

AGRICULTURE DECISIONS

Volume 71

January – June 2012
Part Three (PACA)
Pages 600 - 642



THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2012

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DISCIPLINARY DECISIONS

SAMUEL S. PETRO & BRYAN HERR.
PACA-APP Docket Nos. 09-0161; 09-0162.
Decision and Order as to Bryan Herr 600

CHERYL A. TAYLOR & STEVEN C. FINBERG.
PACA-APP Docket Nos. 06-0008; 06-0009.
Decision and Order on Remand 612

MEZA SIERRA ENTERPRISES, INC.
Docket No. 10-0250.
Decision and Order on the Written Record 624

THIRD COAST PRODUCE COMPANY, LTD.
Docket No. 12-0324.
Decision and Order 633

MISCELLANEOUS ORDERS

SAMUEL S. PETRO & BRYAN HERR.
PACA-APP Docket Nos. 09-0161; 09-0162.
Order Providing Opportunity to Supplement Motion 637

SAMUEL S. PETRO & BRYAN HERR.
PACA-APP Docket Nos. 09-0161; 09-0162.
Order Extending Time for Filing Petition to Reconsider 638

DEFAULT DECISIONS

MOHAMMAD S. MALIK & KIRAN ENTERPRISES, INC., D/B/A
TRENTON HALAL MEAT PACKING CO.

Docket No. 12-0072.

Decision Without Hearing by Entry of Default 640

SUNCOAST DISTRIBUTION, INC.

Docket No. 11-0386.

Default Decision and Order 640

PAUL J. MACRIE, PETER R. MACRIE, JR., & JOHN & PETE’S
FRESH CUT PRODUCE CONCEPTS, LLC.

Docket No. 12-0013.

Default Decision and Order 640

PETER R. MACRIE, JR.

Docket No. 12-0114.

Default Decision and Order 640

JOHN & PETE’S FRESH CUT PRODUCE CONCEPTS, LLC.

Docket No. 12-0115.

Default Decision and Order 640

DESERT STAR PRODUCE, LLC.

Docket No. 11-0322.

Default Decision and Order 640

JK FARM, INC., D/B/A MS FOOD SERVICE.

Docket No. 12-0237.

Default Decision and Order 641

CONSENT DECISIONS

Consent Decisions. 642

PERISHABLE AGRICULTURAL COMMODITIES ACT

PERISHABLE AGRICULTURAL COMMODOTIES ACT

DEPARTMENTAL DISCIPLINARY DECISIONS

In re: SAMUEL S. PETRO & BRYAN HERR.

PACA-APP Docket No. 09-0161; 09-0162.

Decision and Order.

Filed January 18, 2012.

PACA—Responsibly connected.

Ciarra A. Toomey, Esq. and Christopher Young, Esq. for Complainant.
Richard M. Kaplan, Esq. and Tanya N. Garrison, Esq. for Respondent.
Initial Decision by Peter M. Davenport, Chief Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER AS TO BRYAN HERR

Procedural History

On July 2, 2009, Karla D. Whalen, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Branch Chief], issued determinations that Samuel S. Petro and Bryan C. Herr were responsibly connected with Kalil Fresh Marketing, Inc., d/b/a Houston's Finest Produce Co. [hereinafter Houston's Finest], during the period of time that Houston's Finest violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ Pursuant to the rules of practice applicable to this proceeding,² Mr. Petro and Mr. Herr each filed a petition for review of the Branch Chief's "responsibly connected" determination.

¹ Houston's Finest willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 55 sellers of the agreed purchase prices in the amount of \$1,617,014.93 for 645 lots of perishable agricultural commodities, which Houston's Finest purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period October 11, 2007, through February 17, 2008. *In re Kalil Fresh Mktg., Inc.*, ___ Agric. Dec. ___ (Mar. 23, 2010).

² The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

Samuel S. Petro & Bryan Herr
71 Agric. Dec. 600

On June 15, 2010, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] consolidated the two “responsibly connected” proceedings, *In re Samuel S. Petro*, PACA-APP Docket No. 09-0161, and *In re Bryan Herr*, PACA-APP Docket No. 09-0162 (Summary of Teleconference and Order). On January 20-21, 2011, the Chief ALJ conducted an oral hearing in Washington, DC. Richard M. Kaplan and Tanya N. Garrison, Weycer, Kaplan, Pulaski & Zuber, PC, Houston, Texas, represented Mr. Petro and Mr. Herr. Ciarra A. Toomey and Christopher Young, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Branch Chief. Mr. Petro, Mr. Herr, and three other witnesses testified on Mr. Petro and Mr. Herr’s behalf. The Branch Chief called two witnesses.³ Mr. Petro and Mr. Herr introduced 14 exhibits. The Branch Chief introduced two certified agency records: one containing 14 exhibits applicable to Mr. Petro and the other containing 14 exhibits applicable to Mr. Herr.⁴ The Branch Chief also introduced 32 additional exhibits.

On April 7, 2011, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order in which he concluded: (1) Mr. Petro was responsibly connected with Houston’s Finest by virtue of his active participation in Houston’s Finest’s operations, his ownership of 25 percent of the shares of Houston’s Finest, and his status as a director of Houston’s Finest; and (2) Mr. Herr was not responsibly connected with Houston’s Finest because, although ostensibly an owner of 25 percent of the shares of Houston’s Finest, Mr. Herr did not actively participate in any activity resulting in Houston’s Finest’s violations of the PACA and had no actual, significant nexus to Houston’s Finest (Chief ALJ’s Decision and Order at 20 ¶ 2, 21 ¶ 4). On May 9, 2011, the Branch Chief appealed the Chief ALJ’s Decision and Order as it relates to Mr. Herr. On May 27, 2011, Mr. Herr filed a response to the Branch Chief’s appeal petition. Mr. Petro did not appeal the Chief ALJ’s April 7, 2011, Decision and Order, which became final as to Mr. Petro. On June 1, 2011, the Hearing Clerk transmitted the record to the Office

³ The transcript of the hearing is contained in two volumes. References to the transcript are indicated as “Tr.” and the page number.

⁴ References to the exhibits in the Branch Chief’s certified agency record applicable to Mr. Herr are indicated as “BHRX 1-BHRX 14.”

PERISHABLE AGRICULTURAL COMMODITIES ACT

of the Judicial Officer for consideration and a decision as to Mr. Herr. Based upon a careful consideration of the record, I affirm the Chief ALJ's Decision and Order as it relates to Mr. Herr.

DECISION AS TO MR. HERR

Statutory Background

The PACA was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce⁵ and to provide 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 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 PACA, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate or foreign commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), 499d(a). Regulated commission merchants, dealers, and brokers are required 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). An order suspending or revoking a PACA license or a finding that an entity has committed a flagrant violation, or repeated violations, of 7 U.S.C. § 499b(4) has significant collateral consequences in the form of licensing and employment restrictions for persons found to be responsibly connected with the violator.⁷ The term "responsibly connected" is defined as follows:

§ 499a. Short title and definitions

. . . .

(b) Definitions

⁵ H.R. Rep. No. 71-1041 at 1 (1930).

⁶ S. Rep. No. 84-2507 at 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; H.R. Rep. No. 84-1196 at 2 (1955).

⁷ 7 U.S.C. §§ 499d(b), 499h(b).

Samuel S. Petro & Bryan Herr
71 Agric. Dec. 600

For purposes of this chapter:

.....
(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).

The second sentence of the definition of the term “responsibly connected” 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; it creates 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 for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or

PERISHABLE AGRICULTURAL COMMODITIES ACT

entity subject to a license which was the alter ego of its owners[.]

In re Lawrence D. Salins, 57 Agric. Dec. 1474, 1488 (1998). A standard for the first prong of the test has been adopted 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 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 re Michael Norinsberg (Decision on Remand), 58 Agric. Dec. 604, 610-11 (1999).

