UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-05-001-3
	)	
PERFECTLY FRESH FARMS, INC.; PERFECTLY FRESH CONSOLIDATIONS, INC.; and PERFECTLY FRESH SPECIALTIES, INC.,	)	
	)	
Respondents	)	
	)	
	and	
		PACA-APP Docket No. 05-0010-15
	)	
JAIME O. ROVELO; JEFFREY LON DUNCAN; and THOMAS BENNETT	)	
	)	
Petitioners	)	

DECISION

In this decision involving nine consolidated cases, I find that Perfectly Fresh Consolidation, Inc., Perfectly Fresh Farms, Inc., and Perfectly Fresh Specialties, Inc., each committed willful, repeated and flagrant violations of the Perishable Agricultural Commodities Act. I further find that Jaime Rovelo was responsibly connected with each of the above three companies; that Jeffery Lon Duncan was responsibly connected to Perfectly Fresh Consolidation, Inc., but was not responsibly connected to Perfectly Fresh Specialties, Inc. ; and that Thomas Bennett was responsibly connected to Perfectly Fresh Farms, Inc.

Procedural History

On October 1, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("Complainant"), filed separate disciplinary complaints against Perfectly Fresh Consolidation, Inc. ("Consolidation"), Perfectly Fresh Farms, Inc. ("Farms"), and Perfectly Fresh Specialties, Inc, (Specialties"). Each complaint alleged that the respondent had committed willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act ("Act"), 7 U. S. C. §§ 499a et seq. by failing to make full payment promptly to sellers of perishable agricultural commodities. Each respondent had received a PACA license which had expired subsequent to the date of the alleged violations. Each respondent had filed a voluntary bankruptcy petition after the date of the alleged violations and before the filing of the complaints.

In particular, the three separate complaints alleged that Consolidation, during the period November 17, 2002 through February 15, 2003, failed to make full payment of the agreed purchase prices promptly to 24 sellers in the total amount of $373,944.19 for 286 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce; that Farms, during the period October 27, 2002 through February 21, 2003, failed to make full payment of the agreed purchase prices promptly to 14 sellers in the total amount of $442,023.12 for 142 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce; and that Specialties, during the period November 1, 2002 through February 20, 2003, failed to make full payment of the agreed purchase prices promptly to 28 sellers

in the total amount of $263,801.40 for 796 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce.

The complaints were finally served on each of the three respondents on May 22, 2006.[1] Each respondent answered on June 8, 2006, denying the commission of any alleged violations.

Meanwhile, on June 1, 2005, Bruce W. Summers, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Services, USDA, issued six letters informing three individuals that he was finding that they were responsibly connected to one or more of the respondent corporate entities at the time the alleged violations that were the subject of the disciplinary complaints were committed. Thus, Jaime O. Rovelo was found by the PACA Chief to have been responsibility connected to each of the three corporate entities, Thomas Bennett was found to be responsibly connected to Farms, and Jeffery Lon Duncan was found to be responsibly connected to Consolidation and Specialties. Rovelo, Bennett and Duncan each filed a Petition for Review of each of the PACA Chief's responsibly connected determinations. Eventually, the three disciplinary cases and the six responsibly connected cases were consolidated for hearing pursuant to Rule 1.137 of the Rules of Practice. Following the deployment of Judge Davenport to Iraq, I re-assigned the matter to myself.

I conducted a hearing in these consolidated cases in Los Angeles, California, on September 24-27, 2007. Christopher Young-Morales, Esq. and Tonya Keusseyan, Esq. represented Fruit and Vegetable Programs, AMS, Complainant in the disciplinary

[1] Judge Peter M. Davenport granted Complainant's motions for default decisions with respect to Consolidations and Specialties on March 31, 2005, and subsequently vacated his decision via an order dated April 19, 2006 upon discovery that the original complaints with respect to those two parties were not properly served. Pursuant to his order, the three respondents were served/re-served.

proceedings and Respondent in the responsibly connected proceedings. Christopher S. Bryan, Esq., represented the respondents in the disciplinary proceeding and Petitioner Duncan in his responsibly connected hearing. Douglas B. Kerr, Esq., represented Petitioner Bennett in his responsibly connected hearing[2]. Petitioner Jaime O. Rovelo did not respond to any motions or orders after filing his initial petitions, and did not appear at the hearing.

Eight witnesses, including Petitioners Duncan and Bennett, testified at the hearing. Over 120 exhibits, as well as the six "official agency records" in the responsibly connected cases, were received in evidence. The parties filed simultaneous opening and reply briefs, with the final brief being filed on March 7, 2008.

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

[2] Subsequent to the hearing, Jonathan Barry Sexton also appeared on behalf of Petitioner Bennett.

> 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.

When the Secretary of Agriculture determines that a "merchant, dealer or broker has violated any of the provisions of section 499b of this title"

> the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

The regulations define "full payment promptly" and illustrate the default rule for defining prompt payment and when deviation from the default is acceptable.

> (aa) Full payment promptly is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:
>
> (5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;
>
> (11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": Provided, that the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

The Act also imposes on every licensee the duty to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business." 7 U.S.C. § 499i.

In addition to penalizing the violating merchant, dealer or broker, 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).

Facts

The Investigation

Upon receiving notification that four related companies, Specialties, Farms, Consolidated, and Perfectly Fresh Marketing, Inc (which was also known as Perfectly Fresh Florals, LLC), had filed for bankruptcy, the PACA Branch assigned Senior Marketing Specialist Mary Kondora to investigate whether violations of the PACA had occurred. By the time she began her investigation in April 2003, the companies had all ceased doing business, and much of the assets of the companies had been purchased by another company, Hidden Villa. In late April Ms. Kondura spoke to Phil Brundt, the

chief financial officer of Hidden Villa and he informed her that Hidden Villa was in possession of all documents of the four companies. Tr. 33-35, 163. Ms. Kondura faxed him a Notice of Investigation (CX-5) and traveled to Los Angeles in early May to meet with Mr. Brundt. He directed her to 50 boxes of records stacked on two pallets in the corner of a cold room, Tr. 43, and she proceeded to review and copy the accounts payable for the four companies. Id. She conducted an exit interview with Gary and Erin Tice, who were officers in each of the corporations, and Gary Tice indicated to her that the companies owed a total of about $1.2 or $1.3 million in produce debt. Tr. 46-48.

Ms. Kondura examined a large number of invoices and matching vouchers, which generally indicated that one of the three respondent companies had purchased the produce in question.[3] She prepared a "no-pay" table for each of the three companies.[4] According to her tables, Farms owed 14 creditors a total of $442.123.12 for 142 lots of perishable agricultural commodities (CX-01-7); Consolidation owed 24 creditors a total of $373,944.19 for 286 lots of perishable agricultural commodities (CX-02-07); and Specialties owed 28 creditors a total of $263.801.40 for 796 lots of perishable agricultural commodities (CX-03-7). She also compared her lists to Schedule F of the consolidated voluntary bankruptcy filing made on behalf of those companies, and found that the amounts in the Schedule F were generally equal to or greater than the amounts included in her list with respect to those creditors. Tr. 131-132.

