

AGRICULTURE DECISIONS

Volume 77

Book One

January – June 2018



UNITED STATES DEPARTMENT
OF AGRICULTURE

AGRICULTURE DECISIONS

Agriculture Decisions is an official publication by the Secretary of Agriculture that consists of decisions and orders issued in adjudicatory proceedings conducted for the Department under various statutes and regulations. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register; therefore, rules and regulations are not included in *Agriculture Decisions*.

FORMAT

The Office of Administrative Law Judges (OALJ) publishes a comprehensive volume of *Agriculture Decisions* for each calendar year. Two books comprise the annual volume: Book One, which contains the decisions and orders issued from January through June; and Book Two, which contains decisions and orders issued from July through December.

Each *Agriculture Decisions* book is divided into four sections, or "Parts." Part One is organized alphabetically, by statute, and contains general decisions and orders (*i.e.*, all decisions and orders other than those that pertain to the Packers & Stockyards Act or to the Perishable Agricultural Commodities Act). Part Two covers decisions and orders relating to the Packers & Stockyards Act. Part Three contains decisions and orders that involve the Perishable Agricultural Commodities Act, including reparation decisions. Part Four includes an alphabetical list of decisions and orders reported and a subject-matter index.

Parts One, Two, and Three of *Agriculture Decisions* incorporate the following: (1) initial decisions issued by the Administrative Law Judges, decisions and orders issued by the Judicial Officer on appeal, and selected court decisions; (2) a list of miscellaneous orders and dismissals entered by the Administrative Law Judges and full texts of any miscellaneous orders entered by the Judicial Officer; (3) a list of default decisions issued by the Administrative Law Judges; and (4) a list of consent decisions. While *Agriculture Decisions* generally does not include full texts of miscellaneous orders, default decisions, or consent decisions, those rulings are available in their entirety, in portable document format (PDF), via the OALJ website: <https://oalj.oha.usda.gov/current>.

PUBLICATION

Beginning with Volume 72 (circa 2013), *Agriculture Decisions* is published exclusively online. Volume 71 (circa 2012) was the publication's final print edition. All *Agriculture Decisions* books, including those from older volumes, are available for electronic download at <https://oalj.oha.usda.gov/agriculture-decisions-publication>.¹

In addition to uploading the *Agriculture Decisions* publication, OALJ also posts "current" decisions and orders, posting them individually as they are issued. These decisions and orders are displayed in PDF format on the OALJ website and are listed in reverse chronological order. Decisions and orders issued prior to the current year are also available in PDF archives, arranged by calendar year.

Published decisions and orders (*i.e.*, those that appear in *Agriculture Decisions*) may be cited by providing the volume number, page number, and year [*e.g.*, 1 Agric. Dec. 472 (U.S.D.A. 1942)].

¹ As of November 2018, Volumes 55 (circa 1996) through 76 (circa 2017) are available online. Volumes 39 through 54 have been scanned but, due to privacy concerns, do not yet appear online. The Editor of *Agriculture Decisions* is in the process of redacting personally identifiable information (PII) from these books. Once the appropriate redactions have been made, Volumes 39 through 54 will be uploaded to the OALJ website and made available on the *Agriculture Decisions* Archives page.

Further, decisions and orders posted on the OALJ website may also be cited as primary sources. When citing to a decision or order that appears on the OALJ website but has not yet been published in *Agriculture Decisions*, the docket number and date of decision or order should be included [*e.g.*, *Smith*, Docket No. 15-0123 (U.S.D.A. Oct. 1, 2015)].

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AGRICULTURE DECISIONS

Volume 77

Book One

Part One (General)

Pages 1 – 65



THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2018

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

BURNETTE FOODS, INC. v. USDA. No. 1:16-CV-21. Opinion	1
---	---

EQUAL ACCESS TO JUSTICE ACT

COURT DECISION

ANIMAL LEGAL DEFENSE FUND, INC. v. PERDUE. No. 16-914 (CRC). Opinion and Order	8
--	---

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

In re: PHILIP TRIMBLE. Docket No. 15-0097. Initial Decision and Order.	15
---	----

SALARY OFFSET ACT

DEPARTMENTAL DECISION

In re: ASHLEY N. JOHNSON. Docket No. 17-0260. Initial Decision and Order.	53
--	----

--

MISCELLANEOUS ORDERS & DISMISSALS

ANIMAL HEALTH PROTECTION ACT

In re: SWEENEY S. GILLETTE.

Docket No. 16-0024.

Order Dismissing Civil Penalty Held in Abeyance 56

ANIMAL WELFARE ACT

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER THOMAS J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.

Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.

Order Granting Request to Extend Time 56

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER THOMAS J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.

Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.

Order Granting Second Request to Extend Time 57

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER THOMAS J. SELLNER, an Iowa general partnership d/b/a CRICKET HOLLOW ZOO.

Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.

Order Granting Third Request to Extend Time 58

In re: SIDNEY JAY YOST, an individual, and AMAZING ANIMAL PRODUCTIONS, INC., a California corporation.

Docket Nos. 12-0294, 12-0295.

Order Granting Request to Extend Time 59

In re: STEARNS ZOOLOGICAL RESCUE & REHAB CENTER, INC.,
a Florida corporation d/b/a DADE CITY WILD THINGS.
Docket No. 15-0146.
Stay Order 60

HORSE PROTECTION ACT

In re: JUSTIN HARRIS.
Docket No. 17-0126.
Remand Order 60

In re: JACKIE BARRON, an individual; RUSSELL “DUKE” INGRAM,
an individual; SHEA SPROLES, an individual; and GARY SPROLES, an
individual.
Docket Nos. 16-00070, 16-0071, 16-0072, 16-0074.
Order Postponing Further Discretionary Actions by Judge 61

In re: JACKIE BARRON, an individual; and SHEA MCKENSIE
SPROLES, an individual.
Docket Nos. 17-0032, 17-0033.
Order Postponing Further Discretionary Actions by Judge 62

In re: TERRY GIVENS, an individual.
Docket No. 17-0117.
Order Postponing Further Discretionary Actions by Judge 62

In re: EDGAR ABERNATHY, an individual d/b/a ABERNATHY
STABLES; CARROLL COUNTS, an individual; VIRGINIA COUNTS,
an individual; and DARIUS NEWSOME, an individual.
Docket Nos. 17-0081, 17-0082, 17-0083, 17-0084.
Order Denying Motion to Strike and Exclude 62

--

DEFAULT DECISIONS

No Default Decisions Reported 63

--

CONSENT DECISIONS

ANIMAL WELFARE ACT

Consent Decisions 64

FEDERAL MEAT INSPECTION ACT

Consent Decisions 64

HORSE PROTECTION ACT

Consent Decisions 64

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AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

BURNETTE FOODS, INC. v. U.S. DEPARTMENT OF AGRICULTURE.

No. 1:16-CV-21.

Court Decision.

Filed January 24, 2018.

AMAA – Cherries – Cherry Industry Administrative Board – Consignments – Inventory – Sales activities – Sales constituency – Tart Cherry Order.

[Cite as: No. 1:16-CV-21, 2018 WL 538583 (W.D. Mich. Jan. 24, 2018)].

**United States District Court,
Western District of Michigan.**

The Court held that the composition of the Cherry Industry Administrative Board (“CIAB”), which seated fourteen members of CherrCo, Inc. (“CherrCo”), violated the Tart Cherry Order. The Court reversed the decision of the Judicial Officer, finding that although there was substantial evidence to support the Judicial Officer’s conclusion that CherrCo received consignments from its members, the record showed that CherrCo directed where the consigned cherries were sold. Therefore, CherrCo qualified as a sales constituency under the Tart Cherry Order, and the CIAB could have only one CherrCo member.

OPINION GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS’ CROSS-MOTION FOR SUMMARY JUDGMENT

GORDON J. QUIST, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

Each party has moved for summary judgment. Count III of Burnette’s Complaint alleges that the composition of the Cherry Industry Administrative Board (CIAB) violates the Tart Cherry Order. Count III is Burnette’s sole remaining count. (ECF No. 23).

The issue of whether the CIAB violates the Tart Cherry Order turns on whether CherrCo, Inc. is a “sales constituency” under the Tart Cherry Order. A sales constituency is a “common marketing organization or brokerage firm or individual representing a group of handlers and growers.

AGRICULTURAL MARKETING AGREEMENT ACT

An organization *which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency.*” 7 C.F.R. § 930.16 (emphasis added). In order to take into consideration various points of view in the tart cherry business, a single sales constituency cannot have more than one board member on the CIAB. 7 C.F.R. § 930.20(g). When Burnette filed its original petition in 2011, 14 of the 18 CIAB board members were CherrCo members; all nine of the representatives from Michigan on the CIAB were CherrCo members. (ECF No. 30–4 at PageID.2528). A Judicial Officer found that CherrCo is *not* a sales constituency because it receives consignments of cherries from others and does not direct where the consigned cherries are sold. (ECF No. 30–3 at PageID.1411–34). Both parties request summary judgment; Burnette asserts that the Judicial Officer’s determination is not supported by substantial evidence. USDA asserts that the record supports the Judicial Officer’s findings that CherrCo is a consignee of tart cherries which does not direct where cherries are sold.

Upon consideration of the parties’ briefs and the entire record, the Court will grant Burnette’s motion to reverse the Judicial Officer’s decision and deny USDA’s cross-motion.

I. Standard of Review

“[R]eview of the [agency’s] decision is limited to whether the decision is in accordance with law and whether the decision is supported by substantial evidence.” *Defiance Milk Prods. Co. v. Lyng*, 857 F.2d 1065, 1068 (6th Cir. 1988). “The [agency’s] decision. . . must be upheld if the record contains ‘such relevant evidence as a reasonable mind might accept as adequate to support [the agency’s] conclusion.’” *Lehigh Valley Farmers v. Block*, 829 F.2d 409, 412 (3d Cir. 1987) (first alteration added) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Defiance Milk Prods.*, 857 F.2d at 1068 (citing *Lehigh Valley*).

II. Discussion

Despite the deference owed to the Judicial Officer’s decision, the Court finds that the Judicial Officer’s decision is not supported by substantial evidence.

Burnette Foods, Inc. v. USDA
77 Agric. Dec. 1

The Judicial Officer, who affirmed an earlier decision by an administrative law judge on this issue, determined that CherrCo is not a sales constituency as defined in 7 C.F.R. § 930.16 because it receives consignments of cherries *and* does not direct where consigned tart cherries are sold. (ECF No. 1–3 at PageID.68.) The Judicial Officer made the following findings:

- CherrCo’s member-cooperatives select their own sales agents.
- The sales agents agree to follow CherrCo’s terms to ensure that all tart cherries sold by CherrCo’s member-cooperatives meet CherrCo’s minimum conditions for the sale.
- When a sales agent makes a sale, the agent notifies CherrCo of the buyer’s identity, the quantity of tart cherries purchased, the price, and other terms of the sale.
- CherrCo authorizes the release of pooled cherries for sale if the sale meets CherrCo’s minimum criteria for price and other terms.
- Each member-cooperative directs where its tart cherries are sold.
- CherrCo is not a sales constituency because, although it does receive consigned cherries, it does not direct where they are sold.

Id.

Burnette alleges that the Judicial Officer’s conclusions are not supported by substantial evidence and relied only on the testimony of James Jensen, the President of CherrCo. (ECF No. 33 at PageID.6575.) However, the Judicial Officer was not required to specifically cite all supporting record evidence in his opinion, as long as the decision is supported by substantial evidence in the record. *See, e.g., Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1355–56 (6th Cir. 1994). So, with that standard

AGRICULTURAL MARKETING AGREEMENT ACT

in mind, there are two issues:

A. Whether the Record Supports the Conclusion that CherrCo Is an Organization Which Receives Consignments of Cherries:

The Judicial Officer determined that CherrCo is an organization which receives consignments of cherries from its members. (ECF No. 1–3 at PageID.68). Burnette disagrees and argues that CherrCo owns the inventories of tart cherries, acts beyond consignee activities, and does not have a consignment relationship with its members. (ECF No. 33 at PageID.6577–82).

Whether CherrCo is a consignee is important because organizations that receive consignment of cherries and do not direct where they are sold are explicitly exempted from the definition of “sales constituency” under the Tart Cherry Order. 7 C.F.R. § 930.16. If CherrCo is a consignee and does not direct where the cherries are sold, then it is not a sales constituency and the CIAB can have more than one member of CherrCo. To consign a good, the consignor “transfer[s the good] to another’s custody or charge” or “give[s the good] to another to sell, usually with the understanding that the seller will pay the owner for the good[] from the proceeds.” *CONSIGN*, *Black’s Law Dictionary* (10th ed. 2014). “[T]itle does not pass until there is action of consignee indicating sale.” *CONSIGN*, *Black’s Law Dictionary* (6th ed. 1990).

Burnette argues that CherrCo owns the inventories of tart cherries and, accordingly, cannot be a consignee. Burnette relies on the testimony of one witness stating that CherrCo owns the inventory and the fact that CherrCo’s invoices make no mention of individual members. (ECF No. 30–4 at PageID.2865; ECF No. 30–7 at PageID.3518). USDA, in its response and cross-motion, cites a number of contradictory testimonies and other pieces of evidence from the administrative record to demonstrate that CherrCo acts as a consignee and receives consignment of cherries from its members and, rather than owning the inventory, simply retains custody on behalf of its members. (ECF No. 38 at PageID.6631–33). In light of this evidence, a sales invoice itself is not dispositive of ownership of the inventory. The record evidence demonstrates that the members transfer their cherries to CherrCo’s custody for CherrCo to sell; even when the cherry inventory is pooled, the respective members retain title over

their fungible portion of the cherries until CherrCo indicates a sale. The members retain the risk that their portion of the cherries will not be sold.

Burnette argues that because the Judicial Officer acknowledged that CherrCo's activities "go well beyond those of a mere consignee," CherrCo cannot be a consignee. (ECF No. 30-3 at PageID.1498). Burnette asserts that this conclusion and "evidence at the May 2012 Hearing shows that CherrCo is not an organization that receives consignments of cherries because the evidence shows that its activities go well beyond a mere consignor of cherries." (ECF No. 33 at PageID.6579). This argument fails, particularly when considered in light of the other record evidence discussed and cited by USDA in its briefs. The fact that CherrCo provides many services to its members does not nullify its role as a consignee. Consignees often promote the sale of consignee products. Burnette fails to show how CherrCo and its members' relationship does not fit the definition of consignment.

There is substantial evidence in the record supporting the Judicial Officer's determination that CherrCo receives consignments of cherries from its members, and Burnette's arguments are unpersuasive and are unsupported.

B. Whether CherrCo Directs Where Tart Cherries are Sold:

Burnette argues that "the Judicial Officer completely ignored additional activities of CherrCo which are clearly sales activities. . . [and] misinterpreted the relationship between CherrCo and the sales representatives." (ECF No. 33 at PageID.6582). Burnette asserts that "overwhelming" evidence shows that the sales agents represent CherrCo, rather than the individual CherrCo members, and dismisses the argument that the arrangement between CherrCo and the sales agents is a licensing arrangement. (ECF No. 33 at PageID.6582-83). Burnette points out, for example, that CherrCo sets minimum prices for products, is listed as the seller in all orders, provides marketing tools and literature to the sales agents, has contractual relationships with the sales agents, and acts as the "exclusive" marketing agent for CherrCo members. (ECF No. 33 at PageID.6584-85).

The Judicial Officer relied on the fact that member-cooperatives select

AGRICULTURAL MARKETING AGREEMENT ACT

their own sales agents and the fact that the member-cooperative requests release of pooled cherries for sale. But the Judicial Officer also acknowledged that sales are subject to the authorization of CherrCo. (ECF No. 30–3 at PageID.1421–22). The record evidences that CherrCo directs where consigned cherries are sold. As Jensen testified and under the Membership and Marketing Agreement,

- Individual member co-ops do not sign the agreements with the sales representatives. (ECF No. 30–4 at PageID.2077).
- *CherrCo*, itself, pays commissions directly to sales agents. (*Id.* at PageID.2078).
- CherrCo’s marketing committee composed of several CIAB members determines the sales agents’ commissions. (*Id.* at PageID.2079).
- Although the individual members choose who their sales agents are, CherrCo acts as the exclusive marketing agent. (*Id.* at PageID.2081).¹
- Under the Membership and Marketing Agreement, CherrCo is equipped with the authority to sell cherries itself—“Co-op may sell the Product itself or may license sales agents to sell the product.” (ECF No. 30–4 at PageID.2084; ECF No. 30–6 at PageID.3348).
- Whether CherrCo sells cherries itself or licenses sales agents to do so is determined by CherrCo’s Board of Directors. (ECF No. 30–4 at PageID.2084).
- CherrCo Members transfer cherries as CherrCo directs—“Member shall transfer the Product to Co-op, customers of Co-op, or agents of Co-op, as Co-op shall

¹ The Court could not find how many sales representatives CherrCo had. But if not every member of CherrCo had its own sales representative, then the obvious question would be, who was selling the cherries for those who did not have a sales representative.

direct.” (*Id.* at PageID.2086; ECF No. 30–6 at PageID.3349).

- CherrCo “is engaged in the processing, preparing for market, marketing, handling, packing, storing, drying, manufacturing, and selling of tart cherries.” (ECF No. 30–6 at PageID.3347).
- CherrCo also must approve all orders, and can “reject any order or any part thereof for any reason,” and is listed as the seller for all orders. (ECF No. 30–10 at PageID.3822).
- CherrCo is listed as the seller for all orders. (*Id.*).

This is substantial evidence that CherrCo “directs where the consigned cherries are sold” and therefore qualifies as a sales constituency under 7 C.F.R. § 930.16. The Judicial Officer’s conclusion was not supported by substantial evidence. Therefore, CherrCo, as a sales constituency, cannot have more than one seat on the CIAB. 7 C.F.R. § 930.20.

Burnette’s Remaining Arguments

In its reply and response to USDA’s cross-motion, Burnette argues that the Tart Cherry Order has not improved the economic welfare of growers, and that CherrCo inappropriately dominates the CIAB. These assertions are beyond the scope of Burnette’s remaining claim, *i.e.*, that CherrCo is a sales constituency. Therefore, they need not be addressed.

III. Conclusion

Burnette has demonstrated that the Judicial Officer’s decision was not supported by substantial evidence in the record. Burnette’s motion for summary judgment will be granted, and USDA’s cross-motion for summary judgment will be denied.

A separate order will issue.

EQUAL ACCESS TO JUSTICE ACT

EQUAL ACCESS TO JUSTICE ACT

COURT DECISION

ANIMAL LEGAL DEFENSE FUND, INC. v. PERDUE.

No. 16-914 (CRC).

Court Decision.

Filed February 16, 2018.

EAJA – Attorneys’ fees and expenses – Degree of success, adjustment for – Hourly rate – Hours, number of – Prevailing party – Reasonableness of fees – Substantial justification – Third-party participation – Timeliness.

[Cite as: F. Supp. 3d 315 (D.C. Cir. 2018)].

**United States District Court
District of Columbia Circuit.**

The Court granted the plaintiff’s motion for attorneys’ fees and costs in the amount of \$12,169.14, reduced from the requested \$20,359.60 in attorneys’ fees, \$605 in costs, and additional \$3,988.68 in attorneys’ fees for time spent litigating its fee petition. The Court found that the plaintiff was a prevailing party in a civil action against USDA, wherein the plaintiff alleged that the Judicial Officer arbitrarily and capriciously denied its appeal of an Administrative Law Judge’s order denying third-party intervention. The Court held that, because the plaintiff did not prevail on all its claims and the action was ultimately remanded to USDA, a fifty-percent reduction in the fee award was appropriate. Finally, the Court ruled that the plaintiff’s request for \$605 in costs was untimely because it was filed more than twenty-one days after final judgment.

OPINION AND ORDER

CHRISTOPHER R. COOPER, UNITED STATES DISTRICT JUDGE,
DELIVERED THE OPINION OF THE COURT.

For the reasons set forth below, Plaintiff’s motion for attorneys’ fees and costs is granted in the amount of \$12,169.14.

I. Background

In July 2015, the U.S. Department of Agriculture’s (“USDA”) Animal and Plant Health Inspection Service (“APHIS”) filed an enforcement action against the owner of the Cricket Hollow Zoo in Manchester, Iowa. The plaintiff in this case, Animal Legal Defense Fund (“ALDF”), moved

to intervene in that administrative proceeding but its motion was denied by the presiding administrative law judge. ALDF then appealed that decision to the agency's Judicial Officer. The Judicial Officer denied the appeal on three grounds: *first*, that ALDF's "stated interests . . . [were] beyond the scope of [the] proceeding" and thus its intervention "would disrupt the orderly conduct of public business" under section 555(b) of the Administrative Procedure Act ("APA"); *second*, that ALDF was not an "interested party" as required for intervention under APA section 554(c); and *third*, that the USDA's Rules of Practice do not provide for intervention. February 15, 2017 Memorandum Opinion ("Mem. Op.") at 4.

In May 2016, ALDF filed this lawsuit, arguing that the Judicial Officer's decision was arbitrary and capricious and contrary to law under APA section 706(2). The complaint consisted of two counts. In the first count, ALDF alleged that the Judicial Officer's interpretation of the agency's Rules of Practice amounted to a "blanket prohibition" on third-party participation in administrative proceedings in violation of sections 554(c) and 555(b) of the APA. Compl. ¶¶ 90–95. In the second count, ALDF alleged that it was an "interested person" under APA section 555(b), and that the Judicial Officer erred in finding otherwise on the ground that its participation would disrupt the orderly conduct of public business. Compl. ¶ 97. ALDF also argued in count two that the Judicial Officer incorrectly applied the APA's definition of "party" in concluding that ALDF could not intervene as an "interested party" under APA section 554(c). Compl. ¶ 98.

The Court granted ALDF's motion for summary judgment in a February 15, 2017 Memorandum Opinion. The Court rejected the Judicial Officer's finding that ALDF's interests were beyond the scope of the proceeding. And because the Judicial Officer did not otherwise address how ALDF's participation might impede the proceeding, the Court remanded the case "for a more thorough consideration of ALDF's motion in light of the factors relevant to third-party participation in agency proceedings under [APA] Section 555(b)." Mem. Op. at 2. ALDF had abandoned its "interested party" claim under APA section 554(c), and the Court rejected ALDF's argument that the Judicial Officer's finding constituted an unlawful blanket prohibition on third-party participation in USDA proceedings. Mem. Op. at 12–13.

EQUAL ACCESS TO JUSTICE ACT

Plaintiff now seeks \$20,359.60 in attorneys' fees and \$605 in costs as a prevailing party in this action, plus an additional \$3,988.68 in attorneys' fees for time spent litigating its fee petition.

II. Legal Standard

The Equal Access to Justice Act ("EAJA") directs courts to award attorneys' fees and expenses to parties who prevail in civil actions against the United States if the government's position was not "substantially justified." 28 U.S.C. §§ 2412(a)(1), (d)(1)(A). If the government's position was not "substantially justified," *see Role Models Am., Inc. v. Brownlee*, 353 F.3d 962 (D.C. Cir. 2004), the prevailing party is entitled to a reasonable fee award. The "most useful starting point for determining the amount of a reasonable fee," *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), is the "lodestar figure, which is the number of hours reasonably expended multiplied by a reasonable hourly rate," *Murray v. Weinberger*, 741 F.2d 1423, 1427 (D.C. Cir. 1984). However, if a plaintiff prevails on only some of its claims, a court can adjust the fee award to reflect the relative degree of the plaintiff's success. *See George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1535 (D.C. Cir. 1992).

III. Analysis

A. Prevailing Party

The government acknowledges that ALDF is a prevailing party within the definition of 28 U.S.C. § 2412(a)(1). Defendant's Opposition to Plaintiff's Motion for Attorney's Fees ("Def. Opp.") at 5. The Court therefore need not address this requirement.

B. Substantial Justification

The government argues that ALDF is not eligible for a fee award because the government's position was "substantially justified." Def. Opp. at 5–10. In order to meet this standard, the government must demonstrate the reasonableness of both its litigation position and the agency position being challenged. *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962 (D.C. Cir. 2004). A position is "substantially justified" if it has "a reasonable

basis in law and fact.” *Pierce v. Underwood*, 487 U.S. 552 (1988).

While it may have been reasonable for the Justice Department to continue defending the agency’s position in this case, that position was not itself reasonable. The Judicial Officer found that ALDF’s participation in the proceeding would “disrupt the orderly conduct of public business” because ALDF’s interests were “beyond the scope of the proceeding.” Mem. Op. at 4. But, as the Court held, ALDF’s “*obvious* alignment of interests”—a general interest in animal welfare and a specific interest in the treatment of animals at Cricket Hollow Zoo—fell “*squarely within* the scope of the USDA enforcement proceeding.” Mem. Op. at 1, 9–10 (emphasis added). Especially given section 555(b)’s low threshold for third party participation, the agency’s position did not have a “reasonable basis in both fact and law.” *Pierce*, 487 U.S. at 565. As a result, the government has not met its burden of demonstrating that *both* its position and the underlying agency action were justified, and a fee award is warranted.

C. Reasonableness of Fees

1. *Reasonable Hourly Rate*

The EAJA imposes a cap of \$125 on the hourly rate for which an attorney may be compensated unless an increase in the cost of living in the relevant jurisdiction justifies a higher fee. *See* 28 U.S.C. § 2412(d)(2)(A). Here the government agrees that ALDF’s requested hourly rates—\$197.13 for Washington D.C. lawyers in 2016, \$198.20 for Washington, D.C. lawyers in 2017, and \$192.68 for San Francisco, California lawyers in 2016—are “consistent with what is permitted under EAJA.” Def. Opp. at 18 n.5.

2. *Reasonable Number of Hours*

The Court must next determine the “numbers of hours reasonably expended.” *Hensley*, 461 U.S. at 433. ALDF’s counsel claim 103.26 hours spent on the case and 20.25 hours spent litigating the fee petition. After carefully reviewing Plaintiff’s affidavits and time records, the Court finds that this time was reasonably expended.

EQUAL ACCESS TO JUSTICE ACT

Although five attorneys worked on this case, the Court finds that the tasks they performed were appropriate for the litigation. The Court also discerns no instances of unrelated or duplicative work, unnecessary pleadings, manufactured disputes, or excessive time spent on tasks. In fact, it appears that counsel is seeking fewer hours than the billing records account for.¹ See *Hensley*, 461 U.S. at 434 (“Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . .”).

