

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:)
)
JONATHAN DYER,) PACA-APP Docket Nos. 14-0166
DREW JOHNSON a/k/a DREW R. JOHNSON,) 14-0168
and) 14-0169
MICHAEL S. RAWLINGS)
)
Petitioners.)
_____)

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**ORDER AFFIRMING INITIAL DECISION AND ORDER
IN DOCKET NOS. 14-0166, 14-0168 AND 14-0169**

Appearances:

Stephen P. McCarron, Esq., McCarron & Diess, Washington, D.C. 20016, for these four Petitioners in responsibly connected cases (PACA-APP cases): Steven C. Finberg, a/k/a Steve Finberg; Jonathan Dyer; Drew Johnson, also known as Drew R. Johnson; and Michael S. Rawlings (“Petitioners”), and

Charles L. Kendall, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave SW, Washington D.C. 20250, for the Respondent, the Administrator, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture (“the Agency” or “AMS”).

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

PRELIMINARY STATEMENT

This is a “responsibly connected” proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. § 499(a) *et seq.*) (PACA), 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.*) (“Rules” or “Rules of Practice”).

SUMMARY OF PROCEDURAL HISTORY AND PRELIMINARY FINDINGS

On June 28, 2013, a disciplinary complaint (Complaint) was filed against Adams Produce Company LLC (Adams), for failing to make full payment promptly in the amount of \$10,735,186.81 to 51 produce sellers for 9,314 lots of perishable agricultural commodities that the company purchased, received, and accepted during the period of August 8, 2011 through May 18, 2012. As of the filing of the Complaint, \$1,928,417.72 remained unpaid, and is currently still unpaid.

On November 22, 2013, a Default Decision and Order was entered against Adams, finding that Adams willfully, repeatedly and flagrantly violated section 2(4) of the PACA, by failing to make full payment promptly as alleged in the Complaint. The Default Decision and Order became final and effective on January 8, 2014.

Petitioners Jonathan Dyer, Steven C. Finberg, Drew Johnson, and Michael S. Rawlings, each filed a petition for review of the determination of the Director of the PACA Division, Specialty Crops Program, Agricultural Marketing Service (Respondent) determining that each Petitioner was "responsibly connected" with Adams, as that term is defined under section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), during the period of time Adams violated section 2 of the PACA. These four "responsibly connected" cases were consolidated for hearing in accordance with 7 C.F.R. § 1.137 of the Rules of Practice by direction of Rulings and Preliminary Instructions filed on September 4, 2014. The hearings in these proceedings took place on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, D.C., before Administrative Law Judge (ALJ) Jill S. Clifton (Judge Clifton).¹ Although the four petitions for review of the Director's responsibly connected determinations

¹ The parties' Updated Stipulation as to Proceedings filed on June 11, 2015 provided, among other things: All evidence in the consolidated hearing will be available to be considered in each case.

were consolidated for hearing, Judge Clifton issued a separate decision regarding Steven Finberg's responsibly connected status.²

On May 19, 2017 Judge Clifton issued a Decision and Order (Initial Decision or ID) in Dockets 14-0166, 14-0168, and 14-0169, finding that Petitioners Dyer, Johnson, and Rawlings were not "responsibly connected" with Adams during the period that Adams violated section 2(4) of the PACA.

On June 21, 2017, Respondent timely filed an appeal of Judge Clifton's Initial Decision seeking to establish that Petitioners Dyer, Johnson and Rawlings have each failed to rebut the presumption that they were "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA and requesting that the determination by the Director of the PACA Division that Petitioners were "responsibly connected" with Adams during the period of its repeated and flagrant violations of the PACA be affirmed.

Specifically, Respondent requests that the Judicial Officer reverse the ALJ's holdings in the Initial Decision that: 1) Petitioners Dyer, Johnson, and Rawlings were not owners of Adams when Adams violated the PACA; and 2) Adams was the *alter ego* of Scott Grinstead

² On July 25, 2017, Judge Clifton issued her Decision and Order as to Docket 14-0167 only, affirming the determination of the Agency and finding that Petitioner Finberg was "responsibly connected" to Adams, within the meaning of the PACA, pursuant to 7 C.F.R. §499a(b)(9).

On August 21, 2017, Petitioner Finberg timely filed an appeal to the Judicial Officer asserting that he was not "actively involved" in the activities resulting in the violations, that Adams was the alter ego of Mr. Grinstead, and, therefore, that he had successfully rebutted the presumption that he was "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA.