Ms. Kondura also secured written sworn statements from a number of the creditors to document that the transactions she cited were sold in interstate or foreign commerce. Tr. 189-195. She verified with these creditors that the amounts listed in the

[3] The large majority of the Complainant's exhibits consist of these paired invoices and vouchers.
[4] There were no apparent unpaid invoices under the name of Marketing/Florals.

vouchers were still unpaid before she prepared her no-pay list. Tr. 186-187. She also indicated that these creditors generally believed they were dealing with an entity they called "Perfectly Fresh" and did not realize the existence of the individual corporate entities. Tr. 184-186.

Ms. Kondura also testified that each of the three respondents had its own PACA license and each filed its own separate tax return.

A follow-up investigation conducted by Senior Marketing Specialist Josephine Jenkins confirmed that as of July 25, 2007, each of the three entities still owed significant amounts of produce debt to the creditors listed in the complaint, and that approximately 52% of the amount recognized and owed at the time of the approval of the order allowing the PACA Trust Claims at the conclusion of the bankruptcy proceedings remained unpaid.

Formation and Organization of the Perfectly Fresh Companies

In June 2001, Gary Tice, who had a long and successful career in the produce industry, started Perfectly Fresh Marketing, LLC (Marketing) with Jeffery Lon Duncan, who had been in the produce business for about fifteen years. Tice had expertise in managing and owning businesses, and had more recently helped other companies he worked for with strategic planning and with modernizing their business techniques. Tr. 295-300. In 2000-2001 he worked as a consultant for Fresh Point, where he met Respondent Duncan, whose principal job involved servicing the produce needs of cruise lines. Tr. 300-301. They worked together on special projects involving inventory and purchasing. While Tice had been a manager for many years, Duncan did not, in Tice's opinion, perform managerial duties, although he thought Duncan's managerial skills were

"quite adequate." Tr. 305-307. Tice wanted Duncan as a partner to take advantage of his sales skills with cruise lines, while Tice was working on developing a relationship supplying tomatoes to Taco Bell. Tr. 307-309. Marketing's PACA license indicated that 51% was owned by Tice, Inc., which was a company developed by Tice and his wife, Erin Tice, and that 49% was owned by Duncan. Tice testified that he managed the day to day accounts payable and receivable with Duncan. Tr. 309.

In July 2002, the operating agreement of Marketing was amended and three new related companies were created. RX 13. The allocation of ownership shares was changed to reflect the addition of a new partner, Perfectly Fresh, LLC, with a 50% equity share in Marketing, while Tice, Inc. now owned 30% and Duncan now owned 20%.[5] Perfectly Fresh, LLC was owned by John Norton, who was planning to invest approximately $2 million in the new operation, principally to make improvements on the facility and to fund the new companies until they became profitable. Tr. 317-320, 330. John Norton was granted preferred member status, in that his capital investment would be returned to him before capital was returned to the other investors. RX 13, p. 5, paragraph 3.4, Tr. 328. Gary Tice testified that the plan to set up the three operating companies was devised by himself, Duncan, and attorney Steve Calvello. Tr. 325.

Specialties was formed on July 18, 2002 and received PACA license 021539. CX-03-3. That license indicates that Marketing owned 90% of Specialties. The license does not account for the remaining 10% ownership. Respondent Duncan is listed as the Chief Financial Officer and as a director, Gary Tice is listed as Secretary and director, and Erin Tice is listed and President and director. Specialties was set up to sell produce

[5] However, documents filed with the four companies' bankruptcy documents indicated that Duncan owned 49% of Marketing/Florals.

directly to supermarkets, including large supermarket chains such as Ralph's and Safeway. Tr. 336-338.

Consolidation was the second company formed on July 18, 2002 and received PACA license 021540. CX-02-3. The license indicates that Respondent Duncan owned 10% of the stock in Consolidation, and was President and a director; that Marketing owned 90% of the stock, with Gary Tice as the Secretary and a director, and Erin Tice as the Chief Financial Officer and a director. The purpose of Consolidation was basically to sell to cruise lines, carrying on and expanding the same type of business that was Duncan's forte.

Farms was the third company formed on July 18. 2002 and received PACA license 021541. That license indicated that Marketing owned 90% of Farms, and that Tom Bennett owned the remaining 10%, and was the President and a director. Gary Tice was listed as Secretary and director, and Erin Tice was listed as Chief Financial Officer and director. Farms was particularly involved in establishing grower relationships, such as an exclusive agreement to distribute papayas grown by Hawaiian Pride. Tr. 615.

There was a general understanding that the four companies were to be run as one entity, with Marketing essentially managing the overall operations, and the three other entities handling sales, each in its own sphere of specialization. Tr. 320-322. Tice indicated that the management of Marketing was generally under his control, although Norton had some control. Tr. 413-414. Tice, Bennett and Duncan all considered that the three respondents were sales entities, with Marketing handling all the operations including the purchasing; Marketing would buy all the produce and transfer it to the appropriate company; Marketing leased all the warehouse space; and Marketing handled

the receiving when produce arrived at the warehouse. Tr. 354-358. None of the entities ever held a board meeting. Tr. 387.

It appears that customers knew of the companies as "Perfectly Fresh" and were not aware that in reality four different companies existed. The accounting and payment systems were designed by Rovelo with input from Tice, and generally checks from customers went first into the individual companies bank accounts, but were then transferred into Marketing's account to keep the other accounts at a virtual zero balance. Tr. 366-369. According to Tice all the purchasing was done by Marketing, even though the accounts payable documents examined by Ms. Kondura and admitted into evidence generally linked each purchase to a specific company, and even though the produce payables listed in the schedules filed with the bankruptcy court generally matched up with those same records, in terms of which company purchased which lot of produce. Tr. 354.

Shortly after John Norton entered the scene and the new companies were formed, Norton placed Jaime A. Rovelo as the head of the accounting department and Chief Financial Officer for all four entities. Tr. 372-377. Although the PACA licenses indicate otherwise, Tice testified there was no CFO before Rovelo, and that Rovelo wrote all the checks for the companies on a day-to-day basis, and that Rovelo reported to Tice, not to Duncan or Bennett. Id. Until the businesses began to collapse in December, Rovelo made the decisions on who to pay; subsequent to that date those decisions were made by Tice.

Apparently John Norton, the principal financial resource supporting the expansion of the companies, was seeking to compete against Reddy-Pac, a large supplier of produce

to chain stores. Norton apparently had some issues with Reddy-Pac and its CEO, and apparently getting back at Reddy-Pac was a significant aspect of his motivation for investing in Perfectly Fresh. Tr. 317-320, 330. Further, Erin Tice, the spouse of Gary Tice, was an officer with Reddy Pac and came over to Specialties (and became a co-owner of all four companies as a result of her co-ownership of Marketing with her husband) with the idea of using her personal relationships with Reddy-Pac clients to bring those customers over to Specialties. Tr. 336-338. When she joined Specialties, Reddy-Pac became concerned that the employees she had managed there would move with her, and attempted to get them to sign contracts. Specialties ended up hiring 15 or 16 Ready-Pac employees to work this aspect of the business, even though they had planned to hire employees at a much slower rate as the business expended. Tr. 336-338.