The government objects to hours spent by attorneys while they did not formally appear in the case. In particular, the government argues that attorney Daniel Lutz’s hours should be reduced to reflect only the time he was counsel of record in this case, as opposed to time spent after he left ALDF for other employment. However, the government cites no persuasive authority to support this proposition. Legal staff need not formally appear in a case in order to claim time for purposes of a fee petition. Indeed, prevailing parties can recover paralegal fees, see *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008), and associates often bill time for cases in which they are not counsel of record. See *Curry v. A.H. Robins Co.*, 101 F.R.D. 736, 738 (N.D. Ill. 1984) (“For purposes of recovering attorneys’ fees, there is no principled distinction between attorneys who are counsel of record and those who are not.”). The fact that Mr. Lutz changed employers and was no longer counsel of record while continuing to work on the case is not dispositive of whether he rendered legal services to ALDF that are subject to the fee shifting provision of the EAJA. His uncontested declaration states that he continued to represent ALDF, and his contemporaneous time records support that assertion. Mot. for Attorneys’ Fees, Ex. A, Attachment 1 (Lutz Decl.).

Finally, ALDF seeks fees for time spent litigating its fee application. The government counters that some of the time entries could have been filed in the initial application, and are thus untimely. The Court concludes that Plaintiff is entitled to reasonable fees for time spent litigating its fee application, and those hours were properly included in Plaintiff’s

¹ Mr. Lutz, for instance, excised many entries from his billing records, while Katherine Meyer requests only 7.66 hours of the 15.83 hours she spent on the matter, presumably only including time spent on the federal court case (rather than the administrative proceeding) and successful motions.

supplemental application. *See Cinciarelli v. Reagan*, 729 F.2d 801, 809 (D.C. Cir. 1984).

D. Adjustment for Degree of Success

The government argues that Plaintiff's fee should be reduced to reflect Plaintiff's "limited degree of success" in the case. Def. Opp. at 18–20. The Court agrees, and will reduce the fee award by fifty percent.

Where, as here, a plaintiff does not prevail on all of its claims, the Court must allocate fees based on the relative degree of the plaintiff's success. *Hensley* "provided for a two-step inquiry" to guide this determination: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1535 (D.C. Cir. 1992) (quoting *Sierra Club v. EPA*, 769 F.2d 796, 801 (D.C. Cir. 1985)).

ALDF's complaint included two distinct claims: (1) that the Judicial Officer's decision amounted to a "blanket prohibition" on interested person participation and (2) that it was entitled to intervene in the proceeding as either an "interested party" or an "interested person" whose participation would not interfere with the orderly conduct of public business. Compl. ¶¶ 89–99. The Court found that the Judicial Officer erred in denying intervention as an interested person under section 555(b). The Court did not, however, agree with Plaintiff that the Judicial Officer's opinion imposed a "flat ban" on third-party participation—an argument that consumed a significant portion of summary judgment briefing—and ALDF abandoned its "interested party" claim. Nor, stepping back, did the Court award ALDF the ultimate ruling it sought: participation as an intervenor in the underlying proceeding. *See* Compl. Prayer for Relief ¶ 3. Rather, the Court simply remanded the action to the agency for further consideration of the "interested person" intervention factors. Based on both of these considerations, the Court finds that a fifty percent reduction in the fee award, to \$12,169.14, fairly accounts for Plaintiff's overall level of success in the litigation.

E. Timeliness of Costs Motion

EQUAL ACCESS TO JUSTICE ACT

Finally, the government argues that ALDF's request for \$605 in costs is untimely. Def. Opp. at 20–21. The Court agrees. The EAJA sets a 30-day limit for filing a “fees and expenses” application, with “expenses” meaning the reasonable expenses of expert witnesses. 28 U.S.C. §§ 2412(d)(1)(b), 2412(d)(2)(a). Applications for costs, on the other hand, are governed by 28 U.S.C. § 2412(d)(1)(a), which does not specify a deadline. And the D.C. Circuit has explicitly held that in the absence of a statutory deadline, the deadline to request costs is governed by the applicable procedural rule. *Haselwander v. McHugh*, 797 F.3d 1, 2 (D.C. Cir. 2015). Here, the applicable rule is Local Rule 54.1(a), which states that a “bill of costs must be filed within 21 days after entry of judgment . . . unless the time is extended by the court.” D.D.C. Local Rule 54.1(a). Therefore, the Court must deny ALDF's application for costs as untimely because it was filed more than 21 days after the final judgment, and ALDF neither requested nor received an extension of that deadline.²

IV. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion for Attorneys' Fees and Costs be GRANTED IN PART AND DENIED IN PART. It is further

ORDERED that Plaintiff be awarded \$12,169.14 in fees and \$0 in costs.

This is a final, appealable order.

SO ORDERED.

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² To be sure, Plaintiff filed a motion for extension of time, but that motion only asked for an extension related to “fees and expenses.” In any case, the extension request itself was filed after the deadline to file a bill of costs.

Philip Trimble
77 Agric. Dec. 15

HORSE PROTECTION ACT
DEPARTMENTAL DECISION

In re: PHILIP TRIMBLE.

Docket No. 15-0097.

Decision and Order.

Filed June 8, 2018.

HPA.

Thomas N. Bolick, Esq., and Lauren C. Axley, Esq., for APHIS.
Jan Rochester, Esq., for Respondent Philip Trimble.
Initial Decision and Order by Channing D. Strother, Acting Chief Administrative Law Judge.

DECISION AND ORDER

SUMMARY OF DECISION

The Administrator, Animal and Plant Health Inspection Service (“APHIS”), United States Department of Agriculture (“USDA”), Complainant, instituted this administrative enforcement proceeding under the Horse Protection Act, as amended (“HPA” or “Act”)¹, by filing a Complaint alleging that the Respondent, Philip Trimble, violated section 5(2)(B) of the HPA by entering a horse known as “Main Sweetie” in a horse show, while the horse was sore.

The record shows that Respondent has an extensive background and experience in the training and showing of horses and appears to be hardworking and to genuinely care about the horses he trains and manages. The record also shows that Respondent has trained and exhibited many horses, has known of the HPA throughout his career, and has one prior finding of violating the HPA fifteen years ago, which was entered by default for Respondent’s failure to file a timely answer.

This case is generally straightforward. Complainant brought forward testimony and other evidence, based on the USDA Veterinary Medical Officer’s (“VMO”) digital palpation examination at the pertinent show,

¹ 15 U.S.C. §§ 1821-1831.

HORSE PROTECTION ACT

showing that Respondent violated the HPA because he entered the horse, Main Sweetie, in the March 30, 2013 horse show while that horse was sore. In response, Respondent has attempted to challenge Complainant's evidence as insufficient to find a violation under the HPA.

Respondent has contended that USDA policies determining HPA violations should differ from what they are. For instance, Respondent contends that more than one VMO inspection or inspector should be required to corroborate results, that reaction to digital palpation alone should not be sufficient to find soring, that additional pain reactions aside from withdrawal should be evoked before determining soreness can be made, there should be a set number of times palpation should be repeated, and there should either be a clear pattern of soreness or that soreness should be in identical places on each limb to be considered bilateral abnormal sensitivity within the meaning of the HPA. Respondent also contends that the Atlanta Protocol² standards should determine whether a horse is sore. In addition, Respondent has challenged the credibility of the VMO, and has offered evidence related to Main Sweetie's temperament and health to rebut the presumption that arose from the VMO's findings.

However, Respondent's arguments to propose alternative protocol and requirements under the HPA are not supported under current law, regulations, policy, or precedent. Complainant demonstrated by a preponderance of the evidence that Main Sweetie was sore within the meaning of the HPA, and Respondent did not convincingly rebut the presumption. Therefore, based on a careful consideration of the record, I find that the Respondent, Philip Trimble, violated section 5(2)(B) of the HPA by entering a horse known as Main Sweetie in a horse show, while the horse was sore. Complainant requested a penalty of \$2,200.00 and a five-year disqualification period. I find that under the HPA criteria, the amount of the civil penalty and period of disqualification requested is appropriate, and that I have no discretion to order a shorter or otherwise limited disqualification period.

² RX 1.

JURISDICTION AND BURDEN OF PROOF

The HPA was promulgated to prevent the cruel and inhumane soring of horses. The HPA prohibits sored horses from being entered into, participating in, or being transported to or from any horse show, exhibition, sale, or auction. Congress provided for enforcement of the HPA by the Secretary of Agriculture, USDA.³ Regulations promulgated under the HPA are in the Code of Federal Regulations, Part 9, Section 11.

The burden of proof is on Complainant, APHIS.⁴ The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,⁵ such as this one, is the preponderance of the evidence.⁶ Under the HPA, a presumption that a horse is “sore” within the meaning of the HPA arises where it is shown that the horse was abnormally, bilaterally sensitive or inflamed on both of its forelimbs or both of its hind limbs.⁷ The burden of proof remains with the Complainant (“APHIS”), and the presumption is rebuttable.⁸

APPLICABLE STATUTORY PROVISIONS

The Congressional finding under the HPA, 15 U.S.C. § 1822, is that “1) the soring of horses is cruel and inhumane; [and] 2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore”

The HPA defines the term “sore”:

§ 1821 Definitions

As used in this chapter unless the context otherwise requires:

³ 15 U.S.C. §§ 1821-1831.

⁴ 5 U.S.C. § 556(d).

⁵ 5 U.S.C. §§ 551 *et seq.*

⁶ *See Herman & Maclean v. Huddleston*, 459 U.S. 375, 387-91 (1983) (holding the standard of proof in administrative proceedings is preponderance of evidence).

⁷ 15 U.S.C. § 1825(d)(5). The term “sore” is defined at 15 U.S.C. § 1821(3).

⁸ *Martin v. U.S. Dep’t of Agric.*, 57 F.3d 1070 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24, published at 54 Agric. Dec. 198) (quoting *Martin*, 53 Agric. Dec. 212 (U.S.D.A. 1994) (citing *Landrum v. Block*, 40 Agric. Dec. 922 (U.S.D.A. 1981))).

HORSE PROTECTION ACT

(3) The term “sore” when used to describe a horse means that--

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.⁹

The HPA creates a presumption that a horse is sore if it is bilaterally and abnormally sensitive or inflamed:

§ 1825. Violations and penalties

(d)(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests

⁹ 15 U.S.C. § 1821(3).

abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.¹⁰

The HPA prohibits certain conduct, including:

§ 1824 Unlawful acts

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.¹¹

Further, violation of the HPA can result in either criminal penalties for “knowingly” violating the act,¹² or these civil penalties:

§ 1825 Violations and penalties

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such

¹⁰ 15 U.S.C. § 1825(d).

¹¹ 15 U.S.C. § 1824(2).

¹² 15 U.S.C. § 1825(a).

HORSE PROTECTION ACT

conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) or who paid a civil penalty assessed under subsection (b) or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.¹³

The maximum civil penalty for violations after May 7, 2010, but before March 14, 2018, is \$2,200.¹⁴

PROCEDURAL HISTORY

The Complaint was filed on April 9, 2015, alleging that the Respondent, Philip Trimble, violated section 5(2)(B) of the HPA by entering a horse known as “Main Sweetie” in a horse show, while the horse was sore. Respondent filed an answer on April 23, 2015, (1) admitting that in 2003 a previous Decision and Order was issued finding, by default, that Respondent violated the HPA; (2) admitting that Respondent entered Main Sweetie at the 2013 Mississippi Charity Horse Show on March 30, 2013,

¹³ 15 U.S.C. § 1825(b)-(c).

¹⁴ 7 C.F.R. § 3.91(b)(2)(viii). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, is authorized to adjust the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(l) for each violation of 15 U.S.C. § 1824.

to show or exhibit; and (3) denying that Main Sweetie was entered into the 2013 Mississippi Charity Horse Show while sore. On May 8, 2015, Jan Rochester, Esquire, filed a Notice of Appearance on behalf of the Respondent.

On April 30, 2015, Administrative Law Judge Janice K. Bullard issued an Order Setting Deadlines for Submissions. The Order directed the parties to file their respective lists of exhibits and witnesses with the Hearing Clerk and stated that “all dispositive motions shall be entertained if filed.” Both parties exchanged their exhibits, witness lists, and exhibit lists. On August 23, 2016, then Chief Judge Bobbie J. McCartney issued an Order, reassigning the case to the undersigned Administrative Law Judge Channing D. Strother.

On October 7, 2016, all parties participated in a Telephone Conference and it was ordered that a hearing would be set for a future date. Complainant filed a motion for Summary Judgment, exhibits in support, a Memorandum of Points and Authorities, and a proposed Decision and Order on October 21, 2016. Respondent filed a Response to the Motion for Summary Judgement accompanied by a Memorandum of Facts and Law in Support of the Response, exhibits in opposition, and proposed Decision and Order on November 15, 2016. The Motion for Summary Judgment was denied on December 23, 2016.

On February 23, 2017, all parties participated in a Telephone Conference and it was ordered that a hearing would be set for March 21 through 23, 2017. Respondent filed a Motion to Dismiss, or in the alternative, Motion to Stay Proceedings, on March 10, 2017. On March 10, 2017, it was ordered that Respondent’s Motions will be held in abeyance and both parties will be provided a full opportunity to brief the issues after the scheduled hearing. Respondent filed a Motion to Dismiss on March 13, 2017, which was denied on March 15, 2017.

Complainant filed a Motion in Limine on March 10, 2017, to exclude various exhibits, portions of exhibits referencing the Atlanta Protocol, and any testimony regarding the Atlanta Protocol. On March 13, 2017, Respondent filed a Response to Complainant’s Motion in Limine; a Respondent’s Motion in Limine No.1 to exclude Complainant’s evidence and testimony as it relates to pads and action devices; Respondent’s

HORSE PROTECTION ACT

Motion in Limine No. 2 to exclude Dr. Johnson testimony, both written and oral; Respondent's Motion in Limine No. 3 to exclude CX 13 and CX 14; and Respondent's Motion in Limine No. 4 to exclude Dr. Clement Dussault from testifying. On March 14 and 15, 2017 respectively, Respondent's Motion in Limine No. 1, Respondent's Motion in Limine No. 2, and Respondent's Motion in Limine No. 4 were denied.¹⁵ On March 16, 2017, an Order was issued requesting that Complainant address the Respondent's Motion in Limine No. 3 in writing before the scheduled hearing, or orally during the hearing.

A hearing was held on March 21 through 23, 2017, in Nashville, Tennessee. Complainant's Motion in Limine and Respondent's Motion in Limine No. 3 were addressed.¹⁶ Complainant presented these witnesses: Jennifer Wolf,¹⁷ Animal Care inspector, USDA; Michael Pearson,¹⁸ Farm Loan Officer, USDA (formerly Animal Care Inspector, USDA, APHIS); Dr. Ronald Johnson,¹⁹ VMO, USDA, APHIS, Animal Care, presented as examining VMO and an expert witness in equine veterinary care and detection of horse soring under the HPA; and Dr. Clement Dussault,²⁰ Senior Staff Veterinarian, National Veterinary Accreditation Program (formerly Field Veterinary Officer, USDA), presented as a rebuttal

¹⁵ At the time of Respondent's Motion in Limine No. 4 Dr. Dussault had not yet been identified as a Complainant witness, and on that basis the motion was denied. Dr. Dussault was added to the Complainant's witness list by the time of the hearing, and Respondent renewed his Motion in Limine. Tr. 10-11. Dr. Dussault was permitted to testify as Complainant's "wrap-up" or "rebuttal" witness, as well as an expert in detection of horse soring under the HPA, although he did not address penalties. Tr. 13-14, 652-717.

¹⁶ Tr. 9-12, 20-22. Complainant's Motion in Limine was a request to exclude the Atlanta Protocol, and any materials or testimony pertaining to the Atlanta Protocol, such as the testimony of Dr. Mullins, from the record. Tr. 20-22. I denied that motion ruling that while "there was case law of[n] the Atlanta Protocol that I'm not going to ignore"—that is, Judicial Officer precedents rejecting the Atlanta protocols as establishing standards to be applied in HPA proceedings—"it's of interest to me what respondent thinks should be done instead of what was done," and any flaws in the testimony of Dr. Mullin could be explored during cross examination. Respondent's Motion in Limine No. 3 sought to preclude Complainant's introduction of certain letters of warning into the record. At the beginning of the hearing, Tr. 10, Complainant agreed not to introduce those materials into evidence and stipulated that it would not rely upon them for any purpose. This resolution of that motion was acceptable to Respondent. *Id.*

¹⁷ Tr. 33-56.

¹⁸ Tr. 57-74.

¹⁹ Tr. 75-353.

²⁰ Tr. 652-717.

Philip Trimble
77 Agric. Dec. 15

witness and an expert witness in detection of horse soring under the HPA. Respondent presented these witnesses: Rachel Reed,²¹ employee, SHOW, Inc.; Clay Sanderson,²² Respondent's assistant horse trainer; Philip Trimble (Respondent);²³ Amy Trimble,²⁴ wife of Respondent and the individual who presented the horse for inspection; Dr. Michael Harry,²⁵ private treating veterinarian for Main Sweetie, and presented as an expert witness in equine veterinary medicine; and Dr. Stephen Mullins,²⁶ private veterinarian, and presented as an expert in equine veterinary medicine. Parties were allowed an opportunity to *voir dire* before expert witnesses were accepted to testify regarding expertise.

Admitted to the record were Complainant's exhibits identified as CX 1 through CX 7, and CX 10 through CX 13; and Respondent's exhibits, identified as RX 1, RX 2, RX 5, RX 6, RX 8 through RX 12, RX 20 through RX 23, RX 25, RX 30 through RX 32, RX 42, RX 43, RX 50, and RX 54 through RX 59. A Joint Notice of Errata and Proposed Corrections in relation to the hearing transcripts, signed by both parties, was filed on April 25, 2017. The corrections have been accepted by a separate Order Approving Proposed Transcript Corrections, issued on June 8, 2018.

Respondent filed a Post Hearing Brief ("Respondent's PHB") on June 1, 2017. Complainant filed a proposed Findings of Fact, Conclusions of Law, Order, and Brief in support thereof ("Complainant's PHB") on June 2, 2017. Respondent filed a Post Hearing Reply Brief ("Respondent's PHRB") on June 21, 2017.²⁷ Complainant filed a Brief in Reply to the Respondent's Post Hearing Brief ("Complainant's PHRB"), and an Addendum to Complainant's Post-Hearing Reply Brief ("Complainant's Addendum"), on June 22, 2017. As noted above, my March 10, 2017 Order provided that the parties would have the opportunity to address the issues in Respondent's March 10, 2017 Motion post hearing. Neither Respondent's nor Complainant's Post Hearing Briefs, nor Post Hearing

²¹ Tr. 355-67.

²² Tr. 447-58.

²³ Tr. 459-99.

²⁴ Tr. 598-650.

²⁵ Tr. 368-446.

²⁶ Tr. 512-96.

²⁷ The pages of Respondent's PHRB are not numbered. The pinpoint citations in this Decision to pages of that brief are based upon my count of pages from its first page.

HORSE PROTECTION ACT

Reply Briefs, addressed the issues in Respondent's March 10, 2017 Motion to Dismiss, or in the alternative, Motion to Stay Proceedings.

The record is now closed.

ANALYSIS

It is uncontested that Respondent entered the horse known as Main Sweetie, for the purpose of showing or exhibiting, in the 2013 Mississippi Charity Horse Show in Jackson, Mississippi.²⁸ During pre-show inspection, the USDA, APHIS VMO, Dr. Ronald Johnson ("VMO Johnson"), determined that the horse was bilaterally and abnormally sensitive on both of its forelimbs. There is no question that the Complainant bears the burden to show, by a preponderance of the evidence, that the HPA was violated. Evidence showing that the horse was abnormally, bilaterally sensitive or inflamed on both of its forelimbs or both of its hind limbs creates a presumption that the horse is "sore".²⁹ The basis of this presumption is that abnormal bilateral sensitivity or inflammation cannot be due to an "accidental kind of strange injury"³⁰ such as stepping on a rock.

In defense, Respondent makes two main contentions: (1) that Complainant has not met the evidentiary burden to establish the statutory presumption that the horse was sore within the meaning of the HPA by challenging the credibility of VMO Johnson, and that withdrawal responses elicited by digital palpation alone are not enough to establish abnormal sensitivity or soreness within the meaning of the HPA; and (2) that if it is found that the presumption was met under the HPA due to a finding abnormal, bilateral sensitivity, the horse was not sore within the meaning of the HPA because the horse's sensitivity was not abnormal and was due to other natural causes.³¹ Besides Respondent's two main

²⁸ Answer at 1.

²⁹ See 15 U.S.C. § 1821(3).

³⁰ *Horse Protection Act of 1976: Hearing on H.R. 6155 Before the Subcomm. on Health and the Environment of the Comm. on Interstate and Foreign Commerce*, 94th Cong. at 52 (1975) (statement of Christine Stevens, Secretary, Society for Animal Protective Legislation).

³¹ I note that Respondent's Briefs are unconventional and lengthy. Respondent's PHB offers over one hundred pages of excerpted material from case law and comments in contending the Department should conduct its horse protection program differently from

contentions, Respondent has also raised issues regarding Administrative Law Judge authority in adjudicating this case, and has requested consideration of reduced penalties if a violation is determined.

I. Presumption of Soring

I find that the Complainant showed, by a preponderance of the evidence, that the horse known as “Main Sweetie” was sore on March 30, 2013, under the statutory presumption, due to bilateral, abnormal sensitivity elicited during a digital palpation examination.

This evidence including testimony on the record shows that Main Sweetie was bilaterally and abnormally sensitive when presented for inspection:

1. APHIS VMO Johnson was presented by Complainant and accepted as an expert witness, after *voir dire* by the Respondent, to testify regarding his March 30, 2013 visual and physical inspection of Main Sweetie. VMO Johnson testified regarding his experience,

its current practice. Respondent also makes certain statements without supporting citations. For example, parts of a study are quoted in Respondent’s PHB at 144-146 without proper page citation, including insertion of personal commentary. Respondent quotes case text and testimony out of context (see Respondent’s PHB at 97), and cites to documents not proffered for the record, much less admitted into evidence, as exhibits. *See id.* at 154 (where Respondent refers to an exhibit that was never admitted into evidence during hearing). Further, Respondent’s PHRB, pages 8-9, contains photographs captioned “USDA Photo 8-29-1972” and “USDA Photo published 2001 in Understanding the Scar Rule.” Respondent “suggest[s]” that being on the USDA website these photos should be “subject to judicial notice.” PHRB at 9. The former photograph was apparently taken at a horse show in August 1972, more than forty years before the HPA violation at issue here. It is apparently provided as an example of one of types of soring— “scar formation” and “hair loss from chemical blistering”—the HPA was intended to address. *See* Respondent’s PHRB at 7-8. Neither scar formation nor chemical blistering is alleged by the Complainant in this proceeding. Respondent states as to the second photo, without providing a specific citation to the transcript, but apparently meaning to reference Tr. 319-322, “[c]ontrary to Johnson’s testimony at the hearing, redness is visible even though the horse is black.” PHRB at 9. The second photo’s caption indicates that it shows a “scar rule” violation, which is not the type of the violation at issue in this proceeding. Dr. Johnson testified that there were no scars on horse at issue. Tr. 316. Thus, the second photograph does not undermine Dr. Johnson’s testimony, which was that redness from “inflammation” would not be seen on a “black horse with black pigmentation.” Tr. 319. For those reasons, I find that neither photograph should be given any probative weight.

HORSE PROTECTION ACT

his typical examination techniques,³² and his examination of Main Sweetie and findings.³³ VMO Johnson explained that he introduced himself to the horse to ensure that she was comfortable with him, then picked up and examined the left front limb. VMO Johnson testifies that the horse was calm when he digitally palpated the back of her left front pastern, but the horse tried to “come away” from him when he palpated specific spots on the front of the pastern.³⁴ VMO Johnson states that this type of reaction is not normal and indicates “too much sensitivity.”³⁵ VMO Johnson testified that he felt the horse start to back away, allowed her to back away, then pick up her foot again to palpate and found the same spots of sensitivity.³⁶ VMO Johnson also testifies that, when examining the right front limb, and the horse “wanted to lift its leg away” from him when he palpated certain areas.³⁷ VMO Johnson testified that he found the horse to be bilaterally sore.³⁸ VMO Johnson was subsequently cross-examined by Respondent’s counsel and he continued to testify that Main Sweetie’s sensitivity to his digital palpation of specific areas on both forelimbs was abnormal.³⁹

2. The APHIS Form 7077, Summary of Alleged Violations, signed by VMO Johnson, contains VMO Johnson’s observations, recorded partially on the same day and partially two days later, and indicates that the horse was bilaterally sore.⁴⁰ The form also indicates the points on each of the horse’s pasterns where sensitivity was detected.

³² Tr. 134-42.

³³ Tr. 148, 158-60.

³⁴ Tr. 158-59.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Tr. 159.

³⁸ Tr. 160, 163:21-24.

³⁹ Tr. 329-30, 331-32.

⁴⁰ CX 1. Here when considering the probative value of Form 7077, I recognize Departmental precedent that “past recollection recorded is considered reliable, probative and substantial evidence, which fulfills the requirements of the Administrative Procedure Act, if the events were recorded while fresh in the witnesses’ minds.” *Bobo*, 53 Agric. Dec. 176, 189 (U.S.D.A. 1994) (quoting *Jordan*, 51 Agric. Dec. 1229, 1229 (U.S.D.A. 1992)).

3. The video of the inspection performed by VMO Johnson⁴¹ shows the horse, Main Sweetie, walking around the cones, shows VMO Johnson approaching the horse and the horse allowing VMO Johnson to pick up her left forelimb. The video then shows VMO Johnson's digital palpation of Main Sweetie's left forelimb, where the horse reacts by trying to withdraw its leg in response to palpation in pin-point spots and attempts to back away. The video then shows VMO Johnson wait for Main Sweetie to stop backing up and take up her left forelimb to palpate once more, eliciting the same reactions. Last, the video shows VMO Johnson palpate Main Sweetie's right forelimb, eliciting a withdrawal reaction during the pin-point palpation. The video corroborates VMO Johnson's testimony at hearing, Form 7077, and both VMO Johnson's April 1, 2013 Declaration and January 22, 2014 Affidavit.⁴²
4. VMO Johnson's April 1, 2013 Declaration explained that he observed Main Sweetie being examined by two DQPs on March 30, 2013. He observed that Main Sweetie had a normal gait. He thereafter describes his digital palpation examination of Main Sweetie. On the left foot he found no evidence of scarring or sensitivity and the posterior surface, but "found areas of sensitivity along the lateral, middle, and medial areas [of] the pastern."⁴³ VMO Johnson notes that the horse tried to withdraw its leg consistently and repeatedly. On the right foot, there was no evidence of scarring on the posterior pastern, but the horse reacted to the pressure of the palpation "over the medial and lateral mid pastern area."⁴⁴ Again VMO Johnson notes that the horse tried to withdraw her leg in response to the palpation consistently and repeatedly. VMO Johnson also observed that the horse tried to withdraw its leg in response to palpation on anterior surface of the right front pastern "along the coronet band from medial to lateral" in a consistent and repeatable way.⁴⁵

⁴¹ CX 4.

