

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	PACA Docket No. APP-03-0004
)	
Charles R. Brackett and)	
Tom D. Oliver)	
)	
Petitioners)	

DECISION

In this decision, I find that Petitioners Charles R. Brackett and Tom D. Oliver are each responsibly connected to Atlanta Egg & Produce Co., Inc., a company that has committed disciplinary violations under the Perishable Agricultural Commodities Act (PACA). I find that both petitioners were actively involved in the activities resulting in the violations by Atlanta Egg, and that neither petitioner was a nominal partner, officer, director or shareholder of Atlanta Egg.

Procedural History

On October 29, 2002, letters from Bruce W. Summers, Assistant Chief, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, separately notified both petitioners that an initial determination had been made that they were “responsibly connected” to Atlanta Egg & Produce Co., Inc., as that term is defined in 7 U.S.C. § 499a(b)9. With respect to Petitioner Brackett, the determination was based on records showing he was president, a member of the board of directors, and a 33.3 percent

shareholder of Atlanta Egg from February 1995 through February 2001; with respect to Petitioner Oliver, the determination was based on records showing him to be secretary, treasurer, a member of the board of directors, and a 33.3 percent shareholder during the same time period. On November 26, 2002, Petitioners filed a joint letter disputing their responsibly connected status and urged that the Department reconsider its preliminary finding. On February 12, 2003, James Frazier, Chief of the PACA Branch, Fruit and Vegetable Programs, issued separate letters to each Petitioner, stating in each case that it was his determination that each Petitioner was responsibly connected to Atlanta Egg, and informing them of their right to file a petition for review. Petitioners filed such a petition on March 12, 2003.

In the meantime, USDA filed a disciplinary complaint under the PACA against Atlanta Egg on October 23, 2002. At that time, Atlanta Egg was in bankruptcy proceedings and a bankruptcy trustee was managing its assets. Atlanta Egg did not file an answer to the complaint, and the Agency filed a Motion for Decision Without Hearing by Reason of Default. While that motion was pending, Petitioners filed a Motion to Intervene in the Atlanta Egg proceeding, so that they could raise defenses to the alleged disciplinary violations. Since USDA case law unequivocally denies any non-party the right to intervene in disciplinary cases, I denied the Motion to Intervene on December 4, 2003, and signed the Decision against Atlanta Egg that same day. In the same series of rulings, however, I held that due process considerations supported allowing Petitioners to challenge the existence or severity of the Atlanta Egg violations in their “responsibly connected” case.

On June 30, 2004, I conducted a hearing in this case in Atlanta, Georgia.¹ Andrew M. Greene represented Petitioners and Andrew Y. Stanton represented Respondent. The parties subsequently filed briefs.

Factual Background

Petitioner Charles R. Brackett graduated from the University of Georgia in 1974 with a degree in poultry science. Tr. 15. Since that time he has been employed in the poultry and egg industry in a variety of capacities. Tr. 15-17. His current position is live production manager of Hillandale Farms, Lake City Florida. Tr. 17.

Petitioner Tom D. Oliver, after receiving a political science degree from Mercer University and serving in the military, has also been in the poultry and egg business for over 30 years. Tr. 161-2, 175-6. He has worked in his family business, Chestnut Mountain Egg Farm, Chestnut, Georgia, since 1971 and is currently president. Tr. 162.

Brackett and Oliver, along with Oliver's late brother-in-law Perry Hammock, purchased Atlanta Egg from Harry Raptis in early 1994. Tr. 17-19. Brackett supplied \$4,900 of the \$10,000 purchase price and received 49% of the stock; Oliver and Hammock each supplied \$2,550 and each received 25.5% of the stock. Tr. 22, 60. Brackett was named the president of Atlanta Egg, Oliver the treasurer, and Hammock the secretary, and all three were also members of the board of directors. Tr. 23-24, 32, 162, 164.

