

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) PACA-APP Docket No. 04-0010  
Edward S. Martindale, )  
)  
Petitioner ) **Decision and Order**

**PROCEDURAL HISTORY**

On May 10, 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 Edward S. Martindale [hereinafter Petitioner] was responsibly connected with Garden Fresh Produce, Inc., during the period January 2002 through February 2003, when Garden Fresh Produce, Inc., violated the PACA.<sup>1</sup> On June 14, 2004, Petitioner filed a Petition for Review pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter 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)

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<sup>1</sup>During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., purchased, received, and accepted in interstate commerce, from five produce sellers, 109 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$379,923.25, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

[hereinafter the Rules of Practice] seeking reversal of Respondent's May 10, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc.

On March 2, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in San Jose, California. P. Sterling Kerr, Kerr & Associates, Las Vegas, Nevada, represented Petitioner. Charles L. Kendall, Office of the General Counsel, United States Department of Agriculture, represented Respondent.

On January 27, 2006, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ concluded Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA (Initial Decision at 1, 14).

On March 8, 2006, Petitioner appealed to the Judicial Officer. On March 28, 2006, Respondent filed a response to Petitioner's appeal petition. On April 28, 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 Chief ALJ's conclusion that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated the PACA. Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

**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

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>2</sup>

The record establishes Petitioner was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to

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<sup>2</sup>7 U.S.C. § 499a(b)(9).

demonstrate by a preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh 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 failed to carry his burden of proof that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. Petitioner 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 Garden Fresh Produce, Inc. Moreover, as Petitioner was an owner of Garden Fresh Produce, Inc., the defense that he was not an owner of Garden Fresh Produce, Inc., which was the alter ego of its

owners, is not available to Petitioner.<sup>3</sup> As Petitioner has failed to carry his burden of proof regarding the first prong and second prong of the two-prong test, I conclude Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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)).

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<sup>3</sup>*In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), \_\_\_ Agric. Dec. \_\_\_, slip op. at 11 (Jan. 24, 2006) (holding the petitioner, who was an owner of the violating PACA licensee could not raise the defense that he was not an owner of the licensee, which was the alter ego of its owners), *appeal docketed*, No. 06-11609-CC (11th Cir. Mar. 13, 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004) (holding the petitioners, who were owners of the violating PACA licensee could not raise the defense that they were not owners of the licensee, which was the alter ego of its owners), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 49 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 33.3 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

### Facts

Petitioner Edward Shane Martindale<sup>4</sup> has worked in the produce business for approximately 15 years. Petitioner began working at Martindale Distributing, a business run by his father in Salinas, California. When Petitioner began working at Martindale Distributing, his stepbrother, Donald R. Beucke, and his older brother, Wayne Martindale, were already involved in the business. Petitioner started in Martindale Distributing as a produce inspector and “on grounds” buyer. When Petitioner’s father retired from Martindale Distributing in 1999, Petitioner, along with his stepbrother and brother, purchased the company, with each of them owning one-third of the company. Since approximately May 2003, when his brother and stepbrother resigned from Martindale Distributing, Petitioner has been the 100 percent owner of Martindale Distributing. (Tr. 36-39, 41-42.)

In late 1999 or early 2000, Wayne Martindale, who, with his stepbrother Donald Beucke, had already started Bayside Produce, a produce company with a warehouse in San Diego, “started talking about wanting to open another company in Las Vegas.” (Tr. 42.) Petitioner joined his brother and stepbrother, along with several others, and formed Garden Fresh Produce, Inc. Petitioner was a 20 percent shareholder of the new company and was listed as a director and the secretary. Petitioner was issued a stock certificate indicating that he owned 1,000 shares of stock in Garden Fresh Produce, Inc.

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<sup>4</sup>Petitioner’s legal name is Edward Shane Martindale but he is generally known as Shane Martindale (Tr. 34).

(RX 10 at 4), although Petitioner stated he had never seen the stock certificate before the institution of the instant proceeding. Petitioner signed the original PACA license application and the check in payment of the PACA licensing fee. Petitioner submitted his resignation and reassigned his stock on April 4, 2003. By letter dated April 28, 2003, Petitioner notified the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Programs, PACA Branch, that he was no longer connected with Garden Fresh Produce, Inc., and asked that his name be removed from Garden Fresh Produce, Inc.'s PACA license (RX 1 at 16).

