

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) PACA-APP Docket No. 01-0001
)
Fresh Valley Produce, Inc.,)
)
Petitioner) **Decision and Order**

PROCEDURAL HISTORY

On January 31, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued a determination that Fresh Valley Produce, Inc. [hereinafter Petitioner], was responsibly connected with Fresh Valley Food Service, LLC, on June 16, 2000, when Fresh Valley Food Service, LLC, violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ On March 1, 2001, Petitioner filed a “Petition for Review of Determination That Fresh Valley Produce, Inc. Was Responsibly Connected” [hereinafter Petition for

¹On May 17, 2000, I issued a “Default Order” ordering Fresh Valley Food Service, LLC, to pay Denice & Filice Packing Company a reparation award no later than June 16, 2000. *Denice & Filice Packing Co. v. Fresh Valley Food Service LLC*, PACA Docket No. RD-00-204 (May 17, 2000) (Default Order) (RX 4). Fresh Valley Food Service, LLC, failed to pay the reparation award by June 16, 2000, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Review] pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, when Fresh Valley Food Service, LLC, violated the PACA.

On April 24, 2002, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] conducted a hearing in Tucson, Arizona. George O. Krauja, Law Offices of Fennemore Craig, Tucson, Arizona, represented Petitioner. Ruben D. Rudolph, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On May 31, 2002, Petitioner filed a "Post-Hearing Brief," "Proposed Findings of Fact and Conclusions of Law," an "Order," and a "Notice of Lodging Transcript." On June 28, 2002, Respondent filed "Proposed Finding of Fact, Conclusions of Law, and Order." On July 26, 2002, Petitioner filed "Petitioner's Reply in Support of Proposed Findings of Fact and Conclusions of Law" and "Objection to Respondent's Proposed Findings of Fact and Conclusions of Law." On August 14, 2002, Respondent filed "Response to Petitioner's Reply." On September 5, 2002, Petitioner filed "Petitioner's Reply to Response Brief."

On October 18, 2002, the ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent's January 31, 2001,

determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, on June 16, 2000, during the period of time Fresh Valley Food Service, LLC, violated the PACA (Initial Decision and Order at 11).

On November 25, 2002, Petitioner appealed to, and requested oral argument before, the Judicial Officer. On December 16, 2002, Respondent filed "Respondent's Response to Petitioner's Appeal Petition." On December 20, 2002, Respondent filed "Respondent's Response to Request for Oral Hearing." On December 23, 2002, the Hearing Clerk transferred the record to the Judicial Officer for consideration and decision.

Petitioner's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Petitioner and Respondent have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with most of the ALJ's discussion, most of the ALJ's findings of fact, and the ALJ's order affirming Respondent's January 31, 2001, determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, on June 16, 2000, during the period of time Fresh Valley Food Service, LLC, violated the PACA. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt with minor modifications the ALJ's

Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ’s findings of fact and conclusions of law, as restated.

Petitioner’s exhibits are designated by “PX.” Respondent’s exhibits are designated by “RX.” Transcript references are designated by “Tr.”

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

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

....

§ 499b. Unfair conduct

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

....

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

....

§ 499d. Issuance of license

....

(b) Refusal of license; grounds

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

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

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

....

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

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

....

§ 499g. Reparation order

.....

(d) Suspension of license for failure to obey reparation order or appeal

Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to the date of payment: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

§ 499h. Grounds for suspension or revocation of license

.....

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

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

- (1) whose license has been revoked or is currently suspended by order of the Secretary;
- (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such

violation was suspended and the suspension period has expired or is not in effect; or

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

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

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

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

**ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Discussion

Responsibly connected means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.² Respondent determined that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, when Fresh Valley Food Service, LLC, violated the PACA. Petitioner bears the burden of proving by a preponderance of the evidence that: (1) it was not actively involved in the activities resulting in a violation of the PACA; and (2) either it was only nominally a partner, officer, director, or shareholder of Fresh Valley Food Service, LLC, or it was not an owner of Fresh Valley Food Service, LLC, which was the *alter ego* of the owners of Fresh Valley Food Service, LLC.³

Petitioner is an Arizona corporation formed on March 18, 1998 (RX 11 at 1; Tr. 17). Petitioner's Articles of Incorporation provides that Petitioner's place of business is 772 W. Frontage Road, Suite 2, Nogales, Arizona; Petitioner's statutory agent is James A. Soto, 441 N. Grand Avenue, Suite 13, Nogales, Arizona; Ruben Castillo and Arminda Cano serve on Petitioner's two-person board of directors; and Ruben Castillo

²7 U.S.C. § 499a(b)(9).

