

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re: ) PACA-APP Docket No. D-04-0009  
Donald R. Beucke, )  
)  
Petitioner )

**Decision**

In this decision, I find that Petitioner Donald R. Beucke was responsibly connected to Garden Fresh Produce, Inc., a company that has committed disciplinary violations under the Perishable Agricultural Commodities Act (PACA). I find that Petitioner was actively involved in the activities resulting in the violations by Garden Fresh, and that he was more than a nominal partner, officer, director, or shareholder of Garden Fresh.

**Procedural History**

On February 18, 2004, a letter from Karla Whalen, Head, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, notified Petitioner that an initial determination had been made that he was “responsibly connected” to Garden Fresh Produce, Inc., as that term is defined in 7 U.S.C. § 499a(b)(9). The determination was based on Petitioner’s 20 percent ownership of Garden Fresh, as well as his being vice-president and a director of that company from July 2000 through April 2003. That

interval encompassed the period January 2002 through February 2003, during which time Garden Fresh was alleged to have committed numerous violations of the prompt payment provisions of the PACA.

On February 24, 2004 Petitioner challenged the initial determination and requested that the PACA Branch Chief “review and reverse” the finding that he was responsibly connected to Garden Fresh. On April 28, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, issued a final determination that Mr. Beucke was responsibly connected to Garden Fresh at the time violations of the PACA were committed, and informed Mr. Beucke of his right to file a petition for review of his final determination. A petition for review was filed on June 1, 2004.

In a related proceeding, on January 27, 2004, a PACA complaint was filed against Garden Fresh Produce, Inc. for PACA violations committed between January 2002 and February 2003. Following service of the complaint, no answer having been filed by Garden Fresh, the Agency filed a Motion for Decision Without Hearing by Reason of Default on June 4, 2004. No response to that Motion was filed by Garden Fresh and I issued a Decision Without Hearing on August 25, 2004, finding that Garden Fresh had committed the alleged violations involving non-payment of nearly \$380,000 for 109 lots of commodities purchased between January 2002 and February 2003. PX 6.

In another related proceeding, a responsibly connected determination was also issued against Shane Martindale<sup>1</sup> for his role at Garden Fresh. While Mr. Martindale’s petition was not formally consolidated with Mr. Beucke’s, the two cases were grouped throughout the pre-trial process. Since there was no active case involving Garden Fresh,

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<sup>1</sup> Mr. Martindale’s given name is Edward Shane Martindale, but he has generally been referred to as Shane Martindale.

and thus no mandatory consolidation as required by Rule of Procedure 1.137(b), two separate hearings were scheduled, with Mr. Beucke's hearing taking place on March 1, 2005 and Mr. Martindale's hearing taking place the next day.

A hearing was conducted in this case on March 1, 2005 in San Jose, California. Petitioner was represented by Effie F. Anastassiou and Respondent was represented by Charles L. Kendall. Petitioner testified in his own behalf, and called six additional witnesses, while two witnesses testified on behalf of Respondent.

### **Facts**

Petitioner Donald R. Beucke has been involved in the produce business for over 25 years, originally working for his stepfather at Martindale Distributing Company, first as an inspector and later as a buyer. Tr. 59, 61.<sup>2</sup> At one point he was president of Martindale. Tr. 84. During this period, Petitioner worked with other family members, including his step-brothers Wayne and Shane Martindale.

Around the beginning of the year 2000, Wayne Martindale asked Petitioner to invest in Garden Fresh Produce, Inc., a produce company he intended to operate in Las Vegas, Nevada. Tr. 61. Petitioner invested \$20,000 in Garden Fresh, and was listed as a 20% stockholder of the company. Tr. 61. Wayne and Shane Martindale were also listed on the PACA license certificate as 20% stockholders. RX 1. Nevada corporate records list Petitioner as a director and vice president of marketing. RX 3. Petitioner was authorized to sign checks on behalf of Garden Fresh, but there is no evidence that he did

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<sup>2</sup> "Tr." refers to the transcript from the March 1, 2005 hearing. Even though the Beucke and Martindale matters were heard separately, although they were scheduled on consecutive days as a matter of administrative convenience, Respondent filed a single brief combining its discussion of the two cases, and liberally used testimony and other evidence from the Martindale hearing in those portions of its brief regarding the responsibly connected liability of Beucke. I am deciding this case solely based on the testimony and evidence received at the Beucke hearing on March 1, 2005.

so after the first few months the company was operating. RX 13. Petitioner was one of the signatories on the application for a PACA license, RX 12, Tr. 87-89, and was listed on the application as a director, vice-president and 20% shareholder. Petitioner was issued a stock certificate in Garden Fresh Produce indicating that he owned 1000 shares in the company. RX 8, p. 3.

