

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA Docket No. D-04-0012
)	
Terry Thomas Farms, Inc.,)	
)	
Respondent)	
)	
	)	and
In re:	)	PACA-APP Docket No. 04-0015
)	
Terry R. Thomas,)	
)	
Petitioner)	
)	
	)	and
)	
In re:	)	PACA-APP Docket No. 04-0016
)	
Tammie L. Franks,)	
)	
Petitioner)	
)	
	)	and
)	
In re:	)	PACA-APP Docket No. 04-0017
)	
Teresa A. Thomas,)	
)	
Petitioner)	
)	
	)	and
)	
In Re:	)	PACA-APP Docket No. 04-0018
)	
Barbara A. Thomas,)	
)	
Petitioner	)	DECISION AND ORDER

These are consolidated proceedings to determine two sets of issues. Firstly, did Terry Thomas Farms, Inc., a corporation licensed under the Perishable Agricultural Commodities Act (7 U. S.C. § 499a *et seq.*; “the PACA”), violate section 2(4) of the PACA (7 U.S.C. § 499b(4)), by flagrant and repeated failures to make prompt and full

payment to suppliers of fresh fruits and vegetables? Secondly, at the time of the alleged violations, were any of the officers, directors and shareholders of Terry Thomas Farms, Inc., “responsibly connected” with the corporation as that term is used in the PACA (7 U.S.C. § 499a(b)(9)), and for that reason subject to its licensing and employment restrictions as set forth in 7 U.S.C. § 499h?

On April 27, 2004, the PACA Branch, Fruit and Vegetable Programs, Agricultural Service, United States Department of Agriculture (“PACA Branch”), filed a disciplinary complaint against Terry Thomas Farms, Inc., a corporation licensed under the PACA, alleging that it had willfully, flagrantly and repeatedly violated the PACA by failing to make full and prompt payment of invoices, totaling over \$350,000.00, to seventeen suppliers of fruits and vegetables purchased between June 2001 and February 2003. On May 12, 2004, the PACA Branch notified Terry R. Thomas, Tammie L. Franks, Teresa A. Thomas and Barbara A. Thomas that they had been initially determined to be “responsibly connected” to Terry Thomas Farms, Inc., as that term is defined in 7 U.S.C. §499a(b)(9), and would therefore be subject to licensing and employment restrictions under the PACA as set forth in 7 U.S.C. §§ 499h(a) and (b)(2). After reviewing evidence submitted in challenge of the initial determinations, the PACA Branch issued final determinations that Tammie L. Franks and each of the Thomases were “responsibly connected” with Terry Thomas Farms, Inc. On September 2, 2004, petitions for review of those determinations were filed and, together with the disciplinary complaint, are the subjects of the instant proceedings. On June 7, 2004, an answer to the disciplinary complaint was filed. On September 9, 2004, certified copies of the records relied upon by the PACA Branch in determining that Tammie L. Franks and the Thomases were

“responsibly connected” were filed. On April 4, 2005, the parties entered a Joint Stipulation to narrow the issues for hearing. On April 12, 2005, I conducted an oral hearing in Birmingham, Alabama. Michael Chambers, Esq., Birmingham, Alabama, represented Terry Thomas Farms, Inc., Terry R. Thomas, Tammie L. Franks, Teresa A. Thomas and Barbara Thomas. The PACA Branch was represented by Charles Spicknell, Esq., Office of the General Counsel United States Department of Agriculture, Washington, DC. The filing of briefs was completed on August 26, 2005.

Upon consideration of the record evidence and the arguments of the parties, I have found and concluded for the reasons that follow, that Terry Thomas Farms, Inc. committed flagrant and repeated violations of the PACA, and that Tammie L. Franks and each of the Thomases were responsibly connected with the corporation at the time of the violations.

Findings of Fact

A. Terry Thomas Farms, Inc. and its failure to pay for produce

1. Terry Thomas Farms, Inc. was a duly formed corporation under the laws of the State of Alabama with a mailing address of 434 Finley Avenue W, Birmingham, Alabama 35204. Its current mailing address is c/o Michael L. Chambers, Esq, 205 North 20th Street, Suite 1010, Birmingham, Alabama 35203. (Joint Stipulation ¶ 1).

