

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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| In re: |) | |
| |) | |
| James Thames |) | PACA-APP Docket No. 04-0003 |
| |) | |
| Petitioner |) | |
| |) | and |
| |) | |
| George E. Fuller, Jr. |) | PACA-APP Docket No. 03-0021 |
| |) | |
| Petitioner |) | |
| |) | and |
| |) | |
| Jon Fuller |) | PACA-APP Docket No. 03-0020 |
| |) | |
| Petitioner |) | |
| |) | <u>DECISION AND ORDER</u> |

Preliminary Statement

This proceeding was initiated by three petitions for review of determinations by the Agricultural Marketing Service that subjected James Thames, George E. Fuller, Jr., and Jon Fuller to employment restrictions for being “responsibly connected” with a corporation found to have willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499a(b)(9), 499b(4); “the PACA”).

John Manning Company, Inc., a PACA licensee, was the subject of a disciplinary complaint that resulted in a default decision being entered against it on October 21, 2004. The default decision published the finding that John Manning Company, Inc. willfully, flagrantly and repeatedly violated the PACA by failing to pay \$1,953,098.39 for 1,102

lots of produce purchased in interstate commerce from 58 sellers, during the period October 13, 2001 through August 28, 2002. At the time of the violations, James Thames, George E. Fuller, Jr. and Jon Fuller were officers and directors of John Manning Company, Inc. In addition, James Thames held 16% and the Fullers each held 13% of the corporation's outstanding shares of stock. For those reasons, each comes within the express definition of a person deemed to be "responsibly connected" with a corporate licensee found to be in violation of the PACA unless:

the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act and that the person 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)).

I held an oral hearing on March 29, 2005, in Atlanta, Georgia. Jon Fuller and George Fuller were represented by Joseph P. Farrell, Esq., Quirk & Quirk, P.C., Atlanta, Georgia. James Thames was represented by Kenneth D. Federman, Esq., Rothberg and Federman, P.C., West Collingwood, New Jersey. The PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, was represented by Ann Parnes, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, DC. The record in this case consists of the transcribed testimony given at the hearing; the exhibits admitted at the hearing (BxB__); and certified Agency Records of the challenged determinations respecting James Thames (JTRX__), George E. Fuller, Jr. (GFRX__) and Jon Fuller (JFRX__). A brief was filed on behalf of James Thames. A brief and a reply brief were filed on behalf of the Agricultural Marketing Service. A

letter was accepted from the Fullers in lieu of a formal brief in that they were no longer able to afford counsel.

Upon consideration of the record evidence and the arguments of the parties, I have found and concluded that James Thames, George E. Fuller, Jr. and Jon Fuller were responsibly connected with John Manning Company, Inc. at the time it was a licensee violating the PACA. For that reason they are subject to restrictions on their employment by PACA licensees pursuant to 7 U.S.C. § 499h(b). In reaching these conclusions, I took into consideration the fact that the corporation's produce purchasing activities had been taken over by Steven McCue who owned 51% of the corporation's shares of stock and apparently concealed his mismanagement of the corporation from Mr. Thames and the Fullers. However, Steven McCue never removed James Thames as an officer or director and did not undertake to remove the Fullers as officers and directors until May 17, 2002. Therefore when the violations were taking place, each possessed oversight powers and responsibilities pursuant to the corporate by-laws that they were obliged to exercise to protect the corporation and themselves as shareholders. Though there is no evidence that they ever personally engaged in actions designed to leave suppliers unpaid, they failed to fully employ their powers as officers and as the majority of the Board of Directors to constrain Steven McCue's imprudent business practices that did leave suppliers unpaid. Because they had such powers, none was "only nominally a partner, officer, director, or shareholder of a violating licensee" as the PACA requires so as not to be deemed "responsibly connected" with a violating licensee. *See* 7 U.S.C. § 499a(b)(9).

Findings of Fact

1. John Manning Company, Inc. was formed in 1937 by John Manning and George Fuller, Sr. It was a specialty tomato re-packing house until 2000. George Fuller, Sr. became sole owner when John Manning died in 1969. In 1981, Jon Fuller and George E. Fuller, Jr., the sons of George Fuller, Sr., came into the business and became shareholders. In 1990, James Thames joined the business and bought shares from George Fuller, Sr. wherein George Fuller, Sr. retained 7% of the outstanding shares and the remaining 93% was divided equally between James Thames, Jon Fuller and George E. Fuller, Jr. In 1999, competition in the tomato repacking business became fierce resulting in a lower customer base for the company; and a new direction for the company was sought. James Thames introduced Steven McCue to the Fullers in late 1999. Thereupon, Steven McCue became President and he, James Thames, Jon Fuller and George E. Fuller, Jr. held equal shares of stock. The company greatly expanded with diversification into the handling of mixed fruits and vegetables. (JFRX 7Q, p.1).