¹ At the hearing, I heard testimony from both Petitioners, and from Judy Lao and Josephine Jenkins of the PACA Branch. I received into evidence Petitioners' Exhibits 1 through 66, and Respondent's Exhibits 1 through 84, 86 and 87. Also in evidence are the certified copies of the Agency's records for each Petitioner. BCRX refers to Petitioner Brackett's certified record, while OCRX refers to the certified record of Petitioner Oliver.

Brackett desired to hire his former wife's son, Greg Hutson, to manage the company, even though he was only 23 and had no experience in running a business. Tr. 62. At the time they purchased Atlanta Egg, located at the farmers market in Forest Park, Georgia, it was principally a business engaged in the purchasing and selling of eggs, two areas in which both Petitioners had considerable background and expertise. Tr. 18. Oliver testified that he saw it "as a place to distribute some of our eggs," Tr. 178, referring to eggs produced at Chestnut Mountain Egg Farm. By the time Atlanta Egg ceased doing business, only 20% of its business involved eggs, with the remainder in produce. Tr. 34.

Because of Hutson's inexperience, he was closely supervised at first, although he was allowed to take more responsibility for the conduct of the business as time passed. Tr. 62-63. The principal method of supervision was by telephone—with daily contact at first, gradually diminishing to perhaps four calls per week between Brackett and Hutson by 2000. Tr. 66. In addition to communicating with Hutson, Petitioners spoke with each other about the status of the business approximately twice per month. Tr. 67. When Petitioner Oliver was in Atlanta—about every six weeks or so—he would drop by for a visit, and to have lunch with Hutson. Tr. 165-66.

With Hutson running the daily business, Atlanta Egg increased in size from four to 13 employees. Tr. 22, 33. In 1998, Petitioners each received a \$10,000 distribution from the business. Tr. 61. After the death of Hammock in 1998, the stock was redistributed so that Hutson became a stockholder as well. Tr. 24, 163, BCRX 7, pp. 5-6, OCRX 7, pp. 5-6. Petitioners and Hutson each now owned a third of the stock in Atlanta Egg, while Hutson was made vice-president and a director of the company, with Oliver

adding the position of secretary to his previously held position of treasurer. Id. With the company apparently having a profit of around \$100,000 in early 2000, Hutson received a \$30,000 distribution, but Petitioners elected to leave any distribution they were entitled to in the business. Tr. 48.

In 1996, Petitioners decided to allow Atlanta Egg's insurance to lapse, deciding that they could not justify the expensive cost of the insurance in light of the exposure they had with their inventory. Tr. 72. In May 2000, Atlanta Egg's inventory and records were destroyed by fire, leading to severe short-term cash flow problems. Tr. 30-31, 69. As a result of these problems, each Petitioner discussed their situation with several of their suppliers. Tr. 70-72, 184.

Beginning in August 2001, a series of problems were discovered that led to the closing of Atlanta Egg. On one of Oliver's visits, Oliver arrived at Atlanta Egg and found that Hutson was not present and things were in disarray. Tr. 35-36, 167-69. Oliver called Brackett to discuss the situation and shortly thereafter they met with Hutson in Atlanta, after which things appeared to improve. Tr. 36. Then in December 2001 Brackett dropped by Atlanta Egg and once again found the business closed "to the extent that another employee had to break in to open the business that morning." Id. Shortly after that, a similar scenario occurred, at which point Petitioners decided it was time to fire Hutson, which they finally did in January 2002. They then looked at Atlanta Egg's books and discovered that the business had apparently been "severely mismanaged for quite a number of months," Tr. 40, that Hutson had apparently stolen from the company, and that "any thinking person could review the records in front of him and realize that

business couldn't continue." Id. Petitioners then decided to close the business and file for bankruptcy.

Both petitioners attended what appear to be annual meetings of the Atlanta Egg board, as well as at least two special meetings. Tr. 32, 182, BCRX 8, pp. 5-14, 17-22, OCRX 8, pp. 1-16. At the February 2002 meeting, petitioners took the action of removing Hutson from his positions at Atlanta Egg. BCRX 8, p. 22.

