

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

|                      |   |                                  |
|----------------------|---|----------------------------------|
| In re:               | ) | PACA APP Docket No. 04-0012      |
|                      | ) |                                  |
| Joseph T. Cerniglia, | ) |                                  |
|                      | ) |                                  |
| Petitioner           | ) | <b><u>DECISION AND ORDER</u></b> |

Joseph T. Cerniglia initiated this proceeding by filing a petition that seeks the reversal of a determination by the Chief of the PACA Branch of the Agricultural Marketing Service that Mr. Cerniglia, within the meaning of the Perishable Agricultural Commodities Act (“the PACA”; 7 U.S.C. § 499a (b)(9)), was “responsibly connected” with a corporation when it was found to have willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C.§ 499b(4)). The consequence of the Chief’s determination is that Mr. Cerniglia becomes subject to restrictions upon his PACA licensing and employment as set forth at 7 U.S.C. § 499d and § 499h.

The PACA licensing and employment restrictions apply to any person who is a “responsibly connected...officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association” holding a PACA license as a commission merchant, dealer, or broker, that is found to have flagrantly or repeatedly violated section 2 of the PACA. The PACA’s definition section further states, however, that “(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

was not an owner of a violating licensee...which was the alter ego of its owners.”( 7 U.S.C. § 499a(b)(9)).

Although Mr. Cerniglia argues that he was not actively involved in the violations that the corporate licensee was found to have committed, his principal and most compelling argument is that before the commission of the violations, he had resigned all offices in the corporation and had relinquished all of his shares of its stock. Therefore, he cannot be said to come within the essential, first requirement of the “responsibly connected” definition of being an “officer, director, or holder of more than 10 per centum of the outstanding stock....” However, this is not a case of first impression. Controlling Departmental precedent is set forth in *Anthony L. Thomas*, 59 Agric. Dec. 367 (2000). Here, as in *Thomas*, the resignation as a corporate officer was incomplete and ineffective, and Mr. Cerniglia’s active involvement as a *de facto* officer of the corporate licensee continued through the time the corporation violated the PACA. Therefore, the determination by the Chief of the PACA Branch is being affirmed, and an order is being entered that Mr. Cerniglia was responsibly connected to the corporate licensee when it flagrantly and repeatedly violated section 2(4) of the PACA.

### **Procedural Background**

On December 3, 2003, the PACA Branch filed a disciplinary complaint against Fresh Solutions, Inc. alleging that it was a corporation licensed under the PACA that had violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The complaint further alleged that a pending application for a new PACA license should be denied. The proceedings were initially assigned to Administrative Law Judge Leslie B. Holt and then reassigned to Administrative Law Judge Jill Clifton. They each held teleconferences with Mr. Cerniglia

and others believed to be principals of the corporation. In the teleconference conducted by Judge Clifton, a previously scheduled hearing in respect to the disciplinary proceeding was cancelled in light of the fact that an answer had not been filed and the PACA Branch had moved for a decision by reason of default. Judge Clifton also ordered the PACA Branch to identify any responsibly connected proceedings that could be joined with the pending disciplinary proceeding. On February 13, 2004, the PACA Branch notified Mr. Cerniglia that it had made an initial determination of his responsible connection to Fresh Solutions, Inc. (RX-3). By letter dated February 19, 2004, Mr. Cerniglia responded, stating that he had resigned as an officer and a director of the corporation on January 1, 2002 when 100% of the stock of Fresh Solutions, Inc. was transferred to Morris Lewis. (RX-4). Mr. Cerniglia thereafter submitted documents in support of his contention that he was not an officer, director or shareholder of the corporation during the period of August 16, 2002 through April 29, 2003, when the disciplinary complaint alleged that Fresh Produce, Inc. failed to pay for \$351,968.50 in produce purchased from eight produce sellers in violation of section 2(4) of the PACA. On April 12, 2004, Judge Clifton issued a decision against Fresh Produce, Inc. finding that because of its failure to pay produce dealers as alleged in the disciplinary complaint, it had committed willful, repeated and flagrant violations of section 2(4) of the PACA and ordered the publication of the facts and circumstances of the violations. Judge Clifton included in her Order findings that Fresh Solutions, Inc. is unfit to be licensed and that its application for a PACA license was therefore refused. (RX-26). The decision was not appealed and became final on June 30, 2004. By letter dated July 7, 2004, the Chief of the PACA Branch notified Mr. Cerniglia that on behalf of the agency, the Chief had made a final determination that Mr.