⁴² TR. 153-63; CX 2.

⁴³ CX 3 at 3.

⁴⁴ *Id.*

⁴⁵ *Id.*

HORSE PROTECTION ACT

5. The affidavit of VMO Johnson, dated January 22, 2014, states that, when examining Main Sweetie on March 30, 2013, he “found areas of sensitivity along the lateral, middle, and medial areas of the pastern” on the left front pastern, that the horse tried to withdraw its foot in reaction to the palpation, and that VMO Johnson determined that the horse’s response was consistent and repeatable.⁴⁶ VMO Johnson also states that when examining Main Sweetie’s right front pastern, the horse reacted by trying to withdraw its foot when palpitated on the “medial and lateral mid pastern area.”⁴⁷ In this affidavit, VMO Johnson explains that the sensitivity he observed during the digital palpation exam of Main Sweetie was abnormal sensitivity because horses will not generally pull away or withdraw their legs when he palpates or touches their pasterns. He considered Main Sweetie’s reactions to be pain responses within his experience and professional opinion.⁴⁸ This affidavit was provided ten months after the examination, but I find it to be consistent with other oral testimony, with documents drafted contemporaneous to the event, and with the video.
6. The “SHOW DQP” ticket,⁴⁹ completed by DQP Mitchell Butler and DQP Keith Davis after their inspection of Main Sweetie states that the horse was unilaterally sore on the left foot. It is not contested that at least one DQP detected a pain response on the right foot as well.⁵⁰ I assign less weight to this exhibit documenting the findings of the DQPs, who were not presented to testify, than to the testimony and exhibits documenting VMO Johnson’s findings because the extent of the DQPs’ training and experience is unknown. Further, USDA has determined that, generally, the opinions of VMOs are entitled to greater weight than DQPs.⁵¹

⁴⁶ CX 2 at 3.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.*, ¶ 3.4.

⁴⁹ CX 7. The SHOW DQP ticket indicates that the inspection was filmed, but the video from this inspection was not proffered by either party.

⁵⁰ Respondent’s PHB at 6; Complainant’s PHB at 8-9; CX 2 at 3.

⁵¹ While DQPs must be certified by the USDA to be hired by a SHOW HIO, they do not necessarily have to be licensed veterinarians and are generally trained by VMOs when seeking certification. See 9 C.F.R. § 11.7; see also *Fields*, 54 Agric. Dec. 215, 219 (U.S.D.A. 1995); *Oppenheimer*, 54 Agric. Dec. 221 (U.S.D.A. 1995); *Elliott*, 51 Agric. Dec. 334 (U.S.D.A. 1992), *aff’d*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993);

Respondent contends that the above Complainant evidence does not establish the statutory presumption that the horse was sore and contends that Complainant's evidence did not meet Complainant's overall burden show by a preponderance of the evidence that Main Sweetie was sore within the meaning of the HPA. I find to the contrary on both points, as follows.

A. VMO Qualifications and Credibility

Respondent attacks the credibility, qualifications, and examination technique of VMO Johnson. Based on the record, I find the VMO to be credible, qualified, and to have used and properly executed appropriate USDA-approved examination techniques. The evidence presented confirmed that VMO Johnson is qualified: VMO Johnson maintains a high-level of education and over twenty-six years of experience in equine veterinary medicine, had valid credentials and licensure at the time of the inspection, has been trained and trained others regarding Horse Protection Act compliance procedures and USDA protocols for inspection, has performed many examinations, and is well-regarded among his colleagues.⁵²

Regarding credibility, Respondent argues that VMO Johnson was biased and prejudiced against Tennessee Walking Horse owners and trainers in general, against the DQPs, and against Main Sweetie specifically.⁵³ The record is contrary to Respondent's accusation of bias. Although Respondent suggests that VMO Johnson's experience with Tennessee Walking Horses is limited and negative,⁵⁴ the record reflects that VMO Johnson has extensive experience as an equine veterinarian, has examined gaited horses under the HPA multiple times (having been employed by USDA intermittently since 2010), and there is no other evidence to suggest a general bias against Tennessee Walking Horse

Sparkman, 50 Agric. Dec. 602 (U.S.D.A. 1991); *Edwards*, 49 Agric. Dec. 188 (U.S.D.A. 1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992)).

⁵² Tr. 78-87; CX 2 at 1-2; CX 3 at 1; Complainant's PHB at 15-16.

⁵³ Respondent's PHB at 109-11, 113, 118.

⁵⁴ *Id.* at 108.

HORSE PROTECTION ACT

trainers or owners.⁵⁵ Further, Respondent's expert witness, Dr. Mullins, testified that he thinks highly of VMO Johnson as an equine veterinarian.⁵⁶

Respondent also avers that VMO Johnson was biased in choosing to examine Main Sweetie because the choice was not random but because he was "convinced in his mind" that Main Sweetie was sore.⁵⁷ VMO Johnson testified that he had no vested interest in overturning the DQPs' examination results or in choosing Main Sweetie specifically to inspect, either for personal satisfaction or monetary compensation.⁵⁸ A conclusion of bias does not follow simply because VMO Johnson followed up on the DQPs' examinations with a separate examination.

Respondent challenges the probative value of Form 7077 and VMO Johnson's April 1, 2013 Declaration because completing each was reliant on review of the inspection video and "d[id] not rely on his first hand inspection of Main Sweetie."⁵⁹ It is established Department precedent to consider Form 7077 as probative if recorded while fresh in the witness' mind.⁶⁰ VMO Johnson testified that he partially completed the Form 7077 on March 30, 2013, maintained his own notes, and completed both the Form 7077 and his Declaration when he returned home on April 1, 2013.⁶¹ VMO Johnson testified that it is his standard practice to complete his records away from the distractions of the show.⁶² While it is preferable

⁵⁵ Respondent argues that, because VMO Johnson testified to treating sore gaited horses, he had a greater propensity or bias to find a horse sore. I find that the fact that VMO Johnson has treated sore gaited horses was not shown to indicate any bias on his part. Moreover, the record does not show that VMO Johnson has demonstrated bias throughout his career as a USDA VMO.

⁵⁶ Tr. 566:23 ("I consider Dr. Johnson a horseman, one of the few VMOs who I consider a horseman. He knows horses.").

⁵⁷ Respondent's PHB ¶ 118.2 at 132.

⁵⁸ Tr. 99-100.

⁵⁹ Respondent's PHB ¶ 8.1, at 130-31. Additionally, Respondent's PHRB, ¶ 49.3, states that there was a "historical requirement" to "timely" prepare the Form 7077 but does not cite the requirement nor define "timely."

⁶⁰ See *Bobo*, 53 Agric. Dec. 176, 189 (U.S.D.A. 1994) (quoting *Jordan*, 51 Agric. Dec. 1229, 1229 (U.S.D.A. 1992)).

⁶¹ Tr. 168-69.

⁶² *Id.* VMO Johnson testified that he usually waits until the next day to complete the Form 7077 during horse shows. Dr. Dussault also testified that he sometimes waits until the next day, or even two days later, to complete the form fully and avoid additional distractions. Tr. 711-12. Respondent proffered no other testimony as to standard procedure for completing the Form 7077 or time requirements for completion. Respondent also did not

that forms used as recorded recollection be completed promptly, precedent does not suggest, and I do not find, a significant loss of probative value if completed in the immediate days following the event, as long as the event is “fresh” in the witness’ mind. I find nothing about VMO Johnson’s review of the video at the time he completed this documentation to diminish their probative value.

Respondent attempts to discredit VMO Johnson by claiming that he failed or refused to follow proper protocol under 9 CFR, Part 11, Section 11.7, because he disagreed with the inspection outcome of two DQPs but did not reprimand them or issue a warning to them.⁶³ Respondent’s contention is a misinterpretation of the protocol outlined in the regulations, which do not require VMOs to reprimand or issue a warning to a DQP when the VMO disagrees with the outcome of an examination.⁶⁴ While the Department ultimately regulates the certification of Sound Horses, Honest Judging, Objective Inspections, Winning Fairly (“SHOW”) Horse Inspection Organizations (“HIOs”) and the licensure of DQPs, the SHOW HIO sets rules for reprimand and cancellation of DQP licenses and this is not a responsibility of the VMO.⁶⁵

B. Proposed Standards and Protocol

Respondent contends that the USDA regulations, policies, and precedents under the HPA should be different in many respects than those in force. Specifically, Respondent requests this court “hold that the USDA should rely on scientific objective testing to detect and prosecute offenders; that where more than one VMO is present, the diagnosis of sore can only be made after a second VMO reaches that finding independently of the first; and that in matters where scientific objective testing and more

provide any evidence that would indicate that VMO Johnson did not complete the Form while the examination was “fresh” in his mind.

⁶³ Respondent’s PHB at 116; Respondent’s PHRB ¶¶ 3.2, 4.1 (noting incomplete citation of authority).

⁶⁴ 9 C.F.R. § 11.7. DQPs are certified/licensed through the Department and appointed by the management of a horse show, exhibition, sale, or auction. Reprimand, in the form of license cancellation, is determined by the horse industry organization or association having a Department certified DQP. 9 C.F.R. § 11.7(7).

⁶⁵ See RX 11 (SHOW Rule Book – HPA Compliance, Section V(A)(3) at 5 (*also available* at <http://showhio.com/documents/hpa%20section.feb%202016.pdf>) (last visited Oct. 4, 2018).

HORSE PROTECTION ACT

than one VMO is not possible, that the Atlanta Protocol should be implemented.”⁶⁶

First, Respondent misplaces much emphasis on the intent to sore and proof of soring instrumentality. At issue here is simply whether (1) respondent *entered* for the purpose of showing or exhibiting in any horse show and (2) the entry took place while the horse was sore.⁶⁷ Respondent argues that, due to the advancement of medical technology, there should be a requirement that USDA VMOs utilize chemical testing, positively detecting illegal chemicals, and that palpation alone should not be utilized as a diagnostic tool.⁶⁸ VMO Johnson testified that chemical testing during inspection would not necessarily reveal any chemical used to sore the horse,⁶⁹ providing insight on why chemical testing does not provide definitive proof that a horse was sored by chemical means. In addition, Respondent implies there must be a “reasonable expectation or presumption” that Main Sweetie would have worn “any type of legal action device.”⁷⁰ However, it is well established there is no requirement for proof of soring device or agent.⁷¹ With these contentions, Respondent wishes to impose a greater burden of proof on the Department. Respondent’s contentions are policy arguments not supported, and not properly enforceable, under current regulations, policy, or case law.

Regulations do not require for the examination to be performed by more than one APHIS representative or VMO.⁷² Without direct citation to authority, Respondent asserts that two VMOs with corroborated findings of soreness were “historically required” for enforcement and that “historically speaking two VMOs were required to make this differential diagnosis, between nervous and sore, not one.”⁷³ Respondent relies on cases involving instances where two VMOs examined a horse. But historical Departmental *practice* does not equate to a *requirement*, and Respondent’s proffered collection of case law where the facts include two

⁶⁶ Respondent’s PHRB ¶ 24.3.

⁶⁷ 15 U.S.C. § 1824(2)(B).

⁶⁸ Respondent’s PHB at 70-71, ¶¶ 76.2, 86.2.

⁶⁹ Tr. 119: 15-19.

⁷⁰ Respondent’s PHRB at 10-12.

⁷¹ *Bobo*, 53 Agric. Dec. 176, 184 (U.S.D.A. 1994) (citing *Gray*, 41 Agric. Dec. 253, 254-55 (U.S.D.A. 1982); *Holcomb*, Agric. Dec. 1165, 1167 (U.S.D.A. 1976)).

⁷² 9 C.F.R. § 11.4.

⁷³ Respondent’s PHB ¶ 12.2 (case law analysis at 12-106); Respondent’s PHRB ¶¶ 1.2, 6.1.

examining VMOs does not show precedent. Further, Respondent heavily relies on specific language from *Fleming v. USDA* (“*Fleming*”)⁷⁴ to assert that “no one opinion of any examining veterinarian serves as the sole evidentiary basis for decision.”⁷⁵ In citing the discussion in *Fleming*, Respondent omits the words “in the present case,” taking the quote out of context and distorting the holding by suggesting that the court in *Fleming* holds there is requirement for two VMOs to determine a horse is sore.⁷⁶ The text Respondent cites is specific only to the facts of *Fleming*. Contrary to Respondent’s contentions, under HPA regulations and USDA policy the determination of one VMO will establish the presumption that a horse is sore. Unless that presumption is rebutted through evidence on the record, a VMO determination will support the finding of an HPA violation.

Respondent also alludes to there being no additional VMO inspection despite Main Sweetie being stabled onsite during the show.⁷⁷ While a VMO may have had authority to perform another inspection at any time,⁷⁸ there is no requirement to do so. Respondent presented no testimony or other evidence that it is customary for “the USDA” to remove horses from stables and inspect them in the current circumstances—however those circumstances might be defined—and provides no citation to support any such assertion in his PHB. I give the fact that there was no additional VMO inspection during the show no weight in determining whether there was an HPA violation. Respondent contends that the conclusion of one VMO based on his inspection, without additional corroboration, does not meet the Complainant’s burden of proof. In the present case however, Complainant has proffered other evidence to corroborate VMO Johnson’s opinion such as the video of the examination and evidence as to the immediately preceding DQP examination that resulted in disqualification from participation in the horse show. Further, the record includes no contemporaneous evidence that counters VMO Johnson’s findings of sensitivity and, based on the record, Respondent did not have Main

⁷⁴ *Fleming v. U.S. Dep’t of Agric.*, 713 F.2d 179 (6th Cir. 1983).

⁷⁵ Respondent’s PHB at 97.

⁷⁶ See *Fleming*, 713 F.2d at 185 (holding “there is no denial of due process through alleged lack of uniform examination procedures and standards for determining soreness”).

⁷⁷ Respondent’s PHB ¶ 94:5, at 192-93.

⁷⁸ See 9 C.F.R. § 11.4.

HORSE PROTECTION ACT

Sweetie immediately inspected by a private veterinarian despite his criticism of the examination at the hearing.⁷⁹

Respondent and Complainant have briefed the issues regarding the Atlanta Protocol⁸⁰ and Respondent requests that the Protocol be applied to determine when a horse is “sore” under the HPA. As Complainant points out,⁸¹ use of the Atlanta Protocol to determine examination procedures and evidence needed to find a horse sore under the HPA is an issue of law. If the Department adopted the standards and requirements outlined in the Atlanta Protocol, the result and effect on future enforcement proceedings would be that digital palpation alone would not be sufficient to detect soreness of a horse; inspectors would be required to determine gait disfunction combined with pain responses, increasing the burden of proof on the Department. But as the Judicial Officer in *Bennett* states, these suggested requirements for determining whether a horse is sore are “squarely contrary to the explicit language of the Horse Protection Act” and its regulations.⁸²

The USDA Judicial Officer has deemed the Atlanta Protocol “devoid of merit.”⁸³ I recognize there is a split among the circuit courts on whether digital palpation alone is sufficient to determine whether a horse is sore. However, the USDA Judicial Officer held that the case of *Young v. USDA* (“*Young*”),⁸⁴ in which the Court relied on the testimony of expert witnesses and the Atlanta Protocol to find that digital palpation alone could not

⁷⁹ See Tr. 471-72 (where respondent explains the events following the disqualification of Main Sweetie on March 30, 2013). RX 20 (where Dr. Harry, the treating veterinarian for Main Sweetie, stated that he was recovering from surgery and unable to perform an examination).

⁸⁰ RX 1. Note that the admission of RX 1 into evidence was expressly for informational purposes and admission of RX 1 did not allude to the weight it would be given nor did admission amount to judicial notice. See Tr. 521:7-8. See Respondent’s Response to Complainant’s Motion in Limine; Complainant’s Motion in Limine, 2-7; Complainant’s PHB, 18-25.

⁸¹ Complainant’s PHB at 18-25.

⁸² See *Bennett*, 55 Agric. Dec. 176, 181-82 (U.S.D.A. 1996).

⁸³ *Id.* at 205. See also Complainant’s PHB at 18-25. Respondent states that the “devoid of merit” statement was “made in reference” to a Fifth Circuit finding that “the USDA veterinarians were discredited because their forms and affidavits were prepared in anticipation of litigation.” Respondent’s PHB ¶ 70.3. However, no pinpoint citation to any order is provided for this assertion and this assertion is not substantiated upon review of the JO Decision.

⁸⁴ *Young v. U.S. Dep’t of Agric.*, 53 F.3d 728 (5th Cir. 1995).

determine a violation of the HPA, is not strong precedent in any circuit court, including the Fifth Circuit, and “the decision by the majority of the Court in *Young v. USDA* will not be followed by this Department in any future case, including cases in which an appeal would lie to the Fifth Circuit.”⁸⁵

Regarding controlling authority here, due to both Respondent’s place of residence and his place of business, appeal of this case would properly be restricted to either the Sixth Circuit or the District of Columbia Circuit.⁸⁶ I note that Respondent appealed the 2003 default Decision and Order finding he violated the HPA to the Sixth Circuit.⁸⁷ The Sixth Circuit has held “a finding of ‘soreness’ based upon the results of digital palpation alone is sufficient to invoke the rebuttable presumption of 15 U.S.C. § 1825(d)(5).”⁸⁸ The District of Columbia Circuit has also held palpation is an effective method for concluding that a horse is sore.⁸⁹

As the Judicial Officer stated in *Reinhart*:⁹⁰

The United States Department of Agriculture has long held that palpation is a highly reliable method for determining whether a horse is “sore,” as defined in the Horse Protection Act [footnote omitted]. The United States Department of Agriculture’s reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining

⁸⁵ *Bennet*, 55 Agric. Dec. at 181-82. But see *Bradshaw v. U.S. Dep’t of Agric.*, 254 F.3d 1081 (5th Cir. 2001) (unpublished opinion in the Fifth Circuit) (published at 60 Agric. Dec. 145 (U.S.D.A. 2001) (citing *Young*, 53 F.3d at 731) (stating that digital palpation was not substantial evidence to support a violation of the HPA and reversing judgment in favor of the petitioner)).

⁸⁶ See 15 U.S.C. § 1825. Respondent erroneously states that the HPA does not address the appeals process and that the jurisdiction for appeal is expressed in the federal regulations. Respondent’s PHB at 154. Whether Respondent wishes to challenge the statute by appealing to the Fifth Circuit does not change the weight of controlling authority in this case.

⁸⁷ *Trimble v. U.S. Dep’t of Agric.*, 87 F. App’x 456 (6th Cir. 2003).

⁸⁸ *Bobo v. U.S. Dep’t of Agric.*, 52 F.3d 1406, 1413 (6th Cir. 1995).

⁸⁹ *Crawford v. U.S. Dep’t of Agric.*, 50 F.3d 46, 49-50 (D.C. Cir. 1995), cert. denied, 516 U.S. 824 (1995).

⁹⁰ *Reinhart*, 59 Agric. Dec. 721 (U.S.D.A. 2000).

HORSE PROTECTION ACT

many thousands of horses as part of their efforts to enforce the Horse Protection Act. Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act.⁹¹

Despite Respondent's wish to see a change in law, including the adoption of different approaches to inspections than are undertaken by USDA VMOs, and a different definition of "sore" as outlined in the Atlanta Protocol, I am bound by the HPA, current regulations, and controlling precedent. Because the Atlanta Protocol and its recommendation that digital palpation alone is not adequate to support a finding of soring has been rejected in precedents that govern my actions, I must also reject it, and take the rationales as expressed in those precedents governing here.

Respondent also makes other arguments regarding policy and protocol based on analysis of case law, such as: "a pattern of soreness or having soreness in the same location on both feet is an important element,"⁹² there

⁹¹ *Id.* at 751-52 (citing in omitted footnote 12: *Bradshaw*, 59 Agric. Dec. 228 (U.S.D.A. 2000), *rev'd*, 254 F.3d 1081 (5th Cir. 2001); *Gray*, 55 Agric. Dec. 853, 878 (U.S.D.A. 1996) (Decision as to Glen Edward Cole); *Thomas*, 55 Agric. Dec. 800, 836 (U.S.D.A. 1996); *Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (U.S.D.A. 1996); *Oppenheimer*, 54 Agric. Dec. 221, 309 (U.S.D.A. 1995) (Decision as to C.M. Oppenheimer Stables); *Armstrong*, 53 Agric. Dec. 1301, 1319 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *Tuck*, 53 Agric. Dec. 261, 292 (U.S.D.A. 1994) (Decision as to Eddie C. Tuck); *Bobo*, 53 Agric. Dec. 176, 201 (U.S.D.A. 1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *Kelly*, 52 Agric. Dec. 1278, 1292 (U.S.D.A. 1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *Sims*, 52 Agric. Dec. 1243, 1259-60 (U.S.D.A. 1993) (Decision as to Charles Sims); *Jordan*, 52 Agric. Dec. 1214, 1232-33 (U.S.D.A. 1993) (Decision as to Sheryl Crawford), *aff'd sub nom. Crawford v. U.S. Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 824 (1995); *Watlington*, 52 Agric. Dec. 1172, 1191 (U.S.D.A. 1993); *Crowe*, 52 Agric. Dec. 1132, 1151 (U.S.D.A. 1993); *Gray*, 52 Agric. Dec. 1044, 1072-73 (U.S.D.A. 1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *Callaway*, 52 Agric. Dec. 272, 287 (U.S.D.A. 1993); *Brinkley*, 52 Agric. Dec. 252, 266 (U.S.D.A. 1993) (Decision as to Doug Brown); *Holt*, 52 Agric. Dec. 233, 246 (U.S.D.A. 1993) (Decision as to Richard Polch and Merrie Polch), *aff'd per curiam*, 32 F.3d 569 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24)).

⁹² Respondent's PHB ¶ 20.5. Respondent also argues that the case law, which he fails to directly cite, demonstrates that a horse should "exhibit pain reactions in almost identical places." Respondent's PHB at 124. Although some of the cases provided include facts

should be a set number of times palpation must be repeated, that scarring must be present, or that the palpation should elicit a certain type of pain response.⁹³ There is no support under current policy or precedent for these proposed requirements. In each instance where Respondent uses the facts recited in a previous case to support these contentions, Respondent fails to consider that the recitation of the facts in specific cases cited were not legal rulings resulting in applicable precedent. The law, regulations, policies, and precedents regarding each contention are simply not what Respondent argues they should be and Respondent has not presented bases for me to make rulings contrary to them or to find they should be changed from what they are.

Further, Respondent cites to a task force formed by the American Association of Equine Practitioners (“AAEP”) in December 2007, and a White Paper titled “Putting the Horse First: Veterinary Recommendations for Ending the Soring of Tennessee Walking Horses” published in July 2008.⁹⁴ Respondent contends:

Page 2 of that White Paper states “Continued reliance on the use of traditional techniques dependent upon the **subjective response of the horse** would appear a wasted effort and funding for the development of objective methodology for use by qualified veterinary inspectors must be provided.” (emphasis added) Page 3 and Page 4 contain “Improved Methods of Evaluation” wherein the AAEP recommends specific objective methods for evaluation such as immediate drug testing, thermographic screening, and swabbing of the limbs for foreign substances. Regarding palpation of the limbs, it is noted that palpation should be done for a routine evaluation of the limbs, assessment of digital pulses, and critical assessment of specific areas suggested to be abnormal on thermographic examination. The AAEP Task Force further recommends adding a corp[s] of veterinarians and states “Training of both VMOs and this additional corps

where horses exhibited pain responses in similar areas on each leg, there is no precedent requiring such.

⁹³ Respondent’s PHB ¶¶ 13.2, 20.4, 24.8, 25.3, 27.4-5, 30.3, 44.2, 48.5, 75.6, 92.3.

⁹⁴ Respondent’s PHRB at 12-13.

HORSE PROTECTION ACT

of veterinarians must include more objective measures of detection such as thermography and digital radiography.”⁹⁵

Respondent likewise cites to a booklet titled “Horse Soring” that the American Veterinary Medical Association published in July 2015, contending that the AVMA booklet contains the AAEP’s 2008 White Paper, and a study entitled *Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors* (Summary of Research from September 1978 to December 1982), which was purportedly commissioned by the USDA and conducted by a veterinarian who also co-authored the Atlanta Protocol.⁹⁶ Respondent goes on to contend that:

Neither the AVMA nor AAEP are on record in support of the use of palpation alone by one sole VMO to properly detect soring. The AVMA and AAEP support the eradication of soring by objective methods, as does the Respondent.⁹⁷

In response, Complainant contends:

These publications were not entered into evidence and no hearing testimony concerning these documents or the AAEP’s December 2007, task force was proffered during the hearing, and complainant had no opportunity to review and respond to either of the aforementioned documents. Accordingly, none of respondent’s statements about these documents and the AAEP task force should be given any probative weight, and his arguments based upon the same should be found to be without merit.⁹⁸

Complainant’s contentions that these publications are not a part of the record and were not proffered at hearing as evidence – or, for that matter, were not listed in Respondent’s September 17, 2015 list of proposed

⁹⁵ *Id.* at 13.

⁹⁶ *Id.* at 13-14.

⁹⁷ *Id.* at 14.

⁹⁸ Complainant Addendum at 1-2.

exhibits – and have not been subject to review and cross examination at hearing are well-taken. Respondent’s citation to these documents seems to be for the proposition that AVMA and AAEP oppose the use of palpation alone to detect soring and believe that “Improved Methods of Evaluation,” including drug testing, digital radiography, thermographic screening, swabbing of the limbs for foreign substances, and examinations by more than one VMO, should be adopted, which would cause a greater burden on the Department to prove soring. As discussed regarding the Atlanta Protocol, the precedents and the record, including the testimony of VMO Johnson, palpation by a single VMO is sufficient to determine abnormal sensitivity and soring under established USDA policy.⁹⁹ Further, there is no contemporaneous report by another veterinarian in the record, much less one inconsistent with VMO Johnson’s testimony and reports. Respondent has offered no results of his own contemporaneous digital radiography and thermographic screening he claims contradict VMO Johnson’s findings based on his examination.

