

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA-APP Docket No. 02-0001
)	
Benjamin Sudano and)	
Brian Sudano,)	
)	
Petitioners)	Decision and Order

PROCEDURAL HISTORY

On September 27, 2001, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], issued determinations that Benjamin Sudano and Brian Sudano [hereinafter Petitioners] were responsibly connected with Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ Petitioner Brian Sudano and Petitioner Benjamin

¹During the period May 1999 through January 2000, Lexington Produce Co. failed to make full payment promptly to 21 sellers of the agreed purchase prices in the total amount of \$915,115.25 for 731 lots of perishable agricultural commodities, which Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), (continued...)

Sudano each filed a Petition for 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 determinations that Petitioners were responsibly connected with Lexington Produce Co. during the period May 1999 through January 2000.

Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] conducted an oral hearing on November 13-14, 2002, in Philadelphia, Pennsylvania, on January 6, 2003, in Baltimore, Maryland, and on April 23, 2003, in Wilmington, Delaware. Christopher P. Young-Morales, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent. Kenneth D. Federman, Rothberg & Federman, P.C., Bensalem, Pennsylvania, represented Petitioners.

On July 30, 2003, after Petitioners and Respondent filed post-hearing briefs, the Chief ALJ issued a "Decision and Order" [hereinafter Initial Decision and Order] in which the Chief ALJ concluded Petitioners were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, when Lexington Produce Co. violated the PACA (Initial Decision and Order at 15).

On September 2, 2003, Respondent appealed to the Judicial Officer, and on September 3, 2003, Petitioners appealed to the Judicial Officer. On October 24, 2003, Respondent filed a response to Petitioners' appeal petition and Petitioners filed a response

¹(...continued)
PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002).

to Respondent's appeal petition. On October 30, 2003, 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 Petitioners were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, when Lexington Produce Co. violated the PACA. However, I also conclude that Petitioners were responsibly connected with Lexington Produce Co. during the entire period that Lexington Produce Co. violated the PACA, May 1999 through January 2000. Therefore, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order.

Petitioners' exhibits are designated by "A"; Respondent's exhibits are designated by "CX"; and exhibits included in the agency record, which is part of the record of this proceeding,² are designated by "RX." The transcript is divided into four volumes, one volume for each day of the hearing. Each volume begins with page one and is sequentially numbered. References to "Tr. I" are to the volume of the transcript that relates to the November 13, 2002, segment of the hearing; references to "Tr. II" are to the volume of the transcript that relates to the November 14, 2002, segment of the hearing; references to "Tr. III" are to the volume of the transcript that relates to the January 6, 2003, segment of the hearing; and references to "Tr. IV" are to the volume of the transcript that relates to the April 23, 2003, segment of the hearing.

²See 7 C.F.R. § 1.136(a).

APPLICABLE STATUTORY AND REGULATORY 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

(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

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.

§ 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.

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

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE:**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS,
INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF
AGRICULTURE**

....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

**PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE)
UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930**

DEFINITIONS

....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

....

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

....

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

.....

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

7 C.F.R. § 46.2(aa)(5), (11).

DECISION

Summary

The term *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.³ The record establishes that Petitioner Benjamin Sudano was the vice president and secretary of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. The record also establishes that Petitioner Brian Sudano was the president and treasurer of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. The burden is on each Petitioner to demonstrate by a preponderance of the evidence that he

³7 U.S.C. § 499a(b)(9).

was not responsibly connected with Lexington Produce Co. despite his being an officer of Lexington Produce Co. and his ownership of 50 percent of the outstanding stock of Lexington Produce Co. Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged 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, officer, director, or 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.

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*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

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.

I find that neither Petitioner Benjamin Sudano nor Petitioner Brian Sudano carried his burden of proof that he was not actively involved in the activities resulting in Lexington Produce Co.'s failures to make full payment promptly for perishable agricultural commodities in accordance with the PACA. To the contrary, the evidence establishes that each Petitioner used Lexington Produce Co.'s funds for purposes other than paying produce sellers in accordance with the PACA and purchased and supervised the purchase of produce during the period when Lexington Produce Co. failed to make full payment promptly for produce in violation of the PACA. Petitioners were thereby actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA. Moreover, I find that neither Petitioner Benjamin Sudano nor Petitioner Brian Sudano carried his burden of proof that he was only nominally an officer and shareholder of Lexington Produce Co. To the contrary, the evidence establishes that, during the period May 1999 through November 24, 1999, the Petitioners and John Alascio controlled Lexington Produce Co. and, during the period November 25, 1999, through January 2000, Petitioners alone controlled Lexington Produce Co. Further, each Petitioner held 50 percent of the outstanding stock of Lexington Produce Co.; therefore, neither Petitioner Benjamin Sudano nor Petitioner Brian Sudano can demonstrate that he was not an owner of Lexington Produce Co., which was the alter ego of the owners of Lexington Produce Co.

