

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

PACA APP Docket No. 09-0161

In re: Samuel S. Petro,

Petitioner

and

PACA APP Docket No. 09-0162

In re: Bryan Herr,

Petitioner

**Decision and Order**

Appearances: Richard M. Kaplan, Esquire and Tanya N. Garrison, Esquire, Weycer Kaplan Pulaski & Zuber, PC, Houston, Texas for the Petitioners  
Ciarra A. Toomey, Esquire and Christopher Young, 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 Samuel S. Petro (Petro) and Bryan Herr (Herr) of the determinations made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that they were “responsibly connected” (as that term is defined in Section 1(b)(9) of the Act (7 U.S.C. §499a(b)(9))) to Kahil Fresh Marketing, Inc., d/b/a Houston’s Finest Produce Co. (Houston’s Finest), during the period of time that Houston’s Finest violated Section 2 of the Act (7 U.S.C. §499b).

Houston's Finest, a PACA licensee, was the subject of a disciplinary complaint that resulted in a Default Decision and Order being entered against it on March 23, 2010.<sup>1</sup> The Default Decision and Order authorized publication of the finding that Houston's Finest willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. §499b(4)) by failing to make full payment promptly to 55 sellers of the agreed purchase prices in the amount of \$1,617,014.93 for 645 lots of perishable agricultural commodities which Houston's Finest purchased, received, and accepted in the course of interstate commerce during the period October of 2007 through February 2008.

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

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

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

<sup>2</sup> The transcript of the proceedings is contained in two volumes. References to the Transcript will be indicated as Tr. And the page number.

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

## Statutory Background

The Perishable Agricultural Commodities Act, 1930,<sup>4</sup> was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate or foreign commerce.<sup>5</sup> 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.<sup>6</sup> The Act was 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.<sup>7</sup> *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).

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<sup>4</sup> 7 U.S.C. §499a-499s.

<sup>5</sup> HR Rep No 1041, 71<sup>st</sup> Cong, 2d Session 1 (1930)

<sup>6</sup> *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, 81<sup>st</sup> Cong, 1<sup>st</sup> Session 1 (1949); *accord*, S Rep No 1122, 1<sup>st</sup> Session 2 (1949).

<sup>7</sup> S Rep No 2507, 84<sup>th</sup> Cong, 2d Session 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; HR Rep No 1196, 84<sup>th</sup> Cong, 1<sup>st</sup> Session 2 (1955).

Orders suspending or revoking a license, or a finding that an entity has committed a flagrant or repeated violation of Section 2 of the Act have significant collateral consequences in the form of employment restrictions for persons found to be “responsibly connected” with the violator.<sup>8</sup> Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator “in any responsible position.”<sup>9</sup> 1962 amendments replaced the “in any responsible position” language with a “responsibly connected” provision. The term “responsibly connected” is currently defined as follows:

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 percentum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners. 7 U.S.C. §499a(9).

A second sentence was added to the provision by a 1995 amendment<sup>10</sup> and affords those who would otherwise fall within the statutory definition of “responsibly connected” an opportunity to demonstrate that they were not responsible for the violation. Extensive analysis of and comment upon the amendment has been made in a number of decisions, including *Michael Norinsberg v. United States Department of Agriculture and*

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<sup>8</sup> 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.

<sup>9</sup> 7 U.S.C. §499h(b) (1958).

<sup>10</sup> 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 (5<sup>th</sup> Cir. 1993); *Pupillo v. United States*, 755 F. 2d 638, 643-644 (8<sup>th</sup> Cir. 1985); *Birkenfield v. United States*, 369 F.2d 491, 494 (3<sup>rd</sup> 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).

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

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

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

*Norinsberg* articulated the standard for the first prong as follows:

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

This case accordingly turns upon whether the Petitioners met their burden of proof and rebutted the statutory presumption.