As president, Brackett had the authority to supervise, direct and control Atlanta Egg, including presiding at shareholders meetings, signing stock certificates, signing checks, hiring and firing employees, etc. He signed the stock certificates, was authorized to sign checks, issued the weekly payroll checks, paid for invoices, paid Atlanta Egg's PACA license fees, and signed the initial application for a PACA license. Tr. 24-26, 57-58, PX 62, BCRX 7, p. 23. He communicated with Hutson on a regular basis, received information concerning purchases and sales of produce and eggs, and regularly reviewed a variety of financial documents. Tr. 66-67, 69. When Atlanta Egg filed for bankruptcy, Brackett signed the petition. BCRX 9, pp. 2-4, 7.

As treasurer, Oliver had custody of corporate funds, including receiving, disbursing and depositing such funds, and was responsible for maintaining Atlanta Egg's accounts, etc. PX 62, pp. 15-16. Oliver was also authorized to sign checks and occasionally did so. Tr. 164-5. He met with Atlanta Egg's accountant at the end of each year, provided the accountant the necessary information for tax filing regarding receivables, payables and inventory, and signed the annual tax returns on behalf of the company. Tr. 185-6. He was also responsible for maintaining Atlanta Egg's insurance

coverage, and fully participated in the decision, along with Brackett, to let the insurance lapse. Tr. 32, 71, 171-2.

There is no dispute concerning the failure of Atlanta Egg to make full payment promptly to 80 sellers of 683 perishable agriculture commodities in the amount of over \$923,000² from February 2001 through March 2002. No answer to USDA's disciplinary complaint against Atlanta Egg was ever filed either by petitioners or the trustees in bankruptcy. On December 4, 2003, I denied Brackett and Oliver's Motion to Intervene in the disciplinary hearing, holding that the Petitioners had no right to intervene in disciplinary cases. On that day I signed a default decision against Atlanta Egg, finding that it had committed willful, flagrant and repeated violations of section 2(4) of the PACA. However, over the objection of counsel for Respondent, I stated that in the interest of assuring due process to Brackett and Oliver, I would allow Petitioners to attack the violation findings against Atlanta Egg. However, at the June 30 hearing, no such evidence was presented.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

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

² There is some dispute as to whether the amount owed to several of the creditors should be reduced. See discussion, infra.

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.

7 U.S.C. § 499a(b)4.

In addition to penalizing the violating merchant, which in this case would be Atlanta Egg, the Act also imposes severe sanctions against any person “responsibly connected” to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license “has been revoked or is currently suspended” for as long as two years, and then only upon approval of the Secretary. Id.

(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.

7 U.S.C. § 499a(b)9.

Findings of Fact

1. Charles R. Brackett, one of the petitioners in this matter, was part of a group who purchased Atlanta Egg & Produce Co., Inc. in early 1994. Since that time he has

served as president and a board member of Atlanta Egg. While he originally owned 49% of the stock of Atlanta Egg, he owned 1/3 of the company's stock during the period from February 2001 through March 2002. He is a college graduate who has been involved in the poultry and egg business since 1974.

2. Tom D. Oliver, one of the petitioners in this matter, was also part of the group who purchased Atlanta Egg. He was first treasurer and a board member of the company, as well as a 25.5% stockholder, but with the death of Harry Raptis he also became secretary and a 1/3 stockholder in the company. He maintained this role and ownership level during the period from February 2001 through March 2002. He is a college graduate who has been in the poultry and egg business since completing his military service over 30 years ago.

3. Both Brackett and Oliver actively participated in the management of Atlanta Egg. They hired Greg Hutson to perform the day-to-day management of Atlanta Egg, but supervised him fairly closely at first. They made major corporate decisions, including the decision to let their insurance lapse, to contact creditors and work with a bank to keep the business going after a major fire, to remove Hutson from the company, and to file for bankruptcy.

4. As president, Petitioner Brackett had significant authority, including hiring and firing, signing of checks, reviewing financial documents, applying for and renewing Atlanta Egg's PACA license, signing a variety of corporate documents including stock certificates, and presiding over shareholders meetings. He participated in corporate decision-making and was actively involved in Atlanta Egg.