³*Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1197 (D.C. Cir. 1998).

and Arminda Cano are Petitioner's incorporators (RX 20). Petitioner is in the business of importing into the United States, as principal or agent, fruits and vegetables, and then selling, marketing, distributing, and brokering those fruits and vegetables (RX 20; Tr. 39-40).

Fresh Valley Food Service, LLC, is an Arizona limited liability company formed on April 22, 1999 (PX 1; RX 7, RX 8, RX 11 at 1). Fresh Valley Food Service, LLC's Articles of Incorporation provides that Fresh Valley Food Service, LLC's registered office is 772 W. Frontage Road, Suite 2, Nogales, Arizona; Fresh Valley Food Service, LLC's statutory agent is James A. Soto, 441 N. Grand Avenue, Suite 13, Nogales, Arizona; and Fresh Valley Food Service, LLC's members are Ruben Castillo, Paul Gober, and Kevin Vasquez (RX 7). On November 12, 1999, Fresh Valley Food Service, LLC, filed First Amended and Restated Articles of Organization of Fresh Valley Food Service, LLC, with the Arizona Corporation Commission in which Fresh Valley Food Service, LLC, replaced the statutory agent and removed Paul Gober as a member and replaced him with Petitioner (RX 8).

Denice & Filice Packing Co., located in Hollister, California, sold perishable agricultural commodities to Fresh Valley Food Service, LLC, and invoiced Petitioner approximately \$299,000 for the produce sold to Fresh Valley Food Service, LLC. Petitioner paid approximately \$217,000 of the \$299,000 owed to Denice & Filice Packing Co. During the period August 28, 1999, through October 13, 1999, Denice & Filice

Packing Co. sold 26 truckloads of peppers to Fresh Valley Food Service, LLC (PX 6; RX 11). Denice & Filice Packing Co. invoiced Petitioner \$85,042 for the peppers sold to Fresh Valley Food Service, LLC. Neither Petitioner nor Fresh Valley Food Service, LLC, paid Denice & Filice Packing Co. for these peppers, and Denice & Filice Packing Co. instituted a reparation proceeding against Fresh Valley Food Service, LLC, seeking payment for these peppers. (RX 11, RX 12, RX 19; Tr. 138-41.)

Fresh Valley Food Service, LLC, never responded to the reparation complaint filed by Denice & Filice Packing Co., and the Judicial Officer issued a Default Order against Fresh Valley Food Service, LLC, on May 17, 2000, based on Fresh Valley Food Service, LLC's failure to pay for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC, during the period August 28, 1999, through October 13, 1999. The Default Order orders Fresh Valley Food Service, LLC, to pay Denice & Filice Packing Co. a reparation award of \$85,042 with interest and a \$300 filing fee. (RX 4.) Fresh Valley Food Service, LLC, failed to pay the reparation award by June 16, 2000, in violation of the PACA.

Petitioner maintains it was not actively involved in the activities resulting in the violation of the PACA by Fresh Valley Food Service, LLC, or other persons (Petitioner's Post-Hearing Brief at 3). Based upon a careful consideration of the record, I find

Petitioner has failed to prove by a preponderance of the evidence that it was not actively involved in the activities resulting in Fresh Valley Food Service, LLC's violation of the PACA.

Petitioner maintains it does not meet the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) because it is not and never has been an owner of more than 10 percent of Fresh Valley Food Service, LLC (Petitioner's Post-Hearing Brief at 3). The record establishes that Petitioner owned 40 per centum of Fresh Valley Food Service, LLC (RX 1, RX 2). Fresh Valley Food Service, LLC's PACA license application signed by Petitioner's president, Ruben Castillo, on May 20, 1999, and received by the United States Department of Agriculture on May 27, 1999, states Petitioner owns 40 percent of Fresh Valley Food Service, LLC (RX 1 at 3-8). Petitioner's owner, Arminda Cano, was informed of Petitioner's ownership interest in Fresh Valley Food Service, LLC, in writing, when Petitioner's president, Ruben Castillo, resigned from Petitioner on December 12, 1999 (RX 9). Petitioner knew of its ownership interest in Fresh Valley Food Service, LLC, through Petitioner's president, regardless of when Petitioner's owner was informed of the ownership interest. In addition, the First Amended and Restated Articles of Organization of Fresh Valley Food Service, LLC, signed by Ruben Castillo on October 11, 1999, and filed with the Arizona Corporation Commission on November 12, 1999, recite

Petitioner's ownership interest, as first stated by Petitioner's president in the May 1999 Fresh Valley Food Service, LLC, application for a PACA license (RX 8).