Veterinarian members of AVMA and AAEP, and the authors of the Atlanta protocol, may believe that additional examination methods should be utilized in determining soring because current methods can yield inaccurate results. But here there is no evidence of inconsistent results between digital palpation and other examination methods. That some veterinarians opine a need for additional methods of testing to provide more accurate results does not undercut the preponderance of the evidence here showing that the horse was sore based upon palpation.

I am bound to apply the statutes, regulations, and USDA policy. Extra record AVMA nor AAEP documents could not provide a basis for me to do otherwise. Even if I were not so bound, the record here would not support requiring USDA to provide additional testing or mandate methods of testing to support a finding that a horse was sore.

II. Rebuttal of Presumption

Although the Complainant has shown, by a preponderance of the evidence, that the horse known as “Main Sweetie” was sore under the statutory presumption due to the detection of bilateral, abnormal

⁹⁹ See *supra* notes 72, 91, and accompanying text.

HORSE PROTECTION ACT

sensitivity on March 30, 2013, Respondent can rebut the presumption established by VMO Johnson's findings.¹⁰⁰ It is recognized that the "presumption of soreness must be rebutted by more proof than speculation about other natural causes."¹⁰¹ Respondent presents multiple contentions to rebut the presumption, each addressed below. Based on a careful review of the record, I find the evidence proffered by Respondent insufficient to rebut the presumption.

A. Rebuttal: VMO Examination Technique

Based on a review of the Respondent's following contentions and evidence, I find that Respondent did not clearly establish that Main Sweetie's pain reactions were due to any other factor aside from abnormal sensitivity detected by the digital palpation examination. I also find that the examination technique used by VMO Johnson when examining Main Sweetie was sufficient and sound. Respondent argues that VMO Johnson's examination technique was inappropriate and caused a "false positive" outcome.¹⁰² VMO Johnson utilized visual and digital palpation examination techniques. It is well recognized "that palpation is a highly reliable method of determining soreness within the meaning of the Act."¹⁰³ Further, regulations under the HPA state that the USDA may use "whatever means are deemed appropriate and necessary" to inspect a horse for compliance with the HPA, including digital palpation.¹⁰⁴

¹⁰⁰ See *Zahnd v. U.S. Dep't of Agric.*, 479 F.3d 767, 772 (11th Cir. 2007); *Martin v. U.S. Dep't of Agric.*, 57 F.3d 1070 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24, published at 54 Agric. Dec. 198); see also *Landrum v. Block*, No. 81-1035, 40 Agric. Dec. 922, 925, 1981 WL 31848, at *4 (M.D. Tenn. June 25, 1981) (holding that the § 1825(d)(5) presumption must be interpreted in accordance with FED. R. EVID. 301, even though the Federal Rules do not directly apply to administrative hearings).

¹⁰¹ *Jenne*, 73 Agric. Dec. 501, 507-08 (U.S.D.A. 2014) (citing *Beltz*, 64 Agric. Dec. 1438 (U.S.D.A. 2005), *rev.*, 64 Agric. Dec. 1487 (U.S.D.A. 2005); *mot. for recons. denied*, 65 Agric. Dec. 281 (U.S.D.A. 2006), *aff'd sub nom. Zahnd v. Sec'y of Dep't of Agric.*, 479 F.3d 767 (11th Cir. 2007)).

¹⁰² Respondent's PHRB at 162.

¹⁰³ *Bobo*, 53 Agric. Dec. 176, 192 (U.S.D.A. 1994) (citing 52 Agric. Dec. 233, 243-46 (U.S.D.A. 1993) (Decision as to Richard Polch & Merrie Polch), *aff'd*, 32 F.3d 569 (6th Cir. 1994)). Palpation is also expressly approved by Department regulations as an examination technique. 9 C.F.R. § 11.1.

¹⁰⁴ 9 C.F.R. § 11.1.

Based on the record, there was no clear showing that the way in which VMO Johnson performed his exam was improper, nor that the horse's withdrawal reactions resulted from how VMO Johnson held the horse's limbs while palpating. "There is a presumption of regularity with respect to the official acts of public officers and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'"¹⁰⁵ Although Respondent contends that the way in which VMO Johnson held or gripped Main Sweetie's legs during the examination likely caused the horse's withdrawal reactions,¹⁰⁶ two out of the three expert witnesses (Dr. Harry for Respondent¹⁰⁷ and Dr. Dussault for Complainant¹⁰⁸) testified and agreed, while reviewing the video of the examination, that the horse's withdrawal reactions were due to the pinpoint digital palpation. Although Dr. Harry, for Respondent, provided testimony to the effect that VMO Johnson's style of holding the horse's leg may have caused discomfort due to pressure on the ligament and tendon, his explanation was hypothetical and unconvincing that how VMO Johnson held the horse's leg was the actual cause of the withdrawal reactions or caused the horse to back away from the palpation.¹⁰⁹

Respondent suggests that Main Sweetie's reactions to the palpation were merely the mare "moving her feet" and were not "pain responses."¹¹⁰ Respondent claims that "there was no pattern of Main Sweetie's feet movement and no localization identified on the video during VMO

¹⁰⁵ *Bennett*, 55 Agric. Dec. 176, 210 (U.S.D.A. 1996) (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14-15) (citing *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951); *Nat'l Labor Relations Bd. v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948); *Pasadena Research Labs. v. United States*, 169 F.2d 375, 381 (9th Cir. 1948), cert. denied, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939)).

¹⁰⁶ Respondent's PHRB ¶ 10.2.

¹⁰⁷ Tr. 390:10-11. I note that Dr. Harry, later in his testimony, says that the repeated reaction was due to the hold of the leg rather than the palpation, Tr. 391, but as discussed was unclear in his explanation of the causation.

¹⁰⁸ Tr. 694-695.

¹⁰⁹ Dr. Harry recommended performing the examination by draping the horse's leg over the examiner's forearm, but then explained that his recommended examination procedure may also place pressure on the same ligament and tendon. See Tr. 393-94.

¹¹⁰ Respondent's PHRB ¶¶ 5.2, 5.3 (Respondent argues that "the movement [meaning reaction seen in the video] is absent any signs of even the slightest indication of pain"), 10.2 (Respondent also states, "Main Sweetie did not exhibit signs of abnormal sensitivity, she merely moved her feet.").

HORSE PROTECTION ACT

Johnson's inspection."¹¹¹ However, the video of the examination shows Main Sweetie reacting to the digital palpation by jerking and trying to withdraw her leg when VMO Johnson palpates only certain spots. VMO Johnson testified that the horse was calm when he started the digital palpation and did not react when he palpated the back of Main Sweetie's front left pastern, but that the horse tried to "come away" from him when he palpated certain spots on the front of the pastern.¹¹² VMO Johnson testified that Main Sweetie's withdrawal reactions elicited by the pinpoint palpations were abnormal within his experience.¹¹³ Likewise, Dr. Johnson testified that the horse reacted to his digital palpation only on certain spots on the front and back of the right pastern.¹¹⁴ The video corroborates Dr. Johnston's testimony and shows that Main Sweetie does not have the same withdrawal reaction to each pinpoint digital palpation further up her limbs or on the back of the left forelimb.¹¹⁵ The video also shows VMO Johnson move his thumb to palpate different areas of the pastern and coronet band, and return to the areas where Main Sweetie responds with the withdrawal reaction. VMO Johnson determined that the horse's reactions were due to pain experienced during the digital palpation, and his findings appear consistent with regulation standards where palpation to detect such responses is acceptable.¹¹⁶ Further, withdrawal reactions due to palpation are traditionally accepted as pain responses under APHIS policy.¹¹⁷

B. Rebuttal: Reaction Caused by Temperament or Natural Ailment

Although it is unclear whether Respondent is arguing that Main Sweetie's reactions were due to natural temperament, to temperament caused by ailments, to residual pain from ongoing ailments, or all of the above, Respondent failed to provide adequate evidence supporting these

¹¹¹ Respondent's PHB ¶ 18.8.

¹¹² Tr. 167:15-16, Tr. 159:2-3.

¹¹³ Tr. 159.

¹¹⁴ Tr. 159: 13-25, 160:1-4. *See also* Tr. 161-62.

¹¹⁵ CX 4.

¹¹⁶ CX 2 at 3-4. *See Bobo*, 53 Agric. Dec. 176, 192 (U.S.D.A. 1993) (citing *Holt*, 52 Agric. Dec. 233, 243-46 (U.S.D.A. 1993) (Decision as to Richard Polch & Merrie Polch), *aff'd*, 32 F.3d 569 (6th Cir. 1994)).

¹¹⁷ RX 9. *See also* USDA ANIMAL & PLANT HEALTH INSPECTION SERVICE, *USDA Horse Protection - Inspection Process*, USDA.GOV (Feb. 3, 2018), https://www.aphis.usda.gov/animal_welfare/hp/downloads/hio/usda-hpa-hio_presentations_2018.pdf (showing, on the twenty-third unnumbered slide, that the Department process policy still includes withdrawal reactions as a pain response).

assertions to rebut the presumption. The preponderance of the evidence is that the horse's withdrawal reactions to the digital palpation on both forelimbs resulted from abnormal sensitivity and were not the result of any other natural cause.

As support for his contentions that Main Sweetie was hypersensitive due to existing ailments, Respondent presented a letter dated October 21, 2013, seven months after the event at issue, from a private veterinarian, Dr. Mike Harry, which describes diagnoses of a depressed appetite, gastric ulcers, lameness on the left foot, a wart on the left foot, and cystic ovaries.¹¹⁸ Aside from the depressed appetite that was "resolved right away with minor treatment,"¹¹⁹ all other ailments were diagnosed and treated after March 30, 2013. In his affidavit, Dr. Harry states that Main Sweetie's cystic ovaries and gastric ulcers caused pain and "directly contributed to and produced Main Sweetie's behavior exhibited during the inspection,"¹²⁰ providing no further evidence or detailed explanation. To say that Main Sweetie's ovary and gastric health issues "produced" Main Sweetie's reactions to the pinpoint palpations, without more explanation, is speculative. As in *Lacy v. USDA* ("*Lacy*"),¹²¹ where the evidence presented failed to provide a clear connection showing that West Nile Virus could have produced pinpoint pain responses solely on the "front surfaces of the pasterns,"¹²² here RX 20 and testimony by its author, Dr. Harry, and similar testimony by Respondent's expert witness Dr. Muller,¹²³ does specifically and directly explain causation regarding the

¹¹⁸ RX 20. Respondent suggests that Dr. Harry's testimony and opinion should be given equal to, or greater, weight that VMO Johnson's testimony. Respondent's PHRB ¶ 17.2. Respondent states that the Sixth Circuit has precedence "allow[ing] treating physicians in matters outside Social Security cases" but fails to cite this precedent and demonstrate relevance. Respondent's PHB at 167. Complainant clearly lays out precedent that private veterinarian examinations are entitled to less weight than the examining APHIS representative. Complainant's PHB at 37 (citing *Thornton*, 41 Agric. Dec. 870, 878-79, 890-94 (U.S.D.A. 1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983); *Sparkman*, 50 Agric. Dec. 602, 610 (1991); *Edwards*, 55 Agric. Dec. 892, 922 (U.S.D.A. 1996)).

¹¹⁹ RX 20.

¹²⁰ RX 43 at 3. *See also* Tr. 423 (Dr. Harry's testimony that Main Sweetie "could be just experiencing pain all over") (emphasis added).

¹²¹ *Lacy v. U.S. Dep't of Agric.*, 278 F. App'x 616 (6th Cir. 2008).

¹²² *Id.* at 621-22.

¹²³ I note that Respondent's PHB ¶ 13.3 states that RX 42 provides a clear connection of Main Sweetie's medical diagnosis and her reaction during inspection. However, RX 42 does not speak directly to Main Sweetie's medical diagnosis and Dr. Mullins does not

HORSE PROTECTION ACT

ailments and the horse's reaction to digital palpation to rebut the presumption. I give this testimony little weight.

Contrary to evidence presented, Respondent implies that Main Sweetie should be defined as a "silly horse" and that she is naturally sensitive therefore making her reactions during the examination normal.¹²⁴ However, while Respondent's witnesses, Amy Trimble and Clay Sanderson, both testified that Main Sweetie was a nervous or irritable horse, they also testified that they observed no agitated or odd behavior prior to the inspection on March 30, 2013.¹²⁵ VMO Johnson also testified that he observed no signs of agitation prior to the inspection.¹²⁶ The video of the examination corroborates VMO Johnson's testimony, showing the horse approaching and standing still, allowing VMO Johnson to pick up her left front foot, and after backing away, calming and allowing VMO Johnson to pick up and examine the left front foot a second time.¹²⁷

Even though Respondent contended throughout this proceeding this horse's temperament and various medical conditions could have made it prone to give false positive responses to palpation, when specifically asked why he would take a chance showing a horse that posed a risk to his livelihood, Respondent testified that he thought the mare was talented and he was getting paid to do so.¹²⁸ There is no question that this Respondent faced serious penalties if this horse was determined to be sore; penalties of which he was aware based on his previous violation and experience with showing Tennessee Walking Horses. The lack of evidence demonstrating any Respondent's concerns pre-inspection this horse was irritable or temperamental, and prone to false positives, undercuts and contradicts post hoc contentions that the horse was so prone.

appear to have any direct experience examining Main Sweetie and otherwise was unable to testify as to Main Sweetie's medical condition at the time of the event at issue.

¹²⁴ Respondent's PHB ¶ 34.3. *See also id.* ¶ 8.3, 123 (Respondent claims that Main Sweetie reacted to the palpation examination due to "nervousness and anxiety" or other factors such as the presence of other horses).

¹²⁵ Tr. 454:1-3, 638:7-9.

¹²⁶ Tr. 173, 177. *See also Lacy v. U.S. Dep't of Agric.*, 278 F. App'x 616, 622 (6th Cir. 2008) ("USDA VMOs 'follow a simple procedure to distinguish [high-strung, or nervous, or silly] horses from those that are experiencing pain '[T]hey look for . . . specific spots which were painful when palpated.'") (quoting Gray, 52 Agric. Dec. 1044, 1993 WL 308542, at *21 (U.S.D.A. 1993), *aff'd sub nom. Gray v. USDA*, 39 F.3d 670 (6th Cir.1994)).

¹²⁷ CX 4.

¹²⁸ Tr. 493-95, 649-41.

III. Administrative Law Judge Authority to Rule in This Matter

I note that on November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief before the United States Supreme Court 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 under the Appointments Clause and must be appointed by heads of department, U.S. Const. Art. II, § 2, cl. 2. The court granted certiorari for the *Lucia* on January 12, 2018. Briefing has been completed and oral argument was held on April 23, 2018. The Court's opinion is expected to be issued by the end of June 2018.

On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of then Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and Administrative Law Judge Channing D. Strother and renewed their oaths of office.

In his March 10, 2017 Motion to Dismiss; or in the alternative, Motion to Stay Proceedings, pp. 1-2, Respondent contended:

1. The Appointments Clause. Respondent requests that this case be dismissed because a USDA ALJ cannot lawfully adjudicate the Respondents' liability for a violation of the HPA, nor can a USDA ALJ lawfully assess a penalty for a violation. The USDA ALJs cannot perform these functions because (1) only a duly appointed Inferior Officer of the United States can preside over a hearing that determines liability and assesses a penalty and (2) the USDA's delegation of enforcement authority to its ALJs contravenes the Appointments Clause of the U.S. Constitution, art. II, § 2, cl. 2. USDA ALJs act as Officers by entering final decisions, or at the least as inferior Officers, but the USDA's ALJs are not duly appointed as required by U.S. Constitution, art. 2, § 2, cl. 2, and *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991); *PHH Corp. v. CFPB*, 839 F.3d 1, 6 (D.C.

HORSE PROTECTION ACT

Cir. 2016) (vacated and en banc hearing granted, Feb. 16, 2017); and *Lucia v. SEC*, 832 F. 3d 277 (D.C. Cir. 2016) (vacated and en banc hearing granted, Feb. 16, 2017. Oral Argument scheduled for May 24, 2017). The USDA cannot maintain this HPA enforcement action under the current Rules of Practice and the case should be dismissed.

My March 10, 2017 Order Holding in Abeyance Ruling on Motion to Dismiss or in the Alternative Motion to Stay Proceedings held:

Because Respondent is raising novel issues of law which USDA has not been provided an opportunity to address, and which may not be properly before me to rule upon, Respondent's motions will be held in abeyance and both parties will be provided a full opportunity to brief the issues after the scheduled hearing.¹²⁹

As noted previously, neither party briefed any Article II issues in post hearing briefs.

The District of Columbia *Lucia* case referenced by Respondent in his March 10, 2017 motion is the case now pending before the Supreme Court in No. 17-130. The D.C. Circuit was divided evenly *en banc*, the panel opinion that Securities and Exchange Commission Administrative Law Judges are employees and not inferior officers under Article II, and, therefore, need not be appointed by a head of a department. In any event, because the Secretary of Agriculture ratified my appointment in July 2017, I see no reason to delay further the issuance of this Decision and Order. I note, however, that Respondent, should he desire to seek review of this Decision before the Judicial Officer, may desire to postpone filing a petition to review until after the Supreme Court has issued an opinion in *Lucia*. In that event, Respondent may seek an extension of time from the Judicial Officer filing of such petition, and it will be up to the Judicial Officer as to whether to grant such an extension and any terms and conditions applicable thereto.

¹²⁹ Order Holding in Abeyance Ruling on Motion to Dismiss or in the Alternative Motion to Stay Proceedings at 2.

IV. Discussion of Penalties

Regarding penalties,¹³⁰ current regulations leave little room for discretion regarding penalties, especially regarding disqualification when there has been a prior conviction under the HPA. Respondent attempts to challenge a prior determination of soring in a default Order and Decision, when that determination is long final and not subject to challenge. The HPA is unambiguous and inflexible in the time required for disqualification if imposed:

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) or who paid a civil penalty assessed under subsection (b) or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting *any horse*, judging or managing *any horse show*, *horse exhibition*, or *horse sale or auction* for a period of not less than one year for the first violation and *not less than five years for any subsequent violation*.¹³¹

The HPA does not allow for limitation of the disqualification to a lesser amount of time than five years for a subsequent violation – even a violation that takes place, as here, well more than a decade after the “first violation” – if disqualification is imposed, nor does it allow disqualification to be limited to a certain breed of horse.¹³² It is Judicial Officer precedent to

¹³⁰ Respondent requested that, if a violation of the HPA was determined, penalties be established through a separate hearing procedure or phase. Tr. 14-20. I denied this request, ruling that penalties should be addressed at the hearing and briefs associated with this single phase of this case. Additionally, in Respondent’s PHB at 205, Respondent also requests that any suspension be “limited to the breed, Tennessee Walking Horse, thus providing Mr. Trimble an alternative avenue to continue business training and exhibiting cutting horses as well as other disciplines and breeds of horses.”

¹³¹ 15 U.S.C. § 1825 (emphasis added).

¹³² While legislative history supports that the HPA was implemented to protect “Gaited Horses,” such as Tennessee Walking Horses, the Act specifically states “any horse” and regulations define “horse” for the purpose of the Act as “any member of the species *Equus*

HORSE PROTECTION ACT

impose a disqualification period where a civil penalty is assessed.¹³³ While I consider the gravity of the prohibited conduct, culpability of Respondent, and the impact of the penalties on Respondent when considering the civil penalty amount to be imposed, I do not have the authority to change the HPA, nor regulations thereunder, as to disqualification. Respondent has not presented an adequate argument as to why he could not pay a \$2,200 civil penalty or why the civil penalty specifically would affect his ability to continue to do business.

FINDINGS OF FACT

1. Respondent Philip Trimble resides and does business in Pulaski, Tennessee.¹³⁴
2. Respondent Philip Trimble started Trimble Stables, a horse training barn or training facility, in 2001.¹³⁵
3. On March 27, 2003, Judicial Officer William G. Jenson issued a Decision and Order,¹³⁶ adopting the Chief Administrative Law Judge's decision: (1) finding that on April 29, 2000, respondent Philip Trimble violated section 5(2)(B) of the HPA¹³⁷ by entering a horse while the horse was sore as defined in section 11.3(a) of the Horse Protection Regulations;¹³⁸ (2) assessing respondent Philip Trimble a \$2,200 civil penalty; and (3) disqualifying respondent

caballus." 9 C.F.R. § 11.1. See H.R. REP. 94-1174, 4, 1976 U.S.C.C.A.N. 1696, 1699 ("The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed."). But see 9 C.F.R. § 11.1 (defining "horse show" and "horse exhibition" to exclude "events where speed is the prime factor, rodeo events, parades, or trail rides").

¹³³ *Beltz*, 64 Agric. Dec. 1487, 1505-06 (U.S.D.A. 2005).

¹³⁴ Tr. 460:3-4.

¹³⁵ Tr. 464:14; 613:9-10.

¹³⁶ The Judicial Officer's decision was stayed pending an appeal to the U.S. Court of Appeals for the Sixth Circuit. *McCulloch*, 62 Agric. Dec. 103 (U.S.D.A. 2003) (Stay Order as to Philip Trimble). The appellate court denied Trimble's petition for review on December 10, 2003. *Trimble v. USDA*, 87 F. App'x 456 (6th Cir. 2003). Subsequently, on March 2, 2004, the Judicial Officer lifted the stay on the March 27, 2003 Order. *McCulloch*, 63 Agric. Dec. 265 (U.S.D.A. 2004) (Order Lifting Stay as to Philip Trimble).

¹³⁷ 15 U.S.C. § 1824(2)(B).

¹³⁸ 9 C.F.R. § 11.3(a).

Philip Trimble
77 Agric. Dec. 15

Philip Trimble for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

4. In the fall of 2009, Respondent Philip Trimble was hired to train a horse known as Main Sweetie.¹³⁹ Main Sweetie was reserve world champion in 2011 and won two world championships at the Tennessee Walking Horse National Celebrations in Shelbyville, Tennessee in 2012 and 2013.¹⁴⁰
5. On March 30, 2013, Respondent Philip Trimble entered the horse known as Main Sweetie as entry number 435, class number 84, for the purpose of showing or exhibiting at the 2013 Mississippi Charity Horse Show in Jackson, Mississippi.¹⁴¹
6. On March 30, 2013 Main Sweetie was presented by Amy Trimble for a pre-show inspection.¹⁴²
7. DQP Mitchell Butler and DQP Keith Davis inspected Main Sweetie before the show. DQP Mitchell Butler and DQP Keith Davis found the horse to be unilaterally sore on the left front foot but did not agree as to the consistency of pain response on the right front foot.¹⁴³ The DQPs issued ticket #033013MB.¹⁴⁴ SHOW HIO disqualified the horse from showing as a result of this ticket.¹⁴⁵
8. After DQP Mitchell Butler and DQP Keith Davis wrote the ticket for Main Sweetie, Main Sweetie was inspected by Dr. Ronald E. Johnson, Veterinary Medical Officer (“VMO”), Animal Care, Animal and Plant Health Inspection Service (“APHIS”), USDA.¹⁴⁶
9. Dr. Johnson noted that that while digitally palpating Main Sweetie’s anterior surface (lateral, middle, and medial areas) of the

¹³⁹ Tr. 603-04.

¹⁴⁰ Tr. 649:9-10; RX 22.

¹⁴¹ Complaint at 2; Answer at 1; CX 5.

¹⁴² Tr. 614:12.

¹⁴³ Tr. 149: 8-16.

¹⁴⁴ CX 7.

¹⁴⁵ Answer at 2.

¹⁴⁶ Tr. 149: 19; 150: 8-9.

HORSE PROTECTION ACT

left front pastern, the horse consistently and repeatedly withdrew its leg.¹⁴⁷

10. Dr. Johnson noted that while digitally palpating Main Sweetie's right front posterior pastern over the medial and lateral mid pastern area, the horse consistently and repeatedly tried to withdraw its leg.¹⁴⁸
11. It is Dr. Johnson's professional opinion that Main Sweetie exhibited abnormal sensitivity in both front pasterns, these consistent and repeated withdrawals of the leg were the horse's direct response to pain at those points of palpation,¹⁴⁹ and the pain responses he observed while palpating the horse were caused by chemical and/or action devices.¹⁵⁰
12. On or about March 30, 2013, respondent entered the horse known as Main Sweetie, as entry number 435, class number 84, at the Mississippi Charity Horse Show in Jackson, Mississippi, for the purpose of showing or exhibiting the horse while the horse was sore, in violation of section 5(2)(B) of the HPA.¹⁵¹

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction over this matter.
2. I have jurisdiction to issue this Decision and Order.
3. Application of the standards for finding a horse sore recommended by the Atlanta Protocol are not required in the adjudication of HPA cases.
4. Respondent Philip Trimble entered for the purpose of showing or exhibiting the horse known as "Main Sweetie" as entry number 435, class number 84 at the 2013 Mississippi Charity Horse Show

¹⁴⁷ Tr. 158-159; CX 2 at 3; CX 4.

¹⁴⁸ Tr. 159; CX 2 at 4; CX 4.

¹⁴⁹ Tr. 150-60; CX 1.

¹⁵⁰ Tr. 163: 21-24; Tr. 172: 5-12; CX 2 at 4.

¹⁵¹ 15 U.S.C. § 1824(2)(8).

Philip Trimble
77 Agric. Dec. 15

in Jackson, Mississippi, while the horse was sore in violation of section 5(2)(B) of the HPA (15 U.S.C. § 1824(2)(B)).

5. If a disqualification period is imposed, the HPA requires a minimum disqualification of five years for subsequent violations that is not limitable to a specific breed of horse but does not apply to horse shows or horse exhibitions where speed is the prime factor, rodeo events, parades, or trail rides.