### **Discussion**

Initially, it is clear that the statutory threshold contained in the first sentence of §499a(b)(9) is met in this case as the evidence is uncontroverted that the Petitioners each purchased a 25% stock interest in Houston’s Finest. Tr. 349, SPRX-8, BHRX-8. Both Petro and Herr argue however that they were only passive investors in the corporation,

asserting that even after their stock purchase the entity was dominated by John Kalil (Kalil), who then owned 50% of the corporate stock, served as the Chief Executive Officer of the company, and ran the corporation's day to day operations. Tr. 152-153, 349-350. Their position is only partially confirmed as to day to day operations by Kalil's testimony that he ran the corporation after the stock purchase by Petro and Herr and supervised the individuals responsible for sales, purchasing, the warehouse operations and the necessary bookkeeping functions which would include the payments made to suppliers. Tr. 349-350, 382-386.

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

The test for determining whether an individual had an "actual, significant nexus with the violating company" was recently revisited by the DC Circuit in the case of *Cheryl A. Taylor and Steven C. Finberg v. United States Dep't of Agric. and United States of America*, No. 09-1270 (January 7, 2011; *Resubmitted* March 2, 2011), 2011 WL 710460, 629 F.3d 241 (D.C. Cir. 2011). In that case, Senior Circuit Judge Edwards, writing the majority opinion, indicated "[u]nder the actual, significant nexus" test, "the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority." *Id.*, *Slip Op.* at 13 (citing *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted). Citing *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir.

1975) and *Bell*, the Court agreed with the Petitioners that an officer of the offending company is not considered to be “responsibly connected” to a violating licensee (even though the statutory 10% threshold was met) if that person was not actively involved in the PACA violation **and** was “powerless to curb it.” *Id.* The court went on, “...our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry.” *Id.*, *Slip Op.* at 17.

Well prior to the 1995 amendment to Section 499(a)(9), the DC Circuit had considered the statutory presumption of the section to be rebuttable. *Quinn*, at 757. *Hart v. Dep’t of Agric.*, 112 F.3d 1228, 1230 (D.C. Cir. 1997). Where responsibility was not based on an individual’s personal fault, it could be based upon his or her failure to counteract or obviate the fault of others. *Bell*, at 1201. In the past, knowledge of the violations, whether actual or constructive, was found to be highly significant. In discussing the actual, significant nexus test in *Minotto v. USDA*, 711 F.2d 406 (D.C. Cir. 1983) the court indicated that “...In order to prove that one was **only** a nominal officer or director, one must establish that one lacked any ‘actual, significant nexus with the violating company’ and therefore, neither ‘**knew [n]or should have known of the [c]ompany’s misdeeds.**’” *Minotto* at 408, 409. (emphasis added) An affiliation would however be considered nominal if a so-called officer was unsophisticated and the position had no powers at all. *Bell*, at 1201, *Minotto*, at 408, *Quinn*, at 756.

A significant difference was found to exist however between situations where the affiliation was purely nominal with the so-called officer having no authorized powers at all and those in which a genuine officer [or director] simply did not use the powers of his

office.<sup>11</sup> *Quinn at 756, n.84.* In *Hart v. Dep't of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997), the court made it clear that the Act was designed to strike at persons in authority who acquiesced in the wrongdoing as well as the wrongdoers themselves and that individuals seeking to avoid employment restrictions must demonstrate that they were “powerless to curb” the wrongdoing. *Hart at 1230-1231.*

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

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

So basically, I just watched money disappear. You know, I - - it was a bad deal. Tr. 182.

Petro similarly testified:

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

....

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

....

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

Prior caselaw would appear to have suggested that although Petro and Herr both claim to have been powerless to stop the wrongdoing, liability might nonetheless have been imposed upon them once they were joined as co-defendants in litigation in December of 2007. Once served as defendants, they had actual knowledge of the

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<sup>11</sup> During the hearing, Petro conceded that he could have used the authority set forth in the Stock Purchase Agreement, stating “Yes, I had the authority, I could have.” Tr. 93.

