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AGRICULTURE DECISIONS

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PERISHABLE AGRICULTURE COMMODITIES ACT

COURT DECISION

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Cheryl A. Taylor and Steven C. Finberg.
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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISION

CHERYL A. TAYLOR AND STEVEN C. FINBERG v. USDA.
No. 09–1270.
Filed January 7, 2011.
As Amended on Rehearing in Part March 2, 2011.

[Cite as: 629 F.3d 241].

United States Court of Appeals,
District of Columbia Circuit.

[Editor's Note: *The opinion of the United States Court of Appeals, District of Columbia Circuit, in Taylor v. United States Department of Agriculture, was amended. For amended opinion, see 636 F. 3d 608 (below).]*

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CHERYL A. TAYLOR AND STEVEN C. FINBERG v. USDA.
No. 09–1270.
Argued Sept. 20, 2010.
Decided Jan. 7, 2011.
Filed March 2, 2011.

[Cite as: 636 F.3d 608].

PACA – Defense, "powerless to curb" the wrongdoing – Defense, lack of actual and significant power and authority to direct and affect company operations – Defense, requires more than person's title, background, and knowledge .

A long standing line of cases relating to who is "responsibly connected" now has less clarity requiring a balancing of facts shown and less reliance on statutory thresholds or definitions of "nominal officer" both of which tend to increase the burden of proof required by the Agency. Upon review of the same facts, the court reversed the judgment of the Judicial Officer.

United States Court of Appeals,
District of Columbia Circuit.

Vacated and remanded.
Opinion, 629 F.3d 241, superseded.
Brown, Circuit Judge, filed dissenting opinion.
Before: BROWN, Circuit Judge, and EDWARDS and RANDOLPH, Senior Circuit Judges.
Opinion for the Court filed by Senior Circuit Judge EDWARDS.
Dissenting opinion filed by Circuit Judge BROWN.
EDWARDS, Senior Circuit Judge:

The Perishable Agricultural Commodities Act ("PACA") requires persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce to have a license issued by the Secretary of Agriculture, *see* 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), 499d(a), and makes it unlawful for a licensee to engage in certain types of unfair conduct, *see id.* § 499b. The statute 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). It also provides that 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. *See* 7 U.S.C. § 499h(b).

In January 2007, an Administrative Law Judge ("ALJ") at the Department of Agriculture ("Department") found that Fresh America, a national produce wholesaler licensed to do business under PACA, had willfully, repeatedly, and flagrantly violated Section 2(4) of PACA, 7 U.S.C. § 499b(4), by failing to promptly make full payment to produce sellers between February 2002 and February 2003. *In re Fresh Am. Corp.,* 66 Agric. Dec. 953, 959 (U.S.D.A.2007). Fresh America did not contest this decision. While the case against Fresh America was pending, the Chief of the PACA Branch of the Fruit and Vegetable Division of the Agricultural Marketing Service determined that the petitioners in this case, Cheryl Taylor and Steven Finberg, who were officers of Fresh America, had been responsibly connected to Fresh America during the

violations period and were therefore subject to the statute's employment restrictions. Taylor and Finberg sought administrative review of this determination.

In March 2009, following a two-day hearing, an ALJ issued a decision affirming the PACA Branch Chief's determinations and concluding that both Taylor and Finberg had been responsibly connected to Fresh America during the violations period. In September 2009, a Judicial Officer rejected the petitioners' administrative appeals. *In re Taylor,* PACA App. Docket Nos. 06–0008, 06–0009 (U.S.D.A. Sept. 24, 2009) ("*Judicial Officer Decision* "), *reprinted in* 1 Joint Appendix ("J.A.") 7. In holding against the petitioners, the Judicial Officer found that the petitioners were not merely nominal officers of Fresh America. The Judicial Officer also found that Fresh America was not the alter ego of its chairman of the board, Arthur Hollingsworth. Petitioners now seek review in this court.

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). The Judicial Officer in this case "paid little heed to circuit law on nominal officers," *id.,* for his decision is devoid of any analysis of the actual power exercised by Taylor and Finberg at Fresh America. The disputed decision is thus fatally flawed for want of reasoned decision making. Accordingly, the petition for review is granted in part, and the case is remanded to the Department for further proceedings consistent with this decision.

I. BACKGROUND

A. Statutory Background

PACA prohibits certain conduct by merchants, dealers, or brokers of perishable agricultural commodities in order to "help instill confidence in parties dealing with each other on short notice, across state lines and at long distances." *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.,* 497

F.3d 681, 685 (D.C.Cir.2007) (quoting *Veg–Mix, Inc. v. U.S. Dep't of Agric.,* 832 F.2d 601, 604 (D.C.Cir.1987)). PACA is "admittedly and intentionally a tough law." *Kleiman & Hochberg,* 497 F.3d at 693 (quoting S. REP. NO. 84–2507, at 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701 (internal quotation marks omitted)). As noted above, the statute forbids, *inter alia,* any merchant, dealer, or broker of perishable agricultural commodities from "fail [ing] or refus[ing] truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C. § 499b(4). In addition, PACA prevents licensees from employing, for a minimum of one year, "any person who is or has been responsibly connected" to a flagrant or repeated PACA violator. 7 U.S.C. § 499h(b).

Under this statutory scheme,

> [a]n officer, director, or holder of more than ten percent of the stock of a corporation licensed under the PACA is presumed ... to be 'responsibly connected' to that corporation. 7 U.S.C. § 499a(b)(9). For many years the circuits were divided over whether the presumption of § 499a(b)(9) is irrebuttable ... or, as we held, rebuttable. See *Quinn v. Butz,* 510 F.2d at 757.

Hart v. Dep't of Agric., 112 F.3d 1228, 1230 (D.C.Cir.1997). Under the law of this circuit, a person could rebut the presumption that he or she was "responsibly connected" to a PACA violator in either of two ways:

> The first involve[d] cases in which the violator, although formally a corporation, [was] essentially an alter ego of its owners, so dominated as to negate its separate personality.
>
> ...
>
> The second way of rebutting the presumption [was] for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could establish by proving that he lacked an actual, significant nexus with the violating company. Where responsibility was not based on the individual's personal fault it would have to be based at least on his failure to counteract or obviate the fault of others.

Bell, 39 F.3d at 1201 (emphasis in original) (citations and internal quotation marks omitted).

"In 1995 the Congress amended § 499a(b)(9) to make it clear that the presumption is rebuttable." *Hart,* 112 F.3d at 1230. The statute now provides:

> 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). Thus, under the current version of the statute, it is presumed that an officer of a corporation is responsibly connected to the violating company unless the officer can show that he or she (1) was not actively involved in the PACA violations, and (2) was either a nominal officer of the violating PACA licensee or a non-owner of a licensee that was the alter ego of its owners.

B. Factual Background

Cheryl Taylor joined Fresh America as a consultant in April 2001. Her primary tasks were to prepare and review Fresh America's filings for the Securities and Exchange Commission ("SEC"), confer with company accountants, and assist the company in its efforts to secure refinancing of existing debts. Shortly after signing a consulting agreement with Fresh America, Taylor was given the titles of executive vice president, chief financial officer, and secretary of the company, albeit without any additional compensation. According to Taylor, she was assigned these titles because the company "needed [her] to sign documents"; however, she stated that she did not do "any of the normal things that a CFO" does. Hearing Tr. (Jan. 29, 2008) at 362, 364, *reprinted in* 1 J.A. 142, 144.

In 1989, when he was a college student, Steven Finberg first started working with Gourmet Packing, a predecessor company to Fresh America. In 1999, after several promotions, Finberg was given the position of vice president of sales and marketing for Fresh America. His job responsibilities included managing Fresh America's national accounts and developing a marketing message on behalf of the company. In 2001, Finberg was given the title of executive vice president, although his job responsibilities remained the same. Hearing Tr. (Jan. 30, 2008) at 791–92, *reprinted in* 1 J.A. 277–78. In explaining his job, Finberg testified as follows: he never assumed any authority over the purchase of produce; he never was involved in a payment for produce; and he did not recall ever signing a check on behalf of the company. *Id.* at 799–800.

During the period when Fresh America committed the PACA violations that gave rise to this case, Arthur Hollingsworth, the co-founder and partner of the venture-capital and private-equity fund North Texas Opportunity Fund LP ("NTOF"), was chairman of the board. In 2001, NTOF invested $5 million in Fresh America and, as part of a financial restructuring of Fresh America, appointed four of the five members of the board. The record indicates that the company was largely run by the board. As one board member testified, under NTOF's leadership, "board meetings became the management of the company." Hearing Tr. (Jan. 29, 2008) at 146, 1 J.A. 96. And there is evidence that the board, not company officers or managers, made all decisions governing the company's bills, capital expenditures, and personnel. *Id.* at 146–49, 1 J.A. 96–99.

Both Taylor and Finberg attended most of the company's board meetings, but they were not members of the board. And even though they carried "officer" titles at Fresh America, there is evidence that neither Taylor nor Finberg had any measurable power or authority in board deliberations. For example, when the board addressed problems relating to the payment of bills, Taylor and Finberg stressed the need for the company to pay its bills on time. *Id.* at 91, 1 J.A. 84. However, the board rejected the advice offered by Taylor and Finberg. Instead, the board followed a policy of having Fresh America pay its bills when the company had the capacity to do so. *Id.* at 92, 1 J.A. 85. Both Taylor and Finberg remained with Fresh America until at least January 2003, when

the company ceased operations.

C. The Proceedings Before the Agency

In 2005, the Department filed a complaint against Fresh America, alleging that the company had committed PACA violations between February 2002 and February 2003 by failing to promptly pay a total of more than $1.2 million to 82 sellers of perishable agricultural commodities. The company defaulted on these charges. *In re Fresh Am. Corp.,* 66 Agric. Dec. 953 (U.S.D.A.2007). In the summer of 2006, the Chief of the PACA Branch of the Fruit and Vegetable Programs Division of the Agricultural Marketing Service made an initial determination that, pursuant to 7 U.S.C. § 499a(b)(9), Taylor and Finberg were responsibly connected to Fresh America. *In re Taylor,* PACA App. Docket Nos. 06–0008, 06–0009 (U.S.D.A. Mar. 19, 2009) ¶¶ 12–13, *reprinted in* 1 J.A. 31. Taylor and Finberg petitioned the agency for review of these determinations, and the agency joined the two cases for a hearing before an ALJ.

After a two-day hearing, the ALJ found that Taylor, but not Finberg, was actively involved in the PACA violations. However, the ALJ found that both Taylor and Finberg were responsibly connected to Fresh America within the meaning of PACA. The ALJ concluded that the evidence presented by Taylor and Finberg did not demonstrate, as they claimed, that they were merely nominal officers of Fresh America. *Id.* ¶¶ 52–57, 82–85, 1 J.A. 46–47, 57–59. In reaching this conclusion, the ALJ found that Taylor was "vital to Fresh America Corp. and an important and influential officer," *id.* ¶ 56, 1 J.A. 47, and that Finberg "was a valuable member of the team that tried to keep Fresh America Corp. in business," *id.* ¶ 82, 1 J.A. 57. Petitioners appealed within the agency, and the ALJ's decision was reviewed by a Judicial Officer. Although the Judicial Officer did not adopt the ALJ's reasoning, he did affirm the judgments against Taylor and Finberg.

The Judicial Officer relied on three grounds to support his finding that Taylor and Finberg were responsibly connected to Fresh America. First, the Judicial Officer pointed to the petitioners' backgrounds, noting that "each had the experience, training, and education to serve in their positions as officers." *Judicial Officer Decision* at 13, 1 J.A. 19. Second,

he noted that the annual reports and proxy statements filed with the SEC listed Taylor and Finberg as officers. *Id.* at 11–14, 1 J.A. 17–20. He apparently thought this to be decisive, stating: "[T]he fact that each was identified in the SEC filings as an officer makes it difficult for me to conclude that they were only nominal officers." *Id.* at 14, 1 J.A. 20. Finally, the Judicial Officer relied on the fact that "Ms. Taylor and Mr. Finberg knew of Fresh America Corp.'s financial difficulties." *Id.*

The Judicial Officer also expressed the view that, although Taylor and Finberg told the board of directors about the payment provisions in PACA, their "only option to avoid a responsibly connected determination was to resign as officers of Fresh America Corp. prior to Fresh America Corp.'s PACA violations." *Id.* Because the Judicial Officer found that Taylor was not a nominal officer of Fresh America, he chose not to address her separate argument that the ALJ erred in finding her actively involved in the company's PACA violations. *Id.* at 14–15, 1 J.A. 20–21.

Finally, the Judicial Officer rejected the petitioners' argument that Fresh America was the alter ego of Hollingsworth:

> The record makes clear that, while Mr. Hollingsworth was a dominant chairman, the decisions attributed to Mr. Hollingsworth were made by the board of directors. The concept of alter ego goes well beyond the evidence presented in the instant proceeding. Fresh America Corp. had regular board meetings at which non-board members were present and reported to the board. The board of directors, with Mr. Hollingsworth as chairman, ran Fresh America Corp. While Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at a lower level of authority, it is understandable, considering Fresh America Corp.'s financial position and the recent investment made by [NTOF], which was managed by Mr. Hollingsworth, that such decisions came before the board of directors.

Id. at 15–16 (accompanying parenthetical omitted), 1 J.A. 21–22.