Cerniglia was responsibly connected to Fresh Solutions, Inc. during the period of the violations. On August 4, 2004, Mr. Cerniglia filed a petition for review of the agency's determination. Similar determinations of responsible connection were also made in respect to three other principals of Fresh Produce, Inc., i.e., E. Mason McGowin, III, Morris C. Lewis, III and Jonathan Scott Green. Mr. Green did not contest the determination against him. Messrs. McGowin and Lewis initially filed petitions for review, but their petitions were dismissed upon their own motions.

On January 11, 2006, I conducted an oral hearing in Atlanta, Georgia in respect to the one remaining proceeding, Mr. Cerniglia's petition for review of the PACA Chief's determination that he was responsibly connected with Fresh Produce, Inc. at the time of its violations of Section 2(4) of the PACA. Charles E. Spicknall, Esquire, Office of the General Counsel, USDA, Washington, D.C., represented the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture. Mr. Cerniglia represented himself *pro se*. In addition to the record of the proceeding conducted by the PACA Chief, respondent submitted exhibits at the hearing that were received in evidence and respondent's exhibits are designated (RX-\_\_\_). Mr. Cerniglia testified and the hearing was transcribed (Tr.\_\_\_). Exhibits submitted by Mr. Cerniglia and received at the hearing are designated (EX-\_\_\_). Some of his exhibits, originally received as part of the Administrative Record, are designated as (PX-\_\_\_). Both sides submitted post hearing briefs that have been considered in full, including Mr. Cerniglia's rebuttal brief that was received on April 14, 2006.

### **Findings of Fact**

1. Joseph T. Cerniglia's current mailing address is 6730 Ulster Court, Alpharetta, Georgia 30005. (Tr. 18). Upon graduation from the University of West Georgia in 1972, with a degree in history and environmental science, Mr. Cerniglia joined his father's produce business, Cerniglia Produce Co., Inc. He worked there until 1989 when that corporation's PACA license was revoked for failing to pay sellers for their produce. (Tr. 54; Tr. 58; and *In re Cerniglia Produce Co., Inc.*, 48 Agric Dec. 1133 (1989)). From 1989 through 1991, Mr. Cerniglia was employed by Collins Brothers, a produce company. In 1990 or 1991, he was determined to be responsibly connected to Cerniglia Produce Co., Inc., and disqualified from employment in the produce industry for two years. (Tr. 59).

2. In 1993, Mr. Cerniglia returned to the produce industry as a sole proprietorship. He incorporated his business in 1994, and first obtained a PACA license for the business in or about 1995. (Tr. 18). In 1995, Jonathan Scott Green and John Green joined Mr. Cerniglia as owners of the business. (Tr. 89-96). The business was incorporated and, in 1996, was renamed Fresh Solutions, Inc. (Tr. 18; Tr. 59-61; EX-5, at 3). The corporation's stock ledger shows that, on July 2, 1996, Mr. Cerniglia, Jonathan Scott Green, and John Green, together with Mr. Cerniglia's father, Joseph Cerniglia, Sr, and Windsor Jordan, each owned twenty percent of the shares of the corporation. (PX-8). The minutes of the annual meeting of the shareholders and directors of Fresh Solutions, Inc. held on July 2, 1998, show that on that date, the authorized shares of stock in the company were increased and re-distributed so that of the total outstanding shares, Mr. Cerniglia owned 45%; Jonathan Scott Green owned 33%; John Green owned 20%; and Windsor Jordan owned 2%. (EX-1). In 2000-2001, transfers of outstanding shares in the

corporation were made to two investors, Morris Lewis and Mason McGowin, resulting in each of them owning 20% of the total outstanding shares and decreasing Mr. Cerniglia's stock ownership to 29%. (PX-8; EX-2; RX-1, at 4). Morris Lewis invested \$1 million dollars for his 667 shares that represented a 20% interest in the company. (RX-42, at 67).