Petitioner stated he originally decided to join Garden Fresh Produce, Inc., because he was good with bills and money management (Tr. 85). During the early days of Garden Fresh Produce, Inc.'s operations, Petitioner, working from Martindale Distributing's Salinas, California, office, handled much of Garden Fresh Produce, Inc.'s paperwork, even receiving a salary for handling Garden Fresh Produce, Inc.'s payables. Petitioner classified his principal duties with Garden Fresh Produce, Inc., as that of an accounts payable manager, but after Wayne Martindale moved Garden Fresh Produce, Inc.'s accounts payable operations to Las Vegas, Nevada, at the end of 2001, Petitioner issued only a small number of checks for Garden Fresh Produce, Inc. Petitioner stated he relinquished his role because of differences of opinion with his brothers, problems arising from the use of non-matching computer systems, and problems with coordination of purchase orders and bills. Petitioner told the other shareholders that he would no longer handle the payables for Garden Fresh Produce, Inc. All the Garden Fresh Produce, Inc.,

invoices that he had in his possession and had not been paid were taken by Wayne Martindale to Las Vegas, Nevada, in December 2001. (Tr. 48-50.)

Petitioner purchased produce on behalf of Garden Fresh Produce, Inc., in the first year it did business, but did not recall purchasing produce after his brother took Garden Fresh Produce, Inc.'s payables to Las Vegas at the end of 2001 (Tr. 51). However, Joe Quijada, a produce seller, testified that, while he was not 100 percent certain of the year of the transactions, he dealt with Petitioner when selling produce to Garden Fresh Produce, Inc., in 2002 (Tr. 17-18). Petitioner issued checks after 2001 when he was directed by his brother and stepbrother "to make payment to certain vendors that were in Salinas." (Tr. 52, 95.) The record does not contain evidence that Petitioner was directly involved in any of the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

Petitioner testified that, after December 2001, he did not actively monitor Garden Fresh Produce, Inc., on a regular basis, even though he was still a shareholder, an officer, and a director (Tr. 52). Petitioner took calls for Garden Fresh Produce, Inc., at his Salinas, California, office and became aware in 2002 that there were complaints about the way Garden Fresh Produce, Inc., handled accounts payable. Petitioner referred callers to Wayne Martindale to attempt to resolve Garden Fresh Produce, Inc.'s failures to pay (Tr. 52-53). Other than referring callers to his brother, Petitioner only could recall warning one company, Sun America Produce, that he had concerns about Garden Fresh Produce, Inc.'s failures to pay its bills promptly (Tr. 81). Even though Petitioner knew

Garden Fresh Produce, Inc., had financial problems, he did not ask to see a financial statement or bank statements, relying on statements from Wayne Martindale and Donald Beucke “that things were getting better.” (Tr. 99.)

Before Petitioner resigned from Garden Fresh Produce, Inc., by letter dated April 4, 2003, Petitioner signed documents accepting the resignation of two of Garden Fresh Produce, Inc.’s directors, David N. Wiles and Bruce Martindale (RX 1 at 13, RX 9, RX 11). Joe Quijada and Steven Wood (the latter called by Respondent) each testified that Wayne Martindale was the primary contact when dealing with Garden Fresh Produce, Inc. (Tr. 25, 28). Mr. Quijada testified that he never had any slow-pay problems with Martindale Distributing and characterized Petitioner as “an upstanding individual.” (Tr. 22.)

Evert Gonzalez, a senior marketing specialist for the PACA Branch, testified that his investigation was initiated after the PACA Branch received reparation complaints instituted by produce sellers against Garden Fresh Produce, Inc. (Tr. 108-09). Mr. Gonzalez described his investigation, which primarily involved visiting Garden Fresh Produce, Inc.’s Las Vegas, Nevada, office. No one was at the premises when he first arrived, but he eventually received access and requested a variety of records (Tr. 110-11). Wayne Martindale indicated to Mr. Gonzalez that all the principals in Garden Fresh Produce, Inc., including the Petitioner, had equal authority and could sign checks and pay payables (Tr. 112).