Petitioner's arguments and contentions that Petitioner was not actively involved with Fresh Valley Food Service, LLC; that Petitioner was not a member of Fresh Valley Food Service, LLC; and that there is no nexus between Petitioner's activities and the activities of Fresh Valley Food Service, LLC, are not sustained by the evidence.

The evidence is sufficiently persuasive that Petitioner is precluded from denying that it owned 40 percent of Fresh Valley Food Service, LLC, when Fresh Valley Food Service, LLC, violated the PACA and from denying that Petitioner was not otherwise responsibly connected with Fresh Valley Food Service, LLC. Petitioner is a company of four employees, two of whom knew of Petitioner's ownership interest in Fresh Valley Food Service, LLC, through December 1999 (Tr. 49, 52-56).

The details of the involvement of Petitioner and Fresh Valley Food Service, LLC, show that the two companies were inextricably intertwined. Petitioner and Fresh Valley Food Service, LLC, had the same telephone and fax numbers and the same physical address (RX 1 at 2-4, RX 3 at 4-5, 8-9, 11, 13, 17, RX 7, RX 8 at 2, RX 16, RX 17, RX 18). Ruben Castillo was a founding member of both Petitioner and Fresh Valley Food Service, LLC (PX 1; RX 7, RX 20). Petitioner's attorney, James A. Soto, prepared the documents to establish both Petitioner and Fresh Valley Food Service, LLC, and to obtain PACA licenses for both Petitioner and Fresh Valley Food Service, LLC.

Petitioner's office manager, Sylvia Montanez, signed checks on behalf of Fresh Valley Food Service, LLC, while working at Petitioner. (PX 1; RX 1 at 8, RX 3 at 17-20, RX 7, RX 16, RX 20; Tr. 49, 52-56.) Under the authority of Petitioner's president, Ruben Castillo, Petitioner became a 40 percent owner of Fresh Valley Food Service, LLC.

Petitioner argues Arminda Cano, Petitioner's 100 percent owner, never authorized the creation of another company (Petitioner's Post-Hearing Brief at 3). Petitioner's Articles of Incorporation, and Arminda Cano herself, gave Ruben Castillo the broadest possible authority in running Petitioner (RX 20; Tr. 31-32). While Arminda Cano may not have expressly authorized the specific actions of Ruben Castillo, Arminda Cano knew of "problems" at Petitioner and participated in the firing of personnel even if Arminda Cano never visited Petitioner's place of business and at hearing allegedly did not know the last name of Petitioner's current president or his salary. According to Arminda Cano, she met Ruben Castillo only on two occasions; once when Ruben Castillo traveled to Los Angeles, California, to have her sign corporate documents. She further states, except for two meetings with Ruben Castillo in 1998, she never was in contact with him in any way. Allegedly, Arminda Cano is only informed of her business through her husband, Pedro Chavez, who lives in Mexico and visits the business infrequently. Arminda Cano made efforts to establish in her testimony that she only knows what her husband tells her of the business and that she is mainly concerned with raising her children. Her testimony

and general demeanor leave some doubt as to the credibility of her testimony; however, the record does establish that she was not involved with the day-to-day management of Petitioner and that Ruben Castillo had broad authority to manage Petitioner. (Tr. 17-35, 41-42, 149.)

Ruben Castillo's actions in establishing Fresh Valley Food Service, LLC, to conduct business in conjunction with Petitioner were contemplated expressly in Petitioner's Articles of Incorporation that Arminda Cano signed (RX 3 at 18-20). The indemnification clause of the Articles of Incorporation contemplates the formation of joint ventures, partnerships, or "other enterprises," as follows:

ARTICLE 9. The Corporation shall indemnify any person who incurs expenses or liabilities by reason of the fact he or she is or was an officer, director, employee or agent of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or agent of another Corporation, partnership, joint venture, trust or other enterprises. This indemnification shall be mandatory in all circumstances in which indemnification is permitted by law.

RX 3 at 19.

Both Ruben Castillo and Arminda Cano signed the Articles of Incorporation. Because "partnership" and "other enterprises" were contemplated in Petitioner's Articles of Incorporation, Ruben Castillo was not acting outside his authority in establishing a joint venture, partnership, or other enterprise in conjunction with his duties as president of Petitioner.