ORDER

By reasons of the findings of fact above, the Respondent has violated the HPA and, therefore, this Order is issued:

1. Beginning on the effective date of this Decision and Order, Respondent Philip Trimble is disqualified for five (5) years from showing, exhibiting, or entering any horse directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction.¹⁵² “Participating” means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.
2. Respondent Philip Trimble is assessed a civil penalty of \$2,200.00. Respondent shall send a certified check or money order in the amount of two thousand and two hundred dollars (\$2,200.00), payable to the Treasurer of the United States, to:

United States Department of Agriculture
APHIS, Miscellaneous
P.O. Box 979043

¹⁵² In this ordering paragraph, I adopt ordering language proffered by Complainant, which is typical language for orders such as this one. I do note that 9 C.F.R. § 11.1 defines “horse show” and “horse exhibition” to exclude “events where speed is the prime factor, rodeo events, parades, or trail rides.”

HORSE PROTECTION ACT

St. Louis, MO 63197-9000

within sixty (60) days from the effective date of this order. The certified check or money order shall include the docket number of this proceeding in the memo section of the check or money order.

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondent, unless there is an appeal to the Judicial Officer under section 1.145 of the Rules of Practice applicable to this proceeding.¹⁵³

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

¹⁵³ 7 C.F.R. § 1.145.

Ashley N. Johnson
77 Agric. Dec. 53

SALARY OFFSET ACT
DEPARTMENTAL DECISION

In re: ASHLEY N. JOHNSON.

Docket No. 17-0260.

Decision and Order.

Filed May 7, 2018.

SOA.

Joey D. Gonzalez, Esq., for Petitioner Ashley N. Johnson.
Hillary E. Clark, Esq., for ARS.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

This Decision and Order is based on the written record. The evidence is sufficient for me to decide the *salary offset* issue.

Findings & Conclusions

1. The Secretary of Agriculture has jurisdiction over the parties, Ashley N. Johnson and the USDA- Agricultural Research Service; and over the subject matter, which is *salary offset*.
2. Petitioner Ashley N. Johnson works for the USDA- Agricultural Research Service at a location in Miami, Florida, and she was promoted to GS 09 Step 4 with an effective date of 02/05/17 and an approval date of 02/05/17.
3. Petitioner Ashley N. Johnson's promotion effective date was changed from 12/04/2016 to 02/05/17 at the request of a person who worked for USDA- Agricultural Research Service. The 12/04/2016 was cancelled.
4. One explanation in the written record for the two-month difference in Petitioner Ashley N. Johnson's promotion effective date is that 12/04/2016 was in the middle of a pay period. Promotion actions are typically effective at the beginning of a pay period.
5. Either Pay Period 24 or Pay Period 25 could have been used to solve

SALARY OFFSET ACT

the middle-of-a-pay-period problem. Pay Period 24 began on November 27, 2016; Pay Period 25 began on December 11, 2016. A routine correction that might have been predictable would have been to change the promotion effective date to 12/11/16.

6. There are other explanations in the written record for the two-month difference in Petitioner Ashley N. Johnson's promotion effective date. I do not need to choose any particular explanation for the change from 12/04/2016 to 02/05/17 to decide this case.

7. My involvement is limited, in this *salary offset* case. USDA-Agricultural Research Service seeks repayment, through *salary offset*. See 7 C.F.R. §§ 3.70 - 3.87 (regarding Federal Salary Offset). The issue before me is whether Petitioner Ashley N. Johnson shall reimburse USDA-Agricultural Research Service **\$87.74**.

8. USDA- Agricultural Research Service explains the issue: "The subject of this Petition, **\$87.84**, is the amount Petitioner was overpaid for the promotion during the period before it was cancelled and the effective date changed to 2/5/2017. Since the promotion was not effective until 2/5/2017, it is undisputed that Petitioner received an overpayment."

9. Petitioner Ashley N. Johnson MAY have been overpaid **\$87.84**, but I cannot reproduce the calculation. The written record contains no calculation. I do not know what days and what dollar amounts per day were involved. I do not know why the SF-50 that shows Ashley N. Johnson's promotion effective date as 12/04/16 bears an approval date of 02/23/17.

10. USDA- Agricultural Research Service shall NOT be repaid the **\$87.84**, because the amount is *de minimis* (trifling, insignificant); the written record persuades me that Petitioner Ashley N. Johnson is not at fault and had no reason to realize that she was not entitled to the **\$87.84**; the debt should be cancelled and forgiven; and Ashley N. Johnson shall not be required to repay the **\$87.84**.

11. USDA- Agricultural Research Service shall NOT *offset* Ashley N. Johnson's pay or other Federal monies payable to the order of Ashley N. Johnson to recover the **\$87.84** or any portion of it. If **\$87.84** or any portion

Ashley N. Johnson
77 Agric. Dec. 53

of it was taken from Ashley N. Johnson by **salary offset** or other means for 12/04/2016 to 02/05/17, the amount shall be returned to Ashley N. Johnson.

12. For the foregoing reasons, the following Order is issued.

ORDER

13. Petitioner Ashley N. Johnson has prevailed. USDA- Agricultural Research Service shall NOT **offset** Ashley N. Johnson's pay or other Federal monies payable to the order of Ashley N. Johnson to recover the **\$87.84** or any portion of it. See ¶¶ 10 and 11.

Copies of this "Decision and Order on the Written Record" shall be sent by the Hearing Clerk to each of the parties.

MISCELLANEOUS ORDERS & DISMISSALS

MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Substantive Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: <https://oalj.oha.usda.gov/current>.

ANIMAL HEALTH PROTECTION ACT

In re: SWEENEY S. GILLETTE.
Docket No. 16-0024.
Order Dismissing Civil Penalty Held in Abeyance.
Filed June 22, 2018.

ANIMAL WELFARE ACT

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation;
PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an
individual; and PAMELA J. SELLNER TOM J. SELLNER, an
Iowa general partnership, d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Order Granting Extension of Time.
Filed January 18, 2018.

AWA.

Administrative procedure – Extension of time.

Colleen A. Carroll, Esq., for APHIS.
Larry J. Thorson, Esq., for Respondents.
Initial Decision and Order by Channing D. Strother, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO **EXTEND THE TIME FOR FILING A RESPONSE** **TO THE RESPONDENTS' APPEAL PETITION**

On January 16, 2018, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture

[Administrator], filed a motion requesting that I extend to February 1, 2018, the time for filing the Administrator's response to the Respondents' appeal petition. The Administrator states that counsel for Respondents advised the Administrator that Respondents do not object to the Administrator's request for an extension of time.

For good reason stated, the Administrator's motion to extend the time for filing a response to the Respondents' appeal petition is granted. The time for filing the Administrator's response to the Respondents' appeal petition is extended to, and includes, February 1, 2018.¹

—

**In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation;
PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an
individual; and PAMELA J. SELLNER TOM J. SELLNER, an
Iowa general partnership, d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Order Granting Extension of Time.
Filed February 2, 2018.**

AWA.

Administrative procedure – Extension of time.

Colleen A. Carroll, Esq., for APHIS.

Larry J. Thorson, Esq., for Respondents.

Initial Decision and Order by Channing D. Strother, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

**ORDER GRANTING THE ADMINISTRATOR'S SECOND
REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE
TO THE RESPONDENTS' APPEAL PETITION**

On February 1, 2018, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture

¹ The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m. Eastern Time. To ensure timely filing, the Administrator must ensure that his response to the Respondent's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 1, 2018.

MISCELLANEOUS ORDERS & DISMISSALS

[Administrator], by telephone, requested that I extend to February 5, 2018, the time for filing the Administrator's response to the Respondents' appeal petition.

For good reason stated, the Administrator's request to extend the time for filing a response to the Respondents' appeal petition is granted. The time for filing the Administrator's response to the Respondents' appeal petition is extended to, and includes, February 5, 2018.¹

**In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation;
PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an
individual; and PAMELA J. SELLNER TOM J. SELLNER, an
Iowa general partnership, d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Order Granting Extension of Time.
Filed February 6, 2018.**

AWA.

Administrative procedure – Extension of time.

Colleen A. Carroll, Esq., for APHIS.

Larry J. Thorson, Esq., for Respondents.

Initial Decision and Order by Channing D. Strother, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S THIRD REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO THE RESPONDENTS' APPEAL PETITION

On February 5, 2018, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, requested that I extend to February 9, 2018, the time for filing the Administrator's response to the Respondents' appeal

¹ The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m. Eastern Time. To ensure timely filing, the Administrator must ensure that his response to the Respondent's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 5, 2018.

petition.

For good reason stated, the Administrator's request to extend the time for filing a response to the Respondents' appeal petition is granted. The time for filing the Administrator's response to the Respondents' appeal petition is extended to, and includes, February 9, 2018.¹

**In re: SIDNEY JAY YOST, an individual; and AMAZING
ANIMAL PRODUCTIONS, INC., a California corporation.
Docket Nos. 12-0294, 12-0295.
Order Granting Extension of Time.
Filed February 7, 2018.**

AWA.

Administrative procedure – Extension of time.

Colleen A. Carroll, Esq., for APHIS.
James D. White, Esq., for Respondents.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

**ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO
EXTEND THE TIME FOR FILING A RESPONSE TO THE
RESPONDENTS' APPEAL PETITION**

On February 6, 2018, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a "Request for Extension of Time to File Response to Petition for Appeal" requesting that I extend to February 13, 2018, the time for filing the Administrator's response to the Respondents' appeal petition. On February 6, 2018, counsel for the Administrator informed me, by telephone, that counsel for the Respondents informed counsel for the Administrator that Respondents have no objection to the Administrator's

¹ The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m. Eastern Time. To ensure timely filing, the Administrator must ensure that his response to the Respondent's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 9, 2018.

MISCELLANEOUS ORDERS & DISMISSALS

request for an extension of time.

For good reason stated, the Administrator's request to extend the time for filing a response to the Respondents' appeal petition is granted. The time for filing the Administrator's response to the Respondents' appeal petition is extended to, and includes, February 13, 2018.¹

**In re: STEARNS ZOOLOGICAL RESCUE & REHAB CENTER,
INC., a Florida corporation d/b/a DADE CITY WILD THINGS.
Docket No. 15-0146.
Stay Order.
Filed May 4, 2018.**

HORSE PROTECTION ACT

**In re: JUSTIN HARRIS.
Docket No. 17-0126.
Remand Order.
Filed January 9, 2018.**

HPA.

Administrative procedure – Appointments Clause – Remand.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Justin Harris.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

REMAND ORDER AS TO JUSTIN HARRIS

On April 11, 2017, Chief Administrative Law Judge Bobbie J. McCartney issued a "Default Decision and Order" as to Justin Harris in

¹ The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m. Eastern Time. To ensure timely filing, the Administrator must ensure that his response to the Respondent's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 13, 2018.

the instant proceeding. On May 10, 2017, Mr. Harris appealed Chief Administrative Law Judge McCartney's Default Decision and Order to the Judicial Officer; on June 30, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed "Complainant's Response to Petition for Appeal filed by Justin Harris," and on December 6, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision.

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 Security and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art II, § 2, cl. 2. On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and Administrative Law Judge Channing D. Strother and renewed their oaths of office.²

To put to rest Mr. Harris's Appointments Clause claim, I remand this proceeding as it relates to Mr. Harris to Chief Administrative Law Judge McCartney, who shall: (1) consider the record, including all her previous substantive and procedural actions; (2) determine whether to ratify or revise in any respect all her prior actions; and (3) issue an order stating that she has completed consideration of the record and setting forth her determination regarding ratification.

In re: JACKIE BARRON, an individual; RUSSELL "DUKE" INGRAM, an individual; SHEA SPROLES, an individual; and GARY SPROLES, an individual.
Docket Nos. 16-0070, 16-0071, 16-0072, 16-0074.
Order Postponing Further Discretionary Actions by Presiding Judge.
Filed May 24, 2018.

² Attach 1.

MISCELLANEOUS ORDERS & DISMISSALS

In re: JACKIE BARRON, an individual; and SHEA MCKENSIE SPROLES, an individual.

Docket Nos. 17-0032, 17-0033.

**Order Postponing Further Discretionary Actions by Presiding Judge.
Filed May 24, 2018.**

In re: TERRY GIVENS, an individual.

Docket No. 17-0117.

**Order Postponing Further Discretionary Actions by Presiding Judge.
Filed May 24, 2018.**

In re: EDGAR ABERNATHY, an individual d/b/a ABERNATHY STABLES; CARROLL COUNTS, an individual; VIRGINIA COUNTS; an individual; and DARIUS NEWSOME, an individual.

Docket Nos. 17-0081, 17-0082, 17-0083, 17-0084.

**Order Denying Respondents' Motion to Strike and Exclude.
Filed May 25, 2018.**

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Default Decisions
77 Agric. Dec. 63

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: <https://oalj.oha.usda.gov/current>].

No Default Decisions reported.

CONSENT DECISIONS

CONSENT DECISIONS

ANIMAL WELFARE ACT

Debra Pratt, an individual.

Docket No. 18-0011.

Consent Decision and Order.

Filed January 30, 2018.

Arbuckle Adventures, LLC, an Oklahoma limited liability company.

Docket No. 16-0003.

Consent Decision and Order.

Filed May 2, 2018.

Wild Wilderness, Inc., an Arkansas corporation; and Freda Wilmoth, an individual.

Docket Nos. 17-0105, 17-0106.

Consent Decision and Order.

Filed June 4, 2018.

FEDERAL MEAT INSPECTION ACT

Wells Pork and Beef Slaughter, Inc.; and Victor Swinson.

Docket Nos. 18-0012, 18-0013.

Consent Decision and Order.

Filed March 14, 2018.

Cimpl's LLC, d/b/a American Foods Group, LLC.

Docket No. 18-0033.

Consent Decision and Order.

Filed May 16, 2018.

HORSE PROTECTION ACT

Brett Boyd, an individual.

Docket No. 17-0021.

Consent Decision and Order.

Filed January 10, 2018.

Consent Decisions
77 Agric. Dec. 64 – 65

Charles Gleghorn, an individual.

Docket No. 17-0022.

Consent Decision and Order.

Filed January 25, 2018.

Bob Lawrence, an individual.

Docket No. 17-0035.

Consent Decision and Order.

Filed April 5, 2018.

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AGRICULTURE DECISIONS

Volume 77

Book One

Part Two (P&S)

Pages 66 – 69



THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2018

PACKERS & STOCKYARDS ACT

MISCELLANEOUS ORDERS & DISMISSALS

No Miscellaneous Orders or Dismissals Reported 66

--

DEFAULT DECISIONS

No Default Decisions Reported 67

--

CONSENT DECISIONS

Consent Decisions 68

--

MISCELLANEOUS DECISIONS & ORDERS

MISCELLANEOUS DECISIONS & ORDERS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Substantive Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: <https://oalj.oha.usda.gov/current>.

PACKERS & STOCKYARDS ACT

No Miscellaneous Decisions & Orders reported.

Default Decisions
77 Agric. Dec. 67

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: <https://oalj.oha.usda.gov/current>].

PACKERS & STOCKYARDS ACT

No Default Decisions reported.

CONSENT DECISIONS

PACKERS & STOCKYARDS ACT

Farmington Livestock, LLC; and Keith Robertson.

Docket Nos. 18-0021, 18-0022.

Consent Decision and Order.

Filed May 2, 2018.

Wagener Dairy Cattle, LLC; and Kenneth Wagener.

Docket Nos. 18-0036, 18-0037.

Consent Decision and Order.

Filed May 25, 2018.

Robert Rawls, d/b/a Robert Rawls Livestock.

Docket No. 18-0040.

Consent Decision and Order.

Filed June 5, 2018.

Darrell Bouma.

Docket No. 17-0225.

Consent Decision and Order.

Filed June 13, 2018.

Charles D. Leonard, d/b/a Leonard Cattle Co.

Docket No. 18-0045.

Consent Decision and Order.

Filed June 14, 2018.

Samuel Rodriguez, Jr.; and R Y Livestock Sales, Inc.

Docket Nos. 18-0048, 18-0049.

Consent Decision and Order.

Filed June 19, 2018.

Roland Cook, d/b/a RC Livestock.

Docket No. 18-0050.

Consent Decision and Order.

Filed June 20, 2018.

CONSENT DECISIONS

JBS USA Food Company, f/k/a JBS USA, LLC and Swift Beef Company.

Docket No. 18-0057.

Consent Decision and Order.

Filed June 28, 2018.

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AGRICULTURE DECISIONS

Volume 77

Book One

Part Three (PACA)

Pages 70 – 174



THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2018

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: NICHOLAS ALLEN. Docket No. 15-0085. Initial Decision and Order	70
In re: THE PRODUCE CONNECTION, INC. Docket No. 18-0028. Initial Decision and Order	149

--

MISCELLANEOUS ORDERS & DISMISSALS

In re: JONATHAN DYER; STEVEN C. FINBERG; DREW JOHNSON; and MICHAEL RAWLINGS. Docket Nos. 14-0166, 14-0167, 14-0168, 14-0169. Remand Order as to Steven C. Finberg	165
In re: JONATHAN DYER; DREW JOHNSON; and MICHAEL RAWLINGS. Docket Nos. 14-0166, 14-0168, 14-0169. Order Denying Motion for Reconsideration of Remand Order	167
In re: ONE ROOT FOODS, INC. Docket No. 18-0016. Order of Dismissal	168
In re: NICHOLAS ALLEN. Docket No. 15-0085. Order Granting Extension of Time	168

In re: FRESH GROWERS DIRECT.
Docket No. 17-0265.
Order Granting Request to Withdraw Appeal and Appearance 169

In re: ONE ROOT FOODS, INC.
Docket No. 18-0016.
Order of Dismissal 168

--

DEFAULT DECISIONS

In re: J.E. CORCORAN COMPANY.
Docket No. 17-0253.
Default Decision and Order 173

In re: FRESH GROWERS DIRECT.
Docket No. 17-0265.
Default Decision and Order 173

In re: FRUTERA DEL LITORAL USA, LLC.
Docket No. 17-0228.
Default Decision and Order 173

--

CONSENT DECISIONS

Consent Decisions 174

Nicholas Allen
77 Agric. Dec. 70

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: NICHOLAS ALLEN.

Docket No. 15-0085.

Decision and Order.

Filed April 26, 2018.

PACA-APP.

Jeffrey M. Chebot, Esq., and Grant E. Forston, Esq., for Petitioner Nicholas Allen.

Charles L. Kendall, Esq., for AMS.

Initial Decision and Order by Channing D. Strother, Acting Chief Administrative Law Judge.

DECISION AND ORDER

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”)¹ 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, PACA² places the burden on Petitioner to demonstrate by a preponderance of the 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.³

¹ 7 U.S.C. §§ 499a-499s.

² 7 U.S.C. § 499a(b)(9).

³ *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

PERISHABLE AGRICULTURAL COMMODITIES ACT

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.⁴ 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.⁵

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.

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,⁶ the rights and authority

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).

⁴ 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 P1X-24 at 2; Tr. 184-185, 194, 396.

⁵ 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).

⁶ 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.

of those offices had been signed over to others. He was an officer and director in name only, which is the meaning of “nominal.”⁷ 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.⁸ 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.⁹ 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.¹⁰ 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-percent shareholder to be nominal.¹¹ 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.

⁷ *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”).

⁸ 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.”)).

⁹ 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.

¹⁰ See Respondent IB at 21-22; Respondent RB at 20.

¹¹ 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 F. App’x 10, 12 (9th Cir. 2008).

PERISHABLE AGRICULTURAL COMMODITIES ACT

Respondent contends that Petitioner had the legal authority to pay the producers himself, presumably from his own funds or funds he otherwise obtained.¹² 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.¹³

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.¹⁴ 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.

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”),¹⁵ which apply to PACA and the regulations issued thereunder (“Regulations”).¹⁶ The case was

¹² See Respondent IB at 10-11.

¹³ 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).

¹⁴ See Respondent RB at 4-5.

¹⁵ 7 C.F.R. §§ 1.130 *et seq.*

¹⁶ 7 C.F.R. §§ 46.1 *et seq.*

Nicholas Allen
77 Agric. Dec. 70

reassigned by the Chief Administrative Law Judge to the undersigned on August 23, 2016. Thus, this matter is properly before me for resolution.¹⁷

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.”¹⁸ 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.¹⁹

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 *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.²⁰

Statutory Background and Case Law Interpretation

¹⁷ 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.

¹⁸ 7 U.S.C. § 499a(b)(9).

¹⁹ *Id.* (emphasis added).

²⁰ See *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608, 611 (D.C. Cir. 2011).

PERISHABLE AGRICULTURAL COMMODITIES ACT

Congress enacted PACA in 1930 to regulate the sale of produce and promote fair dealing in the sale of perishable commodities.²¹ PACA is an intentionally a “tough law”²² 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.²³

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.²⁴ PACA “makes it unlawful for a licensee to engage in certain types of unfair conduct”²⁵ 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.”²⁶

Further, PACA authorizes the Secretary to impose sanctions on any commission merchant, dealer, or broker who has violated 7 U.S.C. § 499b(4).²⁷ An order suspending or revoking a PACA license can have significant collateral consequences in the form of licensing restrictions and employment restrictions for individuals associated with the violating licensee.²⁸ When an entity’s PACA license is revoked, PACA prohibits

²¹ *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)).

²² *Hawkins v. U.S. Dep’t of Agric.*, 10 F.3d 1125, 1130 (5th Cir. 1993).

²³ H.R. REP. NO. 84-1196, at 2 (1956), reprinted in 1956 U.S.C.C.A.N. 3699, 3701.

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

²⁵ *Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric.*, 497 F.3d 681, 686 (D.C. Cir. 2007).

²⁶ 7 U.S.C. § 499b(4).

²⁷ See 7 U.S.C. § 499h(a).

²⁸ 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

any person who was “responsibly connected” to that entity from working for any other licensee for at least one year.²⁹ These restrictions “are not ‘punishment,’ but rather statutory civil sanctions to assist regulatory enforcement of the PACA.”³⁰

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.’”³¹ The amendment provided no definition for “responsibly connected.”³² 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.”³³

Federal courts varied in their interpretations of the phrase.³⁴ Most circuits adopted a “*per se* exclusionary rule,”³⁵ 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.³⁶ 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

responsibly connected with a person who has been found to have committed violations of 7 U.S.C. § 499b.”).

²⁹ 7 U.S.C. § 499h(b).

³⁰ *Finch*, 73 Agric. Dec. at 302.

³¹ *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).

³² *Id.*

³³ 7 U.S.C. § 499(a)(b)(9) (1994); see *Norinsberg*, 162 F.3d at 1196 (citing H.R. REP. NO. 87-1546, at 4 (1962), reprinted in 1962 U.S.C.C.A.N. 2749, 2751)).

³⁴ *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).

³⁵ *Rodgers*, 56 Agric. Dec. 1919, 1952 (U.S.D.A. 1997).

³⁶ *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.”).

PERISHABLE AGRICULTURAL COMMODITIES ACT

major shareholder of a PACA violator is responsibly connected to the violator.”³⁷

The circuit split existed until 1995,³⁸ when Congress amended the “responsibly connected” definition to “make it clear that the presumption is rebuttable.”³⁹ 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.⁴⁰

In practice, the Secretary of Agriculture “must first determine if an individual falls within one of the three statutory classifications”⁴¹ (*i.e.*, officer, director, or holder of more than ten percent of the violating licensee’s stock).⁴² “If so, the burden shifts to the individual to demonstrate that he 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.”⁴³

II. Rebuttable Presumption

Per the 1995 amendment, PACA now provides a two-prong test for rebutting responsible connection.⁴⁴

³⁷ *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994).

³⁸ *Norinsberg v. U.S. Dep’t of Agric.*, 162 F.3d 1194, 1197 (D.C. Cir. 1998).

³⁹ *Hart v. Dep’t of Agric.*, 112 F.3d 1228, 1230 (D.C. Cir. 1997).

⁴⁰ 7 U.S.C. § 499a(b)(9).

⁴¹ *Norinsberg*, 162 F.3d at 1197.

⁴² *Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric.*, 497 F.3d 681, 686 (D.C. Cir. 2007).

⁴³ *Norinsberg*, 162 F.3d at 1197.

⁴⁴ 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

[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.⁴⁵

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.⁴⁶ Although PACA does not define “active involvement,”⁴⁷ 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 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

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.”).

⁴⁵ *Salins*, 57 Agric. Dec. 1474, 1487-88 (U.S.D.A. 1998).

⁴⁶ 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 . . .”).

⁴⁷ *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.”).

PERISHABLE AGRICULTURAL COMMODITIES ACT

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.⁴⁸

In evaluating active involvement, the focus is on the petitioner's relationship to the violating entity during the period when PACA was violated.⁴⁹

A person may exercise judgment, discretion, or control in a corporation even if he or she is not a principal decision-maker.⁵⁰ Participation in the day-to-day management of the business, for example, may suffice to constitute active involvement.⁵¹ This is especially true where an individual continues to buy or sell produce knowing that suppliers have not been paid.⁵² 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."⁵³

⁴⁸ *Norinsberg*, 58 Agric. Dec. 604, 610-11 (U.S.D.A. 1999) (Decision on Remand) (emphasis added).

⁴⁹ 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).

⁵⁰ See *Perfectly Fresh Farms, Inc.*, 58 Agric. Dec. 503, 509 (U.S.D.A. 2009), *aff'd*, 692 F.2d 960 (9th Cir. 2012).

⁵¹ See *id.*

⁵² 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.").

⁵³ *Beucke*, No. 04-0009, 2006 WL 2850276, at *11 (U.S.D.A. Sept. 28, 2006), *aff'd*, 314 F. 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.⁵⁴ “Generally, active involvement in activities in violation of PACA requires more than a ‘failure to act.’”⁵⁵ For example, in *Petro*,⁵⁶ 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.”⁵⁷

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.⁵⁸

In *Bell v. Department of Agriculture*,⁵⁹ 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.”⁶⁰

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.

⁵⁴ 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).

⁵⁵ *Id.*

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

⁵⁷ *Petro*, 71 Agric. Dec. 1259, 1261 (U.S.D.A. 2012) (Order Den. Pet. to Reconsider as to Bryan Herr).

⁵⁸ 7 U.S.C. § 499a(b)(9).

⁵⁹ 39 F.3d 1199 (D.C. Cir. 1994).

⁶⁰ *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994).

PERISHABLE AGRICULTURAL COMMODITIES ACT

. . . [A]n officer might meet this test by showing that the sole 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.⁶¹

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.⁶²

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.⁶³ In *Quinn v. Butz*,⁶⁴ 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.”⁶⁵ 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.’”⁶⁶

⁶¹ *Id.* (internal quotations omitted).

⁶² *Id.* (internal quotations omitted).

⁶³ *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.

⁶⁴ 510 F.2d 743 (D.C. Cir. 1975).