Decision Summary

The record establishes that Mr. Herr owned 25 percent of the outstanding stock of Houston's Finest during the period of time that Houston's Finest violated the PACA (Tr. 347-49, 355-56, 448, 451; BHRX 1, BHRX 8). The disposition of this proceeding turns upon whether Mr. Herr met his burden of proof and rebutted the statutory presumption that he was responsibly connected with Houston's Finest. The Chief ALJ concluded Mr. Herr demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in Houston's Finest's PACA violations and that he was only nominally a shareholder of Houston's Finest. The Branch Chief argues on appeal that Mr. Herr failed to demonstrate by a preponderance of the evidence that he was not actively involved in the activities resulting in Houston's Finest's PACA violations and that Mr. Herr failed to demonstrate by a preponderance of the evidence that he was only nominally a shareholder of Houston's Finest. Based upon a careful consideration of the record, I

Samuel S. Petro & Bryan Herr
71 Agric. Dec. 600

agree with the Chief ALJ's Decision and Order regarding Mr. Herr and, therefore, conclude Mr. Herr was not responsibly connected with Houston's Finest during the period of time when Houston's Finest violated the PACA.

Discussion

Mr. Herr Demonstrated by a Preponderance of the Evidence He Was Not Actively Involved in the Activities Resulting in Houston's Finest's PACA Violations

Mr. Herr argues he was not actively involved in the activities resulting in Houston's Finest's failure to pay for produce in accordance with the PACA. Mr. Herr contends he was only a passive investor in Houston's Finest, asserting that, even after his stock purchase, Houston's Finest was dominated by John Kalil, who then owned 50 percent of the corporate stock, served as the chief executive officer of Houston's Finest, and ran Houston's Finest's day-to-day operations. Mr. Herr's position that Mr. Kalil ran the day-to-day operations of Houston's Finest is confirmed by Mr. Kalil's testimony that he ran Houston's Finest after the stock purchase by Mr. Herr and supervised the individuals responsible for sales, purchasing, warehouse operations, and bookkeeping functions, which included the payments made to suppliers (Tr. 349-50, 382-86).

The Chief ALJ correctly holds direct involvement in the particular transactions that were not paid in accordance with the PACA is not required and participation in corporate decision making is enough to find active involvement in the activities resulting in a PACA violation (Chief ALJ's Decision and Order at 12-13).⁸ The Branch Chief asserts Mr. Herr's corporate decision making supports a finding that Mr. Herr was actively involved in the activities resulting in Houston's Finest's violations of the PACA (Appeal Pet. at 10) and cites the following as Mr. Herr's corporate decision making: (1) Mr. Herr's involvement in

⁸ See *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1488-89 (1998) (stating there are many functions within a company (corporate finance, corporate decision making, check writing, and choosing which debts to pay) which can cause an individual to be actively involved in the failure to pay promptly for produce, even though the individual does not ever actually purchase produce).

PERISHABLE AGRICULTURAL COMMODITIES ACT

obtaining a line of credit for Houston's Finest; (2) Mr. Herr's providing Mr. Kalil with the name of the person who Mr. Herr used to install refrigeration equipment; (3) Mr. Herr's suggestion that Houston's Finest fire one of its employees, Ray Salazar; (4) Mr. Herr's request for a meeting to determine what was "going on" at Houston's Finest; (5) Mr. Herr's request to Henri Morris, an independent contractor working for Houston's Finest, for information regarding Houston's Finest's financial condition; (6) Mr. Herr's failure to discuss options for saving Houston's Finest with Mr. Morris; (7) Mr. Herr's failure to discuss correcting "anything" at Houston's Finest with Mr. Morris; (8) Mr. Herr's suggestion that Houston's Finest file for bankruptcy; (9) Mr. Herr's failure to stop Houston's Finest from making additional produce purchases after Mr. Herr learned that Houston's Finest failed to pay for produce in accordance with PACA; (10) Mr. Herr's failure to supervise Houston's Finest after Mr. Herr learned that Houston's Finest failed to pay for produce in accordance with the PACA; (11) Mr. Herr's failure to infuse Houston's Finest with capital; and (12) Mr. Herr's ownership of 25 percent of the outstanding stock of Houston's Finest (Appeal Pet. at 10-20). The Branch Chief does not explain how each of Mr. Herr's actions, suggestions, requests, and failures to act resulted in Houston's Finest's failure to pay for produce in accordance with the PACA.

I do not find Mr. Herr's July 2002 ministerial involvement in obtaining a line of credit that Mr. Petro arranged for Houston's Finest, Mr. Herr's providing Mr. Kalil with the name of the person who Mr. Herr used to install refrigeration equipment, Mr. Herr's request for a meeting to determine what was "going on" at Houston's Finest, Mr. Herr's request that Mr. Morris provide information regarding the financial condition of Houston's Finest, Mr. Herr's failure to discuss options for saving Houston's Finest with Mr. Morris, or Mr. Herr's failure to discuss correcting "anything" at Houston's Finest with Mr. Morris are activities which resulted in Houston's Finest's failure to pay for produce in accordance the PACA during the period October 11, 2007, through February 17, 2008.

While Mr. Kalil testified that Mr. Herr recommended that Houston's Finest fire Mr. Salazar (Tr. 359), Mr. Herr testified he did not know Mr. Salazar and never suggested that anyone fire Mr. Salazar (Tr. 181). The Chief ALJ did not find that Mr. Herr suggested that Houston's

Samuel S. Petro & Bryan Herr
71 Agric. Dec. 600

Finest fire Mr. Salazar, and, in light of the conflicting evidence, I decline to find that Mr. Herr recommended that Houston's Finest fire Mr. Salazar. Mr. Herr also testified that he was not involved with Houston's Finest's decision to file for bankruptcy (Tr. 176-77). While Mr. Kalil testified that Mr. Herr recommended that Houston's Finest file for bankruptcy, Mr. Kalil also testified that his attorneys, not Mr. Herr, convinced him that Houston's Finest should file for bankruptcy (Tr. 372-73). The Chief ALJ did not find that Mr. Herr recommended that Houston's Finest file for bankruptcy, and, in light of the conflicting evidence, I decline to find that Mr. Herr recommended that Houston's Finest file for bankruptcy.

I agree with the Branch Chief that Mr. Herr could have infused Houston's Finest with capital after he learned of Houston's Finest's failure to pay for produce in accordance with PACA. However, generally, a failure to infuse a company with capital does not constitute active involvement in activities resulting in that company's failure to pay for produce in accordance with the PACA. I do not find, under the circumstances of this proceeding, that Mr. Herr's failure to infuse Houston's Finest with capital constitutes active involvement in the activities that resulted in Houston's Finest's PACA violations.

Finally, the Branch Chief contends Mr. Herr was actively involved in the activities resulting in Houston's Finest's PACA violations by virtue of Mr. Herr's ownership of 25 percent of the outstanding stock of Houston's Finest. The Branch Chief essentially urges that I hold that an individual who holds more than 10 percent of the outstanding stock of a corporation is *per se* responsibly connected with that corporation. However, Congress rejected the *per se* approach urged by the Branch Chief and amended the definition of the term "responsibly connected" to specifically afford those who would otherwise fall within the statutory definition of "responsibly connected" an opportunity to rebut the statutory presumption that they are "responsibly connected."

I agree with the Chief ALJ's conclusion that Mr. Herr demonstrated by a preponderance of the evidence that he was not actively involved in the activities that resulted in Houston's Finest's failure to pay for produce in accordance with the PACA during the period October 11,

PERISHABLE AGRICULTURAL COMMODITIES ACT

2007, through February 17, 2008. The Branch Chief has not offered anything in the Appeal Petition that convinces me that the Chief ALJ's conclusion is error.

Mr. Herr Demonstrated by a Preponderance of the Evidence
He Was Only Nominally a Shareholder of Houston's Finest

For the second prong of the "responsibly connected" test, Mr. Herr must demonstrate by a preponderance of the evidence one of two alternatives: (1) he was only nominally a shareholder of Houston's Finest or (2) he was not an owner of Houston's Finest, which was the alter ego of its owners. As Mr. Herr was an owner of Houston's Finest, the second alternative is not applicable.⁹

On appeal, the Branch Chief contends the Chief ALJ failed to consider whether Mr. Herr met his burden as to the second prong of the "responsibly connected" test as follows:

Since the Chief ALJ found that Herr was not actively involved in the violations committed by Houston's Finest and was therefore not responsibly connected, he did not consider whether Herr met his burden as to the second prong of the responsibly connected test.