3. The initial money to get the business going in 1993, came from a home equity loan Mr. Cerniglia obtained for a couple of thousand dollars, plus \$19,000.00 of his personal savings and \$30,000.00 from his wife's inheritance. (Tr. 65). He opened an account for Fresh Solutions at the Bank of America on September 26, 1994. (Tr. 66-67; RX-27). Through 2004, Mr. Cerniglia had exclusive signature authority over this account. (Tr. 69).

4. When Mr. Cerniglia started what would become Fresh Solutions, Inc., his concept was to help chain restaurants to better buy produce so that each restaurant in a chain would obtain the same, right quality produce at the right price. (Tr. 60; Tr. 85). Initially, Mr. Cerniglia personally attended to all aspects of the business with some family help. He acted as a broker, recommending certain produce vendors for which his client chain restaurants would authorize the vendor to pay him 3 percent of the price of the purchased produce. (Tr. 83-84). After the Greens joined him, Jonathan Scott Green attended to the financial affairs of the company; John Green helped with sales to restaurants; and Mr. Cerniglia handled produce matters. (Tr. 95). Moreover, the Greens found new customers who desired a different business model from the pure commission one Mr. Cerniglia employed. Under the new model, Fresh Solutions, Inc. would take title to the selected produce and pay the distributors directly. Mr. Cerniglia acceded to adding this new business model, and Fresh Solutions, Inc. thereafter bought produce for various

of its customers directly from 70 or 80 produce distributors. (Tr. 87-88). There was another change in the way Fresh Solutions serviced its customers. It undertook the development of hand-held computerized devices to allow chain restaurant customers to engage in on-line ordering of produce while checking on their inventories. (Tr. 115-116). These hand-held devices were discussed by Mr. Cerniglia with Morris Lewis at the time he contemplated investing in Fresh Solution, Inc. (Tr. 105). The tested models were sensitive to interference from microwaves and would not work in locations where there was a lot of metal. (Tr. 116). Fresh Solutions entered into expensive contracts with consultants to develop and correct the software. (Tr. 116-117).

5. The 2001 tax return filed for Fresh Solutions, Inc. shows it reported a net loss of \$2, 267,291.00 for the year. (RX- 24). By the end of 2001, its investors, namely, Mason McGowin and Morris Lewis had paid-in capital to the corporation of \$1,735,000.00 and an additional \$1 million had been received pursuant to a loan guaranteed by Morris Lewis. (RX-24, at 5). The return also shows that its two highest compensated officers were Mr. Cerniglia who received \$104, 369.00 and J. Scott Green who received \$104, 286.00. (RX-24, at 3; Tr. 254). Mr. Cerniglia and other first tier officers also had expense accounts covering their travel and meals, and a \$550.00 per month car allowance. (Tr. 256-257).

6. As a condition for continuing to fund the corporation, Morris Lewis required the other shareholders to sign their shares over to him, relinquish their corporate offices and cease being directors, in order to convert Fresh Solutions, Inc. into a S-corporation allowing Morris Green to be its sole owner and entitled to personally take a tax loss in respect to the corporation's operations in 2002. (Tr. 154). Mr. Cerniglia

understood that his shares of stock would be returned to him after the 2002 tax loss was taken. (Tr. 155). The S-corporation election was made and Morris Lewis was allowed by IRS to apply the \$3,494,112.00 that Fresh Solutions, Inc. lost in 2002 against his personal income taxes for that year when he received a huge signing bonus as a professional football player. (Tr. 248-249). The documents supporting the S-corporation election accepted by the Internal Revenue Service, included:

(a) The minutes of a Special Meeting of the Directors of Fresh Solutions, Inc. held on December 28, 2001 that was conducted by Jonathan Scott Green, Chairman of the Board and recorded by Joseph T. Cerniglia, Jr., the secretary of the corporation. The Chairman announced that the purpose of the meeting was the resignation of Joseph T. Cerniglia and Jonathan Scott Green, as officers and Directors effective midnight January 1, 2002. After discussion and upon motion duly made and seconded, the resignations were unanimously accepted. The minutes were signed by all three Directors, John Green, Joseph T. Cerniglia and Jonathan Scott Green. They were dated: December 28, 2001. (RX-8).

