

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	PACA-APP Docket No. 04-0010
Edward S. Martindale,	)	
	)	
Petitioner	)	

**Decision**

In this decision, I find that Petitioner Edward S. Martindale was responsibly connected to Garden Fresh Produce, Inc., a company that has committed disciplinary violations under the Perishable Agricultural Commodities Act (PACA). I find that Petitioner was actively involved in the activities resulting in the violations by Garden Fresh, and that he was more than a nominal partner, officer, director, or shareholder of Garden Fresh.

**Procedural History**

On February 18, 2004, a letter from Karla Whalen, Head, Trade Practices Section, PACA Branch, Fruit and Vegetable Programs, notified Petitioner that an initial determination had been made that he was “responsibly connected” to Garden Fresh Produce, Inc., as that term is defined in 7 U.S.C. § 499a(b)(9). RX 2. The determination was based on Petitioner’s 20 percent ownership of Garden Fresh, as well as his being secretary and a director of that company from July 2000 through April 2003. That interval encompassed the period January 2002 through February 2003, during which time

Garden Fresh was alleged to have committed numerous violations of the prompt payment provisions of the PACA.

On March 23, 2004 Respondent challenged the initial determination, contending that he had tendered his resignation from the company before the violative acts took place and that he was “in no way ‘actively involved’ with Garden Fresh” during the violation period. RX 3. On May 10, 2004, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, issued a final determination that Mr. Martindale was responsibly connected to Garden Fresh at the time violations of the PACA were committed, and informed Mr. Martindale of his right to file a petition for review of his final determination. A petition for review was filed on June 10, 2004.

In a related proceeding, on January 27, 2004, a PACA complaint was filed against Garden Fresh Produce, Inc. for PACA violations committed between January 2002 and February 2003. Following service of the complaint, no answer having been filed by Garden Fresh, the Agency filed a Motion for Decision Without Hearing by Reason of Default on June 4, 2004. No response to that Motion was filed by Garden Fresh and I issued a Decision Without Hearing on August 25, 2004, finding that Garden Fresh had committed the alleged violations involving non-payment of nearly \$380,000 for 109 lots of commodities purchased between January 2002 and February 2003. RX 12.

A hearing was conducted in this case on March 2, 2005 in San Jose, California. Petitioner was represented by P. Sterling Kerr, and Respondent was represented by Charles L. Kendall. Petitioner testified in his own behalf, and called one additional witness, while Respondent called three witnesses, including two PACA Branch employees.

## Facts

Petitioner Edward Shane Martindale<sup>1</sup> has worked in the produce business for approximately fifteen years. He began working at Martindale Distributing, a business run by his father in Salinas, California. When he began working there, his stepbrother Donald R. Beucke and his older brother Wayne Martindale were already involved in the business. He started out in the company as a produce inspector and “on grounds” buyer. When his father retired from the company in 1999, Petitioner, along with his stepbrother and brother, purchased the company with each of them owning one-third of the company. Since approximately May 2003, when his brother and stepbrother resigned from Martindale Distributing, he has been the 100% owner of Martindale Distributing. Tr. 36, 41-42.

In late 1999 or early 2000, Wayne Martindale, who with his stepbrother Donald Beucke had already started Bayside Produce, a produce company with a warehouse in San Diego, “started talking about wanting to open another company in Las Vegas.” Tr. 42. Petitioner joined his brother and stepbrother, along with several others, and formed Garden Fresh. Petitioner was a 20% shareholder of the new company, and was listed as a director and secretary. He was issued a stock certificate indicating that he owned 1,000 shares of stock in Garden Fresh (RX 10, p. 4) although he stated he had never seen it before the institution of this proceeding. He signed the original PACA license application and the check in payment of the PACA licensing fee. He submitted his resignation and reassigned his stock on April 4, 2003. By letter dated April 28, 2003, he

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<sup>1</sup> Petitioner’s legal name is Edward Shane Martindale but he is generally known as Shane Martindale. Tr. 34.

notified the PACA Branch that he was no longer connected with Garden Fresh, and asked that his name be removed from Garden Fresh's PACA license. RX 1, p. 16.

Petitioner stated that he originally decided to join the company because he was good with bills and money management. Tr. 85. During the early days of the company's operations, Petitioner, working out of Martindale Distributing's Salinas office, handled much of Garden Fresh's paperwork, even receiving a salary for taking care of payables that were sent to his office in Salinas. He classified his principal duties with Garden Fresh as that of an accounts payable manager, but at the end of 2001 he basically stopped writing checks for the company, when his brother Wayne moved that part of Garden Fresh's operations to Las Vegas. He stated that he relinquished his role because of differences of opinion with his brothers, and that problems arising from the use of non-matching computer systems, and problems with coordination of purchase orders and bills, caused him to "disassociate" himself from Garden Fresh. Tr. 49. He told the other shareholders that he would no longer be involved with handling the payables for Garden Fresh. Tr. 49-50. All the Garden Fresh invoices that he had in his possession and had not been paid were taken by Wayne Martindale to Las Vegas in December, 2001. Tr. 50.

