UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA-APP Docket No. 13-0068
	)	
George Finch,	)	
	)	
Petitioner	)	
	)	
	and	
	)	
In re:	)	PACA-APP Docket No. 13-0069
	)	
John Dennis Honeycutt,	)	
	)	
Petitioner	)	**Decision and Order**

PROCEDURAL HISTORY

On October 3, 2012, Karla D. Whalen, Director, PACA Division, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Director], determined George Finch and John Dennis Honeycutt were responsibly connected with Third Coast Produce Company, Ltd. [hereinafter Third Coast], during the period of time when Third Coast violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s)

[hereinafter the PACA].[1] Pursuant to the rules of practice applicable to this proceeding,[2] Mr. Finch and Mr. Honeycutt each filed a petition for review of the Director's "responsibly connected" determination.

On February 12, 2013, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] consolidated the two "responsibly connected" proceedings, *In re George Finch*, PACA-APP Docket No. 13-0068, and *In re John Dennis Honeycutt*, PACA-APP Docket No. 13-0069.[3] On August 13, 2013, the Chief ALJ conducted an oral hearing in Washington, DC. Michael A. Hirsch, Schlanger, Silver, Barg & Paine, L.L.P., Houston, Texas, represented Mr. Finch and Mr. Honeycutt. Shelton S. Smallwood and Christopher Young, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Director. At the hearing, both Mr. Finch and Mr. Honeycutt testified and one witness, William W. Hammond,

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[1]Third Coast willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 21 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the amount of $514,943.40 for 207 lots of perishable agricultural commodities, which Third Coast purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period February 5, 2010, through July 16, 2010. *In re Third Coast Produce Company, Ltd.*, __ Agric. Dec. ___ (Apr. 27, 2012).

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

[3]Order of Dismissal as to Third Coast Produce Company, Ltd. and Order Setting Hearing Date at 2.

testified on behalf of the Director.[4] Mr. Finch and Mr. Honeycutt introduced 12 exhibits.[5] The Director introduced a certified agency record applicable to Mr. Finch containing 16 exhibits[6] and a certified agency record applicable to Mr. Honeycutt containing 11 exhibits.[7]

On November 20, 2013, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision and Order: (1) concluding Mr. Finch was responsibly connected with Third Coast, during the period when Third Coast committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4), by virtue of his active participation in Third Coast's operations and his status as an officer and a director of Third Coast; (2) concluding Mr. Honeycutt was responsibly connected with Third Coast, during the period when Third Coast committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4), by virtue of his active participation in Third Coast's operations and his status as an officer and a director of Third Coast; (3) affirming the Director's October 3, 2012, determinations that Mr. Finch and Mr. Honeycutt were responsibly connected with Third Coast, during the period when Third Coast committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (4) stating Mr. Finch and Mr. Honeycutt are subject to the

[4]References to the transcript of the August 13, 2013, hearing are indicated as "Tr." and the page number.

[5]Mr. Finch and Mr. Honeycutt's exhibits are indicated as PX 1-PX 12.

[6]References to the exhibits in the Director's certified agency record applicable to Mr. Finch are indicated as GFRX 1-GFRX 16.

[7]References to the exhibits in the Director's certified agency record applicable to Mr. Honeycutt are indicated as JHRX 1-JHRX 11.

licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b).[8]

On December 17, 2013, Mr. Finch and Mr. Honeycutt filed a Petition for Appeal and Brief in Support Thereof [hereinafter Appeal Petition]. On January 8, 2014, the Director filed a Response to Petitioners' Appeal. On January 13, 2014, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and a decision.

Based upon a careful consideration of the record, I adopt, with minor modifications, the Chief ALJ's Decision and Order as the final agency decision and order.

DECISION

Statutory Background

The PACA was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce[9] and to provide a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.[10]

Under the PACA, a person who buys or sells specified quantities of perishable agricultural commodities at wholesale in interstate or foreign commerce is required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), 499d(a).

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[8]Chief ALJ's Decision and Order at 17-18.

[9]H.R. Rep. No. 71-1041, at 1 (1930).

