UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
Cheryl A. Taylor,	)	**PACA APP Docket No. 06-0008**
	)	
Petitioner	)	**Decision & Order**

AND

In re:	)	
Steven C. Finberg,	)	**PACA APP Docket No. 06-0009**
	)	
Petitioner	)	**Decision & Order**

Decision Summary

1. When produce buyer Fresh America Corp. violated the Perishable Agricultural Commodities Act ("the PACA"), by failing to make ***full payment promptly*** to Fresh America Corp.'s produce sellers,[1] the Chief Financial Officer of Fresh America Corp., together with others, became vulnerable to the consequences under the PACA.

2. **Decision Summary Specifically as to Cheryl A. Taylor**: I decide that the Petitioner, Cheryl A. Taylor (herein frequently "Cheryl Taylor"), under the circumstances here, was ***actively involved*** in the activities resulting in PACA violations during February 2002 through February 2003, when produce buyer Fresh America Corp. left produce sellers unpaid for more

[1] in violation of section 2(4) of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4).

than $1.2 million in produce purchases. Cheryl Taylor's ***active involvement*** in such activities stems from her failure as Fresh America Corp.'s Chief Financial Officer (which she became in May 2001), to see that ***full payment promptly*** was made to Fresh America Corp.'s produce sellers. Because she was actively involved, Cheryl Taylor was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9). I decide further that Cheryl Taylor was, during produce buyer Fresh America Corp.'s PACA violations, an officer of Fresh America Corp. (Executive Vice President, Chief Financial Officer, and Secretary) who was **NOT** "***only a nominal***" officer. Consequently, whether she was ***actively involved*** or not, Cheryl Taylor was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9).

3. **Decision Summary Specifically as to Steven C. Finberg**: I decide that the Petitioner, Steven C. Finberg (herein frequently "Steven Finberg"), under the circumstances here, was **NOT** ***actively involved*** in the activities resulting in PACA violations during February 2002 through February 2003, when produce buyer Fresh America Corp. left produce sellers unpaid for more than $1.2 million in produce purchases. Steven Finberg had no involvement in seeing that ***full payment promptly*** was made to Fresh America Corp.'s produce sellers; Steven Finberg's responsibilities were primarily sales and management of sales. I decide, however, that Steven Finberg was, during produce buyer Fresh America Corp.'s PACA violations, an officer of Fresh America Corp. (Vice President of Sales and Marketing OR Executive Vice President of Business Development)[2] who was **NOT** "***only a***

[2] Steven Finberg's title, beginning in October 1999, had been "Vice President of Sales and Marketing." RX 6; RX 31 at 25, 30. The corporate minutes for the October 17, 2001 meeting show

nominal" officer. Consequently, even though he was **NOT *actively involved***, Steven Finberg was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9).

Parties and Counsel

4. Cheryl Taylor and Steven Finberg are both represented by Stephen P. McCarron, Esq., McCarron & Diess, Suite 310, 4900 Massachusetts Ave. NW, Washington, D.C. 20016.

5. The Respondent, the Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS"), is represented by Charles E. Spicknall, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

Introduction

6. The within cases are known as "***responsibly connected***" cases under the PACA, and the underlying disciplinary action is *In re Fresh America Corp.*, 66 Agric. Dec. 953, 959 (2007). The Default Decision and Order in *In re Fresh America Corp.* was issued by U.S. Administrative Law Judge Peter M. Davenport[3] and established that during February 2002 through February 2003, Fresh America Corp., a Texas corporation, left produce sellers unpaid for more than $1.2 million in produce purchases.

Steven Finberg as "Vice President of Sales and Marketing." The SEC (Securities and Exchange Commission) annual report as of March 22, 2002, shows Steven Finberg's agreement for employment for three years commencing on October 5, 2001, "as Vice President of Sales and Marketing." RX 21 at 29. Mr. Finberg testified that the "Executive Vice President" title began in September 2001 (Tr. 791-92), and that his job responsibilities and salary remained the same.

[3] The Default Decision and Order, issued on January 19, 2007 in PACA Docket No. D-06-0002, concluded that Fresh America Corp. violated section 2 of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4).

