In re: ANTHONY L. THOMAS.
PACA-APP Docket No. 98-0001.
Decision and Order filed February 22, 2000.

Responsibly connected – Active involvement in violations – Nominal officer and director – Alter ego – Shareholder and owner distinguished.

The Judicial Officer affirmed Judge Baker's decision that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the time that Sanford violated the PACA. The Judicial Officer found that Petitioner was a knowing "front man" who purchased produce; issued corporate checks; entered into contracts; leased office, warehouse, and cooler space; serviced produce sellers seeking payment; and collected monies from Sanford's customers. The Judicial Officer rejected Petitioner's contentions that he was an officer, director, and shareholder in name only and that he acted at the direction of Mr. Giuffrida, the real owner, who placed Petitioner out front to deal with customers who would have shunned Sanford, if aware of Mr. Giuffrida's involvement. The Judicial Officer found that Petitioner's deceit successfully induced produce sellers to sell to Sanford when they otherwise would not have. The Judicial Officer concluded that Petitioner was actively involved in activities resulting in Sanford's failure to pay violations and therefore responsibly connected with Sanford, within the meaning of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)). The Judicial Officer also rejected Petitioner's argument that he meets both parts of the second prong of the "responsibly connected" test, in that Petitioner was only nominally an officer of Sanford and in that Petitioner was not an owner of a violating entity which was the alter ego of its owners.

Andre Allen Vitale and Andrew Y. Stanton, for Respondent.
Stephen P. McCarron, Washington, DC, for Petitioner.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Anthony L. Thomas [hereinafter Petitioner] instituted this proceeding pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter 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] by filing, on June 23, 1998, a Petition for Review. Petitioner seeks reversal of the determination by J.R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the period the corporation violated the PACA's prompt payment requirement.

J.E. Servais, Head, Trade Practices Section, PACA Branch, wrote a letter dated February 13, 1998, advising Petitioner that a disciplinary complaint had been filed against Sanford Produce Exchange, Inc., and informing Petitioner that United States Department of Agriculture [hereinafter USDA] records indicate he was responsibly connected with Sanford Produce Exchange, Inc., as president, vice president, director, and 25 percent shareholder during the period of Sanford Produce Exchange, Inc.'s alleged violations. Petitioner was given 30 days to deny that he was responsibly connected and to provide evidence supporting his position. In a

letter dated April 3, 1998, counsel for Petitioner responded by denying that Petitioner was responsibly connected during the violation period because Petitioner had resigned as an officer and director of Sanford Produce Exchange, Inc., and had surrendered his shares of stock as of January 10, 1997.

On May 22, 1998, Respondent issued a determination that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the period that Sanford Produce Exchange, Inc., violated the PACA,[1] in that the PACA Branch's records show that Petitioner continued to be active in managing and directing the business operations of the company subsequent to the January 10, 1997, date that Petitioner resigned as an officer and surrendered his stock (CARX 22).

On June 23, 1998, Petitioner filed Petition for Review, challenging Respondent's May 22, 1998, determination that Petitioner was responsibly connected with Sanford Produce Exchange, Inc. Pursuant to the Petition for Review, on November 23, 1998, the ALJ conducted an oral hearing in Washington, DC. Stephen P. McCarron, McCarron & Associates, Washington, DC, represented Petitioner. Andre Allen Vitale and Andrew Y. Stanton, Office of the General Counsel, USDA, Washington, DC, represented Respondent.

On February 1, 1999, Petitioner filed Brief of Petitioner; on March 15, 1999, Respondent filed Respondent's Brief; on April 6, 1999, Petitioner filed Petitioner's Reply Brief; and on May 12, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ affirmed Respondent's determination that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the time that it violated the PACA (Initial Decision and Order at 13).

On July 13, 1999, Petitioner appealed to the Judicial Officer; on August 5, 1999, Respondent filed Respondent's Response to Petitioner's Appeal Petition; and on August 6, 1999, the Hearing Clerk transferred the record of the proceeding to the Judicial Officer for decision.

Petitioner, in this proceeding instituted under section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)), has the burden of proving by a preponderance of the evidence that: (1) he was not actively involved in the activities resulting in a violation of the PACA; and (2) he 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.

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[1]On October 16, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a decision in which the ALJ found that between August 1996 and June 1997, Sanford Produce Exchange, Inc., purchased, received, and accepted 91 lots of perishable agricultural commodities from 21 sellers and failed to make full payment promptly of the agreed purchase prices in the total amount of $256,025.66, and concluded that Sanford Produce Exchange, Inc.'s failures to make full payment promptly constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Sanford Produce Exchange, Inc.*, 57 Agric. Dec. 1748 (1998). (RX 9.)

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion and conclusions, as restated.

Petitioner introduced no exhibits; Respondent's exhibits are designated by the letters "RX"; the Certified Agency Record exhibits are designated by the letters "CARX"; and transcript references are designated by "Tr."

PERTINENT STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

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CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

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§ 499a. Short title and definitions

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(b) Definitions

For purposes of this chapter:

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(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.

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§ 499d. Issuance of license

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(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;

(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

Any 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 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

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(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), 499d(b)(A)-(B), (c), 499h(b) (1994 & Supp. III 1997).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Findings of Fact

1. Anthony L. Thomas, Petitioner, is an individual with a mailing address of 1 Camelot Circle, Berlin, Maryland 21811-2028 (CARX at Index of Exhibits).

2. Petitioner has worked in the produce industry since approximately 1986 (Tr. 137-40). Prior to Sanford Produce Exchange, Inc., Petitioner served as produce manager for Sandler Foods, Virginia Beach, Virginia, for 6 years (Tr. 77, 138). Before Sandler Foods, Petitioner worked for White Swan Corporation in Austin, Texas, as a produce manager for 3 years, and in Florida, as a produce manager for 1 year (Tr. 139-40). Petitioner's responsibilities as a produce manager for Sandler Foods and White Swan Corporation included purchasing produce and directing sales growth in, and profit management for, the produce department (Tr. 138-39). Prior to entering the produce business, Petitioner attended college for 3 years, concentrating on business courses (Tr. 140, 180).

