

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:

Nicholas Allen,

Petitioner.

PACA-APP Docket No. 15-0085

DECISION AND ORDER

Channing D. Strother, Acting Chief Administrative Law Judge

Appearances:*Jeffrey M. Chebot, Esq., and Grant E. Fortson, Esq., representing Petitioner, Nicholas Allen**Charles L. Kendall, Esq., Office of the General Counsel, representing Respondent, PACA Division, Agricultural Marketing Service ("AMS"),¹ United States Department of Agriculture***Summary of Decision**

The primary issue in this proceeding is a legal one of whether Nicholas Allen ("Petitioner"), who was an officer, director, and more than ten-percent shareholder in a licensee company determined to have violated the Perishable Agricultural Commodities Act ("PACA")² during a relevant period, is "responsibly connected" to that company if prior to that period Petitioner ceded—legally and effectively under state corporate law—any authority as an officer, shareholder, and more than ten-percent shareholder to directors and a "chief bankruptcy restructuring officer" ("CRO") appointed pursuant to the insistence of certain secured creditors.

For Petitioner to be deemed not to be responsibly connected to the violating licensee company, PACA³ places the burden on Petitioner to demonstrate by a preponderance of the

¹ "AMS" and the pronoun "it" will be used to refer to the Respondent in this Decision and Order, although Karla Whalen, Director, PACA Division, made the January 30, 2015 Determination on review herein. *See* 7 C.F.R. § 47.49.

² 7 U.S.C. §§ 499a-499s.

³ 7 U.S.C. § 499a(b)(9).

evidence both: 1) that he was not actively involved in the activities resulting in a violation of PACA, and 2) that he was only nominally an officer, director, or shareholder of the violating licensee.⁴

Based upon the record in this proceeding and upon interpretations of PACA in binding precedents, I find that the record evidence is that Petitioner was not actively involved in the activities resulting in a violation of PACA and met the PACA criteria for being a “nominal” officer, director, and shareholder during the relevant time, which is the violations period.⁵ In the circumstances shown in the record, that Petitioner ceded his authority as an officer, director, and more than ten-percent shareholder over to others prior to the violations period is not an activity resulting in a violation of PACA within the meaning of PACA.

The precedents require that “responsibly connected” determinations, including the sub-determinations of whether a person is only nominally an officer, shareholder, or more than ten-percent shareholder, be made based upon the entire context.⁶

There is no evidence that Petitioner took any actions regarding the failures to pay producers that are PACA violations here, and Petitioner presented evidence, including testimony, that he did not.

⁴ *Id.* Because Petitioner owned shares of the company, he cannot meet the § 499a(b)(9) provision that he not be an owner of a violating licensee or entity subject to license that was the alter ego of its owners. *See* Thomas, 59 Agric. Dec. 366, 388 (U.S.D.A. 2000); Norinsberg, 56 Agric. Dec. 1840, 1864-65 (U.S.D.A. 1997), *rev'd on other grounds*, 162 F.3d 1194 (D.C. Cir. 1998), *final decision on remand*, 58 Agric. Dec. 604, 609 n.4 (U.S.D.A. 1999).

⁵ The violations period is the time during which Allens, Inc. “committed the PACA violations that gave rise to this case.” Taylor v. U.S. Dep’t of Agric., 636 F.3d 608, 612 (D.C. Cir. 2011). The violations period took place from October 3, 2013 through January 6, 2014. Allens, Inc., 74 Agric. Dec. 488, 488 (U.S.D.A. 2014); *see* PIX-24 at 2; Tr. 184-185, 194, 396.

⁶ *See, e.g.,* Taylor, 636 F.3d at 615-17; Norinsberg v. U.S. Dep’t of Agric., 162 F.3d 1194, 1196-97 (D.C. Cir. 1998); Finch, 73 Agric. Dec. 302, 305-09 (U.S.D.A. 2014); Taylor, Nos. 06-0008, 06-0009, 2012 WL 9511765, at *5, *6 (U.S.D.A. Dec. 18, 2012) (Modified Decision and Order on Remand); Petro, 71 Agric. Dec. 600, 605-09 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr).

During the violations period, while Petitioner retained the titles of officer and director and was listed as an officer and director in various documentation, including filings at the United States Department of Agriculture (“USDA”) and the State of Arkansas,⁷ the rights and authority of those offices had been signed over to others. He was an officer and director in name only, which is the meaning of “nominal.”⁸ The law does not require that Petitioner change those listings when his status became nominal, nor does it require that he inform USDA or the public of his newly nominal status.⁹ Petitioner retained his more than ten-percent but still minority-stock ownership, and it is less clear on the face of the statute what a “nominal shareholder” would be. However, it is clear that the statute intends and, thus, provides that ongoing shareholders can meet in some manner a status of being only nominal and be deemed to not to be responsibly connected.¹⁰ Contrary to Respondent’s contention on brief, it is not necessary for a more than ten-percent shareholder to rid himself of the stock he holds to be deemed not responsibly connected.¹¹ To require that would be to improperly ignore that the statute refers to nominal shareholders and would be contrary to precedents that have found even a twenty-five-

⁷ As discussed herein, the precedents provide that being listed as an officer or director in government filings does not preclude an individual from being found to be nominal only and thus deemed not to be responsibly connected.

⁸ Taylor, 71 Agric. Dec. 612, 621 n.6 (U.S.D.A. 2012); *Nominal*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining the adjective “nominal” as “[e]xisting in name only”).

⁹ Although there is no requirement that a person notify USDA when his or her status becomes “nominal,” the PACA regulations provide that a licensee shall “[p]romptly report to the Director in writing . . . [a]ny change in officers, directors, members, managers, holders of more than 10 percent of the outstanding stock in a corporation, with the percentage of stock held by such person, and holders of more than 10 percent of the ownership stake in a limited liability company, and the percentage of ownership in the company held by each person.” 7 C.F.R. § 46.13(a)(2). *See* Cerniglia, 66 Agric. Dec. 844, 854 (U.S.D.A. June 6, 2007 (“As a general rule, I find that any individual identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee is, for purposes of PACA, an officer, director, or shareholder of the licensee until such time that the PACA Branch receives written notice that the person is no longer an officer, director, or holder of more than 10 percent of the outstanding stock of the licensee.”)).

¹⁰ *See* 7 U.S.C. § 499a(b)(9); H.R. REP. NO. 104-207, at 18-19 (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

¹¹ *See* Respondent IB at 21-22; Respondent RB at 20.

percent shareholder to be nominal.¹² Given that Petitioner signed over his authority as a shareholder as far as operation of the company to others and undertook no actions with respect to the failure to pay producers, which are the PACA violations here, I find that Petitioner was only a nominal shareholder during the violations period.

Respondent contends that Petitioner had the legal authority to pay the producers himself, presumably from his own funds or funds he otherwise obtained.¹³ I find that the test of “responsibly connected” under PACA involves one’s actions and abilities as they relate to the licensee, not what he or she could have done as an individual.¹⁴

Respondent also contends that the agreement under which Petitioner ceded his authority as an officer, director, and shareholder provided that Petitioner could regain his corporate authority in April 2014 and, had he done so at that time, he could have used that authority to attempt to cause the licensee to pay the producers for failed payments during the violations period.¹⁵ However, that would not have remedied the PACA violation of the failure to timely pay in the first instance. Respondent essentially argues that Petitioner was required to recover his authority over a bankrupt company and subject himself to being responsible for ongoing PACA violations stemming from the earlier violations period. I do not find that Petitioner was required to act under that agreement long after the violations period to recover his authority.

¹² See discussion below. 7 U.S.C. § 499a(b)(9); *see* Petro, 71 Agric. Dec. 600, 607-09 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr); *see also* Beucke v. U.S. Dep’t of Agric., 314 Fed. App’x 10, 12 (9th Cir. 2008).

¹³ *See* Respondent IB at 10-11.

¹⁴ *See* Petro, 71 Agric. Dec. 1259, 1261 (U.S.D.A. 2012) (Order Den. Pet. to Reconsider as to Bryan Herr) (holding that although the petitioner could have infused company with capital after learning of its failure to pay for produce, his failure to do so “did not constitute active involvement in activities resulting in that company’s failure to pay for produce in accordance with the PACA”); Finch, 73 Agric. Dec. 300, 311, 320-21 (U.S.D.A. 2014) (finding petitioners responsibly connected to company that violated prompt payment provisions of PACA despite having infused company with their own personal funds).

¹⁵ *See* Respondent RB at 4-5.

Therefore, the AMS determination that Petitioner was responsibly connected is reversed.

Jurisdiction and Burden of Proof

Petitioner filed his Petition to Review pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (“Rules of Practice”),¹⁶ which apply to PACA and the regulations issued thereunder (“Regulations”).¹⁷ The case was reassigned by the Chief Administrative Law Judge to the undersigned on August 23, 2016. Thus, this matter is properly before me for resolution.¹⁸

PACA defines a “responsibly connected” person as one who is “affiliated or connected with a [licensee] as . . . [an] officer, director, or holder of more than 10 per centum of the outstanding stock.”¹⁹ There is no doubt that Petitioner was an officer, a director, and a holder of more than ten percent of the company’s outstanding stock. However, PACA goes on to provide:

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 [PACA] and that the person either was only nominally . . . [an] officer, director, or shareholder of a violating licensee *or* was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.²⁰

Petitioner clearly cannot fit within the “alter ego” proviso because he was an “owner.” Thus, the burden in this proceeding is on Petitioner to demonstrate by a preponderance of the evidence

¹⁶ 7 C.F.R. §§ 1.130 *et seq.*

¹⁷ 7 C.F.R. §§ 46.1 *et seq.*

¹⁸ I note that on November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief in *Lucia v. SEC* (No. 17-130), in which the Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause (U.S. CONST. art. II, § 2, cl. 2). A Court Opinion is expected in the case by the end of June 2018. I also note that on July 24, 2017, the Secretary of Agriculture ratified my prior written appointment as a United States Administrative Law Judge for the United States Department of Agriculture and renewed my oath of office. Neither party in this case has challenged my authority to preside over this proceeding.

¹⁹ 7 U.S.C. § 499a(b)(9).

²⁰ *Id.* (emphasis added).

both: 1) that he was not actively involved in the PACA violations, and 2) that he was merely a nominal officer, director, and shareholder of the licensee.²¹

Statutory Background and Case Law Interpretation

Congress enacted PACA in 1930 to regulate the sale of produce and promote fair dealing in the sale of perishable commodities.²² PACA is an intentionally a “tough law”²³ that was created

. . . for the purpose of providing a measure of control and regulation over a branch of industry which is engaged in almost exclusively interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.²⁴

Under PACA, those who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate or foreign commerce are required to have a license issued by the Secretary of Agriculture.²⁵ PACA “makes it unlawful for a licensee to engage in certain types of unfair conduct”²⁶ 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.”²⁷

Further, PACA authorizes the Secretary to impose sanctions on any commission merchant, dealer, or broker who has violated 7 U.S.C. § 499b(4).²⁸ An order suspending or revoking a PACA license can have significant collateral consequences in the form of licensing restrictions and

²¹ See *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 611 (D.C. Cir. 2011).

²² *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 413 (5th Cir. 2003) (citing *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1066 (2d Cir. 1995)).

²³ *Hawkins v. U.S. Dep’t of Agric.*, 10 F.3d 1125, 1130 (5th Cir. 1993).

²⁴ H.R. REP. NO. 84-1196, at 2 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701.

²⁵ 7 U.S.C. §§ 499a(b)(5)–(7), 499c(a), and 499d(a).

²⁶ *Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric.*, 497 F.3d 681, 686 (D.C. Cir. 2007).

²⁷ 7 U.S.C. § 499b(4).

²⁸ See 7 U.S.C. § 499h(a).

employment restrictions for individuals associated with the violating licensee.²⁹ When an entity's PACA license is revoked, PACA prohibits any person who was "responsibly connected" to that entity from working for any other licensee for at least one year.³⁰ These restrictions "are not 'punishment,' but rather statutory civil sanctions to assist regulatory enforcement of the PACA."³¹

I. "Responsibly Connected"

Congress amended PACA in 1934 to authorize the Secretary to, without notice, "revoke the license of any 'commission merchant, dealer, or broker' that employed an individual 'who was responsibly connected with any firm, partnership, association, or corporation whose license has been revoked within one year of the date prior to such notice.'"³² The amendment provided no definition for "responsibly connected."³³ However, Congress amended PACA again in 1962, defining "responsibly connected" as "affiliated or connected with a merchant, dealer, or broker as . . . [an] officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association."³⁴

²⁹ See 7 U.S.C. § 499h(b); *Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, 562 (D.C. Cir. 2007) ("Licensees who violate the Act may find their licenses suspended or revoked, and individuals affiliated with violators may be excluded from industry employment."); *Finch*, 73 Agric. Dec. 300, 302 (U.S.D.A. 2014) ("The PACA provides for the imposition of licensing restrictions and employment restrictions on persons responsibly connected with a person who has been found to have committed violations of 7 U.S.C. § 499b.").

³⁰ 7 U.S.C. § 499h(b).

³¹ *Finch*, 73 Agric. Dec. at 302.

³² *Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194, 1196 (D.C. Cir. 1998) (quoting Pub. L. No. 73-159, ch. 120, § 5, 48 Stat. 586) (footnote omitted).

³³ *Id.*

³⁴ 7 U.S.C. § 499(a)(b)(9) (1994); see *Norinsberg*, 162 F.3d at 1996 (citing H.R. REP. NO. 87-1546, at 4 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2751)).

Federal courts varied in their interpretations of the phrase.³⁵ Most circuits adopted a “*per se* exclusionary rule,”³⁶ categorically finding an individual responsibly connected if he or she was an officer, director, or more than ten-percent holder of a company’s outstanding stock.³⁷ The D.C. Circuit, however, “ha[d] consistently read §§ 499(a)9 and 499h(b) as establishing only a *rebuttable* presumption that an officer, director, or major shareholder of a PACA violator is responsibly connected to the violator.”³⁸

The circuit split existed until 1995,³⁹ when Congress amended the “responsibly connected” definition to “make it clear that the presumption is rebuttable.”⁴⁰ The following language was added:

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 was either 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.⁴¹

In practice, the Secretary of Agriculture “must first determine if an individual falls within one of the three statutory classifications”⁴² (*i.e.*, officer, director, or holder of more than ten percent of the violating licensee’s stock).⁴³ “If so, the burden shifts to the individual to demonstrate that he

³⁵ *Norinsberg*, 162 F.3d at 1196; *see, e.g.*, *Faour v. U.S. Dep’t of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993); *Pupillo v. United States*, 755 F.2d 638, 633-34 (8th Cir. 1985); *Birkenfield v. United States*, 369 F.2d 491, 494 (3d Cir. 1966); *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

³⁶ *Rodgers*, 56 Agric. Dec. 1919, 1952 (U.S.D.A. 1997).

³⁷ *Norinsberg*, 162 F.3d at 1196; *see Rodgers*, 56 Agric. Dec. at 1952 (“Until 1975, an individual who was a partner in a partnership or an officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation was considered *per se* responsibly connected and subject to the licensing and employment restrictions in the PACA.”).

³⁸ *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994).

³⁹ *Norinsberg v. U.S. Dep’t of Agric.*, 162 F.3d 1194, 1197 (D.C. Cir. 1998).

⁴⁰ *Hart v. Dep’t of Agric.*, 112 F.3d 1228, 1230 (D.C. Cir. 1997).

⁴¹ 7 U.S.C. § 499a(b)(9).

⁴² *Norinsberg*, 162 F.3d at 1197.

⁴³ *Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric.*, 497 F.3d 681, 686 (D.C. Cir. 2007).

was not actively involved and that he was either only a nominal officer [director, or more than ten-percent shareholder] or not an owner of a licensee within the meaning of the statute.”⁴⁴

II. Rebuttable Presumption

Per the 1995 amendment, PACA now provides a two-prong test for rebutting responsible connection.⁴⁵

[T]he first prong is that a petitioner must demonstrate by a preponderance of the evidence that the 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.⁴⁶

A. First Prong (Active Involvement)

First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities that resulted in a PACA violation.⁴⁷ Although PACA does not define “active involvement,”⁴⁸ the Judicial Officer adopted the following standard for determining whether a person was actively involved in the activities resulting in a PACA violation:

A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner

⁴⁴ *Norinsberg*, 162 F.3d at 1197.

⁴⁵ See *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 611 (D.C. Cir. 2011) (“[U]nder the current version of the statute, it is presumed that an officer of a corporation is responsibly connected to the violating company unless the officer can show that he or she (1) was not actively involved in the PACA violations, and (2) was either a nominal officer of the violating PACA licensee or a non-owner of a licensee that was the alter ego of its owners.”).

⁴⁶ *Salins*, 57 Agric. Dec. 1474, 1487-88 (U.S.D.A. 1998).

⁴⁷ 7 U.S.C. § 499a(b)(9) (“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 . . .”).

⁴⁸ *Orloff*, 62 Agric. Dec. 281, 290 (U.S.D.A. 2003) (“The PACA does not define the term *actively involved in the activities resulting in a violation of the PACA*, and there is no legislative history revealing Congressional intent with respect to the meaning of the term.”).

demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of *ministerial functions only*. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she *did not exercise judgment, discretion, or control* with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.⁴⁹

In evaluating active involvement, the focus is on the petitioner's relationship to the violating entity during the period when PACA was violated.⁵⁰

A person may exercise judgment, discretion, or control in a corporation even if he or she is not a principal decision-maker.⁵¹ Participation in the day-to-day management of the business, for example, may suffice to constitute active involvement.⁵² This is especially true where an individual continues to buy or sell produce knowing that suppliers have not been paid.⁵³ Other functions that may cause an individual to be actively involved in the failure to pay promptly for produce include "corporate finance, . . . check writing, and choosing which debt-in-arrears to pay."⁵⁴

⁴⁹ Norinsberg, 58 Agric. Dec. 604, 610-11 (U.S.D.A. 1999) (Decision on Remand) (emphasis added).

⁵⁰ See Finch, 73 Agric. Dec. 302, 318 (U.S.D.A. 2014) ("Thus, Mr. Finch and Mr. Honeycutt's relationship to Javier Bueno's embezzlement, which occurred prior to Third Coast's violations of the PACA, is not at issue. Instead, the issue is Mr. Finch and Mr. Honeycutt's relationship to Third Coast during the period when Third Coast violated the PACA."); Mealman, 74 Agric. Dec. 1987, 1991 (U.S.D.A. 2005) (Order Den. Pet. to Reconsider).

⁵¹ See Perfectly Fresh Farms, Inc., 58 Agric. Dec. 503, 509 (U.S.D.A. 2009), *aff'd*, 692 F.2d 960 (9th Cir. 2012).

⁵² See *id.*

⁵³ See *id.* at 531 (citing Orloff, 62 Agric. Dec. 281, 290-92 (U.S.D.A. 2003) (Order Den. Pet. for Recons.)) ("In particular, the buying and selling of produce at a time when produce sellers are not getting paid pursuant to the requirements of the PACA has been held to constitute active involvement in activities resulting in a violation of the PACA.").

⁵⁴ Beucke, No. 04-0009, 2006 WL 2850276, at *11 (U.S.D.A. Sept. 28, 2006), *aff'd*, 314 Fed. App'x 10 (10th Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009). But see Norinsberg, 58 Agric. Dec. 604, 618 (U.S.D.A. 1999) (Decision and Order on Remand) (finding that the petitioner's "signing checks was a ministerial function only" where the checks were already made out as to payee and amount and the petitioner signed at the direction of the president when the president was not available).

