 50 F.3d 52, 56 n.† (D.C. Cir. 1995).

*Tambone* does not address the timing of an employment bar imposed on responsibly connected individuals. *Tambone* merely stands for the proposition that the bar on an applicant obtaining a PACA license runs from the effective date of a court order finding that the applicant has flagrantly or repeatedly violated the PACA. The Court declined to address the issue of retroactive application of the license bar. I find *Tambone* inapposite.

*Farley and Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964 (9th Cir. 1991), involved the application of the employment bar to an individual who had been determined to be responsibly connected with a company prior to the final determination that the company had violated the PACA. The instant proceeding involves the application of the employment bar to an individual who is determined to be responsibly connected with a

company after the final determination that the company had violated the PACA. I find *Farley and Calfee* inapposite.

Tenth, Petitioner Beucke contends the ALJ failed to order Respondent to produce prior written and recorded statements of Respondent's witness, as required by the Rules of Practice (Petitioner Beucke's Appeal Pet. at 5, 36-45).

Section 1.141(h)(1)(iii) of the Rules of Practice provides that a party may request and obtain the production of any statement, or part of a statement, of a witness called by the complainant and in the possession of the complainant, as follows:

**§ 1.141 Procedure for hearing.**

....

(h) *Evidence*—(1) *In general*. . . .

....

(iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

7 C.F.R. § 1.141(h)(1)(iii). Petitioner Beucke seeks an investigation report written by Everet Gonzales and in the possession of Charles L. Kendall (Petitioner Beucke's Appeal Pet. at 39). The record clearly establishes that Evert Gonzales was a witness called by Respondent, not the complainant, and Charles L. Kendall represents Respondent, not the complainant (Tr. 2, 205, 405-06). Therefore, by its terms, section 1.141(h)(1)(iii) of the Rules of Practice (7 C.F.R. § 1.141(h)(1)(iii)) is not applicable since it provides that a

party is entitled only to statements of a witness called by the *complainant* in the possession of the *complainant*.

Eleventh, Petitioner Keyeski contends the ALJ erroneously concluded, because Petitioner Keyeski was actively involved with Bayside Produce, Inc., he cannot be considered a nominal shareholder (Petitioner Keyeski's Appeal Pet. at 6).

The ALJ concludes "[b]y reason of his active involvement with Bayside, Petitioner Keyeski was not only nominally a . . . shareholder of Bayside during the period November 23, 2002 to February 7, 2003" (Initial Decision at 12). I agree with the ALJ's conclusion that Petitioner Keyeski failed to prove by a preponderance of the evidence that he was only a nominal shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). In order for a petitioner to show that he or she was only nominally an officer, a director, or a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Active involvement with a company is one indicator of an actual, significant nexus with that company. Here, the record establishes that Petitioner Keyeski participated in a number of corporate matters, including controlling all aspects of Bayside Produce, Inc.'s San Diego, California, office as general manager, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397), purchasing produce on behalf of Bayside Produce, Inc.

(Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44), and managing payroll and paying rent and other incidental expenses related to Bayside Produce, Inc.'s San Diego, California, operation (Tr. 364-65, 397). I agree with the ALJ that active involvement of the nature displayed by Petitioner Keyeski is a basis for concluding that Petitioner Keyeski was not only nominally a shareholder of Bayside Produce, Inc.

Twelfth, Petitioner Keyeski contends the ALJ erroneously found that he (Petitioner Keyeski) was a shareholder of Bayside Produce, Inc., until March 11, 2003. Petitioner Keyeski asserts the record establishes that he ceased being a shareholder of Bayside Produce, Inc., November 8, 2002. (Petitioner Keyeski's Appeal Pet. at 9-10.)

I disagree with Petitioner Keyeski's contention that the record establishes that he ceased being a shareholder of Bayside Produce, Inc., on November 8, 2002. While Petitioner Keyeski testified that he did not consider himself an owner of Bayside Produce, Inc., after November 8, 2002, and introduced some evidence to indicate that by December 18, 2002, he was no longer a stockholder of Bayside Produce, Inc. (Tr. 380; KK 8), the preponderance of the evidence supports the ALJ's finding that Petitioner Keyeski retained his shares of Bayside Produce, Inc., until March 2003 (KK 1, KK 2; Tr. 190-96). Therefore, I reject Petitioner Keyeski's contention that the ALJ erroneously found Petitioner Keyeski was a shareholder of Bayside Produce, Inc., until March 11, 2003.