3. Sanford Produce Exchange, Inc., a produce company, was formed by Vincent Giuffrida on September 26, 1995 (CARX 1 at 3; Tr. 23-24, 27). Approximately 6 months before he formed Sanford Produce Exchange, Inc., Mr. Giuffrida had closed another produce company he owned, Blue Chip Companies, Incorporated [hereinafter Blue Chip], owing approximately $200,000

to produce sellers (Tr. 20-23, 277-80). Mr. Giuffrida testified that, as a result of Blue Chip's failure to pay its produce sellers, he understood he was ineligible to operate in the produce business for at least 2 years (Tr. 23, 26). Therefore, in forming and participating in the operation of Sanford Produce Exchange, Inc., Mr. Giuffrida carefully concealed his involvement in the company (Tr. 27) by never signing any documents (Tr. 30, 80), by employing others in a capacity referred to by Petitioner's counsel as "front man" (Tr. 8), and by using a false name (Tr. 30, 79-80).

4. The so-called front men were Robbin Evans and Petitioner (Tr. 24, 28, 34-35, 81-82). Mr. Evans had no produce experience and was recruited by Mr. Giuffrida for the use of his name to start Sanford Produce Exchange, Inc. (Tr. 24). On September 26, 1995, Mr. Evans signed the initial corporate formation documents (CARX 2a at 3), and on October 3, 1995, Mr. Evans signed the PACA license application in which he was listed as president, vice president, secretary, treasurer, director, and 100 percent shareholder of Sanford Produce Exchange, Inc. (CARX 1 at 10-12). Mr. Evans also signed, as president of Sanford Produce Exchange, Inc., the required Florida Produce Dealer Bond on October 4, 1995 (CARX 9a) and the lease for Sanford Produce Exchange, Inc.'s office and stall at Sanford State Farmers' Market (CARX 10b). Mr. Giuffrida needed "somebody to do the buying" (Tr. 24) of produce for Sanford Produce Exchange, Inc. He could not do so because his failures to pay produce sellers when he operated Blue Chip meant that the produce sellers would not sell to him (Tr. 24, 26, 79-80).

5. Toward the end of 1995, Petitioner relocated to Florida (Tr. 79). Petitioner began his affiliation with Sanford Produce Exchange, Inc., on December 31, 1995, when he was elected president, vice president, and director (Tr. 79, 142-43; CARX 2b at 8-9). Petitioner also purchased 49 per centum of the company's shares for $10,000 (Tr. 144, 146-47; CARX 2e at 1, CARX 16)[2].

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[2]However, an examination of the corporate records reveals a discrepancy in the number of shares authorized versus the number of shares purportedly issued. The Articles of Incorporation, Sanford Produce Exchange, Inc., Article IV: Capitol Stock, states unambiguously that "[t]his corporation is authorized to issue 500 shares of $1.00 par value common stock." (CARX 2a at 1.)

Nevertheless, recorded in the Minutes of the Organizational Meeting of Directors of Sanford Produce Exchange, Inc., of December 31, 1995, are duly adopted resolutions, which purport to allow increases beyond 500 the total number of common shares issued by the corporation (CARX 2b at 2 at third unnumbered resolution and at 3 at first unnumbered resolution). The three directors issued themselves shares, as follows: Robbin Evans, 500 shares for $500; Anthony L. Thomas, 249 shares for $249; and Angelina Giuffrida, 251 shares for $251 (CARX 2b at 4 at first unnumbered resolution). These three directors approved these resolutions (CARX 2b at 5 at first unnumbered resolution) and subscribed to these resolutions (CARX 2b at 6).

Moreover, the three directors voted their shares as shareholders on Consent to Action Taken in Lieu of the Annual Meeting of Shareholders of Sanford Produce Exchange, Inc., as follows: director/shareholder Robbin Evans, 500 shares; director/shareholder Anthony L. Thomas, 249 shares;

Petitioner's intent in becoming affiliated with Sanford Produce Exchange, Inc., was to be an equal partner in ownership and operation (Tr. 144), being paid a weekly salary of $1,000 for the services he performed in the daily operation of Sanford Produce Exchange, Inc. (Tr. 89, 145), and splitting the firm's profits (Tr. 89, 144). Out of the total 500 authorized shares of Sanford Produce Exchange, Inc., Petitioner received 249 shares and Angelina Giuffrida, the secretary and treasurer of Sanford Produce Exchange, Inc., received 251 shares (Tr. 144; CARX 2b at 2, 4)[3]. Mr. Giuffrida's accountant, Joseph Clark, drafted corporate papers to effect these changes (Tr. 27-28, 37-38). Petitioner was also made the sole signatory on the company's bank account (Tr. 29).

6. Although Petitioner describes his association with Sanford Produce Exchange, Inc., as in the nature of an employee, who did not have any corporate or management decision-making authority (Tr. 81, 85), which he maintains was run by Mr. Giuffrida (Tr. 81), the evidence indicates that prior to January 10, 1997, Petitioner's primary responsibilities included: all of the purchasing of produce (Tr. 82, 141); issuing corporate checks (Tr. 144); entering into contracts (Tr. 145); leasing office, warehouse, and cooler space at the Sanford State Farmers' Market (Tr. 124, 145; CARX 10d, e); dealing with produce sellers seeking payments (Tr. 145, 200-01); and collecting monies from Sanford Produce Exchange, Inc.'s customers (Tr. 82, 145).

Notwithstanding such evidence, Petitioner maintains that during this entire time he was operating at the direction and under the control of Mr. Giuffrida (Tr. 81), that he actually had little or no responsibilities with respect to the actions taken by the corporation (Tr. 82, 86), and that his positions of officer, director, and shareholder were in name only (Tr. 85-87). This context had the effect of inducing vendors to sell their produce to Sanford Produce Exchange, Inc., when they might not have done so had they known Mr. Giuffrida was involved (Tr. 79-80, 169-71). To further this deception, Mr. Giuffrida carefully avoided signing any documents and even adopted the alias of "Jimmy Salvo" (Tr. 30, 79-80, 169-70).

7. In mid-1996, Petitioner invested an additional amount between $11,000 and $12,000 in Sanford Produce Exchange, Inc. (Tr. 90).