At around the same time, the entire warehouse where Marketing had rented a small amount of space became available, and Marketing took that over. Much of the money Norton invested was devoted to improving the warehouse. Tr. 331-333.

The Short Road to Bankruptcy

The collapse of the Perfectly Fresh entities was swift, barely 5 months having elapsed between the time the respondent companies starting doing business and the bankruptcy filing. Ready Pac filed suit against Norton and the Tices for tampering with their employees.[6] According to Tice, the CEO of Ready-Pac was seeking to bankrupt Perfectly Fresh, Tr. 343. During the litigation, which was settled in November, 2002, Norton decided that he wanted to be treated as a lender, rather than as an owner/shareholder. Tr. 343-345.

[6] The litigation, while frequently mentioned, was never officially documented in the record, so the descriptions are solely based on the testimony at the hearing.

With funding from Norton stopped as of November, Tice began an effort to attract additional investors. Tr. 349. He was never able to get to the point of serious negotiations. He felt the companies were still in good financial condition at the end of November, with Consolidation doing particularly well. Tr. 349-350. However, in December, with no new funding coming in and Farms having significant problems due to issues with Hawaii Pride, it became difficult to pay debts. Id. Tice testified that at first Rovelo made the decisions as to which creditors should be paid, but that sometime in December he made all those decisions on his own. Tr. 380-381. He further testified that Respondents Bennett and Duncan had no role in deciding who would be paid. Id.

With no funding immediately at hand, Tice retained bankruptcy counsel on behalf of all four Perfectly Fresh entities on January 31, 2003 (RX 2), and the companies filed for bankruptcy a few days later[7]. The same day (February 3), the four companies moved that their separate bankruptcy petitions be consolidated for "joint administration." RX 4. There is no evidence that Bennett or Duncan participated in any aspect of the bankruptcy filings, and most of the bankruptcy documents were signed either by Gary Tice or Jaime Rovelo.

As part of the bankruptcy filing, Farms, Specialties and Consolidation each filed a "Schedule F, Creditors Holding Unsecured Nonpriority Claims." These schedules included both produce and non-produce payables. Every one of the creditors listed in the three disciplinary complaints is listed in the corresponding Schedule F, in an amount equal to or less than that alleged in the complaint to be unpaid.

[7] Shortly before filing for bankruptcy, Marketing transferred its operations to Florals, based on advice from counsel. Tr. 354.

In filing for bankruptcy, Tice indicated that he thought all the creditors would be paid off from the proceeds of the bankruptcy auction, but the attorneys representing the creditors negotiated for a 60% cash payment of the amounts owed. Tr. 405-409. Tice also stated, in a letter to Ms. Kondora (RX 1, p. 5):

> The employees of our company and our other principals should not be held responsible for the results of not paying for our produce within terms, it was not their decision as I had taken control. Lon Duncan, Erin Tice, Tom Bennet[t], and our employees conducted business as I directed and it would be very unfair if actions where [sic] taken against them as individuals. The only other persons having a final say in the ultimate outcome of Perfectly Fresh was John Norton and the attorneys of Rynn & Janowsky.

The Petitioners in the Responsibly Connected Cases

1. Jaime Rovelo—After filing his three petitions to review the determination of the PACA Branch Chief that he was responsibly connected to each of the respondents in the disciplinary cases, Mr. Rovelo had no further contact with the Hearing Clerk's office and did not file any other documents in this matter. After he filed his petitions, Rovelo apparently relocated without notifying the Hearing Clerk, and without leaving a forwarding address. He did not participate further in the proceedings. Since the petitioner carries the burden of proof in a responsibly connected proceeding, and since no evidence was presented that would indicate that Rovelo was not responsibly connected to the three companies, I must find, if I find in favor of Complainant in the disciplinary cases, that Respondent Rovelo was responsibly connected to the three companies. In any event, the evidence demonstrated clearly that he was: the Chief Financial Officer of each of the three respondents in the disciplinary case; the individual who set up and administered the accounting system and signed the great majority of checks; a participant

in many of the decisions as to whom to pay when money became tight; and he was the signatory of many of the bankruptcy related documents. Tr. 372-381.

2. Jeffery Lon Duncan—Respondent Duncan is a high school graduate who has been working in the produce industry since 1986. Tr. 703-706. He had a variety of jobs in the industry and gradually became a specialist in cruise line sales, a very exacting business given that ships are in port for a very short time, and are more demanding than other customers. Tr. 708-710. He testified that he had no managerial responsibilities before he joined up with Tice. Tr. 706. He was a participant in Perfectly Fresh Marketing, LLC, when it was first organized, and was an officer, director and 49% shareholder in the company. After the operating agreement was amended in July 2002, Duncan's ownership share was reduced to 20%. He testified that even though he was listed as supplying capital for several companies, he did not actually put up any money. Tr. 898. He basically indicated that his work at Perfectly Fresh, both when it was only Marketing, and then later when he was put in charge of Consolidation, was the same work that he had been doing earlier—selling to cruise lines. Tr. 850-851.

Duncan indicated that he had many discussions with Tice before they decided to join forces and form their own company, and that he was impressed with Tice's vast knowledge and success in the produce industry. Tr. 715, He stated he was not involved in filing for the PACA licenses, either for Marketing or Consolidation, and that basically he was not involved with keeping the books or managing the warehouse or the employees. He did write some checks, but most of the check-writing was handled by Tice. Tr. 833-840.

Duncan did not have any role in bringing Norton into the picture, although the modified business plan, including the decision to set up the three new corporate entities was discussed with him. Tr. 833-834. He understood that Norton was going to invest substantial funds in the companies and become a partner in Marketing. Id. He did not recall being involved in any discussions concerning the amended operating agreement that he signed in July, 2002, stating that he probably perused it. Tr. 846. He did not have any role in the plan to take over the Ready-Pac business, but he did know about it. Tr. 853-854. When Ready-Pac filed suit, neither Duncan nor Bennett was a party to the litigation. Tr. 856-857.

While he testified that his role in Consolidation was not managerial, but was essentially to continue the cruise produce sales business he had been working on before he came to Perfectly Fresh, he would have received more money, as a partial owner, if Consolidation was profitable. Tr. 865. In fact, it appears that his end of the business was profitable, and that Consolidation's profits were used in effect to subsidize the other companies. Tr. 899-900. He did have check signing authority, but apparently signed only one check in October 2002, prior to the period covered by the complaint, probably because no one else was around. Tr. 951.