2. In May of 2001, Steven McCue informed the others that he was being courted by a produce conglomerate and would only stay with John Manning Company, Inc. if he was allowed to purchase additional shares from the others to increase his shares to 51% of the total shares outstanding. James Thames and the Fullers agreed. (JFRX 7Q, p.1).

3. On August 27, 2001, at a joint meeting of the Board of Directors and the shareholders of John Manning Company, Inc., the shares of stock held by James Thames and the Fullers were re-assigned so that Steven McCue became a 51% shareholder. To accomplish this, Steven McCue purchased for \$1.00 a share, 13,500 shares from George

E. Fuller, Jr., 13,500 shares from Jon Fuller and 10,000 shares from James Thames. Promissory notes were given in payment, but James Thames and the Fullers never received the money promised by the notes. As a result of the re-assignment of the stock that totaled 131,000 shares, Steven McCue held 68,000 shares or slightly over 51%; James Thames held 21,000 shares or slightly over 16%; George E. Fuller, Jr. held 17,500 shares or slightly over 13%, Jon Fuller held 17,500 shares or slightly over 13%; and George E. Fuller, Sr. held 7,000 shares or slightly over 5%. (BXB 9, p. 1; testimony of George E. Fuller, Jr.).

4. When Steven McCue initially joined the company, profits increased and so did the salaries of James Thames and the Fullers. At the end of June 2001, the company had profits of \$130,000.00, and the Fullers were each entitled to \$65,000.00 of retained earnings on which they paid taxes. The weekly salaries of the Fullers and James Thames were increased from \$800.00 to \$1,000.00. When the Fullers later sought their share of the retained earnings, they were told they were needed to pay expenses and instead their salaries were increased to \$1,200.00 per week. James Thames did obtain some of his share of the retained earnings and his salary stayed at \$1,000.00 per week. (GFRX 7Q, p.1; testimony of Jon Fuller).

5. The By-Laws of John Manning Company, Inc. provide that the property and business of the corporation shall be managed by its Board of Directors that shall consist of not less than three nor more than five members. Each director shall hold office until the annual meeting of shareholders held next after his election and until a qualified successor shall be elected, or until his earlier death, resignation, incapacity to serve or removal. Any director may be removed, with or without cause, by the affirmative vote of

the majority of the issued and outstanding shares at any regular or special meeting. The Board of Directors shall have the power to determine which accounts and books of the corporation shall be open to the inspection of shareholders. The By-Laws further provide for the following officers:

The President who shall be the chief executive officer of the corporation; shall preside at all meetings of the stockholders and directors; shall see that all orders and resolutions of the Board are carried into effect; and in addition to other specified duties shall perform all other such duties as the Board may assign to him.

The Vice President who in the absence of the President, or in case of his failure to act, shall have all the powers of the President, and shall perform such duties as shall from time to time be imposed upon him by the Board of Directors.

The Secretary who shall attend and keep the minutes of all meetings of the Board of Directors and Stockholders; shall have charge of the records and seal of the corporation; and shall in general perform all the duties incident to the office of the Secretary of a corporation, subject at all times to the direction and control of the Board of Directors.

The Treasurer who shall keep full and accurate account of receipts and disbursement on the books belonging to the corporation; shall deposit all monies and other properties belonging to the corporation; shall disburse the funds of the corporation as may be ordered by the Board; shall render to the Board whenever they may require, an account of all his transactions as Treasurer and of the

financial condition of the corporation; and shall perform such other duties as shall be assigned to him by the Board of Directors. (JTRX 4).

