UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 13-0068

In re: George Finch,

Petitioner

and

Docket No. 13-0069

In re: John Dennis Honeycutt,

Petitioner

Decision and Order

Appearances: Michael A. Hirsch, Esquire, Schlanger, Silver, Barq & Paine, Houston, Texas for the Petitioners
Christopher Young, Esquire and Shelton Smallwood, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC for the Respondent

Preliminary Statement

This proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a, *et seq.*) (Act) by the petitions for review filed by the Petitioners George Finch and John Dennis Honeycutt of the determinations made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that the two Petitioners were "responsibly connected" (as that term is defined in Section 1(b)(9) of the Act (7 U.S.C. §499a(b)(9))) to Third Coast Produce Company, Ltd. (Third Coast), during the period of time that Third Coast violated Section 2 of the Act (7 U.S.C. §499b).

Third Coast, a PACA licensee, was the subject of a disciplinary complaint that was filed on February 15, 2012. On March 8, 2012, Third Coast filed an Answer in which the material allegations of the Complaint were admitted and on April 27, 2012 a Decision and Order was entered finding that Third Coast willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. §499b(4)) by failing to make full payment promptly to 21 sellers 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 interstate commerce during the period February 5, 2010 through July 16, 2010 and ordering the circumstances of the violations published.[1]

The two actions instituted by the Petitioners were consolidated for the purposes of hearing and were set for hearing in Washington, DC on August 13, 2013, with the Petitioners being represented by Michael A. Hirsch, Esquire, Schlanger, Silver, Barq & Paine, Houston, Texas and the Respondent represented by Christopher Young, Esquire and Shelton Smallwood, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, DC. At the hearing, both Petitioners testified and one witness testified for the Respondent. 12 exhibits were introduced and admitted into evidence on behalf of the Petitioners.[2] The certified Agency Records containing 16 exhibits relating to George Finch and 11 exhibits relating to John Dennis Honeycutt were admitted on behalf of the Respondent.[3] The parties have submitted post-hearing briefs and the matter is now ripe for disposition.

[1] *In re: Third Coast Produce Company, Ltd.,* Docket No. 12-0234, 71 Agric. Dec. _____(2012).
[2] Petitioners' exhibits are indicated as PX 1-12.
[3] Respondent's Exhibits are indicated as GFRX 1-16 and JHRX 1-11.

Background

The Perishable Agricultural Commodities Act, 1930,[4] was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate or foreign commerce.[5] When enacted, the legislation had the approval of the entire organized fruit and vegetable trade, including commission merchants, dealers and brokers, all of whom benefit from the Act's protections.[6] The Act has been characterized as intentionally a "tough" law enacted for the purpose of providing a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.[7] *Kleiman &. Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 693 (D.C. Cir. 2007).

Under the Act, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §499a(b)(5)-(7), 499c(a), and 499d(a). The Act makes it unlawful for a licensee to engage in certain types of unfair conduct and requires regulated merchants, dealers, and brokers to "truly and correctly…account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C §499b(4).

Orders suspending or revoking a license, or a finding that an entity has committed a flagrant or repeated violation of Section 2 of the Act have significant collateral

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[4] 7 U.S.C. §499a-499s.
[5] HR Rep No 1041, 71st Cong, 2d Session 1 (1930)
[6] *Id.* 2,4. In 1949, both the House and Senate found that the PACA regulatory program had "become an integral part of the marketing of fruit and vegetables and it has the unanimous support of both producers and handlers in the fruit and vegetable industry." HR Rep No 1194, 81st Cong, 1st Session 1 (1949); *accord,* S Rep No 1122, 1st Session 2 (1949).
[7] S Rep No 2507, 84th Cong, 2d Session 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; HR Rep No 1196, 84th Cong, 1st Session 2 (1955).

consequences in the form of employment restrictions for persons found to be "responsibly connected" with the violator.[8] Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator "in any responsible position."[9] 1962 amendments replaced the "in any responsible position" language with a "responsibly connected" provision. The term "responsibly connected" is currently defined as follows:

> **§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 was added to the provision by a 1995 amendment[10] and affords those who would otherwise fall within the statutory definition of "responsibly connected" an opportunity to demonstrate that they were not responsible for the violation. Extensive analysis of and comment upon the amendment has been made in a number of

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[8] 7 U.S.C. §499h(b). Under the Act, PACA licensees may not employ, for at least one year, any person found "responsibly connected to any person whose license has been revoked or suspended, or who has been found to have committed any flagrant or repeated violation of 7 U.S.C. §499b.