Petitioner purchased some produce on behalf of Garden Fresh in the first year it did business, but recalled making no such purchases after his brother took the company's payables to Las Vegas at the end of 2001. He did issue some checks after 2001 when he was directed by his brother and stepbrother "to make payment to certain vendors that were in Salinas." Tr. 52, 95. He was not directly involved in any of the transactions that were the subject of the Default Decision I entered against Garden Fresh. After December 2001, he indicated that he did not actively monitor Garden Fresh on a regular basis, even

though he was still a shareholder, officer and director. Tr. 52. He fielded calls for Garden Fresh from his Salinas office, and became aware in 2002 that there were complaints about Garden Fresh concerning the way the company was handling accounts payable. He tried to see that the caller was put in touch with Wayne Martindale to attempt to resolve the issue. Tr. 52-53. Other than referring callers to his brother, he only could recall warning one company, Sun America Produce, that he had concerns about the way Garden Fresh was paying its bills. Tr. 81. Even though he knew there were financial problems, he did not ask to see a financial statement or bank statements, basically relying on statements from Wayne Martindale and Donald Beucke “that things were getting better.” Tr. 99.

Before he resigned from Garden Fresh by letter dated April 4, 2003, Petitioner had signed off on documents accepting the resignation of David Wiles (RX 11) and Bruce Martindale (RX 1, p. 13).

Joe Quijada and Steven Wood (the latter called by Respondent) each testified that Wayne Martindale was the primary person they dealt with when dealing with Garden Fresh. Mr. Quijada testified that he never had any slow pay problems with Martindale Distributing and characterized Petitioner as “an upstanding individual.” Tr. 22.

Evert Gonzalez, a senior marketing specialist for the PACA Branch, testified that his investigation was initiated after the PACA Branch received reparation complaints. Tr. 108-109. He described his investigation, which primarily involved visiting Garden Fresh’s Las Vegas office. No one was at the premises when he first arrived, but he eventually received access and requested a variety of records. Tr. 110-111. Wayne Martindale indicated to him that all the principals in the firms, including the Petitioner,

had equal authority and could sign checks and pay payables. Tr. 112. Mr. Gonzalez did not follow up with any of the stockholders identified by Wayne Martindale.

Phyllis Hall, a senior marketing specialist for the PACA Branch, reviewed the file, and identified the documents contained in the responsibly connected file maintained by the PACA Branch. RX 1-10.

### **Statutory and Regulatory Background**

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499a(b)(4).

In addition to penalizing the violating merchant, which in this case would be Garden Fresh Produce, Inc., the Act also imposes severe sanctions against any person “responsibly connected” to an establishment that has had its license revoked or suspended or has been found to have committed flagrant or repeated violations of Section 2 of the Act. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license “has been revoked or is currently suspended” for as long as two years, and then only upon approval of the Secretary. Id.

(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).

### **Findings of Fact**

1. Petitioner Edward Shane Martindale was part of a group of individuals who organized Garden Fresh Produce, Inc., in April 2000. Petitioner was a 20% shareholder, a director and secretary of Garden Fresh.

2. Petitioner signed Garden Fresh’s application for a PACA license, and was authorized to sign checks on behalf of Garden Fresh. As the money manager of Garden Fresh, he handled a significant portion of the payables in 2001. Even after the payables

were transferred to Las Vegas in late 2001, he handled occasional payments as directed by Wayne Martindale.

3. On October 8, 2002, Petitioner signed the Board of Directors resolution accepting the resignation letter of director David N. Wiles.

4. On March 3, 2003, Petitioner signed the Board of Directors resolution accepting the resignation letter of director Bruce W. Martindale.

5. Petitioner resigned as a director of Garden Fresh on April 4, 2003. He also assigned his stock in the company back to the company on that date.

6. Between January 14, 2002 and February 26, 2003 Garden Fresh failed to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly \$380,000 to five sellers of perishable commodities.

7. During the period described in the previous paragraph, Petitioner was a director, secretary and 20% stockholder of Garden Fresh. There is no evidence in this record that Petitioner was directly involved in any of the transactions described in Finding 6.