Lack of participation, on the other hand, does not usually constitute active involvement.⁵⁵ “Generally, active involvement in activities in violation of PACA requires more than a ‘failure to act.’”⁵⁶ For example, in *Petro*,⁵⁷ the Judicial Officer held although the petitioner could have infused the company with capital after learning of its failure to pay for produce, his failure to do so “[did] not constitute active involvement in activities resulting in that company’s failure to pay for produce in accordance with the PACA.”⁵⁸

B. Second Prong (Alter Ego / Nominal Status)

Upon satisfying the first prong of the test, a petitioner must then demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners; or (2) the petitioner was only nominally a partner, officer, director, or shareholder of the violating PACA licensee or entity subject to a PACA license.⁵⁹

In *Bell v. Department of Agriculture*,⁶⁰ the Court of Appeals for the District of Columbia Circuit articulated “two sets of circumstances under which a petitioner may rebut the presumption that he is responsibly connected with a corporate violator because he is an officer, director, or shareholder.”⁶¹

The first involves cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality. . . . [A]n officer might meet this test by showing that the sole

⁵⁵ See *Maldonado v. Dep’t of Agric.*, 154 F.3d 1086, 1088 (9th Cir. 1998) (rejecting the dissent’s “insistence that liability may be predicated on a failure to counteract or obviate the fault of others”); *Petro*, 71 Agric. Dec. 1259, 1261 (U.S.D.A. 2012) (Order Den. Pet. to Reconsider as to Bryan Herr) (holding that the petitioner’s failure to exercise control over violating corporation’s finances did not constitute active involvement in activities resulting in PACA violations).

⁵⁶ *Id.*

⁵⁷ 71 Agric. Dec. 457 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr).

⁵⁸ *Petro*, 71 Agric. Dec. 1259, 1261 (U.S.D.A. 2012) (Order Den. Pet. to Reconsider as to Bryan Herr).

⁵⁹ 7 U.S.C. § 499a(b)(9).

⁶⁰ 39 F.3d 1199 (D.C. Cir. 1994).

⁶¹ *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994).

stockholder of the corporation effectively retained the decision making power in all aspects of corporate decision making . . . so that the company was not really a corporation within the meaning of 7 U.S.C. § 499a(9), but rather a sole proprietorship.⁶²

The second way of rebutting the presumption is for the petitioner to prove that at the time of the violations he was only a *nominal* officer, director, or shareholder. This he could establish by proving that he lacked an actual, significant nexus with the violating company. . . . Where responsibility was not based on the individual's personal fault, . . . it would have to be based at least on his failure to counteract or obviate the fault of others.⁶³

Well prior to the 1995 amendment of § 499a(b)(9), the D.C. Circuit had held that an individual could rebut the “responsibly connected” presumption by showing that he or she was only a nominal officer, director, or shareholder of the violating corporation.⁶⁴ In *Quinn v. Butz*,⁶⁵ the D.C. Circuit “established that being a director, officer, or ten percent shareholder was only *prima facie* evidence that one was ‘responsibly connected’ to a company which had violated the Act.”⁶⁶ Further, “[t]he *Quinn* court held the statute was not intended to establish absolute liability” and that “[a] finding of liability under section 499h of the Act must be premised upon personal fault or the failure to ‘counteract or obviate the fault of others.’”⁶⁷

Several years later in *Minotto v. USDA*,⁶⁸ the D.C. Circuit instituted what became known as the “actual, significant nexus” test.⁶⁹ Under that standard, an individual could prove that he or she was only a nominal officer or director by establishing that he or she “lacked any ‘actual,

⁶² *Id.* (internal quotations omitted).

⁶³ *Id.* (internal quotations omitted).

⁶⁴ *Hart v. Dep’t of Agric.*, 112 F.3d 1228, 1231 (D.C. Cir. 1997) (citing *Bell*, 39 F.3d at 1201)); *see supra* note 37 and accompanying text.

⁶⁵ 510 F.2d 743 (D.C. Cir. 1975).

⁶⁶ *Hart*, 112 F.3d at 1231 (quoting *Quinn v. Butz*, 510 F.2d 743, 758 (D.C. Cir. 1975)); *see Faour v. U.S. Dep’t of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) (stating that *Quinn v. Butz* was “the first time” a court determined “that the presumption was rebuttable rather than absolute”).

⁶⁷ *Id.* (quoting *Quinn*, 510 F.2d at 758).

⁶⁸ 711 F.2d 406 (D.C. Cir. 1983).

⁶⁹ *Minotto v. U.S. Dep’t of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983) (“The finding that an individual was ‘responsibly connected’ must be based upon evidence of an actual, significant nexus with the violating company.”).

significant nexus with the violating company’ and, therefore, neither ‘knew [n]or should have known of the [c]ompany’s misdeeds.”⁷⁰ Where responsibility was not based upon an individual’s personal fault, it could be based upon his or her failure to counteract or obviate the fault of others.⁷¹

Then, the D.C. Circuit revisited the “actual, significant nexus” test in *Taylor v. USDA*.⁷² There, the court ruled that an officer of the offending company is not considered to be “responsibly connected” to a violating licensee—even where the statutory ten-percent-shareholder threshold is met—if that person was not actively involved in the PACA violation and was “powerless to curb it.”⁷³ The court clarified:

Under the “actual, significant nexus” test, “*the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, than whether the individual has exercised real authority.*” Although we have consistently applied the ‘actual, significant nexus’ test, our cases make clear that what is really important is whether the person who holds the title of an officer had *actual and significant power and authority to direct and affect company operations.*⁷⁴

The Judicial Officer abandoned the “actual, significant nexus” test following the D.C. Circuit’s decision in *Taylor*. On remand, the Judicial Officer stated:

Taylor makes clear to me that I was remiss in failing to abandon the “actual, significant nexus” test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the “actual, significant nexus” test, the power to curb PACA violations, or the power to direct and affect operations. In future cases that come before me, I do not intend to apply the “actual, significant nexus” test, as described in *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). *Instead, my “nominal inquiry” will be limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder “in name only.”* While power to curb PACA violations or to direct and affect

⁷⁰ Hart v. Dep’t of Agric., 112 F.3d 1228, 1231 (D.C. Cir. 1997) (quoting *Minotto*, 711 F.2d at 408-09).

⁷¹ Bell v. Dep’t of Agric., 39 F.3d 1199, 1201 (D.C. Cir. 1994).

⁷² 636 F.3d 608 (D.C. Cir. 2011).

⁷³ *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 610 (D.C. Cir. 2011) (citing *Bell*, 39 F.3d at 1202); *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir. 1975)).

⁷⁴ *Taylor*, 636 F.3d at 615 (emphasis added) (quoting *Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted)).

operations may, in certain circumstances, be a factor to be considered under the “nominal inquiry,” it will not be the *sine qua non* of responsible connection to a PACA-violating entity.⁷⁵

A petitioner will now rebut the “responsibly connected” presumption by demonstrating, by a preponderance of the evidence, that he or she was an officer, director, or shareholder “in name only.”⁷⁶

Although the Judicial Officer has not explicitly announced what it means to be an officer, director, or stockholder “in name only,” the D.C. Circuit described the vice-president of a corporation as merely an officer “on paper” where he was never assigned duties or paid additional salary as vice-president, never performed services as vice-president, never attended meetings of the board of directors, never “had anything to do with policy or business decisions,” and did not have access to the company’s records or know of the company’s financial difficulties.⁷⁷ The court stated: “These circumstances . . . demonstrate not only that [the vice-president] did not to any extent participate in the management of the company’s affairs, but also that he was totally without power to do so.”⁷⁸

Since the Judicial Officer’s abandonment of the “actual, significant nexus” test, few cases have addressed the subject of nominal shareholders. Prior cases established that “in order to show that a petitioner’s stock ownership was nominal, he or she would have to demonstrate by a preponderance of the evidence that he or she did not have an ‘actual, significant nexus’ with the

⁷⁵ Taylor, Nos. 06-0008, 06-0009, 2012 WL 9511765, at *6 (U.S.D.A. Dec. 18, 2012) (Modified Decision and Order on Remand) (emphasis added).

⁷⁶ See *Nominal*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining the adjective “nominal” as “[e]xisting in name only” and offering the example “<he was the nominal leader but had no real authority>”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1534 (2002) (defining the noun “nominal” as “an individual that exists or is something in name or form but not in reality”).

⁷⁷ *Quinn*, 510 F.2d at 752-53.

⁷⁸ *Id.*

corporation during the violations period.”⁷⁹ In determining whether a shareholder was nominal, the Judicial Officer would consider factors such as his or her overall business background and knowledge, active participation in corporate decision-making, and knowledge of the company’s financial condition.⁸⁰ While these factors may have been appropriate under the “actual, significant nexus” test that contemplated the power and authority to curb PACA violations, they prove less useful under the new “in name only” standard hinging on, in the D.C. Circuit’s words, “actual and significant power and authority to direct and affect company operations.”⁸¹

Further, before the “in name only” inquiry replaced the “actual, significant nexus” test, it was often stated that “ownership of a substantial percentage of stock alone [was] very strong evidence that [an individual] was not a nominal shareholder.”⁸² The Judicial Officer acknowledged: “While a petitioner who owns stock may demonstrate that he or she was only nominally a shareholder of a corporation or association, it is extremely difficult to do so when the petitioner owns a substantial per centum of the outstanding stock of the corporation or

⁷⁹ *Justice*, 65 Agric. Dec. 1325, 1332 (U.S.D.A. 2006).

⁸⁰ *Id.* at 1333-34; *see also* *Beucke v. U.S. Dep’t of Agric.*, 314 Fed. App’x 10, 12 (9th Cir. 2008) (holding that the petitioner, a twenty-percent stockholder of a violating company, “was only nominally an officer” and had no “actual, significant nexus” with the violating company where he “had no duties or responsibilities in his named roles; did not attend the organizational meeting or subsequent formal company meetings; received only nominal pay (\$1,500) in the company’s first year; and signed no checks within the violations period”).

⁸¹ *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 618 (D.C. Cir. 2011); *see* *Taylor*, Nos. 06-0008, 06-0009, 2012 WL 9511765, at *6 (U.S.D.A. Dec. 18, 2012) (Modified Decision and Order on Remand); *see also* *Beucke*, 314 F. App’x at 12; *Justice*, 65 Agric. Dec. at 1335 (stating that, as a “major shareholder in the company,” the petitioner “knew, or should have known, that the company was delinquent in paying for its purchases, and should have taken prompt measures to correct this situation.”); *Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987).

⁸² *Kocot*, 57 Agric. Dec. 1517, 1545 (U.S.D.A. 1998); *see also* *Tuscany Farms*, 67 Agric. Dec. 1428, 1438 (D.C. Cir. 2008) (“I agree with the United States Court of Appeals for the District of Columbia Circuit and hold that under the PACA, absent rare and extraordinary circumstances, ownership of more than 10 percent of the outstanding shares of a licensed entity preclude a finding that the holder of that substantial of an interest in the PACA licensee is a nominal shareholder.”).

association.”⁸³ A “substantial” share ranged from twenty to sixty percent,⁸⁴ with majority ownership considered particularly indicative of responsible connection.⁸⁵

In more recent decisions, however, the Judicial Officer has found shareholders of up to as much as twenty-five percent of a violating entity’s outstanding stock to be nominal.⁸⁶ In *Petro*,⁸⁷ for example, the Judicial Officer held that the petitioner was only nominally a twenty-five-percent shareholder even though a stock-purchase agreement appeared to authorize the petitioner to curb the violating company’s PACA violations.⁸⁸

On its face, the Stock Purchase Agreement gives Mr. Herr the authority to curb Houston’s Finest’s PACA violations. However, Mr. Herr introduced ample evidence to demonstrate that the Stock Purchase Agreement did not reflect Mr. Herr’s actual authority within Houston’s Finest. Instead, the record establishes that Mr. Herr, based upon his relationship with his partner, Mr. Petro, merely infused Houston’s Finest with capital. In exchange . . . [Mr.] Herr executed the July 10, 2002, Stock Purchase Agreement, which Mr. Herr did not negotiate or draft (Tr. 159). Mr. Herr never performed any duties or exercised any authority under the

⁸³ *Kocot*, 57 Agric. Dec. at 1545; see, e.g., *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1202 (D.C. Cir. 1994) (stating that in cases involving substantial shareholders, “the likelihood of their being found ‘nominal’ was remote”).

⁸⁴ See *Veg-Mix, Inc.*, 832 F.2d at 611 (holding that sixty-percent majority ownership was enough to support a finding of responsible connection); *Martino v. U.S. Dep’t of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding that twenty-two percent ownership of a violating company’s stock, along with the fact that no one coerced the petitioner into his position of power, was enough to support a finding of responsible connection); *Thomas*, 59 Agric. Dec. 367, 385-86 (U.S.D.A. 2000) (holding that forty-nine-percent shareholder had “actual, significant nexus” to violating company during violations period and was not nominal); *Kocot*, 57 Agric. Dec. at 1544-45 (holding that thirty-eight-percent stock ownership “alone is very strong evidence that [the petitioner] was not a nominal shareholder”) (“[T]he United States Court of Appeals for the District of Columbia Circuit has stated on several occasions that ownership of approximately 20 percentum or more of the stock of a corporation is enough to support a finding of responsible connection.”); *Rodgers*, 56 Agric. Dec. 12919, 1956 (U.S.D.A. 1997) (stating that the petitioner’s thirty-three-percent interest in violating entity’s outstanding stock, alone, was very strong evidence that the petitioner was responsibly connected with violating entity), *aff’d per curiam*, 142 F.3d 920 (D.C. Cir. 1998).

⁸⁵ See *Veg-Mix, Inc.*, 832 F.2d at 611 (“Majority ownership obviously suffices [for a finding of responsible connection].”).

⁸⁶ See *Petro*, 71 Agric. Dec. 600, 607-09 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr) (affirming Chief Administrative Law Judge’s conclusion that the petitioner, who owned twenty-five percent of the violating entity’s outstanding stock, demonstrated by a preponderance of the evidence that he was only a nominal shareholder).

⁸⁷ 71 Agric. Dec. 600 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr).

⁸⁸ *Petro*, 71 Agric. Dec. 1259, 1265 (U.S.D.A. 2012) (Order Den. Pet. to Reconsider Decision as to Bryan Herr) (internal citations to record omitted).

Stock Purchase Agreement (Tr. 160-67), and Mr. Herr demonstrated by a preponderance of the evidence that, despite the terms of the Stock Purchase Agreement, he lacked the actual authority to curb Houston's Finest's violations of the PACA.⁸⁹

Similarly, in *Beucke v. U.S. Department of Agriculture*,⁹⁰ the Ninth Circuit ruled that an individual with a twenty-percent ownership interest was a nominal shareholder because he “had no duties or responsibilities in his named roles; did not attend the organizational meeting or subsequent formal company meetings; received only nominal pay (\$1,500) in the company's first year; and signed no checks within the violations period.”⁹¹ And the court concluded that the same individual—who was a thirty-three-percent shareholder of another corporation—failed to demonstrate that he was only “nominally a partner, officer, director, or shareholder” of the second corporation.⁹² “Instead,” the court explained, “Beucke had a stock certificate issued in his name; attended the formal [company] meetings; was authorized to draw funds on [the company's] bank accounts; and signed 20 checks for [the company] during the violations period.”⁹³

Procedural Background

Veg Liquidation, Inc., formerly known as Allens, Inc. (this entity under either name will be herein referred to as “Allens, Inc.”),⁹⁴ was a major, longstanding Arkansas business closely

⁸⁹ Petro, 71 Agric. Dec. 1259, 1265 (U.S.D.A. 2012) (Order Den. Pet. to Reconsider Decision as to Bryan Herr).

⁹⁰ 314 Fed. App'x 10 (9th Cir. 2008).

⁹¹ *Beucke v. U.S. Dep't of Agric.*, 314 Fed. App'x 10, 12 (9th Cir. 2008); *cf.* Rodgers, 56 Agric. Dec. 1919, 1945, 1954-55 (U.S.D.A. 1997) (holding that the petitioner, who owned thirty-three percent of the violating company's stock, could not establish that he was a nominal officer and stockholder where he was aware of unlawful employment in the company, signed corporate checks, and “played a major role in making corporate decisions”).

⁹² *Beucke*, 314 Fed. App'x at 12.

⁹³ *Id.*

⁹⁴ “Allens, Inc.” is consistent with the caption of the Department's disciplinary complaint against this entity and with its name at the time of the alleged violations.

associated with the Allen family.⁹⁵ For much of its existence it was largely engaged in the canning of fruits and vegetables.⁹⁶ After an expansion into frozen foods, Allens, Inc. became the subject to bankruptcy.⁹⁷

Allens, Inc., Docket No. 14-0109, was a PACA disciplinary proceeding brought against Allens, Inc. by AMS for failure to promptly pay producers during the violations period.⁹⁸ It was resolved by Administrative Law Judge Janice Bullard's October 8, 2015 "Decision and Order; Order Consolidating Matters for Hearing" ("October 8, 2015 Decision"), which was made on the record without a face-to-face hearing and found "Allens, Inc., ha[d] committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b), and Respondent's PACA license shall be revoked."⁹⁹ Judge Bullard found that Allens, Inc. during the violations period had failed to promptly pay — in fact, pay at all — \$9,759,843.86 to forty produce sellers for 2,312 lots of perishable agricultural commodities. The Hearing Clerk's records indicate there was no appeal of or further action upon this Decision, so it became final and not subject to appeal.¹⁰⁰

Based upon her review of the materials included in Exhibits RX-1 through RX-9,¹⁰¹ on January 30, 2015, Karla Whalen, then-Director of the PACA Division of the Specialty Crops Program, Agricultural Marketing Service ("Director"), issued determinations that Petitioner; Petitioner's father, Roderick Allen; Petitioner's brother, Joshua Allen ("Josh Allen"); and Mark Towery were each responsibly connected to Allens, Inc. All four individuals petitioned for

⁹⁵ See Tr. 16-18.

⁹⁶ Tr. 16-17.

⁹⁷ Tr. 17-18.

⁹⁸ The violations period is October 3, 2013, through January 6, 2014. *Allens, Inc.*, 74 Agric. Dec. 488, 488 (U.S.D.A. 2014); Tr. 9 (Petitioner's counsel).

⁹⁹ *Allens, Inc.*, 74 Agric. Dec. 488, 497 (U.S.D.A. 2015).

¹⁰⁰ 7 C.F.R. § 1.142(c)(4).

¹⁰¹ See Tr. 400-421.

review and reversal of the Director's Determination by an Administrative Law Judge as provided in Section 47.49 of the Rules of Practice.¹⁰²

On August 17, 2016, both the AMS determination as to Mark Towery and his petition for review of that determination were withdrawn.¹⁰³ On December 9, 2016, the petitions for review of Roderick Allen and Josh Allen were withdrawn.¹⁰⁴ This Decision goes only to whether Nicholas Allen is responsibly connected. I make no ruling as to Roderick Allen and Josh Allen. The AMS determinations that those two individuals are responsibly connected are now final.

The Director made no final determinations that any other officers or directors were responsibly connected, in particular the two directors and the CRO appointed at the behest of the secured creditors to whom the Petitioner and his father and brother assigned their authority as officers, directors, and shareholders.¹⁰⁵ Although AMS initially found the two directors to be responsibly connected to Allens, Inc., that determination was subsequently withdrawn.¹⁰⁶

A hearing was held before the undersigned on December 13 and 14, 2016 in Fayetteville, Arkansas. Josh Allen,¹⁰⁷ Nicholas Allen (Petitioner),¹⁰⁸ and Lori Sherrell¹⁰⁹ were called as witnesses by Petitioner. AMS called Josephine Elizabeth Jenkins.¹¹⁰

¹⁰² 7 C.F.R. § 47.49. The docket numbers for Roderick Allen, Josh Allen, and Mark Towery were 15-0083, 15-0084, and 15-0095, respectively.

¹⁰³ See August 18, 2016 "Order Canceling Hearing as to Petitioner Mark Towery and Removing Reference to Petitioner Mark Towery and Docket No. 15-0095 From These Proceedings."

