UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Nicholas Allen,	)	PACA-APP Docket No. 15-0085
	)	
Petitioner.	)	

DECISION AND ORDER REVERSING INITIAL DECISION AND AFFIRMING DIRECTOR'S "RESPONSIBLY CONNECTED" DETERMINATION

Appearances:

Jeffrey M. Chebot, Esq., and Grant E. Fortson, Esq., representing Petitioner, Nicholas Allen; and

Charles L. Kendall, Esq., Office of the General Counsel, representing Respondent, PACA Division, Agricultural Marketing Service ("AMS"), United States Department of Agriculture.

Decision and Order issued by Judge Bobbie J. McCartney, Judicial Officer.

PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (hereinafter "PACA" or "Act"), which is conducted pursuant to the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) (hereinafter "Rules" or "Rules of Practice").

The issue to be decided on appeal is whether Petitioner Nicholas Allen was "responsibly connected," as that term is defined under section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Allens, Inc. during the period of time that Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural

commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.[1]

Based upon careful consideration of the record, as well as applicable statutory, regulatory and adjudicatory precedents, and for the reasons set forth herein below, it is my determination that Petitioner Nicholas Allen has failed to rebut the presumption that he was "responsibly connected" to Allens, Inc. as an officer, director, and shareholder of the firm when Allens, Inc. committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly for produce purchases. The evidence of record supports a finding that Petitioner's actions were willful and facilitated the accomplishment of the violations of section 2(4) of the PACA by Allens, Inc..[2] By virtue of being "responsibly connected" with Allens, Inc. during the period when Allens, Inc. violated section 2(4) of the PACA (7 U.S.C. § 499b), Petitioner Nicholas Allen is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

SUMMARY OF PROCEDURAL HISTORY

On May 8, 2014, a disciplinary complaint was filed against Veg Liquidation, Inc., formerly known as Allens, Inc. (hereinafter "Allens, Inc." or "Allens"),[3] alleging as follows:

> Respondent [Allens, Inc.], during the period October 3, 2013, through January 6, 2014, on or about the dates and in the transactions set forth in Appendix A and

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[1] *See* Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

[2] Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Haltmier v. Commodity Futures Trading Comm'n*, 554 F.2d 556, 562 (2d Cir. 1977); *Am. Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980). *See also George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

[3] PACA-D Docket No. 14-0109.

> incorporated herein by reference, failed to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.

Complaint at 2. On October 8, 2015, a Default Decision and Order[4] was entered against Allens, Inc. finding that Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly as alleged in the Complaint.[5]

On January 30, 2015, Karla Whalen, then-Director of the PACA Division of the Specialty Crops Program (now known as the "Fair Trade Practices Program"), Agricultural Marketing Service, United States Department of Agriculture (hereinafter "Director" or "Respondent"),[6] issued a Director's Determination (formerly referred to as a "Chief's Determination") that Nicholas Allen[7] was responsibly connected with Allens, Inc. during the period that Allens, Inc. violated the PACA.[8]

On March 2, 2015, Nicholas Allen (hereinafter "Petitioner") filed a petition for review of the Director's Determination that he was "responsibly connected," as that term is defined under

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[4] *Allens, Inc.*, 74 Agric. Dec. 488 (U.S.D.A. 2015), *also available at* https://oalj.oha.usda.gov/sites/default/files/10082015_PACA-D_Docket%2014-0109_AllensInc.pdf (last visited July 5, 2019).

[5] Respondent's Brief in Support of Appeal Petition filed on May 29, 2018 contains a useful summary of the procedural history of this proceeding and has been adopted herein.

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

[7] PACA-APP Docket No. 15-0085.

[8] Also on January 30, 2015, Director Whalen issued determinations that Petitioner's father, Roderick Allen (PACA-APP Docket No. 15-0083) and brother, Joshua Allen (PACA-APP Docket No. 15-0084) were responsibly connected to Allens, Inc. However, this Decision only addresses the responsibly connected status of Petitioner Nicholas Allen (PACA-APP Docket No. 15-00085) solely.

section l(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Allens, Inc. during the period of time that Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities, which were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.[9]

A hearing took place before Administrative Law Judge (now Chief Administrative Law Judge) Channing D. Strother (hereinafter "Chief ALJ") on December 13, 2016 and December 14, 2016 in Fayetteville, Arkansas. Petitioner was represented by Jeffrey M. Chebot, Esq., of Whiteman, Bankes & Chebot LLC, Philadelphia, Pennsylvania and Grant E. Fortson, Esq., of Lax, Vaughan, Fortson, Rowe & Threet, PA, Little Rock, Arkansas. Respondent was represented by Charles L. Kendall, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC.

Petitioner testified on his own behalf and presented two additional witnesses: Joshua Allen, owner, director, and CEO of Allens, Inc.; and Lori Sherrell, secretary and comptroller of Allens, Inc. One witness, Josephine E. Jenkins, Chief of the Investigation and Enforcement Branch, PACA Division, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture, testified on behalf of Respondent. The transcript of the proceeding (designated herein as "Tr.") consists of 503 pages.

A total of fifty-six exhibits (marked P1X-#1 through P1X-#56) were admitted into evidence on Petitioner's behalf. Respondent presented the Certified Agency Record compiled for the Director's Determination as to Petitioner Nicholas Allen (marked RX-1 through RX-9),

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[9] *See* Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

which is part of the record pursuant to section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Respondent presented one additional exhibit (marked RX-18) from the Certified Agency Record compiled for the Director's Determination as to Joshua Allen,[10] which was also admitted into evidence.[11]

In accordance with the briefing schedule, on April 11, 2017, Petitioner filed his "Proposed Findings of Fact, Conclusions of Law, Brief and Order," and Respondent filed Respondent's Brief, which included proposed findings of fact, proposed conclusions of law, and a proposed-order. On May 31, 2017, Petitioner and Respondent each filed reply briefs thereto. On April 26, 2017, the Chief ALJ issued his Decision and Order ("Initial Decision" or "IDO") finding that Petitioner was not "responsibly connected" to Allens, Inc. during the period of the subject PACA violations.

On May 29, 2018, Respondent appealed to the Judicial Officer[12] seeking affirmation of the Director's Determination that Petitioner was "responsibly connected" with Allens, Inc. at the time of the subject violations and that, consequently, Petitioner is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in

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[10] PACA-APP Docket No. 15-0084 (*see supra* note 7).

[11] Tr. 249:5-14.