2. Terry Thomas Farms, Inc. was issued license number 991408 under the PACA on June 22, 1999. The license terminated on June 22, 2003 when the annual renewal fee was not paid. (Joint Stipulation ¶ 2).

3. During the period of June 2001 through February 2003, Terry Thomas Farms, Inc. failed to make full payment for 82 lots of fruits and vegetables purchased,

received and accepted in interstate commerce or foreign commerce from nine sellers.

These debts, as listed below, remained unpaid at the time of the hearing on April 12,

2005 (Joint Stipulation ¶3, ¶4, Tr. 20 and Tr. 49-50):

<u>Seller</u>	<u>Dates Accepted</u>	<u>Payment Due Date</u>	<u>No. of Lots</u>	<u>Unpaid Am't</u>
(1) Produce Sales of S. Fla.	05/13/01-08/25/01	09/22/01	44	\$64,446.45
(2) Lucedale Produce Shed	06/01/01-06/21/01	07/02/01	3	\$ 7,680.00
(3) Tom Lange Co.	11/10//01-12/20/01	01/18/02	14	\$79,365.35
(4) Five Brothers Produce	04/14/02-05/01/02	05/22/02	4	\$ 6,196.40
(5) Joe McNair	06/11/02-06/26/02	07/10/02	4	\$ 6,000.75
(6) Peach Sales/Titan Farms	08/21/02-09/11/02	09/21/02	4	\$37,760.00
(7) Quality Produce	09/15/02-12/05/02	12/15/02	3	\$ 1,785.00
(8) William Farms	10/02/02-10/04/02	10/14/02	2	\$ 4,873.00
(9) Stovel Siemon LTD	01/02/03-01/23/03	02/20/03	<u>4</u>	<u>\$ 910.00</u>
			82	\$209,016.95

4. Terry Thomas Farms, Inc. fully cooperated with the PACA Branch during its investigation. (Joint Stipulation ¶ 5).

5. Terry Thomas Farms, Inc. had reduced the debt it originally owed from \$400,000.00 to the \$209,016.95 that was still owed at the time of the hearing. Of the 75 vendors with whom Terry Thomas Farms, Inc. customarily did business, only nine were still due balances at the time of the hearing. During the period June 2001 through February 2003, those nine unpaid vendors continued to do business with Terry Thomas Farms, Inc., accepted payment plans, never made demands for full payment and did not initiate lawsuits. (Tr. 14, 50, 51, 54, 55 and 79-80; Joint Stipulation ¶ 3 and ¶ 4).

6. During the period June 2001 through February 2003, Terry Thomas Farms, Inc. had accounts receivable amounting to approximately \$267,000.00 that despite actual collection efforts, it was unable to collect. (Tr. 22, 29 and 30-34).

B. The owners, directors and officers of Terry Thomas Farms, Inc.

7. Terry R. Thomas is married to Barbara Thomas. Teresa A. Thomas and Tammie L. Franks are their daughters. Tammie A. Franks is also the widow of Jeffrey Franks, who bought and sold produce as a 50% partner with Terry R. Thomas, his father-in-law, until October 30, 1998, when they incorporated the business as Terry Thomas Farms, Inc. (Tr. 60-62, 71, 148 and 234).

8. Initially, Terry Thomas Farms, Inc. had a two-member Board of Directors consisting of Terry R. Thomas and Jeffrey Franks who each had one half of the outstanding shares of stock. Terry R. Thomas was President and Jeffrey Franks was Vice President. They elected Barbara Thomas to the position of Treasurer, and Tammie L. Franks to the position of Secretary. (Tr. 233-236; Barbara Thomas Agency Record, at RX 3).

9. Jeffrey Franks died in June of 2000. The 50% of the outstanding shares of stock he held in Terry Farms, Inc. became the property of Tammie L. Franks and her receipt of those shares was recognized in the corporate records on February 9, 2001, when she was elected Vice President. Also on February 9, 2001, the corporate records show that Terry R. Thomas transferred half of his shares of stock, or 25% of the total shares outstanding, to his other daughter, Teresa A. Thomas who was elected Secretary. (Tr. 61, 62, 120, 139-140, and 162; Teresa A. Thomas Agency Record, at RX 4).

10. On December 4, 2001, Terry Thomas transferred his remaining 25% of the total shares outstanding to his wife, Barbara Thomas. At that time, although he no longer owned any shares of stock, Terry Thomas was elected Chairman of the Board of Directors. (Tr. 189 and 203).

