

the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA].¹ On December 16, 2003, Petitioner filed a Petition For Review pursuant to the PACA and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice] seeking reversal of Respondent's November 21, 2003, determination that Petitioner was responsibly connected with John Manning Co., Inc.

Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] conducted a hearing on March 29, 2005, in Atlanta, Georgia. Kenneth D. Federman, Rothberg & Federman, P.C., Bensalem, Pennsylvania, represented Petitioner. Ann Parnes, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Respondent.

On June 22, 2005, Petitioner filed "Brief in Support of the Appeal of James E. Thames, Jr. to the Chief's Determination He Was Responsibly Connected to John Manning Co., Inc." On June 24, 2005, Respondent filed "Respondent's Proposed

¹During the period October 13, 2001, through August 28, 2002, John Manning Co., Inc., failed to make full payment promptly to 58 sellers of the agreed purchase prices in the total amount of \$1,953,098.39 for 1,102 lots of perishable agricultural commodities which John Manning Co., Inc., purchased, received, and accepted in interstate and foreign commerce, in willful, flagrant, and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re John Manning Co.* (Decision Without Hearing by Reason of Default), 64 Agric. Dec. ____ (Oct. 21, 2004).

Findings of Fact, Conclusions and Order.” On August 17, 2005, Petitioner filed “Reply Brief in Support of the Appeal of James E. Thames, Jr. to the Chief’s Determination He Was Responsibly Connected to John Manning Co., Inc.” On August 19, 2005, Respondent filed “Respondent’s Reply to Petitioners’ Proposed Findings of Fact, Conclusions of Law, and Order.”

On October 17, 2005, the ALJ issued a Decision and Order [hereinafter Initial Decision] concluding Petitioner was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., willfully, flagrantly, and repeatedly violated the PACA (Initial Decision at 13).

On November 15, 2005, Petitioner appealed to the Judicial Officer, and on December 16, 2005, Respondent filed a response to Petitioner’s appeal petition. On December 23, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ’s Initial Decision. Therefore, I adopt the substance of the Initial Decision as the final Decision and Order as to James E. Thames, Jr. Additional conclusions by the Judicial Officer follow the ALJ’s conclusion, as restated.

References to the transcript are designated by “Tr.” The agency records upon which Respondent based his determinations that Petitioner, George E. Fuller, Jr., and Jon R. Fuller were responsibly connected with John Manning Co., Inc., are part of the

record of this proceeding.² Exhibits in the agency record relating to Petitioner are designated by “JTRX”; exhibits in the agency record relating to George E. Fuller, Jr., are designated by “GFRX”; and exhibits in the agency record relating to Jon R. Fuller are designated by “JFRX.”

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

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(b) Definitions

For purposes of this chapter:

. . . .

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the 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

²See 7 C.F.R. § 1.136(a).

violating licensee or entity subject to license which was the alter ego of its owners.

....

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

....

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

....

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required). . . .

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who—

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

....

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by

the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

.....

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person—

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection

with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(b).

7 C.F.R.:

TITLE 7—AGRICULTURE

....

**SUBTITLE B—REGULATIONS OF THE
DEPARTMENT OF AGRICULTURE**

**CHAPTER I—AGRICULTURAL MARKETING SERVICE (STANDARDS,
INSPECTIONS, MARKETING PRACTICES), DEPARTMENT OF
AGRICULTURE**

....

**SUBCHAPTER B—MARKETING OF PERISHABLE
AGRICULTURAL COMMODITIES**

**PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE)
UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930**

DEFINITIONS

....

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

....

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. “Full payment promptly,” for the purpose of determining violations of the Act, means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

....

