

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Steven C. Finberg,

Petitioner.

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PACA Docket No. 14-0167

DECISION AND ORDER ON REMAND

Appearances:

Stephen P. McCarron, Esq., and Mary Jean Fassett, Esq., with McCarron & Deiss, Washington, D.C., for the Petitioner Steven C. Finberg; and,

Charles L. Kendall, Esq., with the Office of General Counsel, United States Department of Agriculture, Washington, D.C., for Respondent, the Administrator of the Specialty Crops Program, Agricultural Marketing Service ("AMS").

Before Chief Administrative Law Judge, Channing D. Strother.

The principal issue for consideration and resolution in this Decision is whether Petitioner Steven C. Finberg is "responsibly connected" to Adams Produce Company, LLC ("Adams"), a company that was determined to have violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) ("PACA").¹ This matter was initiated by a Petition for Review filed by Petitioner Finberg on August 13, 2014, pursuant to 7 C.F.R. §§ 133(b)(2) and 1.135(b), requesting review of the PACA Division Director's determination that he was responsibly connected to Adams during the period Adams violated PACA by failing to pay for produce.

Based on a *de novo* review of the record up to, but excluding, the vacated July 25, 2017 Decision and Order, I find Petitioner Finberg failed to rebut the presumption, stemming from the

¹ See *Adams Produce Company LLC*, USDA Docket No. 13-0284, Default Decision and Order (November 25, 2013), available at <https://oalj.oha.usda.gov/sites/default/files/DD%20-%20Adams%20Produce%20-%2013-0284.pdf> (last visited Nov. 8, 2019).

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fact that he was an officer of Adams, that he was responsibly connected with Adams during the period it committed violations of Section 2(4) of PACA.² Petitioner Finberg was actively involved in the activities resulting in the violations of section 2(4) of PACA³ by Adams and was not merely a nominal officer of Adams. Therefore, the determination by the Director of the PACA Division that Petitioner Finberg was responsibly connected with Adams during the period of its violations of PACA is AFFIRMED as further set out herein.

BACKGROUND

A two-part, in-person hearing was held on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, D.C. The instant proceeding was consolidated with and heard together at hearing by Administrative Law Judge Jill S. Clifton (“Judge Clifton”) with three other dockets involving petitioners Respondent AMS determined were responsibly connected with Adams during the period of PACA violations: Jonathan Dyer, Docket No. 14-0166; Drew Johnson a/ka/ Drew R. Johnson, Docket No. 14-0168; and Michael S. Rawlings, Docket No. 14-0169. The record through the end of the hearings is the same in each of the four dockets. However, Judge Clifton issued the July 25, 2017 Decision and Order, now vacated, in the current docket concerning Petitioner Finberg’s responsibly connected status separate from her May 19, 2017 Decision and Order as to the responsibly connected status of the other three petitioners.

On August 21, 2017, Petitioner Finberg filed an Appeal Petition with the Judicial Officer (“JO”) and on August 23, 2017 Respondent AMS filed a “Respondent’s Appeal Petition of the Decision and Order as to Steven C. Finberg (PACA Docket No. 14-0167)”⁴ with the JO.

² 7 U.S.C. § 499b(4).

³ *Id.*

⁴ Respondent AMS’s Appeal Petition was limited to one conclusion from Judge Clifton’s July 25, 2017 Decision and Order, the conclusion that Petitioner Finberg was “never an owner” of Adams. *See* Respondent’s Appeal Petition at 1 (citing initial Decision and Order at 7). Respondent AMS requested

Petitioner Finberg filed “Petitioner’s Opposition to Respondent’s Appeal Petition” on August 29, 2017, and on September 8, 2017, Respondent AMS filed “Respondent’s Opposition to Appeal Petition of Steven C. Finberg (PACA Docket No. 14-0167).” On September 13, 2017, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

IMPACT OF *LUCIA* ON THE INSTANT CASE

On November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief in *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (“*Lucia*”), pending in the United States Supreme Court at that time, in which the Solicitor General took the position that administrative law judges (“ALJs”) of the Securities and Exchange Commission are inferior officers under the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2.

On January 10, 2018, then-USDA JO, William G. Jenson,⁵ acknowledged the Appointments Clause issue raised in *Lucia*, of whether ALJs are inferior officers under the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, and, “[t]o put to rest any Appointments Clause claim that may arise in this proceeding,”⁶ remanded this proceeding to Judge Clifton, directing her, *id.*, to:

1) issue an order providing AMS and Mr. Finberg an opportunity to submit new evidence; (2) consider the record, including any newly submitted evidence and all her previous substantive and procedural actions; (3) determine whether to ratify or revise in any respect all her prior actions; and (4) issue an order stating that she has completed consideration of the record and setting forth her determination regarding ratification.

After accepting a response from each party to the Remand Order, Judge Clifton issued a

that the Judicial Officer find that Petitioner Finberg was an owner of Adams during the period Adams violated PACA. *Id.*

⁵ Judicial Officer William G. Jenson retired from federal service effective August 31, 2018.

⁶ January 10, 2018 Judicial Officer Remand at 2.

“Notice of Completion of Judge’s Tasks on Remand” on November 30, 2018, stating at pg. 3, para. 7, that “Petitioner Steven C. Finberg’s respectful request for a new hearing before a properly appointed official ends my involvement; my tasks on Remand are completed; and Docket Nos. **14-0166, 14-0167, 14-0168 & 14-0169** are ready for return to the Judicial Officer.” (Emphasis in original.)

The Supreme Court issued its decision in *Lucia* on June 21, 2018, holding that Administrative Law Judges (“ALJs”) are Officers of the United States within the meaning of Article II of the United States Constitution and are subject to the Appointments Clause.⁷ The Court also held that, where a case was heard and decided by an ALJ who was not constitutionally appointed and where the issue of improper appointment is timely raised, appropriate relief is a new hearing before a different, properly appointed official, and a new disposition.⁸

In a ceremony on July 24, 2017, almost a year before the Supreme Court’s June 21, 2018 decision in *Lucia*, the Secretary of the United States Department of Agriculture, Sonny Perdue, personally ratified the prior appointments of USDA’s ALJs and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that action.

On February 7, 2019, Judicial Officer Bobbie J. McCartney issued a “Procedural Order Affirming Appeal Status Regarding Docket Nos. 14-0166, 14-0168, and 14-0169 and Remand Order Regarding Docket 14-0167” (“Second Remand Order”). In this Second Remand Order at 5-6, the Judicial Officer finds:

in light of the fact that Petitioner Finberg has requested that a new hearing be conducted in accordance with *Lucia*, while the other three petitioners have declined to request such relief, the dockets have become procedurally

⁷ *Lucia*, 138 S. Ct. at 2051-55.

⁸ See *Lucia*, 138 S. Ct. at 2055 (citing *Ryder v. U.S.*, 515 U.S. 177, 182–183, (1995)).

distinguishable. Accordingly, Docket Nos. **14-0166, 14-0168 & 14-0169** pertaining to Petitioners Jonathan Dyer, Drew Johnson, and Michael S. Rawlings will remain consolidated and will remain in appeal status before the Judicial Officer, while Docket No. **14-0167** pertaining to Petitioner Steven C. Finberg will be Remanded for further proceedings to be conducted in accordance with *Lucia*.

(Emphasis in original). Docket No. 14-0167 pertaining to Petitioner Finberg was therein remanded to the undersigned, Chief ALJ Channing D. Strother, and the July 25, 2017 Decision and Order issued by Judge Clifton was vacated.⁹

I then issued an Order Setting Filing Deadlines for Briefs on Remand. On May 1, 2019, Petitioner Finberg filed “Petitioner’s Brief on Remand” and Respondent AMS filed “Respondent’s Response to Order Setting Filing Deadlines for Briefs on Remand” (“Respondent’s Brief on Remand”).