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

Regulated commission merchants, dealers, and brokers are required to "truly and correctly . . . account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had[.]" 7 U.S.C. § 499b(4). An order suspending or revoking a PACA license or a finding that an entity has committed a flagrant violation, or repeated violations, of 7 U.S.C. § 499b(4) has significant collateral consequences in the form of licensing and employment restrictions for persons found to be responsibly connected with the violator.[11] The term "responsibly connected" is defined as follows:

> **§ 499a. Short title and definitions**
> . . . .
> **(b) Definitions**
>
> For purposes of this chapter:
> . . . .
> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

The second sentence of the definition of the term "responsibly connected" provides a two-prong test whereby those who would otherwise fall within the statutory definition of "responsibly connected" may rebut 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

[11] 7 U.S.C. §§ 499d(b), 499h(b).

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

In re Lawrence D. Salins, 57 Agric. Dec. 1474, 1488 (1998). A standard for the first prong of the test has been adopted as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

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

The parameters of the second prong of the test were revisited in *Taylor v. U.S. Dep't of Agric.,* 636 F.3d 608 (D.C. Cir. 2011). In that case, the Court found Ms. Taylor and Mr. Finberg were merely nominal officers of the violating entity. Citing *Quinn v. Butz,* 510 F.2d 743, 755 (D.C. Cir. 1975), and *Bell v. Dep't of Agric.,* 39 F.3d 1199, 1202 (D.C. Cir. 1994), the Court stated, under 7 U.S.C. § 499a(b)(9), an officer of the offending company is not considered to be responsibly connected with a violating licensee if that person was not actively involved in the PACA violation and was powerless to curb the wrongdoing. The Court emphasized that, under the "actual, significant nexus" test, the crucial inquiry in determining whether a person is merely a nominal officer is whether the person who holds the title of officer has the power and authority to direct and affect a company's operations:

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

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

In *In re Cheryl A. Taylor*, 68 Agric. Dec. 1210, 1220-21 (2009), I had found that Fresh America's board of directors ran Fresh America and made decisions usually reserved for individuals at lower levels of authority, including decisions governing Fresh America's payment of bills, capital expenditures, and personnel. A preponderance of the evidence established that neither Ms. Taylor nor Mr. Finberg had any measurable power or authority in board deliberations. Applying the "actual, significant nexus" test, as explained in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), on remand, I concluded Ms. Taylor and Mr. Finberg were merely nominal officers of Fresh America, who were powerless to curb the PACA violations and who lacked the power and authority to direct and affect Fresh America's operations as they related to payment of produce sellers. *In re Cheryl A. Taylor* (Decision on Remand), __ Agric. Dec. ____, slip op. at 7-8 (May 22, 2012).

The "actual, significant nexus" test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9) wherein Congress amended the definition of the term "responsibly connected" specifically to provide partners, officers, directors, and shareholders who would otherwise fall within the statutory definition of "responsibly connected" a two-prong test

allowing them to rebut the statutory presumption of responsible connection. While Congress could have explicitly adopted the "actual, significant nexus" test, the two-prong test in the 1995 amendment to 7 U.S.C. § 499a(b)(9) contains no reference to "actual, significant nexus," power to curb PACA violations, or power to direct and affect operations. Instead, Congress provided that a partner, officer, director, or shareholder, for the second prong of the two-prong test, could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was "only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license" (7 U.S.C. § 499a(b)(9)).

I concluded that continued application of the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.,* 636 F.3d 608 (D.C. Cir. 2011), could result in persons who Congress intended to include within the definition of the term "responsibly connected" avoiding that status. As examples, I noted that a minority shareholder, who is not merely a shareholder in name only, generally would not have the power to prevent the corporation's PACA violations or the power to direct and affect the corporation's operations. Similarly, a real director, who is a member of a three-person board of directors, generally would not have the power to prevent the corporation's PACA violations or the power to direct and affect the corporation's operations. Similarly, a partner with a 40 percent interest in a partnership, who fully participates in the partnership as a partner, generally would not have the power to prevent the partnership's PACA violations or the power to direct and affect the partnership's operations. Should the minority shareholder, the director on the three-person board of directors, and the partner with a 40 percent interest in the partnership demonstrate the requisite lack of power, application of the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.,* 636 F.3d 608 (D.C. Cir.

2011), would result in each of these persons being designated "nominal."