[12] The position of Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35), was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g) and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C.A.N. at 1068 (1982).

section 8(b) of the PACA (7 U.S.C. § 499d(b)). On July 31, 2018, Petitioner filed his Response to the Appeal Petition and Brief in Support ("Response to Appeal")[13] thereof.[14]

DECISION

Pertinent Statutory, Regulatory, and Adjudicatory Analytical Framework

The Department's interpretation of PACA and policy in cases arising under the Act were succinctly set out in the Judicial Officer's decision, *Baltimore Tomato Company, Inc.*[15] and reaffirmed by the Judicial Officer in *The Caito Produce Co.* ("*Caito Produce*"),[16] which sets forth at length the reasons underlying the Department's policy. As noted by the Judicial Officer, the conclusions in *Caito Produce* are largely taken verbatim from prior decisions (including *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984)), issued for many years in similar cases (many affirmed on judicial review), each of which merely updates the citations previously used.[17] Likewise, this Decision and Order quotes heavily from *Caito Produce*[18] and prior decisions to provide context to the analysis under PACA applicable to this proceeding.

As discussed in pertinent part in *Caito Produce*:

> The "goal of the [Perishable Agricultural] Commodities Act [is] that only financially responsible persons should be engaged in the businesses subject to the Act." *Marvin Tragash Co. v. United States Dept. of Agr.* [524] F.2d [1255] (C.A.

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[13] Included in Petitioner's filing was a request for oral argument before the Judicial Officer. *See* Response to Appeal at 57-58.

[14] On August 3, 2018, Petitioner filed an "Errata Sheet" to correct typographical errors in his July 31, 2018 Response to Appeal.

[15] *See Balt. Tomato Co.*, 39 Agric. Dec. 412, 415-16 (U.S.D.A. 1980).

[16] 48 Agric. Dec. 602 (U.S.D.A. 1989).

[17] *See The Caito Produce Co.*, 48 Agric. Dec. 602, 604 (U.S.D.A. 1989).

[18] Due to the length of the *Caito Produce* decision, only pertinent parts will be reproduced here to provided context to the analysis under PACA in this proceeding, but the full decision is hereby adopted and incorporated herein by reference for all purposes.

5), No. 75-1481, decided December 24, 1975. The purpose of the Act was stated in *Zwick v. Freeman*, 373 F.2d 110, 116 (C.A. 2), certiorari denied, 389 U.S. 835, as follows:

> The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." H. Rept. No. 1196, 84th Cong. 1st Sess. 2 (1955).
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> If a licensee is going to extend credit to its purchasers in this regulated industry, it must be adequately capitalized to be able to sustain any losses that result. If losses occur which jeopardize a licensee's ability to meet its obligations, it must immediately obtain more capital, or suffer the consequences if violations occur. In this regulated industry, the risk of loss should be taken by the banking community, whose business it is to supply risk capital, or by stockholders or other risk takers. Other licensees engaged in business in this vital agricultural marketing system should not be subjected to the risk resulting from respondent's undercapitalization or bad debt experience.

The Caito Produce Co., 48 Agric. Dec. 602, 619-20 (U.S.D.A. 1989).

The peculiar vulnerability of producers of perishable agricultural commodities and livestock and the importance of the Department's regulatory programs to assure payment for these commodities were also recognized by Congress in specifically excluding PACA disciplinary enforcement actions from section 525 of the 1978 Bankruptcy law (11 U.S.C. § 525). As referenced in *Caito Produce:*

> Congressman Foley, Chairman of the House Agriculture Committee, explained the need for the . . . special provisions applicable to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act as follows (Proceedings and Debates of the 95th Cong., 1st Sess., Vol. 19, pp. H 11761-H 11762 (October 28, 1977) [now 123 Cong. Rec. 35,671-72 (1977)]):
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> > Under the Packers and Stockyards Act and the act of July 12, 1943, persons purchasing livestock in commerce are required to conduct their businesses in a financially responsible manner, and

> market agencies and dealers * * * are required to have a bond and to pay for all livestock purchased. The licenses of market agencies and dealers may be suspended if they become insolvent. Packers may be ordered to cease and desist from failing to pay for livestock and packers who become insolvent may be ordered to cease and desist from operating except under such conditions as the Secretary may impose.
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> Under the Perishable Agricultural Commodities Act, commission merchants, dealers, and brokers are required to be licensed and to account and pay promptly for all commodities purchased. Failure to pay can result in suspension of a license, and flagrant and repeated failure may result in revocation of a license. Licensees may in certain circumstances be required by the Secretary to post a bond as evidence of financial responsibility. And the Secretary may refuse to issue licenses to persons who have violated the act or have been convicted of a felony.
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> The Committee on Agriculture has no quarrel with the "fresh-start" philosophy underlying this bill. However, that philosophy is not new and has heretofore been one of the principal purposes of the bankruptcy laws. Because of the peculiar vulnerability of producers of perishable agricultural commodities and livestock, Congress has seen fit, notwithstanding this philosophy, to enact and from time to time amend the Perishable Agricultural Commodities Act, the Packers and Stockyards Act, and the Act of July 12, 1943.

The Caito Produce Co., 48 Agric. Dec. 602, 621 (U.S.D.A. 1989) (footnotes omitted).[19]

As further explained in *Caito*:

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[19] As shown above and in the lengthy quotation from the *Esposito* case cited in *Caito Produce* (*Esposito*, 38 Agric. Dec. 613, 632-40 (U.S.D.A. 1979)), in the 1978 Bankruptcy law, Congress specifically exempted two regulatory programs – the Perishable Agricultural Commodities Act and the Packers and Stockyards Act – from the provisions of section 525 of the Bankruptcy law (11 U.S.C. § 525) that otherwise would have prevented the revocation of a license because of bankruptcy or the failure to pay a debt dischargeable under the Bankruptcy law. Congress also enacted Public Law 94-410, which made extensive amendments to the Packers and Stockyards Act and the Act of July 12, 1943 to assist the Secretary to prevent recurrence of the catastrophic losses to livestock producers which attended the bankruptcies of several large packers in prior years. As the Judicial Officer has cautioned, "[b]oth of these programs must be continued if this Nation is to continue to have a ready source of nutritious food at prices which are reasonable to both the producer and the consumer." *The Caito Produce Co.*, 48 Agric. Dec. 602, 622 (U.S.D.A. 1989).