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file and identified the documents (RX 1-RX 10) contained in the responsibly connected file maintained by the PACA Branch (Tr. 117-40).

### **Findings of Fact**

1. Petitioner was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. On April 28, 2000, Petitioner signed the minutes of the organizational meeting of Garden Fresh Produce, Inc.'s board of directors. Petitioner was a 20 percent shareholder, a director, and the secretary of Garden Fresh Produce, Inc. (Tr. 42; RX 8.)

2. Petitioner signed Garden Fresh Produce, Inc.'s application for a PACA license and was authorized to sign checks on behalf of Garden Fresh Produce, Inc. As the money manager of Garden Fresh Produce, Inc., Petitioner handled a significant portion of the payables in 2001. Even after the payables were transferred to Las Vegas, Nevada, in late 2001, Petitioner handled occasional payments as directed by Wayne Martindale. In 2002, Petitioner purchased some produce for Garden Fresh Produce, Inc. (Tr. 17-18, 48-50, 91-96.)

3. On October 8, 2002, Petitioner signed the board of directors resolution accepting the resignation of director David N. Wiles. On October 8, 2002, Petitioner signed the waiver of notice and action by written consent of the shareholders of Garden Fresh Produce, Inc., accepting the resignation of director David N. Wiles. (RX 9, RX 11.)

4. On March 3, 2003, Petitioner signed the board of directors resolution accepting the resignation of director Bruce Martindale (RX 1 at 13).

5. Petitioner resigned as a director of Garden Fresh Produce, Inc., on April 4, 2003. Petitioner also assigned his stock in the company back to Garden Fresh Produce, Inc., on April 4, 2003. (RX 1 at 18, 20.)

6. During the period January 14, 2002, through February 26, 2003, Garden Fresh Produce, Inc., failed to make full payment promptly of the agreed purchase prices to five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25 (RX 12).

7. During the period January 14, 2002, through February 26, 2003, Petitioner was a director, the secretary, and 20 percent stockholder of Garden Fresh Produce, Inc. (RX 1, RX 7, RX 8, RX 10 at 4; Tr. 134-36). The record does not contain evidence that Petitioner was directly involved in any of the transactions described in Finding of Fact number 6.

8. At all times material to this proceeding, Petitioner had the same authority as all other principals in Garden Fresh Produce, Inc. (Tr. 112).

9. At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and, with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 8 at 4, 5).

10. Petitioner notified the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Programs, PACA Branch, by letter dated April 28, 2003, that he was no longer connected with Garden Fresh Produce, Inc. In that letter, Petitioner requested that the United States Department of Agriculture remove his name from Garden Fresh Produce, Inc.'s PACA license. (RX 1 at 16.)

11. Petitioner has extensive experience in the produce industry. At the time of the hearing, Petitioner had worked in the produce industry for over 15 years; Petitioner had held a number of positions, including sole ownership of Martindale Distributing; Petitioner was particularly knowledgeable in the areas of money management and bill paying in the produce industry; and Petitioner was thoroughly knowledgeable in produce industry operations. (Tr. 35-36, 83-85.)

12. With respect to his employment at Martindale Distributing, Petitioner enjoys a good reputation in the produce business, including timely payment in produce transactions (Tr. 22).

13. Petitioner received compensation for his services in the first year of Garden Fresh Produce, Inc.'s operations (Tr. 45).

14. At all times material to this proceeding, Petitioner knew that Garden Fresh Produce, Inc., was not making full payment promptly for produce. In 2002, a number of Garden Fresh Produce, Inc.'s produce sellers, who were not being paid promptly by Garden Fresh Produce, Inc., contacted Petitioner in order to obtain payment for produce. Petitioner only warned one of these produce sellers, Sun Valley Produce, that Petitioner

had concerns about the manner in which Garden Fresh Produce, Inc., was paying its bills. (Tr. 52-53, 81.)

## **Discussion**

### *I. Introduction*

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 and repeated violations of section 2 of the PACA (7 U.S.C. § 499b). During the period January 14, 2002, through February 26, 2003, Garden Fresh 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 five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25.<sup>5</sup> Thus, an individual who was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh 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)).