### **Findings of Fact**

1. Bayside Produce, Inc., is a California corporation, incorporated on August 6, 1997. Bayside Produce, Inc., applied for and received PACA license number 19981824. Bayside Produce, Inc., annually renewed PACA license number 19981824 on or before its annual anniversary date through 2002 for the year ending August 26, 2003. (RX 1, RX 2.)

2. Bayside Produce, Inc.'s shareholders and directors consisted of Wayne Martindale and Petitioner Beucke, with each of them owning 50 percent of the shares of outstanding stock until February 22, 2000, when Bayside Produce, Inc., amended its bylaws to increase the number of directors from two to three and added Petitioner Keyeski as an equal shareholder, an officer, and a member of the board of directors (RX 4; EX 6).

3. Chief Administrative Law Judge Marc R. Hillson found that Bayside Produce, Inc., willfully, flagrantly, and repeatedly violated the PACA by failing to timely pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period November 23, 2002, through February 7, 2003 (CX 1; RX 22).

4. Petitioner Beucke has significant experience with over 26 years in the produce industry and has owned, and held positions as a corporate officer in, two other produce companies, in addition to Bayside Produce, Inc. Petitioner Beucke was listed on Bayside Produce, Inc.'s PACA license and PACA license certificate as a vice president,



the secretary, a director, and a 33⅓ percent shareholder during the period November 23, 2002, through February 7, 2003. Petitioner Beucke's signature appears on the minutes of Bayside Produce, Inc.'s initial board of directors' meeting on September 15, 1997, the stock certificate issued in his name, and the minutes of Bayside Produce, Inc.'s board of directors' February 22, 2000, meeting. (Tr. 213-14, 218, 312; RX 1-RX 4; CX 9-CX 12.)

5. Petitioner Beucke purchased produce on behalf of Bayside Produce, Inc., on at least 33 occasions during the period November 23, 2002, through February 7, 2003, for which the suppliers of the produce were not paid (Tr. 248-52, 300-05, 323-24; CX 21, CX 23, CX 26, CX 32, CX 33, CX 35).

6. Petitioner Beucke's name and signature appeared on the bank signature card for Bayside Produce, Inc.'s Bank of America account number 01719-21437, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003 (RX 23).

7. Petitioner Beucke's name and signature appeared on the bank authorizations for Bayside Produce, Inc.'s Community Bank of Central California account number 1361955, and Petitioner Beucke was authorized to draw funds on that account during the period November 23, 2002, through February 7, 2003. During that period, Petitioner Beucke signed 20 checks on Bayside Produce, Inc.'s Community Bank of Central California account, including two checks payable to himself (Tr. 239-40;

RX 24; CX 39 at 222, 272, 274, 296, 332, 334, 360, 413, 421, 505, 539, 567, 571, 589, 595, 597, 605, 607, 615, 619).

8. Petitioner Beucke, as an officer of Bayside Produce, Inc., signed a corporate resolution to borrow under loan number 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003 (RX 24 at 18-19).

9. By letter dated April 30, 2003, from his attorney, Lester W. Shirley, to Wayne Martindale, Petitioner Beucke tendered his resignation as a director and vice president of Bayside Produce, Inc., as well as from any position of employment with Bayside Produce, Inc. (RX 1 at 2; CX 6).

10. On October 23, 2003, Petitioner Beucke executed documents entitled “Resignation and Acknowledgment of Stock Redemption” and “Stock Assignment Separate From Certificate,” both of which purported to be effective April 4, 2003 (RX 5, RX 6; CX 7).

11. Petitioner Keyeski has been involved in the produce business since 1985 or 1986, starting first in the warehouse before moving into sales. From sometime in 1990 until July of 1997, Petitioner Keyeski was the sales manager of Coast Citrus Distributors, a San Diego, California, company. (Tr. 357, 393.)

