

In re: DONALD R. BEUCKE and KEITH K. KEYESKI.
PACA APP DOCKET No. 04-0014.
PACA APP DOCKET No. 04-0020.
Decision and Order.
Filed December 20, 2005.

PACA – Responsibly connected.– Two prong test.

Charles L. Kendall, for Complainant.
Effic Anastassiou, Paul Hart and Paul Moncrief for Respondents
Decision and Order by Administrative Law Judge Peter M. Davenport

DECISION AND ORDER

This proceeding was initiated by two petitions for review of determinations by the Agricultural Marketing Service that subjected Donald R. Beucke and Keith K. Keyeski to employment restrictions for being "responsibly connected" with Bayside Produce, Inc., (Hereinafter "Bayside"), a corporation found to have willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act (7 U.S.C. § 499, *et seq.*, the "PACA").

Bayside, a PACA licensee, was the subject of a disciplinary complaint that resulted in a default decision being entered against it on August 25, 2004 by Administrative Law Judge Victor W. Palmer. The default decision authorized publication of the finding that Bayside willfully, flagrantly and repeatedly violated the PACA by failing to pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period from November 23, 2002 to February 7, 2003.

An oral hearing in this matter was held in San Jose, California on October 12 and 13, 2005. Donald R. Beucke is represented by Effie F. Anastassiou, Esquire and Paul Hart, Esquire, both of Anastassiou & Associates, Pismo Beach and Salinas, California; Keith K. Keyeski is represented by Paul W. Moncrief, Esquire, Lombardo & Giles, P.C., Salinas, California; and the Respondent is represented by Charles L. Kendall, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C.

A total of 45 exhibits were admitted into evidence on behalf of Petitioner Beucke (CX 1-45) and 9 exhibits on behalf of Petitioner Keyeski (KK 1-9). Thirty-three exhibits were introduced and admitted by the Respondent, consisting of the certified Agency Record for Petitioner Beucke (RX 1 -21), the additional exhibits introduced at the hearing (RX 22-25) and the certified Agency Record for Petitioner Keyeski (EX 1-8). Briefs have been filed by all parties.

Upon consideration of all of the evidence, I conclude that Donald R. Beucke and Keith K. Keyeski were responsibly connected with Bayside at the time it was a licensee violating the PACA and for that reason, they are subject to the employment restrictions on their employment by PACA licensees pursuant to 7 U.S.C. § 499h(b).

During the time of the violations¹ Donald R. Beucke was the Vice President, Secretary and a director of Bayside. Keith K. Keyeski had been a Vice President and a director of Bayside, but resigned those positions prior to the November 23, 2002 date. He did however continue to manage the San Diego office of Bayside until December 13, 2002. The two petitioners each held 33 1/3 % of the corporation's outstanding shares. For those reasons, each comes within the presumptive definition of a person deemed to be "responsibly connected" with a corporate licensee found to be in violation of the PACA.

The term "responsibly connected" is defined in § 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(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 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 Act and that the person was only nominally a partner, officer, director, or

¹Keith K. Keyeski orally resigned as an officer and director on October 8, 2002 and confirmed his verbal resignation by letter dated October 18, 2002. (KK 5). He did not however relinquish his shares until March 11, 2003. (KK 1). Donald R. Beucke's participation in the affairs of Bayside is documented during the entire period.

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.

The second sentence was added by amendment in 1995 and affords those who would otherwise fall within the statutory definition of "responsibly connected" an opportunity to demonstrate that they were not responsible for the specific violation. The amendment was discussed in *Michael Norinsberg v. United States Department of Agriculture and United States of America*, 162 F. 3d 1194, 1196- 1197 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-1467 (1998); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1482-1487 (1998); and *In re Michael J Mendenhall*, 57 Agric. Dec. 1607, 1615-1619 (1998).

The amendment creates a two prong test for rebutting the statutory presumption:

...the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that the petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners. *Salins*, 57 Agric. Dec. 1474, 1487- 1488.

Actual knowledge of PACA violations is not required as active involvement may be found where a petitioner has made produce purchases for which the suppliers were not paid, and where a petitioner chose to make purchases of produce even though he or she knew or should have known that the company was not paying produce suppliers for perishable agricultural commodities. *In re Janet S. Orloff, Merna K. Jacobson and Terry A. Jacobson*, 62 Agric. Dec. 281 (2003).