Petitioner was an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a

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<sup>5</sup>*In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

preponderance of the evidence that he was not responsibly connected with Garden Fresh Produce, Inc., despite being an officer, a director, and a holder of more than 10 percent of the outstanding stock of Garden Fresh Produce, Inc.

Petitioner failed to carry his burden of proof that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. Petitioner 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 Garden Fresh Produce, Inc. Moreover, as Petitioner was an owner of Garden Fresh Produce, Inc., the defense that he was not an owner of Garden Fresh Produce, Inc., which was the alter ego of its owners, is not available to Petitioner.<sup>6</sup> As Petitioner has failed to carry his burden of proof regarding the first prong and second prong of the two-prong responsibly connected test, I conclude Petitioner was responsibly connected with Garden Fresh Produce, Inc., at the time Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

*II. Petitioner Was Actively Involved In Activities  
Resulting In 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>6</sup>See note 3.

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 was actively involved in the activities resulting in the PACA violations committed by Garden Fresh Produce, Inc. Although Petitioner did not directly participate in the specific transactions resulting in Garden Fresh Produce, Inc.'s PACA violations, Petitioner issued checks in 2002, usually at the direction of Wayne Martindale, at a time when Petitioner knew Garden Fresh Produce, Inc., was not paying produce sellers promptly (Tr. 52, 55). Also, Petitioner made some purchases for Garden Fresh Produce, Inc., in 2002 (Tr. 17-18). By making payments at a time when he knew Garden Fresh Produce, Inc., was not paying some of its produce sellers, Petitioner was in effect choosing which debts to pay, even though it was ostensibly under the "direction" of Wayne Martindale or Donald Beucke. As a co-owner, an officer, and a director, Petitioner cannot avoid his responsibilities under the PACA by characterizing himself as an individual powerless to disobey these directives. Petitioner's executing these checks at a time when he knew Garden Fresh Produce, Inc., was having financial problems is just the kind of conduct referred to in *In re Lawrence D. Salins*, 57 Agric. Dec. 1474 (1998), when I held that check writing and choosing which debts to pay "can cause an individual

to be actively involved in failure to pay promptly for produce.” *Id.* at 1488-89.

Moreover, continuing to make purchases during the period when a PACA licensee is violating the prompt payment provision of the PACA can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.

*III. Petitioner Was Not Merely A Nominal Officer,  
Director, Or Shareholder*

Petitioner did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20 percent shareholder, director, and secretary. 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>7</sup>

The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

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<sup>7</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 was a co-founder of Garden Fresh Produce, Inc., and was actively involved in managing the money and paying the bills of the company at its outset. Petitioner's relationship to Garden Fresh Produce, Inc., is much different than an individual who is listed as an owner because his or her spouse or parent put him or her on corporate records and had no involvement in the corporation or experience in the produce business. Rather, Petitioner is an experienced, savvy individual who has worked in the produce business for at least 15 years, who has worked for years with some or all of the principals in Garden Fresh 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 20 percent owner does not serve in a nominal capacity.<sup>8</sup>

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<sup>8</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 petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity

(continued...)

There is no evidence that Petitioner was other than a voluntary investor, who undertook the responsibilities associated with being a director, the secretary, and a co-owner in an attempt to establish a profitable business. Petitioner presumably would have shared in the company's profits when there were some. Petitioner participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of at least two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh Produce, Inc., the record indicates only one occasion when Petitioner exercised authority consistent with his positions as 20 percent owner, a director, and the secretary to counteract or obviate the fault of others. Despite being contacted by numerous unpaid produce sellers, Petitioner, on only one occasion, warned a produce seller, Sun America Produce, that he had concerns about the way Garden Fresh Produce, Inc., was paying its bills (Tr. 81). That Petitioner chose not to act does not establish that his role was nominal.

### **Petitioner's Appeal Petition**

Petitioner raises three issues in "Petitioner Martindale's Appeal Petition to Department Judicial Officer and Supporting Brief" [hereinafter Petitioner's Appeal Petition]. First, Petitioner contends the facts established in the record do not support the

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<sup>8</sup>(...continued)  
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).