Appeal Pet. at 21. Based upon my reading of the Chief ALJ's Decision and Order, I find the Chief ALJ properly applied the two-prong test and found not only that Mr. Herr demonstrated that he was not actively involved in the activities resulting in Houston's Finest's violations of the PACA, but also, that Mr. Herr demonstrated that he was only nominally a shareholder of Houston's Finest (Chief ALJ's Decision and Order at 20

⁹ *In re B.T. Produce, Co.* 66 Agric. Dec. 774, 832 (2007), *aff'd*, 296 F. App'x 78 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2075 (2009); *In re Donald R. Beucke*, 65 Agric. Dec. 1341, 1351 (2006), *aff'd*, 314 F. App'x 10 (9th Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009); *In re Edward S. Martindale*, 65 Agric. Dec. 1301, 1308 (2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), 65 Agric. Dec. 429, 439 (2006), *aff'd per curiam*, 195 F. App'x 850 (11th Cir. 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

Samuel S. Petro & Bryan Herr
71 Agric. Dec. 600

¶ 13, 21 ¶ 4). Therefore, I find no reason to remand this proceeding to the Chief ALJ for application of the two-prong test.

The Branch Chief correctly states the authority that a person actually has as an officer, director, or shareholder to counteract the fault of others determines whether that person is merely a nominal officer, director, or shareholder of a violating company (Appeal Pet. at 24, 26). The Branch Chief's position that Mr. Herr had authority to alter the course of Houston's Finest's operations, and, therefore, was not nominal, is based in large part on the July 10, 2002, Stock Purchase Agreement executed by Messrs. Kalil, Petro, and Herr (BHRX 8) (Appeal Pet. at 28-31).¹⁰ On its face, the Stock Purchase Agreement gives Mr. Herr authority to curb Houston's Finest's PACA violations (BHRX 8). However, Mr. Herr introduced ample evidence to demonstrate that the Stock Purchase Agreement did not reflect Mr. Herr's actual authority within Houston's Finest. Instead, the record establishes that Mr. Herr, based upon his relationship with his partner, Mr. Petro, merely infused Houston's Finest with capital. In exchange, Messrs. Kalil, Petro, and Herr executed the July 10, 2002, Stock Purchase Agreement, which Mr. Herr did not negotiate or draft (Tr. 159). Mr. Herr never performed any duties or exercised any authority under the Stock Purchase Agreement (Tr. 160-67), and Mr. Herr demonstrated by a preponderance of the evidence that, despite the terms of the Stock Purchase Agreement, he lacked the actual authority to curb Houston's Finest's violations of the PACA.

I agree with the Chief ALJ's conclusion that Mr. Herr demonstrated by a preponderance of the evidence that he was only nominally a shareholder of Houston's Finest, during the period October 11, 2007, through February 17, 2008, when Houston's Finest violated the PACA. The Branch Chief has not offered anything in the Appeal Petition that convinces me that the Chief ALJ's conclusion is error.

Accordingly, on the basis of the record before me, the following Findings of Fact and Conclusions of Law are entered.

¹⁰ Dean Klint Johnson, the Acting Assistant Regional Director for the Agricultural Marketing Service and a witness for the Branch Chief, testified the sole indicator that Mr. Herr had authority within Houston's Finest is the Stock Purchase Agreement.

PERISHABLE AGRICULTURAL COMMODITIES ACT**Findings of Fact**

1. Bryan Herr is an individual residing in Conroe, Texas. During the period October 11, 2007, through February 17, 2008, when Houston's Finest violated the PACA, Mr. Herr owned 50 percent of Country Fresh, a fresh fruit and vegetable company and PACA licensee. Mr. Herr became the sole owner of Country Fresh in September of 2008 when he purchased the interest of his former partner, Samuel S. Petro. Mr. Herr has been in the produce business in excess of 25 years. (Tr. 150-52.)
2. In existence since 1999, Country Fresh is a large, successful fruit and vegetable business employing 800-1,000 employees in September of 2008 (Tr. 29-30, 152). Country Fresh is highly regarded, with an excellent reputation and high Blue Book rating (Tr. 30, 150-54).
3. Mr. Herr is well aware of the PACA's requirements concerning prompt payment for produce. Mr. Herr has never been previously associated with any entity which has violated the PACA. (Tr. 66, 88-90, 153-54.)
4. Kalil Fresh Marketing, Inc., is a Texas corporation, incorporated on August 11, 2000. Prior to July 10, 2002, John Kalil owned all outstanding shares of stock of Kalil Fresh Marketing, Inc. (BHRX 3.)
5. John Kalil is Samuel S. Petro's cousin (Tr. 31). Mr. Petro had worked in the produce industry for many years with John Kalil's father, Charles Kalil, who was considered by Mr. Petro to have been like a second father to him (Tr. 32).
6. Sometime around May or June of 2002, Mr. Kalil discussed with Mr. Petro Kalil Fresh Marketing, Inc.'s need for additional capital (Tr. 32-33). Mr. Petro, in turn, discussed the possibility of acquiring an ownership interest in Kalil Fresh Marketing, Inc., with Mr. Herr and persuaded Mr. Herr to join him in the eventual purchase of half of the corporation.
7. Although Mr. Petro and Mr. Herr were heavily involved with the activities of Country Fresh, Mr. Petro viewed the Kalil Fresh Marketing, Inc., acquisition as a family obligation to help his cousin, as well as an

Samuel S. Petro & Bryan Herr
71 Agric. Dec. 600

opportunity for his son, Michael Petro, to work with Mr. Kalil (Tr. 34). At Mr. Petro's suggestion and urging, Mr. Herr agreed to participate.

8. On July 10, 2002, Mr. Kalil, Mr. Petro, and Mr. Herr executed a Stock Purchase Agreement which had been prepared by Mr. Petro's accountant, Jerry Paul (Tr. 42-43, 103, 159; BHRX 8).

9. Mr. Herr had little contact with Houston's Finest. The evidence establishes Mr. Herr's ministerial involvement with the line of credit which Mr. Petro had arranged for the benefit of Houston's Finest in 2002 and Mr. Herr's refrigeration repair advice provided to Mr. Kalil years prior to Houston's Finest's PACA violations (Tr. 161-62, 170, 357-58).

10. Mr. Herr's responsibilities with Country Fresh required as many as 120 hours per week, leaving insufficient time for him to have had any significant involvement with Houston's Finest's operations (Tr. 169-70).

11. Mr. Herr was not involved in negotiating or drafting the Stock Purchase Agreement, had no intention of performing any duties for Houston's Finest, and, although the Stock Purchase Agreement named him as a director, Mr. Herr never functioned as a director, never attended any board meetings, never received a stock certificate, never signed any document as a corporate officer or director of Houston's Finest, and never received a salary, dividend, K-1, or reimbursement from Houston's Finest (Tr. 160-67). More specifically, Mr. Herr was neither consulted about, nor exercised any power or authority concerning, Houston's Finest's payments to suppliers.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Mr. Herr demonstrated by a preponderance of the evidence that he was not actively involved in any activity resulting in Houston's Finest's violations of the PACA during the period October 11, 2007, through February 17, 2008.

PERISHABLE AGRICULTURAL COMMODITIES ACT

3. Mr. Herr demonstrated by a preponderance of the evidence that he was only nominally a shareholder of Houston's Finest during the period October 11, 2007, through February 17, 2008, when Houston's Finest violated the PACA.
4. Mr. Herr was not responsibly connected with Houston's Finest during the period October 11, 2007, through February 17, 2008, when Houston's Finest violated the PACA.

For the foregoing reasons, the following Order is issued.

ORDER

1. The Chief ALJ's April 7, 2011, Decision and Order as it relates to Mr. Herr, is affirmed.
2. The Branch Chief's July 2, 2009, determination that Mr. Herr was responsibly connected with Houston's Finest, during the period October 11, 2007, through February 17, 2008, when Houston's Finest violated 7 U.S.C. § 499b(4), is reversed.