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and director/shareholder Angelina Giuffrida, 251 shares (CARX 2b at 8), which purported to effectuate the changes in share ownership.

However, it is clear that Petitioner held 249 shares for about 1 year and whether those shares constituted approximately 49 per centum of the total shares or approximately 25 per centum of the total shares, Petitioner, in either event, held more than 10 per centum of the outstanding shares, which is all that is required under the definition of "responsibly connected" in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)). Therefore, there is no need to resolve the discrepancy of what percentage of the total shares issued is 249 shares.

[3]See note 2.

8. As a result of disagreements with Mr. Giuffrida (Tr. 84), on January 10, 1997, Petitioner submitted his resignation as president and as director of Sanford Produce Exchange, Inc. (CARX 14a at 2), and surrendered Petitioner's shares of stock (CARX 2e at 4, CARX 14a at 2-4), but was repaid neither the $10,000 purchase price nor the other $11,000 to $12,000 invested in Sanford Produce Exchange, Inc. (Tr. 90, 146-47).

9. Petitioner continued to serve as president of Sanford Produce Exchange, Inc., after January 10, 1997 (Tr. 82-88, 156-62; RX 8 at 1; CARX 5a-g).

10. Petitioner maintains that after he resigned from all corporate positions and returned his stock on January 10, 1997, he assumed the duties of dock supervisor (Tr. 85-86; Brief of Petitioner at 3) and that the company was run by Mr. Giuffrida under the alias "Jimmy Salvo" (Tr. 54, 123, 136). However, neither Mr. Giuffrida nor his accountant reported the corporate changes to the Florida corporations office or to the PACA Branch; hence, Petitioner continued to appear on the records of these offices as president of Sanford Produce Exchange, Inc. (Tr. 35, 42, 110-15; Brief of Petitioner at 3).

Petitioner describes the situation after January 10, 1997, as follows:

> On January 10, 1997, after many disagreements with Mr. G[iu]ffrida during 1996, Mr. Thomas resigned from all corporate positions, returned his stock and assumed the duties of dock supervisor. After Mr. Thomas resigned his corporate positions in January, 1997, Mr. G[iu]ffrida continued to run the company as Jimmy Salvo. However, neither Mr. G[iu]ffrida nor his accountant reported the corporate changes to the Florida corporations office or to the PACA. Hence, Mr. Thomas continued to appear on the records of these offices as the president of the Company. This was convenient for Mr. G[iu]ffrida because it continued to give Mr. G[iu]ffrida an excuse to request Mr. Thomas to sign documents as the president and thereby continue to conceal his operation with Sanford. These documents included a factoring agreement, certain tax returns and leases. Mr. G[iu]ffrida also kept Mr. Thomas as the signator [sic] on the bank account. However, Mr. Thomas made no decisions and merely signed his name to the checks and documents when they were presented to him by Mr. G[iu]ffrida.

Brief of Petitioner at 3.

11. Notwithstanding Petitioner's description of his situation after January 10, 1997, and attributing it to the convenience of Mr. Giuffrida and his description of his work as that of a dock supervisor, the evidence shows that Petitioner performed duties far beyond that of a dock supervisor, in that:

Acting as president, Petitioner signed a contract with Olympic Credit Fund, Inc., on March 4, 1997, whereby Sanford Produce Exchange, Inc., agreed to sell its

accounts receivable to Olympic in return for payment equal to 90 per centum of the face value of each receivable purchased, referred to as the factoring agreement (CARX 5a); Petitioner signed additional documents in furtherance of the factoring agreement, including a signature authorization form dated March 5, 1997, and signed as president, authorizing Olympic to accept documents signed by Petitioner (CARX 5b); Notification Agreement to inform Sanford Produce Exchange, Inc.'s customers to make future payments to Olympic, on which Petitioner identified himself as president (CARX 5c); a document dated March 5, 1997, entitled "Factoring Procedures" setting forth the procedures used to calculate payments pursuant to the factoring agreement, on which Petitioner identified himself as president (CARX 5d); a Certified Copy of Resolutions, wherein Petitioner is listed as president and secretary/treasurer and which he signed as secretary on March 5, 1997 (CARX 5e); Uniform Commercial Code Financing Statements filed with the State of Florida (CARX 5f at 2-3); a blank accounts receivable schedule for Olympic to use to compare signatures on subsequent schedules (CARX 5f at 1); two completed accounts receivable schedules dated May 12, 1997, and May 13, 1997, respectively (CARX 5f at 4, 8); and an addendum to the factoring agreement dated May 9, 1997, on which Petitioner identified himself as president (CARX 5g). Petitioner's involvement in carrying out the factoring agreement, including serving as the primary contact person at Sanford Produce Exchange, Inc. (CARX 5f at 8, 25, 27, 30, 31), continued until at least June 23, 1997 (CARX 5f at 31).

12. Other significant corporate documents, which Petitioner signed as president after January 10, 1997, include the State of Florida Employer's Quarterly Tax Report signed and dated May 7, 1997 (CARX 13c); Employer's Quarterly Federal Tax Return signed and dated May 7, 1997 (CARX 13d); and an amendment to Sanford Produce Exchange, Inc.'s lease of office, stall, and cooler space, signed and dated May 30, 1997 (CARX 10e at 8-10).

13. In addition, Petitioner continued to be involved in significant day-to-day operations of Sanford Produce Exchange, Inc., after January 10, 1997, carrying out such responsibilities as issuing corporate checks (Tr. 134-36, 215-16; CARX 19 at 1-20, 23-25, 32, 46, 53-58, 60, 63-64, 72, 74-75, 81-82, 89-90, CARX 20 at 9; RX 4 at 9); entering into contracts on behalf of Sanford Produce Exchange, Inc. (Tr. 60, 171); dealing with produce sellers seeking payments from Sanford Produce Exchange, Inc. (RX 4 at 8; Tr. 60, 87-88, 171-72, 178-80, 214-19); and dealing with creditors (Tr. 60, 88).