Findings of Fact

1. At all times material to this proceeding, Lexington Produce Co. was a corporation whose address is 2221 Berlin Street, Baltimore, Maryland. *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002).
2. Lexington Produce Co. was issued PACA license number 900223 on November 9, 1989. At all times material to this proceeding, Lexington Produce Co. was a PACA licensee. Lexington Produce Co.'s PACA license automatically terminated on November 9, 2000, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Lexington Produce Co. failed to pay the annual PACA license renewal fee. *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002).
3. Petitioners purchased Lexington Produce Co. in September 1998. In order to purchase Lexington Produce Co., Petitioners used \$300,000 of their own money. Petitioners also: borrowed \$1,250,000 and received a \$1,000,000 line of credit from the Bank of Maryland; borrowed \$500,000 from John Alascio; borrowed \$500,000 from the City of Baltimore; and borrowed \$20,000 from a friend named "Angelo." At the time Petitioners purchased Lexington Produce Co., Petitioners hired John Alascio as Lexington

Produce Co.'s produce manager. (Tr. I at 9, 47-48; Tr. II at 42-49, 58-59; Tr. IV at 15-20; A 35.)

4. Lexington Produce Co. defaulted on the loan made by the Bank of Maryland. In order to avoid a shutdown of Lexington Produce Co. and to obtain additional funds for Lexington Produce Co.'s continued operation, on February 8, 1999, Petitioner Benjamin Sudano, Petitioner Brian Sudano, Lexington Produce Co., and John Alascio entered into a management agreement. The management agreement gave John Alascio binding input in all areas of Lexington Produce Co.'s business operations, including, but not limited to, accounting, payables, receivables, stockholder distributions, payroll, banking, insurance, purchasing, inventory control, sales, human resources, taxes, transportation, and utilities. (Tr. I at 19-21, 81, 141-42; Tr. II at 100-01, 111-13; Tr. IV at 61-65; A 53; CX 4; *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002).)

5. During the period May 1999 through January 2000, Lexington Produce Co. failed to make full payment promptly to 21 produce sellers in the total amount of \$915,115.25 for 731 lots of perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). (Tr. II at 33-34; *In re Lexington Produce Co.* (Decision

Without Hearing By Reason of Consent as to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007 (Aug. 30, 2002), referenced at 61 Agric. Dec. 869 (2002)).

6. Petitioners had the authority to pay for produce even after the management agreement described in finding of fact number 4 was in effect. Petitioners had the authority to terminate the management agreement described in finding of fact number 4 at any time and effectively terminated the management agreement no later than November 25, 1999, when Petitioners fired John Alascio. During the period in which the management agreement was in effect, February 8, 1999, to November 25, 1999, Petitioners and John Alascio controlled Lexington Produce Co. After Petitioners fired John Alascio, Petitioners alone controlled Lexington Produce Co. (Tr. I at 50-60, 108-14; Tr. III at 70, 114-18, 175-76; Tr. IV at 73-74, 92-107.)

7. After November 25, 1999, during the period in which the management agreement described in finding of fact number 4 was no longer in effect, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of \$242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Specifically, Lexington Produce Co. failed to make full payment promptly to: (1) G. Cefalu & Bro. Inc., in the amount of \$46,498 for produce purchased during the period November 29, 1999, through December 19, 1999 (CX 7 at 40-90); (2) Parade Produce, Inc., in the amount of \$15,670 for produce purchased during

the period November 26, 1999, through December 12, 1999 (CX 11 at 13-16);

(3) Edward G. Rahll & Sons, Inc., in the amount of \$60,835.50 for produce purchased during the period November 29, 1999, through December 14, 1999 (CX 14 at 32-33);