8. Petitioner notified the PACA Branch by letter of April 28, 2003 that he was no longer connected to Garden Fresh. RX 1, p. 16. In that letter, he requested that his name be removed from the PACA license.

9. Petitioner has extensive experience in the produce industry. At the time of the hearing he had worked in the produce industry for over 15 years; had held a number of positions, including sole ownership of Martindale Distributing; was particularly knowledgeable in the areas of money management and bill paying in the produce industry; and was thoroughly knowledgeable in produce industry operations.

10. With respect to his employment at Martindale, Petitioner enjoys a good reputation in the produce business, including timely payment in produce transactions.

11. Petitioner received compensation for his services in the first year of Garden Fresh's operations.

12. Petitioner did not sufficiently exercise his authority as 20% shareholder, secretary and director to prevent or correct the violations committed by Garden Fresh.

**Petitioner was Responsibly Connected To Garden Fresh Produce, Inc. During the Time Period in Which Garden Fresh Committed Violations of the PACA**

By virtue of his long-standing experience in the produce business, his significant investment in Garden Fresh, and his management positions as 20% shareholder, director and vice president, I find that Edward S. (Shane) Martindale was responsibly connected to Garden Fresh at the time it committed violations of the prompt payment provisions of the PACA.

Responsibly connected liability is triggered when a company has its license revoked or suspended for violations of Section 2 of the Act, or when it has been found to have committed flagrant and repeated violations of the Act. On August 29, 2004 I signed a Decision Without Hearing by Reason of Default in which I found that Garden Fresh committed willful, repeated and flagrant violations of section 2(4) of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities from five sellers, in the amount of just under \$380,000. Thus, an individual who is responsibly connected with Garden Fresh during the time these violations were committed is subject to the employment bar imposed by the Act.

I find that Petitioner has not met his burden of showing by a preponderance of the evidence that he (1) was not actively involved in the activities resulting in a violation of

this chapter, and (2) was only nominally a director of a violating licensee or entity subject to license.

Petitioner was actively involved in the activities resulting in the violations committed by Garden Fresh. Although he did not directly enter into or even participate in the specific transactions that gave rise to the violations, his failure to take action, given his role as a co-founder, co-owner, director and officer in the corporation with fifteen years experience in the industry, to prevent or correct the violations, is equivalent to active involvement. The responsibly connected provisions of the Act are a strong indicator that Congress believed that an individual owning a significant portion of a company engaged in perishable produce transactions cannot stand by where violations are being committed, and must undertake corrective actions when he becomes aware that there are violations. Petitioner knew that Wayne Martindale intended to operate Garden Fresh out of Las Vegas, and apparently decided to give him a free rein in doing so, without taking measures, as he surely could have, to periodically review the company's books, more actively participate in the company's management, or to take steps to inform all the company's customers that Garden Fresh was unable to pay its bills. This is particularly glaring in the case of Petitioner, whose strongest field of expertise was apparently in money management and handling payables, and who knew to a certainty in 2001 that there were major problems with Garden Fresh's accounts in 2001, before the violations that were the subject of the disciplinary action even took place. Indeed, once he knew that Garden Fresh was not paying its bills, he had a duty, either alone or in conjunction with the other directors, to implement corrective actions. Instead, he figuratively washed his hands of the matter, handing off the books to his brother Wayne,

and taking no actions consistent with his positions as 20% owner, officer and director to correct the situation. He could have disassociated himself from Garden Fresh by resigning, but instead signed off on the resignations of two other directors without taking similar action himself until after the violation period.

Further, Petitioner issued some checks in 2002, usually at the direction of Wayne Martindale, at a time when he knew that the Garden Fresh was having trouble making its payments. Tr. 52, 55. He may have even made some purchases for Garden Fresh during this time period. Tr. 17-18. By making payments at a time when he knew the company was not making payments to some of its creditors, Petitioner was in effect choosing which debts to pay, even though it was ostensibly under the “direction” of Wayne Martindale or Donald Beucke. As a co-owner, officer and director, he cannot duck his responsibilities under the PACA by characterizing himself as an individual powerless to disobey these directives. His executing these checks at a time when he knew Garden Fresh was having financial problems is just the kind of conduct referred to by the Judicial Officer in In re. Lawrence D. Salins, 57 Agric. Dec. 1474 (1998), when he held that check writing and choosing which debts to pay “can cause an individual to actively involved in failure to pay promptly for produce. Id., at 1488-1489.