Three of the produce purchases for which Sanford Produce Exchange, Inc., failed to make full payment promptly in violation of the PACA, occurred before January 10, 1997 (CARX 4 at 3, items 1 and 2). Petitioner argues that these three transactions should not be considered as failure-to-pay violations, but rather disputes in PACA reparations proceedings (Brief of Petitioner at 4). The first two of those transactions, totaling $16,095 (CARX 4 at 3, item 1), were the subject of a reparation action between Sanford Produce Exchange, Inc., and the seller,

Arkansas Valley Produce (CARX 3 at 18-76). That matter was not resolved until an Order Reinstating Default Order was issued on January 28, 1998 (CARX 3 at 25-26), 12 months after Petitioner had resigned as president and director of Sanford Produce Exchange, Inc., and 6 months after Petitioner had terminated his affiliation with Sanford Produce Exchange, Inc. (Findings of Fact 8-9, 11-14). Petitioner also claims that the third purchase for $2,847.10 from Martin Produce Co., Inc., was the subject of a reparation action (Brief of Petitioner at 4; CARX 3 at 15). However, all three transactions occurring before January 10, 1997, were disposed of by default orders, since Sanford Produce Exchange, Inc., did not answer either separate reparations complaint. Thus, these reparation proceedings have no evidentiary bases for showing that they involved valid disputes. Moreover, Petitioner did not present any other evidence that Sanford Produce Exchange, Inc.'s purchase of produce from either Martin Produce Co., Inc., or Arkansas Valley Produce was the subject of a valid dispute. Therefore, Petitioner's argument that these transactions could not result in failure-to-pay violations, because they were valid disputes resolved by reparations proceedings, is clearly without any merit.

14. Petitioner terminated his affiliation with Sanford Produce Exchange, Inc., in late June 1997 (Tr. 88; Brief of Petitioner at 3).

15. Neither Petitioner nor any other person affiliated with Sanford Produce Exchange, Inc., informed the Florida corporations office or the PACA Branch that Petitioner had resigned as an officer and director of Sanford Produce Exchange, Inc., until after he terminated his affiliation with the company (Finding of Fact 10).

16. Petitioner served as either *de facto* or *de jure* president of Sanford Produce Exchange, Inc., from December 31, 1995, to late June 1997 (Findings of Fact 5-14).

17. Petitioner was actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violations of the PACA (Findings of Fact 11-14).

18. Petitioner had an actual, significant nexus to Sanford Produce Exchange, Inc., during the entire violation period and his association with Sanford Produce Exchange, Inc., was not nominal (Findings of Fact 5-16).

19. Although Mr. Giuffrida used an alias and employed Petitioner as a front man to disguise Mr. Giuffrida's association with Sanford Produce Exchange, Inc., the record does not reveal that USDA brought any disciplinary complaints against Mr. Giuffrida for violations of the PACA while Mr. Giuffrida owned Blue Chip or Sanford Produce Exchange, Inc., or if USDA ever cited Mr. Giuffrida as responsibly connected with Sanford Produce Exchange, Inc.

Discussion and Conclusions

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)) defines "responsibly connected" as an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation. Petitioner was president, vice

president, director, and holder of 49 per centum of the outstanding stock[4] of Sanford Produce Exchange, Inc., as of December 31, 1995. But, Petitioner contends that he resigned as officer and director and surrendered his shares as of January 10, 1997. In fact, Petitioner continued to serve as an officer until Petitioner terminated his affiliation with the company in late June 1997. Petitioner's contention that he was acting only in a nominal capacity, because he acted under the control and direction of Vincent Giuffrida, alias Jimmy Salvo, is not supported by the facts of record; thus, his testimony is not credible. Petitioner was not a nominal officer, director, and shareholder. Prior to January 10, 1997, Petitioner was a holder of 49 per centum of the outstanding stock[5] and was directly involved in Sanford Produce Exchange, Inc.'s day-to-day operations, engaging in significant corporate activities, including signing corporate checks, entering into contracts, leasing business space, purchasing produce, and serving as the contact person in Sanford Produce Exchange, Inc., for produce sellers and creditors seeking payment. Petitioner's direct involvement in significant corporate operations belies his contention that he was only nominal. In addition, the authorities and responsibilities he possessed as an officer, director, and holder of 49 per centum of the outstanding stock[6] establish that he was not nominal. Moreover, Petitioner did not effectively resign as an officer on January 10, 1997. Rather, Petitioner continued to serve as president in significant and substantial corporate operations from January 10, 1997, until he left the company in late June 1997. Thus, Petitioner maintained a significant nexus to Sanford Produce Exchange, Inc., during the entire violation period.

To rebut successfully Respondent's "responsibly connected" determination, Petitioner must demonstrate by a preponderance of the evidence that he was not actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The issue of active involvement is decided by looking at the extent and nature of a petitioner's activities with the violating company. Petitioner failed to establish by a preponderance of the evidence that he was not actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violations of the PACA between August 1996 and June 1997.

Assuming, *arguendo*, Petitioner was only operating as a "front man" for Mr. Giuffrida, that in itself would not support a conclusion that Petitioner was not actively involved in activities resulting in Sanford Produce Exchange, Inc.'s violations of the PACA. Petitioner admits that he served as president to conceal Mr. Giuffrida's involvement in Sanford Produce Exchange, Inc., because vendors

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[4]See note 2.

[5]See note 2.

[6]See note 2.

would not have sold produce to Sanford Produce Exchange, Inc., if aware of Mr. Giuffrida's involvement. Further, Petitioner admits that he knew about Mr. Giuffrida's scheme from the inception of Petitioner's affiliation with Sanford Produce Exchange, Inc., and that his part in misleading produce sellers bothered him. Nevertheless, Petitioner did not inform produce sellers. Instead, Petitioner knowingly, and of his own free will, deceived produce sellers, which enabled Sanford Produce Exchange, Inc., to purchase produce from sellers who would not knowingly have done business with Mr. Giuffrida.

If Sanford Produce Exchange, Inc., had not been able to purchase produce on credit, it would not have left 21 sellers unpaid for $256,025.66 worth of produce. Therefore, by knowingly participating in the scheme to mislead produce sellers, Petitioner was actively involved in the activities which resulted in Sanford Produce Exchange, Inc.'s violations of the prompt payment provision of the PACA.