I announced that, in future cases, I would not apply the "actual, significant nexus" test and would instead substitute a "nominal inquiry" limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder in name only. Thus, while the power to curb PACA violations or to direct and affect operations may, in certain circumstances, be a factor to be considered under the "nominal inquiry," it would no longer be the *sine qua non* of responsible connection to a PACA-violating entity. *In re Cheryl A. Taylor* (Decision on Remand), __ Agric. Dec. __, slip op. at 12-13 (May 22, 2012).[12]

Discussion

Mr. Finch and Mr. Honeycutt have significant experience in the produce industry. Mr. Finch testified that he has "been in the food business all [his] life" with more than 25 years in the produce business (Tr. 40). Mr. Finch acknowledged being thoroughly aware of the PACA and the responsibilities imposed by it, stating "we understand our obligations to PACA" and "PACA was the number one payment we need to make." (Tr. 55, 76). Mr. Honeycutt also had extensive experience as an officer, owner, and PACA licensee in the produce industry (Tr. 79-82, 90-91).

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[12] *In re Cheryl A. Taylor* (Decision on Remand), __ Agric. Dec. __ (May 22, 2012), was remanded upon a joint motion in the United States Court of Appeals for the District of Columbia Circuit and vacated. However, the "nominal inquiry" test remains the current United States Department of Agriculture policy. *In re Cheryl A. Taylor* (Modified Decision on Remand), __ Agric. Dec. ___, slip op. at 10-11 (Dec. 18, 2012); *In re Samuel S. Petro* (Order Denying Pet. to Reconsider as to Bryan Herr), __ Agric. Dec. ___, slip op. at 5-8 (Nov. 13, 2012).

Mr. Finch testified that he, Mr. Honeycutt, and Artemio Bueno started Third Coast in May 1992 (Tr. 40). Third Coast started with just one van and sublet space (Tr. 40). With the passage of time and the investment of substantial time and energy on the part of the three founders, Third Coast grew to one of the major produce distributors in the Houston metropolitan area with about 170 employees, 40 trucks, a 60,000 square foot warehouse, and $1,000,000 in weekly sales (Tr. 40-42, 55, 66).

Prior to discovering serious financial problems within the company, both Mr. Finch and Mr. Honeycutt indicated that their responsibilities "mainly revolved around sales, and the administration around sales, to generate business for the company." (Tr. 38, 82, 84-85). Artemio Bueno functioned as Third Coast's buyer and was responsible for company operations (Tr. 65, 84-85). As the company grew from its small family-run origins, the financial responsibilities of the company became entrusted to Artemio Bueno's oldest son, Javier Bueno, who had graduated from the University of Houston with a degree in accounting and business management and who was working toward a master's degree at Rice University (Tr. 38-39). Mr. Finch and Mr. Honeycutt possessed an unfortunately misplaced but high degree of trust in the Bueno family as they started Third Coast with Artemio Bueno and Mr. Finch and Mr. Honeycutt had watched the Bueno children graduate, get married, and have children (Tr. 40-41).[13] Consistent with that trust, Javier Bueno was in time named the Chief Financial Officer of Third Coast and given oversight of all of the financial aspects of the business (Tr. 41,

[13]Mr. Honeycutt testified that he had known Javier Bueno since about the time Javier Bueno was 10 years old and was employed sweeping the floors at Southern Produce, prior to the time that Third Coast was formed (Tr. 83).

53).

Mr. Finch and Mr. Honeycutt first noticed cash flow problems in 2009 and in early 2010 and directed that Third Coast's financial information be sent to the CPA firm in Houston that monitored Third Coast's books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Mr. Finch and Mr. Honeycutt returned their focus to the sales operation (Tr. 41). Upon being informed that certain Third Coast suppliers had ceased selling to Third Coast and that Third Coast's bank raised its own concerns, Mr. Finch and Mr. Honeycutt retained Tatum & Tatum, LLC, an outside accounting firm, near the end of January 2010 (Tr. 70). The resulting audit and monitoring of the receivables revealed a systematic diversion of Third Coast's receivables to previously unknown and unauthorized bank accounts established by Javier Bueno (Tr. 46-47). To conceal the diversions, Javier Bueno had been making fraudulent general ledger entries making it appear that suppliers were being paid when in fact Third Coast's suppliers were not being paid (Tr. 47-49).[14] After discovering that receivables were being diverted and that produce sellers were not being paid, Mr. Finch and Mr. Honeycutt confronted Javier Bueno, removed him from his position with Third Coast, and assumed control of the company in February 2010 (Tr. 54-59, 73-75, 89). Mr. Finch and Mr. Honeycutt retained control of Third Coast until it ceased operation in July 2010 (Tr. 6, 37).