7. Both Cheryl Taylor and Steven Finberg had urged the Fresh America Corp. Board and specifically Chairman of the Board Arthur Hollingsworth, to pay payables more quickly for business reasons, including improving ratings in the Blue Book (Tr. 861-62) and the Red Book (Tr. 811) (two competing credit services, heavily relied on by produce companies), and including inspiring the confidence of customers and suppliers and potential creditors and investors. Mr. William Hasson of John Hancock (a creditor/investor) testified that, at one of the 10 to 12 Fresh America Corp. board meetings he attended, he had been asked "to talk a little bit about PACA one time." Tr. 88. Mr. Hasson testified he had said the following in response:

> You can't - - I said, You've got to adhere to PACA, or you're pretty much out of business, is what I told them. I said, You guys just need to follow the guidelines, do it, and that's my recommendation. And the board did not take the PACA issue seriously, which really shocked me. I communicated to them that I thought it was a mistake to be so cavalier with that issue, which I thought they were definitely being cavalier with the issue, and I also believed that over a period of time if that continued, that would be the downfall of the company.

Tr. 88-89.

Mr. McCarron: And when you say, that issue, what issue under PACA were you talking about?

Mr. Hasson: Well, simply delaying payment to suppliers. It's just not something that obviously - - that is the reason PACA's issued - - or written - - excuse me. And I just explained to them that, you know, if you want to be a successful company in this industry, you have to adhere to the rules of PACA.

Tr. 88-89.

8. Cheryl Taylor and Steven Finberg were NOT directors of the corporation, or members of the board, that Mr. Hasson was referring to. But they were officers of the corporation that violated 7 U.S.C. § 499b(4), and every such officer is held to be ***responsibly connected*** (which has licensing and employment restrictions ramifications under the PACA), unless he or she can prove that he or she should be excepted (by proving both prongs of the *Norinsberg*[4] two-prong test).

9. Cheryl Taylor and Steven Finberg had worked heroically to save Fresh America Corp. - - to keep the business operating. Even though Fresh America Corp. was in severe financial trouble, Cheryl Taylor and Steven Finberg did not "abandon ship" - - they continued to work for Fresh America Corp. Nevertheless, neither of them was effective in getting the produce sellers ("suppliers") paid promptly.

10. All efforts to keep Fresh America Corp. afloat failed, and Fresh America Corp. ceased operations on January 22, 2003. RX 41 at 2. Cheryl Taylor and Steven Finberg saw their work through, essentially to the end (through January 2003 for Steven Finberg, Tr. 810; longer for Cheryl Taylor who continued to respond to inquiries regarding Fresh America Corp. Tr. 622-24). The steadfast dedication of each of them was laudable (for example, *see* Tr. 648-53; 874-75) but can be hazardous under the PACA to one's career in PACA licensed ventures, if one worked as an officer, as they did, for a produce buyer such as Fresh America Corp. that left produce sellers unpaid.

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[4] *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999).

11. Cheryl Taylor and Steven Finberg took nothing more from Fresh America Corp. than the compensation for their work to which they were entitled ($175,000 per year salary for Ms. Taylor; $145,000 per year salary for Mr. Finberg). Tr. 856. Each had a three-year employment agreement that began October 5, 2001. RX 31 at 30. Their compensation was, in my opinion, reasonable in amount, considering their responsibilities and the risks they undertook staying with a company that was so distressed.

Procedural History

12. The Chief, PACA Branch, Fruit and Vegetable Programs, determined on June 23, 2006, that Cheryl A. Taylor was ***responsibly connected*** with Fresh America Corp., Arlington, Texas, during February 2002 through February 2003. Cheryl Taylor filed her Petition for Review on July 27, 2006. The agency record was filed on August 8, 2006.

13. The Chief, PACA Branch, Fruit and Vegetable Programs, determined on August 11, 2006, that Steve C. Finberg was ***responsibly connected*** with Fresh America Corp., Arlington, Texas, during February 2002 through February 2003. Steven C. Finberg, also known as Steve C. Finberg, filed his Petition for Review on September 13, 2006. The agency record was filed on September 21, 2006.