Both petitioners argue that they were only nominally involved, asserting that the financial aspects of the business were handled exclusively by Wayne Martindale, the President of Bayside and owner of the other 33 1/3% of the shares of the corporation not owned by the petitioners. The

testimony of numerous witnesses called by the Respondents supports their position only to the extent that it establishes Martindale did retain possession of the corporation's checkbook and was the individual that those that did business with Bayside regarded as the individual responsible for payment of invoices.

The petitioners both have significant experience and lengthy involvement with the produce industry. Donald Beucke has twenty-six years of experience in the industry, starting initially as a field inspector and later progressing to the position of buyer and broker. (Tr. 213-214). He has served as the President of Martindale Distributing Company, a business founded by his late stepfather, Dale Martindale, (Tr. 218, 312) and was the Vice-President, Secretary and a director of Bayside (RX 1) as well owning shares in two other businesses involved in the produce industry² He acknowledged being able to and did sign Bayside checks³ but testified that he did so only when directed to do so by Wayne Martindale or Shane Martindale, both of whom are his step brothers, or Kathy Walker, the Executive Coordinator of Bayside. (Tr. 235-240). By his testimony, his involvement with Bayside was limited to purchases and sales for one account, Produce People, and that he last took an order from them in February of 2003. (Tr. 243-246). He resigned as Vice President, as director, and from any position of employment of and with Bayside by letter dated April 11, 2003 and executed a document titled Resignation and Acknowledgment of Stock Redemption dated October 23, 2003 which surrendered his shares in Bayside as of April 4, 2003. (CX 6-7).

Keith K. Keyeski started his career in the produce business in 1985 or 1986 working in the warehouse and worked his way up to a position in sales. He had become acquainted with Wayne Martindale and Donald Beucke through his industry contacts and sometime around August of 1997

²Donald Beucke testified that his late step father Dale Martindale gave him a 1/3 interest in Martindale Produce, that he initially owned half of Bayside before he and Wayne Martindale each sold enough shares to Keith K. Keyeski to enable him to acquire a 1/3 interest. He owned a 1/3 interest in Garden Fresh.

³(Tr. 234-235). CX 39 contains 29 checks written by Respondent Beucke on Bayside's Community Bank of Central California account, including two written to himself.

started working for them out of his home and later opening an office for Bayside in San Diego, California. According to his account, he joined Bayside in an arrangement that was "basically a three-way partnership" with "equal duties, equal opportunity, equal money, equal everything." (Tr. 359-360, 361-362). Except for writing checks for produce and other major expenses, he ran the day to day operation of the San Diego office of the corporation.⁴ Once he managed accumulate a necessary \$7,000.00 investment, he became a shareholder, director and officer in February of 2000; however, according to his account, nothing really changed after he became a shareholder, director and officer of the corporation. The San Diego operation grew significantly and by 2002 was generating the bulk of Bayside's sales.⁵ In October of 2002, by then convinced that Wayne Martindale was not "pulling his weight", and unhappy with the monetary return from his own efforts, he contacted William Trask, an attorney, for advice. (Tr. 374). Trask drafted a letter for Keith Keyeski to Wayne Martindale and Donald Beucke dated October 18, 2002 which confirmed his verbal notice of October 8, 2002, that he was resigning as Vice President and as a member of the board of directors and that as of December 31, 2002⁶ he would be resigning all positions at Bayside. The letter went on to propose that each of them continue to contribute to the business as usual and suggested three alternatives, one of which was his offer to purchase Bayside. (Tr. 374-375; KK 5). No formal response to the letter was received, but sometime in November of 2002 Wayne Martindale advised he had conferred with Donald Beucke and that "they" wanted to keep the business. (Tr. 375-378). Thereafter Keyeski's contact with Wayne Martindale became difficult, with little or no information being provided by Martindale. (Tr. 377). As he had suggested in his October 18, 2002 letter, Keyeski continued to run Bayside's San Diego office and processed orders as usual as "[t]hat's my job" until December 13, 2002. (Tr. 385). On

⁴Bayside did have an account at Bank of America that Keith Keyeski was able to write checks on; however, according to testimony, only a minimal balance was maintained in the account which was used only for payroll, rent and minor incidental expenses. (Tr. 362-363)

⁵Tr. 376. According to Keyeski, Donald Beucke did generate income for the corporation, but Wayne Martindale was not.

⁶This was verbally amended to December 13, 2002.

December 15, 2002, he obtained his own PACA license and commenced operation from Bayside's former San Diego location as New Horizon Distributing, Inc. Still anticipating some return from his investment as he thought Bayside was financially sound, he retained his shares in Bayside until March of 2003.⁷ (KK 1-2).