The hearing process on remand under Lucia

The USDA Judicial Officer McCartney held in her February 19, 2019 “Order Remanding to the Chief Judge for Further Proceedings” in *Trimble*, Docket No. 15-0097, that as a result of the Secretary’s actions to ratify the appointments of USDA ALJs, as of July 24, 2017,

⁹ As previously noted, Judge Clifton issued her decision as to the responsibly connected status of the three other petitioners originally consolidated with Petitioner Finberg (Jonathan Dyer, Docket No. 14-0166; Drew Johnson a/ka/ Drew R. Johnson, Docket No. 14-0168; and Michael S. Rawlings, Docket No. 14-0169), separately from that of Petitioner Finberg. Although Petitioners Dyer, Johnson, and Rawlings, and Respondent AMS filed appeals of Judge Clifton’s May 19, 2017 Decision to the Judicial Officer (“JO”), unlike Petitioner Finberg, none of those petitioners challenged Judge Clifton’s authority under *Lucia* to hear and decide those three dockets. Therefore, these appeals went before the JO, and were decided in her January 9, 2020 Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, and 14-0169. In that Decision, the JO affirmed Judge Clifton’s determinations that petitioners Dyer, Johnson, and Rawlings, although directors of Adams during the period of Adams’ PACA violations, had demonstrated by a preponderance of the evidence that they were not responsibly connected with Adams during the period of the Adams PACA violations because they overcame the presumption of responsibly connected by meeting the criteria set forth in PACA, 7 U.S.C. § 499a(b)(9). See *Dyer et al.*, USDA Docket Nos. 14-0166, 14-0168, 14-0169, Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, 14-0169 (January 9, 2020), available at https://oalj.oha.usda.gov/sites/default/files/JODO%20-%20Dyer_Redacted.pdf (last visited Feb. 4, 2020). Judge Clifton, as affirmed by the JO, found that petitioners Dyer, Johnson, and Rawlings had shown by a preponderance of the evidence that they were not actively involved in the activities resulting in Adams’ PACA violations; that they did not have ownership interest in Adams; and that Adams was the alter ego of Scott Grinstead.

USDA ALJs were duly appointed by a “head of the department” as required by Article II and the Supreme Court’s ruling in *Lucia*.¹⁰ Furthermore, Secretary Perdue appointed me, Channing D. Strother, USDA Chief ALJ on October 17, 2018.

As mentioned, under *Lucia*, where a timely challenge to the “validity of the appointment of an officer who adjudicates his case” is made, the remedy for a respondent is the opportunity to seek a new hearing and a new decision by a new presiding judge.¹¹ Appointments Clause challenges may also be waived.¹²

As previously noted, in the instant case, a hearing on the record was held on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, D.C., and a Decision and Order pertaining to Petitioner Finberg was entered on July 25, 2017. The Hearing was presided over, and the initial Decision and Order entered by, Judge Clifton prior to the Secretary’s July 24, 2017 ratification of USDA ALJ appointments. Therefore, a remedy of a new hearing and new disposition by a new presiding ALJ is warranted in this case under *Lucia*.

The USDA Judicial Officer provided guidance on the procedure for new hearing granted under *Lucia* in this case as follows:¹³

The parties are advised that the newly appointed ALJ shall exercise the full

¹⁰ *Trimble*, Docket No. 15-0097, “Order Remanding to the Chief Judge for Further Proceedings”, at 2, (Feb. 19, 2019) (affirming USDA ALJ authority as of July 24, 2017) available at https://oalj.oha.usda.gov/sites/default/files/15-0097%20-%20OJO%20Remand_Redacted_0.pdf (last visited on Aug. 12, 2019).

¹¹ *Lucia*, 138 S. Ct. 2055 (quoting *Ryder*, 515 U.S. 182–83 (internal quotations omitted)).

¹² See Second Remand Order (where three respondents waived the raising of Appointments Clause challenges and a new hearing, while the instant respondent raised such challenge and was granted a remand for new hearing in accordance with *Lucia*), available at https://oalj.oha.usda.gov/sites/default/files/14-0167%20-%20OJO%20PROCEDURAL%20STATUS_Redacted.pdf (last visited on Aug. 12, 2019). See also, e.g., *DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (litigant forfeited Appointments Clause argument by failing to raise it before agency); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009).

¹³ *Id.* at 7-8 (emphasis in original).

powers conferred by the USDA Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in this matter. Rather, the Decision and Order issued on July 25, 2017 by Judge Clifton in Docket No. 14-0167 is hereby **VACATED** and the written record which has already been made by the parties in this proceeding shall be reviewed *de novo* to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any *new* testimony or other evidence.

Testimony taken at USDA hearings are taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits which have already been admitted into evidence as part of that written record. However, the parties will be given an opportunity to show good cause for the submission of any *new* evidence not previously submitted in the prior proceeding.

Thus, in the April 1, 2019 Order Setting Filing Deadlines for Briefs on Remand (“April 1, 2019 Order”), at 4-5, I provided the parties with the opportunity to

file briefs raising any specific challenges to substantive or procedural actions taken by ALJ Clifton up to but excluding the issuance of the July 25, 2017 initial Decision and Order, which, as noted, was previously vacated by the Judicial Officer; and any specific challenges to the admission, exclusions, or weighing of evidence prior to, during, or after the Hearing held on March 22 and August 23, 2016; and/or to show good cause why the written record should be supplemented with any new testimony or other evidence not previously submitted in this proceeding.

The parties were invited to file briefs

raising 1) any specific challenges to substantive or procedural actions taken by Administrative Law Judge Clifton up to and excluding the issuance of the July 25, 2017 initial Decision and Order; and 2) any specific challenges to the admission, exclusions, or weighing of evidence prior to, during, or after the Hearing held on March 22 and August 23, 2016; and/or **including a showing of good cause** why the written record should be supplemented with any *new* testimony or other evidence not previously submitted in this proceeding.

April 2, 2019 Order at 5 (emphasis added).

Party Briefs on Remand

Petitioner Finberg filed his Brief on Remand on May 1, 2019, which generally challenged Judge Clifton’s vacated July 25, 2017 Decision and Order. In large part, Petitioner Finberg’s Brief on Remand includes background and contentions almost verbatim to those contained in Petitioner Finberg’s post-hearing Brief (filed April 10, 2017) (“Petitioner’s Brief”). In his Brief on Remand at 2, Petitioner Finberg states “that a proper weighing of the evidence results in a finding that he [Finberg] was not actively involved in the activities that resulted in Adams’ PACA violations, which are limited to a failure to pay produce suppliers.” Petitioner Finberg states that a *de novo* review of the evidence from the consolidated hearing is needed but does not request to enter any new evidence and does not specifically challenge the admission or exclusion of any evidence.¹⁴

Respondent AMS filed its Brief on Remand on May 1, 2019, stating that Respondent has no challenges to substantive or procedural actions taken by Judge Clifton and affirming that the record is complete and ready for a decision based upon it. Respondent AMS filed a Reply to Petitioner’s Brief on Remand on May 24, 2019, pointing out that the April 1, 2019 Order directed the parties to provide challenges to any procedural actions taken up to and excluding the issuance of the July 25, 2019 Decision and Order, and contending, at 4, that Petitioner’s Brief on Remand “spends more than 24 pages of a 25-page Brief challenging the July 25, 2017 initial Decision and Order itself,” is “unresponsive to CALJ Strother’s April 1, 2019 Order,” and is an “attempt to color the *de novo* review of ‘the written record which has already been made by the parties in this proceeding.’”

As the JO determined in *Trimble*, the Supreme Court in *Lucia* did not specify the matter

¹⁴ Petitioner Finberg did not submit a reply brief to Respondent’s Brief on Remand.

in which a “new hearing” must be conducted to remedy an Appointments Clause issue.¹⁵ Under the Judicial Officer precedent in *Trimble* and as ordered in her Second Remand Order, a hearing on the record is sufficient in the instant case and will be completed as a *de novo* review of the record up to but not including the vacated July 25, 2017 Decision and Order.

Although the parties were specifically given the opportunity to challenge on brief any of Judge Clifton’s rulings (excluding her vacated Decision and Order) and instructed that failure to raise any such challenge would be a waiver of such in the April 1, 2019 Order Setting Filing Deadlines for Briefs on Remand, aside from Petitioner’s request for new hearing under *Lucia*, neither Petitioner Finberg nor Respondent AMS challenged any of Judge Clifton’s rulings (again, excluding her vacated Decision and Order). As, neither party requested to submit new briefs or new evidence to be considered as a part of my *de novo* review of the record, my review consisted only of the briefs and evidence already part of the record, and they are the basis for this Decision. No weight has been given to the July 25, 2017 Decision and Order nor has any factual finding or legal conclusion determined by Judge Clifton during the instant proceeding been treated as presumptively correct. Indeed, the vacated July 25, 2017 Decision and Order has not been referred to for any purpose in the preparation of this Decision.