[9] 7 U.S.C. §499h(b) (1958).

[10] Prior to the amendment, the circuits were divided as to whether the presumption of §499a(b)(9) was irrebutable. Most adopted a per se rule. *See, e.g., Faour v. United States Dep't of Agric.,* 985 F. 2d 217, 220 (5th Cir. 1993); *Pupillo v. United States*, 755 F. 2d 638, 643-644 (8th Cir. 1985); *Birkenfield v. United States,* 369 F.2d 491, 494 (3rd Cir. 1966); *Zwick v. Freeman,* 373 F.2d 110, 119 (2d Cir. 1967), *cert. denied,* 389 U.S. 835 (1967). The DC Circuit however had adopted a rebuttable presumption test. *See Quinn v. Butz,* 510 F.2d 743 (D.C. Cir. 1975), 34 Agric. Dec. 7 (1975).

decisions, including *Michael Norinsberg v. United States Department of Agriculture and United States of America,* 162 F.3d 1194, 1196-1197 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-1467 (1998); *In re Lawrence D. Salins,* 57 Agric. Dec. 1474, 1482-1487 (1998); and *In re Michael J. Mendenhall,* 57 Agric. Dec. 1607, 1615-1619 (1998).

The amendment created a two prong test for rebutting the statutory presumption of the first sentence:

> …the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner must meet at least one of two alternatives: that a petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to license which was the alter ego of its owners. *Salins,* 57 Agric. Dec. 1474, 1487-1488.

Norinsberg articulated the standard for the first prong as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to performance of ministerial functions only. Thus, if a petitioner demonstrates that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test. *Norinsberg,* 58 Agric. Dec. at 610-611.

The parameters of the second prong of the test were recently revisited by the Circuit Court of Appeals for the District of Columbia in the case of *Taylor v. U.S. Dep't of Agric.,* 636 F. 3d 608 (DC Cir. 2011). In that case, the Court found that the Judicial Officer erroneously rejected Ms. Taylor and Mr. Finberg's claims that they 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 indicated that under7 U.S.C. §499a(b)(9), an "officer" of the offending company is not considered to

be "responsibly connected" to a violating licensee if that person was not actively involved in the PACA violation and was "powerless to curb it." *Taylor, supra* at 610. The Court went on to emphasize 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 , supra at 615, 617.

In *Taylor,* the Departmental Judicial Officer had found the board of directors, with Arthur Hollingsworth as chairman, ran Fresh America and Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at lower levels of authority. *Taylor v. U.S. Dep't of Agric.*, 636 F.3d at 617 (citing *In re Cheryl A. Taylor*, 68 Agric. Dec. 1210,1220-21 (2009)). A preponderance of the evidence indicated that the board of directors made the decisions governing Fresh America's bills, capital expenditures, and personnel and that neither Ms. Taylor nor Mr. Finberg had any measurable power or authority in board deliberations. Moreover, AMS conceded that Ms. Taylor and Mr. Finberg "ultimately proved powerless to save Fresh America or to see that produce sellers were fully repaid." Applying the "actual, significant nexus" test, as explained in *Taylor*, on remand the Judicial Officer concluded that Ms. Taylor and Mr. Finberg demonstrated by a preponderance of the evidence that the Board of Directors made the decisions governing Fresh America's bills, capital expenditures, and personnel and that neither Ms. Taylor nor Mr. Finberg had any measurable

power of authority in board deliberations. Thus, using the "actual, significant nexus" test, the two would be considered 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 and Stanley C. Finberg,* 71 Agric. Dec. ____ (May 22, 2012) (Decision on Remand at 7, 8) 2012 WL 1909339 (U.S.D.A. 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)).