¹⁰⁴ See December 9, 2017 order captioned "Cancellation of Hearing in Docket Nos. 15-0083 and 15-0084 Due to Withdrawal of Petitions by Roderick and Joshua Allen." See also Tr. 456-457. Those individuals were required to serve employment sanctions as described in 7 U.S.C. §499h(b). *Id.*; Petitioner IB at 2, n.1.

¹⁰⁵ See Tr. 397-398; PIX-6.

¹⁰⁶ Tr. 397-398, 429-430.

¹⁰⁷ Tr. 14-165.

¹⁰⁸ Tr. 167-234.

¹⁰⁹ Tr. 257-389.

¹¹⁰ Tr. 391-480.

A total of fifty-six exhibits (marked as PIX-1 through PIX-56) were admitted into the record on behalf of Petitioner. AMS presented the Certified Agency Record compiled for the determination as to Nicholas Allen (marked as RX 1 through RX 9), which is part of the record pursuant to section 1.136(a) of the Rules of Practice.¹¹¹ AMS presented an additional exhibit (marked as RX 18) from the Certified Agency Record compiled for the determination as to Josh Allen, which was also admitted into the record.¹¹²

A February 9, 2017 date was established for proposed transcript corrections, but the Hearing Clerk's records do not indicate that any were filed.

Pursuant to the January 17, 2016 procedural schedule stipulated to by the Parties and my January 18, 2017 Order approving it, Petitioner filed his Proposed Findings of Fact, Conclusions of Law, Brief and Order on April 11, 2017 ("Petitioner Initial Brief" or "IB") and on the same day AMS filed its Respondent's Brief ("AMS Initial Brief" or "IB"). Consistent with my May 11, 2017 grant of a joint request for an extension of the reply brief deadline, on May 31, 2017 Petitioner and AMS each filed reply briefs ("Reply Brief" or "RB").

DISCUSSION

Many of the "facts" are not in dispute between the parties. The legal effects of those facts are greatly in dispute.

Petitioner contends even though he was still on the company's books and was listed formally elsewhere including in papers on file with AMS as an officer, a director, and more than ten-percent shareholder in Allens, Inc. during the violations period in which that company failed to make full prompt payments to sellers of perishable agricultural products and thus was presumably responsibly connected to that company within the meaning of PACA, he has

¹¹¹ 7 C.F.R. § 1.136(a).

¹¹² Tr. 249.

rebutted that presumption by showing both: 1) he had no activities during the violations period that resulted in PACA violations, and 2) was only nominally an officer, director, and more than ten-percent shareholder in the company during that time owing to his, prior to that period, having signed over his authority as an officer, director, and shareholder to two other directors and a chief restructuring officer (“CRO”).¹¹³ Petitioner asserts that any activity on his part during the violation period was solely of a ministerial nature.¹¹⁴ Petitioner contends that his signing over of rights and authority to other directors and the CRO was prior to the violations period, and, thus, because of that timing, is not, under PACA, an activity that could be considered as resulting in the violations.¹¹⁵

Moreover, Petitioner contends his signing over authority to other directors and officers did not result in the violations within the meaning of PACA, because he did not control or effect the actions of those directors and officers that resulted in the violations.¹¹⁶ They were not his agents and acted on their own accord.¹¹⁷ He presented evidence he had no expectation that the secured creditors’ directors and CRO intended to violate PACA.¹¹⁸ Petitioner contends that under Arkansas law he could cede his authority as an officer, director, and more than ten-percent shareholder to others, and thereby effectively become a nominal officer, director, and

¹¹³ Tr. 10-11 (Petitioner’s counsel).

¹¹⁴ See Petitioner IB at 56-57; Tr. 85-86, 93-96, 182-84. During that time, Petitioner, in his role as executive vice president of sales and marketing, “served at the pleasure of CRO Hickman for employee morale purposes antecedent to a sale of assets in bankruptcy.” Petitioner IB at 57; Tr. 184. Petitioner admits that he attended “brief” board meetings as a director; however, he states that at these meetings he would not be provided with any information or presented with any business concerning the company’s accounts payable, nor would he be consulted as a director with respect to the company’s cash management. Tr. 186-187.

¹¹⁵ See Petitioner IB at 61-62; Petitioner RB at 32.

¹¹⁶ See Petitioner IB at 38-39, 42, 55-59, 61-63; Petitioner RB at 32-33.

¹¹⁷ See Petitioner IB at 56-57, 61-62, 66.

¹¹⁸ Tr. at 93-97, 119-122, 185-189, 194-197.

shareholder.¹¹⁹ Petitioner contends that PACA does not supersede Arkansas law in any respect in these circumstances.¹²⁰

AMS contends that under PACA Petitioner was “responsibly connected” to Allens, Inc. during the relevant period. AMS contends that the signing over of certain authority to representatives of secured parties prior to the relevant period, in the current circumstances, did not obviate that Petitioner was “responsibly connected” to Allens, Inc. during the relevant period and is in fact an action causing the violations.¹²¹ Indeed, AMS argues that Petitioner’s signing over of authority to the secured creditors’ directors and officers was an activity that resulted in the PACA violations even though it took place before the violations period.¹²² AMS maintains that an individual can be held to be responsibly connected for activities that took place before the violations period that resulted in violations of PACA during the violations period.¹²³ AMS asserts that by acting under authority ceded to the secured creditors’ directors and CRO, those directors and the CRO were effectively agents of the Petitioner.¹²⁴ AMS contends that even if under Arkansas law Petitioner could legally and effectively cede his authority to the secured creditors’ directors and CRO, that Arkansas law could not supersede PACA and cause Petitioner to become a nominal officer, director, and shareholder as a result of ceding his authority to others.¹²⁵

I find that under PACA and applicable regulations and precedents, Petitioner demonstrated by a preponderance of the evidence he was not responsibly connected to Allens,

¹¹⁹ See Petitioner IB at 62-63.

¹²⁰ See Petitioner IB at 42, 66.

¹²¹ See Respondent IB at 24-25.

¹²² See Respondent IB at 24-25; RB at 17.

¹²³ See Respondent IB at 18, 26-27; Respondent RB at 6.

¹²⁴ See Respondent IB at 18; Respondent RB at 12, 16-17.

¹²⁵ See Respondent IB at 28-30; Respondent RB at 11, 18-19.

Inc. during the relevant period and should not be subject to PACA employment sanctions. The AMS determination is reversed.

I. PETITIONER WAS NOT ACTIVELY INVOLVED IN ACTIVITIES RESULTING IN PACA VIOLATIONS.

Petitioner has established by a preponderance of the evidence that he did not actively participate in any activities resulting in a PACA violation. Thus, he met the requirement of the first prong for a finding of not “responsibly connected.” As previously discussed, a “petitioner who participates in activities resulting in a violation of PACA is actively involved in those activities” unless he or she “demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only.”¹²⁶ Where a petitioner proves by a preponderance of the evidence he or she “did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA,” he or she will not be found to have been actively involved and will “meet the first prong of the responsibly connected test.”¹²⁷

In this case, the PACA violation was Allens, Inc.’s failure to pay forty produce suppliers under 7 U.S.C. § 499b(4).¹²⁸ The record shows by a preponderance of the evidence that Petitioner did not participate in that violation and did not, at any time during the violations period, exercise judgment, discretion, or control regarding the business.

¹²⁶ Norinsberg, 58 Agric. Dec. 604, 610-11 (U.S.D.A. 1999) (Decision on Remand).

¹²⁷ *Id.*

¹²⁸ See Respondent IB at 11 (“During the period of October 3, 2013 through January 6, 2014, Allens, Inc. failed to make full payment promptly of the agreed purchase price for 2,312 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce from forty (40) sellers, in the total amount of \$9,759,843.86.”).

The evidence is that Petitioner, himself, took no action at all related to the violations during the violations period. He so testified.¹²⁹ Petitioner signed no checks and had no role in the purchase or payment of produce.¹³⁰ He specifically testified that no producers contacted him regarding payments, and he did not contact them.¹³¹ He testified that in his role as an officer of the company he dealt with customers for Allens, Inc.'s products and operations of the company's facilities and employees in creating those products and not with the producer suppliers of produce.¹³² This lends credibility to the testimony he did not discuss payments during the violations period with any producer¹³³ and suggests that he was not retained as an officer, director, and shareholder of record to indicate to producers he remained in those roles for the company and therefore there being paid was more likely, or anything of that sort. He testified that he was not otherwise involved in any discussions or payments or lack of payments to producers during the violations period.¹³⁴ The preponderance of the evidence is that Petitioner exercised no judgment, discretion, or control regarding the corporation or its payment decisions or process during the relevant period.¹³⁵ This evidence was not contradicted.

¹²⁹ Tr. 184-189.

¹³⁰ Tr. 163, 165, 185-187, 189-190, 331, 336. *Cf. Perfectly Fresh Farms v. U.S. Dep't of Agric.*, 692 F.3d 960, 972 (9th Cir. 2012) (holding that the petitioner "was engaged in activity involving judgment, discretion, or control" where he would call suppliers in response to orders placed by customers, negotiate the terms of the orders to allow produce to flow from suppliers to the company's customers, and put the purchase order in a computer system for an employee to fill out) (internal quotation omitted); *Orloff*, 62 Agric. Dec. 281, 290 (U.S.D.A. 2003) (holding that the petitioner's actions were not ministerial where she "decided whether to make purchases of frozen foods . . . and chose to do so even though she knew or should have known that [the company] was not paying its produce suppliers").

¹³¹ Tr. 177, 185-186.

¹³² Tr. 170.

¹³³ Tr. 170, 185-186, 197, 226.

¹³⁴ Tr. 186-187, 194-195.

¹³⁵ *Cf. Perfectly Fresh Farms*, 692 F.3d at 972 (holding that the petitioner was actively involved in activities resulting in PACA violations where he "continued to purchase produce despite knowing that [the company] was unable to pay its suppliers in a timely fashion").

AMS argues that even if Petitioner's "overall management of Allens did not constitute active involvement in the activities of Allens resulting in violations," Petitioner "should be considered actively involved in the activities that resulted in the company's violations *solely by virtue of his extensive powers as executive officer and director, and his ownership in the company.*"¹³⁶ Active involvement, however, generally "requires more than a 'failure to act.'"¹³⁷ AMS fails to identify what Petitioner's alleged "extensive powers" were during the relevant period and how they would apply to the active-involvement analysis.

Additionally, AMS contends that an individual's activities outside the violations period can meet the first prong of the PACA standard for responsibly connected, if those activities result in violations during the violations period.¹³⁸ AMS argues that in these circumstances Petitioner's assignment of officer, director, and shareholder authority to the secured creditors' directors and CRO prior to the violations period was such an activity in that Petitioner's assignment enabled the secured creditors' directors to act so that Allens, Inc. violated PACA.¹³⁹ I find here that the assignment of authority does not meet the first prong of the PACA "responsibly connected"

¹³⁶ Respondent IB at 18 (emphasis added).

¹³⁷ Petro, 71 Agric. Dec. 1259, 1261 (U.S.D.A. 2012) (Order Den. Pet. to Reconsider as to Bryan Herr); see Petro, 71 Agric. Dec. 600, 607 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr) (holding that, although the petitioner could have infused company with capital after learning of its failure to pay for produce, his failure to do so "[did] not constitute active involvement in activities resulting in that company's failure to pay for produce in accordance with the PACA"); Maldonado v. Dep't of Agric., 154 F.3d 1086, 1088 (9th Cir. 1998) ("The dissent's insistence that liability may be predicated on a 'failure to counteract or obviate the fault of others' picks up on some language in D.C. Circuit cases Congress rejected when it exempted nominal officers not actively involved in the activities resulting in a violation" 7 U.S.C. § 499a(b)(a).").

¹³⁸ See Respondent IB at 18, 23-24; Respondent RB at 16. Cf. Cerniglia, 66 Agric. Dec. 844, 858 (U.S.D.A. 2007) (holding that the petitioner "participated in the activities that *directly* caused [the company] to miss payments to produce vendors" where the petitioner, either "just before or during the [violations] period," borrowed \$40,000 from the company to purchase a new house, personally signed two checks to a computer company associated with his wife, entered into a contract on behalf of the company, deposited three checks totaling almost \$120,000 to an account over which he had exclusive control, and removed the funds from that account with no explanation) ("Each of these activities by Mr. Cerniglia deprived [the company] of money needed to pay its produce vendors.").

¹³⁹ See Respondent IB at 24-25; Respondent RB at 16.

standard.¹⁴⁰ Although AMS seems to assert that the assignment was a part of a scheme in which Petitioner was consciously involved to deprive producers of prompt payment,¹⁴¹ the record does not demonstrate that it was.¹⁴² Petitioner presented testimony that it was not.¹⁴³

The record also indicates that Allens, Inc. legally delegated financial control to the committee of independent directors. This was a valid transfer of management authority under Arkansas law, and AMS submits no argument to the contrary.

It is uncontroverted that Allens, Inc. was governed by the Arkansas Business Corporation Act of 1987 throughout the violations period.¹⁴⁴ The Act specifically authorizes a board of directors to create committees, to appoint board members to serve on those committees, and to delegate authority to those committees.¹⁴⁵ This is what occurred in the present case, by way of the August 5, 2013 resolutions that amended Allens, Inc.'s bylaws. Two directors, Mr. Boates and Mr. Newsted, were appointed and acted as a committee of board members under Arkansas law.¹⁴⁶ That committee—often referred to as the “Restructuring Committee” or “Special Committee”—was vested with the “sole and absolute authority . . . to evaluate and negotiate” a restructuring of Allens, Inc.¹⁴⁷ The Restructuring Committee could only be dissolved or have its

¹⁴⁰ See Finch, 73 Agric. Dec. 302, 318 (U.S.D.A. 2014) (holding that, where embezzlement by a third party was the proximate cause of the cash shortage that led to the company's failure to make prompt payment, the petitioners' relationship to the embezzlement—which occurred prior to the company's violations of PACA—was not at issue) (“Instead, the issue is [the petitioners'] relationship to Third Coast *during the period when Third Coast violated the PACA.*”) (emphasis added).

¹⁴¹ See Respondent IB at 27-28, 30-31.

¹⁴² Cf. Midland Banana & Tomato Co., Inc., 54 Agric. Dec. 1239, 1333 (U.S.D.A. 1995) (corporation's structure was a “legal façade” designed to circumvent PACA where respondent submitted a PACA application falsely stating that she was the sole officer, shareholder, and director of corporation to conceal identity of the true principal, her father).

¹⁴³ See Tr. 32-46, 49-68, 74-75, 173, 175-183, 188, 194-195.

¹⁴⁴ P1X-2 at 3; Tr. 23-24. The Act appears in the Arkansas Code as section 4-27-101 (ARK. CODE ANN. § 4-27-101 (2014)).

¹⁴⁵ ARK. CODE ANN. § 4-27-825(a),(c) (2014).

¹⁴⁶ P1X-9; Tr. 181.

¹⁴⁷ P1X-9 at 2-3; Tr. 70-71, 181.

authority removed in accordance with the terms of its authorizing resolution,¹⁴⁸ and the shareholder of Allens, Inc. waived its rights to amend the bylaws in any manner inconsistent with the authorizing resolution or to otherwise interfere with the Restructuring Committee's authority.¹⁴⁹

The amended bylaws constituted a contract between Allens, Inc. and its shareholder governing, *inter alia*, the board's power to appoint and designate the authority and term of the Restructuring Committee.¹⁵⁰ Per the modified bylaws, Allens, Inc. legally transferred all control over corporate finances to the Restructuring Committee. The Restructuring Committee had exclusive supervisory powers over the CRO, who was authorized to oversee, manage, and control cash disbursements.¹⁵¹ Whatever corporate authority Petitioner might have possessed prior to the violations period was displaced on August 5, 2013.

Moreover, I find that PACA does not displace Arkansas law regarding the transfer of authority within corporations. While neither party claims that PACA expressly preempts state law, AMS suggests that Petitioner subverted provisions of the Arkansas Code "to stand as a cover for circumventing the purposes of the PACA."¹⁵² The record, however, is that Petitioner had a legitimate reason for executing the August 5, 2013 resolutions—there was testimony that Allens, Inc.'s secured lenders threatened foreclosure multiple times, which would likely have resulted in produce suppliers going unpaid and 1,500 employees losing their jobs.¹⁵³ AMS presented no evidence to prove otherwise.

¹⁴⁸ ARK. CODE ANN. § 4-27-1020(b) (2014).

¹⁴⁹ *Hosp. & Benevolent Ass'n v. Ark. Baptist State Convention*, 176 Ark. 946, 4 S.W. 2d 933, 946-47 (1928) (shareholder waivers binding with respect to business and transactions within the statutory powers of the corporation).

¹⁵⁰ *Young v. Westark Prod. Credit Ass'n*, 222 Ark. 55, 60, 257 S.W.2d 274, 277 (1953).

¹⁵¹ P1X-9; Tr. 85, 189, 436.

¹⁵² Respondent RB at 30.

¹⁵³ Tr. 56, 183.

Further, I find that PACA is not inconsistent with the Arkansas law of corporations.¹⁵⁴ As the courts have long held,

[a] state law is preempted where Congress has legislated comprehensively to occupy an entire field of regulation, . . . as well as where, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]¹⁵⁵

AMS has made no such showing in this case,¹⁵⁶ and there is no evidence that Congress enacted PACA to preempt the state regulation of corporations.¹⁵⁷ As previously discussed, PACA was designed to “promote fair trading practices in the produce industry. Congress intended to protect small farmers and growers who were especially vulnerable to the practices of financially irresponsible commission merchants, dealers, and brokers[.]”¹⁵⁸ The record does not show that Arkansas corporation law frustrates these objectives as to this Petitioner in these circumstances. For instance, while the Arkansas corporate law here allowed a transfer of power from Petitioner

¹⁵⁴ See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (“The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be covered by state-law standards. Corporation law is one such area.”) (internal citations omitted); *Robertson v. Wegmann*, 436 U.S. 584, 593 (2001) (“A state statute cannot be considered ‘inconsistent’ with federal law merely because the statute causes the plaintiff to lose the litigation.”).

¹⁵⁵ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (internal citations and quotation marks omitted); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *Sickle v. Torres Advanced Enter. Solutions, LLC*, 884 F.3d 338, 346-47 (D.C. Cir. 2018); *Green v. Fund Asset Mgmt, LP* (245 F.3d 214, 230 (3d Cir. 2001)).

¹⁵⁶ See Respondent RB at 12; *Comm. Import Export S.A. v. Rep. of Congo*, 757 F.3d 321, 333 (D.C. Cir. 2014) (“The absence of a ‘clear and manifest’ preemptive purpose in [the relevant state law] reinforces the conclusion that preemption is not warranted[.]”).

¹⁵⁷ See *Burks v. Lasker*, 99 S. Ct. 1831, 1837 (1979) (“Corporations are creatures of state law, and it is state law which is the font of corporate directors’ powers.”); *Organic Consumers Ass’n v. Hain Celestial Group, Inc.*, 285 F. Supp. 3d 100, 104 (D.C. Cir. 2018) (“State law is not preempted . . . unless that was the clear and manifest purpose of Congress.”) (internal citation and quotation marks omitted); *Comm. Import Export S.A.*, 757 F.3d at 333 (“[T]he presumption against presumption . . . demands that . . . the court must assume ‘the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

¹⁵⁸ *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 135 (3d Cir. 2000) (internal citation omitted).

to other directors and a CRO, it did not eliminate PACA responsibility for all directors and officers. PACA itself provides that individuals can be officers, directors, and shareholders in name only. The fact that state corporate law allows an individual to accomplish that status does not render that state law inconsistent with PACA.