SUMMARY OF RECORD

As stated, no factual finding nor legal conclusions determined by Judge Clifton during the instant proceeding has been treated as presumptively correct. Orders and rulings of an administrative nature¹⁶ are hereby deemed non-substantive for the purposes of my *de novo*

¹⁵ *Trimble*, Docket No. 15-0097, “Order Remanding to the Chief Judge for Further Proceedings”, at 3, (Feb. 19, 2019) available at [https://oalj.oha.usda.gov/sites/default/files/15-0097%20-%20OJO%20Remand Redacted_0.pdf](https://oalj.oha.usda.gov/sites/default/files/15-0097%20-%20OJO%20Remand%20Redacted_0.pdf) (last visited on Aug. 12, 2019).

¹⁶ The following orders and rulings issued by Judge Clifton are determined by me to be non-substantive for *de novo* review of the Record: September 4, 2014 “Rulings & Preliminary Instructions” (granting Respondent AMS’s request to consolidate four “responsibly connected” cases for hearing and for

review of the Record. The Record consists of the following substantive pleadings, filings, and orders:¹⁷

- August 13, 2014 Petitioner's Petition for Review
- August 26, 2014 Respondent's Agency Record
- October 31, 2014 Respondent's Statement
- October 31, 2014 Statement of Petitioners RE Procedural Issues
- January 20, 2015 Respondent's Proposed Witness List and Proposed Exhibits
- June 11, 2015 [Jointly Filed] Updated Stipulation as to Proceedings
- March 22, 2016 Hearing Transcript (Dallas, Texas)
- April 11, 2016 Petitioner's Exhibits
- August 23, 2016 Hearing Transcript (Washington, D.C.)
- January 13, 2017 Brief of Petitioners
- March 10, 2017 Respondent's Opposition to Brief of Petitioners
- April 10, 2017 Reply Brief of Petitioners
- May 18, 2017 Transcript Corrections

The following exhibits were admitted to the record:

- **As part of August 26, 2014 Agency Record:**

Finberg RX 1 Adams Produce Company LLC PACA License Record

Finberg RX 2 Initial Responsibly Connected Notice

Finberg RX 3 Freedom of Information Act Request

extension of time; and updating the case caption); November 18, 2014 Rulings re: Parties' Statements; November 24, 2014 Hearing Notice; November 24, 2014 Rulings Modification; February 3, 2015 Rescheduled Hearing Notice; February 3, 2015 Disclosure Deadline Extended; February 4, 2015 Hearing Notice; March 11, 2015 Additional Day of Hearing [Notice]; June 19, 2015 Hearing Location Designation; June 23, 2015 Hearing Cancellation; December 21, 2015 Notice of Hearing; February 1, 2016 Designation of Hearing Location; February 10, 2019 "Sept 1 Hearing Notice"; October 24, 2016 Post-Hearing Deadlines; November 22, 2016 Order-First Amended Post-Hearing Deadlines; and February 9, 2017 Second Amended Post-Hearing Deadlines.

¹⁷ The following filing has been deemed non-substantive for purposes of *de novo* review of the Record: Respondent AMS's August 26, 2014 Motion to Consolidate and Request for Leave to File Certified Copies of Records Out of Time.

Finberg RX 4 Reply to Initial Responsibly Connected Notice

Finberg RX 5 Adams Produce Company LLC Limited Liability Company Agreement

Finberg RX 6 API Holdings LLC v. Frost Cummings Tidwell Group LLC

Finberg RX 7 Adams Produce Company LLC v. Frost Cummings Tidwell Group LLC

Finberg RX 8 Interview Memo

Finberg RX 9 The Birmingham News Article

Finberg RX 10 The Packer News Article

- **During the March 22, 2016 Hearing:**¹⁸

PX 1 U.S. Attorney Information, filed Jan 29, 2013, charging Scott Grinstead with Wire Fraud, Misprision of Felony and Failure to File Tax Return

PX 2 Plea Agreement between Scott Grinstead and U.S.A.

PX 3 U.S.A. Sentencing Memorandum re Scott Grinstead

PX 4 Criminal Docket for Scott Grinstead criminal case

PX 5 Scott Grinstead September 14, 2009 email to [REDACTED] re “Strategy to increase margin” for CIC deal

PX 6 Scott Grinstead November 2, 2009 email to [REDACTED] to create a “safety net” re CIC deal

PX 7 CIC Term Sheet for [REDACTED] deal dated February 18, 2010

PX 8 Frost/Cummings (auditors) engagement letter to audit financial statements of Adams Produce Co. dated March 1, 2010

PX 9 March 11-16, 2010 emails between [REDACTED] and Scott Grinstead to fraudulently increase income for CIC purchase

PX 10 March 11-12, 2010 emails between Grinstead and [REDACTED] re increasing net income

PX 11 [REDACTED] of Frost/Cummings (auditor) April 10, 2010 email to [REDACTED] with questions on income entries

¹⁸ An exhibits table of contents is included in Tr. at 4-6.

PX 12 July 29, 2010, emails between [REDACTED] Scott Grinstead and [REDACTED] (Frost Cummings auditor) re missing documentation for fraudulent Kontos A/R

PX 13 July-August 2010 emails between [REDACTED] and Scott Grinstead re proof of an A/R from Kontos

PX 14 Steve Alexander August 11, 2010, emails to Scott Grinstead re fraudulent Kontos A/R

PX 15 Letter from employee [REDACTED] to Alexander dated August 17, 2010, to falsely reclassify salary as payment on a note to increase the income portion of the income statement for the CIC deal with back up

PX 16 Amendment to [REDACTED] contract to falsely reclassify salary for 2009

PX 17 November 3, 2010 letter from attorney for [REDACTED] about reclassified 2009 income

PX 18 November 30, 2010 email to cover-up false reclassification of [REDACTED] salary

PX 19 August 2010 letter from [REDACTED] to [REDACTED] agreeing to falsely reclassify salary as payment on the note to increase income statement for CIC deal, with backup documentation

PX 20 April 4, 2010 email from [REDACTED] re changes to his 2009 W-2

PX 21 March 18, 2011 forged Kontos letter

PX 22 March 20, 2011 forged Kontos Letter

PX 23 Deposition of [REDACTED] on December 11, 2013 confirming forgery of his signature

PX 24 Audit Procedure Letter from Frost/Cummings - March 1, 2010

PX 25 Adams letter to Frost/Cummings, dated September 24, 2010, confirming no fraud or misrepresentation, signed by Grinstead and [REDACTED]

PX 26 Formal resignation of Michael Rawlings as Director/Manager of Adams Produce

- **During the August 23, 2016 Hearing:**¹⁹

¹⁹ An exhibits table of contents is included in Tr. at 173; pages of the August 23, 2016 Tr. start at page 169, continuing from the March 22, 2016 Tr.

Finberg RX 11 Finberg Plea Agreement

Finberg RX 12 Finberg Indictment

JURISDICTION AND BURDEN OF PROOF

The purpose of PACA was stated in *Zwick v. Freeman*²⁰ as follows:

The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct. H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).

Congress provided for the enforcement of PACA by the Secretary of Agriculture, USDA.²¹ The JO includes extensive discussion of PACA and how PACA is applied by USDA to accomplish its statutory goals in *Baltimore Tomato Company, Inc.*,²² reaffirmed in *The Caito Produce Co.*,²³ and most recently in *Allen*²⁴ and *Dyer*.²⁵ As quoted in *Allen*: “The goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act.”²⁶

In a PACA “responsibly connected” proceeding, where a Petitioner is an “officer, director, or holder of more than 10 per centum” of a licensee found to have violated PACA, the

²⁰ *Zwick*, 373 F.2d 110, 116 (2d Cir.), *certiorari* denied, 389 U.S. 835.

²¹ 7 U.S.C. § 499m.

²² *Baltimore Tomato Company, Inc.*, 39 Agric. Dec. 412, 415-16 (U.S.D.A. 1980).

²³ *The Caito Produce Co.*, 48 Agric. Dec. 602 (U.S.D.A. 1989).

²⁴ *Allen*, USDA Docket No. 15-0085, 2019 WL 3928843 (U.S.D.A. Aug. 1, 2019) (also available at https://oalj.oha.usda.gov/sites/default/files/JODO%20-%2015-0085_Redacted.pdf, last visited Jan. 13, 2020).

²⁵ *Dyer et al.*, USDA Docket Nos. 14-0166, 14-0168, 14-0169, Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, 14-0169 (January 9, 2020), available at https://oalj.oha.usda.gov/sites/default/files/JODO%20-%20Dyer_Redacted.pdf (last visited Feb. 4, 2020).