Duncan first became aware that his suppliers were not getting paid in a timely manner in December 2002 or January 2003. Tr. 890. He said when he received a call about late payment, he would get the invoice and bring it to Rovelo and tell Rovelo to take care of it. He did not write the checks himself. Rovelo told him that creditors were not getting paid due to lack of money caused by overhead, and that Gary Tice told him that he was working on other investors and reassured him that he would find the

investors. Tr. 890-892. He had no role with respect to the decision to file for bankruptcy or the actual filing of bankruptcy papers.

3. Thomas Bennett—Respondent Bennett had been in the produce industry for 42 years at the time of the hearing. He had known Gary Tice on a professional level for 25 years. Tr. 1085-1086. When Bennett was running Francisco Distributing as General Manager, Tice (actually Marketing) was renting some office space from Francisco. Tr. 1037-1039. When Fresh America, the company that owned Francisco, decided to close down the Los Angeles Division, and Bennett was basically told to shut down the company, he told Tice that the building was going to be available, and Tice successfully negotiated with the landlord for lease of the warehouse space. Tr. 1037-1038. After that, Tice offered him the position as President of Farms, along with a ten percent ownership interest in the company. Tr. 1039. Bennett did not pay anything for the shares, and stated that he was basically just involved in sales, and that the title of President was just to allow him to deal with a higher level of personnel at the companies to which he would be selling. Tr. 1039.

He said he considered the Tices to be his immediate supervisors, Tr. 1042. When the Farms corporation was being formed, he basically signed all the documents that he was told to sign, without negotiating. Tr. 1044. He did not believe he had check signing authority and testified that he had never signed a check on behalf of Farms[8]. Tr. 1045. When he saw empty cooler space at the warehouse, he started a storage facility where outside shippers could bring their produce to Los Angeles and store it in the warehouse, and spent most of his time working with the rental clients. Tr. 1041-1042.

[8] However, he did in fact sign a card authorizing him to write checks. Bennett RC 23.

He stated that he did not recall having any involvement in the obtaining of the PACA license for Farms, did not know of Norton's involvement until a few months after he began working for Farms, and did not really understand how the accounting system worked or how the vouchers and invoices were coordinated. Tr. 1048-1049. He began hearing about slow payment issues from his salesmen in December; when he would go to Tice or Rovelo. He was told not to worry and that the receivables would catch up. Tr. 1049-1050. He thought he could probably have found out more about the financial condition of the company had he asked, although he did not have access to the accounts of the entities other than Farms and was not told about them. Tr. 1050.

When it became evident to him that the business was not doing well, he sensed that it was time to leave. Tr. 1055. He suggested to Tice in early January that it was time for him (Bennett) to resign. Tr. 1056-1057. He stated that he resigned orally but that he subsequently wrote a letter to Tice attorney asking that his name be removed from all corporate documents.[9] Tr. 1058. He stated that he was concerned for his reputation and did not want to be part of a sinking ship. Tr. 1056-1057.

Discussion

I. Each of the three Respondents has violated the Act by failing to make full payment promptly to sellers of perishable agricultural commodities.

With respect to the disciplinary counts, Complainant has introduced numerous documents Ms. Kondura discovered in well-organized boxes clearly identified as payables, and which generally contained matching invoices and vouchers confirming the existence of each of the debts alleged in the complaint. Further, Complainant introduced bankruptcy schedules, prepared by the three disciplinary respondents, which confirmed

[9] However, he testified that he did not have a copy of that letter.

that these (and other) debts existed at the time they filed for bankruptcy. In each of their answers, respondents admitted that they filed the bankruptcy scheduled referred to by the complaints, but also denied each and every allegation that they had failed to make full payment promptly to the sellers of the produce. The respondent companies contend that the allocation of debts among the companies was essentially an artifice and that all the debts were actually incurred by Marketing/Florals, which is not a party to this action. For the reasons discussed below, I reject the notion that the debts were not incurred by each of the respondent companies, and find that Farms, Consolidation and Specialties each violated the PACA by failing to make full payment promptly for produce as listed in the three complaints.

1. The companies' own records clearly establish the unpaid debts. Each of the respondent companies had clearly marked accounts payable files containing linked invoices and vouchers establishing the purchase of produce. While the invoices generally indicated that the produce was sold to "Perfectly Fresh," the corresponding vouchers identified which of the entities was considered the purchaser of the produce. In most cases, the quantities of the produce and the dollar amounts involved matched up. Respondents are put in the peculiar position of denying the validity of their own records.

Gary Tice, who was clearly the single person most responsible for setting up and operating the three Perfectly Fresh respondents, admitted in a May 16, 2003 letter to Ms. Kondura that from September 1, 2002, when the operations of the three respondent companies started, Marketing did none of the actual buying and selling of produce. RX 1. This was inconsistent with his attempts at the hearing to explain away this statement, and his contention that Marketing did all the buying and the other operations did all the

selling. No explanation for this glaring inconsistency was offered other than Tice's blanket statement that in reality Marketing "incurred all debts." Since this statement is flatly inconsistent with Tice's letter and the documentary evidence gathered by Ms. Kondura, it is not entitled to much credibility. Indeed, the written statement, prepared a month after Tice met with Ms. Kondura, is more consistent with the large majority of evidence received at the hearing.

The testimony of both Respondents Bennett and Duncan also supports the contention that the entities they ran were not making full prompt payments. Thus, Respondent Bennett testified that he was made aware by his salesman in early December that some of Farms' customers were not getting paid on time; he inquired of Tice, and sometimes Rovelo, and was told not to worry, and that receivables would catch up with payables. Tr. 1049-1050. Similarly, Respondent Duncan began receiving calls from the creditors that he dealt with complaining about slow payments in December and January; he would get the invoice and give it to Rovelo and tell him to take care of it. Tr. 890-892.

One of the principal arguments made by counsel for the respondents, and for Petitioners Duncan and Bennett, is that the law firm handling the bankruptcy advised Tice and Rovelo to associate payables with receivables for each of the three entities, Tr. 402-403, because they could not have "one company with nothing but debt and three companies with nothing but assets, and it was just as I recall, it was a way to be able to put the asset to the debt." Tr. 461. Tice's testimony in this regard is simply not credible. Other than his unsupported statements, the evidence shows that the bankruptcy law firm was retained on Friday, January 31, 2003, and that the bankruptcies were filed three days

later. If Respondents are trying to imply that over that weekend an entire voucher system was created along with the more than one thousand vouchers that were linked with the pre-existing invoices, they are entirely unpersuasive. Tice's uncertain and entirely unconvincing testimony in this regard is directly contradicted by the existence of these linked documents, which clearly establish that for each unpaid invoice there is a voucher that indicates which of the three respondent entities purchased the produce for which full timely payment was not forthcoming.

Thus, the accounts payable documents of each of the three respondent companies establishes that, at the time of the investigation conducted by the PACA Branch, each company had outstanding produce debts as alleged in the complaint.