6. During the period October 13, 2001 through May 17, 2002, the officers of John Manning Company, Inc were Steven McCue, President; James Thames, Vice President; George E. Fuller, Jr., Treasurer; and Jon Fuller, Secretary. The four of them constituted the corporation's Board of Directors. Steven McCue attended to all of the buying and selling of produce for the company except in respect to a few old accounts, and he had charge of all other aspects of operations except for those still handled by James Thames and the Fullers. James Thames supervised the running of the tomato lines and supervised the packing crew. He also sold tomatoes to a couple of existing customers. George E. Fuller, Jr. assisted with tomato operations when James Thames was absent; coordinated maintenance service on the company's trucks, forklifts, electrical jacks and refrigeration; prepared inventory reports; and sometimes signed payroll checks. Jon Fuller was in charge of the company payroll; signed payroll checks; assisted with tomato operations when James Thames was absent; purchased tomato supplies; and coordinated insurance for the company. On May 17, 2002, Steven McCue terminated the employment of the Fullers because they refused to put more money into the business, and they did not act as officers or directors after that date. Steven McCue and James Thames continued as President and Vice President and members of the Board of Directors until the corporation stopped doing business at the end of July 2002. (JFRX 7Q, p.2; JTRX 11, p.3).

7. Though John Manning Company, Inc. was profitable in June 2001, there were problems with paying bills. Both Jon Fuller and George E. Fuller, Jr. went to

Steven McCue several times between July and September of 2001 and asked for financial information. It was promised but not delivered. At the end of December of 2001, George E. Fuller, Jr. again asked for financial statements. Steven McCue promised to provide the financials for 2001 by mid February, 2002, but told the Fullers he was only obligated to furnish financial information once or twice a year and because the Fullers no longer did any buying or selling, they did not need the information. Financial information was not furnished by Steven McCue until early May, 2002. (JFRX 7Q, p 2).

8. Though James Thames and the Fullers knew in 2001, that the company was having trouble paying its bills, the problems with paying suppliers were first acknowledged and discussed at the April 24, 2002 annual meeting of the Board of Directors. Steven McCue brought up the fact that shippers were demanding money and that if the checking account was frozen pursuant to the PACA Trust Agreement, John Manning Company, Inc. could not pay. He asked the Fullers for permission to go to their father for money to keep the company from going under. They gave their permission, but emphasized their father would insist upon seeing some Financials and that Zachary Thacker, the Comptroller/CFO who Steven McCue had brought aboard, had not yet provided the 2001 year ending statement. (JTRX 14).

9. On April 29, 2002, the Board of Directors had an impromptu meeting that Zachary Thacker attended. Financial difficulties were again discussed including \$200,000.00 owed to Weis-Buy which John Manning Company, Inc. could satisfy through weekly payments secured by an 8 ³/₄% note and a signed guarantee by the directors. Jon Fuller said he was not signing anything else unless some Financials were

forthcoming. Steven McCue promised they would be delivered by May 1, 2002. (JTRX 15).

10. On May 3, 2002, the Board of Directors had another meeting that was also attended by George E. Fuller, Sr., Zachary Thacker and Don Foster, Attorney for John Manning Company, Inc. The December 31, 2001 year ending report was distributed. It showed a \$140,805.00 loss in 2001 as well as a \$32,598.00 loss in the first quarter of 2002. Steven McCue asked the stockholders for their personal cash infusion to help the company during the financial hardship. He also expressed concern because of the Fullers' refusal to sign additional lines of credit with Weis-Buy. He also regarded George E. Fuller, Jr.'s periodic memos to him asking for financial reports to be "silly". He stated the company could save \$5,000.00 a week without George E. Fuller, Jr., Jon Fuller and James Thames on the payroll, and others could perform their jobs. Steven McCue stated that the company had a "50/50 shot of making or failing". Steven McCue stated he was going to do his best to save the company, and do whatever he had to do. He asked if anyone had anything to say. George E. Fuller, Sr. stated that he thought the company should reorganize under bankruptcy laws, but Steven McCue said that was not an option. George Fuller then said that, under the circumstances, he could not put any more money into the organization. (JTRX 16).

11. On May 17, 2002, Jon Fuller and George E. Fuller, Jr. were terminated as employees, and considered themselves terminated as officers and directors of John Manning Company, Inc. The company shut down on August 21, 2002 and its PACA license terminated on June 5, 2003 for failure to pay the annual license renewal fee.

12. On April 22, 2003, a disciplinary complaint was filed under the PACA against John Manning Company, Inc. for violating the PACA (7 U. S. C. § 499b(4)) from October 2001 through August 2002 by failing to pay \$1,953,098.39 to 58 sellers for perishable agricultural commodities purchased, received and accepted in interstate and foreign commerce. The disciplinary complaint resulted in a default decree being entered against John Manning Company, Inc. that published the finding that it had committed willful, flagrant and repeated violations of the PACA. (JTRX 6).