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly”: *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

**ADMINISTRATIVE LAW JUDGE’S INITIAL DECISION
(AS RESTATED)**

Preliminary Statement

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or an officer, a director, or a holder of more than 10 per centum of the outstanding stock of a corporation or association.³ The record establishes Petitioner was an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with John Manning Co., Inc., despite being an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly

³7 U.S.C. § 499a(b)(9).

connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

Petitioner failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. Moreover, as Petitioner was an owner of John Manning Co., Inc., the defense that he was not an owner of John Manning Co., Inc., which was the alter ego of its owners, is not available to Petitioner.⁴ As Petitioner has failed to carry his burden of

⁴*In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (1984) (holding petitioners, who were owners of the violating PACA licensee could not raise the defense that they were not owners of the licensee, which was the alter ego of its owners), *aff'd per curiam*, 131 Fed. Appx. 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 49 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense that the violating PACA licensee was the alter ego of an owner), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating a petitioner must prove not only that the violating PACA licensee was the alter ego of an owner, but also, the petitioner was not an owner of the violating licensee; therefore, the petitioner, who held 33.3 percent of the outstanding stock of the violating PACA licensee, cannot avail himself of the defense

(continued...)

proof regarding the second prong of the two-pronged test, I conclude Petitioner was responsibly connected with John Manning Co., Inc., at the time John Manning Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Findings of Fact

1. John Manning Co., Inc., was formed in 1937 by John Manning and George E. Fuller, Sr. John Manning Co., Inc., was a specialty tomato re-packing house until 2000. (JFRX 7Q at 1.)
2. George E. Fuller, Sr., became sole owner of John Manning Co., Inc., when John Manning died in 1969 (JFRX 7Q at 1).
3. In 1981, Jon R. Fuller and George E. Fuller, Jr., the sons of George E. Fuller, Sr., entered the business and became stockholders of John Manning Co., Inc. (JFRX 7Q at 1).
4. Petitioner is an individual who resides at 12230 Edgewater Drive, Hampton, Georgia (JTRX 6 at 1).
5. Petitioner has been working in the produce industry since 1963 (Tr. 32).
6. From 1967 to 1990, Petitioner worked as a manager at Dixon Tom-A-Toe, a tomato re-packing business located in Forest Park, Georgia (JTRX 19 at 3; Tr. 31).

⁴(...continued)
that the violating PACA licensee was the alter ego of an owner), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

7. In 1990, Petitioner joined John Manning Co., Inc., and bought stock from George E. Fuller, Sr. After Petitioner's purchase of stock, George E. Fuller, Sr., had 7 percent of the outstanding stock and the remaining 93 percent was divided equally between Petitioner, George E. Fuller, Jr., and Jon R. Fuller. (JFRX 7Q at 1; JTRX 11 at 1.)

8. Petitioner became the vice president and a director of John Manning Co., Inc., in June 1991, and remained the vice president and director of John Manning Co., Inc., at least through the period that John Manning Co., Inc., violated the PACA (JTRX 1).

9. In 1999, competition in the tomato re-packing business became fierce resulting in a lower customer base for John Manning Co., Inc., and a new direction for the company was sought. Petitioner introduced Stephen McCue to the Fullers in late 1999. Thereupon, Stephen McCue became president of John Manning Co., Inc., and he, Petitioner, George E. Fuller, Jr., and Jon R. Fuller held an equal number of shares. John Manning Co., Inc., greatly expanded with diversification into the handling of mixed fruits and vegetables. (JFRX 7Q at 1; JTRX 11 at 1; Tr. 32, 80.)

10. In September 1999, Petitioner signed a \$100,000 line of credit for John Manning Co., Inc., and in December 2000, Petitioner signed a \$250,000 line of credit for John Manning Co., Inc. Petitioner also signed a lease for John Manning Co., Inc.'s new headquarters. (Tr. 59, 88.)

11. In May of 2001, Stephen McCue informed Petitioner, George E. Fuller, Jr., and Jon R. Fuller that he was being courted by a produce conglomerate and would only stay with John Manning Co., Inc., if allowed to purchase additional shares to increase the number of his shares to 51 percent of the total outstanding stock. Petitioner, George E. Fuller, Jr., and Jon R. Fuller agreed. (JFRX 7Q at 1; JTRX 11 at 1.)