Chief ALJ's conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s PACA violations (Petitioner's Appeal Pet. at 3-9).

Petitioner states "Judge Hillson, specifically found in his statement of facts in the opinion that ' . . . He (Shane Martindale) was *not directly involved* in any of the transactions that were the subject of the Default Decision I entered against Garden Fresh.' Opinion p. 4, p. 8. In his legal conclusions, Judge Hillson then states that during the period Garden Fresh was in violation of PACA that ' . . . Petitioner was actively involved in the activities resulting in a violation of the PACA.' Opinion p. 14 (Conclusion 4)." (Petitioner's Appeal Pet. at 4-5.) I infer Petitioner contends the Chief ALJ could not properly conclude Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA and also find Petitioner was not was not directly involved in any of the transactions that were the subject of *In re Garden Fresh Produce, Inc.*, 63 Agric. Dec. 1032 (2004).

I disagree with Petitioner's contention. 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 does not require that the petitioner must have been directly involved in the violative transactions.<sup>9</sup> Thus, I do not find that, in order to conclude Petitioner was actively involved in the activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA, I must first find Petitioner actually

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<sup>9</sup>See *In re Michael Norinsberg* (Decision and Order on Remand), 58 Agric. Dec. 604, 610-11 (1999).

purchased the produce for which Garden Fresh Produce, Inc., failed to make full payment promptly. In *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488-89 (1998), I found erroneous an administrative law judge's conclusion that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of the PACA, as follows:

The ALJ is correct that purchasing produce when there are insufficient funds leads directly to PACA payment violations, but I agree with Respondent that the ALJ's conclusion erroneously assumes that the activities directly involving the actual purchase of produce are the only activities which can result in a violation of PACA. The ALJ gives no authority for this assumption and I do not believe such a conclusion can be supported.

On the contrary, I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce.

I concluded the petitioner, Lawrence D. Salins, was actively involved in the activities resulting in Sol Salins, Inc.'s violations of the PACA even though the petitioner did not purchase any produce. *In re Lawrence D. Salins*, 57 Agric. Dec. 1454 (1998).

Petitioner also asserts that “[i]t is quite apparent from Judge Hillson’s decision that Petitioner Martindale is being punished not for acts of commission, but rather, for acts of omission.” (Petitioner’s Appeal Pet. at 5.)

I disagree with Petitioner’s contention that the Chief ALJ based his conclusion that Petitioner was actively involved in activities resulting in a violation of the PACA solely

on Petitioner's acts of omission. The Chief ALJ based his conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA both on Petitioner's acts of commission, as well as, Petitioner's acts of omission. The Chief ALJ found Petitioner issued checks and may have made some purchases for Garden Fresh Produce, Inc., during the period when Garden Fresh Produce, Inc., violated the PACA (Initial Decision at 11). The record supports the Chief ALJ's finding that Petitioner issued checks, and I find Petitioner made some purchases on behalf of Garden Fresh Produce, Inc., during the period when Garden Fresh Produce, Inc., violated the PACA (Tr. 17-18, 29-30, 33, 52, 55). Check writing and choosing which debts to pay can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.<sup>10</sup> Moreover, continuing to make purchases during the period when a PACA licensee is violating the prompt payment provision of the PACA can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA.

As for Petitioner's acts of omission, I disagree with the Chief ALJ's assertion that Petitioner's acts of omission support the conclusion that Petitioner was actively involved in activities resulting in Garden Fresh Produce, Inc.'s violations of the PACA. The Chief ALJ, citing *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 388 (2000), states "[t]he failure to exercise powers inherent in [Petitioner's] various positions with Garden Fresh,

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<sup>10</sup>*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1489 (1998).

‘because he chose not to use the powers he had’ has previously been found a basis for finding active participation.” (Initial Decision at 12.) However, the passage from *Thomas* quoted by the Chief ALJ relates to issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

Even if I accept Petitioner’s claim that he acted at the direction of Mr. Giuffrida, that does not negate Petitioner’s actual, significant nexus to Sanford Produce Exchange, Inc. As the Court stated in *Veg-Mix, Inc. v. United States Dep’t of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987), in determining whether or not an individual is nominal, “the crucial inquiry is whether an individual has an ‘actual significant nexus with the violating company,’ rather than whether the individual has exercised real authority.” Petitioner cannot avoid responsibility for the violations Sanford Produce Exchange, Inc., committed while he was president, simply because he chose not to use the powers he had.