(4) First Class Produce, Inc., in the amount of \$44,338.50 for produce purchased during the period December 2, 1999, through December 6, 1999 (CX 15 at 45-48); (5) Cardile Bros. Mushroom Pkg., Inc., in the amount of \$7,395.75 for produce purchased during the period November 26, 1999, through December 14, 1999 (CX 16 at 37-50); (6) J.C. Banana & Co. in the amount of \$11,041 for produce purchased during the period November 29, 1999, through December 10, 1999 (CX 17 at 9-10); (7) McDonnell, Inc., in the amount of \$12,209.50 for produce purchased during the period November 29, 1999, through December 20, 1999 (CX 20 at 8-15); (8) Reddy Raw in the amount of \$2,932.40 for produce purchased on December 7, 1999 (CX 21 at 2); (9) L & M Produce in the amount of \$1,635.50 for produce purchased during the period November 26, 1999, through December 13, 1999 (CX 22 at 9-19); (10) Dayoub Marketing, Inc., in the amount of \$9,729.50 for produce purchased during the period November 29, 1999, through December 14, 1999 (CX 23 at 2-3); (11) Atlantic Coast Produce, Inc., in the amount of \$26,564 for produce purchased during the period November 26, 1999, through December 8, 1999 (CX 24 at 4-7); (12) The L. Holloway & Bro. Co. in the amount of \$3,895.50 for produce purchased during the period December 2, 1999, through December 14, 1999 (CX 25 at 2-11); and (13) Imperial Produce in the amount of \$121.75

for produce purchased during the period December 1, 1999, through December 7, 1999 (CX 26 at 1-4).

8. Petitioner Benjamin Sudano was the vice president and secretary of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. Petitioner Brian Sudano was the president and treasurer of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77.)

9. During the period May 1999 through January 2000, Petitioner Benjamin Sudano supervised the night shift at Lexington Produce Co. and was present at Lexington Produce Co.'s place of business for up to 10 to 13 hours every day of the week, including weekends. Petitioner Benjamin Sudano's duties during the night shift included dealing with produce customers and buying produce. At all times material to this proceeding, Petitioner Benjamin Sudano had authority to hire and fire Lexington Produce Co.'s employees. At all times material to this proceeding, Petitioner Benjamin Sudano had access to Lexington Produce Co.'s records. During the period May 1999 through January 2000, Petitioner Brian Sudano supervised the day shift at Lexington Produce Co. and was present at Lexington Produce Co.'s place of business for up to 10 to 13 hours every day of the week, including weekends. Petitioner Brian Sudano's duties during the day shift

included supervising Lexington Produce Co.'s employees, overseeing the shipment and receipt of produce, and dealing with produce customers. At all times material to this proceeding, Petitioner Brian Sudano had authority to hire and fire Lexington Produce Co.'s employees. At all times material to this proceeding, Petitioner Brian Sudano had access to Lexington Produce Co.'s records. (Tr. I at 13-16, 22-23, 83, 88-89, 141; Tr. III at 93-95, 114-16, 120-21, 143, 175; Tr. IV at 52-54, 83-84.)

10. During the period May 1999 through January 2000, Petitioner Benjamin Sudano had an office in the "front office" section of Lexington Produce Co. During the period May 1999 through January 2000, Petitioner Brian Sudano had an office in the "front office" section of Lexington Produce Co. (Tr. II at 72-73; Tr. III at 93-94.)

11. During the period May 1999 through January 2000, Petitioner Benjamin Sudano knew of Lexington Produce Co.'s financial situation and knew that Lexington Produce Co. failed to make full payment promptly to its produce sellers. Despite his knowledge of Lexington Produce Co.'s failures to make full payment promptly to produce sellers, Petitioner Benjamin Sudano reduced Lexington Produce Co.'s resources available to pay produce sellers by writing and signing a check on Lexington Produce Co.'s payroll account to "cash" in the amount of \$7,700. During the period May 1999 through January 2000, Petitioner Brian Sudano knew of Lexington Produce Co.'s financial situation and knew that Lexington Produce Co. failed to make full payment promptly to its produce sellers. Despite his knowledge of Lexington Produce Co.'s failures to make full payment promptly to produce sellers, Petitioner Brian Sudano

reduced Lexington Produce Co.'s resources available to pay produce sellers by writing and signing a check on Lexington Produce Co.'s payroll account to "cash" in the amount of \$2,203.74. (Tr. I at 49-51, 88-89, 106-07, 156-57; Tr. II at 99-101; Tr. III at 165-66; Tr. IV at 73-74; RX 87-RX 88.)