The evidence suggests that Arminda Cano was not as unaware of the business activities of Petitioner as she would have one believe. However, even if the 100 percent shareholder was initially unaware of the existence of Fresh Valley Food Service, LLC, Ruben Castillo informed Arminda Cano that Petitioner owned Fresh Valley Food Service, LLC, as early as 6 months prior to the June 16, 2000, PACA violation. In his December 12, 1999, resignation letter to Arminda Cano, Ruben Castillo informed her Petitioner “owned” Fresh Valley Food Service, LLC (RX 9 at 2). The evidence at the hearing also showed that Petitioner was informed of the actions of Fresh Valley Food Service, LLC, as early as August 1999. In a letter dated February 24, 2000, to Denice & Filice Packing Co., Petitioner’s attorney states Petitioner has not been provided information from Fresh Valley Food Service, LLC, for 6 months (PX 7 at 2; RX 13 at 2). This letter implies Petitioner had been informed of the activities of Fresh Valley Food Service, LLC, in August 1999.

Petitioner’s claim that it had no knowledge of Fresh Valley Food Service, LLC, prior to the time it was contacted by Denice & Filice Packing Co. for collection, is completely untenable and not supported by the evidence. Denice & Filice Packing Co. routinely billed Petitioner, not Fresh Valley Food Service, LLC, for produce Fresh Valley Food Service, LLC, ordered, and Petitioner paid these bills. Denice & Filice Packing Co. transacted approximately \$299,000 of business by billing Petitioner for produce purchased by Fresh Valley Food Service, LLC, and Petitioner paid these bills from its

corporate account (Tr. 138-40). Petitioner's claim of ignorance of the existence of Fresh Valley Food Service, LLC, is unsupported. Fresh Valley Food Service, LLC, was run out of Petitioner's own office. Petitioner conducted business with Denice & Filice Packing Co. and paid for the produce Fresh Valley Food Service, LLC, purchased until August 1999.

I have considered Petitioner's many arguments and contentions but do not find them convincing or sustainable in law and fact.

Denice & Filice Packing Co. was being paid by the Petitioner, not by Fresh Valley Food Service, LLC, and the reparation complaint and subsequent reparation order, which was not paid in violation of the PACA, stemmed from Petitioner's failure to continue to pay for produce ordered by Fresh Valley Food Service, LLC. The evidence and record establish Petitioner was actively involved in activities resulting in the PACA violation committed by Fresh Valley Food Service, LLC.

In this proceeding, Petitioner failed to prove it did not exercise judgment, discretion, or control over the actions that resulted in the non-payment of the reparation award.

Petitioner's argument that ignorance of the underlying transactions as they occurred equates to no active involvement, mischaracterizes the violation of the PACA which was the basis of Respondent's determination, and thwarts the main goal of the responsible connection doctrine. Following the concepts set forth in *In re Michael*

Norinsberg, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), and *Bell v. Dep't of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994), the Judicial Officer in *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 386 (2000), enunciated one of the main goals of finding a party responsibly connected to a PACA violator:

Responsibility is placed upon corporate officers, directors, and holders of more than 10 per centum of the outstanding stock because their status with the company requires that they know, or should know, about violations being committed and that they be held responsible for their failure to “counteract or obviate the fault of others.” [Quoting *Bell* at 1201].

In the instant proceeding, as a 40 percent owner of the violating PACA licensee, Petitioner was in a position to know of the transactions. Petitioner knew that Fresh Valley Food Service, LLC, was purchasing produce from Denice & Filice Packing Co. and knew that Fresh Valley Food Service, LLC, in which it held 40 percent ownership was not paying for produce. Petitioner could have obviated the fault of the company it owned but did not. Petitioner had paid for produce ordered by Fresh Valley Food Service, LLC, but chose not to continue paying. Petitioner must be found responsibly connected to Fresh Valley Food Service, LLC, in which it had an ownership interest, and which ran its business operations out of Petitioner’s office.

Findings of Fact and Conclusions of Law

1. Petitioner is an Arizona corporation whose principal address is 1555 Calle Plata, Suite 203, Nogales, Arizona 85621-4569. Petitioner has been at the 1555 Calle Plata, Suite 203, Nogales, Arizona, location since September 2000.

2. Petitioner's principal place of business was 772 Frontage Road, Suite 2, Nogales, Arizona 85628-2570, from the time the company was established on March 18, 1998, until September 2000.