In re: CHERYL A. TAYLOR & STEVEN C. FINBERG.
PACA-APP Docket No. 06-0008; 06-0009.
Decision and Order on Remand.
Filed May 22, 2012.

PACA—Responsibly connected.

Stephen P. McCarron, Esq. for Petitioner.
Charles E. Spicknall, Esq. for Respondent.
Initial Decision by Jill S. Clifton, Administrative Law Judge.
Decision and Order entered by William G. Jenson, Judicial Officer.
Decision and Order on Remand entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER ON REMAND

Procedural History

Cheryl A. Taylor & Steven C. Finberg
71 Agric. Dec. 612

On September 24, 2009, I issued a Decision and Order: (1) finding Cheryl A. Taylor and Steven C. Finberg were officers of Fresh America Corporation [hereinafter Fresh America] during the period February 2002 through February 2003, when Fresh America violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to make full payment promptly for more than \$1.2 million in produce purchases; (2) finding Ms. Taylor and Mr. Finberg failed to demonstrate by a preponderance of the evidence that they were only nominal officers of Fresh America; and (3) concluding Ms. Taylor and Mr. Finberg were responsibly connected with Fresh America during the period February 2002 through February 2003, when Fresh America violated the PACA. *In re Cheryl A. Taylor*, 68 Agric. Dec. 1210, 1221-22 (2009). The United States Court of Appeals for the District of Columbia Circuit vacated my Decision and Order on the “nominal officer issue” and remanded the case to me for further proceedings consistent with the Court’s opinion. *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 618 (D.C. Cir. 2011).

On June 13, 2011, I conducted a conference call with Stephen P. McCarron, counsel for Ms. Taylor and Mr. Finberg, and Charles E. Spicknall, counsel for the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter AMS], to discuss the procedure to be followed in light of the remand order. Mr. McCarron and Mr. Spicknall each requested an opportunity to brief the issues raised in *Taylor*, which requests I granted. In accordance with the agreed on briefing schedule, AMS filed Respondent’s Brief on Remand on July 14, 2011, Ms. Taylor and Mr. Finberg filed Petitioners’ Brief on Remand on August 2, 2011, and AMS filed Respondent’s Reply Brief on September 1, 2011. On September 8, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and a decision on remand.

DECISION ON REMAND

Statutory and Regulatory Background

The PACA was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and

PERISHABLE AGRICULTURAL COMMODITIES ACT

foreign commerce¹ and to provide 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 conduct, and unfair methods are numerous.²

Under the PACA, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate or foreign commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), 499d(a). Regulated commission merchants, dealers, and brokers are required 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). An order suspending or revoking a PACA license or a finding that an entity has committed a flagrant violation, or repeated violations, of 7 U.S.C. § 499b(4) has significant collateral consequences in the form of licensing and employment restrictions for persons found to be responsibly connected with the violator.³ The term “responsibly connected” is defined as follows:

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(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

¹ H.R. Rep. No. 71-1041 at 1 (1930).

² S. Rep. No. 84-2507 at 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; H.R. Rep. No. 84-1196 at 2 (1955).

³ 7 U.S.C. §§ 499d(b), 499h(b).

Cheryl A. Taylor & Steven C. Finberg
71 Agric. Dec. 612

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).

The second sentence of the definition of the term “responsibly connected” creates a two-prong test for rebutting the statutory presumption of the first sentence:

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

In re Lawrence D. Salins, 57 Agric. Dec. 1474, 1488 (1998). Thus, an officer of a violating corporation is presumed to be responsibly connected with that corporation unless the officer can demonstrate by a preponderance of the evidence that he or she (1) was not actively involved in the activities resulting in a PACA violation and (2) was either a nominal officer of the violating corporation or a non-owner of the corporation that was the alter ego of its owners.

Discussion

PERISHABLE AGRICULTURAL COMMODITIES ACT

The following facts relevant to this proceeding are not at issue on remand: (1) during the period February 2002 through February 2003, Fresh America willfully, repeatedly, and flagrantly violated the PACA; (2) during the period of time when Fresh America violated the PACA, Ms. Taylor was an officer (the executive vice president, chief financial officer, and secretary) of Fresh America; (3) during the period of time when Fresh America violated the PACA, Mr. Finberg was an officer (the vice president of sales and marketing and the executive vice president of business development) of Fresh America; (4) during the period of time when Fresh America violated the PACA, Ms. Taylor and Mr. Finberg were not directors or holders of more than 10 per centum of the outstanding stock of Fresh America; (5) Mr. Finberg was not actively involved in the activities resulting in Fresh America's PACA violations; and (6) Fresh America was not the alter ego of its owners. Only three issues remain on remand. Did Ms. Taylor demonstrate by a preponderance of the evidence that she was only nominally an officer of Fresh America? Did Mr. Finberg demonstrate by a preponderance of the evidence that he was only nominally an officer of Fresh America? Did Ms. Taylor demonstrate by a preponderance of the evidence that she was not actively involved in the activities resulting in Fresh America's violations of the PACA?

Ms. Taylor and Mr. Finberg Demonstrated They Were
Merely Nominal Officers of Fresh America

The United States Court of Appeals for the District of Columbia Circuit held that I erroneously rejected Ms. Taylor's and Mr. Finberg's claims that they were merely nominal officers of Fresh America, as follows:

We agree with petitioners that the Judicial Officer erred in rejecting their claims that they were merely nominal officers of Fresh America. Under 7 U.S.C. § 499a(b)(9), an "officer" of the offending company is not considered to be "responsibly connected" to a violating licensee if that person was not actively involved in the PACA violation and was "powerless to curb it," *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir. 1975). *See also Bell v. Dep't of Agric.*, 39 F.3d 1199, 1202 (D.C. Cir. 1994).

Cheryl A. Taylor & Steven C. Finberg
71 Agric. Dec. 612

Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 610 (D.C. Cir. 2011). The Court emphasized that, under the “actual, significant nexus” test, the crucial inquiry in determining whether a person is merely a nominal officer is whether the person who holds the title of officer has the power and authority to direct and affect a company’s operations:

Under the “actual, significant nexus” test, “the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority.” *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted). Although we have consistently applied the ‘actual, significant nexus’ test, our cases make clear that what is really important is whether the person who holds the title of an officer had actual and significant power and authority to direct and affect company operations.

* * *

As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry.

Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 615, 617 (D.C. Cir. 2011).

As the Court notes, I found the board of directors, with Arthur Hollingsworth as chairman, ran Fresh America and Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at lower levels of authority. *Taylor v. U.S. Dep't of Agric.*, 636 F.3d at 617 (citing *In re Cheryl A. Taylor*, 68 Agric. Dec. 1210, 1220-21 (2009)). Ms. Taylor and Mr. Finberg proved by a preponderance of the evidence that the board of directors made the decisions governing Fresh America’s bills, capital expenditures, and personnel and that neither Ms. Taylor nor Mr. Finberg had any measurable power or authority in board deliberations (Tr. 87-92, 145-50,

PERISHABLE AGRICULTURAL COMMODITIES ACT

523-24, 567-68).⁴ Moreover, AMS concedes that Ms. Taylor and Mr. Finberg “ultimately proved powerless to save Fresh America or to see that produce sellers were fully repaid” (Respondent’s Brief on Remand at 7). Applying the “actual, significant nexus” test, as explained in *Taylor*, to the facts in the instant proceeding, I conclude Ms. Taylor and Mr. Finberg demonstrated by a preponderance of the evidence that they were merely nominal officers of Fresh America, who were powerless to curb Fresh America’s PACA violations and who lacked the power and authority to direct and affect Fresh America’s operations as they related to payment of produce sellers.