Both Mr. Finch and Mr. Honeycutt stipulated they were officers and directors of Third Coast and acted as officers and directors of the company during the violation period (Tr. 5-6, 15,

[14]Third Coast's Wells Fargo account reflected that about $360,000 was diverted between September 2009 and January 2010; however, a more in depth investigation revealed that over a period of three years the amount embezzled was well over $1,000,000 (Tr. 49-53).

37). Despite their knowledge of Third Coast's inability to pay all produce suppliers promptly, as required by the PACA, Mr. Finch and Mr. Honeycutt continued to purchase produce from sellers until Third Coast ceased operation (Tr. 75-78).

Thus, although the defalcation that was the proximate cause of Third Coast's serious cash shortage predated their assumption of control of the company, Mr. Finch and Mr. Honeycutt's period of control of Third Coast occurred during the greatest portion of the violation period, specifically from sometime in February 2010 through July 16, 2010. During that period of time, Third Coast struggled to stay open so as to pay as many people as it possibly could and to maintain payments to the bank (Tr. 54-59, 61-63, 75-78). Even after significant infusions of their own funds from savings and their personal retirement accounts,[15] Mr. Finch and Mr. Honeycutt's efforts to save Third Coast proved unsuccessful. With the bank's "blessing," first the processing portion of the business was sold[16] and later the assets of the distribution portion of the business[17] were sold to another entity (Tr. 57-58). The sale proceeds went to the bank (Tr. 57).

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[15]Mr. Finch testified that the funds he contributed were "[a]nything I had at the time" and were from savings and his 401k (Tr. 57). Mr. Honeycutt borrowed $25,000 from his mother-in-law (Tr. 99).

[16]The processing operation consisted of processing fresh fruits and vegetables for the end user. "It's a value-added product, mixed salads and varied commodities that go to our customers." (Tr. 56).

[17]The assets of the distribution portion of the business consisted of the real estate and the trucks and other equipment used to handle the produce delivered to Third Coast's customers (Tr. 57-58).

I have a great deal of empathy for Mr. Finch and Mr. Honeycutt, both of whom demonstrated themselves to be honest and well-intentioned men who were victims themselves and who did not personally gain from the situation in which they found themselves. Nonetheless, I must conclude that, by virtue of having been actively involved in the activities that resulted in Third Coast's violations of the PACA and officers and directors of Third Coast from sometime in February 2010 until Third Coast's assets were liquidated in July 2010, both Mr. Finch and Mr. Honeycutt were responsibly connected with Third Coast during the period when Third Coast violated the PACA.

Mr. Finch and Mr. Honeycutt's Request for Oral Argument

Mr. Finch and Mr. Honeycutt's request for oral argument,[18] which the Judicial Officer may grant, refuse, or limit,[19] is refused because the issues raised by Mr. Finch and Mr. Honeycutt in their Appeal Petition are not complex and oral argument would serve no useful purpose.

Mr. Finch and Mr. Honeycutt's Appeal Petition

Mr. Finch and Mr. Honeycutt raise six issues in their Appeal Petition. First, Mr. Finch and Mr. Honeycutt contend the PACA is unconstitutionally overbroad because it penalizes virtuous, non-culpable, and lawful conduct as if the conduct were contrary (Appeal Pet. ¶ 1A at 1).

Challenges to the imposition of licensing restrictions in 7 U.S.C. § 499d(b) and

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[18]Appeal Pet. at 3.

[19]7 C.F.R. § 1.145(d).

employment restrictions in 7 U.S.C. § 499h(b) on individuals responsibly connected with violators of the PACA have been consistently rejected.[20] The United States Court of Appeals for the Second Circuit addressed the constitutionality of the application of the employment bar in 7 U.S.C. § 499h(b) to responsibly connected persons, as follows:

> . . . . Undoubtedly the perishable commodities industry is an industry subject to reasonable congressional regulation. *See Eastern Produce Co. v. Benson*, 278 F.2d 606 (3 Cir. 1960). Conceding Congress's undoubted right to regulate the industry petitioners question whether the right to regulate gives Congress the right to provide that the Secretary of Agriculture may exclude persons in petitioners' position from all employment in the industry.
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> Legislative history indicates that Section 499h(b) was enacted in order to prevent circumvention of the purposes behind the Act by persons currently under suspension or by persons whose licenses had been revoked and who, by the subterfuge of acting as an "employee" of a nominal licensee nevertheless continued in the business. It was felt that the only way to prevent this flouting of the purposes of the Act was to forbid persons under suspension, persons whose licenses were revoked, and persons who had been or were currently responsibly connected with them from all employment in the industry. While admittedly the result Congress desired could be harsh in some cases, we cannot say that Section 499h(b) is not reasonably designed to achieve the desired Congressional purpose. *See Nebbia v. People of State of New York*, 291 U.S. 502, 525, 54 S. Ct. 505 (1934).
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> An analogous situation to this was presented to the New York Court of Appeals in *Bradley v. Waterfront Comm'n of N.Y. Harbor*, 12 N.Y.2d 276,

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[20] *Farley & Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (stating the employment bar imposed on individuals responsibly connected with violators of the PACA has been challenged repeatedly with little success; the courts that have considered this issue have been unwilling to invalidate the PACA or to interfere with the Secretary of Agriculture's enforcement of the PACA); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.) (stating, while the employment bar in 7 U.S.C. § 499h(b) can be harsh in some instances, we cannot say that 7 U.S.C. § 499h(b) is not reasonably designed to achieve the desired congressional purpose), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966) (stating we do not agree with the appellant's characterization of the PACA as unconstitutional; the exclusion from the PACA industry of "responsibly connected" persons is not irrational or arbitrary).

> 239 N.Y.S.2d 97, 189 N.E.2d 601 (1963). Section 8 of the New York Waterfront Commission Act, McKinney's Unconsol. Laws, § 9933, which forbids unions from collecting dues from waterfront employees if any of the union's officers had been convicted of a felony was upheld by the United States Supreme Court in *De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed.2d 1109 (1960). Discovering that the former officers continued to dominate the unions as "employees," the New York Legislature amended Section 8 so as to extend the section's application to employees of the union as well as to union officers. The court in *Bradley* had no difficulty in holding that this amendment to the statute did not violate due process because the amendment was no more than was necessary in order to carry out the original objectives of the statute.

Zwick v. Freeman, 373 F.2d 110, 118-19 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967) (footnote omitted). Mr. Finch and Mr. Honeycutt offer no support for their contention that the PACA is unconstitutionally overbroad because it penalizes virtuous, non-culpable, and lawful conduct as if the conduct were contrary, and I reject Mr. Finch and Mr. Honeycutt's contention that the PACA is unconstitutionally overbroad.

Second, Mr. Finch and Mr. Honeycutt contend PACA "responsibly connected" proceedings violate principles of due process (Appeal Pet. ¶ 1B at 1).

The fundamental elements of procedural due process are notice and opportunity to be heard.[21] Each person who has been initially determined to be responsibly connected is provided with notice of the initial determination and an opportunity to be heard, and all PACA "responsibly connected" proceedings are conducted in accordance with the Administrative Procedure Act and the Rules of Practice.

On February 23, 2012, in accordance with 7 C.F.R. § 47.49(a)-(b), Phyllis Hall, Chief,

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[21]*See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84 (1988); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Investigative Enforcement Branch, PACA Division, informed Mr. Finch and Mr. Honeycutt that she had made initial determinations that they were responsibly connected with Third Coast and that they could contest these initial determinations by submitting written responses, which would be reviewed by the Director in accordance with 7 C.F.R. § 47.49(c) (GFRX 2; JHRX 2). On March 12, 2012, Mr. Finch and Mr. Honeycutt submitted a joint response contesting Ms. Hall's initial determinations (GFRX 3; JHRX 3). After review of Mr. Finch and Mr. Honeycutt's joint response, the Director determined Mr. Finch and Mr. Honeycutt were responsibly connected with Third Coast, and on October 3, 2012, the Director notified Mr. Finch and Mr. Honeycutt of her "responsibly connected" determinations and their right under 7 C.F.R. § 47.49(d) to request review of her determinations by an administrative law judge in a proceeding which would be conducted in accordance with the Rules of Practice.