3. The principle place of business of Fresh Valley Food Service, LLC, was 772 Frontage Road, Suite 2, Nogales, Arizona 85628-2570, from the time Fresh Valley Food Service, LLC, was formed on April 22, 1999, and this address is the last known address for Fresh Valley Food Service, LLC. Until September 2000, Fresh Valley Food Service, LLC, and Petitioner shared the same telephone and fax numbers.

4. Petitioner currently employs four people, including its president, Victor Hernandez. Victor Hernandez has worked for Petitioner since the inception of the company in 1998.

5. Sylvia Montanez was Petitioner's office manager until December 1999. Ruben Castillo was Petitioner's president until December 1999.

6. Petitioner owned 40 percent of Fresh Valley Food Service, LLC, on June 16, 2000, when Fresh Valley Food Service, LLC, violated the PACA by failing to pay a reparation award. Petitioner's former president, Ruben Castillo, owned 25 percent of Fresh Valley Food Service, LLC, during the period of May 27, 1999, through May 27, 2000.

7. Arminda Cano owns 100 percent of Petitioner. Arminda Cano is 32 years old, with a high school education. Arminda Cano maintained she has never been

involved with the day-to-day management of Petitioner although she has signed papers, participated in firing one of Petitioner's employees, and was aware of problems. Arminda Cano lives in California and has never visited Petitioner's place of business in Arizona.

8. Arminda Cano is married to Pedro Chavez who lives in Mexico, but visits Arizona on occasion. Pedro Chavez created Petitioner and placed the company's ownership in his wife's name. Pedro Chavez makes management decisions at Arminda Cano's company, and Petitioner's current president, Victor Hernandez, informs Pedro Chavez of the business activities of Petitioner.

9. Arminda Cano was aware of Petitioner's ownership interest in Fresh Valley Food Service, LLC, since at least December 1999, when, at the time of his resignation as president, Ruben Castillo informed Arminda Cano that Petitioner had an ownership interest in Fresh Valley Food Service, LLC.

10. Denice & Filice Packing Co., located in Hollister, California, sold perishable agricultural commodities to Fresh Valley Food Service, LLC, and invoiced Petitioner approximately \$299,000 for the produce sold to Fresh Valley Food Service, LLC. Petitioner paid approximately \$217,000 of the \$299,000 owed to Denice & Filice Packing Co. During the period August 28, 1999, through October 13, 1999, Denice & Filice Packing Co. sold 26 truckloads of peppers to Fresh Valley Food Service, LLC. Denice & Filice Packing Co. invoiced Petitioner \$85,042 for the peppers sold to Fresh Valley Food Service, LLC. Neither Petitioner nor Fresh Valley Food Service, LLC, paid

Denice & Filice Packing Co. for these peppers, and Denice & Filice Packing Co. instituted a reparation proceeding against Fresh Valley Food Service, LLC, seeking payment for these peppers. Fresh Valley Food Service, LLC, never responded to the reparation complaint filed by Denice & Filice Packing Co.

11. On May 17, 2000, the Judicial Officer issued a Default Order against Fresh Valley Food Service, LLC, based on Fresh Valley Food Service, LLC's failure to pay for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC, during the period August 28, 1999, through October 13, 1999. Fresh Valley Food Service, LLC, failed to pay the May 17, 2000, reparation award by June 16, 2000, in violation of the PACA.

12. Fresh Valley Food Service, LLC, had its PACA license suspended for failure to pay the May 17, 2000, reparation award by June 16, 2000. Fresh Valley Food Service, LLC's PACA license terminated on July 12, 2000, when it failed to pay its annual fees.

13. On January 31, 2001, Respondent issued a determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, on June 16, 2000, when Fresh Valley Food Service, LLC, violated the PACA.

14. Petitioner has failed to demonstrate by a preponderance of the evidence that it was not actively involved in the activities resulting in Fresh Valley Food Service, LLC's June 16, 2000, violation of the PACA.

15. Petitioner has failed to demonstrate by a preponderance of the evidence that it was only nominally a shareholder of Fresh Valley Food Service, LLC.

16. Petitioner was *responsibly connected*, as that term is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Fresh Valley Food Service, LLC, on June 16, 2000, when Fresh Valley Food Service, LLC, violated the PACA.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises two issues in its “Petition for Appeal to Judicial Officer” [hereinafter Appeal Petition]. First, Petitioner contends it is not and never has been a holder of more than 10 per centum of the stock of Fresh Valley Food Service, LLC; therefore, Petitioner does not meet the definition of term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) (Appeal Pet. at 1-10).