<sup>12</sup> See prior footnote. Tr. 93.

corporation's failure to pay suppliers and neither of them acted to divest themselves of or surrender their stock, resign from the board of directors or to otherwise take immediate decisive action to close down the business. *Martino v. USDA*, 801 F.2d 1410, 1414 (D.C. Cir. 1986). Instead, (a) despite their close relationship as partners in Country Fresh, (b) their combined ownership of half of the stock of the company, (c) their status as directors (at least according to the terms of the Stock Purchase Agreement), and (d) even after being joined in December of 2007 in a lawsuit alleging non-payment they permitted Kalil to continue to make produce purchases for which it could not pay for over another month before the corporation finally shut its doors and filed for bankruptcy in February of 2008.<sup>13</sup> Tr. 396.

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

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

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

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<sup>13</sup> Kalil testified that during the last month of operation, the corporation's payable grew about \$600,000.00. Tr. 396.

company, even though the circuit had previously denied such a requirement. *Slip Op.* at 20.

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

During the hearing, Petro suggested that his motivation for becoming involved with Houston's Finest had been prompted by his family relationship with his cousin John Kalil. He wanted to help Kalil because he had worked with John's father Charles Kalil who had been "like a second dad to him." Tr. 32, 34-35, 157. The evidence is conflicting as to who first approached whom about a sale of an interest in the corporation;<sup>14</sup> however, it is apparent that possibly a couple of months before July of 2002, Kalil, then in need of financial assistance, had discussed with Petro the corporation's need for additional capital. Tr. 33, 157. Petro saw the overture as an opportunity to get the company on a solid footing and to provide an opportunity for his son Michael Petro to work with Kalil to build something for the future. Tr. 34-35, 157. While the evidence strongly suggests that Petro could easily have loaned money to Kalil without acquiring an ownership interest, for reasons which remain unclear, he opted to take an equity position in the financially troubled corporation. During the same time frame Petro approached his business partner Bryan Herr and persuaded him to join in becoming a shareholder in

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<sup>14</sup> Petro claimed that Kalil approached him. Tr. 156. Kalil testified that selling part of the corporation was Petro's idea. Tr. 439.

Houston's Finest. Tr. 156. Based upon Herr's faith and trust in Petro as his partner, Herr agreed to make the investment.<sup>15</sup> Tr. 156-158.

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

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

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

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

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

5. Kalil, Petro and Herr were named to the board of directors so long as corporate status was maintained.<sup>17</sup> In the event of conversion of the corporation to a limited partnership, Kalil, Petro and Herr would then be placed on the partnership's Board of Management.

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

<sup>16</sup> Paul was also involved in keeping the books for Houston's Finest. Tr. 387.

<sup>17</sup> The agreement envisioned dissolving the corporation and forming a limited partnership; however, the necessary steps to effect such a change were never undertaken. The evidence is abundantly clear that the usual corporate formalities were not observed, such as the issuance of stock certificates, annual or more frequent formal meetings of the board of directors and or shareholders, keeping of minutes with board approval of certain corporate actions and similar activities. Tr. 44-49, 158-167. With the existence of such delicts, board members and shareholders may in many jurisdictions be subjected to individual liability under a theory of "piercing the corporate veil." The decision in *Quinn* might suggest that where a company was not really a corporation, it might become an alter ego of its owner(s). 34 Agric. Dec. 7, 26-29(1975).

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

6. The right of any of the owners to cause an independent audit by an independent accounting firm. Tr. 134.  
SPRX-8; BHRX-8 (Emphasis supplied)