Petitioner’s inaction is particularly striking given that he knew as early as December 2001 that Garden Fresh’s purchase order and invoice process was in such disarray that he passed it over to Wayne Martindale in Las Vegas. Even though he received many calls from Garden Fresh sellers looking for Wayne Martindale because they were not getting paid, he did not seek out all of Garden Fresh’s customers to warn them of the company’s problems. He did not, either on his own or with the participation

of other directors or officers, demand to see the books of the company he co-owned, nor did he travel to Garden Fresh's Las Vegas office to attempt to alleviate the situation, or at least get a better handle on the company's condition. His failure to attempt to take any corrective actions, his "washing his hands" of the payables situation by handing the books to his brother, and his remaining with the company while it was committing violations, constitutes active participation in the activities resulting in a violation of this chapter. The failure of such a knowledgeable person as Petitioner, experienced in the produce business, to take action in a situation where he knows or should know that the company he owns 20% of is violating the PACA does not allow Petitioner to meet his burden here. The failure to exercise powers inherent in his various positions with Garden Fresh, "because he chose not to use the powers he had" has previously been found a basis for finding active participation. In re. Anthony Thomas, 59 Agric. Dec. 367, 388 (2000). Likewise, the need to take action to "counteract or obviate the fault of others" has been recognized as a necessary prerequisite to refute active involvement when the actual violations were not actually committed by the officer, director or shareholder. Bell v. Dept. of Agriculture, 39 F. 3d 1199, 1201 (DC Cir.1994), citing Minotta v. U. S. Dept. of Agriculture, 711 F. 2d 406, 408-409 (DC Cir. 1983).

Even if he was not actively involved in the violations, Petitioner likewise did not meet his burden of showing, by a preponderance of the evidence, that he was only a nominal 20% shareholder, director and secretary. For starters, he was a co-founder of Garden Fresh, and was actively involved in managing the money and paying the bills of the company at its outset. This is a far cry from someone who is listed as an owner because their spouse or parent put them on corporate records, and had no involvement in

the corporation or experience in the produce business. Minotto v. USDA, *supra*, 711 F. 2d at 409. Rather Petitioner is an experienced, savvy individual who had worked in the produce business for at least fifteen years, has worked for years with some or all of his partners, and who is fully aware of the significance of having a valid PACA license, and the importance of complying with the prompt payment provisions of the Act. The fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof. The Judicial Officer and the courts have indicated that ownership of approximately 20% of the stock of a company is strong evidence that a person was not serving in a nominal capacity. In re Joseph T. Kocot, 57 Agric. Dec. 1544, 1545 and cases cited thereunder (1998).

There is no evidence that Petitioner was other than a voluntary investor, who took on the responsibilities associated with being a director, secretary and co-owner in an attempt to establish a profitable business. He presumably would have shared in the company's profits when there were some, and participated in a number of corporate matters, including signing the PACA license application, signing documents accepting the resignations of at least two other directors, and allowing himself to be an authorized signatory on company checks. While for practical purposes it is evident that Wayne Martindale ran Garden Fresh, the fact is that the record does not indicate any attempts of Petitioner to exercise authority consistent with his positions as 20% owner, director and vice president. That he chose not to act does not establish that his role was nominal.

### **Conclusions of Law**

1. Petitioner Edward Shane Martindale was a 20% shareholder, director and secretary of Garden Fresh Produce, Inc. from its inception in April 2000 until he resigned from Garden Fresh on April 4, 2003.

2. Between January 14, 2002 and February 26, 2003, Garden Fresh Produce, Inc. committed willful, flagrant and repeated violations of the PACA by failing to make full payment promptly for 109 lots of perishable agricultural commodities in the amount of nearly \$380,000 to five sellers of perishable commodities.

3. During the period January 14, 2002 through February 26, 2003, Petitioner was responsibly connected with Garden Fresh.

4. During the period January 14, 2002 through February 26, 2003, Petitioner was actively involved in the activities resulting in a violation of the PACA.

5. During the period January 14, 2002 through February 26, 2003, Petitioner did not serve as a 20% stockholder, director and officer of Garden Fresh in a nominal capacity.

### **Conclusion and Order**

Petitioner has failed to show, by a preponderance of the evidence, that he was not responsibly connected to Garden Fresh Produce, Inc. at a time when Garden Fresh committed willful, flagrant and repeated violations of section 2 (4) of PACA (7 U.S.C. § 499b(4)) for failing to make full payment promptly for produce purchases. Petitioner was actively involved in the activities resulting in the violations, and was more than a nominal 20% owner, vice president and director. Wherefore, I affirm the finding of the Chief of the PACA Branch that Edward Shane Martindale was responsibly connected with Garden Fresh at the time the violations were committed.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.  
this 27th day of January, 2006

Marc R. Hillson  
**MARC R. HILLSON**  
Administrative Law Judge