Mr. Finch and Mr. Honeycutt each filed a petition for review of the Director's "responsibly connected" determination and participated in an administrative adjudicatory proceeding conducted by the Chief ALJ in accordance with the Administrative Procedure Act and the Rules of Practice. This proceeding included an oral hearing during which Mr. Finch and Mr. Honeycutt had an opportunity to, and did, present oral and documentary evidence and cross-examine the sole witness who testified on behalf of the Director. After the Chief ALJ issued a Decision and Order affirming the Director's "responsibly connected" determinations, Mr. Finch and Mr. Honeycutt had the opportunity to, and did, appeal the Chief ALJ's Decision and Order to the Judicial Officer. Moreover, Mr. Finch and Mr. Honeycutt have the right to

seek judicial review of this Decision and Order.[22] Therefore, I reject Mr. Finch and Mr. Honeycutt's contention that PACA "responsibly connected" proceedings violate principles of due process, and I reject Mr. Finch and Mr. Honeycutt's suggestion that they have been denied due process in the instant proceeding.

Third, Mr. Finch and Mr. Honeycutt contend the PACA provides for the forfeiture of property to the United States in violation of "the spirit" of 18 U.S.C. §§ 981-987 (Appeal Pet. ¶ 1B at 1).

The imposition of licensing restrictions in accordance with 7 U.S.C. § 499d(b) and employment restrictions in accordance with 7 U.S.C. § 499h(b) does not constitute a forfeiture of property to the United States. Further, 18 U.S.C. §§ 981-987 are not applicable to the licensing restrictions in 7 U.S.C. § 499d(b) or the employment restrictions in 7 U.S.C. § 499h(b). Therefore, I reject Mr. Finch and Mr. Honeycutt's contention that the PACA provides for the forfeiture of property to the United States in violation of "the spirit" of 18 U.S.C. §§ 981-987.

Fourth, Mr. Finch and Mr. Honeycutt contend the PACA violates the Bill of Attainder Clause in Article I, Section 9, of the Constitution of the United States (Appeal Pet. ¶ 1B at 1).

Article I, Section 9, Clause 3, of the Constitution of the United States provides that no bill of attainder shall be passed. A bill of attainder is defined as a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.[23] To constitute a bill of attainder, a statute must: (1) apply with

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[22]28 U.S.C. § 2342(2).

[23]*Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-47 (1984); *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977);

specificity to affected persons; (2) impose punishment; and (3) assign guilt without a judicial trial.

The specificity requirement may be satisfied if a statute singles out a person or class by name or applies to easily ascertainable members of a group.[24] The "easily ascertainable" requirement is satisfied if the challenged statute describes the targeted members of the group in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.[25] The PACA does not identify Mr. Finch or Mr. Honeycutt by name. Moreover, the "responsibly connected" provision of the PACA is open-ended in that it applies to any person who falls within the definition of "responsibly connected."[26] A statute with open-ended applicability, namely, a statute that attaches not to specific persons or groups, but to anyone who commits certain acts or possesses certain characteristics, does not apply with specificity to specific persons or groups and does not constitute a bill of attainder.

The PACA does not impose punishment. The PACA provides for the imposition of licensing restrictions and employment restrictions on persons responsibly connected with a person who has been found to have committed violations of 7 U.S.C. § 499b.[27] However, the

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United States v. Lovett, 328 U.S. 303, 321-22 (1946).

[24]*Foretich v. United States*, 351 F.3d 1198, 1217 (D.C. Cir. 2003).

[25]*Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961); *Cummings v. State of Missouri*, 71 U.S. 277, 323-24 (1866).

[26]*Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.) (stating 7 U.S.C. § 499h(b) is not an invalid bill of attainder as it does not name or describe any persons or groups), *cert. denied*, 389 U.S. 835 (1967).

[27]7 U.S.C. §§ 499d(b), 499h(b).

licensing and employment restrictions in the PACA are not "punishment," but rather statutory civil sanctions to assist regulatory enforcement of the PACA.[28]

The PACA does not assign guilt without a judicial trial. PACA's license and employment restrictions may be imposed only after the person alleged to be responsibly connected has been afforded an opportunity for an administrative adjudicatory proceeding conducted in accordance with the Administrative Procedure Act and the Rules of Practice. Further, any final agency determination that a person is responsibly connected, is subject to judicial review.[29]

[28]*Siegel v. Lyng*, 851 F.2d 412, 416 (D.C. Cir. 1988) (stating the employment restriction provided for in 7 U.S.C. § 499h(b) is not punitive in nature).