12. On August 27, 2001, at a joint meeting of the board of directors and the shareholders of John Manning Co., Inc., the shares held by Petitioner and the Fullers were re-assigned so that Stephen McCue became a holder of 51 percent of the outstanding stock. Stephen McCue purchased for \$1 a share, 13,500 shares from George E. Fuller, Jr.; 13,500 shares from Jon R. Fuller; and 10,000 shares from Petitioner. Stephen McCue gave promissory notes in payment for the shares. As a result of the re-assignment of the shares, totaling 131,000 shares, Stephen McCue held 68,000 shares or slightly over 51 percent; Petitioner held 21,000 shares or slightly over 16 percent; George E. Fuller, Jr., held 17,500 shares or slightly over 13 percent; Jon R. Fuller held 17,500 shares or slightly over 13 percent; and George E. Fuller, Sr., held 7,000 shares or slightly over 5 percent. (JTRX 13 at 1; Tr. 51-52.)

13. When Stephen McCue initially joined John Manning Co., Inc., profits increased and so did the salaries of Petitioner, George E. Fuller, Jr., and Jon R. Fuller. At the end of June 2001, John Manning Co., Inc., had profits of \$130,000, and George E. Fuller, Jr., and Jon R. Fuller were entitled to \$65,000 of retained earnings on which they paid taxes. The weekly salaries of Petitioner, George E. Fuller, Jr., and Jon R. Fuller

were increased from \$800 to \$1,000. When George E. Fuller, Jr., and Jon R. Fuller later sought their portions of the retained earnings, they were told the retained earnings were needed to pay expenses and instead George E. Fuller, Jr.'s and Jon R. Fuller's salaries were increased to \$1,200 per week. Petitioner did obtain some of the retained earnings and his salary remained \$1,000 per week. (GFRX 7Q at 1; Tr. 27, 81, 83, 86-89.)

14. The by-laws of John Manning Co., Inc., provide that the property and business of the corporation shall be managed by its board of directors that shall consist of no fewer than three and not more than five members. Each director shall hold office until the annual meeting of shareholders held next after the director's election and until a qualified successor shall be elected, or until the director's earlier death, resignation, incapacity to serve, or removal. Any director may be removed, with or without cause, by the affirmative vote of the majority of the issued and outstanding shares at any regular or special meeting. The board of directors shall have the power to determine which accounts and books of the corporation shall be open to the inspection of shareholders. The by-laws further provide for the following officers:

The president, who shall be the chief executive officer of the corporation, shall preside at all meetings of the stockholders and directors, shall ensure that all orders and resolutions of the board of directors are made effective, and, in addition to other specified duties, shall perform all other such duties as the board of directors may assign.

The vice president, who, in the absence of the president or in case of the president's failure to act, shall have all the powers of the president and shall perform such duties as shall be imposed upon the vice president by the board of directors.

The secretary, who shall attend and keep the minutes of all meetings of the board of directors and stockholders, shall have charge of the records and seal of the corporation, and shall perform all the duties incident to the office of the secretary of a corporation, subject at all times to the direction and control of the board of directors.

The treasurer, who shall keep full and accurate account of receipts and disbursements on the books belonging to the corporation, shall deposit all monies and other properties belonging to the corporation, shall disburse the funds of the corporation as may be ordered by the board of directors, shall render to the board of directors, whenever the board may require, an account of all transactions and of the financial condition of the corporation, and shall perform such other duties as shall be assigned to the treasurer by the board of directors. (JTRX 4.)

15. During the period October 13, 2001, through May 17, 2002, the officers of John Manning Co., Inc., were Stephen McCue, president; Petitioner, vice president; George E. Fuller, Jr., treasurer; and Jon R. Fuller, secretary. Stephen McCue, Petitioner, George E. Fuller, Jr., and Jon R. Fuller constituted John Manning Co., Inc.'s board of directors. Stephen McCue attended to most of the buying and selling of produce for John

Manning Co., Inc., and he had charge of all other aspects of the business except for those handled by Petitioner, George E. Fuller, Jr., and Jon R. Fuller. Petitioner supervised the tomato lines and the packing crew. Petitioner also sold tomatoes to a few customers.