12. During the period May 1999 through January 2000, Petitioner Benjamin Sudano made management decisions on behalf of Lexington Produce Co. and spoke to various produce sellers regarding money owed by Lexington Produce Co. to the produce sellers. During the period May 1999 through January 2000, Petitioner Brian Sudano made management decisions on behalf of Lexington Produce Co. and spoke to various produce sellers regarding money owed by Lexington Produce Co. to the produce sellers. (Tr. I at 88-89; Tr. II at 101-02; Tr. III at 116-20, 130-31, 174-76; Tr. IV at 53-54, 65.)

13. During the period May 1999 through January 2000, Petitioner Benjamin Sudano bought and sold produce on behalf of Lexington Produce Co. and supervised the buying and selling of produce on behalf of Lexington Produce Co. During the period May 1999 through January 2000, Petitioner Brian Sudano bought and sold produce on behalf of Lexington Produce Co. and supervised the buying and selling of produce on behalf of Lexington Produce Co. (Tr. I at 88-90, 93-95, 110-14; Tr. IV at 92-107.)

Conclusions of Law

1. Lexington Produce Co.'s failures to make full payment promptly with respect to the transactions described in findings of fact numbers 5 and 7 are willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Petitioners failed to prove by a preponderance of the evidence that they were not actively involved in the activities resulting in Lexington Produce Co.'s willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

3. Petitioners failed to prove by a preponderance of the evidence that they were only nominally officers and shareholders of Lexington Produce Co.

4. Petitioners failed to prove by a preponderance of the evidence that they were not owners of Lexington Produce Co., which was the alter ego of the owners of Lexington Produce Co.

5. Petitioners were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Lexington Produce Co., during the period when Lexington Produce Co. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's Appeal Petition

Respondent raises three issues in "Respondent's Appeal to the Decision and Order" [hereinafter Appeal Petition]. First, Respondent contends the Chief ALJ erroneously failed to conclude that Petitioners were responsibly connected with Lexington Produce Co. during the entire period that Lexington Produce Co. violated the PACA (Respondent's Appeal Pet. at 10-32).

The Chief ALJ concluded that during the period November 25, 1999, through January 2000, when Lexington Produce Co. violated the PACA, Petitioners were responsibly connected with Lexington Produce Co. However, the Chief ALJ found that Petitioners were not responsibly connected with Lexington Produce Co. during the period

May 1999 through November 24, 1999. The Chief ALJ based his finding that Petitioners were not responsibly connected with Lexington Produce Co. on the management agreement that was in effect during the period February 8, 1999, through November 24, 1999. (Initial Decision and Order.)

The management agreement gave John Alascio wide-ranging authority over Lexington Produce Co.'s operations from the date the management agreement became effective, February 8, 1999, through the date Petitioners effectively terminated the agreement, November 24, 1999, by firing John Alascio. However, John Alascio's authority during the period in which the management agreement was effective is not determinative of whether Petitioners were responsibly connected with Lexington Produce Co. during the same period. Despite John Alascio's wide-ranging authority, I find that Petitioners failed to prove by a preponderance of the evidence that they were not actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA and failed to prove by a preponderance of the evidence that they were only nominally officers and shareholders of Lexington Produce Co. Instead, as set forth in the findings of fact, the record establishes that Petitioners were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA and were not merely nominal officers and shareholders of Lexington Produce Co. during the period that the management agreement was in effect. Moreover, even if I were to conclude that Petitioners were not responsibly connected with Lexington Produce Co. during the period February 8, 1999, through November 24, 1999, but were responsibly connected with

Lexington Produce Co. during the period November 25, 1999, through January 2000, that conclusion would not affect the disposition of this proceeding.

Second, Respondent contends the Chief ALJ erroneously concluded that, during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to at least four produce sellers in the total amount of \$33,936.50 for perishable agricultural commodities (Respondent's Appeal Pet. at 32-34).