In order to establish that an allegedly responsibly connected individual was only a nominal officer, the individual 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 and significant nexus standards, responsibilities are placed upon corporate officers, directors, and shareholders, even though they may not actually have participated in the violative activities, because their status with the company requires that they knew, or should have known, about the violations being committed and failed to counteract or obviate the fault of others. The record clearly establishes that Petitioner had an actual, significant nexus to Sanford Produce Exchange, Inc., during the entire violation period.

Petitioner relies upon *Maldonado v. Department of Agriculture*, 154 F.3d 1086 (9th Cir. 1998), as dispositive of the issues in this proceeding. In *Maldonado*, the petitioner was held not responsibly connected under section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9) (Supp. III 1997)), because the petitioner therein was found to have neither a significant nexus to the violating company nor active involvement in its activities. There are significant differences between the case, *sub judice*, and *Maldonado*. The affiliation of Mr. Maldonado with the violating company differed significantly from the nature of Petitioner's affiliation with Sanford Produce Exchange, Inc. Mr. Maldonado was found to lack the skill and training commensurate with his position as president, since he had only a sixth grade education, no experience or training in management, and lacked an understanding of corporate structures. Consequently, Mr. Maldonado did not understand the documents he signed because of his lack of education and experience. Petitioner herein has no such lack of education, training, skill, or experience.

In the recent *Norinsberg* remand decision, the Judicial Officer stated:

> 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, 58 Agric. Dec.___, slip op. at 10 (Apr. 5, 1999) (Decision and Order on Remand).

Applying the standards enunciated by the Judicial Officer in *Norinsberg, supra,* I conclude that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the entire violation period.

Petitioner was an officer, director, and holder of 49 per centum of the outstanding stock of Sanford Produce Exchange, Inc.,[7] prior to January 10, 1997. After January 10, 1997, Petitioner continued to serve as the president until late June 1997. During the entire time he was affiliated with Sanford Produce Exchange, Inc., Petitioner was involved in corporate activities that had a significant influence upon the operation and the direction of Sanford Produce Exchange, Inc. These facts establish that he had an actual and significant nexus to Sanford Produce Exchange, Inc., during the entire violation period. Petitioner failed to prove by a preponderance of the evidence that he was acting only in a nominal capacity. Petitioner also failed to prove by a preponderance of the evidence that he was not actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violations of the PACA. Therefore, Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the entire violation period.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises four issues on appeal in support of a reversal of the ALJ's Initial Decision and Order affirming Respondent's determination that Petitioner was responsibly connected with Sanford Produce Exchange, Inc.

Petitioner's first issue is whether Petitioner was actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s violations of section 2(4) of the PACA (Appeal Pet. at 8). Petitioner admits to signing checks, but argues that Mr. Giuffrida controlled all the company's money, deciding each payee and for how much each check would be written. Since Petitioner was given a fully completed check to sign, Petitioner argues that Petitioner exercised no judgment, discretion, or control over the checks. Therefore, Petitioner argues that, under *Maldonado* and *Norinsberg, supra,* Petitioner was not actively involved in the activities resulting

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[7]See note 2.

in a violation of the PACA (Appeal Pet. at 8-9).

Guidance on active involvement is provided by my recent decision on remand in *Norinsberg*, 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, 58 Agric. Dec.___, slip op. at 10 (Apr. 5, 1999) (Decision and Order on Remand).

Respondent replies that Petitioner's argument fails, even if one allows that Mr. Giuffrida directed and controlled all corporate decisions and flow of money, because active involvement includes not only those who decide which, and how much, produce sellers are paid, but active involvement also includes those who freely and knowingly participate in a scheme to fail to pay produce sellers for produce, as Petitioner did (Respondent's Response to Petitioner's Appeal Pet. at 3-4).

I find that the facts are not disputed. Mr. Giuffrida's former produce company, Blue Chip, went under in 1995, owing produce sellers approximately $200,000. Thereafter, Mr. Giuffrida alleges that he believed he was not eligible to operate in the produce business for at least 2 years. Consequently, Mr. Giuffrida started a new company, Sanford Produce Exchange, Inc., adopting an alias, Jimmy Salvo, to conceal his involvement, and hiring people, including Petitioner, to front the new company, because Mr. Giuffrida believed that produce sellers who knew Mr. Giuffrida from his payment practices at Blue Chip would not sell to Mr. Giuffrida. Petitioner knowingly and freely joined the scheme, whereby Petitioner induced produce sellers to sell to Sanford Produce Exchange, Inc., even though Petitioner was fully cognizant of the duplicity of Mr. Giuffrida's occult involvement in the company.

I agree with Respondent's argument that Petitioner's active involvement exceeded *ministerial*, even if it is conceded that Petitioner was a mere puppet of Mr. Giuffrida's financial decisions and instructions, because Petitioner pretended on a daily basis to be the chief operating officer of Sanford Produce Exchange, Inc., knowing full well that produce sellers would not knowingly sell to a firm operated by Mr. Giuffrida. Petitioner's calculated effort to deceive produce sellers is the

primary reason that Sanford Produce Exchange, Inc., was able to buy produce from sellers, who ultimately were not paid for produce in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Moreover, Respondent argues that the undisputed record of Petitioner's activities on behalf of Sanford Produce Exchange, Inc., as its president, director, and holder of more than 10 per centum of the outstanding stock, establish that Petitioner's active involvement far exceeded *ministerial*, irrespective of whether Petitioner was a "puppet" of Mr. Giuffrida (Respondent's Response to Petitioner's Appeal Pet. at 6). Respondent makes two major points in support of this argument. First, the only supporting evidence presented by Petitioner, that Petitioner was a "puppet" of Mr. Giuffrida, is Petitioner's self-serving testimony to this end, and Mr. Giuffrida's corroborating testimony at the hearing. However, little weight should be given to the testimony of Mr. Giuffrida because this testimony is directly contradicted by Mr. Giuffrida's statements on several occasions to Respondent's investigator, Mr. Swainhart, to the effect that Petitioner ran the company, not Mr. Giuffrida (Tr. 239-41, 248, 251-52). Therefore, since Petitioner's testimony that he was a mere "puppet" is self-serving and corroborated only by Mr. Giuffrida's contradictory statements, I agree with Respondent that this evidence deserves little weight.