2. The bankruptcy filings, while not necessarily dispositive, constitute persuasive evidence of the validity of Complainant's claims, particularly when they are confirmed by the voucher/invoice system of each respondent. The filings were signed under penalty of perjury. Respondents' arguments that the bankruptcy filings, particularly Schedule F, do not constitute admissions of the existence of the listed debts, or that they indicate that Marketing and not the entity filing the Schedule F actually incurred the debt are unconvincing and inconsistent with what the documents demonstrate in black and white and under oath. Moreover, these arguments are inconsistent with established Agency precedent holding that documents filed in bankruptcy proceedings may constitute an admission against the interest of the filing party.

The fact is that the creditors listed as holding unsecured claims in each of the Schedule F's are remarkably similar to the creditors listed in the accounts payable. Further, in each of their answers, Respondents admitted the allegations of paragraph IV

of the complaint, which alleged, e.g., that "Respondent admits in its bankruptcy schedules that all 28 sellers listed in paragraph III of this complaint . . . hold unsecured claims for unpaid produce debt totaling of $263,801.40. In the case of each of the 28 sellers listed, the amounts identified in the bankruptcy schedules for unpaid produce debt are greater than or equal to the amounts alleged in paragraph III of this complaint[10]. . ." While this would appear to present an open and shut case,[11] Respondents, in their answer, also denied the allegations that they failed to make full payment promptly. Although Respondents contend otherwise, I find that the admissions in the bankruptcy filings do constitute an admission that these debts for produce did exist at the time of the filings, and that their denial in their answers of the allegations regarding making full payment promptly are in fact inconsistent with their admissions.

Documents filed in bankruptcy cases which list creditors holding unsecured nonpriority claims for the sale of perishable agricultural commodities are deemed admissions in PACA proceedings. In re: Samuel S. Napolitano Produce, Inc., 52 Agric. Dec. 1607, 1610 (1993); In re. Five Star Food Distributors, Inc., 56 Agric. Dec. 880, 8894 (1997), In re: Coronet Foods, Inc., 65 Agric. Dec. 474 (2006). Respondents contend that these and other cases cited by Complainant are distinguishable because only a single entity was involved in the cited cases, and do not apply when there are multiple entities involved, and that application of these rulings to a situation where multiple entities have allocated their debt would be an unwarranted "dramatic extension of the law." (reply br., pp. 3-5). However, I agree with Complainant that the cases actually do

[10] I am quoting the Specialties complaint, but the same language, other than the number of sellers and the total indebtedness, is in all three complaints, and the response is the same for all three answers.
[11] Complainant filed a Motion for Expedited Decision Without Hearing in the consolidated cases on this issue.

support a finding that when a bankruptcy filer acknowledges the existence, under oath, of certain debts, then they have admitted that those debts exist and generally cannot deny them in subsequent proceedings.

Likewise, I reject the notion, raised by respondents and Petitioner Duncan in their reply brief (pp. 3-6) that the statement in each Schedule F that "Creditors listed on the attached sheets with an asterisk are creditors who may have statutory trust interests in the receipts generated by the operation of the debtor's business pursuant to . . . [the PACA]" constitutes "clear" evidence that the produce creditors listed in the schedule were not creditors of the respondent who listed them as a creditor. Just because those who sold produce to the various entities generally thought they were selling to "Perfectly Fresh" and might not have known there were separate entities does not change the fact that the purchases were in fact made by the specific entities and recorded as such in the entities own books. Similarly, the fact that the cases were consolidated at respondents request for ease in administration in the bankruptcy court was obviously nothing more than a procedural matter; if the court considered it an indicator that the bankruptcy schedules filed with by respondents meant something other than they plainly indicated, such a finding by the bankruptcy court is not anywhere in the evidence submitted in these consolidated matters.

3. I also find that there is considerable merit to the assertion, raised by Complainant in its reply brief, that respondents should be estopped from claiming that their own records, and particularly their own bankruptcy filings, have a meaning quite the opposite of what they indicate on their face. "The doctrine of judicial estoppel bars a party from asserting a position that is contrary to one the party has asserted under oath in

a prior proceeding, where the prior court adopted the contrary position "either as a preliminary matter or as part of a final disposition." Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir.1990). Judicial estoppel is an "equitable doctrine meant to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." Id. Judicial estoppel, however, should be applied with caution to "avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement." Id.

In New Hampshire v. Maine, 532 U.S. 742 (2001), the United States Supreme Court laid out the three principal factors a court must examine to determine whether judicial estoppel should apply. "First, a party's later position must be 'clearly inconsistent' with its earlier position." Id., at 750. I find that the respondents' position in the disciplinary case—that all the debts were incurred by Marketing—is inconsistent with the bankruptcy filings where each of the companies acknowledged its produce debts. "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled.'" Id., citing Edwards v. Aetna Life Insurance, 690 F. 2d 595, 599 (C.A. 6, 1982). Here, if I find that all the debts were only owed by Marketing, and that the other entities are debt free, I would be making a finding utterly inconsistent with the documents respondents filed with the bankruptcy courts, as well as with the decision of the bankruptcy court itself. "A third consideration is whether the party seeking to

assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Id. Here, if I were to find that each respondent in fact did not owe creditors for purchases of produce, then they would not be liable for violations of the PACA, a position that would make it difficult for Complainant to ensure that it carries out its statutory mandate of policing the produce industry. Respondents cannot be allowed to list one set of creditors in the bankruptcy courts and totally repudiate that list in the current proceedings. This would undermine the integrity of the judicial process.

4. The violations were willful, flagrant and repeated. Respondents vigorously contend that even if there were violations, they were not willful or flagrant. However, the long-standing case law interpreting these terms makes it clear that the violations do meet the criteria of being willful and flagrant, as well as obviously being repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person "intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute," his acts are regarded as willful. In re. Frank Tambone, Inc., 53 Agric. Dec. 703, 714-15 (1994). In re. Scamcorp, 57 Agric. Dec. 527, 549 (1998). From the time it became apparent that they were having trouble timely paying their creditors in full, until they closed their doors for good, the fact that each of the three respondents continued to order and receive, and not pay for, produce, putting numerous growers and sellers at risk, establishes they were "clearly operat[ing] in disregard of the payment requirements of the PACA," Id., and have committed willful violations. Principals of the companies involved, including Tice, Bennett and Duncan, knew that payments were not being made in a timely fashion. Bennett and Duncan in

particular did little more than inquire of Rovelo and Tice concerning the status of their creditors, and took no actions to correct the situation. The fact that the companies were attempting to acquire a new investor, and appeared to be sincerely concerned about paying the creditors back in full does not alter the fact that their conduct, particularly the continued purchase of produce when they were already facing financial uncertainty, meets the definition of "willful" as previously construed under the Act.

Likewise, the conduct of respondents was flagrant as that term is used in the Act. In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. In re. N. Pugatch, Inc., 55 Agric. Dec. 581 (1995), In re Scamcorp, 57 Agric. Dec. 527 (1998). The number of violations (142 for Farms, 286 for Consolidation, and 796 for Specialties), the amount unpaid (over $442,000 for Farms, over $373,000 for Consolidation, and over $263,000 for Specialties) and the multi-month period over which these violations occurred establish that the violations were flagrant. Likewise, the large number of violations establishes that they were repeated.