14. The within cases, that is, *In re Cheryl A. Taylor*, PACA APP Docket No. 06-0008, and *In re Steven C. Finberg*, PACA APP Docket No. 06-0009, were joined for hearing by Order of Judge Davenport dated March 27, 2007. The hearing was held on January 29-30, 2008, in Dallas, Texas, before me, Jill S. Clifton, U.S. Administrative Law Judge. Witnesses testified and exhibits were admitted into evidence. The transcript, in two volumes, is referred to as "Tr."

15. Cheryl Taylor and Steven Finberg called eight witnesses: (1) William H. Hasson, Tr. 60-133; (2) Colon Otho Washburn, Tr. 137-193; (3) Mark Prowell, Tr. 196-244; (4) Jerry Campbell, Tr. 247-263; (5) Nancy Blakney, Tr. 265-289; (6) Julie Ann Anderson, Tr. 291-325; (7) Cheryl Ann Taylor, Tr. 329-412, 465-750; and (8) Steven Craig Finberg, Tr. 752-884.

16. Petitioners' exhibits are designated by "PX". Cheryl Taylor and Steven Finberg submitted exhibits PX 1 through PX 14 [note, PX 11 has 15 tabs], each of which was admitted into evidence.

17. AMS called one witness: Josephine E. Jenkins, Tr. 885-900.

18. Respondent AMS submitted the following exhibits, each of which was admitted into evidence, each marked as "RX", found in 5 rust-colored binders. I refer to them this way:

TRX 1 through TRX 26 ("T" for Taylor), labeled: "In re: Cheryl A. Taylor" with "PACA copy" written on label.

TRX 27 through TRX 40 ("T" for Taylor), labeled: "In re: Cheryl A. Taylor," Respondent's Supplemental Exhibits.

FRX 1 through FRX 17 ("F" for Finberg), labeled: "In re: Steven C. Finberg" with "PACA copy" written on label.

FRX 18 through FRX 25 ("F" for Finberg), labeled: "In re: Steven C. Finberg," Respondent's Supplemental Exhibits.

JRX 41 through JRX 45 ("J" for Joint), labeled: "In re: Cheryl A. Taylor and Steven C. Finberg," Respondent's Supplemental Exhibits.

19. I took official notice of the Default Decision and Order issued on January 19, 2007 in PACA Docket No. D-06-0002, *In re Fresh America Corp*., together with the Hearing Clerk's cover letter and subsequent Notice of Effective Date.

20. Neal R. Gross and Co., Inc. did excellent work preparing the hearing transcript, and few corrections were requested. AMS filed no request for transcript corrections. Cheryl Taylor's and Steven Finberg's (Petitioners') Corrections to Transcript, filed April 23, 2008, are accepted, and I have made the changes accordingly, EXCEPT that, regarding Tr. 195:4, ~~malleable~~ is corrected to "valuable" on my own motion; and regarding Tr. 483:1, I made no change ("Hasson" was already there). Also, on my own motion, on page 2 of the first volume of transcript, and on pages 460 & 462 of the second volume, I hereby correct the references to counsel's clients as follows: On behalf of the ~~Complainant~~ "Respondent" is Mr. Spicknall; On behalf of the ~~Respondent~~ "Petitioners" is Mr. McCarron. Lastly, on my own motion, regarding Tr. 149:10, ~~mean~~ is corrected to "meant"; and regarding Tr. 101:6, ~~laid~~ is corrected to "late".

21. Cheryl Taylor's and Steven Finberg's Brief of Petitioners was timely filed on April 23, 2008. Cheryl Taylor's and Steven Finberg's (Petitioners') Reply Brief was timely filed on May 22, 2008.

22. AMS's (Respondent's) Proposed Findings of Fact, Conclusions of Law, and Order; and Post-Hearing Brief In Support, were timely filed on April 23, 2008. AMS's Reply Brief was timely filed on May 22, 2008.