Petitioner is correct that “[r]ecognition of the operation of Arkansas law in this case neither offends nor is inconsistent with the policy underlying PACA.”¹⁵⁹ Unlike in *Sebastapol Meat Co. v. Secretary of Agriculture*,¹⁶⁰ a case cited by AMS,¹⁶¹ there were other individuals at Allens, Inc. who may have been responsible for the company’s PACA violations.¹⁶² Josh Allen and Roderick Allen voluntarily withdrew their petitions to challenge responsible connection.¹⁶³ AMS could have—but apparently chose not to—proceed against the “independent directors” of the Restructuring Committee or the CRO.¹⁶⁴ Why AMS did not pursue these other targets is beyond the scope of this Decision.

II. PETITIONER WAS ONLY A NOMINAL OFFICER, DIRECTOR, AND SHAREHOLDER DURING THE VIOLATIONS PERIOD.

As an initial matter, Petitioner does not contend that he “was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.”¹⁶⁵ Petitioner was a 19.31% owner of Allens, Inc. and therefore cannot meet this PACA proviso.¹⁶⁶ Thus, Petitioner

¹⁵⁹ Petitioner RB at 10.

¹⁶⁰ 440 F.2d 983 (9th Cir. 1971).

¹⁶¹ Respondent IB at 29.

¹⁶² See *Sebastapol Meat Co. v. Sec’y of Agric.*, 440 F.2d 983, 985 (9th Cir. 1971).

¹⁶³ Tr. 456-457.

¹⁶⁴ Tr. 429-430, 465-467, 478.

¹⁶⁵ 7 U.S.C. § 499a(b)(9).

¹⁶⁶ See *B.T. Produce Co.*, 66 Agric. Dec. 774, 832 (U.S.D.A. 2007), *aff’d*, Fed. App’x 78 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 2075 (2009); *Beucke*, 65 Agric. Dec. 1341, 1351 (U.S.D.A. 2006), *aff’d*, 314 Fed. App’x 10 (9th Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009); *Martindale*, 65 Agric. Dec. 1301, 1308 (U.S.D.A. 2006).

is left to rebut the statutory presumption of responsible connection by establishing that he was only nominally an officer, director, and shareholder of Allens, Inc.¹⁶⁷

I find that Petitioner demonstrated by a preponderance of the evidence that, during the violations period, he had no actual authority at Allens, Inc.; he thus had no actual and significant power and authority to direct and affect company operations.¹⁶⁸ The preponderance of the evidence is that he was an officer, director, and shareholder “in name only.”¹⁶⁹

a. Petitioner Was a Nominal Officer During the Violations Period.

The preponderance of the evidence is that, during the violations period, Petitioner’s position as an officer was only a nominal title. Although Petitioner was named executive vice president on Allens, Inc.’s PACA-license record and bankruptcy filings, this was a position without power.¹⁷⁰ Petitioner asserted that he retained the title during the violations period for

¹⁶⁷ Bell v. Dep’t of Agric., 39 F.3d 1199, 1201 (D.C. Cir. 1994); see Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric., 497 F.3d 681, 692 (D.C. Cir. 2007) (“[B]ecause [the petitioner] makes no claim that he was not an owner of a violating licensee . . . which was the alter ego of its owners, he must prove that he was only nominally . . . an officer, director and shareholder . . . to obtain the exception’s benefit.”) (internal quotations omitted).

¹⁶⁸ See *supra* note 76; Taylor v. U.S. Dep’t of Agric., 636 F.3d 608, 615 (D.C. Cir. 2011); Taylor, Nos. 06-0008, 06-0009, 2012 WL 9511765, at *6 (U.S.D.A. Dec. 18, 2012) (Modified Decision and Order on Remand).

¹⁶⁹ Petitioner “submits that the ‘actual, significant nexus’ test was incorrectly abandoned by the JO and remains the law, because of the importation of the ‘actual, significant nexus test’ into the 1995 PACA amendments codifying the rebuttable presumption standard.” (Petitioner IB at 61). Petitioner is incorrect. As the Judicial Officer has explicitly stated, Congress amended 7 U.S.C. § 499a(b)(9) “without reference to the ‘actual significant nexus’ test, the power to curb PACA violations, or the power to direct and affect operations.” Taylor, Nos. 06-0008, 06-0009, 2012 WL 9511765, at *6 (U.S.D.A. Dec. 18, 2012) (Modified Decision and Order on Remand) (emphasis added). Therefore, I reject Petitioner’s argument and find that the “in name only” standard applies.

¹⁷⁰ RX-1 at 3; RX-9 at 43, 136; P1X-12 at 5; Tr. 169, 180-186. See Taylor v. U.S. Dep’t of Agric., 636 F.3d 608, 617 (D.C. Cir. 2011) (“The nominal officer exception plainly contemplates situations in which a person’s title is not consistent with the person’s actual responsibilities.”).

purposes of maintaining company morale.¹⁷¹ “The law is clear . . . that an officer may be ‘nominal’ even though the corporate records . . . make him out to be a real one.”¹⁷²

In *Maldonado v. Department of Agriculture*,¹⁷³ for example, the Ninth Circuit found that the petitioner was an officer “in name only” where his duties never changed upon becoming president and he received no additional compensation.¹⁷⁴ Similarly, in *Bell v. Department of Agriculture*,¹⁷⁵ the D.C. Circuit used the term “vice-president on paper” to describe a petitioner whose “duties did not change,” “was paid no additional salary,” and “never had anything to do with policy or business decisions.”¹⁷⁶ Although Petitioner in this case continued to receive the same salary throughout the violations period, his duties as executive vice president were severely diminished; he had no part in managing the company’s affairs and lacked the power to do so.¹⁷⁷

The record demonstrates that Petitioner’s role as executive vice president of sales and marketing changed drastically with the corporate restructuring of Allens, Inc. in August 2013. While Petitioner never had any responsibilities with respect to the purchase or payment of produce or interacting with suppliers, he had significant duties as supervisor and leader of the Allens, Inc. internal sales force prior to the reorganization.¹⁷⁸ When asked about his responsibilities in that position, Petitioner testified:¹⁷⁹

A I oversaw the sales force, the internal sales
force and outside sales force, along with independent

¹⁷¹ Tr. 148, 169.

¹⁷² *Maldonado v. Dep’t of Agric.*, 154 F.3d 1086, 1088 (9th Cir. 1998) (quoting *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1202 (D.C. Cir. 1994) (internal quotation marks omitted)); *see also* *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 617 (D.C. Cir. 2011) (“[A]lthough an individual’s title can be relevant to a consideration of a person’s current situation, title alone is not dispositive.”).

¹⁷³ 154 F.3d 1086 (9th Cir. 1998).

¹⁷⁴ *Maldonado*, 154 F.3d at 1088.

¹⁷⁵ 39 F.3d 1199 (D.C. Cir. 1994).

¹⁷⁶ *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1202 (D.C. Cir. 1994) (discussing *Quinn v. Butz*, 510 F.2d 743, 753 (D.C. Cir. 1975)).

¹⁷⁷ Tr. 95, 180-181, 183-186, 224-225. *See Quinn*, 510 F.2d at 752-53.

¹⁷⁸ Tr. 176.

¹⁷⁹ Tr. 170-171.

brokers and direct contact with the customers.

Q And describe for the Court who were the customers of Allens, Inc.

A The customers would be the retailers throughout the nation and world, and also food service distributors.

Q As executive vice president of sales and marketing, did you have any responsibilities with respect to the purchasing of produce by the company?

A No, sir. I relied on the produce to be put into finished form and then thereafter, the sales team and myself we would sell the finished case to the customer.

Q Did you have any dealings with suppliers in your role as executive vice president of sales and marketing?

A No, sir.

Q And the responsibilities that you described in your role as executive vice president of sales and marketing were those consistent in description and scope from 2009 throughout your employment with the company?

A Yes, sir.

Q And did you have any responsibilities as executive vice president of sales and marketing with respect to the payment of suppliers?

A No, sir.

Following the corporate reorganization, however, Petitioner's authority as an officer was removed.¹⁸⁰ At hearing, Petitioner described his post-resolution role, stating, "I had no authority, but I did have a title, kind of like an officer without -- without a duty."¹⁸¹ More specifically, he testified:¹⁸²

[Q] As things moved forward after the

¹⁸⁰ Tr. 179, 182, 183-184. See Findings of Fact Nos. 98-102, 106, 129-131, 172.

¹⁸¹ Tr. 182.

¹⁸² Tr. 183-186.

appointment of the CRO and the Special Committee was there a change in your power and authority as executive vice president of sales and marketing?

A Yes, sir.

Q And how did things change with respect to your role in the company?

A I was, well, essentially with no power and no, no authority to executive[sic] new sales contracts or make a decision on behalf of the company without the CRO or his team members present. I essentially was there for, you know, moral support.

Q Did the members of the sales team continue to report to you?

A No. It was pretty quick[;] A&M would go directly to them around me and then that would start them going directly to A&M.

Q And moving even more specifically date wise I want to focus on the period of October 3, 2013, through January 6, 2014, okay?

A Okay.

Q Do you understand that this is the period of time that has been referred to during this hearing today, this trial today as the violations period?

A Yes, sir.

Q During the violations period, Nick, were you experiencing that change in your role as executive vice president of sales and marketing that you just described?

A Yes.

Q During that time were you having any involvement with the company's purchase of produce?

A No, sir.

Q You already testified that in your role as

executive vice president of sales and marketing you didn't deal with suppliers, correct?

A That is correct. We relied on the purchasing department.

Q But I want to ask you specifically. During the violations period did you have any interactions with suppliers of Allens, Inc.?

A No, sir.

Q Did you have any power or authority during the violations period to pay or cause to be paid any suppliers of produce to the company?

A No, sir.

....

[Q] . . . Were you provided accounts payable information in your role with the company during the violations period?

A No, sir.

Q Were you consulted with respect to the company's use of its cash and the decision about what bills would be paid and what bills would not be paid?

A No, sir.

Q And that's during the violations period?

A That is correct.

Q Would that also be the case after the appointment of the chief restructuring officer?

A Yes, sir.

Q And going forward from that time did it ever change? Did you ever get any of that information in your role with the company?

A From what time?

Q Moving forward into the early part of 2014.

A No, that never -- never did change.

The record indicates that Petitioner was not directly or significantly involved in the day-to-day operations of Allens, Inc. and did not “play[] an important role in the direction of the company.”¹⁸³ Petitioner’s duties were limited as a result of the August 5, 2013 management restructuring; he was excluded from policy and business decisions, given only limited access to corporate records, and was provided no information about accounts payable.¹⁸⁴ Members of the sales team no longer reported to Petitioner; A&M took over his supervisory role.¹⁸⁵ Furthermore, Petitioner did not sign corporate checks or execute documents on behalf of the company¹⁸⁶ during the violations period.¹⁸⁷ Although Petitioner was authorized to sign checks on the company’s utilities account, the evidence is that the authority was not unilateral and was

¹⁸³ Thomas, 59 Agric. Dec. 367, 387 (U.S.D.A. 2000). *See* Tr. 325, 328.

¹⁸⁴ Tr. 69-70, 85-86, 94, 184, 185-186, 187, 250. *See* Thomas, 59 Agric. Dec. 367, 387 (U.S.D.A. 2000); *cf.* Kocot, 57 Agric. Dec. 1517, 1541 (U.S.D.A. 1998) (holding that the petitioner was not a nominal president, director, or shareholder where, *inter alia*, he had “full access to a wide array of corporate documents,” provided the PACA Branch investigator with all necessary corporate financial documents, and “testified extensively regarding his review of [the] business and financial records after becoming . . . president”).

¹⁸⁵ Tr. 184.

¹⁸⁶ The exception appears to be a bank signature card for an account described as “Utilities Account Debtor in Possession Case #13-Bk-73597.” The signature card, marked as Exhibit RX-8, shows Petitioner’s signature over the title “Exec VP of Sales.” However, the record establishes that CRO Hickman initiated the establishment of that account, facilitated by treasurer Mark Towery. *See* Tr. 330, 354. Petitioner’s signature was not affixed to the checks issued for the Allens, Inc. debtor-in-possession utilities account established pursuant to the Allens, Inc. bankruptcy, and Petitioner had no role in managing or exercising authority with respect to this account. Tr. 331, 332, 361, 388. *See* Maldonado v. Dep’t of Agric., 154 F.3d 1086, 1089 (9th Cir. 1998) (holding that, although the petitioner was authorized as a co-signor on company account and signed five checks, he was a nominal officer) (“These facts indicate that Maldonado’s authority to sign checks had nothing to do with corporate policy.”); Minotto v. U.S. Dep’t of Agric., 711 F.2d 406, 409 n.4 (D.C. Cir. 1983) (holding that the petitioner was not responsibly connected despite her authority to co-sign checks).

¹⁸⁷ Tr. 163, 165, 189-190, 331-333, 361, 388, 449. *See* Maldonado, 154 F.3d at 1089; Norinsberg, 56 Agric. Dec. 1840, 1863 (U.S.D.A. 1997); *cf.* Rodgers, 56 Agric. Dec. 1919, 1954-55 (U.S.D.A. 1997).

unrelated to corporate policy.¹⁸⁸ The preponderance of the evidence is that Petitioner did not act as a true officer of Allens, Inc. at the time it was violating PACA.¹⁸⁹

I note that the record is that Petitioner did not, at any time, maintain interaction with produce suppliers.¹⁹⁰ The record indicates he lacked the authority to pay or cause produce suppliers to be paid, and he was not consulted with respect to the company's use of cash or decisions about which bills to pay.¹⁹¹ Beginning around August 2013, a "cash committee" met weekly to decide which of Allens, Inc.'s bills to pay.¹⁹² At one of these meetings, James Phillips, the vice president of corporate services, raised the issue about PACA and that growers needed to be paid.¹⁹³ Although Petitioner might have attended the first one or two meetings to "see what was going on," he "wasn't really involved."¹⁹⁴ The evidence is that by October 2, 2013, Petitioner had ceased involvement and stopped attending the meetings.¹⁹⁵

Further, Petitioner testified that he was not aware—and did not have the power to make himself aware—of the entities not being paid during the violations period.¹⁹⁶ This situation is vastly different than in cases where officers were not considered nominal because they continued to purchase produce knowing that the company was not paying suppliers.¹⁹⁷ Like in *Bell v.*

¹⁸⁸ Tr. 162-165, 189-193. *See supra* note 53; *Maldonado*, 154 F.3d at 1089 (holding that the petitioner's position as president was "only a nominal title" where he was an authorized co-signor on the company account and the facts "indicate[d] that [his] authority to sign checks had nothing to do with corporate policy").

¹⁸⁹ *See Bell v. Dep't of Agric.*, 39 F.3d 1199, 1200 (D.C. Cir. 1994) (finding that the petitioner did not perform any duties that could be specifically attributed to his being vice-president where he never signed checks or agreements, never filed PACA-license renewals, and had no access to company books or records).

¹⁹⁰ Tr. 144, 170, 185, 197.

¹⁹¹ Tr. 185-186, 216-217.

¹⁹² Tr. 272-274, 364.

¹⁹³ Tr. 380-381.

¹⁹⁴ Tr. 273-274.

¹⁹⁵ Tr. 273-274, 364.

¹⁹⁶ Tr. 194-195.

¹⁹⁷ *Finch*, 73 Agric. Dec. 302, 316 (U.S.D.A. 2014); *see supra* note 130.

Department of Agriculture,¹⁹⁸ the record is that it was not Petitioner whom people contacted when looking to be paid.¹⁹⁹ “This clearly means suppliers did not regard [Petitioner] as having authority to bring about payment by [Allens, Inc.].”²⁰⁰

AMS asserts that “an individual can be held to be responsibly connected with a violating license even if he took no overt actions in furtherance of the violations.”²⁰¹ AMS cites *Kleiman & Hochberg, Inc.*²⁰² to support its contention that “[e]ven where officers of a PACA-licensed company were judged to be unaware of their violations, their responsible connection [h]as been based on their failure to counteract or obviate the wrongdoing of others.”²⁰³ But, in this case, the evidence is that Petitioner lacked the power to counteract or obviate the “wrongdoing”; due to the significant limitations on his authority, Petitioner lacked the power to pay or to cause Allens, Inc.’s produce suppliers to be paid during the violations period.²⁰⁴

Additionally, AMS argues that, unlike the petitioner in *Maldonado v. Department of Agriculture*²⁰⁵—who was found not to have been a nominal officer—“Nicholas Allen had extensive business education, experience, and knowledge.”²⁰⁶ Under the new and old standards, however, factors such as an individual’s education, experience, and knowledge are not dispositive of whether he or she was an officer “in name only.”²⁰⁷ Even under the former “actual,

¹⁹⁸ 39 F.3d 1199 (D.C. Cir. 1994).

¹⁹⁹ See Tr. 145, 185,

²⁰⁰ Bell v. Dep’t of Agric., 39 F.3d 1199, 1204 (D.C. Cir. 1994).

²⁰¹ Respondent IB at 26.

²⁰² 65 Agric. Dec. 482 (U.S.D.A. 2006).

²⁰³ Respondent IB at 27.

²⁰⁴ See *supra* note 168 and accompanying text.

²⁰⁵ 154 F.3d 1086 (9th Cir. 1998).

²⁰⁶ Respondent’s IB at 19.

²⁰⁷ See Taylor v. U.S. Dep’t of Agric., 636 F.3d 608, 616 (D.C. Cir. 2011) (“[A]n individual’s background may be *relevant* to the determination of whether he or she is a nominal officer. But we have never found this factor to be *dispositive*. If an individual has past experience in upper-level management, this would be consistent with a finding that individual is currently working in upper-level management. But past experience is not proof of one’s current situation.”).

significant nexus” test, Petitioner, as a result of the corporate management restructuring of Allens, Inc., was no less nominal as an officer during the violations period than the petitioner in *Maldonado*.²⁰⁸ As was the case in *Maldonado*, the record is that Petitioner had no real power in his named role and “never had anything to do with policy or business decisions.”²⁰⁹ Although Petitioner had extensive experience in the produce industry, he could not utilize his acquired skills or knowledge as he was essentially powerless throughout the violations period.²¹⁰

Finally, AMS contends that Petitioner was not a nominal officer because he received an \$800,000 salary “for his work as an Executive Vice President.”²¹¹ While Petitioner admits he continued to receive this salary during the violations period, he maintains that “this was a matter under the control of the CRO for the purposes of maintaining employee morale and preserving the value of Allens, Inc. as a going concern.”²¹² Petitioner testified to this in detail at the hearing.²¹³ I agree with Petitioner and note that an officer’s level of compensation does not necessarily reflect his or her role in a company. That Petitioner’s salary remained unchanged throughout the violations period does not, by itself, nullify Petitioner’s nominal status. Although Petitioner’s receipt of such a handsome salary while producers went unpaid is troubling, I cannot find that in context of the current record it defeats Petitioner from meeting the preponderance-of-the-evidence standard.

²⁰⁸ See *Maldonado v. Dep’t of Agric.*, 154 F.3d 1086, 1088 (9th Cir. 1998).

²⁰⁹ *Id.*

²¹⁰ The record indicates that Allens, Inc.’s secured lenders insisted on the corporate restructuring resulting in the empowerment of the Special Committee and CRO and were in a position to do so through such things as threatening foreclosure. Petitioner ceded power and authority in the company on August 5, 2013. See Tr. 32-46, 49-68, 70-75, 76-77, 173, 175-183, 188, 219-220, 230-231, 445-446; RX-3 at 18.

²¹¹ Respondent IB at 20.

²¹² Petitioner RB at 22.

²¹³ Tr. 203, 223-224, 234, 226-227.

Based on the foregoing, I find that, during the violations period, Petitioner was as an officer of Allens, Inc. in name only.

b. Petitioner Was a Nominal Director During the Violations Period.