Respondent's second argument is that Petitioner was just what he appeared to be, an officer, director, and holder of more than 10 per centum of the outstanding stock, and responsible for the activities of Sanford Produce Exchange, Inc. (Respondent's Response to Petitioner's Appeal Pet. at 9-11). I agree with Respondent that Respondent's list of activities shows that Petitioner's active involvement was way beyond *ministerial*. Further, Petitioner's activities listed by Respondent are essentially the same activities in which I find Petitioner engaged (Findings of Fact 6, 11-14).

Finally, Respondent contends that Petitioner's reliance on *Maldonado* and *Norinsberg*, *supra*, is misplaced. I agree with Respondent.

In *In re Michael Norinsberg*, 56 Agric. Dec. 1840 (1997), *remanded*, 162 F.3d 1194 (D.C. Cir. 1998), *reprinted in* 57 Agric. Dec. 1465 (1998), the only activity found to constitute active involvement was Mr. Norinsberg's signing 16 corporate checks. 56 Agric. Dec. at 1857. Mr. Norinsberg's involvement with the violating company is slight when compared to Petitioner's extensive participation in the scheme to defraud produce sellers by hiding Mr. Giuffrida's association with Sanford Produce Exchange, Inc., Petitioner's execution of lease and purchase documents, and Petitioner's active involvement in the factoring agreement, all of which enabled Sanford Produce Exchange, Inc., to continue to buy produce from sellers, who ultimately were not paid for the produce in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

In *Maldonado v. Department of Agric.*, 154 F.3d 1086 (9th Cir. 1998), the court found that Mr. Maldonado was not actively involved in the activity that resulted in

failure to pay for produce by his firm. The court noted that, although Mr. Maldonado was authorized to co-sign checks, he did not participate in the fraudulent activities that resulted in funds being siphoned from the firm. His duties before and after he was named president remained the same; *viz.*, running the produce department. *Maldonado*, *supra*, 154 F.3d at 1088. In contrast with *Maldonado*, Petitioner knowingly participated in the fraudulent scheme to hide Mr. Giuffrida's involvement in Sanford Produce Exchange, Inc., so that produce suppliers would sell to the firm. Also, Petitioner's duties with Sanford Produce Exchange, Inc., were to act as its president, vice president, director, and owner of 49 per centum of Sanford Produce Exchange, Inc.'s stock,[8] until January 10, 1997. From January 10, 1997, until late June 1997, Petitioner acted as Sanford Produce Exchange, Inc.'s president. Moreover, in contrast to Mr. Maldonado's lack of education and management experience, Petitioner attended college for 3 years, concentrating on business courses (Tr. 140, 180), and had extensive experience as a produce manager for two other firms, Sandler Foods, Virginia Beach, Virginia, and White Swan Corporation, Austin, Texas, prior to his association with Sanford Produce Exchange, Inc. (Tr. 77, 138-40).

Therefore, the facts in this case are much different than those of *Norinsberg* and *Maldonado* and demonstrate that Petitioner used his position as president, vice president, director, and 49 percent stockholder to defraud Sanford Produce Exchange, Inc.'s produce sellers and was responsible for decisions that led to Sanford Produce Exchange, Inc.'s failure to pay produce sellers promptly. Petitioner was, therefore, actively involved in the activities which resulted in Sanford Produce Exchange, Inc.'s violations of the prompt payment provision of the PACA. For this reason alone, Petitioner was properly held to be responsibly connected with Sanford Produce Exchange, Inc.

Petitioner's second issue concerns the second prong of the "responsibly connected" test, in that Petitioner argues that he was a nominal officer (Appeal Pet. at 9). In support of Petitioner as a *nominal officer* only, Petitioner states that he made no policy decisions or business decisions; attended no board meetings; had no corporate duties; received no compensation for corporate positions which he held; signed documents as an officer solely as an administrative convenience to Mr. Giuffrida; signed corporate checks devoid of corporate policy; was an officer, director, and shareholder in name only; had no managerial authority; and did what Mr. Giuffrida told him to do (Appeal Pet. at 9).

The ALJ concluded that Petitioner was not nominal because he was a holder of 49 per centum of the outstanding stock of Sanford Produce Exchange, Inc., prior to January 10, 1997, and was directly involved in Sanford Produce Exchange, Inc.'s day-to-day operations, having engaged in significant corporate activities, including signing at least 45 corporate checks, entering into contracts and leases, purchasing

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[8]See note 2.

produce, and dealing with produce sellers and creditors seeking payment from Sanford Produce Exchange, Inc., through June 1997. Moreover, the ALJ found that Petitioner did not effectively resign as an officer on January 10, 1997, but continued to serve as president until he left Sanford Produce Exchange, Inc., in late June 1997. (Initial Decision and Order at 9.)

In order for alleged responsibly connected individuals to show that they are only nominal, they must establish by a preponderance of the evidence that they did not have an actual, significant nexus with the violating company during the violation period and, therefore, neither knew nor should have known of the corporation's misdeeds.[9] Responsibility is placed upon corporate officers, directors, and holders of more than 10 per centum of the outstanding stock because their status with the company requires that they know, or should know, about violations being committed and that they be held responsible for their failure to "counteract or obviate the fault of others." *Bell, supra*, 39 F.3d at 1201. The ALJ's conclusion that Petitioner had an actual, significant nexus to Sanford Produce Exchange, Inc., during the entire violation period (Initial Decision and Order at 11), is correct.

Again, Petitioner asserts that his situation is comparable to *Norinsberg* and *Maldonado* (Appeal Pet. at 8). However, the undisputed facts of this case show that Petitioner was far more involved in the business affairs of Sanford Produce Exchange, Inc., than were the petitioners in *Norinsberg* and *Maldonado* in their respective companies.