Discussion

23. Mr. McCarron (counsel for Cheryl Taylor and Steven Finberg) in his opening statement refers to Cheryl Taylor and Steve Finberg as the "poster child" of the people that fit within the exception (the exception to being found to be ***responsibly connected***, by proving both prongs of the *Norinsberg*[5] two-prong test). Tr. 41.

24. Mr. McCarron stated that Cheryl Taylor and Steven Finberg were not actively involved, were officers only nominally, and that NTOF[6] was the alter ego of Fresh America (Tr. 38-41). After careful study of the evidence, I conclude otherwise. I concede that Cheryl Taylor and Steven Finberg may be "poster children" for "no good deed goes unpunished."

25. The term ***responsibly connected*** means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association. 7 U.S.C. § 499a(b)(9).

26. A petitioner must meet a two-prong test in order to demonstrate he or she was not ***responsibly connected***. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies that first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the

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[5] *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999).

[6] By "NTOF," Mr. McCarron was referring to North Texas Opportunity Fund. Such reference could mean North Texas Opportunity Fund LP OR its general partner North Texas Opportunity Fund Capital Partners LP; OR its general partner NTOF Fund LLC; OR North Texas Investment Advisors LLC; or some combination thereof. RX 31 at 32-33; RX 29 at 63-64.

petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. 7 U.S.C. § 499a(b)(9).

27. The United States Department of Agriculture's standard for determining whether a petitioner is actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

> The standard 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.

28. Mr. Colon Washburn had been a Director of Fresh America Corp. from 1993 to about September 2002 (Tr. 144, 184), and he was Fresh America Corp's Chief Executive Officer for nearly 2 years (October 1999 - August 2001). PX 14 at 3; Tr. 144, 154; TRX 31 at 25. Mr.

Washburn's resumé shows the following Fresh America Corp. accomplishments during his time as CEO:

Chief Executive Officer 10/99 - 8/01

- Reduced debt from $49 million to $5.4 million.
- Divested 7 non-performing or non-strategic operating units.
- Retained all key personnel.
- Implemented supply chain and "value-add" strategy.
- Relocated HR, Accounting and IT to corporate.
- Reduced overhead from $13 million (1999) to $5 million (2001).
- Identified and executed "seamless" transition to new owners.

PX 14 at 3.

29. AMS began its cross-examination of Mr. Washburn with Mr. Washburn's acknowledgment that Fresh America Corp. had financial problems during Mr. Washburn's time as CEO (Tr. 151-52):

Mr. Spicknall: Okay. As I understand it, there was - - Fresh America was experiencing some pretty significant financial problems in the late '90s and early 2000, 2001, prior to the NTOF transaction. Is that accurate?

Mr. Washburn: Yes, sir.

Mr. Spicknall: Okay. And during part of that time, at least, 1999 to 2001, you were the CEO, the chief executive officer. Right?

Mr. Washburn: Yes.

Mr. Spicknall: Okay. Now, tell me about - - there was a number of the older management who had been there for quite a period of time that were leaving the company during that late '90s, early 2000 time frame, for instance, John Gray. Why were people leaving?

Mr. Washburn: John actually didn't leave until May of 2001, and John left because he had an incredible opportunity with another company.

Mr. Spicknall: Okay. It didn't have anything -- --

Mr. Washburn: In fact --

Mr. Spicknall: Go ahead.

Mr. Washburn: John and I were personal friends, and he was very reluctant to leave, but he had a great opportunity. Prior to John leaving, he promised the company and fulfilled it that he would find someone - - find his replacement. In fact, he was really instrumental in us finding Cheryl Taylor.

Tr. 151-52.

30. Again, AMS on cross-examination of Mr. Washburn, established that Fresh America Corp. was "in fairly significant financial trouble" (Tr. 156- 57) :

Mr. Spicknall: Right. Now, Fresh America, though was in fairly significant financial trouble by 2000, 2001. Is that accurate?

Mr. Washburn: That's accurate.

Mr. Spicknall: Okay. And, in fact, that's the reason that really it had to take the NTOF transaction. It had to have that cash. Is that accurate?

Mr. Washburn: That's accurate.