During the violations period, Petitioner was a director of Allens, Inc. in only a nominal capacity. Five members comprised the board of directors at that time: Petitioner, Josh Allen, and Roderick Allen, the “original directors”; and Timothy Boates and Richard Newsted, the “independent directors” appointed to the board as part of corporate-management restructuring on August 5, 2013.²¹⁴ Per that resolution, Mr. Boates and Mr. Newsted were vested with full authority over the CRO and financial management throughout the violations period.²¹⁵

As the D.C. Circuit has ruled, “one may hold a paper directorship, and more, and yet be classified as nominal.”²¹⁶ Such is the case here, where the record indicates Petitioner had no actual authority within the company and played no policy or decision-making role.²¹⁷ The record is that actual power was held and exercised by the independent directors, who comprised the “Restructuring Committee,” and by CRO Hickman.²¹⁸ Any of Petitioner’s duties as director were supplanted by the Restructuring Committee and CRO.²¹⁹ At the hearing, Petitioner testified about how the restructuring affected his directorship.²²⁰

Q What about in your capacity as a director of Allens, Inc., what power did you understand you were going to have as a director after these resolutions were signed?

A No, no power at all. The power had been handed over.

²¹⁴ Tr. 22, 64-68, 180-181; PIX-9; PIX-22; RX-3 at 18-20.

²¹⁵ PIX-9; PIX-22; RX-3 at 18-20. *See* Findings of Fact Nos. 76-80, 87, 101.

²¹⁶ *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994).

²¹⁷ PIX-22; Tr. 86-87, 93-94, 119-120, 186-190.

²¹⁸ *See* PIX-9; Tr. 58, 65-66, 84-87, 92-95, 163, 180.

²¹⁹ Tr. 95, 182, 219-220.

²²⁰ Tr. 182.

Q Did you see that with the amendment to the bylaws All Veg, LLC could not undo this appointment or change the bylaws again until a period of time had passed, expiring in April of 2014?

A That is correct.

Q So, what authority or power as a member of All Veg were you going to have to exercise with respect to Allens, Inc.?

A I couldn't until -- until the time elapsed beyond the April 2014 deadline.

Q Okay. And so knowing these things, Nick, why did you sign these resolutions?

A To keep the family business turning and the people, the folks at Allens, Inc. employed.

Further, Petitioner testified that, during the violations period, there was nothing he could do to displace the independent directors from the Special Committee.²²¹ Petitioner stated that he was “advised that it was impossible” by company counsel and “professionals . . . in the business.”²²² Josh Allen also testified that the original directors of Allens, Inc.—Petitioner, Josh Allen, and Roderick Allen—did not have the power or authority as a board to dislodge, disband, or in any way curb the power of the Restructuring Committee.²²³

AMS claims that Petitioner “participated in board meetings as a director, voting and signing minutes” and “acted in his capacity as a Director of Allens, Inc., to restructure the company.”²²⁴ However, the meetings AMS refers to—as well as the company’s restructuring—

²²¹ Tr. 156, 196-197.

²²² Tr. 222, 232-233.

²²³ Tr. 66.

²²⁴ Respondent IB at 21.

took place outside the violations period.²²⁵ AMS sets forth no evidence to suggest that Petitioner voted on any resolutions during the violations period. To the contrary, the record shows that Petitioner “never participated in the formal decisionmaking structures of the corporation.”²²⁶

Although Petitioner attended several board meetings during the violations period, he was not an active participant.²²⁷ The meetings were bifurcated; that is, all of the directors would convene initially, but after a brief time the Allens (Petitioner, Roderick Allen, and Josh Allen) would be excused and the CRO and Special Committee would continue the meeting.²²⁸ Although ostensibly a director of Allens, Inc., Petitioner was not provided with any information concerning accounts payable, nor was he consulted with respect to the company’s cash management.²²⁹ With regard to the substance of these brief meetings, Josh Allen testified:²³⁰

That meeting basically consisted of two things. Number one, it was what A&M was going to present what the temperature of the bank group was, and I believe I used that terminology earlier this morning, and basically what that meant was that the finance arm of A&M would make calls to the bank group or talk to the consultants of the -- of the bankers that were onsite, on campus in Siloam Springs, and see how they were feeling.

And Jonathan or a person on his finance team would come and tell us, hey, the pulse of the bank group, the temperature of the bank group is -- there's three for you and there's two against you. There's four for you, there's one against you. They're all against you.

²²⁵ See RX-4 (meeting minutes dated February 12, 2013); RX-5 (meeting minutes dated March 29, 2013); RX-6 (meeting minutes dated April 8, 2013); P1X-9 at 7 (action by unanimous consent dated August 5, 2013).

²²⁶ *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1204 (D.C. Cir. 1994); see *Minotto v. Dep’t of Agric.*, 711 F.2d 406, 409 (D.C. Cir. 1983) (describing a director’s role at board meetings as being of “nominal nature” where she “had no policy or decision-making role” and “simply acquiesced in the decisions made by the Company President, her boss”).

²²⁷ See Tr. 81-85, 186-188. Cf. *Mealman*, 64 Agric. Dec. 1802, 1818 (U.S.D.A. 2005) (holding that the petitioner was not a nominal director where, at board meetings, he reviewed balance sheets and operating statements, dealt with numerous corporate issues, cast votes, and moved to elect a president of the board).

²²⁸ Tr. 186-187.

²²⁹ Tr. 186-187.

²³⁰ Tr. 82-83.

Everybody hates you, you know, and that was kind of that presentation. It lasted roughly five minutes. And then typically there was any operational questions that anybody would have. Somebody from the Rapid Result side would present here are the things that are being implemented. Here are the things that we're looking to produce over the next couple of weeks.

Further, Petitioner did not, as a director, vote on behalf of Allens, Inc. with respect to the Special Committee's resolution authorizing the bankruptcy filing.²³¹ The record indicates Petitioner played no part in the decision to file a bankruptcy petition; that decision was made and authorized by the Restructuring Committee and Mr. Hickman.²³² Moreover, it appears that Petitioner had no real authority over Allens, Inc. even before the bankruptcy filing. Between August 5, 2013 and October 28, 2013, the record indicates the business was primarily run by Bank of America, who controlled Allens, Inc. in terms of both production and income.²³³

I find that Petitioner's attendance at board meetings as described does not bar him from being a nominal director. The record shows that Petitioner was not an active participant; no important financial discussions occurred in his presence, and no decision-making resulted from the brief meetings.²³⁴ Moreover, that Petitioner was never presented the opportunity to vote during the violations period indicates he lacked the decision-making authority that is generally bestowed upon directors.

²³¹ Tr. 93-94, 188.

²³² Tr. 92-93, 157, 188.

²³³ Tr. 88-91.

²³⁴ Tr. 81-85. *See* *Minotto v. Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983) (noting that the financial transactions "which gave rise to the company's PACA violations[] were not discussed at the meetings in which [the petitioner] voted") ("Her mere presence at board meetings during which the illegal transactions were never discussed cannot be the basis for imputing personal knowledge to her. Such a conclusion would be the functional equivalent of an absolute liability standard which this court expressly rejected in *Quinn*.").

Perhaps most importantly, Petitioner lacked the power to cause Allens, Inc. to pay its produce suppliers during the violations period; that authority rested with the CRO, Mr. Hickman, who reported to the independent directors.²³⁵ Petitioner stated he was unaware that the company's suppliers were not being paid at that time and did not "have the power to make [himself] aware of that fact."²³⁶ Both Petitioner and Josh Allen testified that, after August 5, 2013, Petitioner had no role in the decision-making regarding accounts payable.²³⁷ This is supported by the testimony of Lori Sherrell, corporate secretary and controller of accounting and finance at Allens, Inc.,²³⁸ and by a series of email exchanges between Ms. Sherrell, Jonathan Hickman, Nick Campbell, Dave Jurgens, Mark Towery, and other accounting employees regarding approvals of payment to suppliers.²³⁹ Petitioner was neither a sender nor recipient of these emails and was not included on courtesy copies.²⁴⁰ Again, the responsibility for financial decision-making was granted exclusively to the Restructuring Committee and CRO.²⁴¹

²³⁵ Tr. 188-189. *Cf.* *Thames v. Dep't of Agric.*, 195 Fed. App'x 850, 854 (11th Cir. 2006) (holding that the petitioner was not a nominal director where he had "lengthy experience" as a director and "attended board meetings during the period of violations *at which he could have voted as part of a majority to address the company's financial problems*") (emphasis added).

²³⁶ Tr. 194-195; *see* P1X-24 at 2, 5-7.

²³⁷ Tr. 86, 93-94, 185-187.

²³⁸ Tr. 276-278, 328.

²³⁹ P1X-25; P1X-26; P1X-27; P1X-28; P1X-29; P1X-30; P1X-31; P1X-32; P1X-33; P1X-34; P1X-35; P1X-36; P1X-37; P1X-38; P1X-39; P1X-41; P1X-42; P1X-43; P1X-44; P1X-45; P1X-46; P1X-47; P1X-48; P1X-49; P1X-50; P1X-51; P1X-52; P1X-53; P1X-54; P1X-55; Tr. 293.

²⁴⁰ *See* P1X-25 through P1X-39; P1X-41 through P1X-55; Tr. 319, 325, 338, 345. Petitioner received one email (P1X-24) as part of a courtesy copy to Petitioner, Josh Allen, and Roderick Allen. P1X-24; Tr. 350-351. The email was from Casey Moore, the director of financial analysis, and attached a copy of a borrowing-base certificate. P1X-24; Tr. 350-351. The Allens, Inc. finance team was responsible for preparing borrowing-base certificates; Petitioner played no role with respect to borrowing-base certificates. Tr. 198-199. The Allens, Inc. sales team was responsible for preparing the certificates, and the CRO and bank group would have utilized the information therein. Tr. 199.

²⁴¹ P1X-22; Tr. 86-87.

Further, AMS argues that Petitioner “was not a nominal officer such as Lilly Minotto,”²⁴² quoting the following summary of *Minotto v. Department of Agriculture*²⁴³ by the Ninth Circuit Court of Appeals:²⁴⁴

The court in *Minotto* held that lack of training and experience is a factor in determining whether an individual should be considered “responsibly connected.” In that case, the petitioner was hired as a bookkeeper with secretarial and accounting duties. She had completed one year of post-high school business training and was twenty-three years of age when she began working for the company. Because the petitioner “lacked both the training and the experience to be an active director,” and did not receive an increase in salary or stock as compensation, the court held she was not responsibly connected, notwithstanding the fact that she attended every board meeting and voted in favor of all resolutions proposed.

Maldonado v. Dep’t of Agric., 154 F.3d 1086, 1088 (9th Cir. 1998).

The *Minotto* court, however, did not reach its decision based solely on the petitioner’s lack of training or experience. It also considered, among other things, that the petitioner “had no real authority within the [c]ompany” and “no policy or decision-making role.”²⁴⁵ Much like the present case, where Petitioner’s decision-making authority was superseded by the Restructuring Committee, the petitioner in *Minotto* had no choice but to “acquiesce[] to the decisions” made by the company president.²⁴⁶

I find that Petitioner’s skills and experience do not preclude nominal-director status. Although Petitioner had many years of experience on the board of directors, he could not utilize his skills or knowledge during the violations period without the opportunity or authority to do

²⁴² Respondent IB at 20.

²⁴³ 711 F.2d 406 (D.C. Cir. 1983).

²⁴⁴ Respondent IB at 21.

²⁴⁵ *Minotto v. Dep’t of Agric.*, 711 F.2d 406, 409 (D.C. Cir. 1983).

²⁴⁶ *Id.*

so.²⁴⁷ Such training and experience did not provide him with the “power” within the licensee; thus, those factors are not dispositive in this case.

Based on the foregoing, I find that, during the violations period, Petitioner was a director of Allens, Inc. in name only.

c. Petitioner Was a Nominal Shareholder During the Violations Period.

During the violations period, Petitioner was only a nominal shareholder of Allens, Inc. Petitioner held an indirect ownership stake as a 19.31% member of All Veg, LLC, the sole stockholder of Allens, Inc.²⁴⁸ Thus, Petitioner’s interest was just below the twenty-percent threshold that traditionally sufficed to render a person accountable for not controlling delinquent management, even before considering the effects of the August 5, 2013 corporate restructuring.²⁴⁹ In addition, Petitioner was only a minority stockholder.²⁵⁰ He was not “the majority shareholder voice” that, under the former nominal-status analysis, would have constituted “uncontrovertible” evidence of an “actual, significant nexus with the violating company.”²⁵¹

I find that Petitioner successfully rebutted the presumption created by his 19.31% ownership interest in Allens, Inc. As a less-than-twenty-percent owner of what the record indicates was valueless stock, Petitioner lacked the actual authority to curb Allens, Inc.’s PACA

²⁴⁷ See *supra* note 210 and accompanying text.

²⁴⁸ PIX-22 at 1; Tr. 30-32, 63-64, 97, 98, 170-173.

²⁴⁹ *Siegl v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1998) (“Most clearly in *Martino*, this Court held that approximately twenty per cent stock ownership would suffice to make a person accountable for not controlling delinquent management.”); see *Martino v. U.S. Dep’t of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986); see also *Beucke v. U.S. Dep’t of Agric.*, 314 Fed. App’x 10, 12 (9th Cir. 2008). The twenty-percent threshold developed in cases that applied the “actual, significant nexus” test. See, e.g., *Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987).

²⁵⁰ See RX-1 at 1-4; PIX-22 at 1; Tr. 27. The majority shareholder, Roderick Allen, held a 61.39% stake while Josh Allen held the remaining 19.31%. *Id.*

²⁵¹ *Siegl*, 851 F.2d at 417 (citing *Martino v. Dep’t of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986)).

violations.²⁵² He had no equity and no control over the direction of the company.²⁵³ Pursuant to the August 5, 2013 resolutions, Petitioner was deprived of his ability as shareholder of All Veg, LLC to remove those individuals with actual management authority: the independent directors of the Restructuring Committee.²⁵⁴ The shareholders were blocked from interfering with the Restructuring Committee's authority until April 1, 2014.²⁵⁵

Although Petitioner held onto his shares throughout the violations period, the record shows his stock had no real worth.²⁵⁶ The value of Allens, Inc. as a going concern was zero.²⁵⁷ Petitioner and Josh Allen testified that neither All Veg, LLC's stock in Allens, Inc. nor Petitioner's interest in All Veg, LLC had any value.²⁵⁸ Due to the corporate restructuring, any value inherent in Allens, Inc. was owned by the company's secured creditors.²⁵⁹ The secured creditors had the opportunity to influence payment of produce suppliers throughout the violations period; Petitioner did not.²⁶⁰

AMS argues that "[r]etaining stock, even when it ultimately ended up without value, has been held to prevent a petitioner from establishing it was not responsibly connected to a PACA licensee when it violated the Act."²⁶¹ AMS submits:²⁶²

²⁵² Tr. 195, 218. *See* Taylor, Nos. 06-0008, 06-0009, 2012 WL 9511765, at *6 (U.S.D.A. Dec. 18, 2012) (Modified Decision and Order on Remand) (stating that the "power to curb PACA violations or to direct and affect the operations" may be a factor to be considered under the "nominal inquiry"); Petro, 71 Agric. Dec. 600, 609 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr) (holding that the petitioner was a nominal shareholder where he "lacked the actual authority to curb Houston's Finest's violations of the PACA").

²⁵³ Tr. 65, 195, 222, 230-231, 488. *See* Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric., 497 F.3d 681, 692 (D.C. Cir. 2007); Thomas, 59 Agric. Dec. 367, 387 (U.S.D.A. 2000).

²⁵⁴ PIX-7 at 3-4; PIX-8 at 2-3; PIX-9 at 1-5; Tr. 64-66, 197, 221-222.

²⁵⁵ *See* PIX-7; PIX-8; PIX-9; Tr. 58-59, 65-66, 77, 114-115, 182, 188.

²⁵⁶ Tr. 100-101, 141-142, 195-196.

²⁵⁷ PIX-14; Tr. 98-100, 486.

²⁵⁸ Tr. 101, 195.

²⁵⁹ Tr. 195, 218.

²⁶⁰ Tr. 188-189; 195-196.

²⁶¹ Respondent's IB at 22.

²⁶² Respondent's IB at 22.

The petitioner in that case, Keith Keyeski, had resigned as director and officer of Bayside Produce, Inc., prior to Bayside Produce, Inc.'s violations of the PACA. He retained his stock ownership, however, because of what he believed to be its economic value. *In Re: Donald R. Beucke, In Re: Keith K. Keyeski*, PACA-APP Docket No. 04-0014., 2006 WL 3326080, at *12 (U.S.D.A. Nov. 8, 2006). Mr. Keyeski was held to be responsibly connected. *See also In Re: David L. Hawkins*, 52 Agric. Dec. 1555, 1561 (U.S.D.A. Dec. 21, 1993) (Petitioner unsuccessfully argued that his stock did not represent a bona fide stake in the corporation because it had been rendered useless.)²⁶³

However, these cases are inapposite and do not support AMS's proposition. In *Beucke*,²⁶⁴ the economic value of Keyeski's stock had no bearing in either the Chief Administrative Law Judge's or the Judicial Officer's responsibly connected analysis.²⁶⁵ The Judicial Officer considered Keyeski's retention of stock to determine whether he was a shareholder at a specific time; it was not what inhibited Keyeski from being found nominal.²⁶⁶

Similarly, stock value was not at issue in *Hawkins v. Department of Agriculture*.²⁶⁷ The case was decided by the Fifth Circuit Court of Appeals prior to 1995, when Congress amended PACA to incorporate the rebuttable-presumption standard.²⁶⁸ Unlike the D.C. Circuit, the Fifth Circuit had applied the *per se* rule: if a person was an officer, director, or more-than-ten-percent shareholder of a violating entity, he or she "was considered 'responsibly connected' and subject to sanctions under the PACA."²⁶⁹ Thus, regardless of the value of the petitioner's stock at that

²⁶³ *Hawkins* was issued by the Fifth Circuit Court of Appeals and published in the Federal Reporter. The decision was also included in Volume 52 of *Agriculture Decisions*, which is the publication to which AMS cites (52 Agric. Dec. 1555 (U.S.D.A. 1993)). The more accurate case citation is *Hawkins v. Dep't of Agric.*, 10 F.3d 1125 (5th Cir. 1993).

²⁶⁴ 65 Agric. Dec. 1341 (U.S.D.A. 2006).

²⁶⁵ *See* *Beucke*, 65 Agric. Dec. 1372, 1387-90, 1404-05 (U.S.D.A. 2006).

²⁶⁶ *See id.* I also note that *Beucke* and *Keyeski* each held 33.3% of the company's outstanding stock—approximately thirteen-percent more than Petitioner owned. *Id.* at 1394, 1405, 1407.

²⁶⁷ 10 F.3d 1125 (5th Cir. 1993).

²⁶⁸ *Hawkins v. Dep't of Agric.*, 10 F.3d 1125 (5th Cir. 1993).

²⁶⁹ *Faour v. U.S. Dep't of Agric.*, 985 F.2d 217, 220 (5th Cir. 1993) ("The statute is explicit: If a person falls within one of the three enumerated categories, he is responsibly connected. The statute does not contemplate a defense that allows a person to show that even though he fits into one of the three categories, he never had enough actual authority to be considered truly responsibly connected.").

time, the Fifth Circuit would not have examined his twenty-two percent interest; it was of no consequence whether he was a nominal shareholder.²⁷⁰ I also note that AMS's parenthetical is misleading.²⁷¹ The Fifth Circuit did not rule upon whether the petitioner's "useless" stock "represent[ed] a bona fide stake in the corporation"; it simply applied the *per se* rule to its responsible-connection analysis, which did not take factors such as stock value into consideration.²⁷² *Hawkins* clearly is not controlling in this case. Accordingly, I reject AMS's contention that Petitioner is prevented from overcoming the presumption of responsible connection on the basis that he retained company stock. AMS suggests that Petitioner's holding onto valueless stock rather than selling it indicates Petitioner expected that stock to have some value in the future.²⁷³ However, PACA expressly provides that there can be nominal shareholders.²⁷⁴ Clearly it does not require that an individual rid himself or herself of all stock ownership to meet the burden of showing he or she was not responsibly connected. Given this, it does not seem illogical that Petitioner would retain stock.