(b). The stock ledger of Fresh Solutions, Inc. where it was recorded that on January 1, 2002, all of the 2000 outstanding shares of stock issued to shareholders other than Morris Lewis, III were transferred to Morris Lewis, III. (PX-8).

(c). The individual stock certificates showing their transfer on January 1, 2002 to Morris Lewis, III. (RX-7, at 1-4).

7. In 2001, prior to his resignation, Mr. Cerniglia was the secretary and treasurer of Fresh Solutions, Inc. and held 29% of its outstanding shares of stock. (Tr. 229). Mr. Cerniglia also had the working title of Chief Operating Officer, and in



corporate filings with the State of Georgia, was identified as Chief Financial Officer. (Tr. 229; RX-11, at 2). At that time, Jonathan Scott Green was the CEO and 31% shareholder. Morris Lewis was a Vice President and 20% shareholder. (Tr. 230).

8. The corporate by-laws of Fresh Solutions, Inc. provided for a Board of Directors consisting of not less than one nor more than five directors as fixed by resolution of the shareholders. (EX-4, at 4). The by-laws provided for officers consisting of a Chairman of the Board who is the chief executive officer of the corporation; a President if the Board has not appointed a Chairman or if a President is needed for other designated circumstances; Vice Presidents and Assistant Vice Presidents; a Secretary; and a Treasurer. (EX-4, at 8-10). Any person was permitted to hold two or more offices and no officer needed to be a shareholder. (RX-4, at 8).

9. The State of Georgia requires annual filings from corporations in which corporate officers are categorized as: Chief Executive Officer (CEO), Chief Financial Officer (CFO) and Secretary. See <http://www.sos.state.ga.us> (*Corporations-Annual Registration Q&A*). In the filings for Fresh Solutions, Inc., Joseph T. Cerniglia was identified as Chief Financial Officer and Jonathan S. Green as Chief Executive Officer; no one was identified in these filings as secretary. (RX-11, at 2).

10. On August 16, 2002, when Fresh Solutions, Inc. was found to have stopped fully paying for produce, Mr. Cerniglia did not own any shares of its stock, was no longer one of its directors and had resigned as Secretary and Treasurer. He continued, however, to be recognized as and actively used the title of Chief Operating Officer. In 2002, Mr. Cerniglia learned upon speaking with an unpaid produce distributor who the receptionist referred to him for assistance, that produce distributors were not being paid.

(Tr. 31). His continued actions as the Chief Operating Officer included visiting produce distributors to see if their premises and trucks were clean, and if they had good data processing capability. (Tr. 128). It also included resolving customer problems and bringing customer concerns to produce distributors. (Tr. 128-129). Furthermore, it included speaking to unpaid produce distributors. (Tr. 131). In and for the year 2002, Mr. Cerniglia's salary was increased by \$13,000.00. (Tr. 255). In August, 2002, he also received a loan for \$40,000.00 in order to purchase a new home that he paid back in September, 2002. (Tr. 258-259).

11. On January 10, 2001, three bank accounts were opened for Fresh Solutions, Inc. with First Union Bank. The signature cards for these accounts were signed by: Jonathan S. Green CEO, Joseph T. Cerniglia COO, Shari Green, Director of Finance and John D. Green SUP. (RX-28; RX-29; RX-30; Tr. 263-264). One account was designated as "checking acct./operating". (RX-28). "COO" was used to identify Mr. Cerniglia on the signature cards as the corporation's Chief Operating Officer. (Tr. 72-73). Mr. Cerniglia has testified that he gave Jonathan Scott Green a signature stamp that was available to be used as necessary. (Tr. 271-272). The stamp was used to sign checks to produce suppliers during the period of August 16, 2002 through April 29, 2003 when Fresh Solutions, Inc. has been found to have not fully paid produce sellers. (Tr. 272-273). Sometimes the stamp would be locked away and, when asked, he personally signed checks during that period. (Tr. 273). Just before the period when produce distributors went unpaid, a check for \$54,000.00, bearing Mr. Cerniglia's stamped signature, was issued on August 15, 2002, out of the operating account for paying suppliers at the First Union Bank, that was made out to Fresh Solutions, Inc. and then deposited into the Fresh