George E. Fuller, Jr., assisted with tomato operations when Petitioner was absent; coordinated maintenance service on the company's trucks, forklifts, electrical jacks, and refrigeration; prepared inventory reports; and sometimes signed payroll checks. Jon R. Fuller was in charge of the company payroll; signed payroll checks; assisted with tomato operations when Petitioner was absent; purchased tomato supplies; and coordinated insurance for the company. On May 17, 2002, Stephen McCue terminated the employment of George E. Fuller, Jr., and Jon R. Fuller because they refused to put more money into the business, and they did not act as officers or directors after that date.

Stephen McCue and Petitioner continued as president and vice president and members of the board of directors until the corporation stopped doing business in August 2002.

(JFRX 7Q at 2; JTRX 11 at 2-3; Tr. 20, 33, 35, 67, 76, 89.)

16. Though John Manning Co., Inc., was profitable in June 2001, the company had problems paying bills. Petitioner asked Stephen McCue for financial information. Stephen McCue stated, as chief executive officer and president, he was not required to provide financial information to Petitioner. Financial information was not furnished by Stephen McCue until early May 2002. (JFRX 7Q at 2; JTRX 11 at 2.)

17. Though Petitioner knew in 2001, that John Manning Co., Inc., was having trouble paying its bills, John Manning Co., Inc.'s problems paying produce suppliers were

first acknowledged and discussed at the April 24, 2002, meeting of the board of directors. Stephen McCue informed the board of directors that produce shippers were demanding money and that if the checking account was frozen pursuant to the PACA Trust Agreement, John Manning Co., Inc., could not pay. Stephen McCue asked George E. Fuller, Jr., and Jon R. Fuller for permission request money from George E. Fuller, Sr., to keep John Manning Co., Inc., from bankruptcy. They gave their permission, but emphasized George E. Fuller, Sr., would insist upon seeing some financials and that Zachary Thacker, the comptroller/chief financial officer who Stephen McCue had hired, had not yet provided the 2001 year-ending report for John Manning Co., Inc. (JTRX 14.)

18. On April 29, 2002, the board of directors held a meeting that Zachary Thacker attended. Financial difficulties were again discussed including \$200,000 owed to Weis-Buy which John Manning Co., Inc., could satisfy through weekly payments secured by an 8¾ percent note and a signed guarantee by the directors. Jon R. Fuller said he was not signing anything else unless some financials were forthcoming. Stephen McCue promised financial information would be delivered by May 1, 2002. (JTRX 15.)

19. On May 3, 2002, the board of directors held another meeting that was also attended by George E. Fuller, Sr., Zachary Thacker, and Don Foster, attorney for John Manning Co., Inc. The December 31, 2001, year-ending report was distributed. The report showed a \$140,805 loss in 2001 as well as a \$32,598 loss in the first quarter of 2002. Stephen McCue asked the stockholders for their personal cash infusion to help John Manning Co., Inc., during the financial hardship. He also expressed concern

because of the Fullers' refusal to sign additional lines of credit with Weis-Buy. He stated John Manning Co., Inc., could save \$5,000 a week without George E. Fuller, Jr., Jon R. Fuller, and Petitioner on the payroll, and others could perform their jobs. Stephen McCue stated the company had a "50/50 shot of making or failing." Stephen McCue stated he was going to do his best to save John Manning Co., Inc. George E. Fuller, Sr., stated John Manning Co., Inc., should reorganize under bankruptcy laws, but Stephen McCue said reorganization was not an option. George E. Fuller, Sr., then said, under the circumstances, he could not put any more money into John Manning Co., Inc.

(JTRX 16.)

20. John Manning Co., Inc., shut down in August 2002, and its PACA license terminated on June 5, 2003, for failure to pay the annual PACA license renewal fee (JTRX 1 at 1, JTRX 11 at 3).