On December 28, 2017, the Judicial Officer remanded the instant proceeding in order to put to rest any Appointments Clause claim that may arise in this proceeding in light of the Solicitor General's position in *Lucia v. SEC (Raymond J. Lucia, et al. v. S.E.C., 138 S. Ct. 2044 (2018)) (Lucia)*. On February 1, 2018, the Judicial Officer denied the Petitioner's request for reconsideration of the Remand Order in that case.

Because the hearing conducted by Judge Clifton in these proceedings took place on March 22, 2016 in Dallas, Texas, and on August 23, 2016 in Washington, D.C., and the ensuing Decision and Orders issued on July 25, 2017 predate the July 24, 2017 and December 5, 2017 actions of the Secretary of Agriculture addressing the Appointments Clause requirements; Petitioner Finberg's request for a hearing before an ALJ other than Judge Clifton has been granted, and the proceedings in Docket No. 14-0167 have been remanded for further proceedings to be conducted in accordance with *Lucia*.

when Adams violated the PACA. Also, Respondent asserts that if the Judicial Officer agrees that one or both of these conclusions are in error, the determinations by the Director of the PACA Division that Petitioners Dyer, Johnson, and Rawlings were each “responsibly connected” with Adams during the period that Adams willfully, repeatedly and flagrantly violated section 2(4) of the PACA, should be affirmed.

On February 7, 2019, I issued a Procedural Order Affirming Appeal Status Regarding Docket Nos. 14-0166, 14-0168 & 14-0169 And Remand Order Regarding Docket 14-0167. That Order confirmed that Docket Nos. 14-0166, 14-0168 and 14-0169 involving Petitioners Jonathan Dyer, Steven C. Finberg, Drew Johnson, and Michael S. Rawlings, remain consolidated and are properly and currently before the Judicial Officer, but remanded Docket No. 14-0167 involving Petitioner Finberg to the Chief Judge for further proceedings to be conducted in accordance with *Lucia*, as requested by Petitioner Finberg. (*see* FN 2, *supra*).

**PERTINENT STATUTORY, REGULATORY, AND ADJUDICATORY
ANALYTICAL FRAMEWORK**

The Department’s interpretation of PACA and policy in cases arising under the Act were set out in the Judicial Officer’s decision, *Baltimore Tomato Company, Inc.*,³ reaffirmed by the Judicial Officer in *The Caito Produce Co.* (“*Caito Produce*”),⁴ and more recently in *In re: Nicholas Allen*,⁵ where the current Judicial Officer has discussed and adopted the prior findings in *Baltimore Tomato* and *Caito Produce*.

³ *See Balt. Tomato Co.*, 39 Agric. Dec. 412, 415-16 (U.S.D.A. 1980).

⁴ 48 Agric. Dec. 602 (U.S.D.A. 1989).

⁵ PACA-APP Docket No. 15-J-0169, 78 Agric. Dec. ____ (U.S.D.A. 2019); 2019 WL 392884.

The reasons underlying the Department's policy are set forth at length in *Caito Produce* as well as *Allen*. Together, the jurisprudence of these and prior cases has created a substantial body of settled law. 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.⁶ Likewise, this Decision and Order quotes extensively from *Caito Produce*⁷ 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. 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).

* * *

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

⁶ See *The Caito Produce Co.*, 48 Agric. Dec. 602, 604 (U.S.D.A. 1989).

⁷ Due to the length of the *Caito Produce* decision, only pertinent parts will be reproduced here to provide context to the analysis under PACA in this proceeding, but the full decision is hereby adopted and incorporated herein by reference for all purposes.

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).

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) (emphases added).

The express language of the statute 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 statute 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)).

Here, however, Petitioners have successfully rebutted the presumption of “responsibly connected,” based on the unusual circumstances of this case. For the reasons discussed more

fully herein below, Judge Clifton's finding that Petitioners were not "responsibly connected" to Adams is affirmed.

Petitioners Dyer, Johnson, and Rawlings were Not Owners of Adams

Respondent contends Judge Clifton erred in ruling that Petitioners were not owners of Adams during the time of the PACA violations, arguing that such a ruling results in Petitioners being "spared the consequences of the responsibly connected determination." *Taylor and Finberg*, 636 F.3d 608 (D.C. Cir. 2011) citing *Kleiman & Hochberg*, 497 F.3d at 692 n. 8 (Appeal Petition, pp. 5-7).