5. The investigation was conducted in a proper fashion. Respondents attacked some aspects of the investigation, both in terms of methodology and thoroughness. The government investigation in this case followed the same general methodology employed in numerous other non-payment cases, and has been approved at the Agency level in Judicial Officer decisions as well as by the courts. Receipt by the PACA Branch of either bankruptcy or reparation filings is frequently a trigger for the commencement of an investigation. Respondents' contended in their reply brief that it was "amazing" for

complainant to rely on Ms. Kondura's findings to establish that the various respondents had entered into the transactions that are the subject of these consolidated matters because she had no first-hand knowledge of the companies' operations (reply br. at 8). Of course, such first-hand knowledge would have been somewhat difficult to obtain, given that the companies had ceased doing business by the time the investigation was commenced. Instead, Ms. Kondura ascertained the location of the records of the companies, painstakingly reviewed and copied records, determined that each unpaid invoice was linked with a voucher identifying the specific Perfectly Fresh company that purchased the produce, interviewed both Gary and Erin Tice, received letters from Gary Tice, contacted and prepared affidavits for a number of the creditors who confirmed that the purchases were made in interstate commerce and were still unpaid, and prepared no-pay tables indicating which creditors were not paid by the respective entity and in what amount. That the creditors she talked with did not necessarily know which Perfectly Fresh entity they were dealing with, or that they generally did not even know that there was more than one Perfectly Fresh entity, does not alter the fact that they confirmed that the particular Perfectly Fresh entity that they dealt with owed them money. This information, combined with each entity's own voucher and invoice records, and the filings made under oath with the bankruptcy court, strongly support the no-pay tables she created. There is no basis for a finding other than that Ms. Kondura's investigation was appropriate.

II. The Responsibly Connected Cases

A. Petitioner Rovelo was responsibly connected to each of the three Respondent companies. Jaime Rovelo was notified by the PACA Branch Chief that he

was found to be responsibly connected to each of the three Respondent companies. In June 2005 he filed a Petition challenging all three determinations. Subsequent to that filing, Mr. Rovelo had no further participation in these proceedings, and did not notify the Hearing Clerk or any other participants in the proceeding. Since the burden of proof is on the petitioner in a responsibly connected case, and since Mr. Rovelo did not put on any evidence that would refute the PACA Branch Chief's determinations, I find that Mr. Rovelo was responsibly connected to Farms, Consolidation and Specialties.

B. **Petitioner Jeffrey Lon Duncan was responsibly connected to Perfectly Fresh Consolidation.** Petitioner Duncan, who was President, a board member and 10% direct shareholder in Consolidation (he was also a 20% shareholder in Marketing/Florals, which owned 90% of Consolidation, making him effectively a 28% shareholder in Consolidation) has not 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 10% shareholder of a violating licensee or entity subject to license. As the Petitioner, the burden of proof, by a preponderance of the evidence, lies with Mr. Duncan.

Mr. Duncan is a high school graduate who has spent his entire career, beginning in 1986, in the produce business. He was initially involved as a 49% owner of Marketing when that company was established, and signed off on the Amended Operating Agreement that changed the organization of that company on July 28, 2002 and reduced his share of ownership to 20%, with the addition of John Norton to the ownership team. In joining with Marketing, and in the decision to form the three additional companies, Duncan relied heavily on the expertise and experience of Gary Tice. Both Petitioner and

Mr. Tice portrayed Petitioner as somewhat naïve in the area of founding and managing a business. Petitioner testified that he signed whatever documents that Tice or Tice's attorney told him to sign, and that all he really did with Consolidation was to continue the business he was most familiar with—servicing the needs of cruise lines. He stated that he might have perused the amended agreement, but that he believed Tice and his attorney would not take advantage of him. Tr. 846-849. He was in his office most days, and basically managed the cruise business.

Under the new operating agreement, Duncan was appointed President of Consolidation, and a director, and was made 10% owner of the company. He testified that he never made any capital investment in Consolidation (or in Marketing), so that any documentation indicating that he had paid for his shares would be incorrect. He stated he would share in the profits once Consolidation became profitable. Tr. 865.

James Hinderer, a department head at Produce International who sold produce to Perfectly Fresh and dealt almost exclusively with Duncan, understood that Duncan was taking care of his own cruise accounts, and stated that Duncan had his own strong customer base. Hinderer also speculated that his company quit selling to Perfectly Fresh relatively early, but that he thinks they still got paid in full because Duncan "took care of us." Tr. 801. He speculated that Duncan "exerted pressure somehow" to keep the payments coming. Tr. 802.

When Consolidation creditors began complaining about slow payments in December or January Petitioner Duncan would get the invoices and give them to Rovelo and tell him to take care of the customer. Tr. 890-892. Even though he knew the company was not making payments promptly he continued working on his sales. Tr.

893-894. He indicated that he did not decide which creditors should be paid, but he did go to Rovelo with individual invoices and ask him to take care of things. No evidence was introduced at to whether Rovelo did in fact pay the customers that Duncan requested.

I find that Jeffery Lon Duncan was actively involved in matters resulting in violations of the Act. While he clearly was not principal decision maker for Consolidation, his participation in the day-to-day management of Consolidation, particularly including continuing to order produce after he knew Consolidation's creditors were not getting paid either fully or promptly, is sufficient to constitute active involvement. In In re: Michael Norinsberg, 58 Agric. Dec. 604, 608-609 (1999), the Judicial Officer held:

> A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

In particular, the buying and selling of produce at a time when creditors were not getting paid pursuant to the requirements of the Act has been held to constitute involvement in matters resulting in a violation of the Act. In re: Janet S. Orloff, et al., 62 Agric. Dec. 281 (2003). That Duncan had employees working under his direction who continued to carry on the business of ordering produce for Consolidation during this period, as evidenced by Consolidation's own invoice/voucher system and the filings in bankruptcy court, is further evidence of his participation in activities resulting in a violation of the Act. Basically, each of the unpaid obligations listed in Consolidation's own records and

in their bankruptcy filing constituted a debt incurred when Duncan was managing the sales operations of Consolidation. In this position, Duncan inherently exercised "judgment, discretion, or control" as those terms are used in Norinsberg. This is more than enough to constitute active involvement under the Act.

Even if Petitioner Duncan were to be found not actively involved in the matters that constituted violations of the Act, he failed to meet his burden of proving that he was only a nominal President, director and 10% owner of Consolidation. Respondent, whose entire 15 year career (as of the time Marketing was formed) was in the produce industry, voluntarily entered a business relationship with Gary Tice, an experienced businessman with expertise in the produce business, and elected to rely substantially on Tice's judgment and expertise. Duncan was hardly a novice in the business, and although much has been made of Tice's dominance in decision making matters, I find that Petitioner Duncan was not in the position of someone who is given a title with no expectation of working in the business. Someone who is listed as an owner because their spouse or parent put them on corporate records, and had no involvement in the corporation or experience in the produce business may be found to be nominal. Minotto v. USDA, 711 F. 2d 406, 409 (D.C. Cir. 1983), However, Petitioner Duncan was an experienced operator who entered partnership with Tice in order to earn more money when the business became profitable.