²⁶ *Allen*, *supra*, 2019 WL 3928843, at *4 (citing *Caito Produce*, 48 Agric. Dec. at 619-20) (internal citations and quotations omitted).

Petitioner bears the burden of proof as to the statutory criteria to escape responsibly connected status.²⁷ The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,²⁸ such as this one, is the preponderance of the evidence.²⁹

RELEVANT STATUTORY AND REGULATORY AUTHORITY

PACA Section 1(b)(9)³⁰ sets out the statutory test of whether a person is “responsibly connected” to an entity that has violated PACA:

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

Under PACA Section 4(b)³¹ the Secretary may refuse a PACA license to individuals determined to be responsibly connected to an entity that has violated PACA, and PACA Section 8(b)³² sets out employment limitations applied to individuals determined to be responsibly connected to an entity that has violated PACA:

UNLAWFUL EMPLOYMENT OF CERTAIN PERSONS; BOND ASSURING COMPLIANCE; APPROVAL OF EMPLOYMENT WITHOUT BOND;

²⁷ See 7 U.S.C. § 499a(9). See also *Perfectly Fresh Farms, Inc.*, 2009 WL 1702292, at *8 (U.S.D.A. 2009) (“petitioner carries the burden of proof in a responsibly connected proceeding”); *Rodgers.*, 56 Agric. Dec. 1919 (U.S.D.A. 1997) (“Petitioner bears the burden of proof in this proceeding to avoid responsibly connected status.”).

²⁸ 5 U.S.C. §§ 551 *et seq.*

²⁹ See *Herman & Maclean v. Huddleston*, 459 U.S. 375, 387-91 (1983) (holding the standard of proof in administrative proceedings is preponderance of evidence).

³⁰ 7 U.S.C. § 499a(b)(9).

³¹ 7 U.S.C. § 499d(b).

³² 7 U.S.C. § 499h(b).

CHANGE IN AMOUNT OF BOND; PAYMENT OF INCREASED AMOUNT; PENALTIES. Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person (1) whose license has been revoked or is currently suspended by order of the Secretary; (2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 2, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or (3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 7(c). The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 2, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this Act and that the licensee will pay all reparation awards, subject to its right of appeal under section 7(c), which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order.

DISCUSSION

In a PACA “responsibly connected” proceeding, where a Petitioner is an “officer, director, or holder of more than 10 per centum” of a licensee found to have violated PACA, to escape responsibly connected status, the Petitioner bears the burden of “demonstrat[ing] by a preponderance of the evidence” both that: (1) Petitioner was not *actively involved* in the activities causing the violation, and (2)(a) Petitioner was only *nominally an officer* (or director, ten-percent or more shareholder, or partner) of the violating licensee *or* (b) was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.³³

If a person seeking to prove themselves not “responsibly connected” to a licensee that has violated PACA fails to demonstrate by a preponderance of the evidence both prongs of the

³³ See 7 U.S.C. § 499a(b)(9).

PACA Section 1(b)(9)³⁴ responsibly connected test, he or she will be found to be “responsibly connected” within the meaning of the statute; and will be subject to the licensing and employment restrictions in Sections 4(b) and 8(b) of the PACA.³⁵

Here, it has been resolved through final administrative action not subject to appeal and there is otherwise no dispute that during the period of August 8, 2011 through May 18, 2012, on or about the dates and the transactions set forth in Appendix A of the Complaint in *Adams Produce Company LLC*, USDA Docket No. 13-0284, Adams “willfully, repeatedly, and flagrantly” violated section 2(4) of the PACA³⁶ by failing to make full payment promptly to fifty-one (51) sellers of the agreed purchase prices, or balances thereof, for 9,314 lots of perishable agricultural commodities which Adams purchased, received, and accepted in the course of interstate commerce, in the total amount of \$10,735,186.81.³⁷ There is also no dispute that Petitioner Finberg was the Chief Operations Officer of Adams during the period of Adams’ violations of the PACA. Because Petitioner Finberg was an officer of Adams during that period, he meets the first sentence of the definition of the term *responsibly connected* in PACA Section 1(b)(9)³⁸ and has the burden to demonstrate by a preponderance of the evidence that he meets the statutory criteria to be determined not responsibly connected with Adams during the violations period.

I. Responsibly Connected Test

In general, Petitioner Finberg contends that he was not responsibly connected to Adams

³⁴ 7 U.S.C. § 499a(b)(9).

³⁵ 7 U.S.C. §§ 499d(b), 499h(b).

³⁶ 7 U.S.C. § 499b(4).

³⁷ See *Adams Produce Company LLC*, USDA Docket No. 13-0284, Default Decision and Order (November 25, 2013), *supra* n. 1.

³⁸ 7 U.S.C. § 499a(b)(9).

during the time of Adams' PACA violations because he was "not actively involved in the activities resulting in the violation; and he was not an owner of Adams; and Scott Grinstead was an owner of Adams Produce and the alter ego of Adams Produce."³⁹ Petitioner Finberg testifies he started working at Adams in 2008 as an "executive vice president to work on special projects" and his duties were in sales and marketing for the first two years.⁴⁰ He testifies that in 2009 his role started to involve operations and personnel, working with general managers⁴¹ and he was responsible for overseeing and coordinating "logistics between the company's chain customers and its eight (8) distribution centers," but he was never involved with invoicing customers "on any level."⁴²

Petitioner Finberg explains that CIC, an investment company,⁴³ signed a Letter of Intent with the former owners of Adams as well as Mr. Grinstead to "invest \$7.8 million in Adams in exchange for an ownership interest in a new company to be formed."⁴⁴ In July 2010 Adams became a limited liability corporation ("LLC") in preparation for the CIC investment, and on September 29, 2010, a Second Amended and Restated LLC agreement was executed, solidifying the CIC investment and new ownership of the company by "API Holdings ('APIH') (the vehicle that held the investment from CIC [TR 36:1-5]), Grinstead and Associates, LLC, and Grinstead Corp."⁴⁵ Petitioner Finberg avers that, although Scott Grinstead, then-Chief Executive Officer

³⁹ Petitioner's Brief at 13. *See also id.* at 2 (citing *Norinsberg*, 58 Agric. Dec. 604 (1999); *Quinn v. Butz*, 510 F.2d 743, 757-758 (D.C. Cir. 1975)).

⁴⁰ *Id.* at 22 (citing Tr. 223:5-13, 223:15-16).

⁴¹ Tr. 227:7-10.

⁴² Petitioner's Brief at 22 (citing Tr. 228:22-29, 260-61).

⁴³ I note that CIC is the name of the company and is not an acronym.

⁴⁴ *Id.* at 3-4.

⁴⁵ *Id.*

(“CEO”) of Adams, changed Petitioner Finberg’s title from Executive Vice President to Chief Operations Officer (“COO”) in 2009, his “role and compensation did not change during 2007-2012” aside from Finberg being named “Employee Member” and being required to attend quarterly board meetings after the CIC investment.⁴⁶

Petitioner Finberg states that Mr. Grinstead was hired in 2003 as the CEO of Adams and by 2011 “destroyed the company by engaging in extensive fraudulent activity to enrich himself.”⁴⁷ Petitioner Finberg avers that, although he was one of two designated “Employee Members,” he was “never granted any units or ownership interest of any type, or any voting rights in Adams LLC” as 100% of the units were owned by CIC (55% ownership) and Scott Grinstead entities (45% ownership).⁴⁸ Petitioner Finberg contends that from about September 29, 2010 until about October 2011, he attended four to five board meetings and was unaware of Adams having any financial problems but that “Grinstead’s number of fraudulent activities began to come to light in October 2011.”⁴⁹

Adams was notified that Mr. Grinstead was charged with defrauding the Department of Defense in October 2011, to which he pled guilty in January 2013.⁵⁰ Petitioner Finberg also recounts that Mr. Grinstead defrauded Adams, including the directors and officers, as well as the majority unit holder CIC by “misrepresenting numerous company financial records and forging documents prior to the closing of the deal with CIC to increase the income of the company prior

⁴⁶ *Id.* at 23 (citing Tr. 237:15-25; Tr. 229:21-230:15).

⁴⁷ *Id.* at 2 (citing *Dyer* RX-11, p. 2, ¶ 5).

⁴⁸ *Id.* at 4 (citing *Finberg* RX-4, p. 62, 89, 91). *See also id.* at 23 (citing *Finberg* RX-4 at 61, 89, 91; Tr. 274:20-276:13).