[29]28 U.S.C. § 2342(2).

Therefore, I reject Mr. Finch and Mr. Honeycutt's contention that the PACA violates the Bill of Attainder Clause in Article I, Section 9, of the Constitution of the United States.

Fifth, Mr. Finch and Mr. Honeycutt contend they have proven the circumstances and events resulting in Third Coast's violations of 7 U.S.C. § 499b(4) were due to independent acts of a third party (Appeal Pet. ¶ 1C at 2).

Mr. Finch and Mr. Honeycutt introduced evidence that, prior to the period when Third Coast violated the PACA, Javier Bueno, without Mr. Finch or Mr. Honeycutt's participation, authorization, or knowledge, embezzled funds from Third Coast. This embezzlement was the proximate cause of Third Coast's serious cash shortage. However, proof of Javier Bueno's embezzlement of Third Coast's funds, by itself, is not proof by a preponderance of the evidence that Mr. Finch and Mr. Honeycutt were not actively involved in the activities that resulted in Third Coast's violations of the PACA. The record establishes, despite their knowledge of Third Coast's inability to pay all produce suppliers promptly, Mr. Finch and Mr. Honeycutt continued to purchase produce from sellers until Third Coast ceased operation (Tr. 37, 75-77). I find, under these circumstances, Mr. Finch and Mr. Honeycutt were actively involved in activities that resulted in Third Coast's violations of the PACA.

Sixth, Mr. Finch and Mr. Honeycutt stipulate they were officers and directors of Third Coast (Appeal Pet. Ex. A at 17); however, Mr. Finch and Mr. Honeycutt contend they were only nominal officers and directors of Third Coast *vis-a-vis* Javier Bueno's embezzlement of Third Coast's funds (Appeal Pet. ¶ 1C at 2, Ex. A at 17-18).

Mr. Finch and Mr. Honeycutt introduced evidence that, prior to the period when Third Coast violated the PACA, Javier Bueno, without Mr. Finch or Mr. Honeycutt's participation,

authorization, or knowledge, embezzled funds from Third Coast. However, Congress provided that a partner, officer, director, or shareholder, for the second prong of the two-prong test in 7 U.S.C. § 499a(b)(9), could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was "only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license[.]" (7 U.S.C. § 499a(b)(9)). Thus, Mr. Finch and Mr. Honeycutt's relationship to Javier Bueno's embezzlement, which occurred prior to Third Coast's violations of the PACA, is not at issue. Instead, the issue is Mr. Finch and Mr. Honeycutt's relationship to Third Coast during the period when Third Coast violated the PACA.[30]

Based upon all of the evidence before me, the following Findings of Fact and Conclusions of Law are entered.

Findings of Fact

1. Mr. Finch is an individual residing in Friendswood, Texas. Mr. Finch has been in the food business all of his life, with more than 25 years of experience in the produce industry (Tr. 40). Mr. Finch acknowledged being aware of the PACA and the responsibilities it imposes (Tr. 55, 76-77).

2. Mr. Honeycutt is an individual residing in Katy, Texas. Mr. Honeycutt began his involvement in the produce industry at college age and for the six years prior to forming Third

[30]*Cf. In re Philip J. Margiota*, 65 Agric. Dec. 622, 644-46 (2006) (concluding the petitioner failed to prove he was only a nominal officer of the violating PACA licensee, even though the petitioner proved that another employee of the PACA licensee committed the PACA violations and the petitioner did not authorize, or even know of, the violations).

Coast worked for a produce company that he termed "the best in town." (Tr. 79-82).

3. Mr. Finch, Mr. Honeycutt, and Artemio Bueno started Third Coast in May 1992 and built the enterprise from one with a single van and leased space into an operation in 2010 with 40 trucks, about 170 employees, a 60,000 square foot warehouse, and $1,000,000 in weekly sales (Tr. 40-42, 55, 65-66, 82-84).

4. Third Coast willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 21 sellers of the agreed purchase prices, or the balances of the agreed purchase prices, in the amount of $514,943.40 for 207 lots of perishable agricultural commodities which Third Coast purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period February 5, 2010, through July 16, 2010 (Tr. 6; *In re Third Coast Produce Company, Ltd.*, __ Agric. Dec. ___ (Apr. 27, 2012)).