The Chief ALJ found, during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to four produce sellers in the total amount of \$33,936.50, in violation of the PACA (Initial Decision and Order at 13-15). I disagree with the Chief ALJ's finding. The record establishes that during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of \$242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce or in contemplation of resale in interstate or foreign commerce (CX 7 at 40-90, CX 11 at 13-16, CX 14 at 32-33, CX 15 at 45-48, CX 16 at 37-50, CX 17 at 9-10, CX 20 at 8-15, CX 21 at 2, CX 22 at 9-19, CX 23 at 2-3, CX 24 at 4-7, CX 25 at 2-11, CX 26 at 1-4).

Third, Respondent contends the Chief ALJ's failure to discuss the statutory test set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) with respect to each Petitioner, is error (Respondent's Appeal Pet. at 34-39).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) defines the term *responsibly connected* as affiliated or connected with a commission merchant, dealer, or broker as: (1) a partner in a partnership; or (2) an officer, director, or holder of more than 10 percent of the outstanding stock of a corporation or association. The definition includes a two-pronged test that a person, who is a partner in a partnership or an officer, director, or holder of more than 10 percent of the outstanding stock of a corporation or association, must meet in order to rebut a presumption that he or she is 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. Since the statutory test is in the conjunctive (“and”), a petitioner’s failure to meet the first prong of the statutory test results in the petitioner’s failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must demonstrate by a preponderance of the evidence at least one of two alternatives: (1) the petitioner was only nominally a partner, officer, director, or shareholder of a violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of a violating PACA licensee or entity subject to a PACA license which was the alter ego of its owners.

The Chief ALJ quotes the test set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), finds Petitioners failed to meet the first prong of the two-pronged statutory test, and concludes Petitioners were responsibly connected with Lexington Produce Co. during a period when Lexington Produce Co. failed to make full payment promptly to

produce sellers for perishable agricultural commodities, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Initial Decision and Order at 13-15). I do not find that the Chief ALJ's failure to apply the two-pronged test to each Petitioner individually, is error. Further, since failure to meet the first prong of the two-pronged test results in a petitioner's failure to demonstrate that he or she was not responsibly connected, I do not find the Chief ALJ's failure to apply the second prong of the statutory test to each Petitioner individually, is error.

Petitioners' Appeal Petition

Petitioners raise six issues in Petitioners' "Appeal Petition." First, Petitioners assert the Chief ALJ's finding that they were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, is logically inconsistent with the finding that, during the period from May 1999 through January 2000, Lexington Produce Co. was under the direction, management, and control of John Alascio (Petitioners' Appeal Pet. at first and second unnumbered pages).

Administrative Law Judge Dorothea A. Baker issued consent decisions on August 30, 2002, in which she found, during the period when Lexington Produce Co. violated the PACA: (1) John Alascio was a manager of Lexington Produce Co.; (2) John Alascio had binding input in all areas of Lexington Produce Co.'s business operations; and (3) John Alascio directed, managed, and controlled Lexington Produce Co.⁴ The

⁴*In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as
(continued...))

Chief ALJ took official notice of Administrative Law Judge Dorothea A. Baker's August 30, 2002, consent decisions (Tr. II at 33).

I do not agree with Petitioners' contention that the Chief ALJ's finding that Petitioners were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, is "logically inconsistent" with Administrative Law Judge Dorothea A. Baker's findings regarding John Alascio's role in Lexington Produce Co. Administrative Law Judge Dorothea A. Baker did not find that Lexington Produce Co. was exclusively under John Alascio's direction, management, and control or that Petitioners had no responsibility for the direction, management, or control of Lexington Produce Co. During the entire period when Lexington Produce Co. violated the PACA, Petitioner Benjamin Sudano was the vice president and secretary of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. and Petitioner Brian Sudano was the president and treasurer of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77). As set forth in the findings of fact, during the entire period when Lexington Produce Co. violated the PACA, Petitioners

⁴(...continued)

to Respondent Lexington Produce Co., Inc.), PACA Docket No. D-01-0007, referenced at 61 Agric. Dec. 869 (2002); and *In re Lexington Produce Co.* (Decision Without Hearing By Reason of Consent as to Respondent John Alascio), PACA Docket No. D-01-0007, referenced at 61 Agric. Dec. 869 (2002).

were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA and were not merely nominal officers and shareholders of Lexington Produce Co.

Second, Petitioners contend the Chief ALJ's conclusion that they were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, is against the weight of the evidence and an abuse of discretion (Petitioners' Appeal Pet. at second unnumbered page).

