

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0622

In re: Mark Sandler,

Petitioner

Decision and Order

Appearances: Mark Sandler, *pro se*, Petitioner
Shelton Smallwood, Esquire and Christopher Young, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC for the Respondent

Preliminary Statement

This proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a, *et seq.*) (Act) by the petition for review filed by the Petitioner Mark Sandler of the determination made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that he was “responsibly connected” (as that term is defined in Section 1(b)(9) of the Act (7 U.S.C. §499a(b)(9))) to Sandler Bros., during the period of time that Sandler Bros. violated Section 2 of the Act (7 U.S.C. §499b).

Sandler Bros., a PACA licensee, was the subject of a disciplinary complaint that resulted in a Default Decision and Order being entered against it on August 15, 2012.¹ The Default Decision and Order authorized publication of the finding that Sandler Bros. willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. §499b(4)) by failing to make full payment promptly to 8 sellers of the agreed purchase prices in the

¹ *In re: Sandler Bros.*, Docket No. 12-0111, 71 Agric. Dec. ____ (August 15, 2012)

amount of \$234,385.14 for 314 lots of perishable agricultural commodities which Sandler Bros. purchased, received, and accepted in the course of interstate commerce during the period June 18, 2008 through March 4, 2009.

The matter was set for a telephonic hearing with the Petitioner appearing by telephone from Maine and the Respondent in Washington, DC on June 19, 2013. At the hearing, the Petitioner testified and one witness testified for the Respondent. The certified Agency Records containing 13 exhibits along with one additional exhibit were admitted on behalf of the Respondent.² The parties have waived briefs and the matter is now ripe for disposition.

Statutory Background

The Perishable Agricultural Commodities Act, 1930,³ was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate or foreign commerce.⁴ When enacted, the legislation had the approval of the entire organized fruit and vegetable trade, including commission merchants, dealers and brokers, all of whom benefit from the Act's protections.⁵ The Act was intentionally a "tough" law enacted for the purpose of providing a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business

² Respondent's Exhibits are indicated as RX 1-14.

³ 7 U.S.C. §499a-499s.

⁴ HR Rep No 1041, 71st Cong, 2d Session 1 (1930)

⁵ *Id.* 2,4. In 1949, both the House and Senate found that the PACA regulatory program had "become an integral part of the marketing of fruit and vegetables and it has the unanimous support of both producers and handlers in the fruit and vegetable industry." HR Rep No 1194, 81st Cong, 1st Session 1 (1949); *accord*, S Rep No 1122, 1st Session 2 (1949).

conduct, and unfair methods are numerous.⁶ *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 693 (D.C. Cir. 2007).

Under the Act, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §499a(b)(5)-(7), 499c(a), and 499d(a). The Act makes it unlawful for a licensee to engage in certain types of unfair conduct and requires regulated merchants, dealers, and brokers to “truly and correctly...account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had.” 7 U.S.C §499b(4).

Orders suspending or revoking a license, or a finding that an entity has committed a flagrant or repeated violation of Section 2 of the Act have significant collateral consequences in the form of employment restrictions for persons found to be “responsibly connected” with the violator.⁷ Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator “in any responsible position.⁸” 1962 amendments replaced the “in any responsible position” language with a “responsibly connected” provision. The term “responsibly connected” is currently defined as follows:

(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 percentum 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

⁶ S Rep No 2507, 84th Cong, 2d Session 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; HR Rep No 1196, 84th Cong, 1st Session 2 (1955).

⁷ 7 U.S.C. §499h(b). Under the Act, PACA licensees may not employ, for at least one year, any person found “responsibly connected to any person whose license has been revoked or suspended, or who has been found to have committed any flagrant or repeated violation of 7 U.S.C. §499b.

⁸ 7 U.S.C. §499h(b) (1958).

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(9).

A second sentence was added to the provision by a 1995 amendment⁹ and affords those who would otherwise fall within the statutory definition of “responsibly connected” an opportunity to demonstrate that they were not responsible for the violation. Extensive analysis of and comment upon the amendment has been made in a number of decisions, including *Michael Norinsberg v. United States Department of Agriculture and United States of America*, 162 F.3d 1194, 1196-1197 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-1467 (1998); *In re Lawrence D. Salin*, 57 Agric. Dec. 1474, 1482-1487 (1998); and *In re Michael J. Mendenhall*, 57 Agric. Dec. 1607, 1615-1619 (1998).

The amendment created a two prong test for rebutting the statutory presumption of the first sentence:

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

Norinsberg articulated the standard for the first prong as follows:

The standard is as follows: 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

⁹ Prior to the amendment, the circuits were divided as to whether the presumption of §499a(b)(9) was irrebutable. Most adopted a per se rule. *See, e.g., Faour v. United States Dep’t of Agric.*, 985 F. 2d 217, 220 (5th Cir. 1993); *Pupillo v. United States*, 755 F. 2d 638, 643-644 (8th Cir. 1985); *Birkenfield v. United States*, 369 F.2d 491, 494 (3rd Cir. 1966); *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). The DC Circuit however had adopted a rebuttable presumption test. *See Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), 34 Agric. Dec. 7 (1975).

limited to performance of ministerial functions only. Thus, if a petitioner demonstrates that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of 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. *Norinsberg*, 58 Agric. Dec. at 610-611.