⁶⁵ *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”).

⁶⁶ *Id.* (quoting *Quinn*, 510 F.2d at 758).

Nicholas Allen
77 Agric. Dec. 70

Several years later in *Minotto v. USDA*,⁶⁷ the D.C. Circuit instituted what became known as the “actual, significant nexus” test.⁶⁸ 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, significant nexus with the violating company’ and, therefore, neither ‘knew [n]or should have known of the [c]ompany’s misdeeds.’”⁶⁹ 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.⁷⁰

Then, the D.C. Circuit revisited the “actual, significant nexus” test in *Taylor v. USDA*.⁷¹ 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.”⁷² 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.*⁷³

⁶⁷ 711 F.2d 406 (D.C. Cir. 1983).

⁶⁸ *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.”).

⁶⁹ *Hart v. Dep’t of Agric.*, 112 F.3d 1228, 1231 (D.C. Cir. 1997) (quoting *Minotto*, 711 F.2d at 408-09).

⁷⁰ *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994).

⁷¹ 636 F.3d 608 (D.C. Cir. 2011).

⁷² *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)).

⁷³ *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)).

PERISHABLE AGRICULTURAL COMMODITIES ACT

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 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.⁷⁴

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.”⁷⁵

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

⁷⁴ *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).

⁷⁵ 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”).

policy or business decisions,” and did not have access to the company’s records or know of the company’s financial difficulties.⁷⁶ 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.”⁷⁷

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 corporation during the violations period.”⁷⁸ 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.⁷⁹ 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.”⁸⁰

Further, before the “in name only” inquiry replaced the “actual, significant nexus” test, it was often stated that “ownership of a substantial

⁷⁶ *Quinn*, 510 F.2d at 752-53.

⁷⁷ *Id.*

⁷⁸ *Justice*, 65 Agric. Dec. 1325, 1332 (U.S.D.A. 2006).

⁷⁹ *Id.* at 1333-34; *see also Beucke v. U.S. Dep’t of Agric.*, 314 F. 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”).

⁸⁰ *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).

PERISHABLE AGRICULTURAL COMMODITIES ACT

percentage of stock alone [was] very strong evidence that [an individual] was not a nominal shareholder.”⁸¹ 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 percentage of the outstanding stock of the corporation or association.”⁸² A “substantial” share ranged from twenty to sixty percent,⁸³ with majority ownership considered particularly indicative of responsible connection.⁸⁴

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.⁸⁵ In *Petro*,⁸⁶ for example, the Judicial

⁸¹ *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.”).

⁸² *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”).

⁸³ 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).

⁸⁴ See *Veg-Mix, Inc.*, 832 F.2d at 611 (“Majority ownership obviously suffices [for a finding of responsible connection].”).

⁸⁵ 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).

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

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.⁸⁷

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 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.⁸⁸

Similarly, in *Beucke v. U.S. Department of Agriculture*,⁸⁹ 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."⁹⁰ And the court concluded that the same individual—who was a thirty-three-percent shareholder of another corporation—failed to demonstrate that he

⁸⁷ *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).

⁸⁸ *Id.*

⁸⁹ 314 F. App'x 10 (9th Cir. 2008).

⁹⁰ *Beucke v. U.S. Dep't of Agric.*, 314 F. 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").

PERISHABLE AGRICULTURAL COMMODITIES ACT

was only “nominally a partner, officer, director, or shareholder” of the second corporation.⁹¹ “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.”⁹²

Procedural Background

Veg Liquidation, Inc., formerly known as Allens, Inc. (this entity under either name will be herein referred to as “Allens, Inc.”),⁹³ was a major, longstanding Arkansas business closely associated with the Allen family.⁹⁴ For much of its existence it was largely engaged in the canning of fruits and vegetables.⁹⁵ After an expansion into frozen foods, Allens, Inc. became the subject to bankruptcy.⁹⁶

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.⁹⁷ 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.”⁹⁸ 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.⁹⁹

⁹¹ *Beucke*, 314 F. App’x at 12.

⁹² *Id.*

⁹³ “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.

⁹⁴ See Tr. 16-18.

⁹⁵ Tr. 16-17.

⁹⁶ Tr. 17-18.

⁹⁷ 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).

⁹⁸ *Allens, Inc.*, 74 Agric. Dec. 488, 497 (U.S.D.A. 2015).

⁹⁹ 7 C.F.R. § 1.142(c)(4).

Nicholas Allen
77 Agric. Dec. 70

Based upon her review of the materials included in Exhibits RX-1 through RX-9,¹⁰⁰ 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 review and reversal of the Director’s Determination by an Administrative Law Judge as provided in Section 47.49 of the Rules of Practice.¹⁰¹

On August 17, 2016, both the AMS determination as to Mark Towery and his petition for review of that determination were withdrawn.¹⁰² On December 9, 2016, the petitions for review of Roderick Allen and Josh Allen were withdrawn.¹⁰³ 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.¹⁰⁴ Although AMS initially found the two directors to be responsibly connected to Allens, Inc., that determination was subsequently withdrawn.¹⁰⁵

¹⁰⁰ See Tr. 400-421.

¹⁰¹ 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.

¹⁰² 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.”

¹⁰³ 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.

¹⁰⁴ See Tr. 397-398; P1X-6.

¹⁰⁵ Tr. 397-398, 429-430.

PERISHABLE AGRICULTURAL COMMODITIES ACT

A hearing was held before the undersigned on December 13 and 14, 2016 in Fayetteville, Arkansas. Josh Allen,¹⁰⁶ Nicholas Allen (Petitioner),¹⁰⁷ and Lori Sherrell¹⁰⁸ were called as witnesses by Petitioner. AMS called Josephine Elizabeth Jenkins.¹⁰⁹

A total of fifty-six exhibits (marked as PLX-1 through PLX-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.¹¹⁰ 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.¹¹¹

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.

¹⁰⁶ Tr. 14-165.

¹⁰⁷ Tr. 167-234.

¹⁰⁸ Tr. 257-389.

¹⁰⁹ Tr. 391-480.

¹¹⁰ 7 C.F.R. § 1.136(a).

¹¹¹ Tr. 249.

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 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").¹¹² Petitioner asserts that any activity on his part during the violation period was solely of a ministerial nature.¹¹³ 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.¹¹⁴

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.¹¹⁵ They were not his agents and acted on their own accord.¹¹⁶ He presented evidence he had no expectation that the secured creditors' directors and CRO intended to violate PACA.¹¹⁷ Petitioner contends that under Arkansas law he could cede his authority as an officer, director, and more than ten-percent shareholder to others, and

¹¹² Tr. 10-11 (Petitioner's counsel).

¹¹³ 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.

¹¹⁴ See Petitioner IB at 61-62; Petitioner RB at 32.

¹¹⁵ See Petitioner IB at 38-39, 42, 55-59, 61-63; Petitioner RB at 32-33.

¹¹⁶ See Petitioner IB at 56-57, 61-62, 66.

¹¹⁷ Tr. at 93-97, 119-122, 185-189, 194-197.

PERISHABLE AGRICULTURAL COMMODITIES ACT

thereby effectively become a nominal officer, director, and shareholder.¹¹⁸ Petitioner contends that PACA does not supersede Arkansas law in any respect in these circumstances.¹¹⁹

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.¹²⁰ 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.¹²¹ 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.¹²² 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.¹²³ 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.¹²⁴

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, 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.

¹¹⁸ See Petitioner IB at 62-63.

¹¹⁹ See Petitioner IB at 42, 66.

¹²⁰ See Respondent IB at 24-25.

¹²¹ See Respondent IB at 24-25; RB at 17.

¹²² See Respondent IB at 18, 26-27; Respondent RB at 6.

¹²³ See Respondent IB at 18; Respondent RB at 12, 16-17.

¹²⁴ See Respondent IB at 28-30; Respondent RB at 11, 18-19.

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.”¹²⁵ 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.”¹²⁶

In this case, the PACA violation was Allens, Inc.’s failure to pay forty produce suppliers under 7 U.S.C. § 499b(4).¹²⁷ 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.

The evidence is that Petitioner, himself, took no action at all related to the violations during the violations period. He so testified.¹²⁸ Petitioner signed no checks and had no role in the purchase or payment of produce.¹²⁹ He specifically testified that no producers contacted him regarding

¹²⁵ *Norinsberg*, 58 Agric. Dec. 604, 610-11 (U.S.D.A. 1999) (Decision on Remand).

¹²⁶ *Id.*

¹²⁷ 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.”).

¹²⁸ Tr. 184-189.

¹²⁹ 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”).

PERISHABLE AGRICULTURAL COMMODITIES ACT

payments, and he did not contact them.¹³⁰ 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.¹³¹ This lends credibility to the testimony he did not discuss payments during the violations period with any producer¹³² 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.¹³³ 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.¹³⁴ This evidence was not contradicted.

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.*"¹³⁵ Active involvement, however, generally "requires more than a 'failure to act.'"¹³⁶ AMS fails to identify what Petitioner's alleged

¹³⁰ Tr. 177, 185-186.

¹³¹ Tr. 170.

¹³² Tr. 170, 185-186, 197, 226.

¹³³ Tr. 186-187, 194-195.

¹³⁴ 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").

¹³⁵ Respondent IB at 18 (emphasis added).

¹³⁶ *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).").

“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.¹³⁷ 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.¹³⁸ I find here that the assignment of authority does not meet the first prong of the PACA “responsibly connected” standard.¹³⁹ 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,¹⁴⁰ the record does not demonstrate that it was.¹⁴¹ Petitioner presented testimony that it was not.¹⁴²

The record also indicates that Allens, Inc. legally delegated financial control to the committee of independent directors. This was a valid transfer

¹³⁷ 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.”).

¹³⁸ See Respondent IB at 24-25; Respondent RB at 16.

¹³⁹ 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).

¹⁴⁰ See Respondent IB at 27-28, 30-31.

¹⁴¹ *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).

¹⁴² See Tr. 32-46, 49-68, 74-75, 173, 175-183, 188, 194-195.

PERISHABLE AGRICULTURAL COMMODITIES ACT

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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ The Restructuring Committee could only be dissolved or have its authority removed in accordance with the terms of its authorizing resolution,¹⁴⁷ 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.¹⁴⁸

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.¹⁴⁹ 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.¹⁵⁰ Whatever corporate authority Petitioner might have possessed prior to the violations period was displaced on August 5, 2013.

¹⁴³ 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)).

¹⁴⁴ ARK. CODE ANN. § 4-27-825(a),(e) (2014).

¹⁴⁵ P1X-9; Tr. 181.

¹⁴⁶ P1X-9 at 2-3; Tr. 70-71, 181.

¹⁴⁷ ARK. CODE ANN. § 4-27-1020(b) (2014).

¹⁴⁸ *Hosp. & Benevolent Ass'n v. Ark. Baptist State Convention*, 176 Ark. 946, 4 S.W. 2d 933, 946-47 (1928) (shareholder waives binding with respect to business and transactions within the statutory powers of the corporation).

¹⁴⁹ *Young v. Westark Prod. Credit Ass'n*, 222 Ark. 55, 60, 257 S.W.2d 274, 277 (1953).

¹⁵⁰ P1X-9; Tr. 85, 189, 436.

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.”¹⁵¹ 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.¹⁵² AMS presented no evidence to prove otherwise.

Further, I find that PACA is not inconsistent with the Arkansas law of corporations.¹⁵³ 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[.]¹⁵⁴

AMS has made no such showing in this case,¹⁵⁵ and there is no evidence that Congress enacted PACA to preempt the state regulation of

¹⁵¹ Respondent RB at 30.

¹⁵² Tr. 56, 183.

¹⁵³ 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.”).

¹⁵⁴ *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).

¹⁵⁵ 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[.]”).

PERISHABLE AGRICULTURAL COMMODITIES ACT

corporations.¹⁵⁶ 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[.]”¹⁵⁷ 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 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.”¹⁵⁸ Unlike in *Sebastapol Meat Co. v. Secretary of Agriculture*,¹⁵⁹ a case cited by AMS,¹⁶⁰ there were other individuals at Allens, Inc. who may have been responsible for the company’s PACA violations.¹⁶¹ Josh Allen and Roderick Allen voluntarily withdrew their petitions to challenge responsible connection.¹⁶² AMS could have—but apparently chose not to—proceed against the “independent directors” of the Restructuring Committee or the CRO.¹⁶³ Why AMS did not pursue these other targets is beyond the scope of this Decision.

¹⁵⁶ 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)).

¹⁵⁷ *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 135 (3d Cir. 2000) (internal citation omitted).

¹⁵⁸ Petitioner RB at 10.

¹⁵⁹ 440 F.2d 983 (9th Cir. 1971).

¹⁶⁰ Respondent IB at 29.

¹⁶¹ See *Sebastapol Meat Co. v. Sec’y of Agric.*, 440 F.2d 983, 985 (9th Cir. 1971).

¹⁶² Tr. 456-457.

¹⁶³ Tr. 429-430, 465-467, 478.

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.”¹⁶⁴ Petitioner was a 19.31% owner of Allens, Inc. and therefore cannot meet this PACA proviso.¹⁶⁵ Thus, Petitioner 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.¹⁶⁶

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.¹⁶⁷ The preponderance of the evidence is that he was an officer, director, and shareholder “in name only.”¹⁶⁸

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

¹⁶⁴ 7 U.S.C. § 499a(b)(9).

¹⁶⁵ See *B.T. Produce Co.*, 66 Agric. Dec. 774, 832 (U.S.D.A. 2007), *aff’d*, F. 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 F. App’x 10 (9th Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009); *Martindale*, 65 Agric. Dec. 1301, 1308 (U.S.D.A. 2006).

¹⁶⁶ *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).

¹⁶⁷ 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).

¹⁶⁸ 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.

PERISHABLE AGRICULTURAL COMMODITIES ACT

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.¹⁶⁹ Petitioner asserted that he retained the title during the violations period for purposes of maintaining company morale.¹⁷⁰ "The law is clear . . . that an officer may be 'nominal' even though the corporate records . . . make him out to be a real one."¹⁷¹

In *Maldonado v. Department of Agriculture*,¹⁷² 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.¹⁷³ Similarly, in *Bell v. Department of Agriculture*,¹⁷⁴ 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."¹⁷⁵ 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.¹⁷⁶

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

¹⁶⁹ 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.").

¹⁷⁰ Tr. 148, 169.

¹⁷¹ *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.").

¹⁷² 154 F.3d 1086 (9th Cir. 1998).

¹⁷³ *Maldonado*, 154 F.3d at 1088.

¹⁷⁴ 39 F.3d 1199 (D.C. Cir. 1994).

¹⁷⁵ *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)).

¹⁷⁶ Tr. 95, 180-181, 183-186, 224-225. See *Quinn*, 510 F.2d at 752-53.

Nicholas Allen
77 Agric. Dec. 70

interacting with suppliers, he had significant duties as supervisor and leader of the Allens, Inc. internal sales force prior to the reorganization.¹⁷⁷ When asked about his responsibilities in that position, Petitioner testified:¹⁷⁸

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

¹⁷⁷ Tr. 176.

¹⁷⁸ Tr. 170-171.

PERISHABLE AGRICULTURAL COMMODITIES ACT

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.¹⁷⁹ 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."¹⁸⁰ More specifically, he testified:¹⁸¹

[Q] As things moved forward after the 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

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

¹⁸⁰ Tr. 182.

¹⁸¹ Tr. 183-186.

Nicholas Allen
77 Agric. Dec. 70

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.

PERISHABLE AGRICULTURAL COMMODITIES ACT

....

[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."¹⁸² Petitioner's duties were limited as a result of the August 5, 2013 management restructuring;

¹⁸² *Thomas*, 59 Agric. Dec. 367, 387 (U.S.D.A. 2000). *See* Tr. 325, 328.

he was excluded from policy and business decisions, given only limited access to corporate records, and was provided no information about accounts payable.¹⁸³ Members of the sales team no longer reported to Petitioner; A&M took over his supervisory role.¹⁸⁴ Furthermore, Petitioner did not sign corporate checks or execute documents on behalf of the company¹⁸⁵ during the violations period.¹⁸⁶ Although Petitioner was authorized to sign checks on the company's utilities account, the evidence is that the authority was not unilateral and was unrelated to corporate policy.¹⁸⁷ 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.¹⁸⁸

¹⁸³ Tr. 69-70, 85-86, 94, 184, 185-186, 187, 250. *See Thomas*, 59 Agric. Dec. at 387; *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").

¹⁸⁴ Tr. 184.

¹⁸⁵ 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).

¹⁸⁶ 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).

¹⁸⁷ 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").

¹⁸⁸ *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).

PERISHABLE AGRICULTURAL COMMODITIES ACT

I note that the record is that Petitioner did not, at any time, maintain interaction with produce suppliers.¹⁸⁹ 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.¹⁹⁰ Beginning around August 2013, a "cash committee" met weekly to decide which of Allens, Inc.'s bills to pay.¹⁹¹ 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.¹⁹² Although Petitioner might have attended the first one or two meetings to "see what was going on," he "wasn't really involved."¹⁹³ The evidence is that by October 2, 2013, Petitioner had ceased involvement and stopped attending the meetings.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶ Like in *Bell v. Department of Agriculture*,¹⁹⁷ the record is that it was not Petitioner whom people contacted when looking to be paid.¹⁹⁸ "This clearly means suppliers did not regard [Petitioner] as having authority to bring about payment by [Allens, Inc.]."¹⁹⁹

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."²⁰⁰ AMS cites *Kleiman & Hochberg, Inc.*²⁰¹ to support its contention that "[e]ven where officers of a PACA-licensed company were judged to be unaware of their violations, their responsible

¹⁸⁹ Tr. 144, 170, 185, 197.

¹⁹⁰ Tr. 185-186, 216-217.

¹⁹¹ Tr. 272-274, 364.

¹⁹² Tr. 380-381.

¹⁹³ Tr. 273-274.

¹⁹⁴ Tr. 273-274, 364.

¹⁹⁵ Tr. 194-195.

¹⁹⁶ *Finch*, 73 Agric. Dec. 302, 316 (U.S.D.A. 2014); see *supra* note 130.

¹⁹⁷ 39 F.3d 1199 (D.C. Cir. 1994).

¹⁹⁸ See Tr. 145, 185,

¹⁹⁹ *Bell v. Dep't of Agric.*, 39 F.3d 1199, 1204 (D.C. Cir. 1994).

²⁰⁰ Respondent IB at 26.

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

Nicholas Allen
77 Agric. Dec. 70

connection [h]as been based on their failure to counteract or obviate the wrongdoing of others.”²⁰² 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.²⁰³

Additionally, AMS argues that, unlike the petitioner in *Maldonado v. Department of Agriculture*²⁰⁴—who was found not to have been a nominal officer—“Nicholas Allen had extensive business education, experience, and knowledge.”²⁰⁵ 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.”²⁰⁶ Even under the former “actual, 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*.²⁰⁷ 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.”²⁰⁸ 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.²⁰⁹

²⁰² Respondent IB at 27.

²⁰³ See *supra* note 168 and accompanying text.

²⁰⁴ 154 F.3d 1086 (9th Cir. 1998).

²⁰⁵ Respondent’s IB at 19.

²⁰⁶ 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.”).

²⁰⁷ See *Maldonado v. Dep’t of Agric.*, 154 F.3d 1086, 1088 (9th Cir. 1998).

²⁰⁸ *Id.*

²⁰⁹ 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.

PERISHABLE AGRICULTURAL COMMODITIES ACT

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.”²¹⁰ 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.”²¹¹ Petitioner testified to this in detail at the hearing.²¹² 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.

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, 2013.²¹³ Per that resolution, Mr. Boates and Mr. Newsted were vested with full authority over the CRO and financial management throughout the violations period.²¹⁴

As the D.C. Circuit has ruled, “one may hold a paper directorship, and more, and yet be classified as nominal.”²¹⁵ 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.²¹⁶ The record is that actual

²¹⁰ Respondent IB at 20.

²¹¹ Petitioner RB at 22.

²¹² Tr. 203, 223-224, 234, 226-227.

²¹³ Tr. 22, 64-68, 180-181; P1X-9; P1X-22; RX-3 at 18-20.

²¹⁴ P1X-9; P1X-22; RX-3 at 18-20. See Findings of Fact Nos. 76-80, 87, 101.

²¹⁵ *Bell v. Dep’t of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994).

²¹⁶ P1X-22; Tr. 86-87, 93-94, 119-120, 186-190.

Nicholas Allen
77 Agric. Dec. 70

power was held and exercised by the independent directors, who comprised the “Restructuring Committee,” and by CRO Hickman.²¹⁷ Any of Petitioner’s duties as director were supplanted by the Restructuring Committee and CRO.²¹⁸ At the hearing, Petitioner testified about how the restructuring affected his directorship:²¹⁹

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.

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

²¹⁷ See P1X-9; Tr. 58, 65-66, 84-87, 92-95, 163, 180.

²¹⁸ Tr. 95, 182, 219-220.

²¹⁹ Tr. 182.

PERISHABLE AGRICULTURAL COMMODITIES ACT

Committee.²²⁰ Petitioner stated that he was “advised that it was impossible” by company counsel and “professionals . . . in the business.”²²¹ 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.²²²

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.”²²³ However, the meetings AMS refers to—as well as the company’s restructuring—took place outside the violations period.²²⁴ 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.”²²⁵

Although Petitioner attended several board meetings during the violations period, he was not an active participant.²²⁶ 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.²²⁷ Although ostensibly a director of Allens, Inc., Petitioner was not provided with any information concerning accounts payable, nor was

²²⁰ Tr. 156, 196-197.

²²¹ Tr. 222, 232-233.

²²² Tr. 66.

²²³ Respondent IB at 21.

²²⁴ 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).

²²⁵ *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”).

²²⁶ 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).

²²⁷ Tr. 186-187.

Nicholas Allen
77 Agric. Dec. 70

he consulted with respect to the company's cash management.²²⁸ With regard to the substance of these brief meetings, Josh Allen testified:²²⁹

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. 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.²³⁰ 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.²³¹ 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

²²⁸ Tr. 186-187.

²²⁹ Tr. 82-83.

²³⁰ Tr. 93-94, 188.

²³¹ Tr. 92-93, 157, 188.

PERISHABLE AGRICULTURAL COMMODITIES ACT

America, who controlled Allens, Inc. in terms of both production and income.²³²

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.²³³ 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.

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.²³⁴ 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."²³⁵ Both Petitioner and Josh Allen testified that, after August 5, 2013, Petitioner had no role in the decision-making regarding accounts payable.²³⁶ This is supported by the testimony of Lori Sherrell, corporate secretary and controller of accounting and finance at Allens, Inc.,²³⁷ 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.²³⁸ Petitioner was neither a sender nor recipient of these emails

²³² Tr. 88-91.

²³³ 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*.").

²³⁴ Tr. 188-189. *Cf. Thames v. Dep't of Agric.*, 195 F. 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).

²³⁵ Tr. 194-195; *see* P1X-24 at 2, 5-7.

²³⁶ Tr. 86, 93-94, 185-187.

²³⁷ Tr. 276-278, 328.

²³⁸ 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-

Nicholas Allen
77 Agric. Dec. 70

and was not included on courtesy copies.²³⁹ Again, the responsibility for financial decision-making was granted exclusively to the Restructuring Committee and CRO.²⁴⁰

Further, AMS argues that Petitioner “was not a nominal officer such as Lilly Minotto,”²⁴¹ quoting the following summary of *Minotto v. Department of Agriculture*²⁴² by the Ninth Circuit Court of Appeals:²⁴³

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,

45; P1X-46; P1X-47; P1X-48; P1X-49; P1X-50; P1X-51; P1X-52; P1X-53; P1X-54; P1X-55; Tr. 293.

²³⁹ 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.

²⁴⁰ P1X-22; Tr. 86-87.

²⁴¹ Respondent IB at 20.

²⁴² 711 F.2d 406 (D.C. Cir. 1983).

²⁴³ Respondent IB at 21.

PERISHABLE AGRICULTURAL COMMODITIES ACT

among other things, that the petitioner “had no real authority within the [c]ompany” and “no policy or decision-making role.”²⁴⁴ 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.²⁴⁵

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 so.²⁴⁶ 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.²⁴⁷ 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.²⁴⁸ In addition, Petitioner was only a

²⁴⁴ *Minotto v. Dep’t of Agric.*, 711 F.2d 406, 409 (D.C. Cir. 1983).

²⁴⁵ *Id.*

²⁴⁶ See *supra* note 210 and accompanying text.

²⁴⁷ P1X-22 at 1; Tr. 30-32, 63-64, 97, 98, 170-173.

²⁴⁸ *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 F. 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).

minority stockholder.²⁴⁹ 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.”²⁵⁰

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 violations.²⁵¹ He had no equity and no control over the direction of the company.²⁵² 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.²⁵³ The shareholders were blocked from interfering with the Restructuring Committee’s authority until April 1, 2014.²⁵⁴

Although Petitioner held onto his shares throughout the violations period, the record shows his stock had no real worth.²⁵⁵ The value of Allens, Inc. as a going concern was zero.²⁵⁶ 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.²⁵⁷ Due to the corporate restructuring, any value inherent in Allens, Inc. was owned by the company’s secured creditors.²⁵⁸ The secured creditors had the opportunity

²⁴⁹ See RX-1 at 1-4; P1X-22 at 1; Tr. 27. The majority shareholder, Roderick Allen, held a 61.39% stake while Josh Allen held the remaining 19.31%. *Id.*

²⁵⁰ *Siegl*, 851 F.2d at 417 (citing *Martino v. Dep’t of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986)).

²⁵¹ 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”).

²⁵² 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).

²⁵³ P1X-7 at 3-4; P1X-8 at 2-3; P1X-9 at 1-5; Tr. 64-66, 197, 221-222.

²⁵⁴ See P1X-7; P1X-8; P1X-9; Tr. 58-59, 65-66, 77, 114-115, 182, 188.

²⁵⁵ Tr. 100-101, 141-142, 195-196.

²⁵⁶ P1X-14; Tr. 98-100, 486.

²⁵⁷ Tr. 101, 195.

²⁵⁸ Tr. 195, 218.

PERISHABLE AGRICULTURAL COMMODITIES ACT

to influence payment of produce suppliers throughout the violations period; Petitioner did not.²⁵⁹

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.”²⁶⁰ AMS submits:²⁶¹

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.)²⁶²

However, these cases are inapposite and do not support AMS’s proposition. In *Beucke*,²⁶³ 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.²⁶⁴ The Judicial Officer considered Keyeski’s retention of stock to determine whether he was a

²⁵⁹ Tr. 188-189; 195-196.