5. As secretary and treasurer, Petitioner Oliver had significant authority, and participated in significant corporate decision-making, including the decision to let Atlanta Egg's insurance lapse, to fire Hutson, and to file for bankruptcy. As treasurer, he had the authority to sign checks, was responsible for the company's finances, provided the information for, and signed, Atlanta Egg's tax returns, and had custody of corporate funds. As secretary, he signed the minutes of numerous corporate meetings, and co-signed the stock share certificates with Petitioner Oliver.

6. Atlanta Egg, during the period from February 2001 through March 2002, failed to make full payment promptly to 80 sellers of 683 perishable agriculture commodities in the amount of over \$923,000.

Discussion

As a preliminary matter, I reaffirm my earlier ruling that Petitioners can, in a limited fashion, challenge the underlying violations against Atlanta Egg, which led to Respondent's charges that Petitioners are responsibly connected to a merchant that violated the PACA, and where such claim has not been litigated before the Agency. I also reject Petitioners' arguments that (1) Respondent's investigations were faulty, (2) that the bankruptcy stay should have applied to the Atlanta Egg proceeding, (3) that Respondent's failure to turn over a variety of documents denied Petitioners due process, and that (4) USDA exceeded its statutory authority, and violated both Petitioners' constitutional due process rights and the APA, by prematurely determining that Petitioners were responsibly connected to a PACA violator. Finally, I conclude that the evidence overwhelmingly supports a finding that both Petitioners were responsibly

connected to Atlanta Egg. I discuss the basis for these findings in my Conclusions of Law.

Conclusions of Law

1. An individual charged with being a responsibly connected party has the right to challenge the underlying violation even where the party charged with committing the underlying violation fails to challenge the allegations of the original complaint. While the issue is largely moot in this case, since Petitioners did not produce any evidence indicating that Atlanta Egg did paid the 80 creditors in a timely manner and in full, as required by the PACA, Respondent continued to raise an objection to my ruling at the hearing, Tr. 10, and has urged me in its opening brief, at 19, to reconsider my initial ruling.

I continue to disagree with Respondent's contention that an individual may be deprived of his right to challenge the factual underpinnings of a disciplinary violation of PACA, where he has had no opportunity or authority to participate in that process. As I have recently ruled, the approach urged by Respondent would result in the establishment of one of the facts necessary to prove responsibly connected status—the existence of a violation committed by the merchant—without any opportunity to participate in a proceeding to have that fact adjudicated. In re. Glenn Mealman, 64 Agric. Dec. ___ (slip. Op. 7-9) (Feb. 8, 2005). Yet both the Act and the Rules of Procedure recognize the very close relationship between disciplinary proceedings and responsibly connected proceedings. In 1996, the Rules were changed to require consolidation of disciplinary and responsibly connected cases where they arise from the individuals' relationship with

the company during the time in question. 7 C.F.R. 1.137(b); 61 Fed. Reg. 11501-4 (March 21, 1996).

I find Respondent's reliance on In re Danny L. Brand d/b/a Danny's Food Service, 53 Agric. Dec. 1628, aff'd 66 F. 3d 342 (11th Cir. 1995) unpersuasive. In that case, the Judicial Officer found that res judicata applied because the parties to the case "and their privies" were bound by the final decision of the court. Petitioners technically were not parties to the disciplinary proceeding, as that was instituted after Atlanta Egg was in the hands of a bankruptcy trustee, and Petitioners contended that they had no opportunity to participate in that proceeding. Indeed, I upheld Respondent's objection to allowing Petitioners to intervene in the disciplinary proceeding. Not allowing the Petitioners to challenge the existence of the underlying violation in any forum, which is effectively the urging of Respondent here, is inconsistent with the Act, the Rules of Procedure, and due process.