I disagree with Petitioners' contention that the Chief ALJ's conclusion that Petitioners were responsibly connected with Lexington Produce Co. during the period November 25, 1999, through January 2000, is against the weight of the evidence and an abuse of discretion. During the entire period when Lexington Produce Co. violated the PACA, Petitioner Benjamin Sudano was the vice president and secretary of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. and Petitioner Brian Sudano was the president and treasurer of Lexington Produce Co. and a holder of 50 percent of the outstanding stock of Lexington Produce Co. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77). As discussed in this Decision and Order, *supra*, Petitioners failed to demonstrate by a preponderance of the evidence that they were not actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA and failed to demonstrate by a preponderance of the evidence that they were only nominally officers and shareholders of Lexington Produce Co. Moreover,

as Petitioners were owners of Lexington Produce Co., the defense that they were not owners of Lexington Produce Co., which was the alter ego of its owners, is not available to Petitioners.⁵

The record establishes that Petitioners fired John Alascio no later than November 25, 1999, and after Petitioners fired John Alascio, Petitioners alone controlled Lexington Produce Co. (Tr. I at 50-60, 108-14; Tr. III at 70, 114-18, 175-76; Tr. IV at 73-74, 92-107). During the period November 25, 1999, through January 2000, when Lexington Produce Co. was controlled solely by Petitioners, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of \$242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CX 7 at 40-90, CX 11 at 13-16, CX 14 at 32-33, CX 15

⁵*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 admittedly 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, at all times material to the proceeding, 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).

at 45-48, CX 16 at 37-50, CX 17 at 9-10, CX 20 at 8-15, CX 21 at 2, CX 22 at 9-19, CX 23 at 2-3, CX 24 at 4-7, CX 25 at 2-11, CX 26 at 1-4).

Third, Petitioners contend the Chief ALJ's finding, that Petitioners were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA during the period November 25, 1999, through January 2000, is error. Petitioners assert that John Alascio had de facto control over Lexington Produce Co. and, because Petitioners lacked control over Lexington Produce Co.'s funds, they cannot be properly found to have been actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA. (Petitioners' Appeal Pet. at second and third unnumbered pages.)⁶

The Chief ALJ found that during the period November 25, 1999, through January 2000, Petitioners were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA (Initial Decision and Order at 15). I agree with the Chief ALJ. The record contains no evidence to support Petitioners' contention that John Alascio had de facto control over Lexington Produce Co. during the period November 25, 1999, through January 2000. To the contrary, the record establishes that Petitioners fired John Alascio no later than November 25, 1999, and Petitioners controlled Lexington Produce Co. with no input from John Alascio (Tr. I at 49-60). Moreover, Petitioners'

⁶Petitioners cite "112 Agric. Dec. 1, 7-8 (2003)" as a basis for their argument; however, Agriculture Decisions volumes are numbered sequentially from volume 1, which contains decisions issued in 1942, to volume 62, which contains decisions issued in 2003.

contention that they lacked control over Lexington Produce Co. during the period November 25, 1999, through January 2000, is contrary to their stipulation that during this period Petitioners were in charge of Lexington Produce Co. and in charge of the ordering and receipt of produce (Tr. IV at 104-06). During the period that Petitioners alone controlled Lexington Produce Co. and the purchase and receipt of produce, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of \$242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of the PACA (CX 7 at 40-90, CX 11 at 13-16, CX 14 at 32-33, CX 15 at 45-48, CX 16 at 37-50, CX 17 at 9-10, CX 20 at 8-15, CX 21 at 2, CX 22 at 9-19, CX 23 at 2-3, CX 24 at 4-7, CX 25 at 2-11, CX 26 at 1-4). Petitioners' control of the purchase and receipt of produce for which Lexington Produce Co. failed to make full payment promptly in accordance with the PACA is a sufficient basis for a finding that Petitioners were actively involved in the activities resulting in Lexington Produce Co.'s violations of the PACA.

Fourth, Petitioners contend the Chief ALJ's failure to find that John Alascio used Lexington Produce Co. as his alter ego after November 25, 1999, is error (Petitioners' Appeal Pet. at third unnumbered page).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged 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, officer, director, or 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*. Petitioners contend the Chief ALJ's failure to find that they meet the second alternative of the second prong of the responsibly-connected test, is error.