Petitioner maintained his positions with Garden Fresh during the time period that Garden Fresh committed its willful, flagrant and repeated violations of the PACA. Petitioner testified that Wayne Martindale ran the company and that he had virtually no role in the company's operations other than making his initial \$20,000 investment. Tr. 60-66. He indicated that while Garden Fresh was operating out of Vegas, he maintained his position working full-time at Martindale Distributing in Salinas, California. He remembered attending a single meeting of the board in Las Vegas, but had no recollection of receiving a stock certificate, or signing the PACA license application (until his recollection was refreshed on viewing a copy of the application at the hearing). Tr. 62-64. He stated he wrote a single check on the company's behalf in the start-up phase of operations but otherwise wrote no checks for Garden Fresh, never saw any tax or financial books or records, and had virtually no duties. Tr. 62-64. He stated he was never involved in any business decisions for Garden Fresh. Tr. 65-66. He ordered some produce for Garden Fresh in the months shortly after it was founded, but not during the time period of the violations committed by Garden Fresh. Tr. 65. He also received some compensation—approximately \$1500—during the first year of operation of Garden Fresh. Tr. 65.

While working at Martindale Distributing, Petitioner began to hear that there were problems at Garden Fresh. Tr. 69. Beginning in December, 2002, he began receiving calls from Garden Fresh customers, who were also customers of Martindale Distributing, indicating that they were not getting paid in a timely basis. Id. He told them to call Wayne Martindale, and also told them that they should stop doing business with Garden Fresh if payment was becoming a problem. Tr. 70-71. He frequently placed calls to the Garden Fresh office in Las Vegas to try to determine the status of payments, but had great difficulty in reaching Wayne Martindale, and when he did talk to him was told that checks were in the mail, or that business would be picking up, new accounts had been landed, etc.—information which was not true. Tr. 71-73.

There is no evidence that Petitioner had any direct involvement in the transactions that were the subject of the disciplinary case. Several witnesses testified that they viewed Wayne Martindale as the person running Garden Fresh, and they only called Petitioner to get advice on how to get hold of Wayne Martindale, and to inform him of the situation. Tr. 17, 29-30, 41-42. During the violation period, Petitioner never saw the company's books, and had no role in deciding which creditors to pay. Before he resigned from Garden Fresh via letter of April 4, 2003, Petitioner signed off on the resignations of directors David N. Wiles (RX 7) and Bruce Martindale (RX 1).

Petitioner's witnesses generally corroborated Petitioner's testimony that Wayne Martindale ran Garden Fresh as far as they were concerned, and that Petitioner enjoyed a good reputation in the produce industry and had a reputation for paying the bills of Martindale Distributing on a timely basis.

Respondent's first witness was Evert Gonzalez, a senior marketing specialist for the PACA Branch. The investigation was initiated after the PACA Branch received reparation complaints. He described his investigation, which primarily involved visiting Garden Fresh's Las Vegas office. No one was at the premises when he first arrived, but he eventually received access and requested a variety of records. Wayne Martindale indicated to him that all the principals in the firms, including the Petitioner, had equal authority and could sign checks and pay payables. Mr. Gonzalez did not follow up with any of the stockholders identified by Wayne Martindale.

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file, and identified the documents contained in the responsibly connected file maintained by the PACA Branch. RX 1-9.

### **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 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 Garden Fresh Produce, Inc., the Act also imposes severe sanctions against any person “responsibly connected” to an establishment that has had its license revoked or suspended or has been found to have committed flagrant or repeated violations of Section 2 of the Act.. 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. Petitioner Donald R. Beucke was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. Petitioner invested \$20,000 in the new company and was a 20% shareholder, a director and vice president of marketing.

2. Petitioner signed Garden Fresh's application for a PACA license, and was authorized to sign checks on behalf of Garden Fresh, although there is no evidence that he signed any checks other than in the period shortly after the company started up.

3. On October 8, 2002, Petitioner signed the Board of Directors resolution accepting the resignation letter of director David N. Wiles.

4. On March 3, 2003, Petitioner signed the Board of Directors resolution accepting the resignation letter of director Bruce W. Martindale.