C. Terry R. Thomas' relationship to Terry Thomas Farms, Inc.

11. Terry R. Thomas was the co-founder of Terry Thomas Farms, Inc. which he and Jeffrey Franks incorporated on October 30, 1998. He served as one of its two initial directors, was its president and owned 50% of its outstanding shares of stock until February 9, 2001. On that date, he transferred half of his shares of stock (25% of the total outstanding) to his daughter Teresa A. Thomas. He continued in the office of President, owned 25% of the outstanding shares of stock and was a member of the Board of Directors until December 4, 2001, when he transferred his remaining shares of stock to his wife, Barbara A. Thomas. On that date, Teresa A. Thomas replaced him as President of the corporation and he was elected Chairman of the Board of Directors, even though he no longer owned any shares of stock. His transfers of stock were motivated by failing health and his wish to retire from the business. (Tr. 222-240 and Affidavit of Terry R. Thomas-Agency Record at RX 6).

12. The transactions which are the basis of the disciplinary complaint against Terry Thomas Farms, Inc. began on June 10, 2001. From that date until Terry R. Thomas divested himself of all of his stock, the corporation had failed to make full payment promptly for over \$100,000.00 worth of produce purchased, received and accepted in more than 50 transactions with three firms. (Joint Stipulation ¶ 4, Tr. 239-240).

13. After divesting himself of his shares of stock and giving up the office of President, Terry R. Thomas remained as a director during 2002, but did not attend or participate in any corporate meetings of directors or shareholders. He was not listed as a shareholder, director or officer of the corporation on its 2002 license certificate; however, he continued to work for Terry Thomas Farms, Inc. as an unpaid volunteer and, in that capacity, received and negotiated price adjustments on its behalf until early January of 2003. (Tr. 248-256, EX 10 and Affidavit of Terry Thomas-Agency Record at RX 6).

14. Terry R. Thomas, together with his wife, Barbara, did all they could to keep the business going. They sold their home. They borrowed approximately, \$250,000.00 from their relatives that, together with their personal savings, they put into the failing business. After the business shut down, they made payments to vendors with their personal checks. (Tr. 42, 59 and 190-191).

C. Barbara A. Thomas' relationship to Terry Thomas Farms, Inc.

15. Barbara A. Thomas has worked in the produce industry with her husband, Terry, since 1964. When Terry Thomas Farms, Inc. was incorporated, she was elected its Treasurer and continued to serve in that position until the corporation went out of business in early 2003. Barbara A. Thomas bought and sold produce, wrote and signed checks; and she controlled payments to vendors. On February 9, 2001, she signed a unanimous consent form for the board of directors which showed her to be a director and her re-election as Treasurer. She was a 25% shareholder of the corporation from December 4, 2001 until early 2003. (Affidavit of Barbara A. Thomas-Agency Record RX 11).

16. During the end days of Terry Thomas Farms, Inc., Barbara A. Thomas basically ran the corporation without consultation with others. She undertook to settle its debts to suppliers and wrote settlement checks for roughly 10% of what they were owed. Some produce creditors refused the 10% settlement offer and were paid in full and others have yet to be paid. (Tr. 190-191, Joint Stipulation ¶ 4).

D. Tammie L. Franks' relationship to Terry Thomas Farms, Inc.

17. Tammie L. Franks is the daughter of Terry and Barbara Thomas and Teresa A. Franks is her sister. She has an Associate's degree in paralegal studies. Tammie L. Franks was the Secretary of Terry Thomas Farms, Inc. from November 5, 1998 until February 9, 2001. On February 9, 2001, she was recognized in the corporate records as having inherited her deceased husband's shares of stock in the corporation which amounted to 50% of all of its outstanding shares, and she was elected the corporation's Vice President. (Tr.16, 61-63, 120, 130, 134, 138, 139, EX 4).

18. During the period of June 2001 through February 2003, when the failures to pay vendors took place, Tammie L. Franks was a 50% shareholder, Vice President, and Director of Terry Thomas Farms, Inc. She received a weekly salary and performed clerical work that included updating accounts receivable, answering phones and taking orders for produce. She also took calls from vendors, wrote checks for the corporation, and occasionally signed invoices for produce as the produce was delivered to Terry Thomas Farms, Inc. She did not, however, attend any shareholders' meetings, or exercise any rights as a shareholder, or make any decisions respecting which vendors would be contacted to supply produce, or which vendors would be paid. (Tr. 120-124, 134-138, 143,145, Affidavit of Tammie L. Franks-Agency Record at RX 7).