In their petition for review, Taylor and Finberg contest the Judicial Officer's findings that they were not merely nominal officers of Fresh America and that Fresh America was not the alter ego of Hollingsworth.

II. ANALYSIS

A. Standard of Review

"[W]e must uphold the Judicial Officer's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence." *Kleiman & Hochberg,* 497 F.3d at 686 (quoting *Kirby Produce Co. v. U.S. Dep't of Agric.,* 256 F.3d 830, 833 (D.C.Cir.2001)) (internal quotation marks omitted). "[A]n agency rule would be arbitrary and capricious if the agency ... entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *see also Allentown Mack Sales & Serv., Inc. v. NLRB,* 522 U.S. 359, 374, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) ("The Administrative Procedure Act ... establishes a scheme of 'reasoned decision making.' Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (quoting *State Farm,* 463 U.S. at 52, 103 S.Ct. 2856)). In this case, the petitioners argue that the Judicial Officer's decision defies this requirement of reasoned decision making, because it pays no heed to the controlling law on nominal officers.

Although not stated explicitly, Taylor and Finberg also argue that the Judicial Officer's decision should be set aside for want of substantial evidence, which governs "on-the-record agency fact finding." *Allentown Mack,* 522 U.S. at 377, 118 S.Ct. 818. Under section 706(2)(E) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(E), substantial evidence review requires a court to consider the whole record upon which an agency's factual findings are based. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

> In describing the whole record review of § 706(2)(E), the Court acknowledged that the requirement "does not furnish a calculus of value by which a reviewing court can assess the evidence." [*Universal Camera,* 340 U.S. at 488 [71 S.Ct. 456].] It also noted that substantial evidence review does not negate the "respect" with which courts are to

review decisions based on agency expertise. *Id.* Nor, the Court explained, does whole record review mean that a court can displace an agency's "choice between two fairly conflicting views," even though the reviewing court "would justifiably have made a different choice had the matter been before it *de novo*." *Id.* Rather, a reviewing court must "ask whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion." *Dickinson v. Zurko,* 527 U.S. 150, 162 [119 S.Ct. 1816, 144 L.Ed.2d 143] (1999). Or, put differently, a court must decide whether, on the record under review, "it would have been possible for a reasonable jury to reach the [agency's] conclusion." *Allentown Mack Sales & Serv., Inc. v. NLRB,* 522 U.S. 359, 366–67 [118 S.Ct. 818, 139 L.Ed.2d 797] (1998).

> HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW—REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 176 (2007) (second brackets in original).

B. The Judicial Officer's Decision that Petitioners Were Not Nominal Officers

PACA defines a "responsibly connected" person as one who is "affiliated or connected with a [licensee] as ... [an] officer, director, or holder of more than 10 per centum of the outstanding stock." 7 U.S.C. § 499a(b)(9). There is no dispute that Taylor and Finberg were officers and thus come within this definition. As noted above, however, PACA also provides that:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [PACA] and that the person either was only nominally ... [an] officer, director, or shareholder of a violating licensee.

Id. The question here is whether the petitioners met their burden of demonstrating by a preponderance of the evidence that they were not actively involved in the PACA violations and that they were merely nominal officers of Fresh America.

Before Congress amended PACA in 1995 to include an express exception for *nominal* officers, this circuit had for a number of years applied an "actual, significant nexus" test to determine whether a person was responsibly connected to an offending PACA licensee.

> Prior to the amendment of § 499a(b)(9) we held that an officer, director, or ten percent shareholder could rebut the presumption against her by showing either that the corporate violator is nothing more than the alter ego of its owner or that she was only a nominal officer, director, or shareholder of that corporation. *Bell v. Department of Agriculture,* 39 F.3d 1199, 1201 (D.C.Cir.1994). In order to prove that the corporation is the alter ego of its owner one must show that the owner so dominated the corporation as "to negate its separate personality." *Quinn,* 510 F.2d at 758. 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 v. USDA,* 711 F.2d 406, 408–409 (D.C.Cir.1983). *See also Quinn,* 510 F.2d at 756, n. 84 (observing that situation in which "the affiliation is purely nominal and the so-called officer had no powers at all" is "radically different" from one in which a genuine officer simply "does not use the powers of his office.")

Hart, 112 F.3d at 1230–31 (brackets in original); *see also Quinn,* 510 F.2d at 755 ("[T]he Perishable Agricultural Commodities Act was designed to strike at persons in authority who acquiesced in wrongdoing as well as the wrongdoers themselves."); *id.* (persons who carry the title of officer are not subject to the statute's employment restrictions if they demonstrate that they were "powerless to curb" the wrongdoing). The law of this circuit thus laid the foundation for the nominal officer exception enacted by Congress in 1995.

In this case, the Judicial Officer cited *Hart* and purported to apply the "actual, significant nexus" test in determining that Taylor and Finberg were responsibly connected to Fresh America. *Judicial Officer Decision* at 9, 1 J.A. 15. The petitioners do not take issue with the applicability of the "actual, significant nexus" test. Rather, they argue that the Judicial Officer reached the wrong conclusion because he misapplied the legal standard. We agree.

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. For example, in *Kleiman & Hochberg,* the court found that the petitioner "did not prove that he qualified for the 'nominal' exception, nor could he do so[, because he] ... concede[d that] he owned 31.6 percent of the corporation's outstanding stock, was the company's President, and was 'actively engaged in the day-to-day operations, management, *and control* of [the company].' " 497 F.3d at 692 (emphasis in original). The court also tellingly rejected the suggestion that a person cannot be responsibly connected to a violating licensee unless he either knew or should have known about the violations and then failed to take action to counteract the actions of others constituting the violations. On this point, the court noted that "neither the statutory definition of 'responsibly connected' nor the statutory 'nominal' and 'alter ego' exceptions suggest such a knowledge requirement." *Id.* (accompanying parenthetical omitted).

This case stands in stark contrast to *Kleiman & Hochberg.* The Judicial Officer's decision gives lip service to the "actual, significant nexus" test, but it fails to apply the test in any coherent fashion. Under the applicable legal standard, the agency must carefully assess a person's actual power and authority at the violating company—not merely the person's title, background, and knowledge of PACA violations—in order to determine whether the person was responsibly connected to an offending PACA licensee. The Judicial Officer failed to do this.

As noted above, in reaching the conclusion that Taylor and Finberg were not merely nominal officers of Fresh America, the Judicial Officer relied primarily on three factors: the petitioners' professional backgrounds; annual reports and proxy statements that listed the petitioners as officers; and petitioners' knowledge of Fresh America's financial difficulties. Each of these factors may be relevant in

determining whether a person is merely a nominal officer. However, none of these factors, without more, is dispositive. Indeed, even taken together, these three factors do not demonstrate a person's actual power and authority within a company. Petitioners may have possessed impressive professional backgrounds and officer titles, and they may have been aware of the company's financial woes, and yet still have had no power or authority to alter the course of company operations.

The decisions in *Quinn,* 510 F.2d at 747, *Minotto,* 711 F.2d at 407, and *Bell,* 39 F.3d at 1200, make it clear that an individual's background may be *relevant* to the determination of whether he or she is a nominal officer. But we have never found this factor to be *dispositive.* If an individual has past experience in upper-level management, this would be consistent with a finding that the individual is currently working in upper-level management. But past experience is not proof of one's current station.

Similarly, although an individual's title can be relevant to a consideration of a person's current situation, title alone is not dispositive. Indeed, the statute makes this absolutely clear. Section 499a(b)(9) states that an "officer" "shall not be deemed to be responsibly connected" if the person demonstrates that he or she was only "nominally" an officer of the violating licensee. Obviously, title alone is not conclusive, unless the officer fails to demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of PACA and that he or she was only nominally an officer of a violating licensee. The nominal officer exception plainly contemplates situations in which a person's title is not consistent with the person's actual responsibilities.

The Judicial Officer erred in holding that, "absent very extraordinary circumstances, an individual who is an officer of a publicly traded company, and identified as an officer in the company's filings with the SEC, cannot be found to be a nominal officer as that term is used in the PACA." *Judicial Officer Decision* at 14, 1 J.A. 20. This is not a correct statement of the governing law. "[A]n officer may be 'nominal' even though the corporate records ... make him out to be a real one." *Bell,* 39 F.3d at 1202. The Department characterizes the Judicial Officer's opinion on this point as mere dictum or as an alternative holding. Resp'ts' Br. at

39–40. We disagree, for it is clear that the Judicial Officer viewed Fresh America's SEC filings as a critical factor in his decision.

Finally, the Judicial Officer cited Taylor and Finberg's knowledge of Fresh America's financial difficulties in determining that they were responsibly connected to the licensee. This, too, resulted in an erroneous application of the law. Knowledge may be relevant with respect to a consideration of whether a person was "actively involved in the activities resulting in a violation" of the statute. However, knowledge, without more, surely does not give compelling evidence of a person's actual power and station within a company. This court has made it clear that "neither the statutory definition of 'responsibly connected' nor the statutory 'nominal' and 'alter ego' exceptions suggest such a knowledge requirement." *Kleiman & Hochberg,* 497 F.3d at 692 (accompanying parenthetical omitted).

In *Minotto,* this court found that there was no evidence to "support the [Department Hearing Officer's] conclusion that Minotto knew or should have known of the Company's misdeeds." 711 F.2d at 409. But this statement was offered to confirm that Minotto "had no policy or decision-making role" and "was essentially a clerical employee." *Id.* This is very different from saying that it must be assumed that a person with knowledge of a company's wrongdoings has meaningful power and authority within the company. There are many people in company operations who may be aware of bad deeds by virtue of where or for whom they work, but nonetheless decline to participate in these deeds and have no power or authority to effect change. Indeed, in this case, Taylor and Finberg knew that Fresh America was in danger of violating PACA, but they failed to convince the board to promptly pay produce sellers. Just as a lack of knowledge cannot save a non-nominal officer from the consequences of PACA, *Kleiman & Hochberg,* 497 F.3d at 692, mere knowledge of PACA violations cannot turn a nominal officer into a full-fledged one.

As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry. In *Bell,* the petitioner "seem[ed] to have been made an officer and a director of Sunrise for the administrative convenience of the company" and "never participated in the formal decision-making structures of the corporation, such as board

meetings." 39 F.3d at 1204. Similarly, Minotto "had no policy or decision-making role," *Minotto,* 711 F.2d at 409, and Quinn "did not to any extent participate in the management of the company's affairs," *Quinn,* 510 F.2d at 753.

In this case, the Judicial Officer specifically found that "[t]he board of directors, with Mr. Hollingsworth as chairman, ran Fresh America." *Judicial Officer Decision* at 15, 1 J.A. 21. He also tellingly found that "Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at a lower level of authority," *id.* at 15–16, 1 J.A. 21–22. Yet, the Judicial Officer failed to take this into account in assessing whether the petitioners were merely nominal officers.

In sum, the Judicial Officer purported to apply the "actual, significant nexus" test, yet failed to consider whether Taylor or Finberg had actual power and authority at Fresh America. This defies reasoned decision-making. As the Court noted in *Allentown Mack:*

> Reasoned decision-making, in which the rule announced is the rule applied, promotes sound results, and unreasoned decision-making the opposite. The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably ALJ's), and effective review of the law by the courts.

522 U.S. at 375, 118 S.Ct. 818. Because the Judicial Officer did not faithfully apply the applicable legal standard in determining whether the petitioners were responsibly connected to Fresh America, we vacate and remand to the agency to apply the correct legal standard as we articulate it today. "It is hard to imagine a more violent breach of [the reasoned decision-making] requirement than [when an agency] appl[ies] a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced." *Id.* at 374, 118 S.Ct. 818. We express no opinion on whether Taylor was actively involved in Fresh America's PACA violations, because the Judicial Officer never reached this issue.

C. The Judicial Officer's Decision that Fresh America Was Not the Alter Ego of Arthur Hollingsworth

Section 499a(b)(9) states:

> 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 [PACA] and that the person ... was not an owner of a violating licensee ... which was the alter ego of its owners.

The petitioners claim that the Judicial Officer erred in holding that Fresh America was not the alter ego of its chairman of the board, Arthur Hollingsworth. We disagree.

As we noted in *Kleiman & Hochberg,* "the 'alter ego' exception applie [s] to cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality. A petitioner who [is] not a true owner of such a corporation [will] be spared the consequences of the responsibly connected determination." 497 F.3d at 692 n. 8 (brackets in original) (internal quotation marks omitted). In this case, the Judicial Officer found that "the record contains no evidence that Mr. Hollingsworth and Fresh America Corp. were viewed as one and the same." *Judicial Officer Decision* at 16, 1 J.A. 22. This finding is clearly supported by substantial evidence. A fair reading of the entire record reveals that Fresh America was dominated by the board and its chairman, not by Hollingsworth alone. We therefore find no merit in petitioners' arguments on this point.

III. CONCLUSION

The petition for review is granted in part. The Judicial Officer's decision on the nominal officer issue is vacated and the case is hereby remanded to the agency for further proceedings consistent with this opinion.