> Revocation of respondent's license, in view of his repeated and flagrant violations of the Act, is not only authorized by the Act (7 U.S.C. § 499h(a)) [footnote omitted], but is also consistent with other provisions of the Act, which are not applicable here. . . . ***Similarly, if a licensee fails to pay a reparation order under the Act, his license is automatically suspended until the reparation order is paid, irrespective of whether he is unable to pay because of circumstances beyond his control (7 U.S.C. § 499g(d)).***
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> . . . .
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> Although the Department's approach to enforcing the Perishable Commodities Act appears harsh, in many cases it is not as harsh as it would seem. For example, many persons who suffer a financial loss or otherwise become in a precarious financial position continue to operate for many months and even increase their business substantially, without obtaining new capital, thereby subjecting many persons who sell produce to them to the risk of financial loss. Such conduct has repeatedly been characterized as "flagrant." *See In re John H. Norman & Sons Distributing Co.*, 37 Agr Dec 705, 713 (1978); *In re Atlantic Produce Co.*, 35 Agr Dec 1631, 1640-1641 (1976), [aff'd per curiam, 568 F.2d 772 (4th Cir.) (unpublished), cert. denied, 439 U.S. 819 (1978)]; *Catanzaro*, 35 Agr Dec 26, 31 (1976), *affirmed sub nom.* Catanzaro v. United States and Butz, [556 F.2d 586 (9th Cir. 1977) (unpublished), printed in 36 Agr Dec 467 (1977)]; M. & H. Produce Co., 34 Agr Dec 700, 747 (1975), [aff'd, 549 F.2d 830 (D.C. Cir.) (unpublished), cert. denied, 434 U.S. 920 (1977)]; George Steinberg & Son, 32 Agric. Dec. 236, 243-244 (1973), affirmed *sub nom. George Steinberg & Son, Inc v. Butz*, 491 F.2d 988 (C.A. 2), certiorari denied, 419 U.S. 830.

The Caito Produce Co., 48 Agric. Dec. 602, 619-22 (U.S.D.A. 1989) (emphasis added).

Statutory Definition and Requirements Pertaining to "Responsibly Connected"

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides:

> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker, as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this Act ***and*** that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9) (emphasis added).

The express language of the statue makes clear that the person seeking relief from the ramifications of established PACA violations based on an assertion that he or she was not "responsibly connected" must demonstrate by a preponderance of the evidence that he or she meets all of the conditions of the two-prong test specifically set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

The standard for determining whether a person was actively involved in the activities resulting in a violation under PACA – the first prong of the "responsibly connected" test – is as follows:

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

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

The standard for analyzing the "nominal" prong – the second prong of the two-prong "responsibly connected" test – has been explained by the Judicial Officer as follows:

> *Taylor* makes clear to me that I was remiss in failing to abandon the "actual, significant nexus" test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the "actual, significant nexus" test, the power to curb PACA violations, or the power to direct and affect operations. In future cases that come 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.

Again, the express language of the statue makes clear that the person seeking relief from the ramifications of established PACA violations based on an assertion that he or she was not "responsibly connected" must demonstrate by a preponderance of the evidence that he or she meets all of the conditions of the two-prong test specifically set forth in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9). Failure to do so will result in a finding that he or she is "responsibly connected" within the meaning of the statue and is therefore subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

Discussion

There is no dispute that during the period October 3, 2013, through January 6, 2014, on or about the dates and in the transactions set forth in Appendix A of the Complaint, Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly to, or to pay at all, forty sellers of the agreed purchase prices or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.[20] And the Initial Decision acknowledges this;[21] however, the legal analysis and resulting conclusions set forth in the Initial Decision are based on an overly narrow statement of the issue in dispute, introduced in the Initial Decision as follows:

> 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") 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

[20] PACA-D Docket No. 14-0109.

[21] *See* IDO at 18.

> restructuring officer" ("CRO") appointed pursuant to the insistence of certain secured creditors.

IDO at 1 (footnote omitted).

Correctly stated, the issue to be decided in this proceeding, as delineated by the January 30, 2015 Director's Determination giving rise to this disciplinary enforcement action, is whether Petitioner Nicholas Allen was "responsibly connected," as that term is defined under section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with Allens, Inc. during the period of time that Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA by failing to make full payment promptly to forty sellers of the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.

For the reasons discussed more fully hereinbelow, and based on careful consideration of the record, including all evidence adduced at the hearing as well as all briefs and petitions filed by the parties to date, it is my determination that Petitioner Nicholas Allen has failed to rebut the presumption that he was "responsibly connected" to Allens, Inc. as an officer, director, and shareholder of the firm when Allens, Inc. committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b). Accordingly, Petitioner Nicholas Allen is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

I. Petitioner Failed to Meet the First Prong of the "Responsibly Connected" Test.

As previously explained, the standard for determining whether a person was actively involved in the activities resulting in a violation under PACA – the first prong of the "responsibly connected" test – is as follows:

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

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

Direct involvement in the particular transactions that were not paid in accordance with the PACA is not required, and participation in corporate decision-making is enough to find active involvement in the activities resulting in a PACA violation.[22] The evidence of record in this case supports a finding that the Petitioner exercised substantial influence in corporate decision-making and activities at Allens, Inc. both before and after the period of October 3, 2013 through January 2014.[23] Accordingly, Petitioner has failed to demonstrate by a preponderance of the evidence that he met the requirements of the first prong of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)).

a. The Chief ALJ Failed to Contemplate the Totality of the Circumstances When Determining the Violations Period.

As the Chief ALJ notes in his Initial Decision, when "evaluating active involvement, the focus is on the petitioner's relationship to the violating entity during the period when PACA was

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[22] *See Petro*, 71 Agric. Dec. 600, 605 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr) (stating that participation in corporate decision-making has been enough to find active involvement).

[23] *See Satins*, 57 Agric. Dec. 1474, 1489 (U.S.D.A. 1998) (stating there are many functions within a company -- corporate finance, corporate decision-making, check writing, and choosing which debts to pay – that can cause an individual to be actively involved in the failure to pay promptly for produce even though the individual never actually purchased produce).

violated."[24] However, the Chief ALJ has too narrowly construed the violations period in this case.[25]

The Chief ALJ focuses on the period of October 3, 2013 through January 2014 (the dates of the purchases which Allens, Inc. failed to pay which were identified in the Complaint) as the violations period relevant to the subject "responsibly connected" analysis in this proceeding.[26] However, the violations period in a "responsibly connected" case is not axiomatically defined by or limited to the specific date(s) or time period(s) provided in the disciplinary complaint. In this proceeding, the evidence of record reflects that the violations began well before October 3, 2013 – that is, when the directors, officers, and majority shareholders of Allens, Inc. knew or reasonably should have known that Allens, Inc. could not make full payment for its ongoing purchases of produce – and nevertheless went about a corporate restructuring that would allow the company to continue operating in the produce industry without paying the moneys owed to its producers. This was a breach of fiduciary duty by Petitioner, an officer and director of the violating licensee, and was a PACA violation in and of itself.[27]

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[24] IDO at 10.

[25] *See* IDO at 2 n.5 ("The violations period is the time during which Allens, Inc. 'committed the PACA violations that gave rise to this case.' Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 612 (D.C. Cir. 2011). The violations period took place from October 3, 2013 through January 6, 2014. Allens, Inc., 74 Agric. Dec. 488, 488 (U.S.D.A. 2014); *see* P1X-24 at 2; Tr. 184-185, 194, 396.").