*In re Anthony L. Thomas*, 59 Agric. Dec. 367, 387-88 (2000).

Similarly, the Chief ALJ quotes *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Dir. 1994), to support his conclusion that Petitioner’s inaction constitutes active involvement in activities resulting in a violation of the PACA (Initial Decision at 12). *Bell* makes clear that the passage quoted by the Chief ALJ relates to the issue of whether an individual was a nominal officer, director, and shareholder of a violating company, not to the issue of whether the individual was actively involved in the activities resulting in a violation of the PACA, as follows:

The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer,

director, or shareholder. This he could only establish by proving that he lacked “an actual, significant nexus with the violating company.” *Minotto*, 711 F.2d at 409. Where responsibility was not based on the individual’s “personal fault”, *id.* at 408, it would have to be based at least on his “failure to ‘counteract or obviate the fault of others’”, *id.*

*Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (footnote omitted).

While I disagree with the Chief ALJ’s assertion that Petitioner’s acts of omission support the conclusion that Petitioner was actively involved in activities resulting in Garden Fresh 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’s acts of omission do not constitute active involvement in the activities resulting in Garden Fresh Produce, Inc.’s violations of the PACA.

Second, Petitioner contends the Chief ALJ erroneously concluded Petitioner was not a nominal officer, director, and shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated the PACA (Petitioner’s Appeal Pet. at 3-4, 9-12).

I agree with the Chief ALJ’s conclusion that Petitioner failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of Garden Fresh 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>11</sup> The record establishes Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc., during the violation period.

During the period when Garden Fresh Produce, Inc., violated the PACA, Petitioner owned a substantial percentage of the outstanding stock of Garden Fresh Produce, Inc. Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.<sup>12</sup> Petitioner has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of Garden Fresh Produce, Inc.

Moreover, Petitioner had the appropriate business experience to be a corporate officer and director. At the time of the March 2, 2005, hearing, Petitioner had 15 years of experience in the produce business. Petitioner began working at Martindale Distributing, a business run by Petitioner's father in Salinas, California. Petitioner started in

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<sup>11</sup>See note 7.

<sup>12</sup>See note 8.

Martindale Distributing as a produce inspector and “on grounds” buyer. When Petitioner’s father retired from the Martindale Distributing in 1999, Petitioner, along with his stepbrother and brother, purchased the company, with each of them owning one-third of the company. Since approximately May 2003, when his brother and stepbrother resigned from Martindale Distributing, Petitioner has been the 100 percent owner of Martindale Distributing. (Tr. 36-39, 41-42.)

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>13</sup> In late 1999 or early 2000, Petitioner, along with several others, formed Garden Fresh Produce, Inc. (Tr. 42). Petitioner was a 20 percent shareholder of the new company, a director, and the secretary. Petitioner signed the original PACA license application and the check in payment of the PACA licensing fee. Petitioner remained a stockholder, a director, and the secretary until he submitted his resignation and reassigned his stock in April 2003 (RX 1 at 16, 18, 20).

Petitioner joined Garden Fresh Produce, Inc., because he was good with bills and money management (Tr. 85). During the early days of Garden Fresh Produce, Inc.’s operations, Petitioner, working from Martindale Distributing’s Salinas, California, office, handled much of Garden Fresh Produce, Inc.’s paperwork, even receiving a salary for

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<sup>13</sup>*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

handling the payables. Petitioner classified his principal duties with Garden Fresh Produce, Inc., as that of an accounts payable manager. (Tr. 48-50.)

Petitioner purchased produce on behalf of Garden Fresh Produce, Inc., in the first year it did business, and continued making a small number of purchases in 2002 (Tr. 17-18). Petitioner issued checks after 2001 when he was directed by his brother and stepbrother “to make payment to certain vendors that were in Salinas.” (Tr. 52, 95.)