5. Mr. Finch and Mr. Honeycutt were officers and directors of Third Coast during the period when Third Coast violated the PACA (Tr. 6).

6. Mr. Finch and Mr. Honeycutt first noticed cash flow problems in 2009 and in early 2010 and directed that Third Coast's financial information be sent to the CPA firm in Houston that monitored Third Coast's books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Mr. Finch and Mr. Honeycutt returned their focus to the sales operation until they learned that Third Coast's suppliers were not being paid. (Tr. 41).

7. After being informed that certain Third Coast suppliers had ceased selling to Third Coast and that Third Coast's bank raised its own concerns, Mr. Finch and Mr. Honeycutt retained an outside accounting firm near the end of January 2010. The resulting audit and

monitoring of the receivables revealed a systematic diversion of Third Coast's receivables to previously unknown and unauthorized bank accounts established by Javier Bueno, Third Coast's Chief Financial Officer (Tr. 46-47). To conceal the diversions, Javier Bueno had been making fraudulent general ledger entries making it appear that suppliers were being paid when in fact Third Coast's suppliers were not being paid (Tr. 47-49).

8. Although the preliminary computation of the defalcation amounted to $360,000 between September 2009 and January 2010, a more thorough and comprehensive investigation revealed shortages well in excess of $1,000,000 (Tr. 49-53).

9. In February 2010, Mr. Finch and Mr. Honeycutt removed Javier Bueno from his position with Third Coast and assumed control of Third Coast (Tr. 37, 54-59, 72-75, 89).

10. Despite Mr. Finch and Mr. Honeycutt's best efforts to honor contractual obligations to provide produce, to keep Third Coast open so as to pay as many people possible, to maintain payments to the bank, and to pro-rate the amounts paid to suppliers and despite infusing Third Coast with personal funds and obtaining concessions from Third Coast's bank, it was necessary first to sell the processing portion of the business and finally to liquidate the assets of the distribution portion of the business and cease Third Coast's operation (Tr. 55-58, 75-76).

11. While under the control of Mr. Finch and Mr. Honeycutt, despite knowledge that Third Coast had failed to pay suppliers promptly, as required by the PACA, Mr. Finch and Mr. Honeycutt continued to purchase produce from produce sellers during the period when Third Coast violated the PACA (Tr. 69, 75-77, 89, 95-96).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. Third Coast willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 21 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the amount of $514,943.40 for 207 lots of perishable agricultural commodities, which Third Coast purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce, during the period February 5, 2010, through July 16, 2010. *In re Third Coast Produce Company, Ltd.*, __ Agric. Dec. ___ (Apr. 27, 2012).

3. Mr. Finch was responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), by virtue of his active involvement in the activities resulting in Third Coast's violations of the PACA and his status as an officer and a director of Third Coast.

4. By virtue of being responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), Mr. Finch is subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b).

5. Mr. Honeycutt was responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), by virtue of his active involvement in the activities resulting in Third Coast's violations of the PACA and his status as an officer and a director of Third Coast.

6. By virtue of being responsibly connected with Third Coast, during the period when Third Coast violated 7 U.S.C. § 499b(4), Mr. Honeycutt is subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b).

For the foregoing reasons, the following Order is issued.

ORDER

1. The Director's October 3, 2012, determination that Mr. Finch was responsibly connected with Third Coast, during the period February 5, 2010, through July 16, 2010, when Third Coast violated 7 U.S.C. § 499b(4), is affirmed.

2. Mr. Finch is accordingly subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Mr. Finch.

3. The Director's October 3, 2012, determination that Mr. Honeycutt was responsibly connected with Third Coast, during the period February 5, 2010, through July 16, 2010, when Third Coast violated 7 U.S.C. § 499b(4), is affirmed.

4. Mr. Honeycutt is accordingly subject to the licensing restrictions in 7 U.S.C. § 499d(b) and the employment restrictions in 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Mr. Honeycutt.

RIGHT TO JUDICIAL REVIEW

Mr. Finch and Mr. Honeycutt have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §_ 2341-2350. Judicial review must be sought within 60 days after entry of the Order in this Decision and Order.[31] The date of entry of the Order in this Decision and Order is June 6, 2014.

Done at Washington, DC

June 6, 2014

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[31]28 U.S.C. § 2344.

William G. Jenson
Judicial Officer