Ms. Taylor Failed to Demonstrate She Was Not
Actively Involved in the Activities Resulting in
Fresh America’s PACA Violations

Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] concluded that Ms. Taylor failed to demonstrate by a preponderance of the evidence that she was not actively involved in the activities resulting in Fresh America’s violations of the PACA. *In re Cheryl A. Taylor* (ALJ’s Decision), 68 Agric. Dec. 478, 489-91, 502 ¶¶ 43-51, 102 (2009). Ms. Taylor appealed the ALJ’s conclusion (Appeal Pet. filed Apr. 22, 2009); however, I declined to address the issue because, at that point in this proceeding, addressing the issue of Ms. Taylor’s active involvement would have been no more than an advisory opinion on the issue. *In re Cheryl A. Taylor*, 68 Agric. Dec. 1210, 1220 (2009). The United States Court of Appeals for the District of Columbia Circuit states “[w]e express no opinion on whether Taylor was actively involved in Fresh America’s PACA violations, because the Judicial Officer never reached this issue.” *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 617 (D.C. Cir. 2011). As I conclude on remand that Ms. Taylor demonstrated by a preponderance of the evidence that she was only nominally an officer of Fresh America, the issue of her active involvement in the activities resulting in Fresh America’s PACA violations is relevant to the disposition of this proceeding as to Ms. Taylor.

The standard for whether a person was actively involved in the activities resulting in a PACA violation was explained in *In re Michael*

⁴ References to the transcript of the January 29-30, 2008, administrative hearing are designated as “Tr.”

Cheryl A. Taylor & Steven C. Finberg
71 Agric. Dec. 612

Norinsberg (Decision on Remand), 58 Agric. Dec. 604, 610-11 (1999), 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 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.

Ms. Taylor did not buy or pay for produce and did not determine the preference or priority for paying for produce compared to other payables. *In re Cheryl A. Taylor* (ALJ's Decision), 68 Agric. Dec. 478, 490-91 ¶¶ 45, 48 (2009). Moreover, Ms. Taylor introduced evidence that Helen Mihas, Fresh America's controller, Mr. Hollingsworth and the board of directors, and Darren Miles, Fresh America's president and chief executive officer, controlled payment decisions (Tr. 531-33, 544-46). *In re Cheryl A. Taylor* (ALJ's Decision), 68 Agric. Dec. 490-91 ¶ 47 (2009). Nonetheless, Ms. Taylor signed signature cards of corporate checking accounts (Tr. 654); Ms. Taylor allowed her name and title to be used by Fresh America to pay bills, as her signature was stamped on Fresh America's checks by machine (Tr. 538); Ms. Mihas was Ms. Taylor's subordinate and Ms. Mihas "had to pick and choose which checks could go out the door." (Tr. 39, 535.) Therefore, I affirm the ALJ's conclusion that Ms. Taylor failed to demonstrate by a preponderance of the evidence that she was not actively involved in activities resulting in Fresh America's failures to pay for produce promptly as required by 7 U.S.C. § 499b(4).

The "Actual, Significant Nexus" Test, As Described in Taylor

PERISHABLE AGRICULTURAL COMMODITIES ACT

The “actual, significant nexus” test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9)⁵ wherein Congress amended the definition of the term “responsibly connected” specifically to provide partners, officers, directors, and shareholders who would otherwise fall within the statutory definition of “responsibly connected” a two-prong test whereby they could rebut the statutory presumption of responsible connection. Congress could have explicitly adopted the “actual, significant nexus” test; however, the two-prong test in the 1995 amendment to 7 U.S.C. § 499a(b)(9) contains no reference to “actual, significant nexus,” power to curb PACA violations, or power to direct and affect operations. Instead, Congress provides that a partner, officer, director, or shareholder, for the second prong of the two-prong test, could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was “only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license” (7 U.S.C. § 499a(b)(9)).

In my view, continued application of the “actual, significant nexus” test, as described in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), could result in persons who Congress intended to include within the definition of the term “responsibly connected” avoiding that status. For example, a minority shareholder, who is not merely a shareholder in name only, generally will not have the power to prevent (or even discover) the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Similarly, a real director, who is a member of a 3-person board of directors, generally will not have the power to prevent the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Likewise, a partner with a 40 percent interest in a partnership, who fully participates in the partnership as a partner, generally will not have the power to prevent the partnership’s PACA violations or the power to direct and affect the partnership’s operations. If the minority shareholder, the director on the 3-person board of directors, and the partner with a 40-percent interest in

⁵ See *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating a petitioner may demonstrate he was only a nominal officer, director, or shareholder by proving that he lacked “an actual, significant nexus” with the violating company); *Minotto v. U.S. Dep’t of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983) (stating the finding that an individual was responsibly connected must be based upon evidence of “an actual, significant nexus” with the violating company).

Cheryl A. Taylor & Steven C. Finberg
71 Agric. Dec. 612

the partnership demonstrates the requisite lack of power, application of the “actual, significant nexus” test, as described in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), would result in each of these persons being designated “nominal.”

In the *Taylor* dissent, Judge Brown points out that the United States Department of Agriculture is not forever bound to apply the “actual, significant nexus” test, as follows:

I do not mean to suggest the Department is bound forever to apply the “actual, significant nexus” test. We have previously indicated the 1995 amendment to 7 U.S.C. § 499a(b)(9) might call for different criteria. *See Norinsberg v. USDA*, 162 F.3d 1194, 1199 (D.C. Cir. 1998). . . . But the Judicial Officer in this case explicitly employed the “actual, significant nexus” test . . . and neither the parties nor my colleagues have seen fit to challenge its applicability.

Taylor v. U.S. Dep’t of Agric., 636 F.3d 608, 621-22 (D.C. Cir. 2011) (footnote omitted). *Taylor* makes clear to me that I was remiss in failing to abandon the “actual, significant nexus” test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the “actual significant nexus” test, the power to curb PACA violations, or the power to direct and affect operations. In future cases that come before me, I do not intend to apply the “actual, significant nexus” test, as described in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). Instead, my “nominal inquiry” will be limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder “in name only.”⁶ While power to curb PACA violations or to direct and affect the operations may, in certain circumstances, be a factor to be considered under the

⁶ *See, e.g.*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1534 (2002) (defining the noun “nominal” as “an individual that exists or is something in name or form but not in reality”); BLACK’S LAW DICTIONARY 1148 (9th ed. 2009) (defining the adjective “nominal” as “[e]xisting in name only”).

PERISHABLE AGRICULTURAL COMMODITIES ACT

“nominal inquiry,” it will not be the *sine qua non* of responsible connection to a PACA-violating entity.⁷

Findings of Fact

1. Fresh America, a Texas corporation, was a PACA licensee and ceased operations January 22, 2003.
2. During the period February 2002 through February 2003, Fresh America failed to make full payment promptly in the amount of \$1,223,284.48, to 82 sellers in 1,149 transactions, for the purchase of perishable agricultural commodities that Fresh America received and accepted in interstate and foreign commerce, in violation of 7 U.S.C. § 499b(4).
3. During the period of time in which Fresh America failed to pay produce sellers, Cheryl A. Taylor was only nominally an officer of Fresh America.
4. During the period of time in which Fresh America failed to pay produce sellers, Cheryl A. Taylor was not a director or holder of more than 10 per centum of the outstanding stock of Fresh America.
5. Cheryl A. Taylor was actively involved in the activities that resulted in Fresh America’s violations of the PACA.
6. During the period of time in which Fresh America failed to pay produce sellers, Steven C. Finberg was only nominally an officer of Fresh America.
7. During the period of time in which Fresh America failed to pay produce sellers, Steven C. Finberg was not a director or holder of more than 10 per centum of the outstanding stock of Fresh America.
8. Steven C. Finberg was not actively involved in the activities that resulted in Fresh America’s violations of the PACA.

⁷ See *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 618 (D.C. Cir. 2011) (Judge Brown stating, the majority makes “power and authority” the *sine qua non* of responsible connection).