5. Petitioner resigned as a director of Garden Fresh on April 4, 2003. He also assigned his stock in the company back to the company on that date.

6. Between January 14, 2002 and February 26, 2003 Garden Fresh failed to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly \$380,000 to five sellers of perishable commodities.

7. During the period described in the previous paragraph, Petitioner was a director, vice president and 20% stockholder of Garden Fresh. There is no evidence in this record that Petitioner was directly involved in any of the transactions described in Finding 6.

8. Petitioner notified the PACA Branch by letter of April 28, 2003 that he was no longer connected to Garden Fresh. RX 1. In that letter, he requested that his name be removed from the PACA license.



9. Petitioner has extensive experience in the produce industry. At the time of the hearing he had worked in the produce industry for over 25 years, had held a number of positions, including president at Martindale Distributing, had co-founded Garden Fresh and Bayside Produce, and was thoroughly knowledgeable in produce industry operations.

10. With respect to his employment at Martindale, Petitioner enjoys a good reputation in the produce business, including timely payment in produce transactions.

11. Petitioner received approximately \$1500 compensation for his services in the first year of Garden Fresh's operations.

12. Petitioner did not sufficiently exercise his authority as 20% shareholder, vice president and director to prevent or correct the violations committed by Garden Fresh.

**Petitioner was Responsibly Connected To Garden Fresh Produce, Inc. During the Time Period in Which Garden Fresh Committed Violations of the PACA**

By virtue of his long-standing experience in the produce business, his significant investment in Garden Fresh, and his management positions as 20% shareholder, director and vice president, I find that Donald Beucke was responsibly connected to Garden Fresh at the time it committed violations of the prompt payment provisions of the PACA.

Responsibly connected liability is triggered when a company has its license revoked or suspended for violations of Section 2 of the Act, or when it has been found to have committed flagrant and repeated violations of the Act. On August 29, 2004 I signed a Decision Without Hearing by Reason of Default in which I found that Garden Fresh committed willful, repeated and flagrant violations of section 2(4) of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities from five sellers, in the amount of just under \$380,000. Thus, an individual who is responsibly

connected with Garden Fresh during the time these violations were committed is subject to the employment bar imposed by the Act.

I find that Petitioner has not met his 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 of a violating licensee or entity subject to license.

Petitioner was actively involved in the activities resulting in the violations committed by Garden Fresh. Although he did not directly enter into or even participate in the specific transactions that gave rise to the violations, his failure to take action, given his role as a co-founder, co-owner, director and officer in the corporation with a lifetime of experience in the industry, to prevent or correct the violations, is equivalent to active involvement. The responsibly connected provisions of the Act are a strong indicator that Congress believed that an individual owning a significant portion of a company engaged in perishable produce transactions cannot stand by where violations are being committed, and must undertake corrective actions when he becomes aware that there are violations. Petitioner knew that Wayne Martindale intended to operate Garden Fresh out of Las Vegas, and apparently decided to give him a free rein in doing so, without taking measures, as he surely could have, to periodically review the company's books, more actively participate in the company's management, or to take steps to inform all the company's customers that Garden Fresh was unable to pay its bills.<sup>3</sup> Indeed, once he

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<sup>3</sup> I emphatically reject the attempts of Respondent to insert evidence developed at the Martindale hearing into this proceeding. It was abundantly clear that the hearings were severed, a fact Respondent was aware of since the same attorney represented Respondent at both hearings. Much of Martindale's testimony was obviously intended to point the finger of blame at others, and Petitioner's attorney was not entitled to appear or examine witnesses in the Martindale hearing. Thus, allegations that there is evidence that Petitioner made purchases for Garden Fresh during the violation period, or that he chose which debts to pay, Resp. Br. at 16-18, are not being considered by me in making this decision.

knew that Garden Fresh was not paying its bills, he had a duty, either alone or in conjunction with the other directors, to implement corrective actions. Instead, he apparently chose to believe a series of untruthful statements from Wayne Martindale as to the company's fiscal health, and spent months trying to call Wayne Martindale without being put through to him, or even having Wayne Martindale hang up on him. Likewise, he could have disassociated himself from Garden Fresh by resigning, but instead signed off on the resignations of two other directors without taking similar action himself until after the violation period.