[26] *See* IDO at 2 n.5.

[27] *See Golman-Hayden Co. v. Fresh Source Produce, Inc.*, 217 F.3d 348, 351 (5th Cir. 2000) ("[I]ndividual shareholders, officers, or directors of a corporation who are in a position to control trust assets, and who breach their fiduciary duty to preserve those assets, may be held personally liable under PACA."); *Cipriano*, No. 14-14826, 2015 WL 3441212, at *10-11 (E.D. Mich. May 28, 2015) ("[A]n individual officer or shareholder of a corporation who is in a position to control statutory trust assets, and who fails to preserve those assets, may be held personally liable under PACA. . . . This kind of a claim is breach of fiduciary duty claim; not a claim for nonpayment of a debt.") (internal citation omitted); *Sunrise Orchards, Inc.*, 69 Agric. Dec. 726, 743 n.8 (U.S.D.A. 2010) ("Several circuits have held that the PACA statutory trust provision allows a

Further, the violations continued not only during but well after January 2014. The Chief ALJ affirms that Petitioner retained his 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 before, during, and even after the period of October 3, 2013 through January 2014. Notably, Petitioner remained part of the public face of Allens, Inc. by remaining listed on the company's PACA license as an executive vice president, director, and shareholder.[28] Because Petitioner and his family never alerted USDA or the industry of the "restructuring," produce suppliers would have seen Petitioner as the public face of the reliable, family-owned, ninety-year-old company they had come to rely on and, indeed, the record reflects that they continued to do business with Allens, Inc. to their detriment. Yet, the Chief ALJ goes on to find that because Petitioner arguably succeeded in contractually assigning the rights and authority of his offices over to others under state law during the period of October 3, 2013 through January 2014, Petitioner effectively shielded himself from his responsibilities under PACA.[29]

The Chief ALJ does not, however, adequately address the totality of the circumstances surrounding the Petitioner's efforts to assign (temporarily) the rights and authority of his offices over to others.[30] While Petitioner argues his authority was limited due to the corporate

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plaintiff to recover against both a corporation and its controlling officers for breach of fiduciary duty."); *see also Arava USA, Inc. v. Karni Family Farm,* LLC, 474 F. App'x 452, 453 (6th Cir. 2012); *Bear Mountain Orchards, Inc. v. Mich-Kim, Inc.*, 623 F.3d 163, 170-72 (3d Cir. 2010); *Patterson Frozen Foods v. Crown Foods Int'l*, 307 F.3d 666, 669 (7th Cir. 2002).

[28] *See* IDO at 30-31 ("Petitioner asserted that he retained the title during the violations period for purposes of maintaining company morale."); IDO at 38, 50 (Finding of Fact No. 4).

[29] *Id.* at 3 (emphasis added).

[30] These corporate machinations are outlined in Respondent's Initial Brief and adopted herein by reference for all purposes. *See* Respondent's Initial Brief at 5-11.

"restructuring" of Allens, Inc. during the period of October 3, 2013 through January 2014, the evidence of record demonstrates the crucial, central role Petitioner played in the company's affairs in making that happen.[31] Notably, but for Petitioner *retaining his titles* as executive vice president, director, and shareholder, Allens, Inc. could not have presented a public face of viability, thereby misleading the industry to continue to do business with it. Until Petitioner undertook the "restructurings" effective August 5, 2013 to accomplish the (temporary) contractual delegation of his authority over the operations of Allens, Inc, Allens, Inc. was apparently still paying its produce suppliers.[32] But for Petitioner's actions, no chief restructuring officer (hereinafter "CRO") would have been created or empowered to make financial decisions on behalf of Allens, Inc. But for the continued purchase of produce by the CRO, *whom Petitioner appointed*, Allens, Inc. would not have violated the PACA by failing to pay for its purchases. Taken in context, Petitioner's participation in the activities creating, empowering, and appointing the CRO constitute engaging in the activities that led to Allens, Inc.'s willful, flagrant, and repeated violations of the PACA. I therefore reject the Chief ALJ's finding that by virtue of the corporate restructuring the Petitioner effectively shielded himself from his responsibilities under PACA.[33]

Moreover, the PACA violations are continuing. On October 8, 2015, Administrative Law Judge Janice K. Bullard (hereinafter "ALJ Bullard") issued a Decision and Order as to Allens, Inc., finding that as of October 2, 2014, the $9,759,843.86 that Allens, Inc. owed to forty

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[31] *See Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1274 (U.S.D.A. 1995).

[32] IDO at 62 (Finding of Fact No. 90).

[33] *Id.* at 2 (ruling that Petitioner's cessation "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").

produce suppliers remained unpaid.[34] Petitioner presented no evidence that any of the debt[35] had been paid as of the date of the hearing held on his Petition, some two years after ALJ Bullard's decision against Allens, Inc. Indeed, Petitioner has made no suggestion that payment has been made in whole or in any part as of the date of this Decision and Order, nearly four years after ALJ Bullard's decision against Allens, Inc. Because the produce debts remain unpaid, there is a continuous failure to pay.[36]

As PACA precedent makes clear, while failing to pay promptly is a violation, failing to pay at all is much more egregious. In the seminal *Scamcorp*[37] case, the Judicial Officer observed:

> Cases in which a respondent has failed to pay by the date of the hearing are referred to as "no-pay" cases. License revocation can be avoided and the suspension of a license of a PACA licensee who has failed to pay in accordance with the PACA is ordered if a PACA violator makes full payment by the date of the hearing (or, if no hearing is to be held, by the time the answer is due) and is in full compliance with the PACA by the date of the hearing. Cases in which a respondent has paid and is in full compliance with the PACA by the time of the hearing are referred to as "slow-pay" cases. The Gilardi doctrine was subsequently tightened *in In re Carpentino Bros., Inc.*, 46 Agric. Dec. 486 (1987), aff'd, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a

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[34] *See Allens, Inc.*, 74 Agric. Dec. 488, 496 (U.S.D.A. 2015).

[35] *See* Complaint, Attachment A (incorporated herein by reference).

[36] *Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. at 930-31. Nothing in the PACA itself, the Regulations promulgated thereunder, or in any case cited by the Chief ALJ or Petitioner indicates that the relevant period for a responsibly connected determination ends when the last in a series of ongoing violations begins. In the context of another USDA statute, the Judicial Officer addressed the appropriate timeframe for applying sanctions for continuing violations, stating:

> However, nothing in the Act precludes the assessment of a civil penalty for a continuing violation for the period after the investigation is completed, or even after the Complaint is filed. Theoretically, at least, civil penalties could accrue even up to the time of the hearing. Each case must be judged in the light of all the relevant circumstances in determining when it is no longer appropriate to assess civil penalties for a continuing violation.