Responsibly connected means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.⁴ Petitioner contends Respondent failed to prove by a preponderance of the evidence that Petitioner was a holder of more than 10 per centum of the outstanding stock of Fresh Valley Food Service, LLC⁵ (Appeal Pet. at 4).

⁴See note 2.

⁵Respondent does not allege Petitioner was a partner of Fresh Valley Food Service, LLC, or an officer or director of Fresh Valley Food Service, LLC.

Petitioner states Fresh Valley Food Service, LLC's Articles of Organization, filed with the Arizona Corporation Commission on April 22, 1999, lists only Paul Gober, Ruben C. Castillo, and Kevin Vasquez as members of Fresh Valley Food Service, LLC (PX 1). Petitioner argues it was not even nominally a member of Fresh Valley Food Service, LLC, until November 12, 1999, when Fresh Valley Food Service, LLC, filed the First Amended and Restated Articles of Organization with the Arizona Corporation Commission listing Ruben C. Castillo, Kevin Vasquez, and Petitioner as members (PX 3). Petitioner correctly points out that the First Amended and Restated Articles of Organization, in which Petitioner is first listed as a member of Fresh Valley Food Service, LLC, were not filed with the Arizona Corporation Commission until approximately 1 month after the last produce transaction that was the subject of *Denice & Filice Packing Co. v. Fresh Valley Food Service LLC*, PACA Docket No. RD-00-204. (Appeal Pet. at 5.) However, the issue in this proceeding is whether Petitioner was responsibly connected with Fresh Valley Food Service, LLC, on June 16, 2000, when Fresh Valley Food Service, LLC, violated the PACA by failing to pay the reparation award which the Judicial Officer ordered it to pay in *Denice & Filice Packing Co. v. Fresh Valley Food Service LLC*, PACA Docket No. RD-00-204 (May 17, 2000) (Default Order) (RX 4).

Petitioner further argues that none of the corporate documents issued by Petitioner or Fresh Valley Food Service, LLC, show Petitioner was a holder of more than 10 per centum of the outstanding stock of Fresh Valley Food Service, LLC, because, while these

documents may identify Petitioner as a member of Fresh Valley Food Service, LLC, they do not reveal the per centum of stock in Fresh Valley Food Service, LLC, held by Petitioner (Appeal Pet. at 5-6).

The record contains two documents issued by Fresh Valley Food Service, LLC, that establish that Petitioner was a holder of more than 10 per centum of the outstanding stock of Fresh Valley Food Service, LLC. In Fresh Valley Food Service, LLC's application for a PACA license, signed by Ruben Castillo on May 20, 1999, and filed on May 27, 1999, Fresh Valley Food Service, LLC, reported to the United States Department of Agriculture that Petitioner held 40 per centum of the outstanding stock, Ruben Castillo held 25 per centum of the outstanding stock, Paul Gober held 25 per centum of the outstanding stock, and Kevin Vasquez held 10 per centum of the outstanding stock (RX 1; Tr. 91-93). Again in Fresh Valley Food Service, LLC's unsigned operating agreement submitted by Kevin Vasquez to the United States Department of Agriculture in June 2000, Petitioner is identified as owning a 40 percent interest, Ruben Castillo is identified as owning a 25 percent interest, Paul Gober is identified as owning a 25 percent interest, and Kevin Vasquez is identified as owning a 10 percent interest (RX 2 at 2; Tr. 102-04).

Finally, Petitioner states the only documents purporting to make Petitioner a member of Fresh Valley Food Service, LLC, are signed by Petitioner's former president, Ruben Castillo. Petitioner contends Ruben Castillo had no authority to establish Fresh

Valley Food Service, LLC, and to make Petitioner a member of Fresh Valley Food Service, LLC. (Appeal Pet. at 6-10.)

Ruben Castillo had broad authority to run Petitioner. While Arminda Cano, Petitioner's sole stockholder testified she never authorized Ruben Castillo to make Petitioner a member of Fresh Valley Food Service, LLC (Tr. 20), her testimony indicates she provided almost no oversight over the actions of Petitioner or Ruben Castillo and Ruben Castillo "was in charge of everything" (Tr. 32).