In *Norinsberg*, the Judicial Officer found that the petitioner was made secretary/treasurer by his father, the corporate president, solely for administrative convenience so the petitioner could sign corporate checks and other documents while his father was out of town. The Judicial Officer found that Mr. Norinsberg was nominal, as his sole involvement in the corporation was that he was listed as the firm's secretary, treasurer, director, and stockholder on two PACA license applications, his name had been signed to one of the applications, he was listed as a signatory of checks for three corporate bank accounts and signed 16 corporate checks, he signed one purchase agreement, he signed a proposed bank assignment and security agreement which was never ratified, and a state administrative agency addressed a letter to him as secretary/treasurer. *In re Michael Norinsberg*, *supra*, 56 Agric. Dec. at 1862-64. In *Maldonado*, the court found that Mr. Maldonado did not actually have any authority as president, because his duties never changed after he became president of the firm and he received no additional compensation for being named to that position. The court also pointed out that he never attended any board meetings and "lacked the skill and training commensurate with his position as president," stressing that he only had a sixth grade education and had no

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[9] *Maldonado v. Department of Agric.*, 154 F.3d 1086, 1088 (9th Cir. 1998); *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).

experience or training in management, and lacked an understanding of corporate structures. *Maldonado*, *supra*, 154 F.3d at 1088-89.

In contrast to *Norinsberg* and *Maldonado*, Petitioner was a very experienced and well-educated manager of produce businesses, having served as a produce manager for over 10 years with two businesses other than Sanford Produce Exchange, Inc. Petitioner was well paid, as he received a salary of $1,000 per week and split the firm's profits with Mr. Giuffrida. (Tr. 77, 89, 138-40, 144-45.) Unlike Mr. Maldonado, who had only a sixth grade education, Petitioner attended college for 3 years, concentrating on business courses. Based on his education and experience, Petitioner knew, or should have known, about corporate structures, including the responsibilities and authority that come with holding the position of president. While Mr. Norinsberg and Mr. Maldonado might not have understood the documents they signed due to their lack of experience or, in the case of Mr. Maldonado, his lack of education, Petitioner knew, or should have known, the effect of the significant corporate documents he signed. It was Petitioner alone who signed away Sanford Produce Exchange, Inc.'s accounts receivable. Petitioner knew, or should have known, the significance of the factoring agreement and that his signature bound Sanford Produce Exchange, Inc., to its terms. Petitioner acted as Sanford Produce Exchange, Inc.'s contact with Olympic Credit Fund, Inc., on the factoring agreement and made decisions with regard to that agreement. Petitioner, by affixing his signature to Sanford Produce Exchange, Inc.'s state and federal tax filings, undertook responsibility for the information contained in those documents. Petitioner knew, or should have known, that he was undertaking significant authority by signing at least 45 corporate checks, many of them payable to non-produce creditors. Petitioner was directly and significantly involved in the day-to-day operations of Sanford Produce Exchange, Inc., and therefore, played an important role in the direction of the company. In light of his direct, knowing, and voluntary involvement in significant corporate activities, Petitioner had an actual, significant nexus to Sanford Produce Exchange, Inc., during the entire violation period.

Even if I accept Petitioner's claim that he acted at the direction of Mr. Giuffrida, that does not negate Petitioner's actual, significant nexus to Sanford Produce Exchange, Inc. As the Court stated in *Veg-Mix, Inc. v. United States Dep't of Agric.,* 832 F.2d 601, 611 (D.C. Cir. 1987), in determining whether or not an individual is nominal, "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." Petitioner cannot avoid responsibility for the violations Sanford Produce Exchange, Inc., committed while he was president, simply because he chose not to use the powers he had.

Petitioner's third issue is the question of alter ego, in that Petitioner argues that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., that Mr. Giuffrida negated its separate identity. Petitioner argues that Mr. Giuffrida controlled all

operations; that Mr. Giuffrida decided who would work, who would be paid, and the amount of payments; that Mr. Giuffrida decided what titles would be held by whom; that Mr. Giuffrida used his personal accountant to draft documents reflecting his decisions; that there were never any shareholder or board meetings; that Sanford Produce Exchange, Inc., had no existence independent of Mr. Giuffrida; and that the corporate form was nothing more than a mask to cover Mr. Giuffrida's proprietorship (Appeal Pet. at 9).

Respondent replies that there is no evidence that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., as to negate its separate identity (Respondent's Response to Petitioner's Appeal Pet. at 15).

I agree with Respondent that the evidence does not support the conclusion that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., as to negate its separate identity. My examination of Petitioner's list of reasons in support of the third issue does not convince me that Mr. Giuffrida was dominant. Moreover, Petitioner fails to address the record facts militating against Petitioner's contention that Sanford Produce Exchange, Inc., was Mr. Giuffrida's alter ego, *inter alia*: that Petitioner had at least $21,000 invested in the corporation; that Petitioner was paid a salary of $1,000 per week and was due a share in the profits; that Petitioner not only held the titles of president, vice president, director, and shareholder, but also had duties commensurate with those titles; and that Petitioner held himself out to produce sellers to be president of Sanford Produce Exchange, Inc., and actually functioned as president (Findings of Fact 5-13). Moreover, Mr. Giuffrida, on several occasions in 1997, stated to Respondent's investigator, Mr. Swainhart, that Petitioner was the one in control of Sanford Produce Exchange, Inc. (Tr. 240-41, 248, 252), directly contradicting Mr. Giuffrida's testimony at the hearing (Tr. 28-29). I find that there is not a preponderance of the evidence that Mr. Giuffrida was so dominant that Sanford Produce Exchange, Inc., was the alter ego of Mr. Giuffrida.

Petitioner's fourth issue is that Petitioner can raise the alter ego defense for two reasons: (1) the Petitioner's shareholder status ended on January 10, 1997, before the prompt payment violations occurred; and (2) even if Petitioner is a shareholder, the amended definition of "responsibly connected" in section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 (Pub. L. No. 104-48, § 12(a), 109 Stat. 424, 430 (1995)) makes a distinction between "shareholder" and "owner" in the context of a company which is the alter ego of its "owners" (Appeal Pet. at 10-13).

In support of the first argument that Petitioner was not a shareholder when the prompt payment violations occurred, Petitioner states that the three transactions occurring prior to Petitioner's surrender of his stock on January 10, 1997, are legitimate reparations cases, not failures to pay promptly in accordance with the

PACA.[10] Further, Petitioner argues that if Petitioner was not a shareholder after January 10, 1997, then Petitioner could not be an owner of a violating entity for the purposes of determining if Petitioner is an owner of a violating entity which is the alter ego of its owners. (Appeal Pet. at 10-11.)