19. When Terry Thomas Farms, Inc. experienced difficulties in paying its bills; Tammie L. Franks made some payments to assist the business from her home equity line of credit and took a salary cut in mid 2001. (Tr. 68, 137-138).

E. Teresa A. Thomas' relationship to Terry Thomas Farms, Inc.

20. Teresa A. Thomas is the daughter of Terry and Barbara Thomas. She is the sister of Tammie L. Franks. She has a Bachelor degree in environmental studies. In 1999, she returned to Birmingham to work at Terry Thomas Farms, Inc. On February 9, 2001, Teresa A. Thomas received one half of her father's shares, or 25% of the total outstanding shares, in Terry Thomas Farms, Inc. On that date, she was a director of the corporation and was elected its Secretary. She remained the corporation's Secretary until December 4, 2001, when she replaced her father as President of the corporation. (Tr. 150-151, 162-163, 169-170, 175-176, Affidavit of Teresa A. Thomas-Agency Record at RX 8).

21. During the period of June 2001 through February 2003, when the failures to pay vendors took place, Teresa A. Thomas was a 25% shareholder, and a director of Terry Thomas Farms, Inc. During that period, she was its Secretary until December 4, 2001, when she was elected its President. She received a weekly salary and performed clerical work that included answering phones. She also sold produce to the public and other wholesalers; and she worked with customers in the warehouse assembling their orders. She ordered produce only in unusual, emergency situations and never wrote checks although authorized to do so. She never attended a directors' or shareholders' meeting or performed the duties of the corporation's President. She never decided whom

to pay, how much to pay or when to pay selling vendors. (Tr. 149, 153-155, 163-170, 175-176, Affidavit of Terry A. Thomas-Agency Record at RX 8).

22. When Terry Thomas Farms, Inc. experienced difficulties in paying its bills; Teresa A. Thomas took a salary cut. During 2002, she was only a part-time employee with the corporation. (Tr. 68, 173-174).

Conclusions

1. Terry Thomas Farms, Inc., a corporation licensed under the PACA, violated the PACA by flagrant and repeated failures to make prompt and full payment to suppliers of fresh fruits and vegetables.

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful:

For any commission merchant, dealer, or broker...in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce...to fail...to...make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had....

Section 8(a) of the PACA (7 U. S.C. § 499h(a)) then provides:

Whenever (1) the Secretary determines...that any commission merchant, dealer, or broker has violated any of the provisions of section 2...the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

In addition to whether Terry Thomas Farms, Inc. committed a flagrant and repeated violation of section 2 of the PACA, the parties dispute whether it was willful. However, a finding respecting willfulness is unnecessary in this case. Under the Administrative Procedure Act (5 U.S.C. § 558(c)), in order to revoke a license for reasons other than public health or safety, a warning letter offering the licensee an opportunity to achieve compliance with the statute must first be given the licensee unless the violation is “willful”. *See In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1560 (1998). If,

however, as in the instant case, the license has already terminated, and instead of license revocation, the facts of the violation are being published, there is no need for a finding that the violation was willful. *See In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 397 (2000).

Even though superfluous, it is noted that a finding that the licensee's violations were willful would be consistent with Departmental policy. In circumstances where there have been "repeated failures to pay a substantial amount of money over an extended period of time," the Department customarily finds the violation to have been willful and revokes an existing PACA license. This policy has been upheld upon challenge in federal courts. *See Andershock's Fruitland, Inc., et al. v. USDA*, 151 F.3d 735, 737, 57 Agric. Dec. 1458 (7th Cir. 1998); *Havana Potatoes of New York Corp. v. U.S.*, 136 F. 3d 89, 93 (2d Cir. 1997).

Moreover, a violation may be willful irrespective of evil motive. *See Limeco*, 57 Agric. Dec. 1548, 1560 (1998). When a firm holding an existing license has failed to pay produce vendors promptly and in full as expressly required by the PACA, willfulness will be established on the basis of the length of time during which such violations occurred and the number and dollar amount of the transactions involved. *See In re Scamcorp, Inc.*, 57 Agric. Dec. 527, at 552-553 (1998).