²⁶⁰ Respondent’s IB at 22.

²⁶¹ Respondent’s IB at 22.

²⁶² *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).

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

²⁶⁴ *See Beucke*, 65 Agric. Dec. 1372, 1387-90, 1404-05 (U.S.D.A. 2006).

shareholder at a specific time; it was not what inhibited Keyeski from being found nominal.²⁶⁵

Similarly, stock value was not at issue in *Hawkins v. Department of Agriculture*.²⁶⁶ The case was decided by the Fifth Circuit Court of Appeals prior to 1995, when Congress amended PACA to incorporate the rebuttable-presumption standard.²⁶⁷ 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.”²⁶⁸ Thus, regardless of the value of the petitioner’s stock at that time, the Fifth Circuit would not have examined his twenty-two percent interest; it was of no consequence whether he was a nominal shareholder.²⁶⁹ I also note that AMS’s parenthetical is misleading.²⁷⁰ 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.²⁷¹ *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.²⁷² However, PACA expressly provides that there can be nominal shareholders.²⁷³ Clearly it does not require that an individual rid himself

²⁶⁵ 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.

²⁶⁶ 10 F.3d 1125 (5th Cir. 1993).

²⁶⁷ *Hawkins v. Dep’t of Agric.*, 10 F.3d 1125 (5th Cir. 1993).

²⁶⁸ *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.”).

²⁶⁹ See *Hawkins*, 10 F.3d at 1129-31.

²⁷⁰ 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.”).

²⁷¹ See *Hawkins*, 10 F.3d at 1129-30.

²⁷² Respondent IB at 21-22; Respondent RB at 4.

²⁷³ See 7 U.S.C. § 499a(b)(9).

PERISHABLE AGRICULTURAL COMMODITIES ACT

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.²⁷⁴ He had no role in managing the company's affairs and was unable to elect members to the board of directors.²⁷⁵ Petitioner testified that despite the terms of 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.²⁷⁶ In addition, there is no evidence to suggest that an "annual meeting of the stockholders" took place during the violations period.²⁷⁷

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.²⁷⁸ As previously discussed, that authority rested with the CRO, who reported to the independent directors.²⁷⁹ 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.²⁸⁰ Based on

²⁷⁴ 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).

²⁷⁵ P1X-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.").

²⁷⁶ P1X-9 at 1; P1X-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." (P1X-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." P1X-9 at 3. The document specified that "Restructuring" included "a sale, capital restructuring or change of control of the Company." P1X-9 at 1.

²⁷⁷ See P1X-9 at 2; Tr. 67-68.

²⁷⁸ Tr. 188-189.

²⁷⁹ Tr. 188-189.

²⁸⁰ See P1X-22; Tr. 86-87, 188-189, 460-462.

Nicholas Allen
77 Agric. Dec. 70

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. 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); P1X-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. [P1X-1; Tr. J. Allen 18-19].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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").²⁸¹ [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].

²⁸¹ 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.

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].
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].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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.

PERISHABLE AGRICULTURAL COMMODITIES ACT

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].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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., [P1X-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

Nicholas Allen
77 Agric. Dec. 70

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

PERISHABLE AGRICULTURAL COMMODITIES ACT

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”). [P1X-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. [P1X-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. [P1X-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

PERISHABLE AGRICULTURAL COMMODITIES ACT

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

Nicholas Allen
77 Agric. Dec. 70

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].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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

PERISHABLE AGRICULTURAL COMMODITIES ACT

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].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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,

PERISHABLE AGRICULTURAL COMMODITIES ACT

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].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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].

PERISHABLE AGRICULTURAL COMMODITIES ACT

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.

Nicholas Allen
77 Agric. Dec. 70

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.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: THE PRODUCE CONNECTION, INC.
Docket No. 18-0028.
Decision and Order.
Filed June 20, 2018.

PACA-D.

Shelton S. Smallwood, Esq., for AMS.
Philip S. Vova, Esq., for The Produce Connection, Inc.
Initial Decision and Order by Channing D. Strother, Acting Chief Administrative Law Judge.

DECISION AND ORDER GRANTING COMPLAINANT'S
MOTION FOR DECISION WITHOUT HEARING
BY REASON OF ADMISSIONS

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (“PACA”), the regulations promulgated pursuant to PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151) (“Rules of Practice”).

The Fair Trades and Practices Program, Agricultural Marketing Service of the United States Department of Agriculture (“Complainant”), initiated this proceeding by filing a complaint alleging that The Produce Connection, Inc. (“Respondent”) willfully violated PACA. On May 18, 2018, Complainant moved for a decision without hearing based on admissions pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

For the reasons discussed herein, I find that no hearing is warranted in this matter and a decision on the record is appropriate.

Procedural History

On April 10, 2018, Complainant filed a disciplinary complaint against Respondent. The Complaint alleged that Respondent willfully violated

section 2(4) of PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to fifty-eight sellers for the agreed purchase prices, or balances thereof, in the total amount of \$1,488,447.46 for 745 lots of perishable agricultural commodities it purchased, received, and accepted in interstate and foreign commerce. The Complaint also alleged that, on December 6, 2017, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq.*) in the United States Bankruptcy Court of the Southern District of Florida, Miami Division (Case No. 16-26156). The Complaint requested that: (1) I find that Respondent willfully, flagrantly, and repeatedly violated section (4) of PACA (7 U.S.C. § 499h(a)); and (2) the facts and circumstances of Respondent's violations be published pursuant to section 8(a) of PACA (7 U.S.C. § 499h(a)).

On May 1, 2018, Respondent filed a timely answer¹ to the Complaint.² Respondent either admitted to or stated that it could not admit or deny the jurisdictional allegations of the Complaint. In response to the material allegations of the Complaint, Respondent submitted:

III

The Respondent would dispute the issue as to the dates of payment and would indicate that any delayed payment was due to the unreasonable behavior of the U.S. government through the Department of Defense which made allegations and withheld payments without adequate reason or proof. This behavior by the U.S. government in failing to pay its bills of approximately \$350,000.00 resulted in any delay alleged. Additionally, any sums alleged are not agreed by the Respondent since

¹ Respondent titled the document, "Answer and Affirmative Defenses."

² United States Postal Service records reflect that the Complaint was sent to Respondent's counsel, Philip S. Vova, via certified mail and delivered on April 16, 2018. The same was also sent via certified mail to Respondent's bankruptcy attorney, Robert A. Stok, and delivered on April 16, 2018. Respondent had twenty days from the date of service to file a response. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's answer was due by May 7, 2018.

PERISHABLE AGRICULTURAL COMMODITIES ACT

there are funds available through the bankruptcy and other collection efforts which would give an accurate amount of deficiency, if same exists.

IV

The Respondent admits filing the bankruptcy as alleged but would indicate the schedules of creditors with PACA claims needs to be adjusted for credits due, payments not credited and parties who did not perfect a proper PACA claim. Therefore, the sums due to PACA creditors needs to be determined upon a final accounting through the bankruptcy and funds collected through litigation.

V

The Respondent would deny this allegation based upon the affirmative defense set forth below that here has been no violation of section 2(4) of the PACA [7 U.S.C. § 499b(4)].

VI

The Respondent would affirmatively state that any delay or nonpayment was the result of the U.S. government through the Department of Defense refusing to make payments due and improperly accusing the Respondent with fraud which was proved by investigation to be false. The U.S. government is still refusing to pay their bill and litigation has or will be initiated shortly. This behavior is the contributory factor in any of the delay allegations made in this petition.³

On May 18, 2018, Complainant filed a Motion for Decision Without Hearing by Reason of Admissions (“Motion for Decision Without Hearing”) and proposed Decision Without Hearing Based on Admissions (“Proposed Decision”) pursuant to section 1.139 of the Rules of Practice

³ Answer at 1-2.

(7 C.F.R. § 1.139). The Motion was based upon admissions of fact contained in Respondent's Answer. Respondent has not filed any objections thereto.⁴

Authorities

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary ("Rules of Practice" or "Rules"), set forth at 7 C.F.R. §§ 1.130 *et seq.*, apply to the adjudication of this matter. Pursuant to section 1.136, a respondent is required to file an answer within twenty days after service of a complaint.⁵ The Rules provide that an answer shall "[c]learly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent."⁶ Moreover, "[t]he failure to file an answer, *or the admission by the answer of all the material allegations of fact contained in the complaint*, shall constitute a waiver of hearing."⁷

Also applicable to the instant proceeding are sections 2(4) and 8(a) of PACA (7 U.S.C. §§ 499b(4), 499h(a)). Section 2(4) requires merchants and dealers to make "full payment promptly" for perishable agricultural commodities, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase.⁸ Specifically, Section 2(4) makes it unlawful "[f]or any commission merchant, dealer, or broker to . . . fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had."⁹ Section 8(a) provides:

⁴ United States Postal Service records reflect that the Motion for Decision Without Hearing and Proposed Decision were sent to Respondent's counsel, Philip S. Vova, via certified mail and delivered on May 30, 2018. The same were also sent via certified mail to Respondent's bankruptcy attorney, Robert A. Stok, and delivered on May 29, 2018. Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall not be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's objections were due by June 19, 2018. Respondent did not file any objections on or before that date.

⁵ 7 C.F.R. § 1.136(a).

⁶ 7 C.F.R. § 1.136(b)(1).

⁷ 7 C.F.R. § 1.139 (emphasis added).

⁸ See 7 C.F.R. §§ 46.2(aa)(5), (11).

⁹ 7 U.S.C. § 499b(4).

PERISHABLE AGRICULTURAL COMMODITIES ACT

Whenever . . . the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title . . . *the Secretary may publish the facts and circumstances of such violation* and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, *if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.*¹⁰

In cases where a PACA licensee has failed to make full or prompt payment of perishable agricultural commodities, the Department's policy is straightforward:

In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and that respondent fails to file a timely answer to the complaint, the PACA case will be treated as a "no-pay" case. *In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. . . .* In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with

¹⁰ 7 U.S.C. § 499h(a) (emphasis added).

the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a “slow-pay” case.¹¹

Further, “[i]n any ‘no-pay’ case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.”¹²

Discussion

1. Respondent Has Admitted the Material Allegations of the Complaint That Establish Violations of PACA.

PACA requires licensed produce dealers to make full payment promptly for fruit and vegetable purchases with ten days after the produce is accepted, provided that the parties may elect to use different payment terms so long as the terms are reduced to writing prior to the transaction.¹³ In cases where a respondent has failed to make full payment promptly and “admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served . . . or the date of hearing, whichever occurs first, the [matter] will be treated as a no-pay case.”¹⁴

In its Answer, Respondent did not deny that it failed to timely pay sellers for perishable agricultural commodities.¹⁵ In fact, Respondent admitted to “filing the bankruptcy as alleged,”¹⁶ disputing only the dates of payment and the total sums owed.¹⁷ “It is well established that a PACA respondent’s admissions in documents filed in a bankruptcy case may be

¹¹ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998) (emphasis added).

¹² *Id.* at 549.

¹³ 7 C.F.R. § 46.2(aa)(5), (11).

¹⁴ *Scamcorp, Inc.*, 57 Agric. Dec. at 548-49.

¹⁵ See *Van Buren Cnty. v. Fruit Exch., Inc.*, 51 Agric. Dec. 733, 740 (U.S.D.A. 1992) (holding that the failure to deny an allegation of the complaint is deemed admitted by virtue of the respondent’s failure to deny the allegation); *Kaplinsky*, 47 Agric. Dec. 613, 617 (U.S.D.A. 1988).

¹⁶ Answer ¶ IV.

¹⁷ Answer ¶¶ III, IV.

PERISHABLE AGRICULTURAL COMMODITIES ACT

treated as admissions in a related PACA proceeding.”¹⁸ Here, in the Schedule E/F it filed with the United States Bankruptcy Court for the Southern District of Florida, Respondent listed fifty-five produce vendors, or creditors, to whom it owed money in the aggregate amount of \$1,657,473.71¹⁹ for perishable agricultural commodities it purchased, received, and accepted in interstate and foreign commerce.²⁰ Pursuant to section 1.141 of the Rules of Practice, I take official notice of Respondent’s bankruptcy proceeding and the documents—including the Schedule E/F—filed therein.²¹ I find that Respondent has admitted to owing more than \$1.6 million to fifty-five produce sellers and, therefore, has admitted to violating PACA.

Moreover, Respondent has made no assertion—in its Answer or in any filing thus far—that full payment would be made or full compliance would be achieved pursuant to the parameters set by *Scamcorp*.²² To achieve “full

¹⁸ *The Square Group, LLC*, 75 Agric. Dec. 689, 694 (U.S.D.A. 2016); see *Perfectly Fresh Farms, Inc.*, 68 Agric. Dec. 507, 525 (U.S.D.A. 2009) (“Documents filed in bankruptcy cases which list produce sellers holding claims for the sale of perishable agricultural commodities are deemed admissions in PACA proceedings.”) (internal citations omitted).

¹⁹ Complainant describes the Schedule E/F as listing fifty-five sellers whom Respondent owed a total of \$1,657,473.71 but notes: “Some of the amounts listed in the Schedule E/F for PACA creditors are larger than the amounts listed in Appendix A to the Complaint.” Compl. ¶ IV n.1. Upon close inspection, the Schedule E/F appears to include fifty-six of the fifty-eight sellers identified in Appendix A and reflects an outstanding balance of \$1,671,040.21. Nonetheless, such distinctions are inconsequential in this proceeding as the unpaid debt exceeds a *de minimis* amount. See *infra* notes 28-29, 47-49 and accompanying text.

²⁰ Compl. Appx. B.

²¹ 7 C.F.R. § 1.141(h)(6); see *KDLO Enters., Inc.*, 70 Agric. Dec. 1098, 1103-04 (U.S.D.A. 2011) (“[U]nder 7 C.F.R. § 1.141(h)(6), an administrative law judge presiding over a PACA disciplinary proceeding may take official notice of proceedings in a United States bankruptcy court that have a direct relation to the PACA disciplinary proceeding. Documents filed in a bankruptcy proceeding that have a direct relation to matters at issue in PACA disciplinary proceedings have long been officially noticed in PACA disciplinary proceedings.”); *Judith’s Fine Foods Int’l, Inc.*, 66 Agric. Dec. 758, 770-71 (U.S.D.A. 2007) (holding that the respondent’s Schedule F – Creditors Holding Unsecured Nonpriority Claims, filed in U.S. bankruptcy court, “ha[d] a direct relation to the matters at issue in the [PACA disciplinary] proceeding.”).

²² See *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998) (“In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations of the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the

compliance” with PACA, Respondent would need to pay all of its produce sellers and “have no credit agreements with produce sellers for more than 30 days.”²³ As Respondent failed to address whether or when it expects to pay its vendors fully, this is a “no-pay” case.²⁴ There is no indication that any payments have been made, which might have converted the case to a “slow-pay” case.²⁵

Further, the explanations in Respondent’s Answer do not provide an acceptable defense to liability in a case such as this, wherein a complaint has been filed alleging violations of section 2(4) of PACA due to the failure to make full payment promptly. Respondent submits that “the sums due to PACA creditors needs [sic] to be determined upon a final accounting through the bankruptcy and funds collected through litigation”²⁶ and “dispute[s] the issue as to the dates of payment.”²⁷ Neither argument constitutes a material denial of engaging in practices that violate PACA. Complainant is not required to prove—and I am not required to find—the exact number of unpaid produce sellers or the exact amount Respondent owes each seller.²⁸ The outstanding balance far exceeds \$5,000.00 and axiomatically represents more than a *de minimis* amount.²⁹

2. Respondent’s PACA Violations Were Repeated, Flagrant, and Willful.

The Secretary of Agriculture may revoke the license of a dealer who is found to have committed repeated, flagrant, and willful PACA

respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a ‘no-pay’ case.”).

²³ *Id.* at 549.

²⁴ *Id.* at 548-49.

²⁵ See *Kirby Produce, Inc. v. U.S. Dep’t of Agric.*, 256 F.3d 830, 831 (D.C. Cir. 2001); *Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 945 (U.S.D.A. 1997).

²⁶ Answer ¶ IV.

²⁷ Answer ¶ III.

²⁸ *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1835-36 (U.S.D.A. 2005); see also *Hunts Point Tomato Co.*, 64 Agric. Dec. 1914, 1929-31 (U.S.D.A. 2005).

²⁹ See *H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) (“[T]here is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, so long as the violations are not *de minimis*.”); *Moore Mkt’g Int’l, Inc.*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988); *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

PERISHABLE AGRICULTURAL COMMODITIES ACT

violations.³⁰ Where a dealer has committed repeated, flagrant, and willful PACA violations but has no license to revoke, the appropriate sanction is publication of the facts and circumstances of the violations.³¹

First, Respondent's violations in this case were repeated. Violations are "repeated" under PACA when they are committed multiple times, non-simultaneously.³² As Respondent failed to pay at least fifty-five sellers promptly and in full for 745 lots of perishable agricultural commodities over a two-year period, its violations were clearly repeated.

Respondent's PACA violations were also flagrant. Flagrancy is determined by evaluating the number of violations, total money involved, and length of time in which the violations occurred.³³ Respondent admitted in its Schedule E/F that it owes produce sellers an estimated total of \$1,657,473.71. By failing to pay that money—far more than a *de minimis* amount—to fifty-five sellers over a two-year period, Respondent committed flagrant PACA violations.³⁴

Lastly, Respondent's violations were willful.

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. Willfulness is reflected by Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.³⁵

³⁰ See 7 U.S.C. § 499h(a); 5 U.S.C. § 588(c); *Norinsberg v. U.S. Dep't of Agric.*, 47 F.3d 1224, 1225 (D.C. Cir. 1995).

³¹ *Baiardi Food Chain Corp.*, 64 Agric. Dec. at 1832.

³² See *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 592 (6th Cir. 2003); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir. 1967); *Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

³³ *Five Star Food Distribs., Inc.*, 56 Agric. Dec. at 895; *Havana Potatoes of N.Y. Corp.*, 55 Agric. Dec. 1234, 1270 (U.S.D.A. 1996); see *Reese Sales Co. v. Hardin*, 458 F.2d 183, 185, 187 (9th Cir. 1972).

³⁴ See *supra* note 28 and accompanying text.

³⁵ *Scamcorp, Inc.*, 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998).

Given the large number of transactions, significant amount of debt, and continuation of violations over a two-year period in this case, I find that Respondent's violations were willful in that Respondent knew or should have known it did not have sufficient funds with which to comply with the prompt-payment provisions of PACA.³⁶

Respondent claims that "any delay or nonpayment was the result of the U.S. government through the Department of Defense refusing to make payments due" to Respondent in the approximate amount of \$350,000.00.³⁷ Regardless of whether this unsubstantiated statement is true, it bears no consequence upon Respondent's liability in this case.³⁸ "Even if a Respondent has good excuses for payment violations, such excuses are never regarded as sufficiently mitigating to prevent a Respondent's failure to pay from being considered flagrant or willful."³⁹ Respondent's excuse does not negate the fact that Respondent failed to make full payment promptly in accordance with PACA and cannot show that compliance will be achieved.⁴⁰ As the Judicial Officer has stated:

³⁶ *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016).

³⁷ Answer ¶¶ III, IV.

³⁸ See *Judith's Fine Foods Int'l, Inc.*, 66 Agric. Dec. 758, 771 (U.S.D.A. 2007) ("The PACA requires full payment promptly and an excuse for the failure to make full payment promptly is not a defense to a respondent's failure to make full payment promptly in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)."); *Moore Mk'tg Int'l, Inc.*, 46 Agric. Dec. 981, 981 (U.S.D.A. 1987) (Ruling on Certified Question) ("[T]his Department is not interested in respondent's excuses for its failure to pay."); *Finer Food Sales Co.*, 41 Agric. Dec. 1154, 1171 (U.S.D.A. 1982), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983) ("[E]ven if it were determined that a respondent had a good excuse for the failures to pay involved here, it has repeatedly been held under the Act that all excuses are routinely rejected in determining whether payment violations were willful since the Act calls for payment -- not excuses.").

³⁹ *Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1214 (U.S.D.A. 1996). See also *The Caito Produce Co.*, 48 Agric. Dec. 602, 614 (U.S.D.A. 1989) ("Even though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent's failure from being considered flagrant or willful.").

⁴⁰ See *R.H. Produce, Inc.*, 43 Agric. Dec. 511, 523 (U.S.D.A. 1984) ("In disciplinary cases under the Perishable Agricultural Commodities Act, all excuses that have been offered as to why payment was not made promptly have been routinely ignored since the Act calls for payment not excuses.") (internal quotation marks omitted); see also *John A. Pirello Co.*, 48 Agric. Dec. 565, 567-68 (U.S.D.A. 1989) (nonpayment not an excuse where respondent's customers ceased doing business with respondent when the city announced it was taking respondent's property be eminent domain; *Magic City Produce Co.*, 44 Agric.

PERISHABLE AGRICULTURAL COMMODITIES ACT

Respondent[’s] violations were very serious, repeated, flagrant, and willful violations of the PACA. Respondent[’s] violations directly contravene one of the primary remedial purposes of the PACA, the financial protection of sellers of perishable agricultural commodities. Failure to pay for perishable agricultural commodities not only adversely affects those who are not paid, but such violations of the PACA have a tendency to snowball. On occasion, one PACA licensee fails to pay another licensee who is unable to pay a third licensee. Thus, the failure to pay could have serious repercussions to perishable agricultural commodity producers and other PACA licensees and even customers of perishable agricultural commodities who ultimately bear increased industry costs resulting from failures to pay. These adverse repercussions can be avoided by limiting participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of the PACA.⁴¹

Accordingly, I reject Respondent’s suggestion that the Department of Defense’s “behavior” somehow negates its violations of the PACA prompt-payment provisions.⁴²

3. A Decision Without Hearing Is Appropriate.

Dec. 1241, 1246 n.3 (U.S.D.A. 1985), *aff’d mem.*, 796 F.2d 1477 (11th Cir. 1986) (nonpayment not an excuse despite being due to respondent’s suffering \$200,000 in losses over two-year period from theft of produce in his warehouse); *Jarosz Produce Farms, Inc.*, 42 Agric. Dec. 1505, 1524-26 (U.S.D.A. 1983) (nonpayment not an excuse where respondent’s bankruptcy was caused by failure of large purchaser to comply with contractual agreement); *Kafcsak*, 39 Agric. Dec. 683, 685-86 (U.S.D.A. 1980) (neither a strike nor the failure of others to pay respondent are defenses in a disciplinary action under PACA for failure to pay for produce), *aff’d*, 673 F.2d 1329 (6th Cir. 1981) (Table).

⁴¹ *Havana Potatoes of N.Y. Corp.*, 55 Agric. Dec. 1234, 1273-74 (U.S.D.A. 1996).

⁴² See *supra* note 39 and accompanying text; *Andersshock Fruitland, Inc.*, 55 Agric. Dec. at 1224 (“[E]xcuses for nonpayment in a particular case are not sufficient to prevent a license revocation where there have been flagrant or repeated failures to pay a substantial amount of money over an extended period of time.”).

As previously discussed, section 1.139 of the Rules of Practice allows for a decision without hearing by reason of admissions: “The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing.”⁴³ It is well settled that “a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held.”⁴⁴

I find no genuine issues of fact in this case that would require a hearing.⁴⁵ As previously discussed, Respondent’s bankruptcy Schedule E/F constitutes an admission of the material allegations of the Complaint.⁴⁶ As the amount admittedly owed is not *de minimis*, I need not determine the exact amount Respondent failed to pay.⁴⁷ As the Judicial Officer stated in *Veg-Mix, Inc.*⁴⁸:

[I]n view of respondent’s bankruptcy admissions . . . it is clear that there is no material issue of fact that warrants holding a hearing. It is not necessary to show that the undisputed facts prove all the allegations of the complaint. The same order would be issued in this case unless the proven violations were *de minimis*.⁴⁹

⁴³ 7 C.F.R. § 1.139.

⁴⁴ *H. Schnell & Co.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998); see, e.g., *KDLO Enters., Inc.*, 70 Agric. Dec. 1098, 1104 (U.S.D.A. 2011).

⁴⁵ See *Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (“Common sense suggests the futility of hearings when there is no factual dispute of substance.”).

⁴⁶ See *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016) (“If a respondent in a PACA disciplinary proceeding admits the failure to pay for agricultural commodities in a related bankruptcy proceeding, no hearing is required in the PACA disciplinary proceeding.”).

⁴⁷ See *id.* (“[E]ven if certain debts are disputed, no hearing is required if the sum of all undisputed debts is enough to make the total owed more than *de minimis*.”); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question) (“[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing to determine the precise amount owed.”).

⁴⁸ *Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1590 (U.S.D.A. 1985), *aff’d and remanded*, 832 F.2d 601 (D.C. Cir. 1987), *final decision on remand*, 47 Agric. Dec. 1486 (U.S.D.A. 1988).

⁴⁹ *Id.*

PERISHABLE AGRICULTURAL COMMODITIES ACT

Furthermore, the appropriate sanction in a “no-pay” case is license revocation, or where there is no longer any license to revoke—as is the case here—the appropriate sanction in lieu of revocation is a finding of repeated and flagrant violations of PACA and publication of the facts and circumstances of the violations.⁵⁰ A civil penalty is not appropriate in this case because “limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA,” and it would not be consistent with congressional intent to require a PACA violator to pay the government while produce sellers remain unpaid.⁵¹ Because there can be no debate over the appropriate sanction, a decision may be entered in this case without hearing or further procedure based upon the admitted facts.⁵²

Having carefully considered the pleadings, relevant authorities, and arguments of the parties, the following Findings of Fact, Conclusions, and Order are entered without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is or was a corporation organized and existing under the laws of the State of Florida. Respondent’s business and mailing address is or was 2200 NW 3rd Street, Miami, Florida 33142. The Complaint was served on Respondent’s attorney, Philip Vora, at 4000 Hollywood Blvd., Suite 500N, Hollywood, Florida 33021. The Complaint was also served upon Respondent’s bankruptcy attorney, Robert A. Stok, at Folk & Kon, P.A., 11851 Northeast 29th Avenue, Suite 1005, Aventura, Florida 33180.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of PACA. License number 20160402 was issued to Respondent on February 17, 2016. On February 17, 2017, the license was terminated pursuant to section 4(a) of PACA (7 U.S.C. § 499d(a)) when Respondent failed to pay the required annual renewal fee.