⁴⁹ *Id.* at 5 (citing Tr. 39:1-4, 7-24).

⁵⁰ *See Id.* at 5 (citing PX-3, U.S. Sentencing Memo, 7-8; PX-1, Information, 3; PX-2, Plea Agreement, 5-6; Tr. 38:18-39:24).

to CIC's investment" with the goal of enriching himself;⁵¹ abused the corporate form, using company funds to pay for personal expenditures;⁵² and was ultimately criminally charged by the Northern District of Alabama on multiple counts such as wire fraud, misprision of felony, and failure to file tax returns.⁵³

Petitioner Finberg avers that he "only became aware of Scott Grinstead's fraudulent activity in March 2012, when Grinstead was suspended" and that Finberg never participated in any of Grinstead's criminal activity.⁵⁴

However, Petitioner Finberg admits that he was present at a luncheon on October 26, 2011 during which he learned of two buyers for Adams who admitted to inflating pricing on sales to the government, heard Adams' then-Chief Financial Officer ("CFO") Steven Alexander instruct the buyers to stop the fraudulent scheme and to "'bring it in for a soft landing' to avoid detection," and that Finberg stayed silent during the luncheon and also failed to report what he learned to the Department of Justice ("DOJ").⁵⁵ Petitioner Finberg contends that his silence and failure to inform the DOJ of his knowledge of the fraudulent scheme "does not constitute 'active involvement' " and that there is no evidence that Finberg was aware of Grinstead's fraudulent activity until March 2012, thus he could not have been "responsibly connected" to Adams.⁵⁶

Generally, Respondent AMS contends that even "[a]ccepting as true Petitioners' assertion that Grinstead's fraudulent activities led to the violations by Adams, Petitioner Finberg

⁵¹ *Id.* at 6-8. *See also* PX-9, 11-19, 21-23, 25; Tr. 42:2-44:18, 112:14-17.

⁵² *Id.* at 8-9 (citing PX-1-3).

⁵³ *Id.* at 9-10 (citing PX 1, 3).

⁵⁴ *Id.* at 23 (citing 253:18-23, 261:19- 23, 263:5-23).

⁵⁵ *Id.* (citing Tr. 263-264, 267).

⁵⁶ *Id.* at 24 (citing Tr. 253:18-23, 261:19-23; 7 U.S.C. 499a(b)(9); *Quinn v. Butz*, 510 F.2d at 757-758; *Norinsberg*, 58 Agric. Dec. 604 (1999); *Maldonado v. Dep't of Agric.*, 154 F.3d at 1087).

was actively involved in the activities that resulted in the violations of the PACA” because “[b]ut for Petitioner Finberg’s participation in the fraudulent scheme, and his overt actions in furtherance of the conspiracy with Grinstead and others, the fraudulent activities could not have continued after July of 2011.” Respondent AMS also argues that Petitioner Finberg did not contend that he was an officer in name only and, even if he had, he “was a part of the executive team of Adams, and participated fully and actively in the company’s management” so “was not an officer in name only.”⁵⁷ Respondent AMS contends, therefore, that Petitioner Finberg failed to rebut by a preponderance of the evidence the statutory presumption that he was “responsibly connected” to Adams during the period that Adams violated the PACA.⁵⁸

a. First Prong: Petitioner Finberg was actively involved in the activities causing the violation

As to the first prong of the “responsibly connected test,” the standard for determining whether a person was actively involved in the activities resulting in a violation under PACA is:

A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to 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.

Norinsberg, 58 Agric. Dec. 604, 611-12 (U.S.D.A. 1999) (emphasis added).

Petitioner Finberg contends that he was not involved “at all, much less actively involved” in Scott Grinstead’s fraudulent activities that “led to the non-payment of produce vendors by

⁵⁷ *Id.* at 27.

⁵⁸ *Id.* at 26-31.

Adams in violation of 7 U.S.C. 499b(4).”⁵⁹ In particular, Petitioner Finberg contends that after he was made aware of the illegal upcharging of produce to the Department of Defense, he reported such to Grinstead unaware that Grinstead knew of and had approved the fraudulent scheme.⁶⁰ Thus, Petitioner Finberg argues, “there is no evidence that Finberg was ‘actively involved’ in the violations, and Finberg did not participate in any activities resulting in a violation of PACA.”⁶¹

Respondent AMS contends that Petitioner Finberg did participate and that, “due to Petitioner Finberg’s participation,” the fraudulent activities continued “and resulted in the PACA violations by Adams from August 8, 2011 through May 18, 2012.”⁶² Respondent AMS points out that Petitioner Finberg was the Chief Operations Officer of Adams; was an “Employee Member” of Adams and therefore directly or indirectly held units of Adams; that he held interest in the company of “slightly more than 4 percent[;]” and that Adams held a “key man” insurance policy in the amount of \$3,000,000 on the life of Petitioner Finberg.⁶³

Further, as evidence of Petitioner Finberg’s participation in the fraudulent scheme that resulted in Adams’ violation of the PACA, Respondent AMS provides an indictment, *Finberg* RX-12, filed against Petitioner Finberg in the United States District Court for the Northern District of Alabama on May 29, 2014, charging that Finberg “knowingly and willfully conspired, combined, and agreed with Scott David Grinstead, John Steven Alexander, David Andrew

⁵⁹ Petitioner’s Brief at 13 (citing *Norinsberg*, 58 Agric. Dec. 604, 610 (1999); *Maldonado v. Department of Agric.*, 154 F.3d 1086 (9th Cir. 1998)).

⁶⁰ Petitioner’s Reply Brief at 6 (citing Tr. 262-66).

⁶¹ *Id.* (citing *Norinsberg*, 58 Agric. Dec. at 610-611).

I also note that Petitioner Finberg testified that he first became aware of problems in the company during the holiday season of 2011 because management was “getting more calls that before to the general managers or to the home office asking about payment.” Tr. 238:7-24.

⁶² Respondent’s Brief at 26.

⁶³ Respondent’s Brief at 15 (citing Tr. 259:8-18; *Finberg* RX-6 at 6; *Finberg* RX-7 at 2; *Finberg* RX-8 at 1; *Finberg* RX-9 at 1; *Finberg* RX-10 at 1; *Finberg* RX-5 at 10, 26, 48; Tr. 275:13-20; 276:4-9).

Kirkland, Michael John O'Brien, Stanley Joel Butler, and Christopher Alan Pfahl to defraud the United States and DLA."⁶⁴ Respondent AMS explains that the indictment charged the following overt acts in furtherance of conspiracy:⁶⁵

9. In or about July 2011, defendant **STEVEN CRAIG FINBERG** and other officers and employees of Adams Produce participated in a meeting during which they discussed ways to increase Adams Produce's profit margins on the government contracts, including conducting transactions designed to create fraudulent purchase orders reflecting a higher cost to Adams Produce of purchasing fruits and vegetables.

10. On or about August 1, 2011, defendant **STEVEN CRAIG FINBERG** was included in an email exchange with other officers and employees of Adams Produce, including David Andrew Kirkland, regarding the naming of the company being created within Adams Produce to keep track of the fraudulent transactions. Michael John O'Brien suggested naming the new company "dsf (Dave's slush fund)... gbm (guaranteed bonus maker)."

11. On or about August 22, 2011, defendant **STEVEN CRAIG FINBERG** met with Chief Executive Officer Scott David Grinstead and Chief Financial Officer John Steven Alexander at the Marriott hotel on Highway 280 in Birmingham, Alabama. The agenda for the meeting listed items related to DLA, including "Company 53 and margin." Following the meeting, defendant **STEVEN CRAIG FINBERG** prepared items for a follow-up meeting, including "Review with Dave the paper work with Lange and compare the normal paperwork."

Respondent AMS provides the plea agreement, *Finberg CX-11*, Petitioner Finberg entered on April 22, 2015, which stated:⁶⁶

Between in or about July 2011 and November 2011, Adams Produce conducted at least 82 transactions with T.L.C. designed to create false purchase orders and invoices. As a result of this scheme to defraud, Adams Produce received approximately \$481,000.00 from the government to which it was not entitled.

From at least mid-September 2011 and thereafter, defendant **STEVEN CRAIG FINBERG**, having knowledge of the actual commission of a felony cognizable by a court of the United States, to wit, the wire fraud scheme described in this Factual Basis and in paragraphs 5 through 8 of the Information, did conceal the same and did not as soon as possible make known the same to some judge or other person in civil or military authority under the United States.