Further, the record establishes that Petitioner did not perform any duties as a shareholder of Allens, Inc. during the violations period; he neither participated in corporate activities nor executed authority over operations.²⁷⁵ He had no role in managing the company's affairs and was unable to elect members to the board of directors.²⁷⁶ Petitioner testified that despite the terms of

²⁷⁰ See *Hawkins*, 10 F.3d at 1129-31.

²⁷¹ See Respondent IB at 22 ("Petitioner unsuccessfully argued that his stock did not represent a bona fide stake in the corporation because it had been rendered useless.").

²⁷² See *Hawkins*, 10 F.3d at 1129-30.

²⁷³ Respondent IB at 21-22; Respondent RB at 4.

²⁷⁴ See 7 U.S.C. § 499a(b)(9).

²⁷⁵ RX-1 at 7-13; Tr. 430-431. See *Petro*, 71 Agric. Dec. 1259, 1264-65 (U.S.D.A. 2012) (Order Denying Petition to Reconsider Decision as to Bryan Herr); *Petro*, 71 Agric. Dec. 600, 609 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr); cf. *Beucke*, 65 Agric. Dec. 1372, 1387-90, 1404 (U.S.D.A. 2006).

²⁷⁶ P1-7; P1X-8; P1X-9; P1X-22; Tr. 182. See *Perlman v. Feldman*, 219 F.2d 173, 178-79 (2d Cir. 1955) (Swan, J., dissenting) ("The power to control the management of a corporation, that is, to elect directors to manage its affairs, is an inseparable incident to the ownership of a majority of its stock, or sometimes . . . to the ownership of enough shares, less than a majority, to control an election.").

the August 5, 2013 resolutions authorizing the Restructuring Committee to recommend actions to “the Stockholder,” the Restructuring Committee never presented All Veg, LLC with any proposed sale, capital restructuring, or change of control over Allens, Inc.²⁷⁷ In addition, there is no evidence to suggest that an “annual meeting of the stockholders” took place during the violations period.²⁷⁸

Finally, Petitioner testified that he had no power as a member of All Veg, LLC—that there was no step he could take—to cause Allens, Inc. to pay its produce suppliers.²⁷⁹ As previously discussed, that authority rested with the CRO, who reported to the independent directors.²⁸⁰ Even if Petitioner had called a meeting to convince the majority stockholder to act regarding unpaid produce suppliers, the effort would have failed given the CRO’s total control of finances under Newsted and Boates.²⁸¹ Based on the foregoing, I find that Petitioner was a shareholder of Allens, Inc. in name only throughout the violations period.

On the basis of the entire record before me, the following Findings of Fact, Conclusions of Law, and Order will be entered.

Findings of Fact

1. At all times material herein, Allens, Inc. was a corporation existing under the laws of the State of Arkansas. Allens, Inc. later became known as Veg Liquidation, Inc. Allens, Inc.’s business address is or was 305 East Main Street, Siloam Springs, Arkansas 72761-3231.

²⁷⁷ PIX-9 at 1; PIX-9 at 3; Tr. 229-231. The “Action by Unanimous Written Consent in Lieu of a Meeting of the Board of Directors of Allens, Inc.” (PIX-9) delegated the Restructuring Committee the authority “to recommend the Stockholder what action, if any, should be taken by the Company with respect to the Restructuring.” PIX-9 at 3. The document specified that “Restructuring” included “a sale, capital restructuring or change of control of the Company.” PIX-9 at 1.

²⁷⁸ See PIX-9 at 2; Tr. 67-68.

²⁷⁹ Tr. 188-189.

²⁸⁰ Tr. 188-189.

²⁸¹ See PIX-22; Tr. 86-87, 188-189, 460-462.

Allens, Inc.'s mailing address is P.O. Box 250, Siloam Springs, Arkansas 72761-0250. [RX-1].

2. At all times material herein, Allens, Inc. was licensed under the provisions of PACA. PACA License No. 19202120 was issued to Allens, Inc. on September 23, 1963 and was renewed annually through September 23, 2015. [RX-1].
3. Allens, Inc. was determined to have willfully, repeatedly, and flagrantly violated section 2(4) of PACA by failing to make full payment promptly in the amount of \$9,759,843.86 to forty produce sellers for 2,312 lots of perishable agricultural commodities that Allens, Inc. purchased, received, and accepted during the period of October 3, 2013 through January 6, 2014. [*Allens, Inc.*, 74 Agric. Dec. 488, 497 (U.S.D.A. 2015); PIX-24; RX-3].
4. At all times material herein, Petitioner Nicholas Allen identified as executive vice president, director, and 19.31% owner of Allens, Inc. [RX-1; Tr. N. Allen 169-173].
5. Allen Canning was a family produce-canning business started in Arkansas in 1926. [Tr. J. Allen 16].
6. Allen Canning incorporated as Allen Canning Company in Arkansas in 1957. [PIX-1; Tr. J. Allen 18-19].
7. From the late 1940s until the late 1980s, Allen Canning grew rapidly, canning spinach, greens, and sweet potatoes and building plants. [Tr. J. Allen 16-17].
8. In the 1990s, Allen Canning continued to grow, modernizing plants and acquiring a plant in Wisconsin to can corn and peas. [Tr. J. Allen 17].
9. At its peak in the late 1980s and early 1990s, Allen Canning operated more than twenty processing plants and employed 3,500 people. [Tr. J. Allen 18].

10. By the time the company's bankruptcy filing in 2013, Allen Canning employed 1,500 full-time people. [Tr. J. Allen 18].
11. Joshua Allen ("Josh Allen") is Petitioner's brother, both being sons of Roderick Allen ("Rick Allen").²⁸² [Tr. J. Allen 22].
12. Josh Allen served as corporate secretary for Allen Canning beginning in 1999, when he became director of production. [Tr. J. Allen 23].
13. On April 30, 1999, Allen Canning filed Amended and Restated Articles of Incorporation containing the following language: "10. ELECTION. In accordance with section 4-27-1701, the Company elects to be governed under the provisions of the Arkansas Business Corporation Act of 1987 (Act 958 of the 1987 Acts of Arkansas)." [P1X-2 at 3; Tr. J. Allen 23-24].
14. From 2003 until April 2013, Josh Allen served as executive vice president of operations and raw product at Allen Canning, overseeing grower relations, plant scheduling, overall plant operations, and manufacturing capabilities. [Tr. J. Allen 21].
15. In 2005, Petitioner began working for Allen Canning full time in logistics. [Tr. N. Allen 169].
16. Josh Allen and Petitioner each owned stock in Allen Canning, increasing over the years to just over nineteen percent for each by early 2013. [Tr. J. Allen 21; Tr. N. Allen 171-172].
17. From the early to mid-2000s, Josh Allen served on the board of Allen Canning with Petitioner and Rick Allen until the company's sale in February 2014. [Tr. J. Allen 22].

²⁸² Shortly before the hearing in this matter, Rick Allen and Josh Allen withdrew their Petitions for Review of Director's Determination, which had been consolidated with Petitioner's instant Petition in PACA Docket No. 15-0083 and PACA Docket No. 15-0084, and are currently serving employment sanctions as described in 7 U.S.C. § 499h(b). Tr. 456-457.

18. In 2006, Allen Canning purchased the Birds Eye private-label frozen-foods business but sold that business in 2011. [Tr. J. Allen 17].
19. Allen Canning changed its name to Allens, Inc., pursuant to the purchase of the Birds Eye frozen-food business, as set forth in the Articles of Amendment to the Amended and Restated Articles of Incorporation of Allen Canning Company filed December 20, 2006. [P1X-3; Tr. J. Allen 25-26].
20. From about 2000, Lori Sherrell, a licensed certified public accountant in Arkansas and Oklahoma, served as controller, and from 2006, Lori Sherrell also served as corporate secretary for Allen Canning, participating in the decision-making process regarding payments to suppliers until February 2014. [Tr. Allen 26; Tr. Sherrell 259, 264-265, 371].
21. As controller, Lori Sherrell worked in accounting/finance, prepared financial statements, oversaw accounts-receivable and accounts-payable supervisors, and assisted in systems design and infrastructure. [Tr. Sherrell 264-266].
22. From 2000 through 2012, Lori Sherrell reported to the CFO, but if there was no CFO she reported primarily to Rick Allen or, if he were unavailable, to Josh Allen, and between 2006 to 2012, primarily to Petitioner. [Tr. Sherrell 266-267, 335-336].
23. In 2009, Petitioner became executive president of sales and marketing, holding that title throughout his employment with Allens, Inc., and became a director as well during that time. [Tr. N. Allen 169-170, 171].
24. In his role as executive vice president of sales and marketing, Petitioner oversaw the Allens, Inc. salesforce, independent brokers, and direct contact with customers, including retailers and food-service distributors. [Tr. N. Allen 170].

25. In his role as executive president of sales and marketing, Petitioner had no dealings or interactions with the suppliers of Allens, Inc. and no responsibilities with respect to the payment of suppliers. [Tr. J. Allen 144; Tr. N. Allen 170-171].
26. Lori Sherrell reported to Petitioner from about 2006 until 2012, by which time Petitioner had moved into sales. [Tr. Sherrell 267].
27. Prior to May 2012, the stockholders of Allens, Inc. were Rick Allen, with a 61.39% interest; Josh Allen, with a 19.31% interest; and Petitioner, with a 19.31% interest. [P1X-20 at 1; Tr. J. Allen 27].
28. Prior to May 2012, the directors of Allens, Inc. were Rick Allen, Josh Allen, and Petitioner. [P1X-20 at 1; Tr. J. Allen 27].
29. Prior to May 2012, the officers of Allens, Inc. were Rick Allen as chair and chief executive officer; Josh Allen as vice president – raw supply; Petitioner as vice president – sales; James Phillips as vice president; Lori Sherrell as secretary/controller; Mark Towery as treasurer; and other officers. [P1X-20 at 1; Tr. J. Allen 27].
30. In May 2012, as part of asset-based refinancing with Bank of American (“BAML”), administering a consortium of four or five first-lien lenders involving a \$160 million line of credit and \$35 million term loan, Allens, Inc. was restructured with a single stockholder in Allens, Inc. [Tr. J. Allen 28-30, 44; Tr. N. Allen 173-174].
31. At the time of the restructuring described in Finding of Fact No. 30, the stock in Allens, Inc. was pledged as collateral to the BAML consortium. [Tr. J. Allen 28-29; Tr. N. Allen 173].
32. All Veg, LLC’s Articles of Organization were filed with the Arkansas Secretary of State on May 21, 2012, for the purpose of All Veg, LLC’s holding all of the stock of Allens, Inc. [P1X-4 at 1; Tr. J. Allen 28, 31].

33. All Veg, LLC owned no assets other than the stock of Allens, Inc. [Tr. J. Allen 28, 31, 97].
34. On May 25, 2012, Rick Allen, Josh Allen, and Petitioner executed the Operating Agreement of All Veg, LLC. [P1X-5 at 4 and 33; Tr. J. Allen 30].
35. Under the Operating Agreement of All Veg, LLC, members were required to make decisions by a vote of the majority of units, which were held by Rick Allen, and All Veg, LLC operated accordingly. [P1X-5 at 14; Tr. J. Allen 31].
36. In 2012, Petitioner, Rick Allen, and Josh Allen transferred their stock in Allens, Inc. to All Veg, LLC and received ownership interests in All Veg, LLC in the same percentage as their ownership had been in Allens, Inc. [Tr. N. Allen 172].
37. From May 2012 until August 5, 2013, All Veg, LLC held 100% of the stock of Allens, Inc., and the membership interests in All Veg, LLC were as follows: Rick Allen with a 61.39% interest; Josh Allen with a 19.31% interest; and Petitioner with a 19.31% interest. [P1X-2 at 1; Tr. J. Allen 31-32].
38. From May 2012 until August 5, 2013, the directors and officers of Allens, Inc. were the same as before May 2012. [P1X-20 at 1; P1X-21 at 1; Tr. J. Allen 32].
39. In June 2012, Allens, Inc. raised additional capital with a \$57 million loan from Sankaty Capital, known as Sankaty, an affiliate of Bain Capital, as a second lienholder. [Tr. J. Allen 32-33; Tr. N. Allen 174].
40. In late 2012 or early 2013, Allens, Inc. advised BAML that Allens, Inc. was going to default on a covenant to maintain a certain debt-to-equity ratio, resulting in BAML's not allowing Allens, Inc. to make an interest payment to Sankaty. [Tr. J. Allen 32-33].
41. In January 2013, pursuant to BAML's and Sankaty's requests that Allens, Inc. look at continuous improvement of operations, Allens, Inc. engaged the Alvarez & Marsal ("A&M")

- Rapid Results Team as consultants, at Sankaty's recommendation, for a two-week "deep dive" into the corporation, talking to its people and making a proposal for improvement. [Tr. J. Allen 24-26; Tr. N. Allen 173; Tr. Sherrell 269].
42. The A&M Rapid Results Team proposed saving Allens, Inc. \$20 million in the first year by outsourcing logistics, that is, transportation and consolidating plants. [Tr. J. Allen 36-38].
43. Allens, Inc. permitted the A&M Rapid Results Team to implement its proposals beginning at the end of January 2013 and for the next six to seven months. [Tr. J. Allen 37-38].
44. At Sankaty's recommendation, the A&M Rapid Results Team was joined by the A&M finance team to review, streamline, and improve accounting at Allens, Inc., also for the next six to seven months. [Tr. J. Allen 38-39].
45. The A&M Rapid Results Team consisted of between ten and fifteen people, headed by Markus Lahrkamp, and included Cory Daniel. [Tr. J. Allen 39-40].
46. The A&M finance arm was led by Jonathan Hickman and included Nick Campbell, Dave Jurgens, and others. [Tr. Allen 40; Tr. Sherrell 272].
47. In March 2013, after the close of Allens, Inc.'s fiscal year, the A&M teams at Allens, Inc. were joined by consultants from Carl Marks on behalf of BAML and FTI consulting on behalf of Sankaty. [Tr. J. Allen 49].
48. From March through June 2013, BAML reduced the line of credit. Testimony was presented that this reduction was intended to express dissatisfaction with progress on restructuring the Sankaty obligation, and weekly threatening liquidation of Allens, Inc. [Tr. J. Allen 50-51].
49. In April 2013, A&M and Sankaty, with BAML, communicated to Josh Allen that they required that Josh Allen replace Rick Allen as CEO of Allens, Inc., BAML threatening

- “consequences” if there was not change at the top, because BAML was dissatisfied with the pace of progress under Rapid Results. [Tr. J. Allen 47-48, 51-52].
50. On April 8, 2013, Josh Allen replaced Rick Allen as CEO of Allens, Inc. [RX-6 at 1; Tr. J. Allen 52].
51. Through May 2013, BAML, heading the first-lien group of lenders, and Sankaty, heading the second-lien group of lenders, were in conflict over Sankaty’s proposals for it to take over control of Allens, Inc. [Tr. J. Allen 40-41].
52. In the last week of May 2013, BAML threatened Josh Allen that BAML would shut down Allens, Inc. if the situation regarding Sankaty was not controlled. [Tr. J. Allen 41-42].
53. The Allens, Inc. directors rejected the Sankaty offers to acquire control of Allens, Inc. There was testimony that this was because, in late May 2013, operations were improving with the A&M Rapid Results Team and Allens, Inc. was paying its suppliers. [Tr. J. Allen 42-43].
54. Josh Allen then engaged in a communication with a representative of Wells Fargo, a lender within the BAML group, and informed Hickman of this communication. [Tr. J. Allen 44-45].
55. There was testimony that, in late May 2013, the Allens were optimistic about the 2013 “pack,” that is, in the case production at the plants, based upon favorable weather and an anticipated good harvest. [Tr. J. Allen 45-46].
56. From January 2013 through June 2013, Petitioner met daily with A&M Rapid Results, who organized and presented data to improve selling prices, review recommendations on SKU consolidation, and review wins, losses, and opportunities in sales. [Tr. Allen 175].
57. From January 2013 through June 2013, Petitioner was not involved with the A&M finance team. [Tr. N. Allen 176].

58. From January 2013 through June 2013, Petitioner supervised the Allens, Inc. sales team. [Tr. N. Allen 176].
59. As the pack began in June 2013 and Allens, Inc.'s need for the revolving line of credit became greater, BAML refused to restore the revolver line to normal levels, stated that BAML was not going to fund the pack, and suggested that Allens, Inc. engage a chief restructuring officer ("CRO"). [Tr. J. Allen 52-53].
60. The majority of the growers for the pack in June to July 2013 had already been under contract since the previous winter. [Tr. J. Allen 54].
61. In the first week of July 2013, Jonathan Hickman presented Josh Allen with an engagement letter to engage Hickman as CRO and asked Josh Allen to sign. [Tr. J. Allen 55].
62. In the third week of July, BAML called Josh Allen threatening to shut down Allens, Inc., if he did not sign the letter engaging Hickman as CRO. [Tr. J. Allen 55].
63. Petitioner was aware of the secured lenders' demands for Allens, Inc. to retain a CRO. [Tr. N. Allen 176-177].
64. There was testimony that the Allens believed that if Josh Allen had not signed the CRO engagement letter, 1,500 employees of Allens, Inc. would have lost their jobs and Allens, Inc.'s produce suppliers would not have been paid. [Tr. J. Allen 56; Tr. N. Allen 182-183].
65. On July 19, 2013, the CRO engagement letter was executed by Jonathan Hickman, managing director of A&M, and Josh Allen, CEO of Allens, Inc., [PIX-6 at 13; Tr. J. Allen 56].
66. The CRO engagement letter provided that

The CRO shall initially report to the Company's Board of Directors (the "Board") and subsequently to the Special Committee (as defined below) once appointed. This Agreement assumes that the Board will add two independent directors who will comprise a special committee of the Board (the "Special Committee"), with an agreed delegation of authority over the restructuring process and

Rapid Results implementation and the authority to modify the scope of the CRO engagement (which cannot be modified without the consent of the Special Committee[]).

[P1X-6 at 2; Tr. J. Allen 57-58].

67. The CRO engagement letter further provided that the CRO's services included "to develop, implement and oversee cash management strategies, tactics and process," "to manage the communication and/or negotiation with outside constituents including lenders, customers and suppliers," and "to oversee, manage and control cash disbursements," and provided for the appointment of Cary Daniel, Markus Lahrkamp, and Nick Campbell as assistant chief restructuring officers and additional personnel to assist them. [P1X-6 at 1-2; Tr. J. Allen 58].
68. By the summer of 2013, A&M had a point person overseeing every department at Allens, Inc. contacting vendors, renegotiating deals, changing suppliers, and directing Allens, Inc. employees. [Tr. Sherrell 270-271].
69. By the summer of 2013, Lori Sherrell was directed by Nick Campbell and A&M's lead person, Jonathan Hickman, with the involvement of Dave Jurgens. [Tr. Sherrell 271-272].
70. On August 5, 2013, Josh Allen, Rick Allen, and Petitioner, as the members of All Veg, LLC, executed a written unanimous consent approving resolutions as sole shareholder of Allens, Inc. to amend the bylaws of Allens, Inc. [P1X-7 at 1; Tr. J. Allen 60; Tr. N. Allen 178].
71. The August 5, 2013 resolutions adopted by All Veg, LLC, as shareholder of Allens, Inc. (also "Shareholder Consent") amended the bylaws to provide: that the number of directors would increase from three to five; that the board was authorized to establish a "Special Committee" to evaluate, negotiate, or conduct a sale, capital restructuring, or change of control of Allens, Inc. with "all authority granted to it pursuant to its authorizing resolutions or committee charter," subject to the Arkansas Business Corporation Act of 1987, provided that the Special

Committee “shall not report to the Board of Directors, but shall have complete autonomy within the authority granted to it in its authorizing resolutions”; and that the Special Committee “shall not be dissolved or dismissed, nor shall its authority be removed, modified, limited or amended, in any case, except in accordance with its authorizing resolutions.” [P1X-7 at 3; P1X-8 at 2; Tr. J. Allen 60-61].