I reject Petitioner's first argument on the fourth issue for three reasons.

First, the ALJ found that the three transactions occurring prior to Petitioner's surrender of his stock constitute failures to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *In re Sanford Produce Exchange, Inc.*, 57 Agric. Dec. 1748 (1998) (RX 9).

Second, Petitioner has no credibility to now argue that the three transactions were good faith reparations disputes, when Petitioner's uncontested testimony is that the main reason that Petitioner could not adjust to the business practices and techniques of Mr. Giuffrida is that Petitioner was uncomfortable with "hammering" produce sellers, a technique utilized by Sanford Produce Exchange, Inc., to pay produce sellers less than the true value of their produce (Tr. 83). I find that it is more likely than not that these transactions are instances of "hammering" produce sellers. Moreover, Petitioner testified that at the end of his relationship with Mr. Giuffrida, Petitioner was in anguish over being required to perform the "shuck and jive," which was what Petitioner called Mr. Giuffrida's technique utilized to keep creditors at bay (Tr. 88). I find that Petitioner has failed to show by a preponderance of the evidence that the three transactions were good faith disputes which took the three transactions out of the prompt payment requirements.

Third, I find that neither the Arkansas Valley Produce transactions nor the Martin Produce Co., Inc., transaction could, in any event, be considered disputed transactions, as Petitioner argues, since Sanford Produce Exchange, Inc., failed to answer either the reparation complaint of Arkansas Valley Produce or the reparation complaint of Martin Produce Co., Inc. I signed, respectively, both the Default Order in favor of Martin Produce Co., Inc., on December 3, 1997 (CARX 3 at 15), and the Order Reinstating Default Order in favor of Arkansas Valley Produce on January 28, 1998 (CARX 3 at 25).

Petitioner's second argument on the fourth issue is that, even if Petitioner is a shareholder, the amended definition of "responsibly connected" in section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 (Pub. L. No. 104-48, § 12(a), 109 Stat. 424, 430 (1995)) makes a distinction between "shareholder" and "owner" in the context of a company which is the alter ego of its "owners," such that Petitioner is a shareholder but not an owner and therefore Petitioner may raise the alter ego defense (Appeal Pet. at 12).

Specifically, Petitioner argues that my decision in *In re Michael Norinsberg*, 56

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[10]Two of the transactions involved Sanford Produce Exchange, Inc.'s purchase of produce from Arkansas Valley Produce and one of the transactions involved Sanford Produce Exchange, Inc.'s purchase of produce from Martin Produce Co., Inc.

Agric. Dec. 1840, 1864-65 (1997), *remanded*, 162 F.3d 1194 (D.C. Cir. 1998), *reprinted in* 57 Agric. Dec. 1465 (1998), *final decision on remand,* 58 Agric. Dec. ___ (Apr. 5, 1999), is incorrect insofar as that decision held that a shareholder of a corporation is an owner and thus barred from raising the alter ego defense available to non-owners in 7 U.S.C. § 499a(b)(9) (Supp. III 1997). However, Petitioner fails to cite legislative history, case law, or any other precedent or guidance to support Petitioner's position. Petitioner argues merely that the amended statutory definition "clearly makes a distinction between a 'shareholder' and an 'owner' of a company which is the alter ego of its 'owners'" (Appeal Pet. at 12).

When the United States Court of Appeals for the District of Columbia Circuit reviewed *Norinsberg*, the Court could have had the Judicial Officer adopt Petitioner's meanings of "owner" and "shareholder," but the court did not do so. The *Norinsberg* case turned on the meaning of "actively involved." Nonetheless, the court could have included its view of the definitions of "owner" and "shareholder" *vis-a-vis* the alter ego defense, if the court disagreed with me, but the court did not do so. As it now stands, the *Norinsberg* decision is the authority on this issue, and it left in place my views on the alter ego defense *vis-a-vis* shareholder versus owner. Therefore, I reject Petitioner's argument. Instead, I adhere to my view in *Norinsberg* that in order to avoid responsibly connected status, a petitioner must prove not only that the violating licensee or entity subject to the license is the alter ego of an owner, but also that the petitioner is not an owner of the violating licensee or entity subject to a license. As Petitioner was admittedly a holder of 49 per centum of the outstanding stock of Sanford Produce Exchange, Inc., he cannot utilize the alter ego defense.

Further, even if Petitioner were permitted to use the alter ego defense, the fact that Petitioner was a holder of 49 per centum of the outstanding stock, president, vice president, and director of Sanford Produce Exchange, Inc., and participated extensively in the control of Sanford Produce Exchange, Inc., as well as knowingly engaged in a fraudulent attempt to conceal Mr. Giuffrida's involvement from produce sellers, shows that Petitioner had a significant role in managing Sanford Produce Exchange, Inc.'s affairs. Sanford Produce Exchange, Inc., was thus not the alter ego of Mr. Giuffrida.

Therefore, as there is insufficient evidence that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., as to negate its separate personality, Petitioner's claim that Sanford Produce Exchange, Inc., was the alter ego of Mr. Giuffrida cannot prevail.

The ALJ's conclusion in the Initial Decision and Order that Petitioner was responsibly connected is affirmed. Petitioner was actively involved in the activities resulting in Sanford Produce Exchange, Inc.'s PACA violations. Petitioner knowingly and voluntarily participated in a scheme to mislead produce sellers and hide Mr. Giuffrida's involvement. Petitioner participated extensively in the control

of Sanford Produce Exchange, Inc. Petitioner was also not a nominal officer, due to active participation as president, vice president, and director of the company. Further, as an owner, Petitioner cannot claim that Sanford Produce Exchange, Inc., was the alter ego of Mr. Giuffrida. Moreover, even if Petitioner could assert an alter ego defense, there is insufficient evidence that Mr. Giuffrida so dominated Sanford Produce Exchange, Inc., as to negate its separate existence.

Order

The May 22, 1998, determination by the Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, that Petitioner was responsibly connected with Sanford Produce Exchange, Inc., during the period of time that Sanford Produce Exchange, Inc., violated the PACA, is affirmed.

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) (Supp. III 1997)).

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

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