Solutions, Inc. account at Bank of America where Mr. Cerniglia was the only authorized signatory. (Tr. 75-81; RX-19, at 22; RX-27). On July, 11, 2002, \$10,000.00 had been similarly transferred. (Tr. 78; RX-19, at 299; RX-27). On July 18, 2002, \$55,000.00 had also been similarly transferred. (Tr. 80-81; RX-19, 310; RX-27).

12. Mr. Cerniglia, on March 21, 2003, as Chief Operating Officer, “COO”, signed service contracts for Fresh Solutions, Inc. with Automated Solutions Consulting Group, Inc. (“ASC”).(RX-32, at 5; RX-33, at 2; Tr. 122). The contract was to keep computers owned by Fresh Solutions, Inc. running. (Tr.122). Mr. Cerniglia also signed checks to ASC on January 10, 2003 for \$5,000.00 (RX-19, at 105); on January 17, 2003 for \$2,000.00 (RX-19, at 107); and on January 31, 2003 for \$2,000.00 (RX-19, at 157). These transactions occurred during the period of time that produce distributors were not being paid. In February, 2004, following Mr. Cerniglia’s resignation from Fresh Solutions, Inc., his wife together with the wife of the president of ASC started a new produce firm under the name Fresh Works. For a short time, Mr. Cerniglia worked for that firm. (Tr.119-120).

13. Mr. Cerniglia never regained any of the shares of stock he transferred in 2002 to Morris Lewis. On May 16, 2003, Morris Lewis, as 100% Shareholder and Chairman, presided over a special meeting of the shareholders of Fresh Solutions, Inc. At the meeting, the then current Directors were removed; Morris Lewis was appointed Director of the corporation; and M. Darnell Jones was designated as secretary. Resolutions were also made to prohibit “the corporation, its Officers, Directors, Employees and/or agents” from entering into contracts, or hiring or employing anyone so as to create obligations or indebtedness. (RX-36, at 1).

14. After May 16, 2003, M. Darnell Jones engaged a new payroll company and Mr. Cerniglia's salary was cut. Mr. Jones also withheld some payroll checks, and Mr. Cerniglia received salaried compensation in the high \$30's for the year instead of his agreed \$117,000.00 yearly salary. (Tr. 49-52). Mr. Cerniglia, together with Jonathan Scott Green, continued to represent Fresh Solutions, Inc. before the PACA Branch, and on October 2, 2003, they signed a letter to the PACA Branch advising that Fresh Solutions, Inc. was diligently working to pay and resolve the debts it owed to produce distributors. (EX-3, at 2). On a license application filed with the PACA Branch for Fresh Solutions, Inc. that Mr. Cerniglia admits he signed on October 8, 2003, he was identified as its Secretary, Treasurer, COO and 29% shareholder. (RX 2; Tr. 143-147). Mr. Cerniglia, Jonathan Scott Green and E. Mason McGowin did not notify the PACA Branch that there had been a change in ownership of Fresh Solutions, Inc. until May 2, 2004. (Tr. 259-260; RX-43).

15. On February 23, 2004, Mr. Cerniglia resigned from Fresh Solutions, Inc. and left its premises because he no longer had any hope that it was going to be saved and he had to feed his family. (RX-42, at 8-9; RX-42, at 33; Tr. 245).

16. On March 9, 2004, Fresh Solutions, Inc. by and through its sole shareholder, director and president, Morris C. Lewis, III, filed a voluntary petition under Chapter 7 for bankruptcy protection from its unpaid creditors that included produce sellers. (RX-17).

### **Conclusion**

**Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc. at the time it committed flagrant and repeated violations of section 2 of the PACA.**

Mr. Cerniglia argues that there are two reasons why he cannot be determined to be “responsibly connected” with Fresh Solutions, Inc. at the time it violated the PACA. Firstly, when the violations took place, he was no longer a corporate officer, director or holder of the corporation’s stock as required by the PACA because he had previously resigned all offices and given up his shares of stock. Secondly, he was not actively involved in the violations themselves.