BROWN, Circuit Judge, dissenting:

The court vacates the Judicial Officer's determination that Taylor and Finberg were responsibly connected to Fresh America because my colleagues believe the Judicial Officer "misapplied" our "actual, significant nexus" test. Maj. Op. 615. I respectfully disagree. It is the

court that misapplies the test in two respects: First, the court fails to defer to the Judicial Officer's legitimate focus on Taylor and Finberg's actual knowledge of their company's violations, in combination with other relevant indicators of their "responsibly connected" status, even though we have previously suggested such knowledge may be dispositive. Second, the court makes "power and authority" the *sine qua non* of responsible connection to the PACA-violating company, even though we have previously denied such a requirement.

I

The Judicial Officer found that Taylor and Finberg were "responsibly connected" to Fresh America under the "actual, significant nexus" test, in part because "they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others." *Judicial Officer Decision* at 13–14, 1 J.A. 19–20. Specifically, the Judicial Officer found, "Ms. Taylor and Mr. Finberg knew of Fresh America Corp.'s financial difficulties. Although they told the board of directors of the prompt payment provisions of the PACA, they failed to convince the board of directors to comply with the provisions of the PACA." *Id.* at 14, 1 J.A. 20. The record amply supports this finding. Finberg testified that at one point he called a meeting of the board without the chairman's permission, and he and Taylor talked to the board about Fresh America's late produce payments for "ten or fifteen minutes." Hearing Tr. (Jan. 30, 2008) at 813, 1 J.A. 289. Taylor testified that she discussed "PACA payables" with Hollinger, but he responded, "PACA people [who] want to get paid in ... 30 days" were "crybabies." *Id.* at 545, 1 J.A. 215. She recalled that when a $5 million investment came in, it was made clear "that additional money ... was not to be used to pay down PACA payables." *Id.* at 546, 1 J.A. 216.

Contrary to the court's suggestion, the Judicial Officer did not hold that "mere knowledge of PACA violations [can] turn a nominal officer into a full-fledged one." Maj. Op. 617. We need not decide whether knowledge of company wrongdoing is sufficient by itself, because the Judicial Officer also relied in part on the officers' high levels of compensation—a detail the court does not mention. *Judicial Officer Decision* at 11–12, 1 J.A. 17–18. The Judicial Officer found Taylor and Finberg earned salaries of $175,000 and $145,000, respectively, and compensation packages that included "bonus potential, stock options,

and other 'fringe benefits.' " *Id.* Compensation is a relevant consideration under the "actual, significant nexus" test. *See Minotto v. USDA,* 711 F.2d 406, 408–09 (D.C.Cir.1983).

Moreover, the Judicial Officer expressly considered Taylor and Finberg's "experience, training, and education," *Judicial Officer Decision* at 13, 1 J.A. 19, which were consistent with genuine officers'. *Id.* at 10–13, 1 J.A. 16–19. Like compensation, professional qualifications are relevant to the "actual, significant nexus" test. *See Veg–Mix, Inc. v. USDA,* 832 F.2d 601, 612 (D.C.Cir.1987) ("[The officer's] legal training put him on notice of the responsibilities of a corporate director.... Thus his case is easily distinguishable from those of the nominal officer and corporate director in *Quinn* and *Minotto,* who were unsophisticated persons employed by the wrongdoers."); *Minotto,* 711 F.2d at 409 (reversing the Department's "responsibly connected" determination because, among other reasons, the so-called officer "lacked both the training and the experience to be an active director").

Taylor is a certified public accountant with prior experience as a "chief financial officer and vice president of finance and administration" at The Great Train Store, a company she helped to take public. Immediately before coming to Fresh America, she worked with the CEO of another troubled company, Intellisys Group, to get it refinanced. When Intellisys was purchased by another company, Taylor stayed on to help it through the transition. *Judicial Officer Decision* at 11, 1 J.A. 17.

Finberg was also well qualified to serve as an officer. He rose up through the ranks of Fresh America over several years, starting with summer jobs at its predecessor company. While still in college, Finberg worked full-time as general manager of two locations. After graduating, Finberg earned a series of promotions, serving variously as corporate liaison with the company's primary customer, director of customer service, director of national programs, and general manager of a distribution center. Only after gaining this leadership experience was Finberg elevated to vice president of sales and marketing, and eventually vice president of business development. *Id.* at 12, 1 J.A. 18.

This case therefore presents the question whether the Department's "responsibly connected" determination is an arbitrary and capricious

application of the "actual, significant nexus" test when the officer has actual knowledge of her company's PACA violations and a salary and résumé in keeping with her title. I think not.

We have previously recognized that an officer's knowledge of her company's PACA violations may be decisive under the "actual, significant nexus" test. In *Bell v. USDA*, the possibility that knowledge of company wrongdoing might confer "responsibly connected" status on an otherwise nominal "officer" led us to remand the Department's decision "for further consideration." 39 F.3d 1199, 1202 (D.C.Cir.1994). Bell was a produce salesman who performed no duties "that can be specifically attributed to his being vice-president." *Id.* at 1200. He had heard, however, "that some of the company's checks had bounced." *Id.* at 1200. We suggested that even where the employee was dubbed an "officer" only "for the administrative convenience of the company" and even where he "never participated in the formal decision making structures of the corporation," the Department could find him " responsibly connected" by virtue of his knowledge of the company's PACA violations. 39 F.3d at 1204. Although the Judicial Officer in *Bell* had made no finding about Bell's knowledge, we observed "Bell's awareness of some company wrongdoing may provide a distinction between this case and *Quinn* and *Minotto*." *Id.* at 1204. We rejected the Department's litigation position that under our prior cases "ignorance of company wrongdoing is a *sine qua non* of a finding that an officer's or director's relation to the corporate licensee was nominal," *id.,* but we implied that the Department could reasonably interpret some kinds of knowledge as establishing responsible connection *per se,* and asked the Department on remand to "formulate some principle delineating the role of differing degrees of knowledge of general corporate difficulties, or of 'transactions which gave rise to the underlying violations', or of the violations themselves, consistent with our cases." *Id.* at 1204–05.

Although the Judicial Officer in this case did not set out the full taxonomy we requested in *Bell,* he did make an acceptable judgment about how to treat "knowledge ... of the violations themselves." *Id.* Remember, Taylor and Finberg were found to have actual—not just constructive—knowledge of the PACA violations. The Judicial Officer said that when Taylor and Finberg "failed to convince the board of directors to comply with the provisions of PACA," their "only option to

avoid a responsibly connected determination was to resign as officers of Fresh America." *Judicial Officer Decision* at 14, 1 J.A. 20. In other words, direct knowledge of a PACA violation, in the mind of an "officer" whose compensation, "experience, training, and education" are commensurate with the title, constitutes "responsible connection" to the violating company.

The court is hard-pressed to call this an unreasonable interpretation of the statute, especially since we have stated an even harsher rule in dicta. *Hart v. USDA,* 112 F.3d 1228, 1231 (D.C.Cir.1997) ("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 nor should have known* of the company's misdeeds.' " (emphasis added) (quoting *Minotto,* 711 F.2d at 408–09)). The Judicial Officer's remedy is certainly "consistent with our cases." *Bell,* 39 F.3d at 1204–05. In fact, it comes straight from *Martino v. USDA*:

> "The fact that an individual has not exercised 'real' authority in the sanctioned company is not controlling: certainly the individual could have resigned as an officer and director.... It was his free choice not to do so. Having made that choice, the appellant[s] assumed the burdens imposed by the Act."

801 F.2d 1410, 1414 (D.C.Cir.1986) (quoting *Birkenfield v. United States,* 369 F.2d 491, 494–95 (3d Cir.1966)).

II

The court recognizes that an officer's knowledge of his company's PACA violations is relevant to whether he is responsibly connected, Maj. Op. 616, but concludes that it cannot be dispositive because "actual power and authority are the crux of the nominal officer inquiry," *Id.* at 617. This turns the doctrine on its head. Under our case law, "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,* 832 F.2d at 611. In other words, "[t]he fact that an individual has not exercised 'real' authority in the sanctioned company is not controlling." *Martino,* 801 F.2d at 1414. The court now

contradicts these statements by superimposing a "power and authority" requirement on the "actual, significant nexus" test.

Until today, that test contained no such requirement. Instead, managerial control was a sufficient—but not necessary—indicator of the requisite nexus with the violating company. *See Siegel v. Lyng,* 851 F.2d 412, 417 (D.C.Cir.1988). We have recognized an officer may be responsibly connected to a violating company in multiple ways, of which real managerial power is only one. For example, a minority shareholder may not have actual power or authority to prevent (or even discover) the company's PACA violations, but our cases have approved a sort of strict liability for so-called "officers" who hold a certain percentage of the violating company's stock. *See Veg–Mix, Inc. v. USDA,* 832 F.2d 601, 611 (D.C.Cir.1987) ("In *Martino,* we found that ownership interest of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection." (citing 801 F.2d at 1414)).

Even if the court's new "power and authority" test were one reasonable interpretation of the statute, it is not the interpretation employed by the Judicial Officer in this case, nor is it required by our precedent. After telling the Department it could find at least some kinds of knowledge of company wrongdoing to be dispositive evidence of an officer's "actual, significant nexus" to the violating company, *see Bell,* 39 F.3d at 1204–05, we cannot now declare arbitrary and capricious the Judicial Officer's decision based on Taylor and Finberg's actual knowledge of Fresh America's consummated PACA violations, along with compensation and qualifications commensurate with the officers' titles. We must defer to the Department's reasonable interpretation. *See Coosemans Specialties, Inc. v. USDA,* 482 F.3d 560, 564 (D.C.Cir.2007).

III

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). Perhaps, we could have viewed *Kleiman & Hochberg, Inc. v. USDA,* 497 F.3d 681 (D.C.Cir.2007), as a paradigm shift rendering the old test obsolete. Instead, the court treats that case as discerning a "power and

authority" requirement in the "actual, significant nexus" test even though we neither mentioned that test nor suggested the officer's managerial control was the cause-in-fact—much less a necessary condition—of his responsible connection to the company. *See* 497 F.3d at 692. He also owned 31.6 percent of the company's stock, *id.,* which is more than "enough support for a finding of responsible connection," *Veg–Mix, Inc.,* 832 F.2d at 611. I have no objection in principle to a demand for evidence of "power and authority." But the Judicial Officer in this case explicitly employed the "actual, significant nexus" test, *Judicial Officer Decision* at 13, 1 J.A. 19, and neither the parties nor my colleagues have seen fit to challenge its applicability.[1FN1] If the "actual, significant nexus" test applies, as the court holds it does, the Judicial Officer reasonably determined Taylor and Finberg's direct knowledge of their company's PACA violations, combined with their officer-appropriate salaries and qualifications, makes them responsibly connected to the violating company. Only if that test does *not* apply may a finding of "power and authority" be required instead. We cannot have it both ways.

———

[1] We have the authority to consider the propriety of the Department's continued application of the "actual, significant nexus" test even if the parties do not object. "[T]he appellate court ... always possesses discretion to reach an otherwise waived issue logically 'antecedent to and ultimately dispositive of the dispute before it.' " *Crocker v. Piedmont Aviation,* 49 F.3d 735, 740 (D.C.Cir.1995) (quoting *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America,* 508 U.S. 439, 447, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993)).

PERISHABLE AGRICULTURE COMMODITIES ACT

DEPARTMENTAL DECISIONS

SAMUEL S. PETRO,
PACA APP Docket No. 09-0161
and
BRYAN HERR,
PACA APP Docket No. 09-0162
Decision and Order
Filed April 7, 2011

PACA –

Decision and Order

Richard M. Kaplan, Esq. and Tanya N. Garrison, Esq. for the Petitioners
Ciarra A. Toomey, Esq. and Christopher Young, Esq. for AMS.
Decision and Order by Chief Administrative Law Judge Peter M. Davenport.

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 petitions for review filed by the Petitioners Samuel S. Petro (Petro) and Bryan Herr (Herr) of the determinations made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that they were "responsibly connected" (as that term is defined in Section 1(b)(9) of the Act (7 U.S.C. §499a(b)(9))) to Kahil Fresh Marketing, Inc., d/b/a Houston's Finest Produce Co. (Houston's Finest), during the period of time that Houston's Finest violated Section 2 of the Act (7 U.S.C. §499b).

Houston's Finest, a PACA licensee, was the subject of a disciplinary complaint that resulted in a Default Decision and Order being entered against it on March 23, 2010.[1] The Default Decision and Order authorized publication of the finding that Houston's Finest willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C.

[1] *In re: Kalil Fresh Marketing, Inc., d/b/a Houston's Finest Produce Co.*, Docket No. 09-0095, 69 Agric. Dec. _____(March 23, 2010)

§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 interstate commerce during the period October of 2007 through February 2008.

The petitions for review were consolidated for hearing and an oral hearing was held in Washington, DC on January 20 and 21, 2011. Samuel S. Petro and Bryan Herr were represented by Richard M. Kaplan, Esquire and Tanya N. Garrison, Esquire, Weycer Kaplan Pulaski & Zuber, PC, Houston, Texas and the Respondent was represented by Ciarra A. Toomey, Esquire and Christopher Young, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC.

At the hearing, the two Petitioners and three other witnesses testified on the Petitioners' behalf. Two witnesses were called by the Respondent.[2] 14 exhibits were introduced and admitted by the Petitioners and the certified Agency records containing 14 exhibits for Petro and 15 exhibits for Herr were admitted on behalf of the Respondent.[3] Briefs have been filed on behalf of all of the parties and the matter is now ripe for disposition.