21. On April 22, 2003, a disciplinary complaint was filed under the PACA against John Manning Co., Inc., for violating section 2(4) of the PACA (7 U.S.C. § 499b(4)) from October 13, 2001, through August 28, 2002, by failing to pay \$1,953,098.39 to 58 sellers for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce. The disciplinary complaint resulted in a

default decision being entered against John Manning Co., Inc., that published the finding that it had committed willful, flagrant, and repeated violations of the PACA.⁵

(JTRX 5-6.)

22. Petitioner attended numerous board of director meetings during the time he was a director of John Manning Co., Inc., including board meetings held on February 23, 2000, March 22, 2000, April 19, 2000, May 15, 2001, August 27, 2001, April 24, 2002, April 29, 2002, and May 3, 2002 (JFRX 7I-7P; JTRX 13-16).

Conclusion

Petitioner was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Petitioner failed to prove by a preponderance of the evidence that he was a nominal officer, director, and shareholder of John Manning Co., Inc. Petitioner had an actual significant nexus with John Manning Co., Inc., during the violation period. John Manning Co., Inc.'s by-laws vested all oversight and governance powers in the board of directors, and together, Petitioner, George E. Fuller, Jr., and Jon R. Fuller constituted the majority of the board of directors. Though Stephen McCue, as majority stockholder, could have removed Petitioner as an officer and a director, he did not. Petitioner therefore had powers that he failed to use in an effort to prevent John Manning Co., Inc.'s violations of the prompt payment provision

⁵*In re John Manning Co.* (Decision Without Hearing by Reason of Default), 64 Agric. Dec. ____ (Oct. 21, 2004).

of the PACA. Under these circumstances, Petitioner was so positioned that he should have known of the misdeeds and taken steps to “counteract or obviate the fault of others.”⁶ Petitioner therefore cannot be found to be a nominal officer, director, or shareholder under controlling legal precedents that have interpreted and applied the term “nominal” within the meaning of the PACA.

The PACA allows a person who otherwise comes under its “responsibly connected” definition to show he or she should not be so considered by satisfying both parts of an evidentiary test that he or she was not actively involved in the activities resulting in a violation and was only nominally a partner, an officer, a director, and a shareholder of a violating PACA licensee. Inasmuch as Petitioner cannot be found to have only “nominally” been an officer, a director, and a shareholder of John Manning Co., Inc., I find it unnecessary to address whether under the applicable precedents Petitioner met his burden of proof that he was not actively involved in the activities resulting in a violation.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises two issues in Petitioner’s Appeal Petition. First, Petitioner asserts the ALJ found a discussion of the issue of Petitioner’s active involvement in the activities resulting in a violation of the PACA unnecessary because the ALJ concluded Petitioner

⁶*Bell v. Department of Agriculture*, 39 F.3d 1199, 1201 (D.C. Cir. 1994). *See also Minotto v. United States Dep’t of Agric.*, 711 F.2d 406, 408-09 (D. C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 (D.C. Cir. 1975); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 386 (2000), *aff’d*, No. 00-1157 (D.C. Cir. Jan. 30, 2001).

failed to prove by a preponderance of the evidence that he was only nominally an officer, a director, and a shareholder of John Manning Co., Inc. Petitioner requests, if I find necessary a discussion of the issue of Petitioner's active involvement in the activities resulting in John Manning Co. Inc.'s violations of the PACA, that I refer to Petitioner's discussion of active involvement in Petitioner's Brief in Support of the Appeal of James E. Thames, Jr. to the Chief's Determination He Was Responsibly Connected to John Manning Co., Inc. (Petitioner's Appeal Pet. at ¶ 1.A.)

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 per centum of the outstanding stock of a corporation or association.⁷ The record establishes Petitioner was an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). The burden is on Petitioner to demonstrate by a preponderance of the evidence that he was not responsibly connected with John Manning Co., Inc., despite his being an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc.

⁷7 U.S.C. § 499a(b)(9).