The first argument is his principal one. He contends that he does not qualify under the PACA’s definition of responsibly connected as an individual who was at the time of the violations, “an officer, director or holder of...outstanding stock”. (7 U.S.C. § 499a(b)(9)). This is because several months before the violations, he had resigned as secretary, treasurer and director and transferred all of the shares of stock he owned to Morris Lewis. This was done to facilitate the conversion of the corporation to an S-type owned by Mr. Lewis who then took a tax credit against a huge signing bonus he received as a professional football player. Although it was everyone’s intention to return the transferred stock back to Mr. Cerniglia and the others who had developed and would continue to operate the corporation after Morris Lewis received his 2002 tax break, this never happened. Mr. Cerniglia never again was made a director of the corporation or an officer holding one of the titles listed in the corporation’s by-laws. He did continue to file documents with the State of Georgia as the corporation’s Chief Financial Officer, but that was a misnomer. He never controlled financial matters for Fresh Solutions, Inc. from the time Jonathan Scott Green joined the corporation. Whenever he signed checks for the corporation or allowed his signature to be used for that purpose, he did so as a matter of convenience and at the direction of others.

At first this argument appears compelling. Historically, the Department of Agriculture has employed a strict reading of the PACA's language to determine who is subject to its licensing and employment restrictions as a person "responsibly connected" to a licensee that violated section 2 of the PACA. When its determinations were appealed to United States Circuit Courts, the Department argued that the plain meaning of the statute was unambiguous, and it proposed a *per se* rule that was adopted by various circuits other than the District of Columbia Circuit. See *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966); and *Faour v. United States Dep't of Agric.*, 985 F.2d 217 (5<sup>th</sup> Cir. 1993). Under the *per se* rule, an individual was found to be responsibly connected if he fit one of the stated statutory categories. *Norinsberg v. United States Dep't of Agric.*, 162 F.3d 1194, 1196 (D.C.Cir.1998). The District of Columbia Circuit, however, rejected this approach and determined that the language only created a rebuttable rather than an absolute presumption that an officer, director or holder of more than 10 per centum of the outstanding stock was responsibly connected to the corporation. *Quinn v. Butz*, 510 F.2d 743, 751 (D.C.Cir.1975); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 409 (D.C.Cir.1983); *Bell v. Dep't of Agric.*, 39 F.3d 1199 (D.C.Cir.1994).

The circuit split existed until 1995 when the Congress amended the definition of responsibly connected to 'permit individuals who are responsibly connected ... the opportunity to demonstrate that they were not responsible for the specific violation,' Perishable Agriculture Commodities Act Amendments of 1995, H.R.Rep. No. 104-207, at 11 (1995) .... According to the amendment, Agriculture must first determine if an individual falls within one of the three statutory classifications. If so, the burden shifts to the individual to demonstrate that he was not actively involved and that he was either only a nominal officer or not an owner of a licensee within the meaning of the statute.

*Norinsberg, supra*, at 1197. The 1995 amendment not only resolved the circuit split, it negated the harshness of the Department's unwavering strict application of the

PACA's responsibly connected definition to everyone who was unable to appeal an adverse Departmental determination to the District of Columbia Circuit. The Department's historically consistent use of a plain meaning *per se* interpretation of the PACA definition of responsibly connected gives strength to Mr. Cerniglia's argument that his resignation of all offices and his transfer of stock before the corporation's violations of the PACA, places him outside of all three classifications of an individual who may be determined to be responsibly connected.

However, in a recent case where an officer and director resigned and gave up his stock in a corporation prior to its violation of section 2 of the PACA, the Department nonetheless held that individual to be a responsibly connected officer on the basis that he had not effectively resigned as an officer in light of the actual duties he continued to perform. *Anthony L. Thomas*, 59 Agric. Dec. 367, 385-388 (2000).