⁶⁴ Respondent's Brief at 16 (citing *Finberg RX-[12]* at 3 (internal quotations omitted)).

⁶⁵ *Id.* (citing *Finberg RX-[12]* at 4-5 (internal quotations omitted) (emphasis in original)).

⁶⁶ *Id.* (citing *Finberg RX-11* at 5 (internal quotations omitted) (emphasis in original)).

On or about October 26, 2011, defendant **STEVEN CRAIG FINBERG** agreed with John Stephen Alexander, David Andrew Kirkland, and Michael John O'Brien to gradually end the scheme to defraud-to bring it in for a soft landing - rather than end it immediately so as to avoid raising red flags and better avoid detection by DLA.

In neither his post Hearing Brief nor his Reply Brief does Petitioner Finberg address having pled guilty to participating in a fraudulent scheme or deny that his participation in the wire fraud scheme contributed to Adams' violations of PACA.

As stated in *Norinsberg, supra*, "a petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only."⁶⁷ *Norinsberg* goes on to explain that a determination of "whether an individual was actively involved in activities resulting in a violation of the PACA requires a fact-specific determination and consideration of the totality of the circumstances."⁶⁸

"Personal fault is not required, although it certainly would be sufficient to establish that a Petitioner was actively involved."⁶⁹ Here, the activities resulting in Adams' violation of PACA were directly related to misuse of company funds and fraudulent schemes against the company and the U.S. government. The evidence demonstrates that Petitioner Finberg pled guilty to being involved in a wire fraud scheme from at least mid-September 2011 by concealing his actual

⁶⁷ *Norinsberg, supra*, 58 Agric. Dec. at 604.

⁶⁸ *Norinsberg*, 58 Agric. Dec. at 610 (citing *United States v. Vertac Chemical Corp.*, 46 F.3d 803, 808 (8th Cir. 1995) (indicating that actual or substantial control requires at a minimum active involvement in activities and stating that determining whether an entity has exerted actual or substantial control requires a fact-intensive inquiry and consideration of the totality of the circumstances), *cert. denied sub nom. Hercules, Inc. v. United States*, 515 U.S. 1158 (1995); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 843-45 (3rd Cir. 1994) (same)).

⁶⁹ *Caito*, 57 Agric. Dec. 582 (U.S.D.A. 1998) (finding that "[g]iven that Anthony A. Caito performed both acts of commission and omission, he was actively involved in the Caito & Mascari, Inc.'s violations of the Act.").

knowledge of the scheme and agreeing⁷⁰ on October 26, 2011 to gradually end the scheme to avoid detection of fraud against the government amounting to \$481,000.00.⁷¹ As previously mentioned, during the period of August 8, 2011 through May 18, 2012, Adams “willfully, repeatedly, and flagrantly” violated section 2(4) of the PACA.⁷² Therefore, contrary to Petitioner Finberg’s claims that he was not actively involved in Grinstead’s fraud by that led to Adams’ violations of the PACA,⁷³ the record demonstrates that he actively participated in a wire fraud scheme, which demonstrates that he exercised judgment or discretion in activities that contributed to the PACA violations; in particular he chose not to bring the fraudulent scheme to an immediate end or express any desire to do so, with respect to activities that resulted in Adams’ violation of the PACA during the period of violation.⁷⁴ While the record indicates Mr. Grinstead was the master-mind behind the fraudulent schemes and misused company funds for his own benefit, Petitioner Finberg has not demonstrated by a preponderance of the evidence that he was not actively involved in the activities causing the PACA violations. Indeed, the record demonstrates by a preponderance of the evidence that Petitioner Finberg’s activities helped bring about the downfall of Adams, which resulted in Adams’ violation of the PACA. A preponderance of the evidence shows that Petitioner Finberg was actively involved in the activities causing the PACA violations.

⁷⁰ I acknowledge that Petitioner Finberg does not agree that he “agreed” to gradually end the scheme to avoid detection but admits that he did not act to stop the proposed action or state anything during the October 26, 2011 discussion to indicate that he disagreed with the discussion. *See* Tr. 267:19-268:5.

⁷¹ RX-12 at 5.

⁷² (7 U.S.C. § 499b(4)). *See Adams Produce Company LLC*, USDA Docket No. 13-0284, Default Decision and Order (November 25, 2013), *supra* n. 1.

⁷³ *See* Petitioner’s Reply Brief at 6.

⁷⁴ I note that, despite Petitioner’s attempts to separate his guilty plea to misprision of felony from Grinstead’s fraudulent activity, this action is identical to one of the charges to which Grinstead also plead guilty, *see* PX-1 at 6, PX-2 at 7, and PX-3 at 4..

Therefore, I find that Petitioner Steven C. Finberg has failed to rebut the statutory presumption that he was “responsibly connected” to Adams Produce Company LLC, as an officer of the firm during the period Adams violated PACA, because he failed to meet the first prong of the statutory test.

b. Second Prong: Petitioner Finberg was not a nominal officer of Adams; Petitioner Finberg was not an owner of Adams

The second prong of the responsibly connected test has been explained, as follows:⁷⁵

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

As noted in *Norinsberg, supra*, “a petitioner’s failure to meet the first prong of the statutory test results in the petitioner’s failure to demonstrate that he or she was not responsibly connected, without recourse to the second prong.” Here Petitioner Finberg has failed to rebut the statutory presumption that he is responsibly connected, because he failed to meet the first prong of the statutory test. Nevertheless, because the record is before me, in the potential aid of proceedings on appeal, I address certain other elements of the statutory test, which do not have to be reached in this Decision as a result of Petitioner Finberg failing the first prong.

The standard for “nominal partner” was further explained by the USDA Judicial Officer as follows:

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

⁷⁵ *Norinsberg*, 58 Agric. Dec. at 609.

before me, I do not intend to apply the “actual, significant nexus” test, as described in *Taylor v. US. 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 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.

Taylor, 71 Agric. Dec. 612, 621 (U.S.D.A. 2012).

Petitioner Finberg contends “persons designated as officers or directors, who are not owners of a licensee, may show that the company was so dominated and exclusively controlled by one person to demonstrate that it was in reality conducted as a sole proprietorship.”⁷⁶ He also states that, if a person demonstrates such domination and exclusive control, the corporate form should be disregarded to avoid an injustice.⁷⁷ Petitioner Finberg contends that Mr. Grinstead, as CEO and an owner of Adams, “dominated and exclusively controlled Adams as a his sole proprietorship”⁷⁸ and that Grinstead’s abuse of the corporate form, especially his treatment of the corporation as his personal bank account, “are hallmarks of an alter ego.”⁷⁹ Petitioner Finberg also contends that Mr. Grinstead consistently mixed his personal interests with Adams’ business interests, another significant feature of a corporate alter ego.⁸⁰

Respondent AMS contends that Petitioner Finberg failed to advance an argument that he

⁷⁶ Petitioner’s Brief at 14 (citing *Quinn v. Butz*, 510 F.2d 743, 759 (D.C. Cir. 1975)).

⁷⁷ *Id.* (citing *Bell v. Department of Agriculture*, 39 F.3d 1199, 1205 (D.C. Cir. 1994)). *See also* Petitioner’s Reply Brief at 6 (stating that a “two-prong test is used in determining if a company is the alter ego of a dominant individual: (1) is there such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist; and (2) if the acts are treated as those of the corporation alone, will an inequitable result follow?” and citing *Labadie Coal Co. v. Black*, 672 F.2d 92 (D.C. Cir. 1982)).

⁷⁸ *Id.* at 15. *See also* Tr. at 231:23-232:1 (Petitioner Finberg stating that Grinstead “was solely responsible for making any major decisions within the organization”).

⁷⁹ *Id.* at 9 (citing *Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975)).

⁸⁰ *Id.* at 15 (citing *Labadie Coal Co. v. Black*, 672 F.2d 92 (D.C. Cir. 1982); PX-1 at 4-5; PX-2 at 4-5; PX-3 at 6).

was “a nominal officer of Adams Produce LLC when Adams violated the PACA” but that, even if he had, “the record shows that Petitioner Finberg was a part of the executive team of Adams, and participated fully and actively in the company’s management” and that he was not “an officer in name only.”⁸¹ Petitioner Finberg admits that he does not claim to have held a nominal position.⁸² Thus, I find that Petitioner Finberg did not demonstrate by a preponderance of the evidence that he was nominally an officer. Petitioner Finberg thus failed the first part of the second prong of the statutory responsibly connected test.