As explained below, and for the reasons stated in Petitioners' Brief and the Reply Brief, incorporated herein by reference, Judge Clifton did not err in finding that Petitioners Dyer, Johnson, and Rawlings were not owners of the company when it violated the PACA. The record reflects that the PACA license records of Adams establishes there were two (2) owners of the company: API Holdings, LLC (55.30%) and Scott Grinstead (44.7%), which together held 100% of the stock of Adams (*Finber*; RX-1, pp. 1-7). Thus the agency's licensing records show that Petitioners Dyer, Johnson, and Rawlings were not owners of Adams (RX-1; and RX-2 of the agency records for *Dyer, Johnson, Rawlings*).

Respondent maintains Petitioners were owners because they had some unknown amount of money invested in CIC Partners and/or API Holdings, LLC (Appeal Petition, p. 6). But any such unknown investment in these companies by Petitioners do not show Petitioners had any ownership in Adams according to the agency's license records. Respondent cites *In re: Michael Norinsberg*, 56 Agric. Dec. 1840, 1864-5 (1997), as support for the proposition that a 2.97914% holder of stock in a company results in a petitioner being an owner. But in this case there is no evidence that Petitioners held any stock of Adams. Accordingly, based on the evidence of record in this

proceeding, Judge Clifton did not err in finding that, “Each of these 3 Petitioners was not an owner of Adams Produce Company, LLC” (ID, p. 30).

Scott Grinstead was the Alter Ego of Adams

Assuming *arguendo* that Petitioners Dyer, Johnson, and Rawlings were “owners” of Adams based on their investment in CIC Partners and/or API Holdings, LLC, as argued by Respondent (Appeal Petition, p. 6), the evidence of record supports Judge Clifton’s determination that only Scott Grinstead, and *not* Petitioners Dyer, Johnson, and Rawlings, was the alter ego of Adams during the time of the subject PACA violations. This issue has been fully and persuasively addressed in Petitioners’ Brief and the Reply Brief as summarized herein below.

There is no dispute that Grinstead engaged in extensive fraudulent activity against the federal government and the Petitioners to illegally enrich himself as CEO during his tenure at Adams (PX-1 thru PX-25). Respondent claims Grinstead was able to conduct his fraudulent activities solely as a result of his position as a director of Adams. But Respondent ignores the crucial fact that Grinstead was the Chief Executive Officer of Adams, who ran Adams’ day-to-day operations. In that capacity, Grinstead defrauded the U.S. Government, falsified the company’s financial information to Petitioners and auditors, treated corporate funds as his own, and used his office for personal gain. These extensive illegal activities demonstrate he was the alter ego of Adams, as discussed by Judge Clifton (ID, pp. 7-14).

After Petitioners were notified Adams was being investigated for fraud by the Department of Justice, when Grinstead was the CEO, Petitioners paid legal fees to Fulbright & Jaworski of over two (2) million dollars to assist the DOJ in the investigation of any fraudulent activities. During this investigation, Petitioners learned of Grinstead’s extensive fraud and deception towards Petitioners regarding the financial records of Adams, and promptly removed Grinstead.

While domination and control of a corporation by an individual in and of itself is enough to find the

company is the alter ego of the individual, another hallmark of an alter ego is evidence of diversion of corporate assets for personal use. *Labadie Coal Co. v. Black*, 672 F.2d 92, 98 (D.C. Cir. 1982). Judge Clifton found such evidence existed, as Grinstead siphoned off between \$200,000 to \$400,000 in corporate funds in 2011 and early 2012 for his personal use to pay for clothing, jewelry, personal travel for himself and his family, casino debts, strip clubs, lawn care at his home and items related to his vacation home (ID, pp. 8-9, *citing* PX-1; PX-2 and PX-3 (the U.S. Attorneys' indictment and Sentencing Memo explaining Grinstead's criminal conduct). In addition, Grinstead's undisputed and extensive fraudulent alterations of Adams' financial records to enrich himself is another clear sign that Grinstead was the alter ego of Adams (ID, pp. 6-11).

Respondent also argues Grinstead was not an alter ego of Adams after he was removed in late February and early March 2012. But Grinstead's extensive criminal activities as the CEO and alter ego of Adams continued to disrupt and ultimately destroy the company after his removal.