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

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

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

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

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

By way of contrast, it is apparent that Herr had far less contact with Houston's Finest than did Petro. The evidence establishes only ministerial involvement with the line of credit which Petro had arranged<sup>20</sup> and providing Kalil with information about refrigeration well before the violations period when changes were made to the warehouse operation to expand the amount of refrigerated space the corporation had. Tr. 357-358. His testimony that Country Fresh required 120 hours of his time per week, although possibly hyperbole, sounded genuine and credible.<sup>21</sup> Devotion of even less time to Country Fresh would have been manifestly inconsistent with any real ability to have had any significant involvement with Houston's Finest's operations. Tr. 169. Moreover, Herr was not involved in negotiating the Stock Purchase Agreement, had no intentions of performing any duties for Houston's Finest, and although the Stock Purchase Agreement named Herr as a director, never attended any board meetings, never received a stock certificate, never signed any document as a corporate officer or director of Houston's Finest, and never received a salary, dividend, K-1, or reimbursement from the corporation. Tr. 160-167. The testimony throughout the hearing established him as a passive participant, distanced from any significant nexus to any "exercise of judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA" related to any violations of the Act and relying upon his partner Petro to pass on any information concerning the investment he had made only at Petro's urging, confident

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

<sup>21</sup> Country Fresh is a large operation with 800-1000 employees. Tr. 30, 152.

that Petro would stand good for any problems. *Norisberg*, 58 Agric. Dec. at 611, Tr. 168, 170-172.

Unlike the unsophisticated individuals and the faux corporate positions found in *Bell*, *Minotto* and *Quinn*, the facts in this case demonstrate that Petro participated in the very corporate decision making activities enumerated in the Stock Purchase Agreement. As an experienced and sophisticated businessman fully familiar with the payment provisions of the Act, Petro elected to take both an equity position and director's seat in the violating company and participated actively in its activities. Given that active participation, Petro should not escape liability with claims of inability and impotence to act based upon a claim of minority ownership.<sup>22</sup> The evidence is compelling that Petro exercised substantial influence in corporate decision making and activities, but failed when necessary to exercise the authority that he admitted that he possessed.<sup>23</sup> Tr. 66-67, 93. Nor may Petro claim ignorance. Indeed, Petro's liability is consistent with the long recognized principle that corporate officers and directors are fiduciaries, and "in the discharge of his responsibilities must at least use the degree of diligence that an 'ordinarily prudent' person under similar circumstances must use."<sup>24</sup> *Minnoto*, at 408; *Hanson Trust PLC v. MLSCM Acquisition, Inc.*, 781 F.2d 264 (2d Cir. 1986).

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

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

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

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

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

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

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

<sup>26</sup> While the same reasoning as to corporate formalities might be applied to Petro, his more active involvement precludes him from being considered only nominal.

(ownership of 33 1/3%); *Jacobson v. Dep't of Agric.*, 99 Fed. Appx. 238 (D.C. Cir. 2004) (ownership of 11.95%); *Conforti v. U.S.*, 74 F.3d 838 8<sup>th</sup> Cir. 1996); *In re: Joseph T. Kocol*, 57 Agric. Dec. 1517 (1998); and *In re: Anthony L. Thomas*, 59 Agric. Dec. 367, 386 (2000).

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

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

#### **Findings of Fact**

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

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

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

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

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

6. John Kalil is Samuel S. Petro's cousin. Tr. 31. Petro had worked in the produce industry for many years with Kalil's father Charles Kalil who was considered by Petro to have been like a second dad to him. Tr. 32.

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

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

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

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

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

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

12. Herr's responsibilities with Country Fresh required as many as 120 hours per week, leaving insufficient time for him to have had any significant involvement with Houston's Finest's operations. Tr. 169.

13. Herr was not involved in negotiating the Stock Purchase Agreement, had no intentions of performing any duties for Houston's Finest, and although the Stock Purchase Agreement named him as a director, never functioned as a director, never attended any board meetings, never received a stock certificate, never signed any document as a corporate officer or director of Houston's Finest, and never received a salary, dividend, K-1, or reimbursement from the corporation. Tr. 160-167. More specifically, Herr was neither consulted about nor exercised any power or authority concerning what payables were paid or in what order.

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

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

### **Conclusions of Law**

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

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

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

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

### **Order**

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

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

3. Samuel S. Petro is accordingly subject to the licensing restrictions and employment sanctions contained in Section 4(b) and 8(b) of the Act (7 U.S.C. §499d(b) and §499h(b)).

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

Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

April 7, 2011

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**PETER M. DAVENPORT**  
Chief Administrative Law Judge

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