Respondent AMS avers that Petitioner Finberg seeks to “establish the second prong of the responsibly connected test through the ‘*alter ego*’ alternative”⁸³ and that Adams could not have been the alter ego of Mr. Grinstead because Mr. Grinstead, or Scott Grinstead Associates, “represented a minority share in Adams Produce LLC (44.7%)” and Adams operated under the direction of its Board of Directors, removing Grinstead “midway through the violation period (the violations continued in his absence).”⁸⁴ Respondent AMS avers that Petitioner’s argument, that Adams was the alter ego of Grinstead, defies logic as the Board “could and did remove” him.⁸⁵ Respondent AMS also argues that, even if Adams was the alter ego of Grinstead, “the alter ego alternative for showing the second prong of the responsible connection test is not available to Petitioner Finberg because he was an owner of Adams Produce LLC.”⁸⁶ Respondent

⁸¹ Respondent’s Brief at 27. *See also id.* at 15, ¶¶ 44-48, noting that Finberg was the Chief Operating Officer, designated as an Employee Member of Adams, held interest in Adams, and held a “key man” insurance policy (citing Tr. 259:8-18; *Finberg* RX-6 at 6; *Finberg* RX-7 at 2; *Finberg* RX-8 at 1; *Finberg* RX-9 at 1; *Finberg* RX-10 at 1; *Finberg* RX-5 at 10, 26, 48; Tr. 275:13-20; 276:4-9).

⁸² Petitioner’s Reply Brief at 1.

⁸³ *Id.* at 23.

⁸⁴ *Id.* at 25.

⁸⁵ *Id.* *See also id.* at 15, ¶ 47 (citing Tr. 275:13-20; 276:4-9).

⁸⁶ Respondent’s Brief at 28, 23-24 (citing *Norinsberg*, 56 Agric. Dec. 1840, 1864-5 (1997); *Thames v. U.S. Dep’t of Agric.*, 195 F. App’x 850, 854 (11th Cir. 2006)).

AMS contends that even an “ownership interest as small as 4%, such as that owned by Petitioner Finberg, is sufficient to combat that alter ego argument” and that the issue to be considered is the Petitioner’s relationship to the company during the period when the company violated the PACA as opposed to his relationship only to the fraudulent activity.⁸⁷

In response, Petitioner Finberg contends that he “was not an owner of Adams in any respect” and that although he expected to receive four percent (4%) interest in the company as an “Employee Member,” “the undisputed evidence establishes he never received any units, ownership interests, or voting rights.”⁸⁸ Petitioner Finberg avers that his title of “Employee Member” was only fictional and that the true owners were APIH and Grinstead.⁸⁹ Petitioner Finberg states that it would be “fundamentally unfair, and contrary to the statute” to find that Petitioner, a victim of Mr. Grinstead, was responsibly connected to Adams.⁹⁰

To meet the second part of the second prong of the “responsibly connected” test, the Petitioner must prove that a) he was not an owner of Adams, and b) that Adams was the alter ego of one or more of its actual owners.⁹¹ Respondent AMS contends that the alter ego exception from responsibly connected is unavailable to Petitioner Finberg because he is an owner with at least four percent (4%) interest in Adams.⁹² In support of this contention, Respondent AMS 1)

⁸⁷ *Id.* at 25 (citing *Finch*, PACA-APP Docket Nos. 13-0068, 13-0069, 2014 WL 4311062, at *10 (U.S.D.A. 2014); *Margiola*, 65 Agric. Dec. 622, 644-46 (2006) (concluding the petitioner failed to prove he was only a nominal officer of the violating PACA licensee, even though the petitioner proved that no other employee of the PACA licensee committed the PACA violations and the petitioner did not authorize, or even know of, the violations)).

⁸⁸ Petitioner’s Reply Brief at 8 (citing Tr. 375 [sic]:18-20; RX-4 at 61, 91).

⁸⁹ *Id.* (citing Tr. 275-76).

⁹⁰ *Id.* at 9.

⁹¹ See *supra* *Norinsberg*, 58 Agric. Dec. at 609.

⁹² See Respondent’s Brief at 15, ¶¶ 47-48 (citing Tr. 275:13-20; 276:4-9; *Finberg* RX-5, at 26.); *id.* at 28, 23-24.

cites to transcripts where Petitioner Finberg notes that he expected to receive slightly more than four percent (4%) interest, and 2) provides *Finberg* RX-5, p. 26, the Second Amended and Restated Limited Liability Company Agreement, which states that Adams held a “key man” insurance policy in the amount of \$3,000,000 on the life of Petitioner.

During the hearing, Petitioner Finberg explained that:⁹³

[I]t was explained to me at the time of the CIC transaction that I would be given some level of stock ownership in the entity. And I believe -- I never saw the documents after, but I believed the initial operating agreement showed me at like slightly more than 4 percent.

However, Respondent AMS does not provide any evidence, including any documentation, showing that Petitioner Finberg was actually vested with an ownership interest in Adams.⁹⁴ Further, Petitioner Finberg points out that API Holdings and Grinstead entities together held a 100 percent interest in Adams⁹⁵ and the agency’s licensing records, *Finberg* RX-1, show that Petitioner Finberg was not an owner of Adams. Thus, I conclude that Petitioner Finberg is not excluded by any ownership interest in Adams from making an alter ego contention.

In *Dyer*⁹⁶ the JO affirmed Judge Clifton’s determination that Adams was the alter ego of Mr. Grinstead. As explained previously, because Petitioner Finberg has not demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in PACA violations, I do not have to reach any issues of whether Adams was the alter ego of Mr. Grinstead in order to find that Petitioner Finberg is responsibly connected, and I do not.

⁹³ Tr. 275:16-20.

⁹⁴ In fact, Respondent’s own proposed statement of facts provides: “Of these four members, tow held ownership interests: API Holdings LLC 55.30%, and Scott Grinstead 44.70%.” Respondent’s Brief at 4-5, ¶ 3 (citing *Finberg* RX-1 at 1, 3; *Finberg* RX-5 at 47, 48, 50, 51).

⁹⁵ Petitioner’s Reply Brief at 8 (citing RX-4 at 61, 91); Petitioner’s Brief at 4 (citing RX-4 at 87). *See also* RX-4 at 91. *See also* *Finberg* RX-1 at 1-3, 6; *Finberg* RX-5 at 52.

⁹⁶ *See supra Dyer et al.*, n. 25.

I note that, as the JO in *Dyer* pointed out:⁹⁷

Not only did Petitioners Johnson and Dyer form a “Special Committee” to look into the wrongdoing, and fully co-operated with the investigation by the United States Department of Justice (ID at 11), they saw to it that the PACA debts were repaid in large part. Suppliers of produce were owed \$10,735,186.81, and Petitioners saw to it that they were paid all but \$1,928,417.74 (ID at 7-8, citing Tr. 112, 117, 18). Further, Petitioners paid over \$2 million to the investigators who were hired to assist the DOJ. Petitioners set aside an additional \$2 million to cover the remaining payments to the suppliers, but, through no fault of their own, PNC Bank garnished the funds, even after being told the money was reserved for the purpose of settling the remaining PACA debt (ID at 8, citing Tr. 118). Judge Clifton quoted a portion of testimony as follows:

In contrast, CIC Partners invested \$8.2 million and lost nearly all of it. A settlement with the auditor (see *Dyer* RX 8) returned some money, but then the \$2 million plus paid to Fulbright & Jaworski to assist DOJ used that. Petitioner Drew Johnson testified credibly: “We didn’t take a dime. Once the DOJ gave any indication there was a problem, we never took a dime out of this company. All we did is put money in, and that money went to the banks or it went to pay PACA bills. So all the money we put in, none of it went to us.” Tr. 116-18. (ID at 9).

Petitioner Finberg does not claim to have participated in any of these activities to root out wrongdoing and to get the suppliers paid, and the record is bereft of any evidence that he did. Instead, Petitioner by his own testimony continued to draw his salary as COO until the company became insolvent.⁹⁸ The evidence shows that he is not similarly situated to the Petitioners the JO found in *Dyer* to have met the burden of demonstrating that they were not responsibly connected.

FINDINGS OF FACT

Adams Produce Company, LLC

1. Adams Produce Company LLC (“Adams”) is a limited liability company organized and existing under the laws of the state of Delaware, formed on July 8, 2010. *Finberg* RX-1 at 10. Its last known business address was 302 Finley

⁹⁷ See *supra* *Dyer* et al., n. 25, Order Affirming Initial Decision and Order in Docket Nos. 14-0166, 14-0168, 14-0169 at 8-9.