Cheryl A. Taylor & Steven C. Finberg
71 Agric. Dec. 612

9. Fresh America was not the alter ego of its owners.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.
2. Fresh America's failures to make full payment promptly in the amount of \$1,223,284.48, to 82 sellers in 1,149 transactions, for the purchase of perishable agricultural commodities that it received and accepted in interstate and foreign commerce during the period February 2002 through February 2003 are willful, repeated, and flagrant violations of 7 U.S.C. § 499b(4). *In re Fresh America Corp.*, 66 Agric. Dec. 953 (2007).
3. Cheryl A. Taylor was "responsibly connected" with Fresh America, as that term is defined by 7 U.S.C. § 499a(b)(9), during the period February 2002 through February 2003, when Fresh America willfully, repeatedly, and flagrantly violated 7 U.S.C. § 499b(4).
4. Steven C. Finberg was not "responsibly connected" with Fresh America, as that term is defined by 7 U.S.C. § 499a(b)(9), during the period February 2002 through February 2003, when Fresh America willfully, repeatedly, and flagrantly violated 7 U.S.C. § 499b(4).

For the foregoing reasons, the following Order is issued.

ORDER

1. AMS' June 23, 2006, determination that Cheryl A. Taylor was responsibly connected with Fresh America, Arlington, Texas, during the period of time Fresh America violated the PACA, is affirmed. Accordingly, Cheryl A. Taylor is subject to the licensing restrictions under 7 U.S.C. § 499d(b) and the employment restrictions under 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Cheryl A. Taylor.

PERISHABLE AGRICULTURAL COMMODITIES ACT

2. AMS' August 11, 2006, determination that Steven C. Finberg was responsibly connected with Fresh America, Arlington, Texas, during the period of time Fresh America violated the PACA, is reversed.

RIGHT TO JUDICIAL REVIEW

Cheryl A. Taylor has the right to seek judicial review of the Order in this Decision and Order on Remand in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial Review must be sought within 60 days after entry of the Order in this Decision and Order on Remand.⁸ The date of entry of the Order in this Decision and Order on Remand is May 22, 2012.

In re: MEZA SIERRA ENTERPRISES, INC.
Docket No. 10-0250.
Decision and Order.
Filed April 26, 2012.

PACA.

Shelton S. Smallwood, Esq. for AMS.
Ricardo A. Rodriguez, Esq. for Respondent.
Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

Decision Summary

⁸ 28 U.S.C. § 2344.

Meza Sierra Enterprises, Inc.
71 Agric. Dec. 624

1. Respondent Meza Sierra failed, during November 2008 through January 2009, to make full payment promptly in the amount of \$215,385.00 to produce seller Kingdom Fresh Produce, Inc., of Donna, Texas, for perishable agricultural commodities (tomatoes) that Meza Sierra purchased, received, and accepted in interstate commerce. Meza Sierra thereby committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act ("PACA") (7 U.S.C. § 499b(4)). The appropriate remedy is revocation of Meza Sierra's PACA license. If Meza Sierra's PACA license is no longer active, the facts and circumstances of the violations shall be published.

Parties and Allegations

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS" or "Complainant").

3. AMS is represented by Shelton S. Smallwood, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington, D.C. 20250-1417. AMS was previously represented by Brian P. Sylvester, Esq., with the same Office of the General Counsel.

4. The Respondent is Meza Sierra Enterprises, Inc., a corporation registered in the State of Texas (herein frequently "Meza Sierra" or "Respondent"). Meza Sierra's business address was in McAllen, Texas. Meza Sierra can be contacted through its attorney, Ricardo A. Rodriguez, Esq. See next paragraph.

5. Meza Sierra is represented by Ricardo A. Rodriguez, Esq., 7001 N. 10th Street, Suite 302, McAllen, Texas 78504.

6. The Complaint, filed on April 26, 2010, alleges that Meza Sierra committed willful, flagrant and repeated violations of section 2(4) of the Perishable Agricultural Commodities Act, 1930, as amended (herein frequently the "PACA" or the "Act") (7 U.S.C. § 499b(4)), and the regulations issued thereunder.

PERISHABLE AGRICULTURAL COMMODITIES ACT

7. Meza Sierra, through Ricardo A. Rodriguez, Esq., filed its Answer on May 18, 2010. Meza Sierra objected to subject matter jurisdiction and denied all allegations contained in the Complaint. Affirmatively, Meza Sierra asserted that it disputes the claims of Kingdom Fresh Produce, Inc. and the claims of Grande Produce LTD, Co.; and that no violation of § 2(4) of the PACA [7 U.S.C. § 499b(4)] has been proven in any court of law with adjudicating authority with due process protection.

8. The case was scheduled for hearing in McAllen, Texas, originally for May 2011, and then for August 2011. Each party, for entirely different reasons, was reluctant to go to hearing. With the passage of time and events, I conclude that now a decision based on the written record provides due process to all parties and will suffice; consequently, no in-person (face-to-face) hearing is required.

Discussion

9. AMS filed, on July 20, 2011, a Motion entitled “Complainant’s Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be Issued.” *See* 7 C.F.R. § 1.139. AMS filed, on August 10, 2011, two documents entitled “Complainant’s Amended Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.” Meza Sierra filed, on August 11, 2011, a “Response to Complainant’s Motion Requesting Order From Court Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.” AMS’s Reply was filed on September 13, 2011.

10. After my Second Ruling, AMS filed, on December 1, 2011, a Motion entitled “Complainant’s Motion for Reconsideration of Second Ruling Concerning Complainant’s Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be Issued.” Meza Sierra filed, on December 21, 2011, a “Response to Complainant’s Motion for Reconsideration of Second Ruling Concerning Complainant’s Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued.”

11. Again, I ruled. AMS filed, on January 18, 2012, a “Response to Ruling.”

Meza Sierra Enterprises, Inc.
71 Agric. Dec. 624

12. What I have determined to do, is to dismiss, with prejudice, that portion of the case pertaining to the claims of Grande Produce LTD, Co., as to only this proceeding. I do that because Meza Sierra contests them and would be entitled to be heard.

13. With regard to that portion of the case pertaining to the claims of Kingdom Fresh Produce, Inc., the written record contains what is needed to decide this case. The claims of Kingdom Fresh Produce, Inc., involving the same tomatoes at issue here, have been fully litigated in the state courts of Texas. By taking official notice of certain documents from that state court litigation, I am able to issue a decision based on the written record that I am confident provides due process to all parties.

14. Nothing further is required of either party. Whether either of the produce sellers in Appendix A attached to the Complaint is already paid-in-full or will eventually be paid-in-full, or will eventually be paid nothing, my decision here would not change. Upon careful consideration and reconsideration, I issue this Decision and Order on the Written Record without hearing or further procedure.

15. Section 2(4) of the PACA requires licensed produce dealers to make "full payment promptly" for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4). *See also* 7 C.F.R. § 46.2(aa)(5) and (11) (defining "full payment promptly"). A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held." *See In re: H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (1998). *See also, In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997).

16. Meza Sierra, a PACA licensee, failed to make prompt payment for produce and failed to be in compliance with the PACA within 120 days of having been served with the Complaint. Meza Sierra's failure to achieve full compliance with the PACA within 120 days of having been

PERISHABLE AGRICULTURAL COMMODITIES ACT

served with the Complaint makes this a “no-pay” case. *See In re: Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (1998).

17. The time within which to achieve full compliance with the PACA, to avoid a “no-pay” classification, expired during September 2010 or earlier. The appropriate sanction in a “no-pay” case where the violations are flagrant and repeated is license revocation. *See In re: Scamcorp, Inc., id.* A civil penalty is not appropriate because “limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA”, and it would not be consistent with the Congressional intent to require a PACA violator to pay the Government while produce sellers are left unpaid. *See id.*, at 570-71.

18. Meza Sierra intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, “shifted the risk of nonpayment to sellers of the perishable agricultural commodities.” *See In re: Scamcorp, Inc.*, at 553. *See also In re: KDLO Enterprises, Inc.*, 70 Agric. Dec. ____ (2011), which can be found online at <http://www.nationalaglawcenter.org/assets/decisions/KDLO.pdf>, especially regarding the terms “repeated” “flagrant” and “willful.” Meza Sierra’s violations are “repeated” because repeated means more than one. Meza Sierra’s violations are “flagrant” because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. *See In re: Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997). Meza Sierra’s violations of the PACA are also “willful” as that term is used in the Administrative Procedure Act. 5 U.S.C. § 558(c). A violation is willful under the Administrative Procedure Act if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *See, e.g., Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); and *Finer Foods Sales Co. v. Block*, 708 F. 2d 774, 777-78 (D.C. Cir. 1983). Willfulness is reflected by Meza Sierra’s violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which Meza Sierra committed the violations and the number and dollar amount of Meza Sierra’s violative transactions.