2. Petitioners' challenges regarding the conduct of the investigation, and the impact of the bankruptcy proceedings against Atlanta Egg, and the alleged failure to turn over "key" documents, are without merit. While I allowed Petitioners to challenge the factual underpinnings of the disciplinary violation against Atlanta Egg, no specific evidence was presented indicating that Atlanta Egg did not commit any of the violations that were the subject of the default decision. Petitioners contend that the investigation conducted by the PACA Branch was faulty, but focuses its criticism on alleged uncertainties in the exact amounts that Atlanta Egg owed, and not on the uncontested findings that 80 creditors were owed many hundreds of thousands of dollars. Since Judy Lao, a marketing specialist with PACA, testified without challenge that her

findings as to the number of violations and the amounts due and unpaid were based on Atlanta Egg's own records--records specifically pointed out to her by Petitioner Brackett, I find there is overwhelming evidence supporting the claims against Atlanta Egg. Tr. 86-88, 106, 109. Likewise, the contention that Ms. Lao's telephone verification, in the days before the hearing, that Atlanta Egg still owed substantial amounts to its nine biggest creditors, was hearsay and inaccurate ignores the fact that she was merely confirming what she was told by Atlanta Egg representatives—that substantial funds were owed and it was not likely that they would be paid. Further, such a follow-up was consistent with the need to determine whether Atlanta Egg was paying their creditors slowly or not at all, as spelled out by the Judicial Officer in In re. Scamcorp, 57 Agric. Dec. 527 (1998).

With respect to the bankruptcy filing, Petitioners' contention that the bankruptcy stay provisions apply to PACA disciplinary and responsibly connected proceedings is not in accord with either USDA or federal court rulings. E.g., In re Ruma Fruit and Produce Co., Inc., 55 Agric. Dec. 642 (1996). The instant proceeding represents "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power . . . ," 11 U.S.C. § 362(b)(4), and as such is not subject to the bankruptcy stay. Both the disciplinary action taken against Atlanta Egg and the responsibly connected proceeding against Petitioners fit within this exception to the stay. Indeed, section 525(a) of the Bankruptcy Code, 11 U.S.C. § 525(a), specifically exempts PACA license revocations from the general exception preventing the government from denying, revoking, suspending or refusing to renew a license.

Allegations concerning Respondent's failure to produce certain "key" documents requested under the Freedom of Information Act (FOIA) likewise do not constitute a violation of due process. Petitioners had the option to appeal FOIA delays or denials under the rules of that statute. While it is somewhat puzzling that these documents were not disclosed, particularly in light of my ruling that I would allow Petitioners' to present evidence challenging the disciplinary violations, it is understandable that the PACA Branch would treat the underlying documents for the disciplinary hearing as not part of the record of the responsibly connected proceedings. It is even more puzzling to me why Petitioners did not seek such documents via a subpoena duces tecum in the instant proceeding.

In any event, these documents would have not aided Petitioners in meeting their burden of proof. The evidence was overwhelming and largely undisputed that Atlanta Egg had committed numerous significant violations of the PACA's prompt payment provisions. The fact that eight reparation complaints triggered the investigation of Atlanta Egg is of no relevance to their committing the violations as charged, particularly where the violations were generally admitted by Petitioners and supported by the findings of the investigation.

The failure to turn over an outline of documents drafted by a former employee is likewise not an error. Josephine Jenkins simply testified that a former employee drafted an outline of the documents that were submitted for the PACA Branch Chief's review. Tr. 139-40. There is nothing to refute the Agency's contention that the responsibly connected determination was made in reliance on any documents other than those included in the certified record provided for each petitioner. The Agency has based its

decision solely on the documents in the certified record, so the cases cited by Petitioners to the effect that an agency must disclose the evidence it relied on in making its decision are simply inapposite.

3. The USDA's timing in pursuing a responsibly connected case against Petitioners before the underlying disciplinary action was resolved is proper.

Petitioners also contend that USDA exceeded its statutory authority, and denied them due process rights, under the constitution and the Administrative Procedure Act, by prematurely determining that Petitioners were responsibly connected to a PACA violator. Petitioners argue that an individual cannot even be cited as responsibly connected until there is a determination, after notice and opportunity for hearing, that a disciplinary violation has been committed, and that Respondent's approach is a "cart-before-the horse approach to the administrative process." Pet. Br. at 6.