Statutory Background

The Perishable Agricultural Commodities Act, 1930,[4] was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate or foreign commerce.[5] 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.[6] The Act was

[2] The transcript of the proceedings is contained in two volumes. References to the Transcript will be indicated as Tr. And the page number.

[3] Petitioner's Exhibits are indicated as PX 1-14 and the Agency exhibits as SPRX 1-14 (Petro) and BHRX 1-15 (Herr).

[4] 7 U.S.C. §499a-499s.

[5] HR Rep No 1041, 71st Cong, 2d Session 1 (1930)

[6] *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).

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 conduct, and unfair methods are numerous.[7] *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.[8] Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator "in any responsible position.[9]" 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 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

[7] 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).

[8] 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.

[9] 7 U.S.C. §499h(b) (1958).

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 amendment[10] 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 limited to performance of ministerial functions only. Thus, if a petitioner demonstrates that he or

[10] 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).

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 Petitioners met their 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 evidence is uncontroverted that the Petitioners each purchased a 25% stock interest in Houston's Finest. Tr. 349, SPRX-8, BHRX-8. Both Petro and Herr argue however that they were only passive investors in the corporation, asserting that even after their stock purchase the entity was dominated by John Kalil (Kalil), who then owned 50% of the corporate stock, served as the Chief Executive Officer of the company, and ran the corporation's day to day operations. Tr. 152-153, 349-350. Their position is only partially confirmed as to day to day operations by Kalil's testimony that he ran the corporation after the stock purchase by Petro and Herr and supervised the individuals responsible for sales, purchasing, the warehouse operations and the necessary bookkeeping functions which would include the payments made to suppliers. Tr. 349-350, 382-386.

Thus, by reason of their professed lack of involvement with the violating corporation, the Petitioners claim that at the time of the violations, they were only *nominal* directors and shareholders, lacking any actual, significant nexus with the violating company. *See, Bell v. Dep't of Agric.,* 39 F.3d 1199 at 1201(D.C. Cir. 1994) (emphasis in original).

The test for determining whether an individual had an "actual, significant nexus with the violating company" was recently revisited by the DC Circuit in the case of *Cheryl A. Taylor and Steven C. Finberg v. United States Dep't of Agric. and United States of America,* No. 09-1270 (January 7, 2011; *Resubmitted* March 2, 2011), 2011 WL 710460, 629 F.3d 241 (D.C. Cir. 2011). In that case, Senior Circuit Judge Edwards, writing the majority opinion, indicated "[u]nder 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." *Id., Slip Op. at* 13 (citing *Veg-Mix, Inc. v. U.S. Dep't of Agric*., 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted). Citing *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir. 1975) and *Bell,* the Court agreed with the Petitioners that an officer of the offending company is not considered to be "responsibly connected" to a violating licensee (even though the statutory 10% threshold was met) if that person was not actively involved in the PACA violation **and** was "powerless to curb it." *Id.* The court went on, "…our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry." *Id., Slip Op.* at 17.

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.[11] *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.

[11] During the hearing, Petro conceded that he could have used the authority set forth in the Stock Purchase Agreement, stating "Yes, I had the authority, I could have." Tr. 93.

Not surprisingly, while Petro conceded that he did have some authority,[12] both Petro and Herr raised their individual 25% shareholder interest as indicia of their impotence to alter any wrongdoing. Tr. 160-161. Indeed, Herr testified:

I - - there was nothing I could do. There was absolutely nothing I could do as I had no control over anything. John ran that company and basically he let everybody know that this is his baby, it's what he does, it's all about him.

So basically, I just watched money disappear. You know, I - - it was a bad deal.

Tr. 182.

Petro similarly testified:

I believe John just believed that he could handle it all and didn't need anybody's advice, is the only thing I can come up with. Tr. 59-60.

….

John ran the company. I didn't have…I did not have that authority. Tr. 68.

….

…John ran the company. I didn't have access to things. Tr. 72.

Prior caselaw would appear to have suggested that although Petro and Herr both claim to have been powerless to stop the wrongdoing, liability might nonetheless have been imposed upon them once they were joined as co-defendants in litigation in December of 2007. Once served as defendants, they had actual knowledge of the corporation's failure to pay suppliers and neither of them acted to divest themselves of or surrender their stock, resign from the board of directors or to otherwise take immediate decisive action to close down the business. *Martino v. USDA,* 801 F.2d 1410, 1414 (D.C. Cir. 1986). Instead, (a) despite their close relationship as partners in Country Fresh, (b) their combined ownership of half of the stock of the company, (c) their status as directors (at least according to the terms of the Stock Purchase Agreement), and (d) even

[12] See prior footnote. Tr. 93.

after being joined in December of 2007 in a lawsuit alleging non-payment they permitted Kalil to continue to make produce purchases for which it could not pay for over another month before the corporation finally shut its doors and filed for bankruptcy in February of 2008.[13] Tr. 396.

The *Taylor and Finberg* majority opinion appears to represent a volte-face departing somewhat from the prior standard, indicating:

…However, knowledge, without more, surely does not give compelling evidence of a person's actual power and station within a company. This court has made it clear that "neither the statutory definition of 'responsibly connected' nor the statutory 'nominal' and 'alter ego' exceptions suggest such a knowledge requirement. *Kleiman & Hochberg,* at 692.

The dissent, written by Circuit Judge Brown, disagreed, criticizing the majority for failing to defer to the Judicial Officer's legitimate focus on Taylor and Finberg's actual knowledge of the company's violations, in connection with other relevant factors of their responsibly connected status even though the circuit had previously suggested that such knowledge would be relevant. Judge Brown suggested that the majority made "power and authority" the *sine qua non* of responsible connection to the violating company, even though the circuit had previously denied such a requirement. *Slip Op.* at 20.

Although the *Taylor* decision is still potentially subject to modification, as a DC Circuit decision, it has effective nationwide applicability. The decision appears to significantly lessen a Petitioner's burden of rebuttal of the statutory presumption, and in so doing, casts a note of uncertainty into an area of the law that heretofore had been predictable; however, I consider it to be binding upon me in evaluating the two cases presently before me.

During the hearing, Petro suggested that his motivation for becoming involved with Houston's Finest had been prompted by his family relationship with his cousin John Kalil. He wanted to help Kalil because he had worked with John's father Charles Kalil who had been "like a second dad to him." Tr. 32, 34-35, 157. The evidence is conflicting as to who first approached whom about a sale of an interest in the

[13] Kalil testified that during the last month of operation, the corporation's payable grew about $600,000.00. Tr. 396.

corporation;[14] however, it is apparent that possibly a couple of months before July of 2002, Kalil, then in need of financial assistance, had discussed with Petro the corporation's need for additional capital. Tr. 33, 157. Petro saw the overture as an opportunity to get the company on a solid footing and to provide an opportunity for his son Michael Petro to work with Kalil to build something for the future. Tr. 34-35, 157. While the evidence strongly suggests that Petro could easily have loaned money to Kalil without acquiring an ownership interest, for reasons which remain unclear, he opted to take an equity position in the financially troubled corporation. During the same time frame Petro approached his business partner Bryan Herr and persuaded him to join in becoming a shareholder in Houston's Finest. Tr. 156. Based upon Herr's faith and trust in Petro as his partner, Herr agreed to make the investment.[15] Tr. 156-158.

What emerged from the discussions was a Stock Purchase Agreement which was prepared by Petro's accountant Jerry Paul.[16] Tr. 42, 358, 439. Executed on July 10, 2002, the Stock Purchase Agreement included the following in its provisions:

1. Petro and Herr would receive 50% of the stock of Kalil Fresh Marketing, Inc. (25% each) for the sum of $75,000.00. Tr. 54-55, 90, 158-160, 227, 230.

2. Petro and Herr would assist (with personal guarantees, if required) in obtaining a line of credit from Southwest Bank in the amount of $500,000.00, to be increased to $1,000,000.00 as business improved.

3. The corporation would effective January 1, 2003 henceforth do business as Houston's Finest Produce Company, Inc. Tr. 377.

4. Petro's son Michael Petro would be hired as a Vice President at compensation specified in the agreement. Tr. 51-55, 114-115, 353.

5. Kalil, Petro and Herr were named to the board of directors so long as corporate status was maintained.[17] In the event of conversion of the

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[14] Petro claimed that Kalil approached him. Tr. 156. Kalil testified that selling part of the corporation was Petro's idea. Tr. 439.

[15] One is reminded of the character Ben Rumson's (played by Lee Marvin) articulation of the duties of a partner expected of a partner to Pardner (Clint Eastwood) in the 1969 Paramount Pictures film *Paint Your Wagon.*

[16] Paul was also involved in keeping the books for Houston's Finest. Tr. 387.

[17] The agreement envisioned dissolving the corporation and forming a limited partnership; however, the necessary steps to effect such a change were never undertaken. The evidence is abundantly clear that the usual corporate formalities were not observed, such as the issuance of stock certificates, annual or more frequent formal meetings of the

corporation to a limited partnership, Kalil, Petro and Herr would then be placed on the partnership's Board of Management.

6. Petro and Herr were given specific **input and authority** over several areas, including deciding what accounts to sell to and upon what terms, equipment purchases, major personnel changes, sales strategies, and buying strategies. Tr. 93, 114.

7. The right of any of the owners to cause an independent audit by an independent accounting firm. Tr. 134.

SPRX-8; BHRX-8 (Emphasis supplied)

Both Petro and Herr have significant experience and lengthy involvement in the produce industry and testified that at the time of their purchase they both were heavily engaged with Country Fresh[18] and considered their stock ownership of 50% of Houston's Finest as merely an investment.[19] Tr. 35-36, 44, 156-158. Both individuals are very successful and astute businessmen with excellent reputations in the produce industry, with Petro's self characterization of having been "born in the produce industry" with nearly 50 years in the industry and Herr's briefer, but still lengthy experience of a quarter of a century. Tr. 27, 31, 89, 149, 150-151, 153-155. Over their many years in the industry, neither individual had ever been associated with any entity cited for a violation of the Act, and both acknowledge that they are well aware of its stringent requirements for paying suppliers. Tr. 30, 66, 88-90, 153-154.

Despite Petro's asseveration of lack of participation in Houston's Finest, it is clear that his involvement exceeded that of a passive investor. Direct involvement in the particular transactions that were left unpaid is not required. *In re: Charles R. Brackett, et al.,* 64 Agric. Dec. 942, 956 (2005). Participation in corporate decision-making has been enough to

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board of directors and or shareholders, keeping of minutes with board approval of certain corporate actions and similar activities. Tr. 44-49, 158-167. With the existence of such delicts, board members and shareholders may in many jurisdictions be subjected to individual liability under a theory of "piercing the corporate veil." The decision in *Quinn* might suggest that where a company was not really a corporation, it might become an alter ego of its owner(s). 34 Agric. Dec. 7, 26-29(1975).

[18] Country Fresh was involved in the sale of fresh cut fruits and vegetables which would be packaged, whereas Houston's Finest's market was characterized as the more traditional buying and selling of fruits and vegetables in the same form it was purchased. Tr. 150. As the two entities served different markets, they were not competitors.

[19] Herr indicated that from the outset he would not have had any time to devote to Houston's Finest as he was spending as many as 120 hours per week running Country Fresh and "didn't have time to go down there." Tr. 169.

find active involvement. *In re: Lawrence D. Salins,* 57 Agric. Dec. 1474, 1489 (1998). In addition to placing his son Michael Petro with the corporation in a well paying position with the title of the Vice President of Sales where he could serve as Petro's "eyes and ears" (Tr. 51, 378.), Petro was instrumental in bringing Avendra, a large account that was the buying arm for the Hyatt and Marriott hotel chains to Houston's Finest. Tr. 350-352. Later when Kalil complained that the contract was not as profitable as it should be, Petro renegotiated the subsequent extension on more favorable terms. Tr. 436. Petro discussed with Kalil which customers Houston's Finest was selling to, which price lists were being used and what type of services were being offered. Tr. 352, 356. Petro acknowledged discussing the Avendra account with Kalil and made regular visits to the business where he would discuss sales strategies with his son Mike and the other sales staff. Tr. 58, 123, 360. Although it was Herr that actually signed the loan documents for the line of credit at Southwest Bank, the evidence indicates that Herr's involvement was at Petro's request as he was out of town and it was Petro who had arranged the transaction. Tr. 136, 353-354. Petro also monitored whether payments were being made on the loan. Tr. 61-63. On other occasions, as contemplated in the Stock Purchase Agreement, he exercised his authority in personnel decisions, recommending that "Rosanna" be hired. Tr. 358-359. Petro also visited Houston's Finest's customers, entertaining them with meals and season tickets for which he was reimbursed his travel and other expenses. Tr. 120-122, 360-361. Even the decision as to the type of bankruptcy that the violating corporation would file was influenced, if not dictated by Petro. Tr. 371-372.