Petitioner took calls for Garden Fresh Produce, Inc., at his Salinas, California, office and became aware in 2002 that there were complaints about the way Garden Fresh Produce, Inc., handled accounts payable. Petitioner referred callers to Wayne Martindale to attempt to resolve Garden Fresh Produce, Inc.’s failures to pay (Tr. 52-53). Even though Petitioner knew Garden Fresh Produce, Inc., had financial problems, he did not ask to see a financial statement or bank statements, relying on statements from Wayne Martindale and Donald Beucke “that things were getting better.” (Tr. 99.)

Before Petitioner resigned from Garden Fresh Produce, Inc., Petitioner signed documents accepting the resignation of two directors, David N. Wiles and Bruce Martindale (RX 1 at 13, RX 9, RX 11). At all times material to this proceeding, all the principals in Garden Fresh Produce, Inc., including Petitioner, had equal authority and could sign checks and pay payables (Tr. 112). At all times material to this proceeding, Petitioner was authorized to negotiate contracts, leases, and other arrangements for and on behalf of Garden Fresh Produce, Inc., and, with the other officers of Garden Fresh Produce, Inc., had responsibility for the activities of the corporation (RX 8 at 4, 5).

In short, I find Petitioner had an actual, significant nexus with Garden Fresh Produce, Inc. Petitioner was a major stockholder of Garden Fresh Produce, Inc.;

Petitioner had the appropriate business experience to be a corporate officer and director; and Petitioner participated in corporate decision-making.

Third, Petitioner contends the Chief ALJ erroneously concluded, because Petitioner owned 20 percent of the stock in Garden Fresh Produce, Inc., Petitioner had to make a particularly compelling case in order to establish that he was not responsibly connected (Petitioner's Appeal Pet. at 4, 12-13).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that for the first alternative of the second prong of the responsibly connected test, a petitioner, who is a holder of more than 10 percent of the outstanding stock of a company, must demonstrate by a preponderance of the evidence that he or she was only nominally a shareholder of the company. Petitioner bases his contention that the Chief ALJ held Petitioner to a higher standard of proof than preponderance of the evidence on the following statement: “[t]he fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof.” (Initial Decision at 13.) I do not find that the Chief ALJ's reference to “a particular compelling case” indicates the Chief ALJ applied the incorrect standard of proof in this proceeding.

The Chief 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 7). Moreover, the Chief ALJ explicitly applies the standard of proof in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), stating: “Even if [Petitioner] was not actively involved in the

violation, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director, and secretary.”

(Initial Decision at 12.) The Chief ALJ does not apply an alternative standard of proof in this proceeding. Therefore, I reject Petitioner’s contention that the Chief ALJ held Petitioner to a standard of proof higher than preponderance of the evidence to demonstrate that he was only a nominal 20 percent shareholder of Garden Fresh Produce, Inc.

### **Conclusions of Law**

1. Petitioner was a 20 percent shareholder, a director, and the secretary of Garden Fresh Produce, Inc., from its inception in April 2000 until he resigned from Garden Fresh Produce, Inc., in April 2003.

2. During the period January 14, 2002, through February 26, 2003, Garden Fresh 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 five produce sellers for 109 lots of perishable agricultural commodities, in the total amount of \$379,923.25.

3. Petitioner failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Garden Fresh Produce, Inc.’s violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), during the period January 14, 2002, through February 26, 2003.

4. Petitioner failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

5. Petitioner failed to prove by a preponderance of the evidence that he was not an owner of Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

6. 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 Garden Fresh Produce, Inc., during the period January 14, 2002, through February 26, 2003, when Garden Fresh 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**

I affirm Respondent's May 10, 2004, determination that Petitioner was responsibly connected with Garden Fresh Produce, Inc., when Garden Fresh Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). 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)), effective 60 days after service of this Order on Petitioner.

### **RIGHT TO JUDICIAL REVIEW**

Petitioner has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order.<sup>14</sup> The date of entry of the Order in this Decision and Order is July 26, 2006.

Done at Washington, DC

July 26, 2006

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William G. Jenson  
Judicial Officer

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<sup>14</sup>28 U.S.C. § 2344.