Even if an individual arguably cannot be finally adjudicated as responsibly connected and suffer the consequent employment sanctions without an underlying disciplinary violation against the entity to which the individual was responsibly connected, Petitioners are incorrect in asserting that a responsibly connected proceeding cannot even be commenced until the underlying disciplinary violation is resolved. Indeed, the Rules of Procedure specifically contemplate that, where both a disciplinary and responsibly connected proceeding for a licensee are pending, they be joined for hearing.

(b) Joinder. The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(9), to the licensee during the period of the alleged violations. In any case in

which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a et seq., but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

7 C.F.R. §1.137(b). To require the disciplinary proceeding to come to a full resolution, including possible appeals to federal court, without allowing the responsibly connected cases to proceed would be waste of resources, especially given the close relationship between these two types of actions, and could add years to the process of resolving these cases.

4. Atlanta Egg violated PACA by its failure to pay 80 creditors for 683 lots of perishable agricultural commodities in the amount of over \$923,000. While Petitioners have questioned whether the total unpaid amount owed by Atlanta Egg might be slightly overstated, there is no evidence in this record that would show that Atlanta Egg did not commit the violations alleged by the PACA Chief. Thus, it is undisputed that Atlanta Egg failed to pay 80 creditors for 683 lots of perishable agricultural commodities. Although Petitioners have contended that the amount of money still owed in the eight reparation cases may have been less than originally alleged, there is no dispute that substantial payments are owed to each of those eight creditors, and there has been no challenge to the allegations concerning the remaining 72 creditors. Thus, the findings in my December 4, 2003 Decision Without Hearing By Reason of Default apply to this proceeding.

4. Petitioners Charles R. Brackett and Tom D. Oliver were each responsibly connected to Atlanta Egg. Neither Petitioner has met his two-step burden of showing

by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director, officer and 1/3 shareholder of a violating licensee or entity subject to license.

(a) Both Brackett and Oliver were actively involved in the activities resulting in a violation of this chapter. Although Petitioners may not have been aware of or participated in the specific transactions that were the subject of Atlanta Egg's violations, by virtue of their major role in the company they must be deemed to have been actively involved in the activities resulting in the violations. By virtue of their significant role in the founding of Atlanta Egg, by their participation in all manner of significant corporate decision making including the hiring of Hutson, the decision to allow Hutson to expand the egg business into one that was largely produce, the decision to let the company's insurance expire, the decision to file for bankruptcy, by their significant ownership interest and performance of significant corporate functions, the Petitioners easily meet the standard for "actively involved" set out in the statute and in the case law.

The principal explication of the standard for whether a person is actively involved is stated in In re Michael Norinsberg, 58 Agric. Dec. 604, 610-11(1999)(Decision and Order on Remand). The Judicial Officer stated that " 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.” The Judicial Officer in In re Lawrence D. Salins, 57 Agric. Dec. 1474 (1998), stated that in determining whether an individual is actively involved, the adjudicator must look beyond whether a petitioner was directly involved in the purchase of the produce that was not timely paid for. Rather, he found several factors to be significant in his decision that Salins was “actively involved,” including his day-to-day participation in the company, his “long-term, substantial involvement” in weekly staff management meetings, his participation in deciding which individual bills were to be paid, and his frequent participation in managerial decision making activities, including the providing of “financial information to assist in the decision making process.” Id., at 1490. Unlike the situation in Mealman, supra, it is apparent that in this case Petitioners were closely and heavily involved in the corporate decision making process, as was Salins, and so are actively involved.

Thus, Petitioner Brackett was a co-founder of Atlanta Egg, and was president, director and a 1/3 shareholder in the corporation during the time the violations were committed. He was intimately involved in the decision to hire Hutson, who is the son of his ex-wife, and was fully aware that Atlanta Egg was expanding into the produce business, rather than being just involved in the egg business as was his original intention when he co-founded the company. As president, Brackett exercised many of the powers set out in Atlanta Egg’s corporate by-laws, including presiding over board meetings, signing the share certificates, and signing checks. He was directly involved in both the hiring and firing of Hutson, and had full hiring and firing authority at all times. He signed Atlanta Egg’s initial application for a PACA license, as well as the checks for payment of PACA license fees, and reviewed the company’s monthly bank statements.