By way of contrast, it is apparent that Herr had far less contact with Houston's Finest than did Petro. The evidence establishes only ministerial involvement with the line of credit which Petro had arranged[20] and providing Kalil with information about refrigeration well before the violations period when changes were made to the warehouse operation to expand the amount of refrigerated space the corporation had. Tr. 357-358. His testimony that Country Fresh required 120 hours of his

[20] As Petro was unavailable at the time of the loan closing, he asked Herr to sign the loan documents for Houston's Finest's line of credit at Southwest Bank as President of Country Fresh, Inc. Tr. 62-63, BHRX-9. Herr testified that he co-signed the note "Because Sam asked me to." Tr. 170. and "Because I knew that Sam would stand behind it, yes." Tr. 171. When asked: "You weren't concerned about signing it personally because Sam would pay it if you had to? Herr answered: "That is correct." and "That's exactly what happened." Tr. 171.

time per week, although possibly hyperbole, sounded genuine and credible.[21] Devotion of even less time to Country Fresh would have been manifestly inconsistent with any real ability to have had any significant involvement with Houston's Finest's operations. Tr. 169. Moreover, Herr was not involved in negotiating the Stock Purchase Agreement, had no intentions of performing any duties for Houston's Finest, and although the Stock Purchase Agreement named Herr 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 the corporation. Tr. 160-167. The testimony throughout the hearing established him as a passive participant, distanced from any significant nexus to any "exercise of judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA" related to any violations of the Act and relying upon his partner Petro to pass on any information concerning the investment he had made only at Petro's urging, confident that Petro would stand good for any problems. *Norisberg,* 58 Agric. Dec. at 611, Tr. 168, 170-172.

Unlike the unsophisticated individuals and the faux corporate positions found in *Bell, Minotto* and *Quinn*, the facts in this case demonstrate that Petro participated in the very corporate decision making activities enumerated in the Stock Purchase Agreement. As an experienced and sophisticated businessman fully familiar with the payment provisions of the Act, Petro elected to take both an equity position and director's seat in the violating company and participated actively in its activities. Given that active participation, Petro should not escape liability with claims of inability and impotence to act based upon a claim of minority ownership.[22] The evidence is compelling that Petro exercised substantial influence in corporate decision making and activites, but failed when necessary to exercise the authority that he admitted that he possessed.[23] Tr. 66-67, 93. Nor may Petro claim

[21] Country Fresh is a large operation with 800-1000 employees. Tr. 30, 152.

[22] Petro admitted that he would have removed Kalil had he known the full extent of the corporation's financial problems. Tr. 67. Petro indicated that he paid the entire line of credit liability off as "…that was my responsibility because - - it was - - it wasn't Bryan's fault and, as a partner, I put him in that position…" Tr. 76-77. Petro went on: "Bryan signed that note because I was his partner. If Bryan had asked me to do something, I would have said yes…." Tr. 78.

[23] Petro testified that he should have "stepped forward and gone into the company and put people in there to find out what the problem was." Tr. 66-67.

ignorance. Indeed, Petro's liability is consistent with the long recognized principle that corporate officers and directors are fiduciaries, and "in the discharge of his responsibilities must at least use the degree of diligence that an 'ordinarily prudent' person under similar circumstances must use."[24] *Minnoto,* at 408; *Hanson Trust PLC v. MLSCM Acquisition, Inc.,* 781 F.2d 264 (2d Cir. 1986).

Petro's decision to acquire an equity position in Houston's Finest turned out to be a very expensive one. To his credit, he lived up to his partner's expectation[25] and assumed the responsibility for the entire $817,000.00 line of credit note and together with his partner settled the 40-60 lawsuits brought by PACA creditors for $250,000.00. Tr. 63, 72.

A contrary conclusion can be reached as to Herr who although ostensibly a 25% shareholder never received a stock certificate; who while also ostensibly a director never attended a directors meeting or otherwise acted in any corporate capacity to exercise any "power and authority" in the violating corporation;[26] and who the evidence establishes made the investment solely because of his partnership relationship with Samuel Petro. *Cf., Taylor* at 14.

As the facts in *Taylor* involved officers who had no ownership interest in the corporation, it is unclear whether the court in articulating an "actual power and authority" standard intended to eviscerate all remaining vestiges of the *per se* liability imposed in the line of cases where ownership has been used in determining liability. *See, Birkenfield v. United States,* 369 F. 2d 491, 494 (3rd Cir. 1966); *Siegel v. Lyng,* 851 F.2d 412, (D.C. Cir. 1988) (a large percentage of the corporate stock citing *Martino*); *Veg-Mix, Inc.,* 832 F.2d at 611 (finding 31.6 percent of the company's stock is more than enough support for a finding of responsible connection); *Martino,* 832 F.2d at 1401 (ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Beucke v. U.S. Dep't of Agric.,* 314 Fed. Appx. 10 (9th Cir. 2008) (ownership of 33 1/3%); *Jacobson v. Dep't of Agric.*, 99 Fed. Appx. 238 (D.C. Cir. 2004) (ownership of 11.95%);

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[24] Petro's concession that it was "not typical" for him to acquire a 25% ownership of a company and then just let it run on its own lends casts further doubt on his denial of active involvement. Tr. 91.

[25] Petro made it clear that he was solely responsible: "Same thing with this note. I asked Bryan to sign it. When it came time to pay it, it should not have been Bryan's responsibility, and that's why he's not on that note." Tr. 78.

[26] While the same reasoning as to corporate formalities might be applied to Petro, his more active involvement precludes him from being considered only nomial.

Conforti v. U.S., 74 F.3d 838 8th Cir. 1996); *In re: Joseph T. Kocol,* 57 Agric. Dec. 1517 (1998); and *In re: Anthony L. Thomas,* 59 Agric. Dec. 367, 386 (2000).

Even if unintended, under the actual power and authority standard articulated in *Taylor*, ownership of more than a 10% ownership interest without more, like the requirement of knowledge which previously had been considered significant, is insufficient absent active involvement in the activities resulting in a violation of the Act.

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. Samuel S. Petro is an individual residing in Houston, Texas. SPRX-3. Mr. Petro considers himself to have been born in the produce business. Tr. 27. During the violation period alleged in the disciplinary complaint, Petro owned 50% of Country Fresh, a fresh fruit and vegetable company and PACA licensee. Tr. 27-30. When he retired in 2008, selling his interest in the partnership to Herr, he had been in the industry for approximately 50 years. Tr. 27, 89, 171-172.

2. Bryan Herr is an individual residing in Conroe, Texas. During the violation period alleged in the disciplinary complaint, Herr owned 50% of Country Fresh, a fresh fruit and vegetable company and PACA licensee. Herr became the sole owner of Country Fresh in September of 2008 when he purchased the interest of his former partner Samuel S. Petro. He has been in the produce business in excess of 25 years. Tr. 151.

3. In existence since 1999, Country Fresh is a large successful fruit and vegetable business employing 800-1,000 employees in September of 2008. Tr. 30, 152. Country Fresh is considered highly regarded, with an excellent reputation and high Blue Book rating. Tr. 150-154.

4. Both Petro and Herr are well aware of the Act's stringent requirements concerning prompt payment for produce and neither individual had ever been previously associated with any entity having any violations of the Act. Tr. 66, 88-90, 154.

5. Kalil Fresh Marketing, Inc. is a Texas corporation, incorporated on August 11, 2000. Prior to July 10, 2002, all outstanding shares of stock of the corporation were owned by John Kalil. SPRX-3, BHRX-3.

6. John Kalil is Samuel S. Petro's cousin. Tr. 31. Petro had worked in the produce industry for many years with Kalil's father Charles Kalil

who was considered by Petro to have been like a second dad to him. Tr. 32.

7. Sometime around May or June of 2002, Kalil discussed with Petro his need for additional capital. Tr. 33. Petro in turn discussed the possibility of acquiring an ownership interest in Kalil's corporation and persuaded his partner Herr to join him in the eventual purchase of half of the corporation. Tr. 36, 439.

8. Although Petro and Herr were heavily involved with the activities of Country Fresh, Petro viewed the acquisition as a family obligation to help his cousin as well as an opportunity for his son Michael Petro to work with Kalil and "do some things here, do some good." Tr. 34. At Petro's suggestion and urging, Herr agreed to participate. Tr.

9. On July 10, 2002, Kalil, Petro and Herr executed a Stock Purchase Agreement (previously summarized in the Discussion, *supra.*) which had been prepared by Petro's accountant Jerry Paul. SPRX-8; BHRX-8

10. Petro exercised input and authority contemplated by the Agreement in many different areas, including the change of the business name, negotiating a new line of credit for the corporation with Southwest Bank, monitoring of payments made on the line of credit loan, assistance in acquiring significant new accounts for Houston's Finest, including Avendra, the purchasing arm for the Hyatt and Marriott hotel chains,[27] discussions and advice with Kalil concerning which customers Houston's Finest was selling to, what price lists were used, and what types of services were being offered, discussions concerning sales strategy with his son Michael and the other sales staff, input in personnel matters, resulting in the hiring of an employee, and Petro's travel to, visiting with and entertaining of Houston's Finest's customers with meals and season tickets for which he was reimbursed his expenses. Tr. 58, 61-63, 121, 123, 136, 145, 161, 352-354, 356, 358, 360-361, 377, 400-403, 405-408, SPRX-6

11. Herr had significantly less contact with Houston's Finest than did Petro, with the evidence establishing only his titular involvement with the line of credit which Petro had arranged and the advice he provided to Kalil well before the violations period in making changes to the warehouse operation expanding the amount of refrigerated space the corporation had. Tr. 357-358.

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[27] When Kalil approached Petro about the lack of profitability of the Avendra account, Petro assisted in the negotiation of an extension of the contract with Avendra at new, more favorable terms. Tr. 436-437.

12. 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.

13. Herr was not involved in negotiating the Stock Purchase Agreement, had no intentions of performing any duties for Houston's Finest, and although the Stock Purchase Agreement named him as a director, 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 the corporation. Tr. 160-167. More specifically, Herr was neither consulted about nor exercised any power or authority concerning what payables were paid or in what order.

14. Herr relied exclusively upon Petro to pass on any information concerning the investment he had made only at Petro's urging, confident that Petro would stand good for any problems. Tr. 168, 170-172.

15. Petro assumed total responsibility for Houston's Finest's line of credit note, paying the bank the $817,000.00 owed and with Herr settled the 40-60 lawsuits brought by PACA creditors for $250,000.00.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Samuel S. Petro is an individual responsibly connected to Kalil's Fresh Marketing, Inc. by virtue of his active participation in corporate operations, his ownership of 25% of the shares of the corporation and his status as a director.

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

4. Bryan Herr, although ostensibly an owner of 25% of the shares of the violating corporation (no shares were ever actually issued) did not actively participate in any activity resulting in a violation of the Act and had no actual, significant nexus to the corporation. As a result, he was not responsibly connected to the violating corporation.

5. Herr, by not being found to be responsibly connected, is not subject to the employment restrictions of the Act.

Order

1. The determination of the Chief of the PACA Branch that Samuel S. Petro was responsibly connected to Kalil Fresh Marketing, Inc., d/b/a Houston's Finest during the period of October 2007 through February 2008 when the corporation was committing willful, flagrant and repeated violations of the Act is **AFFIRMED.**

2. The determination of the Chief of the PACA Branch that Bryan Herr was responsibly connected to Kalil Fresh Marketing, Inc., d/b/a Houston's Finest during the period of October 2007 through February 2008 when the corporation was committing willful, flagrant and repeated violations of the Act is **REVERSED**.

3. Samuel S. Petro 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)).

4. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Respondent, 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.

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

DEPARTMENTAL DECISIONS

NEW GENERATION PRODUCE CORP. v. ROSSI FOODS, INC. (KISSENA FARMS).
PACA Docket No. R-10-005.
Decision and Order.
Filed January 19, 2011.

PACA-R -- Agency – Settlement Negotiated by Collection Agent – Ratification by Principal

Although Respondent failed to establish the collection agent was bestowed by Complainant with either actual or apparent authority to negotiate a settlement on Complainant's behalf, Complainant's acceptance of funds the collection agent received from Respondent raised the question as to whether Complainant ratified the settlement agreement the collection agent negotiated with Respondent. It was, however, determined that all the necessary elements of ratification had not been met, as there was no indication Complainant intended to ratify the settlement agreement, nor did it appear Complainant had full knowledge of the terms of the agreement at the time it accepted the funds from the collection agent.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
Meuers Law Firm, P.C., Counsel for Complainant
Winograd & Winograd,P.C., Counsel for Respondent
Decision and Order issued by William G. Jenson, Judicial Officer

Decision and Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $18,890.50 in connection with 31 trucklots of mixed produce shipped in the course of interstate commerce.

A copy of the Complaint was served upon the Respondent, who was afforded twenty days from receipt of the Complaint to file an Answer. Respondent failed to submit a timely Answer, so a Default Order was issued on August 8, 2008, awarding Complainant $14,631.75, plus interest and handling fees.[1] The Department subsequently received from Respondent a Petition to Reopen after Default. In the Petition, Respondent offered a defense that could at least mitigate the award requested by Complainant. Therefore, in order to properly determine the validity of the allegations made by the parties, and to weigh all the facts on the merits, it was necessary to reopen the Complaint. Accordingly, on April 3, 2009, an Order granting Respondent's Petition to Reopen after Default was issued.

The amount claimed in the Complaint does not exceed $30,000.00, therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement. Respondent filed an Answering Statement. Neither party submitted a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 195 Lombardy Street, Brooklyn, NY 11222. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a corporation whose post office address is 72-15 Kissena Boulevard, Flushing, NY 11367. At the time of the transactions involved herein, Respondent was licensed under the Act.