Findings of Fact

Meza Sierra Enterprises, Inc.
71 Agric. Dec. 624

19. Meza Sierra Enterprises, Inc. is a corporation registered in the State of Texas.

20. The mailing address of Meza Sierra is in care of its attorney, Ricardo A. Rodriguez, Esq., 7001 N. 10th Street, Suite 302, McAllen, Texas 78504.

21. Pursuant to the licensing provisions of the PACA, Meza Sierra was issued license number 20070589 on March 15, 2007.

22. Official notice is taken of certain documents from Cause No. C-1990-09-A in the District Court, 92nd Judicial District, Hidalgo County, Texas, a true and correct copy of which are attached (Attachment A) to AMS's Response to Ruling filed January 18, 2012. These documents establish, among other things, that the tomatoes from Kingdom Fresh Produce, Inc. that are the subject matter of that case, are the same tomatoes from Kingdom Fresh Produce, Inc. as are identified on Appendix A attached to the Complaint in this case. Official notice is taken also of the "Final Summary Judgment" from Cause No. C-1990-09-A, which is listed on AMS's "Complainant's Exhibits" filed May 24, 2011; **AMS shall search the record file and within 10 days after service of this Decision file identification of the location within the record file of the true and correct copy thereof, OR file a true and correct copy thereof.**

23. Official notice is taken of certain documents from Cause No. C-1990-09-A in the District Court, 92nd Judicial District, Hidalgo County, Texas, a true and correct copy of which accompanied Meza Sierra's "Respondent's Proposed Exhibits" filed July 11, 2011, and are marked RX 1 and RX 2.

PERISHABLE AGRICULTURAL COMMODITIES ACT

24. Official notice is taken of certain documents from case number 13-11-00184-CV from the Court of Appeals, Thirteenth District of Texas, a true and correct copy of which are attached (Attachment A) to AMS's "Complainant's Motion for Reconsideration of Second Ruling Concerning Complainant's Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not be Issued," filed December 1, 2011. These documents establish that Meza Sierra was not successful (untimely) in appealing the judgment entered against it on April 19, 2010, in favor of Kingdom Fresh Produce, Inc., in Cause No. C-1990-09-A.

25. The documents of which I have taken official notice establish, among other things, that Meza Sierra Enterprises, Inc., did not achieve full compliance with the PACA before the end of September 2010 (within 120 days of having been served with the Complaint), thereby establishing this is a "no-pay" case.

26. The documents of which I have taken official notice establish further that Meza Sierra Enterprises, Inc., during November 2008 through January 2009, failed to make full payment promptly of the purchase prices, or balances thereof, to Kingdom Fresh Produce, Inc., for \$215,385.00 in fruits and vegetables (tomatoes), all being perishable agricultural commodities, that Meza Sierra purchased, received, and accepted in the course of interstate commerce. *See* section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Conclusions

27. The Secretary of Agriculture has jurisdiction over Respondent Meza Sierra and the subject matter involved herein.

28. The Administrative Law Judge is authorized to decide this case, and the Rules of Practice are applicable (Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes, 7 C.F.R. § 1.130 *et seq.*). Meza Sierra brought to my attention that the Rules of Practice specify certain statutory provisions under the Perishable Agricultural Commodities Act, 1930, as amended, to which the Rules of Practice are applicable, and that section 2(4) of the PACA (7 U.S.C. § 499b(4)) is not one of them. *See* 7 C.F.R.

Meza Sierra Enterprises, Inc.
71 Agric. Dec. 624

§ 1.131(a). Nevertheless, under Delegations of Authority, specifically, 7 C.F.R. § 2.27(a), I am designated to hold hearings and perform related duties under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), and I will apply the Rules of Practice as if 7 U.S.C. § 499b(4) were specified in 7 C.F.R. § 1.131(a) for two reasons:

(a) other PACA provisions are found therein, especially 7 U.S.C. § 499h(a), which specifies the Secretary's authority when violations of 7 U.S.C. § 499b (Unfair conduct) have been determined to have occurred; and

(b) the provisions of 7 C.F.R. § 1.131(b)(6) state that the Rules of Practice shall also be applicable to:

(6) Other adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration.

29. That portion of the case pertaining to the claims of Grande Produce LTD, Co., I have determined to dismiss, with prejudice. As to proof of those claims, Meza Sierra would be entitled to an in-person hearing during which witnesses, subject to cross-examination, would be expected to present evidence, including laying a proper foundation for the admission of documents. Holding such an in-person hearing would increase time and money expenditures on this case for everyone involved, and the outcome of such an in-person hearing would not significantly change my conclusion.

30. Based on that portion of the case pertaining to the claims of Kingdom Fresh Produce, Inc., I have determined to issue a decision based on the written record by taking official notice of certain documents from state court litigation involving the same tomatoes that are the subject here.

PERISHABLE AGRICULTURAL COMMODITIES ACT

31. Respondent Meza Sierra willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during November 2008 through January 2009, by failing to make full payment promptly of the purchase prices, or balances thereof, for \$215,385.00 in fruits and vegetables (tomatoes), all being perishable agricultural commodities, that Meza Sierra purchased, received, and accepted in the course of interstate commerce.

ORDER

32. The PACA license of Meza Sierra Enterprises, Inc., is revoked, because Meza Sierra committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4).

33. If Meza Sierra's PACA license is no longer active, Meza Sierra is found to have committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4), and the facts and circumstances of the violations shall be published pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

34. That portion of the case pertaining to the claims of Grande Produce LTD, Co., is DISMISSED, with prejudice, as to only this proceeding.

35. AMS shall search the record file and within 10 days after service of this Decision shall file identification of the location within the record file of the true and correct copy of the "Final Summary Judgment" from Cause No. C-1990-09-A; OR shall file a true and correct copy thereof.

36. This Order shall take effect on the 11th day after this Decision becomes final.

Finality

37. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Third Coast Produce Company, Ltd.
71 Agric. Dec. 633

Copies of this Decision and Order on the Written Record shall be served by the Hearing Clerk upon each of the parties.

In re: THIRD COAST PRODUCE COMPANY, LTD.
Docket No. 12-0324.
Decision and Order.
Filed April 27, 2012.

PACA.

Shelton S. Sherwood, Esq. for AMS.

Michael A. Hirsch, Esq. for Respondent.

Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151). Charles W. Parrott, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, initiated this proceeding by filing a Complaint on February 15, 2012, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 21 sellers of produce it purchased, received and accepted, and seeking that the facts and circumstance of the violation be published.

Respondent filed a timely Answer to the Complaint and the parties were directed by Order entered on March 28, 2012 to file witness and exhibit lists with the Hearing Clerk and to exchange exhibits. Complainant then moved for a decision without hearing based on admissions pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §

PERISHABLE AGRICULTURAL COMMODITIES ACT

1.139). Ruling on the Motion was deferred pending receipt of a Response from the Respondent. Respondent filed a Response on April 26, 2012 and requested an oral hearing on the matter.

Respondent's Answer admitted accounting discrepancies, but substantially admitted the debts alleged in the Complaint casting blame for the violations of the Act on a "trusted employee and officer, Javier Bueno." Respondent specifically admitted violating the Act stating that "the shortfall in receivables, for which criminal charges have been sought against Javier Bueno, caused the failure to pay for product as received, and ultimately led to the demise of the Company." Respondent further stated that "strictly in relation to the need to respond by Respondent to the pending Complaint, that Respondent, TCP Ventures, Ltd. f/k/a/ Third Coast Produce Company, Ltd., would like to respond that the failure to pay was indeed true, to the extend [sic] indicated, but that it was not from a common design or malfeasance on the part of the remaining principals of the enterprise, George Finch and Dennis Honeycutt."