Calabrese, 51 Agric. Dec. 131, 150 (U.S.D.A. 1992).

[37] *Scamcorp, Inc.*, 57 Agric. Dec. 527 (U.S.D.A. 1998).

> respondent's present compliance not involve credit agreements for more than 30 days.
>
> The purpose of allowing PACA licensees to convert a "no-pay" case to a "slow-pay" case and avoid license revocation is to encourage PACA violators to pay their produce suppliers and attain full compliance with the PACA. If there were no opportunity to reduce the sanction, a PACA licensee against whom an action is instituted for failure to pay in accordance with the PACA and who has violated the payment provisions of the PACA may have no incentive to pay its produce suppliers. However, PACA requires full payment promptly, and a PACA licensee who has violated the payment provisions of the PACA should be given an incentive to pay its produce suppliers promptly.

Scamcorp, Inc., 57 Agric. Dec. 527, 547-48 (U.S.D.A. 1998).

In the instant case, after April 1, 2014, Petitioner had the power, authority, and opportunity to direct Allens, Inc. to pay the produce debts-in-arrears, but he opted not to do so.[38] As pointed out in Respondent's Reply Brief at 4-5:

> After April 1, 2014, Petitioner, along with the other two directors and owners (Joshua Allen and Roderick Allen), had the authority to remove the Special Committee and displace the CRO. P1X-#9-4, Tr. 182:12-21, 188:20-24. There was nothing preventing them from reasserting their control over the company and petitioning the bankruptcy court to permit Allens, Inc. to come into compliance with the applicable law (PACA) by paying the produce suppliers. *See In re Kmart Corp.*, C.A.7 (Ill.) 2004, 359 F.3d 866, rehearing and rehearing en banc denied, certiorari denied 125 S. Ct. 495, 543 U.S. 986, 160 L. Ed.2d 370, certiorari denied 125 S. Ct. 495, 543 U.S. 995, 160 L. Ed.2d 385. 11 U.S.C.A. § 363 (West). Allens, Inc. was not in Chapter 7 liquidation under the control of a trustee, wherein it could not petition the Court, until June 6, 2014. P1X-#10-1. Petitioner testified that there was no other legal constraint on the actions of Petitioner and the other owner/directors (Roderick Allen and Joshua Allen). Tr. 126:22-127:17.

Rather than make any attempt to cure the PACA violations, Petitioner opted to permit corporate funds to be used for other purposes, including continuing to pay his own $800,000

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[38] *See* IDO at 2 ("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.").

yearly salary.[39] Petitioner's decision to maintain the failures-to-pay status quo even after April 1, 2014 supports a finding that he was actively involved in the activities that resulted in violations of PACA.[40] That the failures-to-pay were never cured even after Petitioner regained his full status as an officer, director, and more than-ten percent shareholder of Allens, Inc., unencumbered by the restrictions he had unilaterally placed upon himself, demonstrates Petitioner's lack of good faith in accomplishing his (temporary) delegation of authority over the company's operations.[41] Such lack of good faith is underscored by Petitioner's failure to notify both USDA and the public of his "temporary" change in status.[42]

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[39] *Id.* at 64 (Finding of Fact No. 104). *See Salins*, 57 Agric. Dec. 1474, 1495 (U.S.D.A. 1998) ("Petitioner testified that Petitioner knew that the company was in financial trouble in the early 1990s, but Petitioner does not explain why Petitioner was getting a bonus when the company was in financial trouble. I conclude that a reasonable explanation for Petitioner's bonus is that Petitioner was much more than a nominal officer[.]").

[40] *See Martindale*, 65 Agric. Dec. 1301, 1319 (U.S.D.A. 2006) ("Check writing and choosing which debts to pay can cause an individual to be actively involved in the failure of a PACA licensee to make full payment promptly in accordance with the PACA."); *Salins*, 57 Agric. Dec. at 1489, 1495 ("I agree with Respondent that there are many functions within the company, *e.g.*, corporate finance, corporate decision making, check writing, and choosing which debt-in-arrears to pay, which can cause an individual to be actively involved in failure to pay promptly for produce, even though the individual does not ever actually purchase produce."); *see also Orloff*, 62 Agric. Dec. 264, 279 (U.S.D.A. 2003) ("I reject what I find to be Petitioner's argument: that in order to be actively involved in the activities resulting in a PACA licensee's violation of the PACA, a petitioner must actually commit the PACA violation.").

[41] *See* IDO at 4. *Cf. Havana Potatoes of N.Y. Corp. v. United States*, 136 F.3d 89, 93-94 (2d Cir. 1997) ("[I]solated failures to pay within ten days or even substantial delays in payments fully cured after a temporary period of financial difficulty might justify mitigation. However, PACA simply cannot be read to allow the continued licensing of a produce buyer in the face of its persistent failures to comply with the statute's terms because of the produce buyer's long-standing financial difficulties."); *Petro*, 71 Agric. Dec. 600, 607 (U.S.D.A. 2012) (Decision and Order as to Bryan Herr) ("I agree with the Branch Chief that Mr. Herr could have infused Houston's Finest with capital after he learned of Houston's Finest's failure to pay for produce in accordance with PACA.").

[42] *See* IDO at 3, 3 n.9 (citing 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 licensee 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

Accordingly, it is the determination of this Judicial Officer that Petitioner has wholly failed to demonstrate by a preponderance of the evidence that he met the first prong of the requirements of the two-prong test specifically set forth in section 1(b)(9) (7 U.S.C. § 499a(b)(9)) of the PACA.

b. Regardless of Lawfulness Under State Law, the Temporary Transfer of Corporate Authority Does Not Preclude a Finding of Active Involvement Under the PACA.

PACA precedent makes clear that, within the PACA framework, one cannot divest oneself of fiduciary duties as an officer, director, and shareholder of a PACA licensee with the consequence of facilitating PACA violations by another and not be held accountable.[43] PACA "is admittedly and intentionally a 'tough' law"[44] that has resulted in "one of the nation's most successful regulatory programs."[45] It is, as the U.S. Court of Appeals for the Second Circuit has described, "an intentionally rigorous law whose primary purpose is to exercise control over an industry 'which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.'"[46] Further, PACA case law has stated:

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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.')).").

[43] *See, e.g.*, *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2dd 601, 614 (D.C. Cir. 1987); *Midland Banana & Tomato Co. v. U.S. Dep't of Agric.*, 54 Agric. Dec. 1239, 1310-11 (U.S.D.A. 1995), *aff'd sub nom. Midland Banana & Tomato Co v. U.S. Dep't of Agric.*, 104 F.3d 139 (8th Cir. 1997); *see also Golman-Hayden Co. v. Fresh Source Produce, Inc.*, 217 F.3d 348, 351 n.18 (5th Cir. 2000) ("While individuals generally are not held responsible for the liabilities of a corporation, we recognize that a corporation can only act through its agents and can fulfill fiduciary obligations only through its agents.").