[1] In the Default Order, the $18,890.50 claimed by Complainant was stated to include payments made by Respondent totaling $4,258.75, and $550.00 for chestnuts, a commodity that is not subject to the Secretary's jurisdiction under PACA. These items were therefore deducted from the amount claimed, reducing the award amount to $14,631.75. It appears, however, that Complainant had already deducted the $550.00 for chestnuts from the amount claimed, as the invoices attached to the Complaint total $19,440.50 ($19,440.50 - $550.00 = $18,890.50). See Compl. Ex. 1-31.

3. Between September 6, 2007, and October 15, 2007, Complainant sold and shipped to Respondent 31 trucklots of mixed produce, as set forth more fully below:

Inv. No.	*Date*	*Description*	*Price*	*Total*
80982	9/06/2007	5 CTNS FUJI APPLES	$22.00	$110.00
		24 CTNS BANANAS	$12.00	$288.00
		5 CTNS GALA APPLES	$27.00	$135.00
		5 CTNS GOLDEN DEL	$30.00	$150.00
		40 CTNS CLEMENTINES	$6.50	$260.00
		Invoice Total		*$943.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
81108	9/07/2007	24 CTNS BANANAS	$11.00	$264.00
		60 CTNS HAMI MELONS	$18.00	$1,080.00
		Invoice Total		*$1,344.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
81159	9/08/2007	30 CTNS BANANAS	$12.50	$375.00
		24 CTNS WHITE PEACHES	$17.00	$408.00
		Invoice Total		*$783.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
81280	9/09/2007	24 CTNS BANANAS	$12.00	$288.00
		Invoice Total		*$288.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
58573	9/10/2007	30 CTNS BANANAS	$12.00	$360.00
		Invoice Total		*$360.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
58656	9/11/2007	24 CTNS BANANAS	$11.00	$264.00
		Invoice Total		*$264.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
58740	9/12/2007	24 CTNS BANANAS	$10.50	$252.00
		Invoice Total		*$252.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
58894	9/14/2007	30 CTNS BANANAS	$12.50	$375.00
		60 CTNS HAMI MELONS	$18.00	$1,080.00
		16 CTNS PLUMS	$15.00	$240.00
		Invoice Total		*$1,695.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
59037	9/15/2007	24 CTNS BANANAS	$14.00	$336.00
		Invoice Total		*$336.00*

nv. No.	*Date*	*Description*	*Price*	*Total*
59148	9/17/2007	20 CTNS BANANAS	$14.00	$280.00
		12 CTNS PAPAYAS	$29.00	$348.00
		Invoice Total	*$628.00*	

Inv. No.	*Date*	*Description*	*Price*	*Total*
59284	9/18/2007	15 CTNS BANANAS	$16.00	$240.00
		Invoice Total	*$240.00*	

Inv. No.	*Date*	*Description*	*Price*	*Total*
59348	9/19/2007	10 CTNS BANANAS	$16.00	$160.00
		1 BIN WATERMELONS	$240.00	$240.00
		Invoice Total		*$400.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
59509	9/21/2007	60 CTNS HAMI MELONS	$17.50	$1,050.00
		Invoice Total		*$1,050.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
59584	9/22/2007	24 CTNS BANANAS	$15.00	$360.00
		Invoice Total		*$360.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
59660	9/23/2007	24 CTNS BANANAS	$15.50	$372.00
		Invoice Total		*$372.*

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Inv. No.	*Date*	*Description*	*Price*	*Total*
10091	9/24/2007	30 CTNS BANANAS	$15.00	$450.00
		Invoice Total		*$450.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10195	9/25/2007	10 CTNS BANANAS	$15.00	$150.00
		60 CTNS HAMI MELONS	$17.50	$1,050.00
		Invoice Total		*$1,200.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10273	9/26/2007	15 CTNS BANANAS	$15.00	$225.00
		Invoice Total		*$225.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10335	9/27/2007	20 CTNS BANANAS	$12.50	$250.00
		60 CTNS HAMI MELONS	$7.00	$420.00
		Invoice Total		*$670.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10505	9/29/2007	25 CTNS BANANAS	$14.50	$362.50
		Invoice Total		*$362.50*

Inv. No.	*Date*	*Description*	*Price*	*Total*
106	10/01/2	10 CTNS BANANAS	$14.50	$145.

11	007			00
		60 CTNS HAMI MELONS	$18.00	$1,080.00
		Invoice Total		*$1,225.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10704	10/02/2007	10 CTNS FUJI APPLES	$16.00	$160.00
		20 CTNS BANANAS	$13.50	$270.00
		Invoice Total		*$430.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10789	10/03/2007	12 CTNS BANANAS	$13.50	$162.00
		8 CTNS BANANAS	$14.50	$116.00
		Invoice Total		*$278.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
10850	10/07/2007	20 CTNS BANANAS	$13.50	$270.00
		60 CTNS HAMI MELONS	$15.00	$900.00
		Invoice Total		*$1,170.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11022	10/06/2007	24 CTNS BANANAS	$13.50	$324.00
		Invoice Total		*$324.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11069	10/07/2007	24 CTNS BANANAS	$13.50	$324.00
		56 CTNS CANTALOUPES	$8.00	$448.00
		Invoice Total		*$772.0*

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Inv. No.	*Date*	*Description*	*Price*	*Total*
11159	10/08/2007	20 CTNS BANANAS	$13.50	$270.00
		54 CTNS HAMI MELONS	$15.00	$810.00
		Invoice Total		*$1,080.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11314	10/10/2007	10 CTNS BANANAS	$13.50	$135.00
		5 CTNS CHESTNUTS	$110.00	$550.00
		Invoice Total		*$685.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11548	10/13/2007	24 CTNS BANANAS	$14.00	$336.00
		14 CTNS GRAPES	$6.00	$84.00
		15 CTNS BANANAS	$14.00	$210.00
		Invoice Total		*$630.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11663	10/14/2007	24 CTNS BANANAS	$13.00	$312.00
		Invoice Total		*$312.00*

Inv. No.	*Date*	*Description*	*Price*	*Total*
11731	10/15/2007	24 CTNS BANANAS	$13.00	$312.00
		Invoice Total		*$312.0*

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(Compl. Ex. 1-31.)

4. On March 14, 2008, and April 15, 2008, Respondent issued check numbers 2110 and 2416, respectively, each made payable to Cox, Wells & Associates in the amount of $4,258.75. (Answer Ex. D, E.) On or about May 7, 2008, Complainant was paid $2,129.38 of the funds Cox, Wells & Associates collected from Respondent. (Compl. ¶ 26; Opening Stmt. Ex. C.)

5. The informal complaint was filed on December 31, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for the unpaid balance of the invoice price for 31 trucklots of mixed produce purchased from Complainant. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since paid only $7,697.00 of the agreed purchase prices thereof, leaving a balance due Complainant of $18,890.50. (Compl. ¶ 8.) Respondent asserts, in response, that the transactions in question were settled for $8,517.50, which amount was remitted to Complainant's collection agent, Cox, Wells & Associates, in two separate installments. (Answer ¶¶ 14, 15.)

We will first consider Respondent's allegation that an agreement was reached to settle the transactions for $8,517.50. Respondent, as the proponent of this claim, has the burden to prove its allegations by a preponderance of the evidence. Respondent's bookkeeper, Ms. Theresa Lapetina, asserts in Respondent's sworn Answer that on March 13, 2008, she was contacted by Ronald Hager, a representative of Cox, Wells & Associates, who stated that Respondent's open account had been sent to collections. (Answer ¶ 12.) After speaking with Mr. Hager, Ms. Lapetina states she called "Linda" of Complainant to inquire as to why the account had been sent to collections. According to Ms. Lapetina, Linda stated "I had to do what I had to do" because Respondent "was not paying fast enough." (Answer ¶ 13.) Ms. Lapetina states she then called Cox, Wells & Associates and discussed a compromise of the open balance. Ms. Lapetina states Cox, Wells & Associates then sent her a

letter detailing the terms of the settlement agreement. (Answer ¶ 14.) The letter, which is attached to Respondent's Answer as Exhibit C, reads as follows:

Pursuant to our phone conversation this afternoon, please be advised that my firm represents New Generation Produce, on a past due account in the amount of $17,035.80.

On behalf of my client my firm will accept the sum of $8,517.50 as settlement in full of any and all monies due.

It is my understanding that for this settlement to be in effect, a check in the amount of $4,258.75 must be picked up at your office no later than tomorrow, March 14, 2008, between the hours of 12:00 p.m. and 3:00 p.m., via my courier Federal Express at my firm's expense. I will make the necessary arrangements. My firm's Federal Express account # is 3690-5020-6. Additionally, a second check for the amount of 4,258.75 must be picked up at your office on April 14, 2008. Please call me when the check is available so I can make the necessary arrangements.

Please make your check payable to the firm of Cox Wells & Associates and forward to the above referenced address.

In accordance with the settlement referenced in this correspondence, Ms. Lapetina states Respondent remitted to Cox, Wells & Associates the sum of $4,258.75 on March 14, 2008, with check number 2110, and the sum of $4,258.75 on April 15, 2008, with check number 2416. Ms. Lapetina states that at that point in time she reasonably believed that Respondent had settled the open balance with Complainant. (Answer ¶ 14.)

In response to Respondent's allegation of a settlement agreement, Complainant's President, Katherine Chau, asserts in a sworn statement submitted as Complainant's Opening Statement that Complainant neither hired Cox, Wells & Associates nor any other collection agency to act on its behalf. Ms. Chau explains that on or about March 12, 2008, Complainant received a solicitation call from Frances Gennino, who said she was associated with a company identified as Creditors Service Bureau, a collection agency that had developed a very successful program to recover past due accounts receivable. (Opening Stmt. ¶ 20.)

Ms. Chau states Ms. Gennino indicated that Creditors Service Bureau would review Complainant's past due statements, determine the potential for collection and then make a proposal to represent Complainant on the accounts. (Opening Stmt. ¶ 21.) Ms. Chau states Complainant decided to give Creditors Service Bureau the opportunity to review five of its delinquent accounts, including Respondent, although Creditors Service Bureau was not hired to collect the accounts. Ms. Chau states she intended to make a decision on whether to hire Creditors Service Bureau based upon their proposal after reviewing the accounts. (Opening Stmt. ¶ 22.) Instead of providing an opinion on the potential for collection and a proposal, Ms. Chau states Creditors Service Bureau sent correspondence with Power of Attorney forms under the name of Cox, Wells & Associates. (Opening Stmt. ¶ 23.) The form pertaining to Respondent reads as follows:

Please accept this letter as appointment to act as agent for New Generation Produce, on all matters relating to the $21,964.50 owed by Kessina [sic] Farms. We hereby grant you Power of Attorney to carry out your duties to resolve this claim.

Very Truly Yours,

Katherine Chau

Since what Complainant received was something quite different from what Ms. Gennino had originally proposed, Ms. Chau states that neither she nor anyone from Complainant signed the Powers of Attorney for Cox, Wells & Associates or agreed to hire Creditors Service Bureau. (Opening Stmt. ¶ 24.) Despite the fact that they were neither hired nor authorized to contact Respondent, Ms. Chau states Cox, Wells & Associates apparently did just that, claiming to represent Complainant. Ms. Chau states Complainant was never informed by Creditors Service Bureau or Cox, Wells & Associates that they were attempting to collect against any delinquent accounts, including Respondent. (Opening Stmt. ¶ 25.) On or about May 7, 2008, Ms. Chau states Complainant received a letter from Creditors Service Bureau informing Complainant that it had collected the sum of $4,258.75 from Respondent, from which the sum of

$2,129.37 was deducted, and a check made payable to Complainant in the amount of $2,129.38 was enclosed. (Opening Stmt. ¶ 26.) A copy of this letter is attached to Complainant's Opening Statement as Exhibit C. On the same date, Mr. Chau states Complainant sent a fax to Creditors Service Bureau informing them to cease all collection efforts as of May 7, 2008. (Opening Stmt. ¶ 27.) A copy of the fax is attached to Complainant's Opening Statement as Exhibit D. Ms. Chau states neither she nor anyone from Complainant ever advised Respondent that Creditors Service Bureau or Cox, Wells & Associates were authorized to act on behalf of Complainant. (Opening Stmt. ¶ 28.)

Initially, we note that the exact relationship between Creditors Service Bureau and Cox, Wells & Associates is not disclosed in the record, and the two appear to have acted interchangeably in their dealings with Complainant and Respondent. Therefore, for the remainder of this discussion, the firms will be collectively referred to as "CSB/Cox." There is no dispute that CSB/Cox informed Respondent that it was acting as agent for Complainant, after which CSB/Cox negotiated a settlement with Respondent for the transactions at issue in this dispute. The issue to be determined here is whether this settlement agreement is binding upon Complainant. As CSB/Cox was purportedly acting as agent for Complainant when the settlement was negotiated, the effect of the settlement on Complainant depends on whether CSB/Cox had actual or apparent authority to act on Complainant's behalf.