72. The August 5, 2013 Shareholder Consent also amended Allens, Inc.’s bylaws to prohibit the sole stockholder All Veg, LLC from changing or modifying the bylaws as to the Special Committee unless consistent with resolutions appointing the Special Committee. [P1X-7 at 3-4; P1X-8 at 2-3; Tr. J. Allen 61-62].

73. Among the August 5, 2013 Shareholder Consent resolutions adopted by All Veg, LLC were resolutions waiving All Veg, LLC’s authority as shareholder to inhibit the restructuring as per an accompanying directors’ “Restructuring Resolution” and waiving the right to remove the two “Independent Directors,” to be appointed with the expansion of the corporate board of Allens, Inc. [P1X-7 at 4; P1X-8 at 3].

74. Josh Allen was the sole signatory to the August 5, 2013 Unanimous Written Consent effecting the resolutions set forth in Findings of Fact Nos. 71 through 73, as the CEO and on behalf of All Veg, LLC, sole shareholder of Allens, Inc., and pursuant to the All Veg, LLC members’ unanimous consent referenced in Finding of Fact No. 70, executed the same day. [P1X-8 at 5; Tr. J. Allen 63-64; Tr. N. Allen 179].

75. Following the execution of the August 5, 2013 Shareholder Consent resolutions amending the bylaws of Allens, Inc., neither All Veg, LLC nor original Allens, Inc. directors Petitioner, Josh Allen, or Rick Allen had the authority to disband or dislodge the Special Committee. [P1X-7; P1X-8; Tr. J. Allen 65-66, 132-133]. Josh Allen understood these resolutions to take

away the original directors' authority to curb the power of the Special Committee. [Tr. J. Allen 65-66, 132-133]. Petitioner's understanding was that, after the resolutions were signed, he would no longer had any power or authority in his capacity as a director until April 2014. [Tr. N. Allen 182].

76. On August 5, 2013, Josh Allen, Rick Allen, and Petitioner signed an Action by Unanimous Written Consent in Lieu of a Meeting of the Board of Directors of Allens, Inc. (the "Directors' Consent"). [PIX-9 at 7; Tr. J. Allen 67, 74; Tr. N. Allen 178].

77. The August 5, 2013 Directors' Consent appointed Timothy D. Boates and Richard E. Newsted as the "Independent Directors" to fill the two newly created board positions. Neither could be removed or replaced, except following a resignation, for so long as the Special Committee, defined as the "Restructuring Committee," remained in existence. [PIX-9 at 2; Tr. J. Allen 67-68].

78. Newsted and Boates were selected as members of the Special Committee following recommendation by either A&M or Lazard, an investment banker previously used by Allens, Inc. in mergers and acquisitions. [Tr. J. Allen 77-79; Tr. N. Allen 180-181].

79. The August 5, 2013 Directors' Consent established the Restructuring Committee with "sole and absolute authority . . . to evaluate and negotiate" a restructuring of Allens, Inc. [PIX-9 at 2-3; Tr. J. Allen 70-71].

80. The August 5, 2013 Directors' Consent granted the Restructuring Committee the power to authorize Bankruptcy Code filings and manage any resulting Chapter 11 case; to use Allens, Inc. assets to the extent necessary or appropriate to carry out its duties; and to have the sole and exclusive authority of the board with respect to matters delegated to it, all determinations of the Restructuring Committee as to the scope of its charge, not being subject to review,

modification, amendment, suspension, or revocation by the board. [P1X-9 at 3-4; Tr. J. Allen 71-72].

81. The August 5, 2013 Directors' Consent provided that prior to April 1, 2013, All Veg, LLC, the stockholder of Allens, Inc., had no authority to terminate the Restructuring Committee if Allens, Inc. "as determined by the Restructuring Committee in its sole discretion, is negotiating in good faith the terms of the [r]estructuring as contemplated by [certain alternative term sheets representing sales of assets, respectively, within and outside of bankruptcy]." [P1X-9 at 1, 3-4; Tr. J. Allen 72; Tr. N. Allen 182, 188].
82. The August 5, 2013 Directors' Consent appointed Jonathan Hickman as CRO of Allens, Inc., granting the Restructuring Committee the "exclusive authority and management of the Chief Restructuring Officer" and the other personnel described in the July 19, 2013 CRO engagement letter. [P1X-9 at 5; Tr. J. Allen 73].
83. Pursuant to the August 5, 2013 Directors' Consent, the directors, including Petitioner, could not terminate the CRO unless the Restructuring Committee was disbanded. [P1X-9 at 5-6; Tr. J. Allen 156].
84. Josh Allen testified that he executed the August 5, 2013 Shareholders' Consent and Directors' Consent, presented to him by Jonathan Hickman, in response to Hickman's saying, "you need to sign these." [Tr. J. Allen 75].
85. Josh Allen testified that he executed the August 5, 2013 Shareholders' Consent and Directors' Consent because he understood that the BAML first-lien creditor group and the Sankaty second-lien creditor group would shut down the operations of Allens, Inc. if he did not. [Tr. J. Allen 76].

86. Petitioner testified that he executed the August 5, 2013 resolutions to keep Allens, Inc. operating and keep 1,500 people employed, having been told by the lending group that it would foreclose if he did not do so and believing that the lending group had the power and will to foreclose, based upon a history of strong-arming by the lending group. [Tr. N. Allen 183].
87. Petitioner had no power to displace or dislodge Boates and Newsted, who had supervisory authority over CRO Hickman and A&M, until April 1, 2014. [Tr. J. Allen 121-122; Tr. N. Allen 182, 188-189; P1X-9 at 4].
88. There was testimony that when the August 5, 2013 resolutions were signed, Allens, Inc.'s counsel, Greenberg Traurig, and the professionals advised Petitioner, Josh Allen, and Rick Allen that the CRO and Special Committee were "rock solid" and could not be removed until April 2014. [Tr. J. Allen 74; Tr. N. Allen 221-222].
89. Petitioner testified that he understood that the purpose of the August 5, 2013 resolutions was to engage the CRO and Special Committee, engage in corporate restructuring, and give full authority over the business to the CRO and Special Committee. [Tr. N. Allen 179-180].
90. Until August 5, 2013, Allens, Inc. was still paying its produce suppliers. [Tr. J. Allen 79].
91. Following the restructuring represented by the August 5, 2013 resolutions, Hickman had plenary authority to run the entire affairs of Allens, Inc. under the supervision of the Special Committee of Newsted and Boates. [Tr. J. Allen 140].
92. Following the restructuring represented by the August 5, 2013 resolutions, day-to-day interaction between Josh Allen and Hickman ceased, replaced by a weekly board meeting, consisting of two parts, including: operational and financial representatives of A&M; Newsted; Boates; an observer from Sankaty authorized by its June 2012 loan agreement with

Allens, Inc.; representatives from corporate counsel Greenberg Traurig; Andy Torgove of Lazard; Josh Allen; Rick Allen; and Petitioner. [Tr. J. Allen 74, 80-82; Tr. N. Allen 186-187].

93. During the final part of the board meetings after August 5, 2013, lasting about twenty minutes, A&M would present the positions of the five members of the bank lending group, whether they were for or against Allens, Inc., and A&M Rapid Results would dictate production levels based upon sales orders instead of building inventory as is done in the canning business. [Tr. J. Allen 82-84; Tr. N. Allen 186-187].
94. No decision-making occurred during the first part of the board meetings attended by the Allens after August 5, 2013. [Tr. J. Allen 84; Tr. N. Allen 186-187].
95. Rick Allen, Josh Allen, and Petitioner were excused from the second part of the board meetings, which were attended by all participants except the Allen family members. [Tr. J. Allen 84-85; Tr. N. Allen 186-187].
96. At the board meetings attended by Petitioner after August 5, 2013, Petitioner was not provided with information concerning accounts payable or cash management and was not consulted regarding cash management. [Tr. N. Allen 187].
97. Board meetings continued in the manner described in Findings of Fact Nos. 92 through 96 above until February 2014. [Tr. J. Allen 85; Tr. N. Allen 186-187].
98. After August 5, 2013, decision-making regarding accounts payable, accounts receivable, and accounting matters resided with A&M, Jonathan Hickman, the Carl Marks BAML consultants, and the Allens, Inc. accounting personnel. [Tr. J. Allen 85].
99. After August 5, 2013, Petitioner had no decision-making role with respect to the accounts payable of Allens, Inc. [Tr. J. Allen 86, 93-94; Tr. N. Allen 216-217].

100. Once A&M and the CRO were installed, Petitioner did not have the authority he had previously held. [Tr. Sherrell 349].
101. After August 5, 2013, the structure of financial decision-making at Allens, Inc. was such that ultimate authority was held by Special Committee Members Newsted and Boates, to whom CRO Hickman reported, while Hickman, in turn, was reported to by executive vice president of human resources James Phillips, who, through long-term employment with Allens, Inc., understood corporate operations, plant operations, and the pack. [P1X-22 at 1; Tr. J. Allen 86-87].
102. After August 5, 2013, Petitioner, though named as (a) a 19.31% member of All, Veg LLC, which was the 100% stockholder of Allens, Inc.; (b) director of Allens, Inc.; and (c) vice president of Allens, Inc.; had no financial decision-making authority in Allens, Inc. [P1X-22 at 1; Tr. J. Allen 86-87].
103. After August 5, 2013, the Special Committee and CRO Hickman had ultimate authority regarding the signing of corporate checks for Allens, Inc. [Tr. J. Allen 162-163].
104. After August 5, 2013, Petitioner held an officer's title without any duties or authority and had no power as a director. He continued to receive a salary of approximately \$800,000.00. [RX-3 at 20; RX-9 at 136-137; Tr. N. Allen 182, 204-207].
105. Petitioner played no role in preparing Allens, Inc.'s borrowing base certificates, which showed assets and liabilities, as required by the lenders and relied upon by the CRO and bank group, and took no action regarding information contained in them. [Tr. N. Allen 199].
106. After August 5, 2013, Petitioner, at Allens, Inc., had no authority to execute sales contracts, while sales team members reported to A&M instead of Petitioner and Petitioner

- could not make a decision without the CRO or his team members present. [Tr. N. Allen 184, 225].
107. After August 5, 2013, Lori Sherrell considered her supervisors to be A&M, Hickman, and Campbell. [Tr. Sherrell 277].
108. Beginning in August 2013, a cash committee consistent of Jonathan Hickman, Nick Campbell, Dave Jurgens, Lori Sherrell, Josh Allen, Rick Allen, Mark Hunter, James Phillips, Mark Towery, and, at the first or second meeting only, Petitioner, met weekly to decide what was to be paid from a download of information describing what was due. [Tr. Sherrell 273, 274, 364].
109. Lori Sherrell presented the data at the weekly cash committee meetings and attended about 95% of the meetings. [Tr. Sherrell 274-275].
110. There was testimony that Petitioner attended a cash committee meeting just to see what was going on but was not actually involved in decisions and, by October 2, 2013, he had stopped attending and was not at all involved with these meetings. [Tr. Sherrell 273-274, 364].
111. At a cash committee meeting, James Phillips, Allens, Inc's vice president, corporate services, raised the PACA issue and that growers needed to be paid. [Tr. Sherrell 380-381].
112. After August 5, 2013, A&M set the budget as to what Allens, Inc. could spend to continue in business. [Tr. Sherrell 379-380].
113. In August 2013, an email accounted to the company, Allens, Inc. that Hickman was the CRO and all payments had to be approved by him and, if he were not available, Campbell or someone delegated by Hickman. [Tr. Sherrell 275].

114. Beginning in August 2013, Petitioner was no longer sufficient to authorize Allens, Inc. payments. [Tr. Sherrell 276].
115. Petitioner was not copied or referenced on an August 27, 2013 email to Lori Sherrell from James Phillips, which stated that Nick Campbell would advise why produce supplier Hartung was not paid. [P1X-25 at 1; Tr. Sherrell 280-281].
116. An email chain ending August 29, 2013 regarding retainer of an attorney, Godfrey, by Allens, Inc., through James Phillips, vice president of corporate services, and Hickman, did not copy or refer to Petitioner. [P1X-26 at 1; Tr. Sherrell 281-282, 288].
117. An email chain ending September 3, 2013, in which Lori Sherrell confirmed cash availability to pay temp labor, taxes, boxes, cans, transport, and dry beans and sought approval from Hickman and Campbell, was not copied and did not contain reference to Petitioner. [P1X-27; Tr. Sherrell 282-285, 288].
118. An email chain ending September 12, 2013 includes Lori Sherrell requesting approval from Cary Daniel, A&M person in charge of logistics, shipping, and warehousing, for payment of Ryder invoices for transportation but was not copied and did not contain reference to Petitioner. [P1X-28 at 1-3; Tr. Sherrell 285-286, 288].
119. An email chain ending September 12, 2013 includes Lori Sherrell forwarding, to Hickman and Campbell, Daniel's inquiry for payment to a warehouse lessor, P.J. Hudson, but was not copied and did not contain reference to Petitioner. [P1X-29 at 1; Tr. Sherrell 286-288].
120. In an email dated September 19, 2013, Lori Sherrell requested approval from Daniel to pay a Penske truck leasing company, with no copy or reference to Petitioner. [P1X-30 at 1; Tr. Sherrell 288-289].

121. In an email dated September 19, 2013, Lori Sherrell requested approval from Jurgens to pay \$600,000 to Ryder, with no copy or reference to Petitioner. [P1X-31 at 1; Tr. Sherrell 289-290].
122. In an email chain ending September 19, 2013, Lori Sherrell sought authorization from A&M's Cary Daniel to pay invoices for Ryder's fleet dedicated to Allens, Inc. and for Ryder freight brokerage contracted by Ryder to other carriers, with no copy or reference to Petitioner. [P1X-32 at 1-2; Tr. Sherrell 290-291].
123. An email chain ending September 19, 2013 includes Lori Sherrell's confirming approval from Hickman and Campbell to A&M production person Daniel LaMantia to prioritize payments to Imperial Sugar to receive more sugar shipments, with no copy or reference to Petitioner. [P1X-33 at 1-3; Tr. Sherrell 296-297].
124. Payments at Allens, Inc. were normally handled by a weekly process, with the September 2013 emails representing matters that could not wait for the normal weekly process. [Tr. Sherrell 297].
125. Payments to Allens, Inc.'s produce suppliers were handled no differently than other payments described in the September 2013 emails. [Tr. Sherrell 291].
126. An email chain ending September 20, 2013 includes Lori Sherrell directing to Hickman, Campbell, and Jurgens a request for payment to Ryder to pay its subcarrier, Direct Connect Logistics, for approval and acceleration, with no copy or reference to Petitioner. [P1X-34 at 1-3; Tr. Sherrell 297-299].
127. An email chain ending September 20, 2013 includes Lori Sherrell's obtaining approval from Jurgens to pay brokerage by paper check and ACH, but not Ball, the can supplier, with no copy or reference to Petitioner. [P1X-35 at 1; Tr. Sherrell 299-300].

128. In an email dated September 23, 2013, Lori Sherrell requested approval from Hickman to pay Ball, reporting the number of cans received in the data system and added from plants, with no copy or reference to Petitioner. [P1X-36 at 1; Tr. Sherrell 300-301].
129. During the period from October 3, 2013, through January 6, 2014 (the “violations period”), Petitioner continued with Allens, Inc. as described in Finding of Fact No. 106. [Tr. N. Allen 184-185].
130. The record indicates that during the violations period, Petitioner never exercised control over financial matters at Allens, Inc.; never participated in financial decision-making processes regarding financial matters for Allens, Inc.; never was involved with the purchase of produce; never interacted with suppliers; had no power to pay or cause produce suppliers to be paid; was not provided with accounts payable information; was not consulted concerning the company’s use of cash or decisions about which bills would or would not be paid; and was not solicited for advice by A&M. [Tr. J. Allen 119-120; Tr. N. Allen 185-186; Tr. Sherrell 276, 278].
131. Petitioner testified that, during the violations period, Petitioner was not presented with business in the role of a director concerning the company’s accounts payable to produce suppliers or concerning cash management. [Tr. N. Allen 187].
132. During the violations period, Petitioner did not sign checks for Allens, Inc. [Tr. J. Allen 163, 165; Tr. N. Allen 189-190].
133. During the violations period, CRO Hickman, reporting to independent directors Newsted and Boates and the bank, had the power and authority to pay the produce suppliers of Allens, Inc. [Tr. N. Allen 189, 195, 217].

134. During the violations period, Petitioner had no power to displace CRO Hickman or independent directors Newsted and Boates. [Tr. N. Allen 196-197].
135. During the violations period, CRO Hickman several times informed Josh Allen that the Allens, Inc. produce suppliers would be paid. [Tr. J. Allen 152].
136. During the violations period, Petitioner had no awareness that the entities alleged by the Respondent to have been unpaid during the violations period were not paid and had no power to cause these entities to be paid. [P1X-24 at 2, 5-7; Tr. N. Allen 194-195].
137. From August 5, 2013 until October 28, 2013, BAML, through its advisor, Carl Marks, controlled Allens, Inc. production and operations through A&M Rapid Results by funding the pack based only upon sales orders instead of based upon inventory to supply future sales. [Tr. J. Allen 88-90].
138. During the violations period, the secured creditors influenced the payment of all suppliers, including all produce suppliers. [Tr. N. Allen 195-196].
139. From August 5, 2013 until October 28, 2013, BAML swept the Allens, Inc. bank account of deposited income received, paying itself, BAML, with respect to its revolving line of credit and term loan, decided upon the amount of funds, and released those funds for production, payables, and payroll. [Tr. J. Allen 90-91, 151].
140. During the violations period, the BAML first-lien lenders and Sankaty second-lien lenders were paid through Allens, Inc.'s cash deposits, which were controlled by BAML through the account sweeps. [Tr. J. Allen 90-91, 104-105].
141. Petitioner had no role in structuring the BAML account sweeps. [Tr. J. Allen 105].
142. In an email chain ending October 7, 2013, Lori Sherrell requested A&M for approval for the balance of a \$1.164 million daily emergency payment list, adding freight hauler Pomp's

and including Newly Weds, a dried bean or spice supplier, with no copy or reference to Petitioner, although there was testimony that Josh and Rick Allen were copied as a courtesy. [P1X-37 at 1; Tr. Sherrell 302-304, 344-345].

143. In an email dated October 8, 2013, Lori Sherrell attached a daily emergency payment list totaling \$466,000, with tentative payments of \$100,000 to each of Ball Metal and Crown Cork and Seal, pending final approval needed from Hickman or his delegated A&M personnel, with no copy or reference to Petitioner. [P1X-38 at 1-4; Tr. Sherrell 304-306].
144. In an email chain ending October 16, 2013, Rick Allen asked Lori Sherrell to confirm an amount approved by A&M for payment to supplier Frank Pomp, with no copy or reference to Petitioner. [P1X-39 at 1; Tr. Sherrell 306-307].
145. On October 28, 2013, Allens, Inc. filed a Chapter 11 bankruptcy petition. [P1X-10 at 1; Tr. J. Allen 87, 92].
146. Allens, Inc.'s bankruptcy petition bears the facsimile signature of CRO Jonathan Hickman. [P1X-11 at 3; Tr. J. Allen 93].
147. Allens, Inc.'s bankruptcy filing was authorized by a Consent Memorandum executed only by Newsted and Boates, the two members of the Special Committee/Restructuring Committee. [P1X-11 at 7-8; Tr. J. Allen 92-93].
148. Petitioner did not participate in the decision to file a bankruptcy petition for Allens, Inc. [Tr. J. Allen 83; Tr. N. Allen 188].
149. The decision to file a bankruptcy petition for Allens, Inc. was made by the Special Committee and CRO Hickman. [Tr. N. Allen 188].
150. The Special Committee never presented to All Veg, LLC, the stockholder, any proposed sale, capital restructuring, or change in control of Allens, Inc. [Tr. N. Allen 230].