⁵⁰ See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

⁵¹ See *Scamcorp, Inc.*, 57 Agric. Dec. at 570-71.

⁵² See 7 C.F.R. § 1.139.

The Produce Connection, Inc.
77 Agric. Dec. 149

3. Respondent, during the period June 2015 through January 2017, on or about the dates and in the transactions set forth in Appendix A attached hereto and incorporated herein by reference, failed to make fully payment promptly to fifty-five sellers of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$1,657,473.71.
4. On December 6, 2017, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 701 *et seq.*) in the United States Bankruptcy Court, Southern District of Florida, Miami Division. This petition was designated Case No. 16-26156.
5. In the Schedule E/F that Respondent filed with the bankruptcy court, Respondent listed 103 produce companies who have unsecured claims that are entitled to payment from the PACA statutory trust. Of the 103 produce companies listed in the Schedule E/F, fifty-five are listed in Appendix A to the Complaint and are owed unsecured produce debt in the amount of \$1,657,473.71.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Official notice is taken of the Schedule E/F filed by Respondent in the United States Bankruptcy Court, Southern District of Florida, Miami Division (Case No. 16-26156), which lists \$1,657,473.71 of produce debt that Respondent owed to fifty-five sellers for perishable agricultural commodities.
3. Respondent's admissions in its bankruptcy filings constitute admissions of the allegations set forth in the Complaint and provide reason to dispense with a formal hearing in this matter.
4. The unpaid balances due to produce sellers represents more than *de minimis* amounts, thereby obviating the need for a hearing in this matter.
5. Respondent willfully violated section 2(4) of PACA (7 U.S.C. § 499b(4)).

PERISHABLE AGRICULTURAL COMMODITIES ACT

6. The failure of Respondent to make full payment promptly of the agreed purchase prices for the perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant, and repeated violations of section 2(4) of PACA (7 U.S.C. § 499b(4)).
7. As Respondent's PACA license terminated prior to the institution of this proceeding, the appropriate sanction is publication of the facts and circumstances of Respondent's violations.

ORDER

1. Complainant's Motion for Decision Without Hearing by Reason of Admissions is GRANTED.
2. Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of PACA (7 U.S.C. § 499b(4)).
3. The facts and circumstances of Respondent's PACA violations, as set forth above, shall be published.

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, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Potentially interested or affected parties are alerted that any licensing and/or employment sanctions attendant to this Decision and Order pursuant to PACA sections 4(b) and 8(b) will take effect on the eleventh (11th) day after this Decision and Order becomes final. Persons "responsibly connected" to Respondent during the period of Respondent's violations are hereby alerted that they will be subject to licensing restrictions under section 4(b) of PACA (7 U.S.C. § 499d) and the employment restrictions under section 8(b) of PACA (7 U.S.C. § 499h).

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

The Produce Connection, Inc.
77 Agric. Dec. 149

MISCELLANEOUS ORDERS & DISMISSALS

MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Substantive Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: <https://oalj.oha.usda.gov/current>.

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: JONATHAN DYER; STEVEN C. FINBERG; DREW JOHNSON; and MICHAEL RAWLINGS.

Docket Nos. 14-0166, 14-0167, 14-0168, 14-0169.

Remand Order.

Filed January 10, 2018.

PACA-APP.

Administrative procedure – Appointments Clause – Remand.

Stephen P. McCarron, Esq., for Petitioner Steven C. Finberg.

Charles L. Kendall, Esq., for AMS.

Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

REMAND ORDER AS TO STEVEN C. FINBERG

On July 25, 2017, Administrative Law Judge Jill S. Clifton issued a “Decision and Order” as to Steven C. Finberg. On August 21, 2017, Mr. Finberg filed an “Appeal Petition”; on August 23, 2017, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture [AMS], filed “Respondent’s Appeal Petition of the Decision and Order as to Steven C. Finberg (PACA Docket No. 14-0167”); on August 29, 2017, Mr. Finberg filed “Petitioner’s Opposition to Respondent’s Appeal Petition”; and on September 8, 2017, AMS filed “Respondent’s Opposition to Appeal Petition of Steven C. Finberg (PACA Docket No. 14-0167).” On September 13, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision as to Mr. Finberg.

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 Security and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art II, § 2, cl. 2. On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and Administrative Law Judge Channing D. Strother and renewed their oaths of office.¹

To put to rest Mr. Harris's Appointments Clause claim, I remand this proceeding to Administrative Law Judge Clifton, who shall: (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.

Administrative Law Judge Clifton issued the Decision and Order as to Mr. Finberg after ratification of her appointment and renewal of her oath of office. Under this circumstance, I would not generally remand this proceeding as to Mr. Finberg to Administrative Law Judge Clifton. However, I previously remanded this proceeding as to Messrs. Dyer, Johnson, and Rawlings to Administrative Law Judge Clifton (Dyer (Remand Order), __ Agric. Dec. __ (U.S.D.A. Dec. 28, 2017)), based upon Administrative Law Judge Clifton's issuance of a Decision and Order as to Messrs. Dyer, Johnson, and Rawlings prior to ratification of her appointment and renewal of her oath of office. The record as it relates to Mr. Finberg is intertwined with the record as it relates to Messrs. Dyer, Johnson, and Rawlings.² Therefore, I remand this proceeding as to Mr. Finberg to Administrative Law Judge Clifton even though Administrative

¹ Attach 1.

² For example, the hearing with respect to Messrs. Dyer, Finberg, Johnson, and Rawlings was consolidated, and all of the Petitioners (Messrs. Dyer, Finberg, Johnson, and Rawlings) and AMS stipulated that the evidence in the consolidated hearing would be available to be considered with respect to each Petitioner (Updated Stipulation as to Proceedings ¶ 6 at 2 (filed June 11, 2015)).

MISCELLANEOUS ORDERS & DISMISSALS

Law Judge Clifton issued a Decision and Order as to Mr. Finberg after ratification of her appointment and renewal of her oath of office.

In re: JONATHAN DYER; DREW JOHNSON; and MICHAEL RAWLINGS.

Docket Nos. 14-0166, 14-0168, 14-0169.

Order Denying Motion for Reconsideration.

Filed February 1, 2018.

PACA-APP.

Administrative procedure – Appointments Clause – Reconsideration, motion for – Remand.

Stephen P. McCarron, Esq., for Petitioners.

Charles L. Kendall, Esq., for AMS.

Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

ORDER DENYING PETITIONERS' MOTION FOR RECONSIDERATION OF REMAND ORDER

On December 28, 2017, I remanded the instant proceeding to Administrative Law Judge Jill S. Clifton in order to put to rest any Appointments Clause claim that may arise in this proceeding. *Dyer*, 76 Agric. Dec. 789 (U.S.D.A. 2017).

On January 9, 2018, Jonathan Dyer, Drew Johnson, and Michael S. Rawlings [Petitioners] filed “Motion of Petitioners to Reconsider Remand Order.” Petitioners contend further evidentiary proceedings, and the attendant expenses thereto, are not warranted and would be unfairly prejudicial to them.

On January 30, 2018, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture [AMS], filed “Respondent’s Reply to Motion of Petitioners to Reconsider Remand Order.” AMS contends the December 28, 2017 Remand Order is directed to Administrative Law Judge Clifton and imposes no duties or constraints

Miscellaneous Orders & Dismissals
77 Agric. Dec. 165 – 172

on the parties.

On January 31, 2018, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for a ruling on the Motion of Petitioners to Reconsider Remand Order.

In light of the Solicitor General's position in *Lucia v. SEC* (No. 17-0130), I find the December 28, 2017 Remand Order is warranted. Should Petitioners believe that any order issued by Administrative Law Judge Clifton pursuant to the December 28, 2017 Remand Order is unfairly prejudicial to Petitioners, they may appeal Administrative Law Judge Clifton's order to the Judicial Officer pursuant to 7 C.F.R. § 1.145(a).

In re: ONE ROOT FOODS, INC.
Docket No. 18-0016.
Order of Dismissal.
Filed January 9, 2018.

In re: NICHOLAS ALLEN.
Docket No. 15-0085.
Order Granting Extension of Time.
Filed June 6, 2018.

PACA-APP.

Administrative procedure – Extension of time.

Jeffrey M. Chebot, Esq., and Grant E. Forston, Esq., for Petitioner Nicholas Allen.
Charles L. Kendall, Esq., for AMS.
Initial Decision and Order by Channing D. Strother, Acting Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING PETITIONER'S REQUEST TO EXTEND
THE TIME FOR FILING A RESPONSE TO THE
RESPONDENTS' APPEAL PETITION
AND SUPPORT BRIEF

MISCELLANEOUS ORDERS & DISMISSALS

On June 7, 2018, Nicholas Allen requested that I extend to July 31, 2018, the time for filing a response to the Respondent's Appeal Petition and Brief in Support of Appeal Petition.

For good reason stated, Mr. Allen's request to extend the time for filing a response to the Respondents' Appeal Petition and Brief in Support of Appeal Petition is granted. The time for filing the Administrator's response to the Respondents' appeal petition is extended to, and includes, July 31, 2018.¹

**In re: FRESH GROWERS DIRECT.
Docket No. 17-0265.
Order Granting Requests to Withdraw.
Filed June 8, 2018.**

PACA-D.

Administrative procedure – Appeal petition, motion to withdraw – Appearance, withdrawal of – Default – Public interest – Withdrawal.

Christopher P. Young, Esq., for AMS.
David M. Bradford, Esq., for Respondent Fresh Growers Direct.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING REQUESTS TO WITHDRAW APPEAL PETITION AND WITHDRAW APPEARANCE

Melissa Bailey, Associate Deputy Administrator, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture [Deputy Administrator], instituted this proceeding by filing a complaint on June 16, 2017. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [PACA]; the regulations promulgated

¹ The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m. Eastern Time. To ensure timely filing, Mr. Allen must ensure that his response to the Respondent's Appeal petition and Brief in Support of Appeal Petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, July 31, 2018.

Miscellaneous Orders & Dismissals
77 Agric. Dec. 165 – 172

under the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151) [Rules of Practice].

The Deputy Administrator alleges, during the period August 2015 through June 2016, Fresh Growers Direct willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly of the agreed purchase prices to five produce sellers in the total amount of \$244,508.00 for thirteen lots of perishable agricultural commodities, which Fresh Growers Direct purchased, received, and accepted in interstate and foreign commerce.¹

On July 3, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Fresh Growers Direct with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated June 16, 2017.² Fresh Growers Direct failed to file an answer to the Complaint with the Hearing Clerk within twenty days after service, as required by 7 C.F.R. § 1.136(a). By letter dated August 3, 2017, the Hearing Clerk informed Fresh Growers Direct that it had not filed an answer to the Complaint within the time required by the Rules of Practice.³

On November 14, 2017, former Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] filed an Order to Show Cause Why Default Should Not Be Entered [Order to Show Cause] directing the parties to show cause in writing, not later than twenty days after issuance of the Order to Show Cause, why a default should not be entered pursuant to 7 C.F.R. § 1.136(c). On December 4, 2017, the Deputy Administrator filed Complainant's Response to Show Cause Order and Request for Decision Without Hearing by Reason of Default [Motion for Default Decision] and a proposed Decision Without Hearing by Reason of Default [Proposed Default Decision]. Fresh Growers Direct failed to file a response to the Chief ALJ's Order to Show Cause and failed to file a response to the Deputy Administrator's Motion for Default Decision and

¹ Compl. ¶¶ III-IV at 2-3.

² United States Postal Service Domestic Return Receipt for article number 7015 3010 0001 5187 5341.

³ Letter dated August 3, 2017, from Caroline Hill, Assistant Hearing Clerk, to Fresh Growers Direct.

MISCELLANEOUS ORDERS & DISMISSALS

Proposed Default Decision.

On January 9, 2018, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Decision and Order Without Hearing by Reason of Default, in which the Chief ALJ: (1) found that Fresh Growers Direct committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4); and (2) pursuant to 7 U.S.C. § 499h(a), ordered publication of the facts and circumstances of Fresh Growers Direct's willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4).⁴

On May 1, 2018, Mr. David M. Bradford, Bradford & Associates Attorneys, and Mr. Lee Pakulsky, Director Mediation & Settlements, CRS Consulting Mediation & Settlements, Manhasset, New York, entered an appearance on behalf of Fresh Growers Direct. On May 15, 2018, Fresh Growers Direct filed an appeal [Appeal Petition] of the Chief ALJ's January 9, 2018 Decision and Order Without Hearing by Reason of Default. On June 1, 2018, Fresh Growers Direct filed a Notice of Withdrawal, in which Fresh Growers Direct gives notice of the withdrawal of "[a]ll documentation including notices of appearance, motions, appeals, and any letter correspondence[.]" On June 4, 2018, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of Fresh Growers Direct's Appeal Petition and Notice of Withdrawal. On June 6, 2018, counsel for the Deputy Administrator informed me, by telephone, that the Deputy Administrator does not oppose Fresh Growers Direct's Notice of Withdrawal.

Discussion

A party does not have a right to withdraw its own appeal; however, a party's request to withdraw its own appeal is generally granted. When determining whether to grant a motion to withdraw an appeal petition, the Judicial Officer must consider the public interest.⁵ Based on the record

⁴ Chief ALJ's Decision and Order Without Hearing by Reason of Default at 4.

⁵ See *Ford Motor Co. v. NLRB*, 305 U.S. 364, 370 (1939) (stating, where the NLRB petitions for enforcement of its order against an employer and jurisdiction of the court has attached, permission to withdraw rests in the sound discretion of the court to be exercised in light of the circumstances of the case); *Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dep't of Envtl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994) (stating the court of appeals has broad discretion to grant or deny voluntary motions to dismiss appeal); *Country Classic Diaries, Inc.*, 66 Agric. Dec. 1280, 1281-82 (U.S.D.A. 2007) (stating withdrawal of an appeal

Miscellaneous Orders & Dismissals
77 Agric. Dec. 165 – 172

before me, I find no reason for denying Fresh Growers Direct's request to withdraw its Appeal Petition. Moreover, I find no reason for denying Mr. Bradford and Mr. Pakulsky's request to withdraw their appearance on behalf of Fresh Growers Direct.

For the foregoing reasons, the following Order is issued.

ORDER

1. Fresh Growers Direct's June 1, 2018 request to withdraw its May 15, 2018 Appeal Petition is granted.
2. Messrs. Bradford and Pakulsky's June 1, 2018 request to withdraw their May 1, 2018 appearance on behalf of Fresh Growers Direct is granted.
3. The Chief ALJ's Decision and Order Without Hearing by Reason of Default, filed January 9, 2018, is the final decision in this proceeding. The Order issued by the Chief ALJ in the Decision and Order Without Hearing by Reason of Default, filed January 9, 2018, shall become effective thirty days after service of this Order on Fresh Growers Direct.

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petition is not a matter of right); *Hartford Packing Co.*, 60 Agric. Dec. 851, 853 (U.S.D.A. 2001) (same); *Waller*, 34 Agric. Dec. 373, 374 (U.S.D.A. 1975) (stating the Rules of Practice do not permit a party to withdraw an appeal as a matter of right; when determining whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest).

DEFAULT DECISIONS

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: <https://oalj.oha.usda.gov/current>].

PERISHABLE AGRICULTURAL COMMODITIES ACT

J.E. CORCORAN COMPANY.

Docket No. 17-0253.

Default Decision and Order.

Filed January 9, 2018.

FRESH GROWERS DIRECT.

Docket No. 17-0265.

Default Decision and Order.

Filed January 9, 2018.

FRUTERA DEL LITORAL USA, LLC.

Docket No. 17-0228.

Default Decision and Order.

Filed February 28, 2018.

Consent Decisions
77 Agric. Dec. 174

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Goodness Greeness, Inc.

Docket Nos. 18-0026.

Consent Decision and Order.

Filed June 19, 2018.

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AGRICULTURE DECISIONS

Volume 77

Book One

Part Four

List of Decisions Reported
(Alphabetical Listing)

Index
(Subject Matter)



THIS IS A COMPILATION OF DECISIONS ISSUED BY THE
SECRETARY OF AGRICULTURE AND THE COURTS
PERTAINING TO STATUTES ADMINISTERED BY THE
UNITED STATES DEPARTMENT OF AGRICULTURE

LIST OF DECISIONS REPORTED

JANUARY – JUNE 2018

(ALPHABETICALLY LISTED)

Abernathy, Edgar	62
Abernathy Stables	62
Allen, Nicholas	70, 168
American Foods Group, LLC	64
Animal Legal Defense Fund, Inc.	8
Arbuckle Adventures, LLC	64
Barron, Jackie	61, 62
Bouma, Darrell	68
Boyd, Brett	64
Burnette Foods, Inc.	1
Cimpl's LLC	64
Cook, Roland	68
Counts, Carroll	62
Counts, Virginia	62
Cricket Hollow Zoo, Inc.	56, 57, 58
Dade City Wild Things	60
Dyer, Jonathan	165, 167
Farmington Livestock, LLC	68
Finberg, Steven C.	165
Fresh Growers Direct	169, 173
Frutera Del Litoral USA, LLC	173
Gillette, Sweeny S.	56
Givens, Terry	62
Gleghorn, Charles	65
Goodness Greeness, Inc.	174
Harris, Justin	60
Ingram, Russell "Duke"	61
J.E. Corcoran Company	173
JBS USA, LLC	69
JBS USA Food Company	69
Johnson, Ashley N.	53
Johnson, Drew	165, 167
Lawrence, Bob	65
Leonard, Charles D.	68
Leonard Cattle Co.	68

Newsome, Darius	62
Perdue, Sonny	8
Pratt, Debra	6
R Y Livestock Sales, Inc.	68
Rawlings, Michael	165, 167
Rawls, Robert	68
RC Livestock	68
Robert Rawls Livestock	68
Robertson, Keith	68
Rodriguez, Samuel Jr.	68
Sellner, Pamela J.	56, 57, 58
Sellner, Thomas J.	56, 57, 58
Sproles, Gary	61
Sproles, Shea.	61
Sproles, Shea McKensie	62
Stearns Zoological Rescue & Rehab Center, Inc.	60
Swift Beef Company	69
Swinson, Victor	64
The Produce Connection, Inc.	149
Trimble, Philip	15
Wagener, Kenneth	68
Wagener Dairy Cattle, LLC	68
Wells Pork and Beef Slaughter, Inc.	64
Wild Wilderness, Inc.	64
Yost, Sidney Jay	59

SUBJECT-MATTER INDEX
JANUARY – JUNE 2018

ADMINISTRATIVE PROCEDURE

Administrative procedure	56, 57, 58, 59, 60, 165, 167, 168, 169
Administrative law judges, authority of	25, 45, 48, 74
Administrative Procedure Act (“APA”)	9, 17, 26, 157
Appointments Clause	45, 60, 61, 74, 165, 166, 167
Burden of proof	17, 32, 33, 34, 73, 117
Credibility	16, 24, 29, 93
Evidence, preponderance of	16, 17, 24, 25, 29, 39, 43, 70, 74, 77, 78
Evidence, preponderance of	79, 80, 83, 84, 85, 86, 91, 92, 93, 98, 99, 104, 107
Federal Rules of Evidence	40
Interested party or person	9, 13
Intervention	8, 9, 13
Public interest	169, 171, 172
Standard of review	2
Third-party participation	8, 9, 13

AGRICULTURAL MARKETING AGREEMENT ACT

AMAA	1 – 7
Cherries	1, 2, 3, 4, 5, 6, 7
Cherry Industry Administrative Board (“CIAB”)	1, 2, 4, 6, 7
Consignments	1, 2, 3, 4, 5
Inventory	1, 4
Sales activities	1, 5
Sales constituency	1, 2, 3, 4, 7
Tart Cherry Order	1, 4, 7

ANIMAL HEALTH PROTECTION ACT

<i>Miscellaneous Orders and Dismissals</i>	56
--	----

ANIMAL WELFARE ACT

<i>Miscellaneous Orders & Dismissals</i>	56 – 60
<i>Consent Decisions</i>	64

EQUAL ACCESS TO JUSTICE ACT

EAJA	8 – 14
Attorneys' fees and expenses	8, 10, 12, 14
Degree of success, adjustment for	8, 10, 13
Hourly rate	8, 10, 11
Hours, number of	8, 10, 11, 12
Prevailing party	8, 10, 12
Reasonableness of fees	8, 10, 11
Substantial justification	8, 10
Timeliness	8, 13, 14

FEDERAL MEAT INSPECTION ACT

<i>Consent Decisions</i>	64
------------------------------------	----

HORSE PROTECTION ACT

HPA	15 – 52
Atlanta Protocol	16, 21, 22, 32, 34, 36, 38, 39, 50
Civil penalty	16, 18, 19, 20, 45, 47, 48, 51
Disqualification	16, 20, 33, 34, 47, 48, 49, 51
Examination	15, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 39, 40, 41, 42, 43, 44
Palpation	15, 16, 24, 25, 26, 27, 28, 32, 34, 35
Palpation	36, 37, 38, 39, 40, 41, 42, 43, 44, 49, 50
Palpation, reaction to	16, 26, 27, 28, 36, 40, 41, 42, 43, 44
Presumption of regularity	41
Presumption of soreness	17, 18, 24, 25, 29, 32, 33, 35, 39, 40, 41, 43, 44
Public officers, official acts of	41
Scar rule	25
Sore	15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 28

Sore	29, 30, 31, 32, 33, 34, 35, 36, 39, 44, 48, 49, 50, 51
Veterinary Medical Officer (“VMO”)	15, 16, 22, 24, 25, 26, 27, 28, 29, 30, 31
Veterinary Medical Officer (“VMO”)	32, 33, 36, 37, 38, 39, 40, 41, 42, 43, 44, 49
Violation	16, 18, 19, 20, 25, 33, 35, 44, 45, 47, 50, 51
Withdrawal	16, 24, 27, 28, 41, 42, 43, 50
<i>Miscellaneous Orders & Dismissals</i>	60 – 62
<i>Consent Decisions</i>	64 – 65

RULES OF PRACTICE

Admission of complaint allegations	149, 151, 152, 154, 155, 160, 162, 163
Answer, timeliness of	15, 150, 152, 153, 160, 170
Appeal petition, request to withdraw	169, 171, 172
Appeal to Judicial Officer	3, 8, 9, 52, 56, 57, 58, 59, 60, 61, 87
Appeal to Judicial Officer	148, 163, 165, 168, 169, 171, 172
Appearance, withdrawal of	169, 171, 172
Default	15, 20, 35, 47, 60, 61, 63, 67, 169, 170, 171, 172, 173
Extension of time	14, 46, 56, 57, 58, 59, 60, 168
Failure to deny or respond to allegations of complaint	154
Failure to file timely answer	15, 152, 160
Hearing, opportunity for	19, 20, 23, 46, 47
Judicial notice	25, 34
Official notice	155, 162
Remand	8, 13, 60, 61, 83, 165, 166, 167, 168
Stay	21, 24, 45, 46, 48, 60
Reconsideration, motion for	167, 168
Waiver of hearing	152, 160
Withdrawal	169, 171, 172

SALARY OFFSET ACT

SOA	53 – 55
Overpayment	54
Pay period	53, 54

Promotion actions	53
-------------------------	----

PACKERS & STOCKYARDS ACT

P & S	66 – 69
<i>Consent Decisions.</i>	68 – 69

PERISHABLE AGRICULTURAL COMMODITIES ACT

PACA	70 – 174
Active involvement	70, 71, 73, 74, 77, 78, 79, 80, 82, 91, 92, 93, 94, 147
Actual, significant nexus	81, 82, 83, 84, 85, 98, 106, 113, 114
Alter ego	71, 74, 77, 78, 80, 98
Authority	70, 71, 72, 73, 74, 82, 83, 84, 86, 88, 90, 91, 94, 95, 96, 98, 101
Authority.	102, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 116, 117
Authority.	125, 126, 127, 128, 129, 130, 131, 132, 135, 139, 144, 145, 147
Bankruptcy	70, 73, 87, 90, 99, 104, 110, 119, 128, 129, 137, 138, 139, 140
Bankruptcy	143, 144, 145, 146, 150, 151, 152, 154, 155, 156, 159, 160, 161, 162
Bankruptcy proceedings, official notice of	155, 162
<i>De minimis</i> amount	155, 156, 157, 160, 162
Duties	83, 84, 86, 99, 100, 103, 104, 108, 112, 117, 128, 132, 138, 147
Failure to act	80, 93
Failure to counteract or obviate fault of others	80, 81, 82, 93, 106
Failure to make full payment promptly	73, 75, 79, 87, 92, 118, 150, 152
Failure to make full payment promptly	154, 156, 157, 158, 162, 163, 170
Failure to pay, to pay promptly	72, 73, 79, 80, 87, 92, 93, 94, 156, 158, 159, 160
Flagrant	87, 148, 150, 153, 154, 156, 157, 158, 159, 161, 163, 170, 171
Full payment promptly	75, 92, 118, 150, 152, 154, 156, 158, 163, 170
License, revocation of	75, 76, 87, 153, 154, 156, 157, 159, 161
License, suspension of	75, 128, 153
No-pay case	153, 154, 156, 161
Nominal	70, 71, 72, 74, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 90
Nominal	91, 93, 98, 99, 104, 105, 106, 107, 109, 111, 112, 113, 114, 116, 148
Operations, power to direct and affect	82, 83, 84, 98, 114

Repeated	87, 118, 148, 150, 153, 154, 156, 157, 158, 159, 161, 163, 170, 171
Responsibly connected	70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81
Responsibly connected	82, 83, 85, 88, 90, 91, 92, 94, 104, 105
Responsibly connected	112, 115, 116, 117, 146, 147, 148, 163
Sanctions	75, 76, 88, 91, 116, 119, 157, 161, 163
Slow-pay case	154, 156
Stock ownership	72, 74, 76, 77, 81, 84, 85, 86, 113, 114, 115, 116, 117, 120, 121, 122
Violations period	71, 72, 73, 84, 85, 86, 87, 90, 91, 92, 93, 94, 95, 98, 99
Violations period	102, 103, 104, 105, 106, 107, 108, 109, 111, 113, 114
Violations period	115, 117, 118, 135, 136, 138, 139, 145, 146, 147
Willful	87, 118, 148, 149, 150, 156, 157, 158, 159, 162, 163, 170, 171
<i>Default Decisions</i>	173
<i>Consent Decisions</i>	174