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-pronged test which a petitioner must meet in order to demonstrate that he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

I agree with the ALJ's conclusion that Petitioner failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 per centum of the outstanding stock of John Manning Co., Inc. Moreover, as Petitioner was an owner of John Manning Co., Inc., the defense that he was not an owner of John Manning Co., Inc., which was the alter ego of its owners, is not available to Petitioner.⁸ As Petitioner has failed to carry his burden of proof regarding the second prong of the two-pronged test, I agree with the ALJ that a discussion of the issue of Petitioner's active involvement in the activities resulting in a violation of the PACA (the first prong of the two-pronged test), is unnecessary.

⁸See note 4.

Second, Petitioner states the ALJ's conclusion that Petitioner was not a nominal officer, director, and stockholder of John Manning Co., Inc., is error (Petitioner's Appeal Pet. at ¶ 1.B).

I agree with the ALJ's conclusion that Petitioner failed to establish by a preponderance of the evidence that he was only nominally an officer, a director, and a stockholder of John Manning Co., Inc. In order for a petitioner to show that he or she was only nominally an officer, a director, and a stockholder, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.⁹ The record establishes Petitioner had an actual, significant nexus with John Manning Co., Inc., during the violation period.

Petitioner had 39 years of experience in the produce business. Prior to his employment by John Manning Co., Inc., in 1990, Petitioner had considerable experience in the tomato re-packing business, where he worked as a manager for Dixon Tom-A-Toe,

⁹*Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

in Forest Park, Georgia, from 1967 to 1990. At John Manning Co., Inc., Petitioner supervised nearly all of the tomato re-pack operations and packing crew on a daily basis, hired and fired employees, and took orders for produce. (JTRX 19 at 3; Tr. 30-33, 35, 39.)

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.¹⁰ Petitioner held the positions of vice president and director at John Manning Co., Inc., from June 1991 until John Manning Co., Inc., stopped doing business in 2002. During the time he held these positions, Petitioner was active in corporate decision-making. Petitioner co-signed lines of credit for John Manning Co., Inc., signed the lease for John Manning Co., Inc.'s new headquarters, and nominated and voted for Stephen McCue to be president of John Manning Co., Inc. (JFRX 7I at 1; Tr. 29, 37-38, 59, 87-88). During his tenure as a director on the board of directors, Petitioner attended and participated in numerous board meetings (JTRX 13-16; JFRX 7I-7P). Petitioner knew by the April 24, 2002, board of directors meeting that John Manning Co., Inc., was not paying its produce sellers in accordance with the PACA.

Substantial compensation as a result of a person's association with the violating PACA licensee is another factor in determining whether that person was or was not a

¹⁰*In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

nominal officer or director.¹¹ Petitioner earned \$1,000 a week during the period when John Manning Co., Inc., violated the PACA (Tr. 27). A salary of \$52,000 per year suggests that Petitioner's roles as vice president and director were not nominal. Moreover, payment of dividends to Petitioner out of the retained earnings (Tr. 27, 88-89) indicates Petitioner was not merely a nominal stockholder.

In short, I find Petitioner had an actual, significant nexus with John Manning Co., Inc. Petitioner had the appropriate business experience to be a corporate officer and director, participated in corporate decision-making, received substantial compensation for his services, and attended and participated in board meetings.

For the foregoing reasons, the following Order should be issued.

ORDER

I affirm Respondent's November 21, 2003, determination that Petitioner was responsibly connected with John Manning Co., Inc., during the period October 13, 2001, through August 28, 2002, when John Manning Co., Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

This Order shall become effective 60 days after service of this Order on Petitioner.

¹¹*In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1543 (1998); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1495-96 (1998).

RIGHT TO JUDICIAL REVIEW

Petitioner has the right to seek judicial review of the Order in this Decision and Order as to James E. Thames, Jr., in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Petitioner must seek judicial review within 60 days after entry of the Order in this Decision and Order as to James E. Thames, Jr.¹² The date of entry of the Order in this Decision and Order as to James E. Thames, Jr., is January 24, 2006.

Done at Washington, DC

January 24, 2006

William G. Jenson
Judicial Officer

¹²See 28 U.S.C. § 2344.