The evidence introduced through multiple witnesses called by the Petitioners demonstrates that the companies that dealt with Bayside lodged the blame for Bayside's payment problems on Wayne Martindale's misconduct and not on either Donald Beucke or Keith Keyeski. Universally those witnesses professed to remain willing to do business with both of them. Both men are regarded as honorable and after the fact have contributed significant amounts financially to attempt to correct the problems which occurred. There is no evidence that either of them personally engaged in any affirmative action designed to leave suppliers unpaid. Neither of them however acted upon the reports coming to them that invoices were not being paid in a timely manner.⁸ Such failure to exercise their oversight obligations owed by them to the corporation as shareholders, if not as officers, cannot be excused. Their failure to employ their majority interest in the corporation to constrain and halt the misconduct of Wayne Martindale did leave suppliers unpaid. Because they had such power and failed to exercise it while still holding positions as shareholders, a corporate officer and or actively involved in Bayside's business activities, neither of them can be considered "only nominally a partner, officer, director, or shareholder of a violating licensee". Accordingly, the following Findings of Fact and Conclusions of Law will be made.

⁷Keith Keyeski's letter of March 11, 2003 requested that minutes of the corporation be forwarded to him that reflected that he was not affiliated with Bayside "other than as a shareholder" after December 14, 2002. (KK 1).

⁸Keyeski denied hearing any reports of non payment until the second or third week of January of 2003 which was after he had resigned as an officer and director of Bayside. (Tr. 385) He however remained a shareholder until March 11, 2003 noting in his letter of that date that "... as of December 14, 2002, other than as a shareholder, I was not affiliated in any way with Bayside Produce, Inc." (KK 1).

FINDINGS OF FACT

1. Bayside Produce, Inc. is a California corporation, organized and chartered on September 15, 1997, which applied for and received PACA License Number #19981824. Annual renewals of that license were made on or before its annual anniversary date through 2002 for the year ending August 26, 2003. (RX 1-2).

2. Bayside's shareholders and directors consisted of Wayne Martindale and Donald Beucke, with each of them owning 50% of the shares of outstanding stock until February 22, 2000 when Bayside amended its by-laws to increase the number of directors from two to three and adding Keith Keyeski as an equal shareholder, officer and member of the board of directors. (RX 4; EX 6).

3. Pursuant to a Default Decision entered by Administrative Law Judge Victor W. Palmer, Bayside was found to have wilfully, flagrantly and repeatedly violated the PACA by failing to timely pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers during the period November 23, 2002 to February 7, 2003. (CX 1; RX 22).

4. Petitioner Beucke has significant experience with over 26 years in the produce industry and has owned and held positions as a corporate officer in two other produce companies beside Bayside. He was listed on Bayside's PACA license and license certificate as Vice President, Secretary, director and as a 33-1/3% shareholder throughout the violation period from November 23, 2002 to February 7, 2003. His signature appears on the initial minutes of the Bayside Board of Director's meeting on September 15, 1997, the stock certificate issued in his name and the minutes of the Bayside Board of Director's February 22, 2000 meeting. (Tr. 213-214, 218, and 312; RX 1-4; CX 9, 10, 11 and 12).

5. Petitioner Beucke purchased produce on behalf of Bayside on at least 33 occasions during the violation period of November 23, 2002 to February 7, 2003 for which the suppliers of the produce were not paid. (Tr. 248-252, 300-305, 323-324; CX 21, 23, 26, 32, 33, and 35).

6. Petitioner Beucke's name and signature appeared on the bank signature card for Bayside's Bank America Account # 01719-21437 and he was authorized to draw funds on that account during the period November 23, 2002 to February 7, 2003. (RX 23).

7. Petitioner Beucke's name and signature appeared on the bank authorizations for Bayside's Community Bank of Central California Account # 1361955 and he was authorized to draw funds on that account

during the period November 23, 2002 to February 7, 2003. During that period, he signed 29 checks on the account, including checks to 11 produce suppliers as well as 2 checks payable to himself. (RX 24; CX 39 pp. 222, 272, 296, 360, 505, 571, 595, 597. 607, 710, 726, 730, and 736).

8. Petitioner Beucke, as an officer of Bayside, signed a Corporate Resolution to Borrow under Loan # 160087672 from Community Bank of Central California for the loan dated January 21, 2002, with a maturity date of January 28, 2003. (RX 24).