[44] S. REP. NO. 2507, 84th Cong., 2d Sess. (citing H. REP. NO. 1196, 84th Cong., 1st Sess.), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701).

[45] *Quinn v. Butz*, 510 F.2d 743, 746 (D.C. Cir. 1975).

[46] *Harry Klein Produce v. U.S. Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987) (quoting S. REP. NO. 2507, 84th Cong., 2d Sess. 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701).

> [W]hen interpreting a statute, the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of the business activity or the enforcement of standards it has established.

Sebastopol Meat Co. v. Sec'y of Agric., 440 F.2d 983, 985 (9th Cir. 1971).

In his Initial Decision, the Chief ALJ correctly finds that "PACA does not displace Arkansas law regarding the transfer of authority within corporations"[47] and "is not inconsistent with the Arkansas law of corporations."[48] The Chief ALJ also notes that "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."[49] However, the Initial Decision stops short in that it fails to stress an important principle: that although neither of the laws preempts the other, state law may not be used as a shield for circumventing the purposes of the PACA.[50]

In a seminal case under the Act, the Judicial Officer held that state law is not controlling as to whether the corporate veil may be pierced so as to make an order applicable to the responsible directing officials and owner, or part owner, of a corporation involved in PACA violations.[51] Similarly, in *Tomato Specialties*,[52] the Chief ALJ found that "[t]he Arizona law of

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[47] IDO at 27.

[48] *Id.* at 28.

[49] *Id.* at 28-29.

[50] *See Midland Banana & Tomato Co.*, 54 Agric. Dec. at 1310-11 ("The PACA violator's ability to leap into the next corporate entity to escape the Secretary's regulatory reach should be non-existent. Those individuals who use corporate devices to evade . . . PACA financial requirements are some of the most financially irresponsible Respondents I have seen in my 46 years at USDA.").

[51] *See id.* at 1305-09.

[52] 76 Agric. Dec. 658 (U.S.D.A. 2017).

misrepresentation and fraud in sales transactions, in particular that cited by Tomato Specialties, [was] not applicable to the issues in th[e] case."[53] Likewise, in the present case, Petitioner's delegation of authority, even if sufficient for purposes of Arkansas law, is not controlling for purposes of determining Petitioner's "responsibly connected" status under the PACA.[54] Furthermore, the cited provision of the Arkansas Code[55] does not excuse or exculpate Petitioner from his failure to properly discharge his duties as a director. The Code provides in pertinent part:

> (f) The creation of, delegation of authority to, or action by a committee does not alone constitute compliance by a director with the standards of conduct described in § 4-27-830.

ARK. CODE ANN. § 4-27-825(f) (West). Further, the referenced standards of conduct with which a director must comply, in pertinent part, provide:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

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[53] *Tomato Specialties, LLC*, 76 Agric. Dec. 658, 700 (U.S.D.A. 2017).

[54] *See Sebastopol Meat Co. v. Sec'y of Agric.*, 440 F.2d 983, 984-86 (9th Cir. 1971); *Lloyd Myers Co.*, 51 Agric. Dec. 747, 769, 772 (U.S.D.A. 1992) ("There are many cases that stand for the general principle that the mere form of a business organization is insufficient to shield the practices sought to be prohibited from the reach of a federal regulatory agency.") (citing *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 440 (1938); *FTC v. Standard Ed. Soc'y*, 302 U.S. 112, 119-20 (1937); *H.P. Lambert Co. v. Sec'y of Treas.*, 354 F.2d 819, 822 (1st Cir. 1965); *Joseph A. Kaplan & Sons, Inc. v. FTC*, 347 F.2d 785, 787 n.4 (D.C. Cir. 1965); *S.C. Generating Co. v. FPC*, 261 F.2d 915, 920 (4th Cir. 1958); *Corn Products Refining Co. v. Benson*, 232 F.2d 554, 565 (2d Cir. 1956); *Keystone Mining Co. v. Gray*, 120 F.2d 1, 6 (3d Cir. 1941); *Ala. Power Co. v. McNinch*, 94 F.2d 601, 618 (D.C. Cir. 1938); *Tractor Training Serv. v. FTC*, 227 F.2d 420, 425 (9th Cir. 1955); *Goodman v. FTC*, 244 F.2d 584, 593-94 (9th Cir. 1957)).

[55] *See* Response to Appeal at 32-34 (citing ARK. CODE ANN. §§ 4-27-1701, 4-27-801, 4-27-1020(b), and 4-27-825(d)).

(3) in a manner he reasonably believes to be in the best interests of the corporation.

ARK. CODE ANN. § 4-27-830(a) (West).

The "care an ordinarily prudent person in a like position would exercise under similar circumstances" would be to comply with the PACA.[56] Empowering others to violate the law (PACA) that governs the heavily regulated produce industry and failing to assure that they did not, as Petitioner did in this case, could hardly be viewed as discharging his duties "in a manner he reasonably believes to be in the best interests of the corporation."[57]

II. Petitioner Failed to Meet the Second Prong of the "Responsibly Connected" Test.

Even assuming *arguendo* that Petitioner could continue to argue that he met the first prong requirements of section 1(b)(9), for the reasons discussed more fully herein below it is the determination of this Judicial Officer that Petitioner also fails the second prong of the "responsibly connected" test.

As previously explained, under section 1(b)(9) of the PACA (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 Act ***and*** that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.[58] The

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[56] ARK. CODE ANN. § 4-27-830(a)(2).

[57] ARK. CODE ANN. § 4-27-830(a)(3).

[58] *See* 7 U.S.C. § 499a(b)(9).

second prong, or the test necessary to overcome the statutory presumption, is referred to as the "nominal" standard.[59]

The Chief ALJ identifies the correct standard for analyzing the "nominal" prong of the responsibly connected inquiry and cites a relevant part of the decision that set the standard:

> 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.
>
> 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."

IDO at 13-14 (footnotes omitted).

a. Petitioner's "Nominal" Status as Director and Officer Was Temporary and Self-Inflicted.

Despite having identified the proper standard, the Chief ALJ fails to properly apply the standard to the facts of this case by failing to address the fact that the very corporate resolutions that Petitioner put in place, which he now claims rendered him powerless, granted Petitioner authorities that he declined to employ.[60] Accordingly, while the Initial Decision cites the various

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[59] *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).

[60] *See* Appeal Petition at 17-18; Response to Appeal at 25-28.

powers that were denied or withheld from Petitioner at some length, it fails to address the fundamental fact that it was Petitioner himself who did the denying or withholding.[61]

The Chief ALJ correctly cites *Tuscany Farms, Inc.*,[62] in which the Judicial Officer stated, as of October 15, 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.