Further, Petitioner's Articles of Incorporation contemplate the formation of corporations, partnerships, joint ventures, trusts, or other enterprises and expressly provides for the indemnification of Petitioner's officers, directors, employees, or agents serving at Petitioner's request as directors, officers, employees, or agents of another corporation, partnership, joint venture, trust, or enterprise (RX 3 at 19). Both Ruben Castillo and Arminda Cano signed these Articles of Incorporation (RX 3 at 20). I agree with the ALJ's conclusion that "[b]ecause 'partnership' and 'other enterprises' were contemplated in Petitioner's Articles of Incorporation, Mr. Castillo was not acting outside his authority in establishing a joint venture, partnership, or other enterprise in conjunction with his duties as President of Petitioner." (Initial Decision and Order at 7.)

Petitioner argues that the indemnification clause in article 9 of the Articles of Incorporation does not mean that Petitioner's president was vested with authority to unilaterally form another entity and to make Petitioner a member of that entity (Appeal

Pet. at 8). I reject Petitioner's argument. The record reveals that Ruben Castillo was vested with authority to perform every corporate function (Tr. 32). Petitioner ratified Ruben Castillo's action by paying for produce purchased by Fresh Valley Food Service, LLC. Finally, pursuant to section 16 of the PACA (7 U.S.C. § 499p) the act of Petitioner's officer, Ruben Castillo, is deemed the act of Petitioner.

Second, Petitioner contends the ALJ based her conclusion that Petitioner was actively involved in activities resulting in Fresh Valley Food Service, LLC's violation of the PACA on Petitioner's payment of \$217,000 of the \$299,000 owed to Denice & Filice Packing Co. for produce ordered by Fresh Valley Food Service, LLC. Petitioner contends the ALJ's finding that Petitioner paid Denice & Filice Packing Co. for produce ordered by Fresh Valley Food Service, LLC, is not supported by the record. (Appeal Pet. at 2.)

I disagree with Petitioner's contention that the ALJ's finding that Petitioner paid Denice & Filice Packing Co. \$217,000 for produce ordered by Fresh Valley Food Service, LLC, is error. I find the record contains substantial evidence that Petitioner paid Denice & Filice Packing Co. for produce ordered by Fresh Valley Food Service, LLC.

Petitioner states the Denice & Filice Packing Co. representative who testified did not specify who paid Denice & Filice Packing Co. \$217,000 of the \$299,000 owed for produce. I disagree with Petitioner. Mark Bauman, chief financial officer for Denice & Filice Packing Co. testified that Denice & Filice Packing Co. invoiced Petitioner for

produce sold to Fresh Valley Food Service, LLC, and Petitioner paid the \$217,000 at issue, as follows:

[BY MR. RUDOLPH:]

Q. All right. And are you familiar with the Petitioner?

[BY MR. BAUMAN:]

A. Yes.

Q. How are you familiar with the Petitioner?

A. The L.L.C. would order products through our company. We would pack it for them and then ship it to their customers.

....

Q. How are you familiar with the Petitioner, the corporation Fresh Valley Produce, Inc.?

A. When Kevin Vasquez first came to us he represented that he worked for the corporation.

Q. Okay.

A. And then subsequently when we started doing business with them they brought business cards saying that they were an L.L.C. And our sales manager did not want to extend credit to the L.L.C. so he told Kevin we were going to invoice the corporation.

And he told me he called Ruben Castillo and informed him that if he wanted to do business with us we would be billing the corporation for any product they bought from us.

....

Q.

Do you recall what period of, what time period that Kevin Vasquez first approached you?

A. It would have been early in '99, probably February or March of '99.

Q. Okay. And then later on you said you were supposed, you were going to do business or it was proposed to do business with the L.L.C., Kevin Vasquez has proposed to do business with the L.L.C.?

A. Yes. Yeah, they came to us and said that they have now formed an L.L.C. And that's when we told them we didn't want to do business with an L.L.C. that had no track record.

Q. And why did, how long after you set up this account did Kevin Vasquez bring up the L.L.C.?

A. Would have been about May or June.

Q. Okay. So a couple months after the account had been set up. All right.

I'm handing you what's been marked as Respondent's Exhibit
Number 19.

....

Q. Do you know what this document is?

A. This is an invoice that was faxed over to us from Fresh Valley Food Service, L.L.C. for us to pack 84 boxes of 25 pound large peppers and ship them to Boys Market in Delray Beach, Florida. And we filled that order on the 24th and it's initialed by the sales manager. And that number 76287 is the invoice number where we would have invoiced the corporation.

Q. So in this transaction you packed, your company packed the peppers and sent them to the ship to address of Boys Farmers?