This case accordingly turns upon whether the Petitioner met his burden of proof and rebutted the statutory presumption.

Discussion

Initially, it is clear that the statutory threshold contained in the first sentence of §499a(b)(9) is met in this case as the Petitioner admitted and the evidence is uncontroverted that the Petitioner was an officer and director of Sandler Bros. being referred to as Clerk and later President. RX-1, 6-9.

Petitioner professes a lack of involvement with the violating corporation, indicating that although he was President of the corporation, at the time of the violations, he had nothing to do with the financial side of the business. In view of the obvious fact that he was a signatory on the bank account, signed checks, and knew of the corporation's failure to pay suppliers without taking appropriate action prior to his resignation, any claim that he was only a *nominal* director and officer, lacking any actual, significant nexus with the violating company is clearly without merit. *See, Bell v. Dep't of Agric.*, 39 F.3d 1199 at 1201(D.C. Cir. 1994) (emphasis in original).

Well prior to the 1995 amendment to Section 499(a)(9), the DC Circuit had considered the statutory presumption of the section to be rebuttable. *Quinn*, at 757. *Hart v. Dep't of Agric.*, 112 F.3d 1228, 1230 (D.C. Cir. 1997). Where responsibility was not based on an individual's personal fault, it could be based upon his or her failure to

counteract or obviate the fault of others. *Bell*, at 1201. In the past, knowledge of the violations, whether actual or constructive, was found to be highly significant. In discussing the actual, significant nexus test in *Minotto v. USDA*, 711 F.2d 406 (D.C. Cir. 1983) the court indicated that "...In order to prove that one was **only** a nominal officer or director, one must establish that one lacked any 'actual, significant nexus with the violating company' and therefore, neither '**knew [n]or should have known of the [c]ompany's misdeeds.**'" *Minotto* at 408, 409. (emphasis added) An affiliation would however be considered nominal if a so-called officer was unsophisticated and the position had no powers at all. *Bell*, at 1201, *Minotto*, at 408, *Quinn*, at 756.

A significant difference was found to exist however between situations where the affiliation was purely nominal with the so-called officer having no authorized powers at all and those in which a genuine officer [or director] simply did not use the powers of his office. *Quinn* at 756, n.84. In *Hart v. Dep't of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997), the court made it clear that the Act was designed to strike at persons in authority who acquiesced in the wrongdoing as well as the wrongdoers themselves and that individuals seeking to avoid employment restrictions must demonstrate that they were "powerless to curb" the wrongdoing. *Hart* at 1230-1231.

Sandler admitted having actual knowledge of the corporation's failure to pay suppliers as early as January or February of 2009, but failed to resign as an officer and director until March 20, 2009. RX-6; *Martino v. USDA*, 801 F.2d 1410, 1414 (D.C. Cir. 1986).

Accordingly, on the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Petitioner Mark Sandler is an individual residing in Scarborough, Maine.
2. Sandler Bros. began as a family business originally started by Petitioner's grandfather in 1929 and was later incorporated and operated as a Maine corporation by his father Herbert Sandler and James Sandler, until Herbert Sandler's death in 2006.
RX-6.
3. During the period between June 18, 2008 and March 4, 2009, Sandler Bros. was found to have willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. §499b(4)) by failing to make full payment promptly to 8 sellers of the agreed purchase prices in the amount of \$234,385.14 for 314 lots of perishable agricultural commodities which Sandler Bros. purchased, received, and accepted in the course of interstate commerce during the period June 18, 2008 through March 4, 2009.¹⁰
4. Mark Sandler became a Clerk and/or President and director of Sandler Bros. following his father's death in 2006 and continued to hold such officer until his resignation on March 20, 2009.
5. Despite being an officer and director of the corporation and having knowledge that creditors were not being paid as early as January or February of 2009, he failed to take appropriate action to stop such violations and remained an officer and director until March 20, 2009 when he finally resigned.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

¹⁰ *In re: Sandler Bros., supra.*

2. Mark Sandler is an individual responsibly connected to Sandler Bros. by virtue of his active participation in corporate operations and his status as an officer and director of the corporation.

3. By virtue of being responsibly connected to a violating corporation, Petro is subject to the employment restrictions of the Act.

Order

1. The determination of the Chief of the PACA Branch that Mark Sandler was responsibly connected to Sandler Bros. during the period between June 18, 2008 and March 4, 2009 when the corporation was committing willful, flagrant and repeated violations of the Act is **AFFIRMED**.

2. Mark Sandler is accordingly subject to the licensing restrictions and employment sanctions contained in Section 4(b) and 8(b) of the Act (7 U.S.C. §499d(b) and §499h(b)).

3. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Petitioner, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

June 19, 2013

Peter M. Davenport
Chief Administrative Law Judge

Copies to: Mark Sandler
Shelton Smallwood, Esquire
Christopher Young, Esquire