In a further effort to save the company, Petitioners Dyer and Johnson hired a Chief Restructuring Officer to ascertain Adams' true financial position. They also secured and invested an additional \$2,000,000 into the company to provide liquidity.⁸ Petitioners also instructed Adams' secured lender not to sweep accounts because the funds were PACA trust assets to be paid to creditors. However, the secured lender ignored Petitioners, swept the accounts for the lender's benefit, and Adams was forced to file for bankruptcy on April 25, 2017, at which time Petitioners were no longer in control of the company (Tr. 126).

In her decision, Judge Clifton provided rationale for her finding, explaining that the investment company (CIC Partners) owned by the three Petitioners had no way of knowing about the fraudulent alterations made by Scott Grimstead to the financial statements of the Adams

⁸ The additional \$2,000,000 provided would have paid in full the PACA Creditors of Adams.

Produce Company which made the company look more profitable than it actually was, thereby inducing CIC Partners to invest (ID at 7). ALJ Clifton noted that the fraudulent activities were hidden prior to CIC's investment, and the 2009 audit they relied on was not reliable, containing alterations of accounts, reclassifying them from payables to receivables (ID at 10-11).

Further, Judge Clifton found that Scott Grimstead's fraudulent and pervasive actions as to Adams rose to the level of "alter ego." She explained, "The profligate spending by CEO Scott Grimstead, using the money of Adams Produce Company LLC as if that money were his personal funds, is strong evidence that Adams Produce Company LLC was the alter ego of ... Scott David Grimstead." (ID at 8). The fraudulent activity supports the "alter ago" finding, because Petitioners had no meaningful control of the company.

Judge Clifton's rationale is based on *Taylor and Finberg*, 636 F.3d 608 (D.C. Cir. 2011), and also in large part upon the fact that Grimstead committed numerous crimes involving fraud (ID at 2), and is fully supported by the evidence of record. Judge Clifton also found that Petitioners did not know of the fraudulent activity, because it was known to no one but Grimstead and his associates. The fraudulent entries were hidden, and did not come to light until investigations uncovered them (ID at 19, *citing* Tr. 107).

Judge Clifton also made favorable findings as to the actions of the Petitioners in uncovering the fraud, and in their attempts to mitigate the damage. Not only did Petitioners Johnson and Dyer form a "Special Committee" to look into the wrongdoing, and fully cooperated with the investigation by the United States Department of Justice (ID at 11), they saw to it that the PACA debts were repaid in large part. Suppliers of produce were owed \$10,735,186.81, and Petitioners saw to it that they were paid all but \$1,928,417.74 (ID at 7-8, *citing* Tr. 112, 117, 18). Further, Petitioners paid over \$2 million to the investigators who were

hired to assist the DOJ. Petitioners set aside an additional \$2 million to cover the remaining payments to the suppliers, but, through no fault of their own, PNC Bank garnished the funds, even after being told the money was reserved for the purpose of settling the remaining PACA debt (ID at 8, *citing* Tr. 118). Judge Clifton quoted a portion of testimony as follows:

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

(ID at 9).

Judge Clifton’s analysis centers on the “alter ego” provision of the second prong of the statute, at 7 U.S.C. § 499a(b)(9). Using the standard set forth in *Taylor and Finberg*, Judge Clifton found that Adams Produce Company LLC “was the alter ego of its owner Scott Grinstead” based on facts adduced in this proceeding, including findings set forth in the United States Sentencing Memorandum as well as on testimony taken at the hearings (ID at 2, 3). Based on this analysis, founded in the specific facts of this case, Judge Clifton determined that Petitioners Dyer, Johnson and Rawlins were not “responsibly connected” as that term is defined in 7 U.S.C. § 499a(b)(9). Judge Clifton’s determination is fully supported by the evidence of record in this proceeding.

DECISION AND ORDER

For the reasons discussed herein above, Judge Clifton’s May 19, 2017 Initial Decision and Order in Dockets 14-0166, 14-0168, and 14-0169, determination that Petitioners Dyer, Johnson, and Rawlings were not “responsibly connected” with Adams Produce Company LLC during the period of August 8, 2011 through May 18, 2012 when Adams violated section 2(4) of

the PACA is hereby **AFFIRMED** and **ADOPTED** as the final order in this proceeding for all purposes, including judicial review.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties in each of the dockets identified herein above.

Done at Washington, D.C.
This 9th day of January 2020



Bobbie J. McCartney
Judicial Officer

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