Even when the inability of a licensee to pay vendors was precipitated by the failure of its own customers to pay their accounts receivable, the licensee is not absolved from being found to have violated the payment requirements of the PACA. *See In re The Caito Produce Co.*, 48 Agric. 602, 622 (1989); *In re Hogan Distributing, Inc.*, 55 Agric. Dec. 622, 633 (1996). Nor is a licensee absolved from liability because, in the face of its

insolvency, its produce vendors have accepted partial payments and released the licensee from further claims. *In re Top Fresh, Inc.* 53 Agric. Dec. 951, 953-954 (1994).

By failing to pay for perishable produce in 82 transactions, Terry Thomas Farms, Inc. committed repeated violations of section 2 of the PACA. Still owing, at the hearing held on April 12, 2005, \$209,016.95 for those produce purchases made between June 2001 and February 2003, established the violations to also be flagrant. *See In re Pugach, Inc.*, 55 Agric. Dec. 581, 587-588 (1995); and *In re Coastal Banana & Tomato Co.*, 55 Agric. Dec. 617, 621 (1996).

A succinct statement of applicable USDA policy and its underlying rationale is to be found in *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 397 (2000):

The purpose of the PACA is to not only protect growers and producers from the 'sharp practices of financially irresponsible and unscrupulous brokers' in the produce industry, but also to protect growers and producers from any produce dealer or broker who, regardless of the reason, fails to pay promptly for the produce it buys. *In re Tony Kastner and Sons Produce Co.*, 51 Agric. Dec. 741, 745 (1992); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1159 (1983). When there is more than one failure to make full payment promptly and the amount is more than *de minimis*, the violations of the PACA are repeated and flagrant. The penalty for failure to make full payment by the time of the hearing is revocation of the respondent's license or, if the license has expired, publication of a finding that the respondent has committed repeated and flagrant violations of the PACA. *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. at 1156.

Therefore, under applicable Departmental policy, the failure to pay before the hearing, \$209,016.95 for produce purchased over one year in 82 transactions requires publication of a finding that Terry Thomas Farms, Inc. committed flagrant and repeated violations of the PACA. Departmental policy requires this finding even where, as here, the owners of the business have an honorable history of scrupulous dealings with suppliers, and had not failed to pay their suppliers in full and on time, until their own customers failed to pay them. Moreover, the fact that they did all they could to keep the

business going by selling their home, borrowing money from their relatives, and paying vendors from their personal checking account is unavailing under this policy. It is a policy of long duration that the courts accept as consistent with the purposes of the PACA. *See Andershock's Fruitland, Inc., supra; and Havana Potatoes of New York Corp., supra.*

2. Terry R. Thomas was responsibly connected with Terry Thomas Farms, Inc. at the time it committed flagrant and repeated violations of section 2 of the PACA.

Section 8(b) of the PACA places restrictions on the employment by PACA licensees of any person found to have been responsibly connected with anyone who committed any flagrant or repeated violation of section 2 of the PACA. (7 U.S.C. § 499h(b)).

“Responsibly connected” is defined in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(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 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 Act and that the person 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.

The second sentence was added by amendment in 1995. It affords those who would otherwise fit within the statutory definition of “responsibly connected”, the right to demonstrate that they were not responsible for the specific violation. (H.R. Rep. No. 104-207, at 11 (1995)). The amendment’s statutory background may be found in *Michael Norinsberg v. United States Department of Agriculture and United States of America,*

162 F. 3d 1194, 1196-1197 (D.C. Cir. 1998), *reprinted in* 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 established:

...a two-prong test for rebutting the presumption when a person meets the definition of *responsibly connected* in the first part of the statute: 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 for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners.

Salins, 57 Agric. Dec. 1474, 1487-1488. Terry R. Thomas has failed to satisfy either prong of the test.

As set forth in Findings of Fact 11 and 12, *supra*, from the time the violations began on June 10, 2001 until December 4, 2001, Terry R. Thomas was the President of the corporation, was one of its directors and owned 25% of its stock. During that time, the corporation failed to make full payment promptly for over \$100, 000.00 worth of produce purchased, received and accepted in more than 50 transactions. His functions in relation to the activities that were in violation of the PACA, cannot be found to have been ministerial in nature only as is required to satisfy the first prong of the test. *See In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999). After transferring his stock to his wife, Barbara, on December 4, 2001, Terry R. Thomas remained as a director of the corporation and continued to work for it as an unpaid volunteer who received and negotiated price adjustments on its behalf until January of 2003. Though unpaid, he

continued to perform functions for the corporation where he exercised judgment and discretion that exceeded those that could be categorized as merely ministerial, and he continued to not meet the first prong of the statutory test.