Mr. Spicknall: Okay. Or it would have shut down. Is that true?

Mr. Washburn: I don't know whether we would have shut down. I felt two responsibilities in the summer of 2001 is that we keep everybody's job, and two, could we pay all our vendors.

And I felt that was the best option was to go to NTOF. And there may have been other options, but we chose NTOF.

Tr. 156-57.

31. NTOF invested substantial amounts of money in Fresh America Corp. ($5 million). Tr. 103, 145. In the end, NTOF and Arthur Hollingsworth, who was placed by NTOF as Chairman of the Board, lost their investment. During their tenure, they kept a tight rein on Fresh America Corp.'s operation (Tr. 145-46):

Mr. McCarron: All right. Now I'd like to take you to the point when the North Texas Opportunity Fund, NTOF, became involved with Fresh America. Do you recall that?

Mr. Washburn: Yes.

Mr. McCarron: All right. And do you recall them becoming - - investing $5 million and obtaining a number of shares of stock in Fresh America?

Mr. Washburn: Yes.

Mr. McCarron: All right. Now, do you recall as part of the deal how many board positions NTOF was allotted?

Mr. Washburn: I recall four positions.

Mr. McCarron: An then did you fill the fifth one?

Mr. Washburn: Yes.

Mr. McCarron: All right. Do you remember who was on the board there at NTOF?

Mr. Washburn: Yes.

Mr. McCarron: Can you tell us those names?

Mr. Washburn: Yes. Arthur Hollingsworth, Darren Miles, Luke Sweetser, Greg Campbell.

Mr. McCarron: All right. And can you tell us how the - - what changes were made in the operation of the company from the time that NTOF became involved in 2001.

Mr. Washburn: In effect, the board meetings became the management of the company. Steve and Cheryl and others had no operating authority with the company. We discussed - - everything was, the way I described it, is managed at board level.

Tr. 145-46.

32. Further (Tr. 146-47):

Mr. McCarron: All right. And what decisions were made by - - well, who actually made the decisions - - when you say, management by the board, who was actually making the decisions, the management decisions, at the board?

Mr. Washburn: Arthur Hollingsworth.

Tr. 146-47.

33. Further (Tr. 148-50):

Mr. McCarron: What about bills to pay? Who decided that?

Mr. Washburn: In essence, the board decided. There was a point during one meeting when we were getting - - burning through the $5 million quicker than anyone had anticipated, and the comment was made, Well, what do we need to do. And Arthur Hollingsworth said, Well, we need to delay paying our vendors. And both Cheryl and Steve commented, well, was Arthur aware of PACA and what that meant.

And Arthur said initially that it didn't really make any difference, that he'd managed and run other companies, and he was able to extend payments without any problem. And we got into a rather lengthy discussion about what that meant on PACA. In essence, Arthur was

going to decide who was going to get paid, when, and how, and what kind of terms those payment terms would be.

Mr. McCarron: What authority did either Cheryl Taylor or Steve Finberg have over any decisions - - what decision-making authority, if any, did they have at Fresh America after NTOF came in?

Mr. Washburn: Cheryl virtually had no authority. Steve had some authority. I think he could book trips and pretty much see the customers he wanted to, but beyond that, he had no authority.

Tr. 148-50.

34. Finally (Tr. 179):

Mr. Washburn: During the NTOF, it was very obvious that it was difficult, if not impossible, to make any decisions on a day-to-day basis in Fresh America, that they needed to be handled by Arthur during the board, or if there was a decision that needed to be made before a board meeting, they would contact Arthur to get the decision made.

Tr. 179.

35. **Discussion Specifically as to Cheryl Taylor** (paragraphs 32 through 68): Cheryl Taylor was, among other things, the Chief Financial Officer. If it was not ***her*** job to see that ***full payment promptly*** was made to Fresh America Corp.'s produce sellers, then whose job was it?

36. The chief financial officer of a produce buyer is in a unique position to see that ***full payment promptly*** is made to produce sellers. The privilege of buying produce may be lost

under the PACA (through license suspension or revocation) if produce buyers do not pay produce sellers ***full payment promptly***.