12. Starting in approximately August 1997, Petitioner Keyeski joined Bayside Produce, Inc., in an arrangement with Wayne Martindale and Petitioner Beucke that was

“basically a three-way partnership, . . . equal duties, equal opportunity, equal money, equal everything.” (Tr. 358-59.)

13. Once he managed to accumulate the necessary \$7,000 investment on February 22, 2000, Petitioner Keyeski attended a Bayside Produce, Inc., board of directors’ meeting in Salinas, California, and became a 33 $\frac{1}{3}$  percent shareholder, vice president, and director of Bayside Produce, Inc. (KK 6; Tr. 368).

14. Petitioner Keyeski ran the San Diego, California, office of Bayside Produce, Inc., as a general manager, controlling all aspects of its operation, including managing the payroll and paying the rent and other incidental expenses, except for depositing receivables and paying for purchases of produce (Tr. 364-65, 397).

15. Petitioner Keyeski purchased produce on behalf of Bayside Produce, Inc., on at least four occasions during the period November 23, 2002, through February 7, 2003, for which suppliers of the produce were not paid (Tr. 161-64, 167-68; CX 16, CX 28, CX 41, CX 44).

16. By letter dated October 18, 2002, Petitioner Keyeski confirmed his verbal notice of October 8, 2002, that he was resigning as vice president and as a director of Bayside Produce, Inc., and that, effective December 31, 2002, he would be resigning all positions at Bayside Produce, Inc. Petitioner Keyeski verbally amended the effective date of his resignation from all positions at Bayside Produce, Inc., to December 13, 2002. (Tr. 375; KK 5; EX 5.)

17. Petitioner Keyeski retained his shares in Bayside Produce, Inc., until March 3, 2003, when he executed a document entitled “Declaration of Lost Stock and Assignment of Shares,” which was forwarded to Bayside Produce, Inc., by letter dated March 11, 2003 (Tr. 386; KK 1, KK 2; EX 8).

### **Conclusions of Law**

1. During the period November 23, 2002, through February 7, 2003, Bayside Produce, Inc., 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 of the agreed purchase prices to 22 produce sellers for 74 lots of perishable agricultural commodities, in the total amount of \$163,102.70. *In re Bayside Produce, Inc.*, 63 Agric. Dec. 1029 (2004).

2. Petitioner Beucke was the vice president, the secretary, a director, and a holder of 33 $\frac{1}{3}$  percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003.

3. Petitioner Beucke failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Bayside Produce, Inc.’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period November 23, 2002, through February 7, 2003.

4. Petitioner Beucke failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Bayside Produce, Inc.,

during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner Beucke failed to prove by a preponderance of the evidence that he was not an owner of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. Petitioner Beucke was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

7. Petitioner Keyeski was a holder of 33 $\frac{1}{3}$  percent of the outstanding stock of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003.

8. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Bayside Produce, Inc.'s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period November 23, 2002, through February 7, 2003.

9. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was only nominally a shareholder of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

10. Petitioner Keyeski failed to prove by a preponderance of the evidence that he was not an owner of Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

11. Petitioner Keyeski was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Bayside Produce, Inc., during the period November 23, 2002, through February 7, 2003, when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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

### **ORDER**

1. I affirm Respondent's August 13, 2004, determination that Petitioner Keyeski was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Keyeski is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner Keyeski.

2. I affirm Respondent's August 17, 2004, determination that Petitioner Beucke was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Beucke is subject to the licensing restrictions under section 4(b) of the PACA and the

employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner Beucke.

### **RIGHT TO JUDICIAL REVIEW**

Petitioner Beucke and Petitioner Keyeski have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner Beucke and Petitioner Keyeski must seek judicial review within 60 days after entry of the Order in this Decision and Order.<sup>32</sup>

The date of entry of the Order in this Decision and Order is November 8, 2006.

Done at Washington, DC

November 8, 2006

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William G. Jenson  
Judicial Officer

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<sup>32</sup>28 U.S.C. § 2344.