While originally a 49% owner of Marketing, Petitioner Duncan acquiesced in amending the operating agreement after Tice enlisted Norton's financial support to set up and fund the three new entities. As a result of the amended operating agreement, Duncan's share of Marketing was reduced to 20%, plus he was made President of

Consolidation with a 10% ownership stake. That he elected to rely totally on the representations of Tice and the attorney who drafted the amended agreement, only electing to peruse it rather than to fully inform himself of his potential rights and obligations, indicates that perhaps he was too trusting and naïve, but does not reflect on whether his ownership was nominal. Clearly, he could have objected to the new arrangement, or opted out of it, or at least attempted to have some say in the matter, particularly with respect to Consolidation where he was effectively a 28% owner. 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 (1998) and cases cited thereunder. Here, Petitioner knew he was a 28% stockholder in Consolidation, through his 10% direct ownership and his 20% ownership of Marketing, which in turn owned 90% of Consolidation. That he chose not to exercise the authority inherent in his three positions of President, director, and shareholder does not relieve him of the duty to do so, and does not sustain his claim that his position was nominal. He was no mere figurehead, but in fact ran the cruise business that Consolidation was set up to conduct. He had the authority to sign checks, although it is clear that with the exception of one check he signed shortly before during the violative period, he did not handle the check-writing duties[12].

C. **Petitioner Jeffrey Lon Duncan was not responsibly connected to Perfectly Fresh Specialties.** Unlike with Consolidation, where Duncan basically ran the day-to-day operations of the cruise supply business, Respondent Duncan had no apparent day-to-day involvement in Specialties. Specialties was considered the business of Erin Tice,

[12] He did not, contrary to the suggestion of Complainant, attend any meetings as a director.

who left her prior position with Ready-Pac to engage in a similar business running Specialties. Duncan had no direct ownership in Specialties, and owned 18% of Specialties indirectly through his 20% ownership in Marketing which owned 90% of Specialties. While he is listed as the Chief Financial Officer and a Director on the PACA application, it is undisputed that Jaime Rovelo acted as Chief Financial Officer during the periods when the violation was taking place, and that no board of directors meetings of Specialties ever occurred. There is no evidence that Duncan was even aware he was a director or the CFO of Specialties and, other than his indirect 18% ownership of the company, he appears to be truly a nominal owner as that term has been recognized in PACA decisions.

There is no evidence that Duncan ordered any produce on behalf of Specialties, and the record is overwhelmingly clear that he had no expertise in this specialized aspect of the produce business. Unlike the business of supplying cruise ships, where Duncan was unquestionably the expert and manager of the business, and where Duncan or those under his direction continued to order produce well after it was known to them that produce suppliers were not being paid fully and promptly, Specialties presents a situation where Duncan had no control over pertinent events. The employees at Specialties were all brought over by Erin Tice and had no demonstrable connection whatsoever with Duncan.

While Duncan did not oppose the creation of Specialties and was aware that many of Erin Tice's Reddy Pack employees were coming over to Specialties, he clearly had no power or authority over the situation given the fact that Gary Tice and Norton wielded the majority vote of Marketing, and that he had no knowledge or planned role in the

business. Basically, the fact that Duncan was only an indirect shareholder in Specialties, coupled with the fact that he never acted as, nor was aware of, his listed titles as CFO and director of Specialties, and the fact that he had absolutely no discernible role in the operation of that business supports a finding that he was only a nominal director, shareholder and officer in that company.

D. **Thomas Bennett was Responsibly Connected to Perfectly Fresh Farms**. Petitioner Bennett, who was a 10% shareholder, President and a director of Perfectly Fresh Farms, has not 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 10% shareholder of a violating licensee or entity subject to license. As the Petitioner, the burden of proof, by a preponderance of the evidence, lies with Mr. Bennett.

Petitioner Bennett had been in the produce industry for 42 years at the time of the hearing. He had built and sold a restaurant chain, had been a produce buyer for 11 years at Cisco, and then ran Francisco distributing for 11 years. He had known Gary Tice on a professional level. Tice (actually Perfectly Fresh Marketing) was leasing space from Francisco when Bennett was told that Francisco was closing down; Bennett told Tice that the whole building would be available, and Tice offered a position to him and some of the sales force that he had managed at Francisco. He was offered the position of President of Perfectly Fresh Farms, along with a 10% ownership share in the new company. He never actually put up any money nor did he ever see any physical manifestation of the shares he owned. He did sign a number of corporate documents when Farms started up, basically signing whatever documents Tice and Tice's attorney

told him to sign. He signed a card authorizing him to sign checks, although he had no recollection of that fact and there is no evidence that he ever signed a check.

While he classified his work at Farms as "kind of a glorified babysitting job," Tr. 1041, it is evident that he had a major role in the day-to-day business of Farms. He came in most mornings at 5 and checked the markets, mostly with regard to citrus, Hawaiian papayas and chilies. He stated that he was given the title of President to give him the apparent authority to call higher officials of potential clients. He did not generally contact clients, but the sales staff who worked for him did. When he realized that Farms had excess storage space, he started an outside storage business on behalf of Farms on his own, and spent more time working on that then on Farms' produce business. Tr. 1041-1042. He stated that he first heard about slow payments from his salesmen in December, and that he would go to Tice or Rovelo who told him not to worry. He testified that he probably could have found out more about the financial condition of Farms and the other companies had he asked. Tr. 1049-1050. David Hewitt, one of Farms former employees, confirmed that Bennett hired him (he was one of the Francisco employees that Bennett brought over) and was his manager, and oversaw the operations of Farms, although he also stated that Bennett apparently reported to others. Tr. 604-607, 612.

I find that Thomas Bennett was actively involved in matters resulting in violations of the Act. As the President of Farms, he managed the significant aspects of the business, as well as the outside storage business which he apparently pursued on his own initiative. While some of the transactions that resulted in failure to pay occurred after his apparent resignation,[13] a significant number of these purchases were made while he was serving as President of Farms. Like Petitioner Duncan, he allowed his employees to continue

[13] He stated he resigned in early January 2003 but there is no evidence supporting a specific date.

ordering produce even after he became aware that his customers were getting paid slowly, if at all. This, in itself, would constitute active involvement.

Even if Petitioner Bennett could be found not to be actively involved in matters resulting in violations of the Act, he would only avoid responsibly connected status if his positions as President, director and 10% shareholder in Farms were nominal. I find that his positions as President and 10% shareholder were not nominal as that term is used and interpreted in the PACA case law; I make no ruling on his position as director since it is not clear whether he even knew he was a director and there were no meetings of the board of directors while he was affiliated with Farms.