Tuscany Farms, Inc., 67 Agric. Dec. 1428, 1438 (U.S.D.A. 2008). The Chief ALJ also goes on to cite two cases as examples of such rare and extraordinary circumstances. In the first of these instances, the Judicial Officer considered these facts:

> Mr. Herr was not involved in negotiating or drafting the Stock Purchase Agreement, had no intention of performing any duties for Houston's Finest, and, although the Stock Purchase Agreement named him as a director, Mr. Herr never functioned as a director, never attended any board meetings, never received a stock certificate, never signed any document as a corporate officer or director of Houston's Finest, and never received a salary, dividend, K-1, or reimbursement from Houston's Finest (Tr. 160-67). More specifically, Mr. Herr was neither consulted about, nor exercised any power or authority concerning, Houston's Finest's payments to suppliers.

Petro, 71 Agric. Dec. 600, 611 (U.S.D.A. 2012).

Petitioner Nicholas Allen did not share Mr. Herr's extraordinary circumstances. In stark contrast, Petitioner functioned as a director; attended and participated in board meetings; held stock in the LLC that he participated in founding;[63] signed documents as a corporate officer and

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[61] *See* IDO at 3-4, 27, 30, 32, 35-36.

[62] 67 Agric. Dec. 1428 (U.S.D.A. 2008).

[63] IDO at 54 (Finding of Fact No. 36).

director of Allens, Inc.;[64] and received an $800,000 annual salary.[65] The *Herr* decision is inapposite to Petitioner's status.

Similarly, in the second-cited case,[66] the Ninth Circuit considered two consolidated responsibly connected cases regarding Donald Beucke. The Court found that Mr. Beucke was responsibly connected with Bayside Produce when it violated the PACA but was not responsibly connected with Garden Fresh Produce when it violated the PACA, despite Mr. Beucke's stock ownership in Garden Fresh.[67] The Court considered Mr. Beucke's overall role and found that he was nominal; the Court did not separately analyze his roles as officer, director, and shareholder. As noted by the Chief ALJ,[68] the Court found that "Beucke 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."[69]

In contrast, Petitioner Nicholas Allen had duties or responsibilities in his named roles; attended the organizational meeting and subsequent formal company meetings (including the meeting that formed the LLC of which he was a shareholder); and received much more than nominal pay ($800,000 annually).[70] The *Beucke*/Garden Fresh decision is also inapposite to Petitioner's status.

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[64] *Id.* at 58 (Finding of Fact No. 70), 60 (Finding of Fact No. 76).

[65] *Id.* at 64 (Finding of Fact No. 104).

[66] *Beucke v. U.S. Dep't of Agric.*, 314 F. App'x 10 (9th Cir. 2008).

[67] *Id.* at 12.

[68] IDO at 17.

[69] *Beucke*, 314 F. App'x at 12.

[70] IDO at 64 (Finding of Fact No. 104).

b. The Value of Petitioner's Stock Has No Bearing on Whether Petitioner Was a "Nominal" Shareholder.

The Chief ALJ credits Petitioner's argument that he was only nominally a shareholder because the stock Petitioner held eventually became worthless, noting that "he had no equity" and that:

> Although Petitioner held onto [sic] his shares throughout the violations period, the record shows his stock had no real worth. The value of Allens, Inc. as a going concern was zero. 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.

IDO at 46 (footnotes omitted).

The Chief ALJ notes Respondent's citations in this regard to PACA precedent that indicates that the purported or speculated value of stock is irrelevant to the question of whether one is a nominal shareholder:

> 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." AMS submits:
>
> > 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.)

IDO at 46-47 (footnote omitted). The Chief ALJ found that these cases were inapposite and did not support AMS' position, first stating:

> In *Beucke*, 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. The Judicial Officer considered Keyeski's retention of stock to

> determine whether he was a shareholder at a specific time; it was not what inhibited Keyeski from being found nominal.

IDO at 47.

The Chief ALJ's analysis of this issue is inaccurate. A review of the cited case shows that Keith Keyeski's retention of his stock was pivotal to the finding that he *was* responsibly connected to Bayside Produce.[71] The fact that Mr. Keyeski had retained his stock despite the fact that it became worthless was what prevented him from rebutting the presumption that he was responsibly connected.[72] The Judicial Officer said: "The failure to exercise their oversight obligations owed by them to Bayside Produce, Inc., as shareholders, if not as officers and directors, does not establish that Petitioner Beucke's and Petitioner Keyeski's roles were nominal."[73]

The Chief ALJ also rejects the precedent set in *Hawkins v. Department of Agriculture*,[74] stating:

> Similarly, stock value was not at issue in *Hawkins v. Department of Agriculture*. The case was decided by the Fifth Circuit Court of Appeals prior to 1995, when Congress amended PACA to incorporate the rebuttable-presumption standard. 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." 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. I also note that AMS's parenthetical is misleading. 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

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[71] *See Beucke*, 65 Agric. Dec. at 1358 ("Petitioner's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.").

[72] *See id.* at 1405.

[73] *Beucke*, 65 Agric. Dec. 1341, 1385 (U.S.D.A. 2006), *aff'd*, 314 F. App'x 10 (9th Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009).

[74] 10 F.3d 1125 (5th Cir. 1993).

analysis, which did not take factors such as stock value into consideration. Hawkins clearly is not controlling in this case.

IDO at 47-48.

The Fifth Circuit held that stock value was not at issue; the petitioner in that case attempted to introduce it as an issue.[75] In order to apply its *per se* rule, the Fifth Circuit had to identify Mr. Hawkins as a shareholder during the violation period, and it did so.[76] In making that determination, the Court simply found that he held stock and rejected Mr. Hawkins's argument that the value of the stock was relevant.[77] In the present case, the surmised or speculated value of Petitioner Nicholas Allen's stock is not relevant either. At hearing, the Chief ALJ asked what difference it makes that the stock had no value.[78] Respondent is correct in observing that the answer is quite simple; it makes no difference. The speculative market value of stock was rejected as a factor in the cases cited by Respondent, as discussed above, and has never been applied as having any bearing on whether a shareholder was nominal under the PACA.[79]

If value of stock, or the lack thereof, were considered as a factor in a responsibly connected analysis, individuals would rarely – if ever – be held responsibly connected. A large majority of PACA violations involve companies that are failing financially, and for that reason have failed to pay produce creditors.[80] Therefore, stock held in those violating companies is

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[75] *See Hawkins v. Dep't of Agric.*, 10 F.3d 1125, 1128, 1130-31 (5th Cir. 1993).

[76] *See id.* at 1130.

[77] *See id.*

[78] Tr. 487:8-9.

[79] *See supra* notes 77 to 81 and accompanying text.