The Judicial Officer then concluded that continued application of the "actual, significant nexus" test, as described in the Court of Appeals decision in *Taylor* could result in persons who Congress intended to include within the definition of the term "responsibly connected" avoiding that status. As examples, he 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 3-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 3-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 the Court of Appeals decision in *Taylor* would result in each of these persons being designated "nominal."

Opining that he had been remiss in failing to abandon the "actual, significant nexus" test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the "actual significant nexus" test, the Judicial Officer announced that in future cases that come before him, he 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 the operations may, in certain circumstances be a factor to be considered under the "nominal inquiry," it will no longer be the *sine qua non* of responsible connection to a PACA-violating entity.[11] The Judicial Officer, using the "nominal inquiry" test, then found Taylor responsibly connected and

[11] It will be noted that the May 22, 2012 Decision on Remand in *Taylor* was remanded upon a joint motion in the DC Circuit Court of Appeals. The May 22, 2012 Decision and Order was vacated and a Modified Decision and Order on Remand was entered which without affecting the JO's adoption of the "nominal inquiry" test reversed the finding as to Ms. Taylor's responsible connection to the violating entity. (Modified Decision and Order on Remand, December 18, 2012). Language substantially identical to that found in *Taylor* concerning adoption of the "nominal inquiry" test is also contained in The Judicial Officer's Order Denying Petition to Reconsider Decision as to Bryan Herr and the "nominal inquiry" test remains the current Departmental policy. Docket No. 09-0162, *In re Samuel S. Petro and Bryan Herr,* 71Agric. Dec. ____ (Order Denying Petition to Reconsider Decision as to Bryan Herr at 9, 10) (November 13, 2012).

Finberg not responsibly connected. *In re Cheryl A. Taylor and Stanley C. Finberg,* 71 Agric. Dec. ____ (May 22, 2012) (Decision on Remand at 14, 15) 2012 WL 1909339 (U.S.D.A. 2012).

Discussion

Petitioners contest the Chief of the PACA Branch's determination that they were "responsibly connected" to Third Coast on three grounds:

1. The Act [PACA] is unconstitutionally overbroad in that it penalizes virtuous non-culpable conduct as if it were the contrary;[12]

2. The Act [PACA] violated fundamental principles of due process and is an unconstitutional forfeiture in violation of U.S.C.A. Title 18, Chapter 46, §§ 981, *et seq.;* and

3. The Petitioners have each proven, by uncontroverted evidence, that the circumstances and events causing and resulting in the default of payment under the Act as amended, to be concluded by the Court to be the sole, independent act of a third-party officer/director of the company from which Petitioners did not profit or benefit, and in which Petitioners did not participate, where the conduct of Petitioners was not culpable within the declared intent of the Act, as amended; these principals could only have been nominal officers or directors, viz-a-viz the transaction causing the default in payment under PACA.

Petitioners' Brief in Trial of Petition for Review of PACA Division Determination, pages 5, 12, and 16.[13]

[12] While noting that acceptance of such an argument would require a departure from case precedent, Petitioners' Counsel failed to cite the adverse cases concerning the constitutionality of the PACA.
[13] Docket Entry No. 18.

As is conceded in Petitioners' Brief, granting relief on any of the three grounds set forth above would require "a departure from case precedent." Petitioners' Brief at page 1. The constitutionality of the PACA is well established as challenges to it have been repeatedly rejected. *Bama Tomato Co. v. U.S. Dep't of Agric*. 112 F 3d 1542 (11th Cir. 1997); *Krueger v. Acme Fruit Co.*, 75 F. 2d 67 (5th Cir. 1935); *See also: George Steinberg & Son v. Butz,* 491 F. 2d 988 (2d Cir. 1974) *application denied* 419 U.S. 904 *certiorari denied* 419 U.S. 830. Accordingly, the first argument will be rejected summarily as being without merit.