The underlying Administrative Law Judge decision that the Judicial Officer affirmed, had found that although the petitioner described himself to be an employee with little or no responsibilities over the actions taken by the corporation and had, on January 10, 1997, resigned all corporate positions, returned his stock and assumed the duties of dock supervisor, he continued to appear on PACA records as president of the corporation, failed to inform the State corporations office or the PACA Branch that he had resigned as an officer and director, and performed duties far beyond that of a dock supervisor. The duties the petitioner performed after the date of his resignation through late June 1997 when he terminated his affiliation, included acting as president, signing an agreement to sell the corporation's accounts receivable in which he identified himself as president and secretary/treasurer and signing other significant corporate documents as president after

the date of his resignation. In addition he continued to be involved in significant day-to-day operations of the corporation that included issuing checks, entering into contracts and dealing with produce sellers seeking payments. *Thomas, supra*, at 375-378. On the basis of these findings, the Administrative Law Judge found that the petitioner served as either *de facto* or *de jure* president of the corporation from December 31, 1995 to late June 1997 (*Thomas, supra*, at 379), and concluded that he was responsibly connected during the entire violation period. *Thomas, supra*, at 382.

On appeal, the Judicial Officer discussed the petitioner's resignation as an officer in the context of the Administrative Law Judge's finding that he was not a nominal officer. *Thomas, supra*, at 385-388. The Judicial Officer agreed that the petitioner was not nominal because he did not meet the test most recently enunciated in *Maldonado v. Dep't of Agric.*, 39 F.3d 1086, 1088 (9<sup>th</sup> Cir. 1998) of being a person who "did not have an actual, significant nexus with the violating company during the violation period and, therefore, neither knew nor should have known of the corporation's misdeeds". The Administrative Law Judge had concluded that the petitioner did not meet this test because he held 49 per centum of the outstanding stock prior to January 10, 1997, and was directly involved in the corporation's day-to-day operations, having engaged in significant corporate activities. As part of this discussion, the Judicial Officer noted that: "... the ALJ found that Petitioner did not effectively resign as an officer on January 10, 1997, but continued to serve as president until he left ... in late June 1997." The Judicial Officer then stated: "The ALJ's conclusion that Petitioner had an actual, significant nexus to ... (the corporation) during the entire violation period is correct."



*Thomas, supra*, at 386. Accordingly, the Department employs the same test for whether an officer is merely nominal to determine whether an individual's resignation as an officer is effective. It is not effective if he continued to have an actual and significant nexus to the corporation during the period it violated section 2 of the PACA. The danger in this two-fold use of the same test is that it could lead to confusion respecting burden of proof. On the one hand, an individual who has been established to be an officer has the burden of proving that he was only a nominal officer who comes within the exception added to the PACA definition by the 1995 amendment. On the other hand, the initial and principal burden of proving an individual to be an officer who is subject to the PACA's responsibly connected provisions rest entirely with the Department.

The evidence in this case, however, clearly establishes that both before and after his resignation, Mr. Cerniglia held himself out to be and was in every sense the Chief Operating Officer of Fresh Solutions, Inc. As such he meets the test expressed in *Thomas, supra*, for an officer who, despite a tendered resignation, continues to be subject as a responsibly connected person, to the PACA's licensing and employment restrictions. Just as is the case when a petitioner argues that his officer status was only nominal, the activities performed and not the title held are controlling when deciding whether a petitioner effectively resigned as an officer and was no longer responsibly connected with an offending corporation.

As was the case in *Thomas, supra*, at 384-385, Mr. Cerniglia was in no sense like Mr. Maldonado who the Ninth Circuit found was not actively involved in his firm's failure to pay for produce. *Maldonado, supra*, 154 F.3d at 1088. Mr. Cerniglia did not lack either the education or the management experience to understand that the