37. Cheryl Taylor concluded that she, Cheryl Taylor, never had the authority to get the produce sellers paid. Cheryl Taylor compared her own authority with that of others in management of Fresh America Corp. that had greater authority. Cheryl Taylor described her helplessness to affect the agenda of (1) Arthur Hollingsworth (Chairman of the Board beginning October 2001, TRX 31 at 25); (2) Darren Miles (President and Chief Executive Officer beginning in August of 2001; also Director beginning October 2001, TRX 31 at 25), and (3) Cheryl Taylor's subordinate Helen Mihas (Vice President, Treasurer, Controller, and Assistant Secretary, beginning in May 2001 according to TRX 4; and in April 2001 according to TRX 31 at 25).

38. Cheryl Taylor worked for Fresh America Corp. to obtain financing, including filing required SEC (Securities and Exchange Commission) documents. She began as a consultant, April 23, 2001, having committed to working for a minimum of 30 hours per week, for three months. Tr. 364-65. PX 1. Cheryl Taylor's good work - - she tried valiantly to keep Fresh America Corp. from failing; she worked hard to find financing - - is irrelevant to whether she is found to have been ***responsibly connected***.

39. Cheryl Taylor was to report to John Gray. Within the first month of her work as a consultant, during May 2001, John Gray resigned as Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., and Cheryl Taylor was "elected to the offices of Executive Vice President, Chief Financial Officer and Secretary of the Company" (Fresh America Corp.). TRX 4. Cheryl Taylor was no longer a consultant but an

employee. Cheryl Taylor had become part of Fresh America Corp.'s management. The effective date shown on TRX 4 was May _____, 2001. Simultaneously, Cheryl Taylor picked up another of John H. Gray's responsibilities, that of being the registered agent: "it is in the best interest of the Company to change the registered agent of the Company from John H. Gray to Cheryl Taylor." TRX 4. There is nothing "nominal" about these responsibilities.

40. Had Cheryl Taylor remained a consultant on contract, one who was **not** an officer, director, or holder of more than 10 per centum of the outstanding stock, it is true that there would be no basis for finding her to be responsibly connected. Cheryl Taylor's analysis is, that her job responsibilities did not change from those she was hired to do as a consultant. Tr. 635-38. I disagree. When Cheryl Taylor became Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., with respect to the Perishable Agricultural Commodities Act, everything changed.

41. Cheryl Taylor's counsel, Mr. McCarron, is extremely capable in addressing the evidence and the law. Here, he attempted to "shoehorn" Cheryl Taylor's role within Fresh America Corp. into ***exceptions*** that would allow her to escape a ***responsibly connected*** finding. Exceptions to being found to be ***responsibly connected*** are rare.

42. Before addressing counsel's attempt to fit Cheryl Taylor's work into an exception, I address the general rules that are pertinent here. Generally under the PACA, officers are ***responsibly connected*** with the corporation they serve. 7 U.S.C. § 499a(b)(9). Every officer of a corporation that violates 7 U.S.C. § 499b(4) is held to be ***responsibly connected***, unless

she can prove that she should be excepted (by proving both prongs of the *Norinsberg*[7] two-prong test).

43. **Was Cheryl Taylor Actively Involved?** (paragraphs 43 through 51). Fresh America Corp. did not pay its produce sellers ***full payment promptly***, as required by the PACA. *See* 7 C.F.R. § 46.2(aa), which contains definitions of "Full payment promptly". While I do not have the details of Fresh America Corp.'s arrangements with its produce sellers, produce sellers are entitled to be paid quickly, as quickly as ***within 10 days*** after the produce is accepted. Not only were produce sellers to Fresh America Corp. not paid quickly; they were not paid ever, to the tune of $1.2 million.[8]

44. Fresh America Corp. was disintegrating. Fresh America Corp. was losing half-a-million dollars a month. Tr. 742. Under the PACA, especially under such circumstances, financial management is required to see that the produce sellers are paid. Fresh America Corp. had taken the produce; Fresh America Corp. was required to pay for the produce. Under the PACA, other payments should have taken a lower priority than paying the produce sellers. Cheryl Taylor's failure to exercise authority over the payables, at least to see that the produce was paid for, constituted ***active involvement*** under the PACA under these circumstances.