⁹⁸ Tr. 228: 23-24.

- Avenue West, Birmingham, Alabama, 35204-1050. *Finberg* RX-1 at 1.
2. At all times material to the underlying PACA Complaint in this case, Adams was licensed under and operating subject to the provisions of the PACA. *Finberg* RX-1 at 1, 3. License number 2010 1293 was issued to Adams on September 23, 2010. *Finberg* RX-1 at 3. This license terminated on September 23, 2012, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Adams failed to pay the required annual fee. *Adams Produce Company, LLC*, PACA Docket No. 13-0284 at 2.
 3. At all times material to these proceedings, the members of Adams Produce Company LLC were Steve Finberg, API Holdings, Scott Grinstead, and Steve Alexander. *Finberg* RX-1 at 1, 3; *Finberg* RX-5 at 47, 48. Of these four members, two held ownership interests: API Holdings LLC 55.30%, and Scott Grinstead 44.70%. *Finberg* RX-1 at 1, 3; *Finberg* RX-5 at 47, 48, 50, 51.
 4. An ALJ found that Adams, during the period August 8, 2011, through May 18, 2012, failed to make full payment promptly to 51 sellers of the agreed purchase prices, or balances thereof, for 9,314 lots of perishable agricultural commodities, which Adams purchased in the course of interstate and foreign commerce, in the total amount of \$10,735,186.81. A total amount of \$1,928,417.74 remained unpaid when the disciplinary Complaint was filed against Adams on June 28, 2012. *Adams Produce Company, LLC*, PACA Docket No. 13-0284 at 2. The ALJ ordered the facts and circumstances of Adams' violations be published.
 5. CIC is a private equity investing firm whose basic function is to take investors' money and go find investments to go acquire or invest in companies. Tr. 33:7-11.
 6. In preparation for purchasing Adams Produce Company LLC, CIC generated a

wholly-owned company, API Holdings LLC ("APIH"). *Dyer* RX-1 at 6. APIH was an entity that was created by CIC Partners to house the investments from CIC and was the vehicle where the cash and the capital came into the company to buy out the sellers. Tr. 36:1-5. These preparations culminated in APIH "acquiring and taking the reins of the produce company." *Dyer* RX-8 at 6.

7. The acquisition was finalized by a Second Amended and Restated LLC Agreement, made and entered into on September 29, 2010. *Finberg* RX-4 at 45; Tr. 37:5-8. The Agreement listed as Members: APIH, Grinstead and Associates LLC, and Grinstead Corporation, and Employee Members Steve Alexander and Steve Finberg. *Finberg* RX-4 at 87.
8. Following the sale, Adams continued to employ Scott Grinstead as its Chief Executive Officer. Steve Finberg served as the Chief Operating Officer and Steve Alexander served as the Chief Financial Officer. *Finberg* RX-6 at 6.

Petitioner Finberg (Officer)

1. Steven Finberg has been a senior manager and executive in the produce industry for approximately 25 years. Tr. 222:23-24.
2. The PACA license record shows that Steven Finberg was a member of Adams Produce LLC from its formation until the company went out of business. *Finberg* RX-1 at 1, 3.
3. At all times material to these proceedings, Steven Finberg was the Chief Operating Officer of Adams Produce Company LLC. Tr. 259:8-18; *Finberg* RX-6 at 6; *Finberg* RX-7 at 2; *Finberg* RX-8 at 1; *Finberg* RX-9 at 1; *Finberg* RX-10 at 1.
4. Steven Finberg signed the Second Amended and Restated LLC Agreement as an

“Employee Member” of Adams. *Finberg* RX-5 at 48.

5. The Second Amended and Restated LLC Agreement defines Employee Member as follows: “‘Employee Member’ means each employee of the Company or any subsidiary of the Company that directly or indirectly holds Units. For the avoidance of doubt, as of the Effective Date, Steve Alexander, Steve Finberg, and Scott Grinstead are each an Employee Member.” *Finberg* RX-5 at 10.
6. By an indictment filed in the United States District Court for the Northern District of Alabama on May 29, 2014, a grand jury charged Steven Finberg as follows:

2. Defendant **STEVEN CRAIG FINBERG** was the Chief Operating Officer of Adams Produce from 2007 until the company closed in April 2012. As the Chief Operating Officer, defendant **STEVEN CRAIG FINBERG** was involved in the management of the company.

Finberg RX 11, pg. 2.

5. From in or about July 2011, and continuing until in or about November 2011, the exact dates being unknown, within Jefferson County in the Northern District of Alabama, and elsewhere, defendant **STEVEN CRAIG FINBERG** knowingly and willfully conspired, combined, and agreed with Scott David Grinstead, John Steven Alexander, David Andrew Kirkland, Michael John O'Brien, Stanley Joel Butler, and Christopher Alan Pfahl to defraud the United States and DLA.

Finberg RX-11 at 3.

The indictment charged the following overt acts in furtherance of the conspiracy:

9. In or about July 2011, defendant **STEVEN CRAIG FINBERG** and other officers and employees of Adams Produce participated in a meeting during which they discussed ways to increase Adams Produce's profit margins on the government contracts, including conducting transactions designed to create fraudulent purchase orders reflecting a higher cost to Adams Produce of purchasing fruits and vegetables.

Finberg RX 11, pg. 4.

10. On or about August 1, 2011, defendant **STEVEN CRAIG FINBERG** was included in an email exchange with other officers and employees of Adams Produce, including David Andrew Kirkland, regarding the naming of the company being created within Adams Produce to keep track of the fraudulent transactions. Michael John O'Brien suggested naming the new company "dsf (Dave's slush fund) . . . gbm (guaranteed bonus maker).

Finberg RX 11 at 4.

11. On or about August 22, 2011, defendant **STEVEN CRAIG FINBERG** met with Chief Executive Officer Scott David Grinstead and Chief Financial Officer John Steven Alexander at the Marriott hotel on Highway 280 in Birmingham, Alabama. The agenda for the meeting listed items related to DLA, including 'Company 53 and margin.' Following the meeting, defendant **STEVEN CRAIG FINBERG** prepared items for a follow-up meeting, including 'Review with Dave the paper work with Lange and compare the normal paperwork.'

Finberg RX-11 at 5.

7. On April 22, 2015, Steven Finberg entered a plea agreement, Finberg RX-12 at 5, which stated:

Between in or about July 2011 and November 2011, Adams Produce conducted at least 82 transactions with T.L.C. designed to create false purchase orders and invoices. As a result of this scheme to defraud, Adams which it was not entitled.

From at least mid-September 2011 and thereafter, defendant **STEVEN CRAIG FINBERG**, having knowledge of the actual commission of a felony cognizable by a court of the United States, to wit, the wire fraud scheme described in this Factual Basis and in paragraphs 5 through 8 of the Information, did conceal the same and did not as soon as possible make known the same to some judge or other person in civil or military authority under the United States.

On or about October 26, 2011, defendant **STEVEN CRAIG FINBERG** agreed with John Stephen Alexander, David Andrew Kirkland, and Michael John O'Brien to gradually end the scheme to defraud-to bring it in for a soft landing - rather than end it immediately so as to avoid raising red flags and better avoid detection by DLA.

LEGAL CONCLUSIONS

1. The Secretary has jurisdiction of this matter.
2. Petitioner Finberg has failed to rebut the presumption that he was responsibly connected with Adams at the time it committed violations of section 2 of the PACA. Petitioner Finberg was actively involved in the activities resulting in the violations of Section 2 of the PACA by Adams and was not a nominal director and shareholder of Adams. Therefore, the determination by the Director of the PACA Division that Petitioner Finberg was responsibly connected with Adams during the period of its repeated and flagrant violations of the PACA is affirmed.

ORDER

It is therefore ordered that, because Petitioner Finberg has failed to rebut the presumption that he was responsibly connected to Adams Produce, LLC as an officer of the firm when Adams committed willful, flagrant and repeated violations of Section 2(4) of the PACA by failing to make full payment promptly for produce purchases, the determination by the Director of the PACA Division that Petitioner Finberg was responsibly connected with Adams at the time of its violations is **AFFIRMED**.

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondents, unless there is an appeal to the Judicial Officer under section 1.145 of the Rules of Practice (7 C.F.R. § 1.145) applicable to this proceeding.

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

Issued this 6th day of February 2020, in Washington, D.C.



Channing D. Strother
Chief Administrative Law Judge

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