The second argument which suggests that civil forfeitures of real or personal property involved in transactions, attempted transactions, or proceeds derived from violations of enumerated criminal statutes can somehow be equated with the disqualification sanction found in the PACA for individuals who are found to be "responsibly connected." As Petitioners not only have a statutory avenue for contesting the determination of being responsibly connected, but also are doing so in this proceeding, it is difficult at best to conceive of any valid basis for asserting a lack of due process. Moreover, finding no appropriate nexus cited in 18 U.S.C. §981 to the PACA, while acknowledging the unique anatopism of the argument, it similarly will be summarily rejected.

The third argument will be considered in the following analysis. Both Finch and Honeycutt have significant experience in the produce industry. [14] Finch described his involvement as having "been in the food business all of [his] life" and has been working

[14] The Petitioners' extensive experience forecloses any argument that they lacked training or experience and thus should be considered only nominal officers or directors. *Cf. Minotto v. U.S. Dep't of Agric*. 711 F. 2d 406, 409 (D.C. Cirr. 1983); *Maldonado v. U.S. Dep't of Agric*., 154 F. 3d 1086, 1088-1089 (9th Cir. 1998); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 387 (2000).

in the produce business for over 25 years. Tr. 40. During the hearing, he acknowledged being thoroughly aware of the PACA and the responsibilities imposed by it, stating that "we understand our obligations to PACA" and that "PACA was the number one payment we need to make." Tr. 55, 76. Honeycutt also had extensive experience as an officer, owner and PACA licensee in the produce industry and expressed pride in the good standing that Third Coast had in the Blue Book. Tr. 79-82, 90-91.

George Finch testified that he, John Dennis Honeycutt and Artemio Bueno started Third Coast in May of 1992. Tr. 40. The company started with a very humble beginning, literally with just a van and sublet space. *Id.* With the passage of time and the investment of substantial time and energy on the part of the three founders, the company grew substantially to an operation considered one of the major distributors in the Houston metropolitan area with about 170 employees, 40 trucks, a new 60,000 square foot warehouse, and approximately a million dollars in sales weekly. Tr. 40-42, 55, 66.

Prior to discovering that there were serious financial problems within the company, both Finch and Honeycutt indicated that their responsibilities "mainly revolved around sales, and the administration around sales, to generate business for the company." Tr. 38, 82, 84. Artemio Bueno functioned as the company'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. The founding Petitioners possessed an unfortunately misplaced but high degree of trust in the Bueno family as they had all started together

from scratch and the Petitioners had watched the Bueno children graduate, get married and have children.[15] Tr. 41. Consistent with that trust, the younger Bueno was in time named the CFO of Third Coast and given oversight of all of the financial aspects of the business. Tr. 41, 53.

Following completion of the new warehouse, Finch and Honeycutt started seeing cash flow challenges in 2009 and in early 2010 and directed that the company's financial information be sent to the CPA firm in Houston that monitored their books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Finch and Honeycutt returned their focus to the sales operation. *Id.*. Still blissfully unaware of the impending financial disaster facing the company until being informed that certain of their suppliers had "cut them off" and ceased selling to them and their bank raised its own concerns,[16] the decision to call in Tatum & Tatum, LLC., an outside accounting firm, was not made until the end of January of 2010. Tr. 70. In the course of the resulting audit and monitoring of the receivables, a systematic diversion of company receivables to previously unknown and unauthorized multiple bank accounts established by Javier Bueno was detected. Tr. 46-47. To further conceal the diversions, the younger Bueno had been making fraudulent General Ledger entries making it appear that suppliers were being paid when in fact they were not. Tr. 47-49.[17] After discovering that all was not well and that sellers were not being paid, Petitioners confronted Javier Bueno, removed him from his position with the company, and assumed control of the company. Tr. 54-59,

[15] Honeycutt testified that he had known Javier Bueno since about the time he was 10 years old and was employed sweeping the floors at Southern Produce, prior to the time that Third Coast was formed. Tr. 83.
[16] The company owed their banks about ten million in bank loans at the time. Tr. 54.
[17] The Wells Fargo accounts reflected that about $360,000 was diverted between September of 2009 until January of 2010; however, a more in depth investigation revealed that over a period of three years the amount embezzled was well over one million dollars. Tr.49- 53.