Conclusions

The record evidence establishes that James Thames, George E. Fuller, Jr. and Jon Fuller were, within the meaning of the PACA definition, responsibly connected with a corporate licensee found to have violated the PACA. The record evidence does not establish that they were only nominally officers, directors and shareholders of the violating licensee.

The consequences of Steven McCue's mismanagement of John Manning Company, Inc. were disastrous for everyone. Suppliers went unpaid. Employees lost their jobs. James Thames became addicted for a time to pain killers. (JTRX 11).

But the consequences were especially tragic for the Fullers. The company their father had established in 1937 was left in ruins. Their personal reputations for honest dealing were sullied. Their reason for challenging the "responsibly connected" determinations was not to be eligible for industry employment, but to clear their names as honest men. In that respect, the facts do show they did nothing to intentionally harm anyone.

However, the PACA places the burden upon every officer and director of a corporate licensee to use all the powers they have under the by-laws to stay aware of the

details of the corporation's activities and to obtain the financial information needed to assure that the licensee's produce suppliers are being promptly paid in full. When requests to Steven McCue for financial information were put off, James Thames and the Fullers had to do more. Legal counsel should have been retained and instructed to take every step necessary to find out if the company was still solvent and able to pay its suppliers. Steven McCue's obstinate resistance to furnishing the financials may well have made the appointment of a receiver necessary to obtain needed information and to put a halt to ongoing mismanagement. James Thames and the Fullers were not "nominal" officers and directors. Each had an actual significant nexus with the violating company during the violation period. The by-laws vested all oversight and governance powers in the Board of Directors, and together, they constituted the majority of the Board. Though Steven McCue as majority stockholder could have removed them as directors, he did not. They therefore had powers that they failed to use to protect themselves, the corporation and the corporation's suppliers. Under these circumstances, James Thames and the Fullers were so positioned that they should have known of the misdeeds and taken steps to "counteract or obviate the fault of others" *Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). *See also Minotto v. United States Department of Agriculture*, 711 F.2d 406, 408-409 (D. C. Cir. 1983); and *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975); and Anthony Thomas, 59 Agric. Dec. 367, 386 (2000). James Thames and the Fullers therefore cannot be found to be nominal officers, directors or shareholders under controlling legal precedents that have interpreted and applied the term "nominal" within the meaning of the PACA.

The PACA's definition of "responsibly connected" was amended in 1995, to resolve a split in the circuits in their interpretation of the term. The concept advanced by the Circuit Court for the District of Columbia in the above cited cases, that a "nominal" officer, director or shareholder may be found not to be responsibly connected had been rejected by courts in other circuits. See *Norinsberg v. United States Department of Agriculture et al*, 162 F.3d 1194 (D.C. Cir. 1998). The revised PACA definition now employs a rebuttable presumption test akin to that adopted by the DC Circuit:

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 Act 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)

As revised, the PACA allows a person who otherwise comes under its "responsibly connected" definition to show he should not be so considered by satisfying both parts of an evidentiary test that he "was not actively involved in the activities resulting in a violation" and "was only nominally a partner, officer, director, or shareholder of a violating license". See *Norinsberg, supra and Thomas supra, at 385-387* (2000). Inasmuch as James Thames, George E. Fuller, Jr. and Jon Fuller for the reasons just explained, cannot be found to have only "nominally" been officers, directors and shareholders of John Manning Company, Inc., it is unnecessary to address whether under the applicable precedents they met their burden of proof that they were "not actively

involved in the activities resulting in a violation”. As I stated before, I do believe that they did not instigate the consequences that befell the company and its unpaid suppliers.

Accordingly, the following order is being issued that places them under the employment restrictions mandated by the PACA. (7 U.S.C. § 499h(b)).

ORDER

It is hereby found that James Thames, George E. Fuller, Jr. and Jon Fuller were responsibly connected with John Manning Company, Inc., a PACA licensee, when it committed willful, repeated and flagrant violations of 7 U.S.C. § 499b(4) by failing to make full payment for produce purchased in interstate or foreign commerce.

This Order shall take effect on the 11th 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 ____ day of October, 2005

Victor W. Palmer
Administrative Law Judge