The cover letter accompanying the Response filed by the Respondent clearly indicates that "[T]he "Response is substantially an admission of liability on the part of TCP¹ as to the failure to pay promptly in respect to certain commodity transactions...." and asserts that the failure to pay was not from a common design or malfeasance on the part of George Finch or Dennis Honeycutt and that neither individual should be considered "responsibly connected" to the violations. As this action is limited to the question of whether the named Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA as alleged in the Complaint, any question of whether Finch and Honeycutt should be considered "responsibly connected" is not before me at this time.

Respondent's denial that its failure to pay was not willful is without merit. A violation is willful under the Administrative Procedure Act (5 U.S.C. §558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with a careless disregard of statutory requirements. *In re: Ocean View Produce, Inc.*, 68 Agric. Dec. 594 (2009).

¹ Respondent indicates that Third Coast Produce Company, Ltd subsequently became TCP Ventures, Ltd.

Third Coast Produce Company, Ltd.
71 Agric. Dec. 633

Accordingly, a violation is willful if a prohibited act is done intentionally, regardless of the violator's intent in committing those acts. *In re: Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 630 (1996). Willfulness is established in this action as Respondent despite having a clear statutory requirement to make full and prompt payment withheld full and prompt payment from 21 sellers from whom it purchased, received and accepted perishable agricultural commodities in the course of or in contemplation of interstate and foreign commerce.

As I find that Respondent's Answer and the Response to the Motion both substantially admit the material allegations of the Complaint and no material issues of fact are in dispute, no hearing is warranted in this matter. *See, Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F. 2d 601, 607-08 (D.C. Cir. 1987). Accordingly, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Respondent is or was a limited partnership organized and existing under the laws of Texas. Respondent ceased business operations on or about June 28, 2010. Respondent's business address and mailing address was in Houston, Texas.
2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 2002 1620 was issued to Respondent on September 19, 2002. The license terminated on September 19, 2011 pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.
3. Respondent, during the period of February 5, 2010, through July 16, 2010, on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference, failed to make full payment promptly to 21 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$514,943.40 for 207 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce.

PERISHABLE AGRICULTURAL COMMODITIES ACT

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

1. A finding is made that Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and that the facts and circumstances set forth above, shall be published.
2. This decision will become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer by a party to these proceedings within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice, 7 C.F.R. § 1.139, 1.145.

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

Miscellaneous Orders
71 Agric. Dec. 637 - 639

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions/.

In re: SAMUEL S. PETRO & BRYAN HERR.
PACA-APP Docket No. 09-0161; 09-0162.
Miscellaneous Order.
Filed January 30, 2012.

PACA.

Tanya N. Garrison, Esq. and Richard M. Kaplan, Esq. for Petitioners.
Cierra A. Toomey, Esq. and Christopher Young, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

**ORDER PROVIDING THE BRANCH CHIEF AN OPPORTUNITY
TO SUPPLEMENT MOTION**

On January 26, 2012, Karla D. Whalen, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Branch Chief], requested a 20-day extension of time within which to file a petition to reconsider *In re Samuel S. Petro* (Decision as to Bryan Herr), __ Agric. Dec. __ (Jan. 18, 2012). The Branch Chief's January 26, 2012, motion does not state the grounds for the requested extension of time, as required by 7 C.F.R. 1.143(c). The Judicial Officer may extend the time for filing a petition to reconsider, if, in the judgment of the Judicial Officer, there is good reason for the extension (7 C.F.R. § 1.147(f)). As the Branch Chief has failed to state the grounds for the requested extension of time and I find nothing in the record upon which to find good reason for an extension, I cannot grant the Branch Chief's request for an extension of

MISCELLANEOUS ORDERS

time to file a petition to reconsider. However, I grant the Branch Chief an opportunity to supplement the January 26, 2012, request, as follows: the Branch Chief may supplement the January 26, 2012, "Request For An Extension of Time To File A Petition For Reconsideration Of The Decision Regarding Bryan Herr" no later than February 2, 2012.¹

In re: SAMUEL S. PETRO & BRYAN HERR.
PACA-APP Docket No. 09-0161; 09-0162.
Miscellaneous Order.
Filed February 2, 2012.

PACA.

Tanya N. Garrison, Esq. and Richard M. Kaplan, Esq. for Petitioners.
Cierra A. Toomey, Esq. and Christopher Young, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

**ORDER EXTENDING THE TIME FOR FILING THE BRANCH
CHIEF'S PETITION TO RECONSIDER**

On January 26, 2012, Karla D. Whalen, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Branch Chief], requested an extension of time within which to file a petition to reconsider *In re Samuel S. Petro* (Decision as to Bryan Herr), __ Agric. Dec. __ (Jan. 18, 2012). The Branch Chief's January 26, 2012, motion did not state the grounds for the requested extension of time, as required by 7 C.F.R. 1.143(c), and I provided the Branch Chief an opportunity to supplement the January 26, 2012, motion for an extension of time. On February 1, 2012, the Branch Chief filed a timely supplement in which the Branch Chief requested an extension of time to February 29, 2012, within which to file a petition to reconsider and provided grounds for the

¹ The Office of the Hearing Clerk receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Branch Chief must ensure any supplement to the January 26, 2012, "Request For An Extension of Time To File A Petition For Reconsideration Of The Decision Regarding Bryan Herr" is received by the Office of the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 2, 2012.

Miscellaneous Orders
71 Agric. Dec. 637 - 639

request. For good reason stated, the Branch Chief's motion to extend the time for filing a petition to reconsider *In re Samuel S. Petro* (Decision as to Bryan Herr), __ Agric. Dec. __ (Jan. 18, 2012), is granted. The time for filing the Branch Chief's petition to reconsider is extended to, and includes, February 29, 2012.¹

¹ The Office of the Hearing Clerk receives documents from 8:30 a.m. to 4:30 p.m., Eastern Time. To ensure timely filing, the Branch Chief must ensure the petition to reconsider is received by the Office of the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 29, 2012.

DEFAULT DECISIONS**PERISHABLE AGRICULTURAL COMMODITIES ACT****DEFAULT DECISIONS**

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: www.dm.usda.gov/oaljdecisions].

**MOHAMMAD S. MALIK & KIRAN ENTERPRISES, INC., D/B/A
TRENTON HALAL MEAT PACKING CO.****Docket No. 12-0073.****Decision Without Hearing by Entry of Default by Respondents.****Filed January 26, 2012.****SUNCOAST DISTRIBUTION, INC.****Docket No. 11-0386.****Default Decision and Order.****Filed January 31, 2012.****PAUL J. MACRIE, PETER R. MACRIE, JR., & JOHN & PETE'S
FRESH CUT PRODUCE CONCEPTS, LLC.****Docket No. 12-0113.****Default Decision and Order.****Filed March 13, 2012.****PETER R. MACRIE, JR.****Docket No. 12-0114.****Default Decision and Order.****Filed March 13, 2012.****JOHN & PETE'S FRESH CUT PRODUCE CONCEPTS, LLC.****Docket No. 12-0115.****Default Decision and Order.****Filed March 13, 2012.****DESERT STAR PRODUCE, LLC.****Docket No. 11-0322.**

Default Decisions
71 Agric. Dec. 640 – 641

Default Decision and Order.
Filed March 27, 2012.

JK FARM, INC., D/B/A MS FOOD SERVICE.
Docket No. 12-0237.
Default Decision and Order.
Filed April 24, 2012.

CONSENT DECISIONS

PERISHABLE AGRICULTURE COMMODITIES ACT

CONSENT DECISIONS

MS Grand, Inc., PACA-D-11-0296, 01/11/12.
Ven-Co Produce, Inc., PACA-D-11-0383, 02/15/12.
Empire Fresh Cuts, LLC, PACA-D-12-0231, 03/02/12.
Paradise Produce, Inc., PACA-D-11-0121, 04/23/12.
Auster Acquisitions, LLC, PACA-D-12-0235, 04/24/12.