The Restatement of Agency (Third) § 2.01, provides that an agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act. While we note that Complainant admittedly sent copies of its receivables to CSB/Cox, including those for Respondent, Complainant has also stated that further discussions were to take place and that no agreement for CSB/Cox to handle collections on behalf of Complainant was ever reached. This claim is supported by the fact that the Power of Attorney form that Complainant received from CSB/Cox is not signed by Complainant. (Opening Stmt. Ex. B.) We also note that the past due amount of $21,964.50 referenced in the Power of Attorney does not match either the past due amount of $17,035.80 that CSB/Cox mentioned in its correspondence to Respondent, or the past due amount of $18,890.50 which Complainant seeks to recover through this Complaint. These discrepancies suggest a lack of communication

between Complainant and CSB/Cox, i.e., if Complainant had hired CSB/Cox to collect the past due amount owed by Respondent, we presume Complainant would have provided CSB/Cox with an accurate figure of the amount due. Consequently, in the absence of any other manifestations on the part of Complainant indicating that it wished for CSB/Cox to act on its behalf, we conclude that CSB/Cox did not have actual authority to negotiate a settlement with Respondent concerning the receivables owed to Complainant.

On the issue of apparent authority, it has long been held that the necessary elements to establish apparent authority are: (1) that the principal has given indicia of authority to the agent or has knowingly permitted or caused another to appear to be its agent; (2) that there has been a representation of the agency by the principal to a third party; (3) that there was a reliance upon such representation by the third party; and (4) that such representation was acted upon in good faith to the injury of the third party. *Sunny Sally, Inc. v. Ray Burke Farmer*, 23 Agric. Dec. 268 (1964).

While the accounts receivable that Complainant provided to CSB/Cox allowed CSB/Cox to contact Respondent and appear to be acting as Complainant's agent, there is no evidence indicating that Complainant directly communicated to Respondent that CSB/Cox had authority to act on Complainant's behalf. Rather, Respondent's bookkeeper, Theresa Lapetina, has testified that she was contacted by Ronald Hager, a representative of CSB/Cox, who reportedly informed Ms. Lapetina that he was representing Complainant. To show apparent authority or the scope of authority in general, it is the acts and conduct of the principal, and not those of the agent, that must be relied upon. *Louis Caric & Sons v. Garden Fresh Markets, Inc. and/or Maure Solt Company*, 35 Agric. Dec. 412 (1976); *Gulf & Western Food Products Company v. Prevor-Mayrsohn International, Inc.*, 34 Agric. Dec. 1911 (1975). While Ms. Lapetina has also testified that she contacted "Linda" of Complainant, who reportedly confirmed that Respondent's account was sent to collection because Respondent was not paying fast enough, Ms. Lapetina has not asserted that CSB/Cox was specifically mentioned in this conversation. This is significant because at the time of the alleged conversation, the Complaint at issue herein was at the informal stages, and telephone calls were being made from PACA representatives to Respondent concerning the alleged balance due. While we hasten to point out that a PACA reparation complaint is *not* equivalent to

collection, the term "collection" is nevertheless often used, however erroneously, to refer to the informal mediation efforts conducted by PACA. Hence, we cannot be reasonably certain that Complainant's representative was aware, or should have been aware, that the collection referenced by Ms. Lapetina was that conducted by CSB/Cox.

On the basis of the evidence submitted and for the reasons cited, we find Respondent has failed to establish that it reasonably relied upon representations made by Complainant when it made the alleged settlement payment to CSB/Cox to satisfy its indebtedness to Complainant. Even assuming that CSB/Cox was under the false impression that it was acting as Complainant's agent, it had no authority to resolve the outstanding invoices with Respondent. When one deals with or through an agent, he assumes all the risks of lack of authority in the agent. *See, e.g., Pasco County Peach Ass'n v. J.F. Solley & Co., Inc.*, 146 F.2d 880, 883 (4th Cir. 1945). The burden of any necessary diligence to ascertain the agent's authority rests on the party dealing with the agent. *Id.* Respondent's submission of testimony from its bookkeeper concerning an alleged telephone conversation with a representative of Complainant inquiring as to whether Respondent's account had been sent to collection is not sufficient to establish that it met the burden of "necessary diligence to ascertain" whether CSB/Cox had authority to settle the transactions in question on behalf of Complainant. Consequently, Respondent's mistaken reliance upon CSB/Cox's representations ordinarily would not relieve it of liability for payment of the outstanding invoices to Complainant.

However, despite the fact that CSB/Cox had neither actual nor apparent authority to settle Respondent's indebtedness to Complainant, the record shows Complainant deposited a portion of the funds that CSB/Cox collected from Respondent. This raises the question as to whether the settlement agreement, although unauthorized, was nevertheless ratified by Complainant. The Restatement of Agency (Third) § 2.01 defines "ratification" as "the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority." Section 2.01 provides further that a person ratifies an act by: (a) manifesting assent that the act shall affect the person's legal relations, or (b) conduct that justifies a reasonable assumption that the person so consents.

Complainant asserts that the funds received from CSB/Cox were applied to Respondent's past due account (Opening Stmt. ¶ 12.);

however, Complainant fails to explain why it accepted the funds, given its assertion that CSB/Cox was not authorized to act as its collection agent. The act of ratification, whether express or implied, must nevertheless be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language. *See* 57 NY Jur Estoppel, Ratification, and Waiver §§ 87, 88.

Complainant was plainly aware that the funds received from CSB/Cox were collected on its behalf from Respondent, as the letter that accompanied the check advised Complainant of the total amount CSB/Cox collected from Respondent and noted the amount CSB/Cox withheld as its collection fee. (Opening Stmt. Ex. C.) If Complainant did not acquiesce to CSB/Cox negotiating a settlement and collecting funds from Respondent on its behalf, Complainant should have returned the funds to CSB/Cox and notified all parties involved that CSB/Cox did not have authority to act on its behalf. Instead, Complainant advised CSB/Cox by fax to "cease and desist all collections as of May 7, 2008" (Opening Stmt. Ex. D.), but it also accepted the funds collected. Complainant cannot have it both ways. Accordingly, we find that Complainant ratified the settlement agreement CSB/Cox negotiated with Respondent when it accepted and deposited the funds CSB/Cox collected from Respondent pursuant to the agreement. As Respondent submitted full payment to CSB/Cox in accordance with the settlement terms, we find that Respondent has fully satisfied its liability to Complainant for the transactions at issue in this dispute. The Complaint should therefore be dismissed.

Order

The Complaint is dismissed.
Copies of this Order shall be served upon the parties.
Done at Washington, D.C.

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JUDY S. ROU D/B/A LAMAR ROU PRODUCE v. SEVERT SONS PRODUCE, INC., D/B/A SEVERT SONS PRODUCE, INC.,
PACA Docket No. R-09-020
Decision and Order
Filed April 19, 2011.

PACA-R -- Offsets

Where Respondent admitted to accepting produce from Complainant, and cited as a defense against paying for that produce an offset agreement reached between Respondent and a third party, and the third party denied the existence of such an agreement (as did Complainant), Respondent could not offset the debt for accepted produce owed to Complainant with the debt owed by the third party under a previous growing arrangement between the third party and Respondent.

Christopher Young, Presiding Officer.
Rynn & Janosky, LLP for Complainant
Meurs Law Firm, P.L. for Respondent
Decision and Order issued by William G. Jenson, Judicial Officer

[Editor's Note: See JO Decision filed November, 10, 2011]

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) (the Act). A timely Complaint was filed with the United States Department of Agriculture (the Department) on June 20, 2008, in which Complainant sought a reparation award against Respondent in the amount of $71,541.62, which was alleged to be past due and owing in connection with ten (10) shipments of watermelons sold to Respondent in the course of interstate commerce.

A Report of Investigation was prepared by the Department and served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability and requesting an oral hearing.

Although the amount claimed in the Complaint exceeds $30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the

verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements, and to file briefs. Complainant filed an Opening Statement and a Statement In Reply, and Respondent filed an Answering Statement. Both parties submitted a brief.

Findings of Fact

1. Complainant, Judy S. Rou d/b/a Lamar Rou Produce (Rou Produce or Complainant), was an individual[1] whose business mailing address is or was 5979 S.E. 39th Avenue, Ocala, Florida 34480. At the time of the transactions alleged in the Complaint, Complainant was licensed under the PACA. (Complaint, p. 1; *See* ROI, PACA License Information.)

2. Respondent, Severt Sons Produce, Inc., d/b/a Severt Sons Produce, Inc. (Severt & Sons or Respondent[2]), is a corporation whose business address is or was 3725-B SR 16, St. Augustine, Florida 32092. At the time of the transactions alleged in the Complaint, Respondent was licensed under the PACA. (Answer, p. 1; *See* ROI, PACA License Information.)

3. Complainant Judy Rou created invoices, for purported f.o.b. sales, reflecting the sale of numerous lots of watermelons to Respondent between May 1, 2007, and May 12, 2007. (Complainant's Opening Statement, Exhibits 1-10, 11c-f, 12 e, 13 c-f.)

4. Each Judy Rou invoice has an accompanying bill of lading. Judy Rou's "letterhead" with address appears at the top of each bill of lading. (Complainant's Opening Statement, Exhibits 1-13f.)

5. Between May 1, 2007 and May 12, 2007, Complainant shipped from its place of business ten loads of watermelons to Respondent's customers in Atlanta, GA, Columbia, SC, and Jacksonville, FL, which were accepted by Respondent's customers without incident. (ROI,

[1] Judy Rou d/b/a Lamar Rou Produce may have become a corporation since the filing of its reparation Complaint in this case.

[2] Respondent's business name on its PACA license is Severt Sons Produce, Inc., d/b/a Severt Sons Produce, Inc. However, throughout the remainder of the decision, the company will be referred to for ease of reference as either Severt & Sons or Respondent.

Exhibits C, E, G, H, I, M, P; Complainant's Opening Statement pp. 2-4, Exhibits 1-13f; Respondent's Answering Statement, pp. 2-5.)

6. Simultaneous to or shortly after the shipment of each load of watermelons, Complainant sent an invoice, mentioned in Finding of Fact No. 3, for each load to Respondent. (Respondent's Answering Statement, affidavit of Daniel Severt, p. 4; Complainant's Opening Statement, Exhibits 1-13f.)

7. Respondent refused to pay Complainant for all ten loads of watermelon, citing a previous agreement between David Herrera, a grower of watermelons in Collier County, Florida and Respondent in which Respondent Severt & Sons was to "offset" the approximately $77,000 worth of debt owed by Mr. Herrera to Severt & Sons under a 2005 growing arrangement, by supplying watermelons to Respondent Severt & Sons through Complainant Rou Produce, Mr. Herrera's 2007 season sales agent, until the $77,000 worth of debt owed by Mr. Herrera was satisfied. (Respondent's Answering Statement, affidavit of Daniel Severt, pp. 2-4.) Respondent based its refusal to pay Complainant for the watermelons at issue in this case on the purported agreement reached by David Herrera and Respondent.

8. Complainant had no involvement with the 2005 growing arrangement between David Herrera and Respondent. (Complainant's Opening Statement, pp. 3-4; Complainant's Statement In Reply, p. 3; Respondent's Answering Statement, pp. 2-3.)

9. During the 2007 season, Complainant acted as David Herrera's sales agent, selling watermelons. (Complainant's Opening Statement, affidavit of Judy Rou p. 4; affidavit of David Herrera, p. 2; Respondent's Answering Statement, affidavit of Daniel Severt, p. 2.)

10. The informal complaint was filed on July 6, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

Complainant alleges that Respondent is liable in the amount of $71,541.72, which is alleged to be past due and owing in connection with ten (10) shipments of watermelons sold to Respondent by Complainant in the course of interstate commerce. (Complainant's Opening Statement, pp. 2-3; Complainant's Statement In Reply, pp. 2-3.) Respondent acknowledges its refusal to pay Complainant for all ten loads of the watermelons, and claims that Complainant was not the owner of the

watermelons and therefore not entitled to payment. (Respondent's Answering Statement, pp 2-5.) Respondent claims that the owner of the 10 watermelon loads sold by Complainant was David Herrera, a grower of watermelons in Collier, County, Florida, and that at the time of the sale, Complainant was acting as David Herrera's agent. (Respondent's Answering Statement, pp 2-6.) Respondent further claims that under an arrangement with David Herrera, made prior to the sale of the watermelons at issue, Mr. Herrera agreed that Respondent could offset the ten loads against a previous debt owed by Mr. Herrera. (*Id.*)

Complainant has the burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract, the terms thereof, a breach by Respondent, and damages resulting from that breach. *Haywood County Co-operative Fruit, et al. v. Orlando Tomato, Inc.,* 47 Agric. Dec. 581, 582 (1988). *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (1987) *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533, 534-5 (1975). In this case, based on the aggregate of evidence in the record, we find that Complainant has met its burden.

Complainant provided as proof of the allegations the invoices for each of the ten loads of watermelons, which were sent to Respondent simultaneous to or shortly after the shipment of each load of watermelons. (Respondent's Answering Statement, affidavit of Daniel Severt, p. 4; Complainant's Opening Statement, Exhibits 1-13f.) Respondent admits to receiving the invoices. Each shows the transactions were f.o.b.[3] sales. Complainant also provided the accompanying bills of lading to each invoice, which show that between May 1, 2007 and May 12, 2007, Complainant shipped from its place of business 10 loads of watermelons[4] to Respondent's customers in Atlanta,

[3] F.o.b. means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the [buyer] through land transportation at shipping point, in suitable condition...and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. 7 C.F.R. § 46.43 (i); *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 975-976 (1997). The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at the time of shipment. . . . 7 C.F.R. § 46.43 (i).