73-74, 89. Accordingly, the first prong of the statutory test in §499a(b)(9) is met in this case as their actions went far beyond the performance of "ministerial functions only" as both Petitioners exercised judgment, discretion and control of the company's as officers and directors activities from their discovery of the defalcation until the company's ultimate demise. Tr. 6, 37. *See: Norinsberg, supra.* Both Petitioners stipulated at the hearing that they were officers and directors of Third Coast and acted as officers and directors of the company during the violation period and despite their knowledge of their inability to pay all suppliers promptly continued to purchase produce from sellers until Third Coast ceased operation. Tr. 37, 75-77.

Thus, although the defalcation that was the proximate cause of the serious cash shortage that led to the company's ultimate demise predated their assumption of control of the company, the Petitioners' period of control of the company occurred during the greatest portion of the violation period, specifically from sometime in February of 2010 through July 16, 2010. During that period of time, the company struggled to keep its doors open so as to pay many people as it possibly could, maintaining payments to the bank, pro-rating the amounts paid to suppliers and still attempting to collect the money owed to it.[18] Tr. 54-57, 61-63, 75-76. In explaining why they continued to operate, George Finch testified:

> "….We had contractual agreements with customers that we needed to fulfill. If we close that door, then those customers would have gone without product. In business, in this business, if you don't have products, you don't have a business, you close the doors. I'm looking at the obligations of customers that helped us get to where we were over a prolonged period of time. Some of these relationships we had had for a long period of time. Unfortunately, those relationships are gone now, but that's business. I've lost those-- I still know those people, but I've lost

[18] During the violation period, Petitioners attempted to salvage the company's existence; bank payments were made and the company's employees were being paid. Tr. 54-57, 61-63, 75-76. Over a period of three or four months, one PACA claimant was paid approximately $2.2 million. Tr. 59.

> their business, because of what happened. There's another situation, obviously we had a very, we understand our obligations to PACA, but as I looked around, I looked at my employees, who had been with us, some of them, for a long time. We shut the business down, they're without work. It's a bigger picture, and it's an awesome responsibility-- "Tr. 75-76.
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> "To take care of everyone. And we did the best we could within the constraints of what we had to do that….. Tr. 76-77.

Indeed, even after significant infusions of their own funds from savings and their personal retirement accounts[19], Finch and Honeycutt's efforts ultimately proved unsuccessful in preserving the company. With the bank's "blessing," first the processing portion of the business was sold[20] and later the assets of the distribution portion[21] were sold to another entity. Tr. 57-58. The sale proceeds went to the bank. Tr. 57.

While having a great deal of empathy for the Petitioners, 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 they found themselves in, I must nonetheless hold that by virtue of having controlled the operation of the company from sometime in February of 2010 until its assets were liquidated in July of 2010 neither individual can be said to be only nominally officers and directors of the violating entity. *See,* 7 U.S.C. §499(a)(9); *Taylor,* 636 F. 3d at 615, 617.

Accordingly, on the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

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[19] Tr. 57, 99. Finch testified that the funds he contributed were "[a]nything I had at the time" and were from savings and his 401k. Tr. 57. Honeycutt borrowed $25,000 from his mother-in-law. Tr. 99. Unlike the Petitioners, despite his son's involvement, Artemio Bueno did not contribute funds to attempt to maintain the company's existence. Tr. 99.

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

[21] The distribution business was an asset purchase, involving the real estate, trucks and other equipment used in handling the produce delivered to the company customers. Tr. 57-58.

Findings of Fact

1. Petitioner George Finch is an individual residing in Friendswood, Texas. By his account, he has been in the food business all of his life, with over 25 years of experience in the produce industry. Tr. 40. Finch acknowledged being aware of the PACA and the responsibilities it imposed, specifically, the number one obligation being to the PACA. Tr. 55, 76-77.

2. Petitioner John Dennis Honeycutt is an individual residing in Katy, Texas. He began his involvement in the produce industry at college age and for the six years prior to forming Third Coast worked for a produce company that he termed "the best in town." Tr. 79-82.