The record establishes that at all times material to this proceeding, each Petitioner held 50 percent of the outstanding stock of Lexington Produce Co. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77). Since each Petitioner was an owner of Lexington Produce Co. during the period that Lexington Produce Co. violated the PACA, Petitioners cannot meet the second alternative of the second prong of the responsibly-connected test.⁷ Moreover, in order to meet the second alternative of the second prong of the responsibly-connected test, Petitioners must demonstrate by a preponderance of the evidence that John Alascio was an owner of Lexington Produce Co. during the period in which Lexington Produce Co. violated the PACA. The record contains no evidence that John Alascio owned Lexington Produce Co. during the period in which Lexington

⁷See note 5.

Produce Co. violated the PACA. To the contrary, the record establishes that, at all times material to this proceeding, Petitioners owned 100 percent of Lexington Produce Co. (Tr. I at 4, 71-74, 77; Tr. II at 34, 61-62, 183, 190; Tr. IV at 26-27, 83, 86; CX 1, CX 3-CX 4; A 37, A 42; RX 60, RX 63, RX 65-RX 67, RX 77).

Fifth, Petitioners contend they should not be charged with willful conduct because they did not intentionally fail to pay for produce ordered after November 25, 1999. Petitioners assert John Alascio made payment for produce impossible by freezing Lexington Produce Co.'s bank accounts. (Petitioners' Appeal Pet. at fourth unnumbered page.)

Petitioners do not reference any document filed in this proceeding in which they were charged with willfully or intentionally violating the PACA. I have carefully reviewed Respondent's September 27, 2001, determinations that Petitioners were responsibly connected with Lexington Produce Co. when it violated the PACA and the Chief ALJ's conclusion that Petitioners were responsibly connected with Lexington Produce Co. when it violated the PACA. I do not find that Respondent determined or that the Chief ALJ concluded that Petitioners willfully or intentionally violated the PACA.

Moreover, a conclusion that a person is *responsibly connected*, as defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), is not dependent on a finding that the allegedly responsibly connected person willfully or intentionally violated the PACA. Further still, as Respondent is not seeking to withdraw, suspend, revoke, or annul

Petitioners' PACA license, the willfulness provisions of the Administrative Procedure Act (5 U.S.C. § 558(c)) are not applicable.⁸

Sixth, Petitioners contend the Chief ALJ's conclusion that Lexington Produce Co. failed to make full payment promptly for produce ordered during the period November 25, 1999, through January 2000, is not supported by the evidence (Petitioners' Appeal Pet. at fourth unnumbered page).

The Chief ALJ found that during the period November 25, 1999, through January 2000, Lexington Produce Co. violated the PACA "by failing to pay four sellers for produce it purchased in the amount of \$33,936.50" (Initial Decision and Order at 15). While I disagree with the number of produce sellers and the total purchase price involved in Lexington Produce Co.'s post November 24, 1999, PACA violations, I agree with the Chief ALJ's finding that during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to produce sellers in violation of the PACA.

⁸*Joe Phillips & Associates, Inc. v. United States Dep't of Agric.*, 923 F.2d 862, 1991 WL 7136 n.9 (9th Cir. 1991), *printed in* 50 Agric. Dec. 847, 853 n.9 (1991) (not to be cited as precedent under 9th Circuit Rule 36-3); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 993-94 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 628 (1996); *In re SWF Produce Co.*, 54 Agric. Dec. 693 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1428 (1992); *In re Rudolph John Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980).

The record establishes that during the period November 25, 1999, through January 2000, Lexington Produce Co. failed to make full payment promptly to 13 produce sellers in the total amount of \$242,867.15 for perishable agricultural commodities that Lexington Produce Co. purchased, received, and accepted in interstate and foreign commerce, or in contemplation of resale in interstate or foreign commerce, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (CX 7 at 40-90, CX 11 at 13-16, CX 14 at 32-33, CX 15 at 45-48, CX 16 at 37-50, CX 17 at 9-10, CX 20 at 8-15, CX 21 at 2, CX 22 at 9-19, CX 23 at 2-3, CX 24 at 4-7, CX 25 at 2-11, CX 26 at 1-4).

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

ORDER

I affirm Respondent's September 27, 2001, determinations that Petitioners were responsibly connected with Lexington Produce Co. during the period May 1999 through January 2000, when Lexington Produce Co. violated the PACA. Accordingly, Petitioners are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

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

Done at Washington, DC

May 21, 2004

William G. Jenson
Judicial Officer