[4] There is some dispute as to whether Complainant or Respondent arranged for the transportation of watermelons to customers. Complainant claims that Respondent made the arrangements (*See* Complainant's Statement In Reply, affidavit of Christopher

GA, Columbia, SC, and Jacksonville, FL, which were accepted by Respondent's customers without incident. (Complainant's Opening Statement, Exhibits 1-10, 11c-f, 12 e, 13 c-f; Respondent's Answering Statement, pp 2-4.)

Complainant provided the affidavits of Judy Rou, owner of Complainant Rou Produce, and Christopher Collier, salesman of Complainant, who handled the sale of each of the loads at issue in this case. Both Ms. Rou and Mr. Collier state that they were familiar with and recalled the circumstances surrounding the sale of the loads at issue, and Mr. Collier states that he was personally involved in each sale. Both Ms. Rou and Mr. Collier state that Complainant was the owner of the watermelons at issue, that Complainant sold the watermelons at issue to Respondent, and that Respondent failed to pay for the watermelons. (*See* Complainant's Opening Statement, affidavit of Judy S. Rou, pp. 2-4; *see also* Complainant's Statement In Reply, affidavit of Christopher Collier, pp. 2-3.)

Complainant provided accounts of sale showing that it paid David Herrera for the watermelons at issue (Complainant's Opening Statement, Exhibits 11b, 12 b, 12c, 12d), and provided checks dated June 2, 2007 (*Id.* at 12a) and June 27, 2007 (*Id.* at 11a) that show payment to David Herrera and that correspond to the accounts of sale. The accounts of sale identify the loads of watermelons at issue in this case by purchase order number and amount. (Complainant's Opening Statement, Exhibits 11b, 12 b, 12c, 12d.) Respondent admits that it (or its specified customers) received and accepted the ten loads of watermelons from Complainant and that it refused to pay Complainant for all ten loads of watermelons. (Respondent's Answering Statement, affidavit of Daniel Severt, pp. 4-5.) Therefore, based on the foregoing, Complainant has proven by a preponderance of the evidence all of the material allegations of its complaint. *See Haywood County Co-operative Fruit, et al. v. Orlando Tomato, Inc.,* 47 Agric. Dec. 581, 583 (1988); *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (1987); *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533 (1975).

Collier), while Respondent claims that Complainant made the arrangements. (*See* Respondent's Answering Statement, affidavit of Daniel Severt.) Regardless of who arranged for transportation, it seems clear that the watermelons were shipped from Complainant's place of business. (Complainant's Opening Statement, Exhibits 1-13f, affidavit of Judy Rou, p. 3.)

Respondent admits receiving and accepting the ten shipments of watermelons it ordered from Complainant. Respondent, as its defense, points to a previous agreement with David Herrera, a grower of watermelons in Collier County, Florida. (Respondent's Answering Statement, affidavit of Daniel Severt, pp. 2-5.) Respondent asserts that it based its refusal to pay Complainant for the watermelons at issue in this case on a purported agreement reached with Mr. Herrera, which involved a previous 2005 debt owed by Mr. Herrera, for a 2005 growing arrangement between Respondent Severt & Sons and Mr. Herrera. The purported agreement (between David Herrera and Severt & Sons) was to "offset" the approximately $77,000 worth of debt owed by Mr. Herrera to Respondent, by supplying watermelons to Respondent through Complainant Rou Produce, Mr. Herrera's 2007 season sales agent, purportedly for free, until the $77,000 worth of debt owed by Mr. Herrera was satisfied. (Respondent's Answering Statement, pp. 2-5.)

Respondent provides the affidavits of Daniel Severt[5], Vice President of Severt & Sons, as well as the affidavits of Jessica Severt, receptionist and accountant for Severt & Sons; Barbara Severt, Secretary of Severt & Sons; Lee Severt, salesperson for Severt & Sons; and Junior Lazzano, "employee"[6] of Severt & Sons, as support for the claim that an offset agreement was reached with David Herrera. (Respondent's Answering Statement.) Each of the affidavits state that in April 2007, Mr. Herrera came to Severt & Sons' office in Immokalee, Florida to discuss the $77,000 worth of debt owed by Mr. Herrera to Severt & Sons under the 2005 growing arrangement, and that during that meeting, the above-mentioned agreement to offset the debt was made. (Respondent's Answering Statement, affidavit of Barbara Severt, pp. 1-2; affidavit of Jessica Severt, pp. 1-2; affidavit of Lee Severt, pp. 1-2; affidavit of Junior Lazzano, pp. 1-2.) We note, however, that when this case first arose, Respondent, through its counsel, sent a letter dated September 14,

[5] We note that Mr. Severt, in his affidavit, states that prior to the transactions at issue in this case, Respondent had never purchased produce from Complainant. (Respondent's Answering Statement, affidavit of Daniel Severt, p. 3.) This claim was directly rebutted by Complainant, and it is clear that Respondent purchased produce from Complainant in 2003. (Complainant's Statement in Reply, affidavit of Judy S. Rou, p. 3, affidavit of Christopher Collier, p. 1, exhibit A.)

[6] In the affidavit, Mr. Lazzano simply states that he was an "employee" of Severt & Sons.

2007 to the Department, stating that the "offset" agreement was reached between Daniel Severt and David Herrera *telephonically*. (ROI, Exhibit P, pp.3-4.) Respondent did not provide a date for the telephonic agreement in this letter. Further, Respondent does not provide any explanation for this discrepancy.[7]

Complainant provided, in its Opening Statement, the affidavit of David Herrera, wherein Mr. Herrera states that Complainant purchased the 10 loads of watermelons at issue in this case from him, and that he received payment in full for the watermelons. Mr. Herrera further states that "at no time was it his intention that [the] watermelons be used to offset any debt owed to Respondent", and that "at no time did [he] tell Respondent that [the] watermelons were to be used to offset any debt to Respondent". Mr. Herrera also states that "at no time did I tell [Complainant] that [the] watermelons were to be used to offset any debt to Respondent." (Complainant's Opening Statement, affidavit of David Herrera, p. 2.)

Complainant further provided in its Opening Statement the affidavit of Judy S. Rou, owner of Complainant. Ms. Rou states in her affidavit that the sales at issue were f.o.b, and that the purchase agreement was reached with Daniel Severt of Respondent. (Complainant's Opening Statement, affidavit of Judy S. Rou, pp. 2,4.) Ms. Rou further states that Complainant purchased the watermelons at issue from David Herrera, and that at the time of the sale to Respondent, Complainant was the owner of the watermelons and entitled to full payment for them. Ms. Rou states that at the time of the purchase by Respondent, Complainant was not aware that David Herrera allegedly owed money to Respondent, or of any offset agreement. (Complainant's Opening Statement, affidavit of Judy S. Rou, p. 4.) The evidence is unclear as to whether Complainant owned the watermelons in question, or whether Complainant was acting as David Herrera's agent at the time of the sale of watermelons to Respondent. However, in light of our other findings in this case, *see infra*, this issue is moot.

[7] We further note that other than the affidavits of Daniel and Jessica Severt, Respondent's affidavits in this case are all substantively identical (other than the change in name and title in each). In a case such as this, where proof of an agreement with David Herrera is the crux of Respondent's case, a "canned" affidavit that is signed by several individuals, rather than affidavits that provide their own individual accounts of what transpired, will be accorded little weight.

Complainant also provided, in its Statement In Reply, the affidavit of Christopher Collier, Complainant's salesman who handled the watermelon sales transactions at issue in this case. Mr. Collier states in his affidavit that the sales at issue were f.o.b, and that the purchase agreement for the 10 loads of watermelons was reached with Daniel Severt of Respondent. (Complainant's Statement in Reply, affidavit of Christopher Collier, p. 1.) Mr. Collier further states that Complainant paid David Herrera for the watermelons, and that at no time during his dealing with Daniel Severt or any other of Respondent's representatives "was he informed" that Respondent did not intend to pay for the watermelons or of any offset agreement. (Complainant's Statement in Reply, affidavit of Christopher Collier, p. 2.)

The proponent of a claim has the burden of proof. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec 893, 894 (1987). The party which has the burden of proof as to a fact must prove the fact by a preponderance of the evidence. *Id.; A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (1969). In this case, Respondent has not met its burden to prove its claim that an offset agreement existed that would affect its obligation to pay Complainant for the ten loads of watermelons Respondent ordered from Complainant. Respondent submits conflicting accounts of when and how the purported agreement with David Herrera was reached. *See supra* at 7-8. Further, Respondent provides no written contract or memorialized agreement to prove the offset arrangement reached between Respondent and David Herrera. However, it seems logical, given Respondent's purported prior dealings with Mr. Herrera, that Respondent would have required that any offset agreement be in writing, particularly when the debt was already two years old and when it involved a third party, who had nothing to do with the debt allegedly owed by Mr. Herrera. Moreover, David Herrera, with whom Respondent claims the offset agreement was reached, flatly denies the existence of any such offset agreement. (Complainant's Opening Statement, affidavit of David Herrera , pp. 1-2.) Based on the ambiguity of Respondent's evidence that any offset agreement was reached, the lack of any written contract or agreement memorializing an offset agreement, and the statements of David Herrera and Christopher Collier, that directly contradict Respondent's claim that an offset agreement was reached between David Herrera and Respondent and communicated to Complainant, we find that there was no offset agreement that could affect Complainant's claim in this case. The

evidence does not support the conclusion that an offset agreement existed that would alleviate Respondent's obligation to pay for the 10 loads of watermelons it (or its customers) received and accepted between May 1, 2007 and May 12, 2007.

Because we find that no offset agreement existed, we need not address the issue of whether Complainant, as David Herrera's agent, could be obligated by Mr. Herrera's agreement to offset a 2005 debt with the 2007 watermelon loads at issue in this case (had such an agreement been made). We further need not address the issue of whether a 2007 growers agent arrangement between Complainant and David Herrera existed at the time of the sale of the 10 loads of watermelons in this case. We note that Complainant provides a "sales contract", which purports to show that at some point in 2007, Complainant acted as David Herrera's selling agent. (Complainant's Opening Statement, Exhibit 14.) There is no date range listed in the contract as to the length of the agreement. The contract is dated March 1, 2007; however, both Judy Rou and David Herrera claim that the contract was "backdated", and that it was not in effect at the time of the transactions in this case. (Complainant's Opening Statement, affidavit of Judy Rou p. 4; affidavit of David Herrera, p. 2.) David Herrera states in his affidavit that the contract was not in place until "several months" after the transactions in this case. (Complainant's Opening Statement, affidavit of David Herrera, p. 2.) Judy Rou never states when the contract was in fact put in place or began. Neither David Herrera nor Ms. Rou provide any explanation for the somewhat extraordinary claim that the contract was backdated, or why it would have been so. We note, as Respondent points out in its brief, that Complainant paid David Herrera for the loads of watermelons in accordance with the "sales contract", *i.e.* the full price of the watermelons minus a selling commission of $0.02 per pound. *(See* Complainant's Opening Statement, exhibit 14.) However, this fact is not relevant to the decision here, since the agreement between Complainant and Mr. Herrera is separate and distinct from the contracts between Complainant and Respondent. Even if Complainant was operating as Mr. Herrera's agent for the transactions at issue, we have determined that no offset agreement was reached between Mr. Herrera and Respondent involving the watermelons sold by Complainant.

Because we find that Respondent failed to prove by a preponderance of the evidence that any offset agreement existed when the 10 loads of watermelons were sold to and accepted by Respondent

and/or its customers between May 1, 2007 and May 12, 2007, we find that Respondent is liable to Complainant for the entire invoice price of the 10 loads of watermelons ordered by Respondent.

Respondent's failure to pay Complainant $71,541.62 for 10 loads of watermelons purchased and accepted between May 1, 2007 and May 12, 2007 is a violation of section 2 of the Act (7 U.S.C. § 499b), for which reparation should be awarded to the Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (1963). The interest to be applied

shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant in this action paid a $300.00 handling fee to file its complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $71,541.62, with interest thereon at the rate of 0.24% per annum from June 1, 2007, until paid; plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

[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 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

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

NAGI G. HABIB.
Docket No. PACA 09 – 0096.
Miscellaneous Order.
Filed March 7, 2007.

G & T TERMINAL PACKAGING CO.
Docket No. PACA 11 – 0182.
Miscellaneous Order.
Filed May 2, 2011.

[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]

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

K & R FARMS PRODUCE INC.
Docket No. PACA 10 – 0308.
Default Decision.
Filed January 10, 2011.

MAS POR MEMOS LLC.
Docket No. PACA 10 – 0361.
Default Decision.
Filed February 23, 2011.

STOREYS' FRUIT & PRODUCE INC.
Docket No. PACA 10 – 0378.
Default Decision.
Filed February 24, 2011.

NOR CAL RASIN PACKING INC.
Docket No. AMA a 10 – 0383.
Default Decision.
Filed February 28, 2011.

BABALUCI FRESH FRUIT &.
Docket No. PACA 11 – 0099.
Default Decision.
Filed April 1, 2011.

Consent Decisions

Perishable Agricultural Commodities Act

Topical Banana Company Inc., PACA-D-10-0453, 11/01/07.
Craig R. Anderson, PACA-D-10-0049, 11/02/04.
The Kinoko Company, PACA-D-10-0048, 11/02/04.
Jard Marketing Corporation, PACA-D-10-0220, 11/04/11.