151. Contemporaneously with the filing of the Allens, Inc. bankruptcy petition, All Veg, LLC also filed a Chapter 11 bankruptcy case, which was administered in bankruptcy jointly with the Allens, Inc. case. [P1X-13 at 1, 5; Tr. J. Allen 96, 98].
152. By the time the bankruptcy petition was filed, A&M had instructed key Allens, Inc. operations personnel to approach A&M directly and not Petitioner. [Tr. J. Allen 150].
153. Steve Brown, Allens, Inc.'s director of raw product who interacted with suppliers, did not bring to Josh Allen's attention concerns about suppliers not getting paid around the time of the bankruptcy filing. [Tr. J. Allen 150].
154. Throughout the violations period, including after the bankruptcy filing, Petitioner was directed not to speak on behalf of the company or concerning the bankruptcy, and Petitioner so advised customers when fielding calls from them. [Tr. N. Allen 197-198].
155. Petitioner did not field calls from suppliers. [Tr. N. Allen 197].
156. When the Allens, Inc. bankruptcy petition was filed, Petitioner had no powers or duties as director executive vice president, all such management powers and duties then residing in the Special Committee of Newsted and Boates and of CRO Hickman. [Tr. J. Allen 95].
157. Petitioner never drafted or released a press release on behalf of Allens, Inc. regarding the bankruptcy. [Tr. N. Allen 197].
158. The market value of Allens, Inc. as a going concern was exceeded by its \$287,945,167.31 reported liabilities at the time of the October 28, 2013 filing of the Allens, Inc. bankruptcy petition, based upon Lazard's marketing evaluations. [P1X-14 at 1; Tr. J. Allen 98-100, 142-143].

159. The market value of Allens, Inc. as a going concern was exceeded by its liabilities from August 5, 2013 through the October 28, 2013 filing of the Allens, Inc. bankruptcy petition. [Tr. J. Allen 100].
160. All Veg, LLC's stock interest in Allens, Inc. had no value from August 5, 2013 through January 2014. [Tr. J. Allen 100; Tr. N. Allen 217].
161. From August 5, 2013 through January 2014, Petitioner's interest in All Veg, LLC had no value. [Tr. J. Allen 100-101; Tr. N. Allen 195, 217].
162. During the violations period, only the BAML first-lien lenders and the Sankaty second-lien lenders owned any value in Allens, Inc. [Tr. J. Allen 101; Tr. N. Allen 195].
163. After the bankruptcy petition was filed, Hickman expressed the need for Allens, Inc. to establish a separate account to pay utilities because other accounts could be frozen because of the bankruptcy. [Tr. Sherrell 330, 354].
164. A separate Allens, Inc. account was set up for all utilities to be paid through that account, with the facilitation of corporate treasurer Mark Towery. [RX-8 at 1-2; Tr. Sherrell 330, 354].
165. Checks from the Allens, Inc. utilities account were processed through the same payable process and on the same check stock as other Allens, Inc. payables. [Tr. Sherrell 330, 354].
166. Checks from the Allens, Inc. debtor-in-possession utilities account had the electronic signature of Rick Allen affixed. [Tr. Sherrell 331, 361].
167. Petitioner's signature was not affixed to the checks issued for the Allens, Inc. debtor-in-possession utilities account established pursuant to the Allens, Inc. bankruptcy. [Tr. Sherrell 331, 361].

168. Petitioner had no role in managing the debtor-in-possession utilities account or in processing those utilities. [Tr. Sherrell 332].
169. Petitioner never exercised any authority with respect to the debtor-in-possession utilities account. [Tr. Sherrell 388].
170. There was testimony that from November 2013 forward, the Allens, Inc. accounting department would process the checks from the debtor-in-possession utilities account, which bore the signature of Rick Allen, only at the discretion of A&M. [Tr. Sherrell 333].
171. Petitioner testified that he had no recollection of seeing or signing a bank signature card with the descriptive account title of "utilities account, debtor in possession." [Tr. N. Allen 190-191].
172. After the Allens, Inc. bankruptcy petition was filed, Petitioner had no role or responsibility regarding Allens, Inc.'s utilities; did not incur liabilities for Allens, Inc. regarding utilities; was not involved with the payment of utilities for Allens, Inc.; and never signed checks drawn on the debtor-in-possession utilities account for Allens, Inc. [RX-8 at 1-2; Tr. N. Allen 192-193].
173. Respondent presented no evidence that Petitioner signed checks on the debtor-in-possession utilities account or authorized payments from this account. [Tr. Jenkins 449].
174. In an email chain ending November 4, 2013, following the bankruptcy filing, Cary Daniel approved payment on the daily accumulated request list for A&M's production person, Daniel LaMantia, permitting plant production to proceed, with no copy or reference to Petitioner. [P1X-41 at 1-4; Tr. Sherrell 307-309].
175. In an email chain ending November 25, 2013, Lori Sherrell advised the Allens, Inc. accounts-payable team and various Allens, Inc. buyer personnel that A&M had approved

payment on the daily accumulated request list for A&M's production person, Daniel LaMantia, including payments for dried beans and fresh sweet potatoes, permitting plant production to proceed, but with no copy or reference to Petitioner. [P1X-42 at 1-2; Tr. Sherrell 309-311].

176. In an email chain ending December 16, 2013, Vicki Kincheloe, Allens, Inc.'s accounts-payable supervisor, obtained approval from Jurgens for the daily payment list after request to Hickman, Campbell, and Jurgens, but with no copy or reference to Petitioner. [P1X-43 at 1; Tr. Sherrell 311].

177. In an email chain ending December 17, 2013, Vicki Kincheloe, Allens, Inc.'s accounts-payable supervisor, obtained approval from Jurgens for the daily payment list, with the exception of \$17,000 to Seneca for finished goods, which are canned products, after request to Hickman, Campbell, and Jurgens, but with no copy or reference to Petitioner. [P1X-44 at 1; Tr. Sherrell 311-313].

178. In an email chain ending December 18, 2013, Vicki Kincheloe, Allens, Inc.'s accounts-payable supervisor, obtained approval from Jurgens for the daily payment list, including payments to Seneca and Del Monte, after request to Campbell and Jurgens, but with no copy or reference to Petitioner. [P1X-45 at 1; Tr. Sherrell 314].

179. In an email chain ending December 20, 2013, Jurgens updated and commented on the daily payment list to Vicki Kincheloe, instructing payment to Ball and delaying payment to some raw product vendors, but with no copy or reference to or approval sought from Petitioner. [P1X-46 at 1-2; Tr. Sherrell 314-315].

180. In an email chain dated December 20, 2013, Jurgens approved the daily payment request submitted by Vicki Kincheloe, but with no copy or reference to Petitioner. [P1X-47 at 1; Tr. Sherrell 316].
181. In December 2013, near Christmas, with A&M people travelling, Hickman authorized Jurgens to approve daily request if Hickman were not present. [Tr. Sherrell 316].
182. On December 20, 2013, Mark Hunter, raw materials buyer for Allens, Inc., sent an email, with attached daily payment approval request, to Vicki Kincheloe to enable her to consolidate a list and submit to A&M for approval, but with no copy or reference to Petitioner. [P1X-48 at 1-2; Tr. Sherrell 317-318].
183. By email chain ending December 21, 2013, Allens, Inc.'s treasurer and tax manager, Mark Towery, obtained approval from Jurgens to pay an entire \$122,000 Arkansas sales and use tax assessment, while A&M controlled Allens, Inc.'s tax payments, but with no copy or reference to Petitioner. [P1X-49 at 1-2; Tr. Sherrell 318-319].
184. By email chain ending December 21, 2013, James Phillips confirmed approval and payment to Worksource for temporary labor with Jurgens and Lori Sherrell, but with no copy or reference to Petitioner. [P1X-50 at 1-2; Tr. Sherrell 320-321].
185. By email chain ending December 23, 2013, Jurgens gathered the list of professionals for payment, including attorneys Greenberg & Traurig for \$271,888, Mitchell Williams for \$81,979, and consultants A&M for \$789,137, in communication with Vicki Kincheloe, Lori Sherrell, Hickman, and others, but with no copy or reference to Petitioner. [P1X-51 at 1-4; Tr. Sherrell 321-323].
186. By email chain ending December 23, 2013, Hickman directed the setting up of a new warehousing and trucking arrangement with McDermid Transportation, including conditions

- for payment, to James Phillips, Lori Sherrell, and, through Jurgens, Mark Towery and Vicki Kincheloe, but with no copy or reference to Petitioner. [P1X-52-1-14; Tr. Sherrell 323-325].
187. By email chain ending December 23, 2013, Jurgens approved payment for chemical field spray for Allens, Inc., which was requested by field employee Boyce Wofford, through his supervisor, Steve Brown, and, in turn, through Tasha Brown, under Lori Sherrell in accounts payable, but with no copy or reference to Petitioner. [P1X-53 at 1-2; Tr. Sherrell 325-327].
188. By email chain ending December 23, 2013, Jurgens approved the Allens, Inc. daily payment request list, submitted by Vicki Kincheloe to Jurgens and Campbell, but with no copy or reference to Petitioner. [P1X-54 at 1; Tr. Sherrell 327].
189. On December 23, 2013, Lori Sherrell, by email, directed Vicki Kincheloe to copy both Campbell and Jurgens for payment approvals since both would be available, although not at the same time, over the Christmas holidays, with no copy or reference to Petitioner. [P1X-55 at 1; Tr. Sherrell 327].
190. By email chain ending December 23, 2013, Vicki Kincheloe directed to Jurgens for his review and approval the weekly payment batch, including utilities due the first week of January 2014, and other items, with no copy or reference to Petitioner. [P1X-56 at 1; Tr. Sherrell 327-328].
191. Petitioner was not at all involved in the process of payment approvals represented by Allens, Inc. email communications from September through December 2013. [Tr. Sherrell 328].
192. CRO Jonathan Hickman executed by facsimile Allens, Inc.'s Statement of Financial Affairs filed December 26, 2013. [P1X-15 at 2; Tr. J. Allen 101-102].

193. On February 12, 2014, the bankruptcy court entered an order authorizing and approving the sale of Allens, Inc.'s assets to Sager Creek Acquisition Corp. ("Sager Creek"), a company formed by Sankaty, as the winning auction bid. [P1X-10 at 9; P1X-16 at 6-7; Tr. J. Allen 105, 110, 111].
194. Petitioner testified that the CRO and Special Committee continued to pay Petitioner his salary and kept him employed until February 2014 to encourage the loyalty of Allens, Inc.'s employees and maintain its value as a going concern. [Tr. N. Allen 226-228].
195. Sager Creek's purchase price for the Allens, Inc. assets included \$124,781,000 in cash; \$32,801,000 as a credit bid against the Sankaty second-lien obligations; and about \$30 million in assumed liabilities. [P1X-16 at 18; Tr. J. Allen 111-112].
196. The aggregate bankruptcy purchase price for Allens, Inc. was insufficient to pay the reported prepetition liabilities of \$287,945,167.31. [P1X-14 at 1; P1X-16 at 18; Tr. J. Allen 112].
197. CRO Jonathan Hickman, on behalf of Allens, Inc., executed the Asset Purchase Agreement, selling the assets of Allens, Inc. to Sager Creek. [P1X-16 at 20; Tr. J. Allen 113].
198. Petitioner played no role in the sale of the assets of Allens, Inc. to Sager Creek; did not sign the Asset Purchase Agreement; and could not have exercised authority or power with respect to that sale. [Tr. N. Allen 196].
199. BAML received the cash proceeds of the sale of assets of Allens, Inc. to Sager Creek. [Tr. N. Allen 189].
200. After the assets of Allens, Inc. were sold at auction in February 2014, there were no assets to be sold to create any residual value for the stockholder All Veg, LLC. [Tr. N. Allen 231].

201. After April 1, 2014, Petitioner could not, absent an order from the bankruptcy court, have caused Allens, Inc. to pay the forty produce suppliers alleged by Respondent to be unpaid because Allens, Inc. was in bankruptcy. [P1X-10; P1X-11; P1X-22; Tr. J. Allen 114-115; Tr. N. Allen 196].
202. On April 10, 2014, the bankruptcy court entered an order changing the debtor Allens, Inc.'s caption name to Veg Liquidation, Inc. because Sager Creek wanted to use the name "Allens." [P1X-17 at 1-2; Tr. J. Allen 113-114].
203. On April 10, 2014, the bankruptcy court entered an order terminating A&M's services respecting debtor Veg Liquidation, Inc., f/k/a Allens, Inc. ("Veg Liquidation"); authorizing A&M to provide services to Sager Creek; and authorizing the appointment of Newsted and Boates as Responsible Officers for debtor Veg Liquidation. [P1X-18 at 2; Tr. J. Allen 115-116].
204. During the existence of the Restructuring Committee of Newsted and Boates, they never directed to Petitioner any proposed action, including, without limitation, any action in connection with the restructuring or sale of Allens, Inc. [Tr. J. Allen 116].
205. On June 6, 2014, the Veg Liquidation and Veg, LLC bankruptcy cases were both converted to Chapter 7 because they had no assets. [P1X-10 at 1; P1X-13 at 1; P1X-19 at 1-3; Tr. J. Allen 92, 96-07, 117].
206. Ray Fulmer was appointed Chapter 7 trustee for both Veg Liquidation and All Veg, LLC. [Tr. J. Allen 117].
207. At no time from the sale of assets of Allens, Inc. in February 2014 until the appointment of Ray Fulmer as Chapter 7 trustee did or could Petitioner exercise control over the assets or

payables of Veg Liquidation, f/k/a Allens, Inc. [Tr. J. Allen 117; Tr. N. Allen 196; Tr. Jenkins 435].

208. From June 2014 to the date of the hearing in the instant matter, bankruptcy trustee Ray Fulmer has controlled the financial decision-making for Veg Liquidation, f/k/a Allens, Inc. [P1X-23 at 1; Tr. J. Allen 118].

209. Petitioner was never contacted concerning a PACA license, date-stamped October 9, 2014, listing his name as an officer of Veg Liquidation and Ray Fulmer II as Trustee. [RX-1 at 1; Tr. N. Allen 193].

210. Stephen Leara, Esquire, believed by Respondent's sole witness to represent a party purchasing assets of Allens, Inc., or Veg Liquidation, communicated with Respondent in August 2014 concerning amendments to the PACA license listing Ray Fulmer II as trustee and Petitioner as officer, director, and 19.3% owner. [RX-1 at 1, 6; Tr. Jenkins 432-433].

211. An attorney representing the purchaser of a PACA licensee's assets has no authority to change its PACA license. [Tr. Jenkins 433].

212. In its Complaint against Allens, Inc., which is the basis of this matter, Respondent defined the violations period as between October 3, 2013 through January 6, 2014. [P1X-24 at 2; Tr. J. Allen 199; Tr. Jenkins 396, 425].

213. Petitioner was not aware that a PACA license had been renewed for Veg Liquidation in September 2014, or that he was listed as an officer, or that he was an officer of Veg Liquidation at that time. [Tr. N. Allen 194-195].

214. Pursuant to its undated initial determination letter, Respondent's stated determination regarding Petitioner's alleged responsible connection is for the time period during which

Allens, Inc. was alleged to have committed PACA violations, that is, from October 2013 until January 2014. [RX-2 at 1; Tr. Jenkins 424, 426-427].

215. Newsted and Boates are both listed as directors of Allens, Inc. on its PACA license during the violations period. [RX-1 at 7; Tr. Jenkins 429].

216. Respondent initially found Newsted and Boates to be responsibly connected to Allens, Inc. but subsequently withdrew its determination. [Tr. Jenkins 429-430].

217. Allens, Inc.'s Statement of Financial Affairs in bankruptcy, relied upon by Respondent in its determination, reflected Newsted and Boates as directors, subject to PACA requirements, according to Respondent's sole witness. [RX-9 at 43; Tr. Jenkins 451].

218. Respondent's PACA license record for Allens, Inc. does not indicate that a CRO was installed by Allens, Inc.'s secured lenders, answerable only to Newsted and Boates. [RX-1; Tr. Jenkins 431].

219. Documents relied upon by Respondent to support its finding of Petitioner's responsible connection include submissions from Petitioner with three declarations showing that CRO Hickman and A&M controlled financial decision-making at Allens, Inc. during the violations period, subject to Newsted and Boates. [RX-3 at 3-21; Tr. Jenkins 436].

220. In reaching its determination of Petitioner's alleged responsible connection, Respondent relied upon three sets of resolutions predating the installation of the CRO and the restructuring that installed the Special Committee of Newsted and Boates, as well as the violations period by between four and eight months, and did not take into account the effects of the August 5, 2013 restructuring resolutions. [RX-4; RX-5; RX-6; Tr. Jenkins 436-438].

221. The sole witness for Respondent stated that Respondent now seeks to hold Petitioner responsible for a decision occurring two months before the violations period. [Tr. Jenkins 444-446, 460-461].
222. An Arkansas Secretary of State record for Allens, Inc., relied upon by Respondent in reaching its determination of Petitioner's alleged responsible connection, dated January 23, 2015 and listing Petitioner as vice president and Hickman as registered agent, does not reflect that Josh Allen replaced Rick Allen as president and does not indicate that Petitioner holds any duties other than having a title. [RX-6 at 1; RX-7 at 1; Tr. Jenkins 446-449].
223. Allens, Inc.'s bankruptcy Statement of Financial Affairs, relied upon by Respondent in reaching its determination of Petitioner's alleged responsible connection and itemizing Petitioner's credit-card reimbursements, shows a flat monthly charge of \$20 beginning in August 2013 and that Petitioner no longer needed to be reimbursed for purchases after prior monthly credit-card expenses of \$1,828.95; \$7,373.74; \$1,691.28; \$30.00; \$250.00; \$807.85; \$1,972.22; \$2,908.27; and \$5,418.69 prior to August 2013. [RX-9 at 136-137; Tr. Jenkins 455].
224. Respondent's sole witness was unaware of anything Petitioner could have done during the violations period to cause payments to be made to the persons alleged by Respondent to have been unpaid by Allens, Inc., underlying this matter. [Tr. Jenkins 460-462].
225. Respondent did not consider whether CRO Hickman was responsibly connected. [Tr. Jenkins 466].

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. PACA neither displaces nor conflicts with Arkansas law relating to the delegation of authority within corporations.
3. Nicholas Allen was not actively involved in the activities that resulted in Allens, Inc.'s PACA violations.
4. Nicholas Allen was only a nominal officer, director, and shareholder of Allens, Inc. during the period when Allens, Inc. violated PACA, October 3, 2013 through January 6, 2014.
5. Nicholas Allen was not responsibly connected with Allens, Inc. during the period when Allens, Inc. violated PACA, October 3, 2013 through January 6, 2014.
6. Nicholas Allen, by being found not to have been responsibly connected to a violating corporation, is not subject to the employment restrictions of PACA and is not subject to the licensing restrictions of PACA.

ORDER

The determination of the Director of the PACA Division that Nicholas Allen was responsibly connected to Allens, Inc. during the period of October 2013 to January 2014, when the corporation was committing willful, flagrant, and repeated violations of PACA is REVERSED.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 26th day of April, 2018



Channing D. Strother
Acting Chief Administrative Law Judge

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