[80] *See Havana Potatoes of N.Y. Corp. v. United States*, 163 F.3d 89, 94 (2d Cir. 1997) ("Moreover, financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of an ongoing lack of funds.").

often, if not almost always, worthless. Citing worthless or useless stock is inappropriate in any PACA analysis of whether a stockholder is nominal, and the Chief ALJ erred in doing so.

c. Petitioner Did Not Act in Good Faith by Continuing to Serve as the Public Face of Allens, Inc. Despite Having Temporarily Delegated His Authority as Officer and Director.

Throughout the violations period, Petitioner remained part of the public face of Allens, Inc., remaining listed on the company's PACA license as an executive vice president, director, and shareholder.[81] Because Petitioner and his family never alerted USDA or the industry of the corporate restructuring, produce suppliers would have seen Petitioner as a public face of the reliable, family-owned, ninety-year-old company they had come to rely on and continued to do business with Allens, Inc. to their detriment.

The Chief ALJ finds 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."[82] Whatever beneficial effects Petitioner may have brought about for the Allens, Inc. employees and the Allens, Inc. secured lenders, his actions also accomplished an additional result: they allowed Petitioner (and others) to mislead produce suppliers about the financial health and payment practices of Allens, Inc. The produce suppliers continued to provide Allens, Inc. with produce for which they were never paid; specifically, the forty sellers who were never paid the agreed purchase prices, or balances thereof, for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate

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[81] *See* IDO at 30-31 ("Petitioner asserted that he retained the title during the violations period for purposes of maintaining company morale."); IDO at 38, 50 (Finding of Fact No. 4).

[82] *Id.* at 27.

and foreign commerce, in the total amount of $9,759,843.86.[83] The financial wellbeing of these produce suppliers, and the jobs of their employees, are also entitled to the protections of PACA.

The Chief ALJ cites relevant precedent,[84] which says in pertinent part:

> While the regulation [7 C.F.R. § 46.13] imposes the burden of notifying the PACA Branch about changes on the licensee, an individual hoping to avoid a responsibly connected determination must ensure the notice of his or her changes reaches the agency, even if that requires the individual to personally notify the PACA Branch. It is reasonable for the PACA Branch to treat each individual who is identified on a PACA license as an officer, director, or holder of more than 10 percent of the outstanding stock of a PACA licensee as responsibly connected until the PACA Branch receives notice otherwise. 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 the 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.

Cerniglia, 66 Agric. Dec. 844, 854 (U.S.D.A. 2007). Petitioner argues now that his status with Allens, Inc. (temporarily) changed.[85] At the time, however, Petitioner never provided notice of any change in his status; he remained an officer, director, and shareholder throughout the violations period.[86]

Petitioner's attempts to circumvent the PACA here are much more sophisticated than the typical appointment of a relative (*see Midland Banana*, discussed *supra*)[87] or clerk as a

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[83] *See* Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

[84] *Id.* at 3.

[85] *See* Response to Appeal at 54, 56-57.

[86] *See* Appeal Petition at 25; Response to Appeal at 55-57.

[87] *See Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1270-73 (U.S.D.A. 1995).

figurehead,[88] but they nonetheless constitute an effort by an officer, director, and owner to hide (under cover of state law) as a helpless "mere employee."[89] Petitioner did not notify or warn USDA, Allens, Inc.'s produce suppliers, or the industry as a whole of the financial troubles at Allens, Inc.; on the contrary, Petitioner helped conceal those troubles while continuing to draw his $800,000 salary "for the purposes of maintaining employee morale and preserving the value of Allens, Inc. as a going concern."[90] Petitioner was an officer and director of Allens, Inc. whose actions in restructuring the company in an apparent attempt to contractually shield himself from PACA liability resulted in forty produce sellers going unpaid for 2,312 lots of perishable agricultural commodities that were purchased, received, and accepted in the course of interstate and foreign commerce, in the total amount of $9,759,843.86.[91]

Based on the foregoing, I conclude that the record shows that Petitioner was actively involved in the activities that resulted in Allens, Inc.'s violations of the PACA and supports a finding that Petitioner was not a nominal officer, director, or shareholder of Allens, Inc. when it violated the PACA. I agree with Respondent's contention that Petitioner's actions before, during, and after the failure-to-pay transactions of October 3, 2013 through January 6, 2014 "enabled [Allens, Inc.] to violate the PACA" and "are important parts of the entire context on which the determinations must be made."[92]

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[88] *See Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408 (D.C. Cir. 1983) (finding that a secretary who was made director of a PACA licensee to ensure that a quorum existed for board meetings was a nominal officer).

[89] Appeal Petition at 24.

[90] IDO at 38.

[91] *See* Complaint at 2, as affirmed and adopted in the October 8, 2015 Default Decision and Order entered against Allens, Inc.

[92] Appeal Petition at 5.

CONCLUSIONS

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Petitioner Nicholas Allen has failed to rebut the presumption that he was "responsibly connected" to Allens, Inc. as an officer, director, and shareholder of the firm when Allens, Inc. committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b) by failing to make full payment promptly for produce purchases.
3. By virtue of being responsibly connected with Allens, Inc. during the period when Allens, Inc. violated section 2(4) of the PACA (7 U.S.C. § 499b), Petitioner Nicholas Allen is subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

ORDER

1. Petitioner Nicholas Allen's Request for Oral Argument is DENIED.
2. The Chief ALJ's ruling that Petitioner Nicholas Allen did not participate in any activity resulting in a violation of the PACA is REVERSED.
3. The Chief ALJ's ruling that Petitioner Nicholas Allen was only nominally an officer, director, and holder of more than ten percent of the stock of Allens, Inc. during the period that Allens, Inc. willfully, repeatedly, and flagrantly violated section 2(4) of the PACA is REVERSED.
4. The January 30, 2015 determination by the Director of the PACA Division that Petitioner Nicholas Allen was "responsibly connected" with Allens, Inc. at the time of its violations is AFFIRMED.

5. Petitioner Nicholas Allen is accordingly subject to the licensing restrictions in section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment sanctions in section 8(b) of the PACA (7 U.S.C. § 499d(b)).

RIGHT TO SEEK JUDICIAL REVIEW

Nicholas Allen has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial review must be sought within sixty (60) days after entry of the Order in this Decision and Order.[93] The date of entry of the Order in this Decision and Order is August ___, 2019.

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

Done at Washington, D.C.,
this 1st day of August 2019

[redacted]
Judge Bobbie J. McCartney
Judicial Officer

Hearing Clerk's Office
United States Department of Agriculture
South Building, Room 1031
1400 Independence Avenue, SW
Washington, DC 20250-9203
Tel.: 202-720-4443
Fax: 202-720-0776
SM.OHA.HearingClerks@OHA.USDA.GOV

[93] 28 U.S.C. § 2344.