A. That's correct.

Q. And how were you going to get paid for these peppers that you packed?

A. We invoiced the corporation for the peppers.

Q. Okay.

A. And have been paid for them.

Q. So you sent your invoice?

A. 76287.

Q. To Fresh Valley Produce?

A. Yes.

Q. The corporation?

A. Yes.

Q. And there was no dispute over this invoice was there?

A. Not at all.

Q. You were paid?

A. We were paid.

.....

Q. Okay. Of course your company didn't get paid for some invoices; is that correct?

A. That's correct. We invoiced them for about \$299,000 worth of product. They paid for about 217. And there's 82,000 left to pay, approximately.

Tr. 135-40.

Petitioner correctly states Mark Bauman does not specify who "they" is in his last response in the above-quoted testimony (Appeal Pet. at 10-11). However, the record

clearly establishes Mark Bauman was referring to Petitioner when he used the words “them” and “they” in his last response in the above-quoted testimony.⁶

Further, Petitioner notes Mark Bauman’s testimony was not part of the record when Respondent made his January 31, 2001, determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC (Appeal Pet. at 11). I agree with Petitioner. However, I do not conclude the ALJ erred by relying on Mark Bauman’s testimony because it was not part of the record when Respondent made his January 31, 2001, determination.

Under the Rules of Practice, the record upon which the Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, bases a responsibly connected determination is only part of the record in a proceeding to review that determination.⁷ Petitioner filed Petition for Review of Respondent’s January 31, 2001, determination on March 1, 2001. A petition for review is deemed a request for hearing.⁸ Moreover, Petitioner specifically requested a hearing in the Petition for Review (Pet. for Review at 1). The Rules of Practice provides

⁶See *Wiley v. Borough of Towanda*, 26 F. 594, 595 (C.C.W.D. Pa. 1886) (finding, even though the word “they” was sometimes employed in an agreement, the parties were referring to a corporation).

⁷See 7 C.F.R. § 1.136(a).

⁸See 7 C.F.R. § 1.141(a).

for the receipt of witness testimony at hearings.⁹ The administrative law judge's decision must be made in accordance with 5 U.S.C. § 556¹⁰ which requires that the decision be based on consideration of the whole record or those parts of the record cited by a party.¹¹ Therefore, I find the ALJ did not err when she considered the testimony given by Mark Bauman at the April 24, 2002, hearing.

Finally, Petitioner contends Denice & Filice Packing Co.'s institution of a reparation proceeding only against Fresh Valley Food Service, LLC, makes clear that Denice & Filice Packing Co. knew it contracted only with Fresh Valley Food Service, LLC, and knew only Fresh Valley Food Service, LLC, was liable to Denice & Filice Packing Co. for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC. Petitioner contends, if Denice & Filice Packing Co. thought Petitioner was involved with or responsible for Fresh Valley Food Service, LLC, Denice & Filice Packing Co. would have instituted the reparation action against Petitioner. (Appeal Pet. at 11.)

The record establishes Denice & Filice Packing Co. viewed Petitioner as related to Fresh Valley Food Service, LLC, and responsible for payment for produce Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC. Mark Bauman testified that

⁹See 7 C.F.R. § 1.141(h)(1).

¹⁰See the definition of the word *decision* in 7 C.F.R. § 1.132.

¹¹See 5 U.S.C. § 556(d).

Denice & Filice Packing Co. viewed Petitioner responsible for paying for produce that Denice & Filice Packing Co. sold to Fresh Valley Food Service, LLC, and that in hindsight, Denice & Filice Packing Co. probably should have instituted the reparation action against both Petitioner and Fresh Valley Food Service, LLC (Tr. 135-41). Denice & Felice Packing Co. sent Petitioner a written demand for payment for produce sold to Fresh Valley Food Service, LLC, sometime prior to February 3, 2000 (RX 10). When Petitioner refused to pay, Denice & Filice Packing Co. responded with a letter dated February 8, 2000, from its attorney again demanding payment from Petitioner (RX 11). Finally, in a letter dated February 9, 2000, Denice & Filice Packing Co. requested that the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, request Petitioner “and/or” Fresh Valley Food Service, LLC, make full payment to Denice & Filice Packing Co. (RX 12).

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

ORDER

I affirm Respondent’s January 31, 2001, determination that Petitioner was responsibly connected with Fresh Valley Food Service, LLC, during the period of time that Fresh Valley Food Service, LLC, violated the PACA.

Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

Done at Washington, DC

March 20, 2003

William G. Jenson
Judicial Officer