He, along with Oliver, made the decision to file for bankruptcy. He was personally involved in many decisions that led to the company's bankruptcy, including determining the level of supervision of Hutson, participating in the decision not to insure the company's property, participating in a variety of post-fire activities with creditors and the securing of a bank loan to insure that Atlanta Egg's business would continue, and allowing Hutson to continue to run the business long after serious problems were discovered. Under Norinsberg and Salins, Petitioner Brackett was unquestionably involved in corporate decision-making and thus was "actively involved" with Atlanta Egg.

Under the same analysis, Petitioner Oliver was likewise "actively involved" with Atlanta Egg. He was a co-founder of the company, and was secretary, treasurer, director and a 1/3 shareholder in the company at the time the violations were committed. His duties as treasurer included being responsible for the financial aspects of Atlanta Egg's business, and he was directly involved in disbursement of funds, and was authorized to sign checks on behalf of the company and occasionally did so. He reviewed financial matters at least annually with the company's accountant, provided the accountant with the documents necessary to prepare the tax return, and signed the returns on behalf of the company. He jointly made the decision not to purchase insurance, which clearly contributed to the company's financial problems after the fire, and was involved in securing the post-fire bank loan and in some of the discussions with company creditors. Further, he was the officer who first discovered the significant problems with Hutson's management of Atlanta Egg, which he discussed with Brackett. Even though Hutson's conduct should have indicated significant problems were occurring in the

business, Oliver did not see fit to examine the company's books, nor did he and Brackett see fit to terminate Hutson until months passed. He was involved in all manner of corporate decision making for Atlanta Egg and as such he was "actively involved" with the company.

(b) Neither Brackett's nor Oliver's positions as major shareholders, corporate officers, and directors of Atlanta Egg were served in a nominal capacity. Petitioners must defeat both prongs of the two-prong statutory test to satisfy their burden of proof that they were not responsibly connected to Atlanta Egg. Although I have already found that they did not satisfy their burden that they were not "actively involved," I will examine the claim that their roles as owners, officers and directors were "nominal" in the interest of judicial economy. Even if my findings that Petitioners were "actively involved" with Atlanta Egg were to be reversed, Petitioners bear the burden of demonstrating, by the preponderance of the evidence, that they were only "nominal" 1/3 owners, officers and board members of Atlanta Egg in order to defeat the PACA Branch's findings that they were responsibly connected to Atlanta Egg. Petitioners do not come close to meeting this burden.

To briefly reiterate, any director, officer, and owner of over 10 per cent of the stock of a company that commits a disciplinary violation leading to suspension or revocation of their PACA license must show, not only that they were not "actively involved" as discussed above, but that they were only acting in a nominal capacity with respect to each of these roles. In Minotto v. USDA, 711 F. 2d 406 (D.C.Cir. 1983), the Court overturned a finding that a board member was responsibly connected, ruling that a director must have an "actual, significant nexus with the violating company," Id., at 409,

and should be in a position where he “knew or should have known of the Company’s misdeeds.” Id., at 408. Here, the record overwhelmingly demonstrates that each petitioner had a significant nexus with Atlanta Egg from its inception, and particularly during the time leading up to and throughout the period the company was violating the PACA. Petitioners decided to hire Hutson, not to carry insurance, to decrease the supervision over Hutson, to allow Hutson to greatly expand the scope of their business, to not remove Hutson once they found out he was not properly performing his job, to not closely review the books as soon as they began to suspect things were going wrong, and to finally fire Hutson and go into bankruptcy. This is more than sufficient to constitute a significant nexus.

Moreover, the Judicial Officer and the courts have held that ownership of over 20% of a company’s stock is sufficient in itself to rebut a contention that an individual is serving in a nominal position, In re. Joseph T. Kocot, 57 Agric. Dec. 1517, 1544-45 (1998), and is sufficient “to make a person accountable for not controlling delinquent management.” Siegel v. Lyng, 851 F. 2d 412, 417 (1988). Here, Petitioners had (and eventually exercised) the authority to both hire and fire the individual allegedly responsible for causing the disciplinary violations--actions not consistent with serving in a nominal position. The fact that Petitioners chose not to exercise their authority in a timelier manner does not mean that they did not have the authority.