3. Petitioner Finch, Petitioner Honeycutt and Artemio Bueno started Third Coast in May of 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 new 60,000 square foot warehouse, and a volume of a million dollars per week in sales. Tr. 40-42, 55, 65-66, 82-84.

4. As a result of defalcations by the CFO of the company and the resulting cash flow shortage, Third Coast willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. §499b(4)) by failing to make full payment promptly to 21 sellers 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 interstate commerce during the period February 5, 2010 through July 16, 2010. Tr. 6; *In*

re: Third Coast Produce Company, Ltd., Docket No. 12-0234, 71 Agric. Dec. _____(2012).

5. Petitioner Finch and Petitioner Honeycutt each owned 32.333 percent of Third Coast and were officers and directors of Third Coast during the violation period. Tr. 6; GFRX 5 at 25; JHRX 5 at 25.

6. Petitioners Finch and Honeycutt first started seeing cash flow challenges in 2009 and in early 2010 and directed that the company's financial information be sent to the CPA firm in Houston that monitored their books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Finch and Honeycutt returned their focus to the sales operation until additional information came to them that suppliers were not being paid. Tr. 41.

7. After being informed that certain of their suppliers had "cut them off" and ceased selling to them and their bank raised its own concerns, Petitioners retained an outside accounting firm near the end of January of 2010. The resulting audit and monitoring of the receivables detected a systematic diversion of company receivables to previously unknown and unauthorized multiple bank accounts established by Javier Bueno. Tr. 46-47. To further conceal the diversions, the younger Bueno had been making fraudulent General Ledger entries making it appear that suppliers were being paid when in fact they were not. Tr. 47-49, 54, 69, 74, 95.

8. Although the preliminary computation of the defalcation amounted to $360,000 during the period of September of 2009 to January of 2010; a more thorough and comprehensive investigation revealed shortages well in excess of a million dollars. Tr. 49-53.

8. In February of 2010, Petitioners removed Javier Bueno from his position with the company and assumed control of the company. Tr. 37, 54-59, 72-74, 89.

9. Despite the Petitioners' best efforts to honor contractual obligations to provide produce, to keep the doors open so as to pay many people as it possibly could, maintain payments to the bank, and pro-rate the amounts paid to suppliers while still attempting to collect the money owed to it, and despite infusing the company with personal funds and obtaining concessions from their bank, it was necessary to first sell the processing portion of the business and finally the liquidate the assets of the distribution operation and cease operation. Tr. 55-57, 75-76.

10. While under the control of Petitioners Finch and Honeycutt, despite knowledge that the company had failed to pay suppliers in a timely manner, the company continued to purchase produce from produce sellers, and purchased produce during the violation period. Tr. 69, 75-77, 89, 95-96.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. George Finch is an individual responsibly connected to Third Coast Produce Company, Ltd. by virtue of his active participation in corporate operations and his status as an officer and director of the entity.

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

4. John Dennis Honeycutt is an individual responsibly connected to Third Coast Produce Company, Ltd. by virtue of his active participation in corporate operations and his status as an officer and director of the entity.

5. By virtue of being responsibly connected to a violating corporation, Petitioner John Dennis Honeycutt is subject to the employment restrictions of the Act.

Order

1. The determination of the Chief of the PACA Branch that George Finch and John Dennis Honeycutt were responsibly connected to Third Coast Produce Company, Ltd. during the period between February 5, 2010 through July 16, 2010 when the entity was committing willful, flagrant and repeated violations of the Act is **AFFIRMED.**

2. Petitioners George Finch and John Dennis Honeycutt are accordingly subject to the licensing restrictions and employment sanctions contained in Section 4(b) and 8(b) of the Act (7 U.S.C. §499d(b) and §499h(b)).

3. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Petitioner, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

November 20, 2013

Peter M. Davenport

Peter M. Davenport
Chief Administrative Law Judge

Copies to: Michael A. Hirsch, Esquire
Shelton Smallwood, Esquire
Christopher Young, Esquire