With his lifetime of experience in the produce business, Bennett was a knowledgeable and seasoned veteran, who should have understood the obligations that the PACA imposes upon a significant shareholder and officer in a produce company. Like, Duncan, he was hardly the type of unknowledgeable, powerless individual the court was contemplating in the Minotto decision. In fact, he alerted Tice that the building that Marketing was leasing some office space in was going to be vacated by Francisco, his then current employer. As a result of ensuing discussions with Tice, Bennett ended up as the President and 10% shareholder in Farms, and found immediate employment for many of the people who worked for him at Francisco, who would otherwise be terminated when that operation ceased. Such was the extent of his participation in the operation of Farms that, on his own, he sub-leased space on behalf of Farms to other produce businesses that were looking for storage space. This action in itself belies that he was

acting in a nominal capacity for Farms.[14] In addition, as a 10% shareholder, he was presumably in line to get a percentage of profits once Farms became profitable.

I am mindful that Petitioner Bennett played a lesser overall role with respect to Farms than Petitioner Duncan did with respect to both Consolidation and Marketing/Florals and that both Petitioners were rather gullible and trusting for individuals with their years of experience in the produce industry. However, neither Petitioner was able to demonstrate that they were not actively involved in the violative matters. And neither Petitioner was able to demonstrate that their roles as President and 10% shareholder (more, in Duncan's case) were nominal.

Findings of Fact

1. Perfectly Fresh Marketing, LLC (Marketing) was a California corporation established in June 2001 to engage in the produce business. Initially, 51% of the company was owned by Tice, Inc (which was owned by Gary and Erin Tice), and 49% was owned by Petitioner Jeffery Lon Duncan.

2. In July 2002, the operating agreement of Perfectly Fresh Marketing was amended so that 50% of the company was owned by Perfectly Fresh, LLC, a holding company controlled by John Norton, 30% was owned by Tice, Inc. and 20% was owned by Jeffery Lon Duncan. Gary Tice, John Norton and Jeffery Lon Duncan each signed the amended agreement on July 18, 2002.

3. Respondent Perfectly Fresh Farms, Inc. (Farms), a California corporation 90% owned by Perfectly Fresh Marketing and 10% owned by Petitioner Thomas Bennett, was

[14] In some areas, Bennett did not have much leverage, as when he tried to convince Tice to cease Farms' relationship with Hawaii Pride.

the holder of PACA license 20021541 from August 2002 until the license expired on August 21, 2003.

4. Between October 27, 2002 and February 21, 2003, Farms failed to make full payment promptly to 14 sellers of 142 lots of perishable agricultural commodities that were purchased, received and accepted in interstate commerce, in the amount of $442,023.12.

5. Respondent Perfectly Fresh Consolidation, Inc. (Consolidation), a California corporation 90% owned by Perfectly Fresh Marketing and 10% owned by Petitioner Jeffery Lon Duncan, was holder of PACA license 20021540 from August 2002 until the license expired on August 21, 2003.

6. Between November 17, 2002 and February 15, 2003, Consolidation failed to make full payment promptly to 24 sellers of 286 lots of perishable agricultural commodities that were purchased, received and accepted in interstate commerce, in the amount of $373,944.19.

7. Respondent Perfectly Fresh Specialties, Inc. (Specialties), a California corporation 90% owned by Perfectly Fresh Marketing (and whose PACA license did not account for the remaining 10% ownership) was holder of PACA license 20021539 from August 2002 until the license expired on August 21, 2003.

8. Between November 1, 2002 and February 20, 2003, Specialties failed to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities that were purchased, received and accepted in interstate commerce, in the amount of $263, 801.40.

9. Thomas Bennett was President and a 10% shareholder in Farms during much of the time period when Farms' was ordering produce and failing to fully and promptly pay for such produce. As of the date of the hearing he had been employed in the produce industry for 45 years. He was actively involved in the day-to-day operations of Farms throughout the period he was employed there. He signed numerous corporate documents and was involved in decisions consistent with a position of responsibility.

10. Petitioner Jeffery Lon Duncan was President and a 10% shareholder in Consolidation from the time the company was created through the time it filed for bankruptcy. He was also an owner of an additional 18% of Consolidation through his 20% ownership in Perfectly Fresh Marketing, LLC. As of the date of the hearing he had been employed in the produce industry for over 20 years. He was actively involved in the day-to-day operations of Consolidation throughout the period of its existence, signing numerous corporate documents, including the Amended Operating Agreement, occasionally signing checks, and was involved in decisions consistent with a position of responsibility.

11. Petitioner Jeffery Lon Duncan was not actively involved in the operations of Perfectly Fresh Specialties, Inc. during the time that entity committed violations of the PACA. Even though the PACA license application listed him as CFO and a director of Specialties, his role with that company, if any, was purely nominal.

Conclusions of Law

1. Respondent Perfectly Fresh Farms, Inc. has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to 14 sellers of 142

lots of perishable agricultural commodities in the amount of $442,023.12 between October 2002 and February 2003.

2. The appropriate sanction for Perfectly Fresh Farms, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations.

3. Respondent Perfectly Fresh Consolidation, Inc. has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to 24 sellers of 286 lots of perishable agricultural commodities in the amount of $373,944.19 between November 2002 and February 2003.

4. The appropriate sanction for Perfectly Fresh Consolidation, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations.

5. Respondent Perfectly Fresh Specialties, Inc. has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to 28 sellers of 796 lots of perishable agricultural commodities in the amount of $263,801.40 between November 2002 and February 2003.

6. The appropriate sanction for Perfectly Fresh Consolidation, Inc., since it is no longer in business, is publication of the facts and circumstances of its violations.

7. Petitioner Jaime Rovelo was responsibly connected to Perfectly Fresh Farms, Inc., Perfectly Fresh Consolidation, Inc., and Perfectly Fresh Specialties, Inc., during the time those three entities committed violations of the PACA. As such, he is subject to the licensing and employment restrictions of the PACA.

6. Petitioner Thomas Bennett was responsibly connected to Perfectly Fresh Farms, Inc., during the time Farms committed violations of the PACA. As such, he is subject to the licensing and employment restrictions of the PACA.

7. Petitioner Jeffery Lon Duncan was responsibly connected to Perfectly Fresh Consolidation, Inc., during the time Consolidation committed violations of the PACA. As such he is subject to the licensing and employment restrictions of the PACA.

8. Petitioner Jeffery Lon Duncan was not responsibly connected to Perfectly Fresh Specialties, Inc., during the time Specialties committed violations of the PACA.

Order

The facts and circumstances of the violations committed by Perfectly Fresh Farms, Inc., Perfectly Fresh Consolidation, Inc., and Perfectly Fresh Specialties, Inc. shall be published. Jaime Rovelo, Thomas Bennett and Jeffery Lon Duncan are each found to be responsibly connected to one or more Perfectly Fresh Respondents and are subject to the employment restrictions imposed by the Act.

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 28th day of October, 2008

_____
MARC R. HILLSON
Chief Administrative Law Judge