The Judicial Officer has also looked at the educational and business background of those alleged by the PACA Branch to be responsibly connected, as a factor in determining whether they are only serving in a nominal position. Both Petitioners here are well educated, each with decades of business experience. While their experience has

been more in the area of the egg and poultry business, they each have years of experience in running a business. Brackett graduated college with a degree in poultry science in 1974 and has worked in the poultry and egg business since that time, including 18 years at Crystal Farms, where he became the firm's national sales manager, eight years as president of New Morn Farms, and his current position as live production manager at Hillandale Farms. Oliver also is a college graduate who has worked at his family's Chestnut Mountain Egg Farm, of which he is now president, since returning from military service in 1971. He was and is the "financial man" for Chestnut Mountain Egg Farm. Tr. 176-77. While this factor is not dispositive in itself, it stands in sharp contrast to the education and training of the petitioners in Norinsberg, supra, or in Maldonado v. USDA, 154 F. 3d 1086 (9th Cir. 1998).

In Salins, supra, the Judicial Officer discussed seven factors affecting whether a person was serving in a nominal capacity under the Act. (1) In Salins, the petitioner had access to corporate records, including access to detailed monthly financial statements, accounts payable, accounts receivable, etc. Both petitioners here have had full access to all financial documents, and were in a position to review accounts if they had so desired. (2) Salins had particularized knowledge of the company's financial difficulties, and a "sophisticated level of information" inconsistent with nominal status. Here, Petitioners knew well before the company filed for bankruptcy that the company was in a financially difficult position, and their own actions helped contribute to this situation. Further, they were each in a position to review financial documents whenever they desired, and failed to investigate or take any drastic action when it should have been clear to them that Hutson was putting the company in a precarious position by not showing up for work.

(3) Salins had a direct relationship with unpaid creditors inconsistent with that of someone in a nominal role. Here, Petitioners directly met with some creditors when the company was in a crisis after the fire, and clearly had the ability to determine whom their creditors were and what their status was at any time. (4) Salins actively participated in corporate decision-making. As discussed, supra, both Brackett and Oliver were actively involved in all manner of corporate decision making. (5) Salins had check-writing responsibilities. Both Brackett and Oliver were authorized to sign checks, although Brackett signed them on a more regular basis. (6) Salins signed numerous corporate documents, including PACA licenses, answers to reparation complaints, etc. Brackett signed Atlanta Egg's stock certificates, PACA license applications, the bankruptcy petition and numerous other corporate documents. Oliver signed the minutes of board meetings, stock certificates and the company's annual tax returns. (7) The final factor cited by the Judicial Officer was whether substantial compensation was received. Here, both petitioners had expectations of financial gain. They each received \$10,000 in 1998, and each declined \$30,000 payments in 2002, deciding instead to reinvest those funds in the company. Since their original investments in the company totaled approximately \$7,500, the \$20,000 in actual payments and \$60,000 in declined payments are not insignificant. Nor is such profit taking and reinvesting consistent with serving in a nominal capacity. Id., at 1492-95.

CONCLUSION AND ORDER

Petitioners have failed to show, by a preponderance of the evidence, that they were not responsibly connected to Atlanta Egg & Produce Co., Inc. at a time when Atlanta Egg committed willful, flagrant and repeated violations of section 2 (4) of PACA

for failing to make full payment promptly for produce purchases. Each petitioner was actively involved in the activities resulting in a violation of this chapter. Neither petitioner served in a nominal capacity by virtue of their activities as 1/3 owners, officers, and directors of Atlanta Egg.

Wherefore, I find that Charles R. Brackett and Tom. D. Oliver are each responsibly connected to Atlanta Egg.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 16th day of March, 2005

MARC R. HILLSON
Chief Administrative Law Judge