9. By letter dated April 30, 2003 from his attorney Lester W. Shirley to Wayne Martindale, Petitioner Beucke tendered his resignation as a director and Vice President of Bayside as well as from any position of employment with Bayside. (RX 1; CX 6).

10. On October 23, 2003, Petitioner Beucke executed documents entitled Resignation and Acknowledgment of Stock Redemption and Stock Assignment Separate from Stock Certificate, both of which purported to be effective April 4, 2003. (RX 5-6; cx 7).

11. Petitioner Keyeski has been involved in the produce business since 1985 or 1986, starting first in the warehouse before moving into sales. From sometime in 1990 until July of 1997, he was the sales manager of Coast Citrus Distributors, a San Diego company. (Tr. 357,393).

12. Starting in approximately August of 1997, he entered into an arrangement with Wayne Martindale and Petitioner Beucke that was "basically a three way partnership, ... equal duties, equal opportunity, equal money, equal everything." (Tr. 3 58- 359)

13. Once he managed to accumulate the necessary \$7,000.00 investment, on February 22, 2000, Petitioner Keyeski attended a Bayside board meeting in Salinas, California and became a 33 1/3% shareholder, Vice President and director of Bayside. (Tr. 368).

14. Petitioner Keyeski ran the San Diego office of Bayside as a general manager, controlling all aspects of its operation, including managing the payroll, paying the rent and other incidental expenses of Bayside's San Diego business except for depositing receivables and paying for purchases of produce. (Tr. 364-365, 397).

15. Petitioner Keyeski purchased produce on behalf of Bayside on at least four occasions during the violation period November 23, 2002 to February 7, 2003 for which suppliers of the produce were not paid. (Tr. 161 -164, 167- 168; CX 1 6; CX 28; CX 4 1 and CX 44).

16. By letter dated October 18, 2002, Petitioner Keyeski confirmed his verbal notice of October 8, 2002 that he was resigning as Vice President

and as a member of the board of directors of Bayside and that he would be resigning all positions at Bayside as of December 31, 2002. The December 31, 2002 date was later verbally changed to December 13, 2002. (Tr. 375; KK 5; EX 5).

17. On March 3, 2003, Petitioner Keyeski executed a Declaration of Lost Stock [Certificate] and Assignment of Shares which was forwarded to Bayside by letter dated March 11, 2003. (Tr. 386; KK 1; KK 2; EX 8).

CONCLUSIONS OF LAW

1. Petitioner Beucke was actively involved with Bayside at the time it was committing violations of the PACA. He was the Vice President, Secretary and a member of the board of directors, as well as holding 33 1/3% of the outstanding stock of Bayside during the period November 23, 2002 to February 7, 2003 and purchased produce from suppliers that were not paid during that period.

2. By reason of his active involvement with Bayside, Petitioner Beucke was not only nominally a partner, officer, director, or shareholder of Bayside during the period November 23, 2002 to February 7, 2003 and was an owner of a violating entity which was the alter ego of its owners.

3. Petitioner Keyeski was actively involved with Bayside during at least a portion of the time it was committing violations of the PACA. Although he had resigned his positions as Vice President and member of the board of directors prior to the period November 23, 2002 to February 7, 2003, he retained his 33-1/3% stock ownership until March 11, 2003, he continued to run Bayside's San Diego operation of Bayside through December 13, 2002 and purchased produce from suppliers that were not paid during the period November 23, 2002 through at least December 10, 2002.

4. By reason of his active involvement with Bayside, Petitioner Keyeski was not only nominally a partner, officer, director, or shareholder of Bayside during the period November 23, 2002 to February 7, 2003 and was an owner of a violating entity which was the alter ego of its owners.

ORDER

1. The determination of the Chief of the PACA Branch that Donald R..

Beucke was responsibly connected with Bayside during the period November 23, 2002 to February 7, 2003 during which period Bayside wilfully, flagrantly and repeatedly violated the PACA by failing to pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers should be affirmed.

2. The determination of the Chief of the PACA Branch that Keith K. Keyeski was responsibly connected with Bayside during the period November 23, 2002 to February 7, 2003 during which period Bayside wilfully, flagrantly and repeatedly violated the PACA by failing to pay \$163,102.70 for 74 lots of produce purchased in interstate commerce from 22 sellers should be affirmed.

This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed within thirty (30) days after service.

Copies of this Decision and Order shall be served upon the Parties by the Hearing Clerk's Office.