corporation, as a PACA licensee, was violating basic statutory requirements. He is a college graduate with a lifetime of experience in the produce industry. In 1993, Mr. Cerniglia founded the underlying firm that became Fresh Solutions, Inc. At the end of 2001, he was the secretary and treasurer of Fresh Solutions, Inc. and held 29% of its outstanding shares of stock. He headed all of the corporation's produce matters from its inception until he left the corporation on February 23, 2004. In less than two weeks after he left, a petition under Chapter 7 of the Bankruptcy Act was filed. Though Mr. Cerniglia, as of January 1, 2002, transferred away his stock and resigned as a director of the corporation, he never ceased being its Chief Operating Officer. As such he resolved customer complaints and brought customer concerns to produce distributors. He spoke to unpaid produce dealers who told him they were not being paid. But he did nothing to stop the dissipation of the corporation's funds through the issuance of checks to persons other than unpaid produce sellers. From his past experience with his father's corporation when its PACA license was revoked for failing to pay produce sellers, he had personal and painful knowledge that the failure to make full and timely payments to produce sellers was a violation of Section 2 of the PACA that can lead to licensing and employment restrictions. But he did nothing to stop that from happening. Moreover, he continued to represent the corporation in official filings with the State of Georgia and the PACA Branch. He never advised either government entity that his status with the corporation had changed. He never advised produce sellers that there was any change in his status with Fresh Solutions, Inc. The corporate by-laws of Fresh Solutions, Inc. permit persons other than shareholders to be officers, and in most meaningful ways, Mr. Cerniglia continued to act as an officer after he transferred away his shares of stock and after his

recorded resignation. He signed a significant contract as Chief Operating Officer with an outside consultant to maintain the corporation's computers. He continued to permit his signature stamp to be used on checks that went to entities other than unpaid produce distributors. When his stamp was locked away and not conveniently available, he at times personally signed checks. These checks included payments to ASC, the outside computer consultant, whose president's wife would later go into business with Mr. Cerniglia's wife; a business that for a time would employ Mr. Cerniglia. Just before the period when produce distributors would go unpaid, approximately \$129,000.00 was transferred out of the checking account used to pay their bills, and instead was put into another corporate bank account over which Mr. Cerniglia had exclusive control.

The evidence of record conclusively shows that Mr. Cerniglia continued to serve as the Chief Operating Officer after January 1, 2002. He participated in corporate activities that were beneficial to him and detrimental to unpaid produce distributors. He had an actual, significant nexus to Fresh Solutions, Inc. during the entire violation period. Under *Thomas*, he therefore did not effectively resign but continued to be a *de facto* officer of the corporation when it violated Section 2 of the PACA.

For these same reasons, he was not a nominal officer as that term is used in the definition section of the PACA

Mr. Cerniglia's second argument that he was not responsibly connected because he was not actively involved with Fresh Solutions, Inc. is likewise refuted by the activities he performed during the violation period as the corporation's Chief Operating Officer. His functions were in no sense "ministerial functions only" under the test the

Department applies to determine whether an officer was “actively involved”. *In re Norinsberg, final decision on remand*, 58 Agric, Dec. 604, 610-611 (1999). Again, as in *Thomas, supra*, at 382-384, the fact that someone else decided which, and how much, produce sellers are paid does not mean an individual was not actively involved. Mr. Cerniglia was actively involved in that he executed significant contracts and was involved in other activities that enabled the corporation to buy produce from sellers who ultimately were not paid when he knew or should have known that their prompt and full payment was questionable.

The 1995 amendment to the PACA also allows an individual to defend against a responsibly connected determination on the basis that the offending corporation was in actuality another person’s alter ego. Though Mr. Cerniglia has not raised this defense, respondent has addressed it. To be an alter ego of a corporation, a person must so dominate it as to negate its separate personality. *Thomas, supra*, at 391. Here, Morris Lewis, after becoming the 100% shareholder, still depended on Mr. Cerniglia and Jonathan Scott Green to run the corporation and his dependence continued throughout the violation period. Accordingly, Morris Lewis was not the corporation’s alter ego.

For these reasons, the following order is being issued.

### **ORDER**

It is hereby found that Joseph T. Cerniglia was responsibly connected with Fresh Solutions, Inc., a PACA licensee, when it committed willful, repeated and flagrant violations of section 2(4) of the PACA ( 7U.S.C. § 499b(4)).

This Order shall take effect on the 11<sup>th</sup> day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision and Order shall become final without further proceedings, 35 days after service hereof unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service.

Copies of this Decision and Order shall be served upon the parties.

Done at Washington, D.C.  
this 4<sup>th</sup> day of May, 2006

Victor W. Palmer  
Victor W. Palmer  
Administrative Law Judge