Petitioner's inaction is particularly striking given that he knew as early as December 2002 that Garden Fresh was not paying its bills on time, if at all. He indicated that numerous customers of Garden Fresh called him at the office of Martindale Distributing, primarily to see if he could help them locate Wayne Martindale so that they could get paid. Tr. 69-71, 90-91. As a result of this, he advised some of these callers not to engage in further transactions with Garden Fresh, and began making his frequent phone calls to Wayne Martindale. He did not seek out all of Garden Fresh's customers to warn them of the company's problems. He did not, either on his own or with the participation of other directors or officers, demand to see the books of the company he co-owned, nor did he travel to Garden Fresh's Las Vegas office to attempt to alleviate the situation, or at least get a better handle on the company's condition. His failure to attempt to take any corrective actions other than trying to call Wayne Martindale, and his remaining with the company while it was committing violations, constitutes active participation in the activities resulting in a violation of this chapter. The failure of such a knowledgeable person as Petitioner, experienced in the produce business and a co-owner,

officer and director of apparently at least two additional produce companies, to take action in a situation where he knows or should know that the company he owns 20% of is violating the PACA does not allow Petitioner to meet his burden here. The failure to exercise powers inherent in his various positions with Garden Fresh, “because he chose not to use the powers he had” has previously been found a basis for finding active participation. In re. Anthony Thomas, 59 Agric. Dec. 367, 392 (2000). Likewise, the need to take action to “counteract or obviate the fault of others” has been recognized as a necessary prerequisite to refute active involvement when the actual violations were not actually committed by the officer, director or shareholder. Bell v. Dept. of Agriculture, 39 F. 3d 1199, 1201 (DC Cir.1994), citing Minotta v. U. S. Dept. of Agriculture, 711 F. 2d 406, 408-409 (DC Cir. 1983).

Even if he was not actively involved in the violations, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director and vice president. For starters, he was a co-founder of Garden Fresh and put up \$20,000 as part of the initial capitalization of Garden Fresh. This is a far cry from someone who is listed as an owner because their spouse or parent put them on corporate records, and had no involvement in the corporation nor experience in the produce business. Minotto v. USDA, 711 F. 2d 406, 409 (D.C. Cir. 1983). Rather Petitioner is an experienced, savvy individual who had worked in the produce business for a quarter of a century, has worked for years with some or all of his partners, and who is fully aware of the significance of having a valid PACA license, and the importance of complying with the prompt payment provisions of the Act. The fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding

responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof. The Judicial Officer and the courts have indicated that ownership of approximately 20% of the stock of a company is strong evidence that a person was not serving in a nominal capacity. In re Joseph T. Kocot, 57 Agric. Dec. 1544, 1545 and cases cited thereunder (1998).

There is no evidence that Petitioner was other than a voluntary investor, who took on the responsibilities associated with being a director, vice president and co-owner in an attempt to establish a profitable business. He apparently shared in the company's profits when there were some, and participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of at least two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh, the fact is that the record does not indicate any attempts, other than telephone calls, of Petitioner to exercise authority consistent with his positions as 20% owner, director and vice president. That he chose not to act does not establish that his role was nominal.

### **Conclusions of Law**

1. Petitioner Donald R. Beucke was a 20% shareholder, director and vice president of Garden Fresh Produce, Inc. from its inception in April 2000 until he resigned from Garden Fresh on April 4, 2003.

2. Between January 14, 2002 and February 26, 2003, Garden Fresh Produce, Inc. committed willful, flagrant and repeated violations of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly \$380,000 to five sellers of perishable commodities.

3. During the period January 14, 2002 through February 26, 2003, Petitioner was responsibly connected with Garden Fresh.

4. During the period January 14, 2002 through February 26, 2003, Petitioner was actively involved in the activities resulting in a violation of the PACA.

5. During the period January 14, 2002 through February 26, 2003, Petitioner did not serve as a 20% stockholder, director and officer of Garden Fresh in a nominal capacity.

### **Conclusion and Order**

Petitioner has failed to show, by a preponderance of the evidence, that he was not responsibly connected to Garden Fresh Produce, Inc. at a time when Garden Fresh committed willful, flagrant and repeated violations of section 2 (4) of PACA for failing to make full payment promptly for produce purchases. Petitioner was actively involved in the activities resulting in the violations, and was more than a nominal 20% owner, vice president and director. Wherefore, I affirm the finding of the Chief of the PACA Branch that Donald R. Beucke was responsibly connected with Garden Fresh at the time the violations were committed.

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 19<sup>th</sup> day of January, 2006

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**MARC R. HILLSON**  
Chief Administrative Law Judge