He also failed to meet the second prong of the test. During the initial payment violations, as the President, director and owner of 25% of the corporate licensee's stock, Terry R. Thomas was not a nominal officer, director or shareholder.

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... (the corporate licensee) committed while he was president, simply because he chose not to exercise the powers he had.

In Re Anthony L. Thomas, 59 Agric. Dec. 367, 387-388 (2000). For these reasons, it is concluded that Terry R. Thomas was responsibly connected with Terry Thomas Farms, Inc. when it flagrantly and repeatedly violated the PACA.

3. Barbara A. Thomas was responsibly connected with Terry Thomas Farms, Inc. at the time it committed flagrant and repeated violations of the PACA.

The evidence conclusively shows that Barbara A. Thomas was actively involved in the violations of the PACA by Terry Thomas Farms, Inc. She and her family members have testified that during the last days of the corporation's existence, Barbara A. Thomas ran it without consulting them, undertook to settle its debts to suppliers and wrote the settlement checks. She was also the corporation's Treasurer, a director and from December 4, 2001 until early 2003, she was a 25% shareholder.

Under the applicable legal precedents previously set forth, it is therefore concluded that Barbara A. Thomas was responsibly connected with Terry Farms, Inc. when it flagrantly and repeatedly violated the PACA.

4. Tammie L. Franks was responsibly connected with Terry Thomas Farms, Inc. at the time it committed flagrant and repeated violations of the PACA.

The evidence shows that Tammie L. Franks took no part in buying produce other than taking phone calls from vendors or occasionally signing delivery invoices. Her work was essentially clerical and she deferred all business decisions during the time the violations took place, to her mother. As one whose functions can be categorized as basically ministerial in nature, Tammie L Franks has met the first prong of the statutory test.

Unfortunately, she does not meet its second prong. It cannot be found that she had a merely nominal relationship to the licensee during the period when the violations occurred. At that time, she was a 50% shareholder, Vice President and a Director of Terry Farms, Inc. and for that reason she had:

...an actual significant nexus with the violating company during the violation period...(that)... required that (she) know, or should know, about violations being committed and...be held responsible for (her)failure to ‘counteract or obviate the fault of others.’ *Bell, supra*, 39 F. 3d at 1201.

In re: Anthony L. Thomas, 59 Agric. Dec. 367 at 386 (2000).

I therefore must conclude that Tammie L. Franks was responsibly connected with Terry Thomas Farms, Inc. when it flagrantly and repeatedly violated the PACA.

5. Teresa A. Thomas was responsibly connected with Terry Thomas Farms, Inc. at the time it committed flagrant and repeated violations of the PACA.

Teresa A. Thomas had clerical duties and only ordered produce in unusual situations. However, she also sold produce to the public and other wholesalers; and she worked with customers in the warehouse assembling their orders. Though her functions were not at a managerial level, they appear to have been more than merely ministerial in

nature. But regardless of whether she fits within the first prong of the test, she too fails to meet the second prong.

Teresa A. Thomas was President, a 25% shareholder and a director of Terry Thomas Farms, Inc. when it violated the PACA. She therefore had a significant nexus to the corporation that places her outside of the “nominal” designation. Under applicable precedents, she must be concluded to have been responsibly connected with the corporate licensee and “... held responsible for her failure to counteract or obviate the fault of others.” *In re: Anthony L. Thomas, supra.*

For these reasons, the following Order is being issued.

ORDER

An Order is hereby issued publishing the finding that Terry Thomas Farms, Inc. committed flagrant and repeated violations of section 2 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)).

Additionally, it is found that Terry R. Thomas, Tammie L. Franks, Teresa A. Thomas and Barbara A. Thomas were each responsibly connected with Terry Thomas Farms, Inc. at the time it committed the flagrant and repeated violations.

This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed within thirty (30) days after service.

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

Dated: 11-18-05

Victor W. Palmer
Victor W. Palmer
Administrative Law Judge