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[7] *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999).

[8] This could have been worse. When Fresh America Corp. ceased operations on or about January 22, 2003 (JRX 41 at 2), produce sellers to Fresh America Corp. were owed about $13 million. Distributions reducing that amount were made from the PACA trust, United States District Court for the Norther District of Texas.

45. Cheryl Taylor is found to have been ***actively involved*** in Fresh America Corp.'s activities that led to the PACA violations, even though she herself did not buy produce, and she herself did not pay for other items in preference to paying for the produce.

46. I am sympathetic to Cheryl Taylor in the predicament she was in. Cheryl Taylor testified that she was the chief financial officer in name only, so that she could be the "signer" of documents prepared by lawyers who understood why the documents were needed (Tr. 365-66), that her function as the signer was merely administrative. Tr. 362. The documents might be needed to dissolve or transfer entities that would no longer be connected to Fresh America Corp. Tr. 358-59. The documents might be related to obtaining financing, which was what she had been hired to do (Tr. 361-62). Cheryl Taylor had her hands full, with her efforts to obtain financing, including filing required SEC documents.[9] Her work also required her to be involved in severing or modifying connections with numerous entities. Cheryl Taylor worked also in preparation for taking the Fresh America Corp. private, to cut expenses.

47. Cheryl Taylor maintains that she was shut out of the bill-paying process. Cheryl Taylor disputes that she was able to "exercise judgment, discretion, or control" with regard to whether produce would be paid for promptly. Cheryl Taylor testified that Helen Mihas (her subordinate), was very protective over her (Helen Mihas's) work, walled Cheryl Taylor out, and controlled such decisions (Tr. 531-33); that Arthur Hollingsworth (Chairman of the Board) controlled such decisions (Tr. 544-46); that Darren Miles (President and Chief Executive Officer) had more control over such decisions than she had.

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[9] Cheryl Taylor: I would say 90 to 95 percent of my time at any given week or time was devoted to trying to get the company refinanced and working on the SEC documents. Tr. 738. *See also* Tr. 349.

48. Cheryl Taylor's name and title were used by Fresh America Corp. to pay bills. Cheryl Taylor signed signature cards of corporate checking accounts, and her signature was stamped on corporate checks by machine; after all, she was the Chief Financial Officer. Cheryl Taylor neither bought produce nor paid for it. Cheryl Taylor did not determine the preference or priority for paying for produce compared to other payables. Cheryl Taylor did not exercise authority over the payables.

49. Nevertheless, Cheryl Taylor was the "Executive Vice President, Chief Financial Officer, and Secretary," and regardless of why she had ascended to those responsibilities, they were hers. Where, as here, produce sellers were left unpaid for more than $1.2 million in produce purchases, the chief financial officer of the produce buyer was ***actively involved*** in the produce buyer's activities that resulted in PACA violations, because the chief financial officer was uniquely positioned to see that ***full payment promptly*** was made to produce sellers.

50. Cheryl Taylor's failure to see that ***full payment promptly*** was made to Fresh America Corp.'s produce sellers, constituted ***active involvement*** in the activities resulting in the produce buyer's PACA violations (violations of section 2 of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499b(4)). This is consistent with *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-611 (1999), because the chief financial officer of a produce buyer is expected to "exercise judgment, discretion, or control" with regard to whether produce will be bought and whether produce will be paid for promptly.

51. Cheryl Taylor cannot prove the first prong of the exception, because she was **actively involved**, within the meaning of 7 U.S.C. § 499a(b)(9), in the activities which led to Fresh

America Corp.'s PACA violations. Thus, Cheryl Taylor must be determined to be ***responsibly connected*** with Fresh America Corp. during its PACA violations.

52. **Was Cheryl Taylor "*Only a Nominal*" Officer?** (paragraphs 52 through 57). As indicated in paragraph 32, there was nothing "nominal" about Cheryl Taylor's responsibilities as Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp. Whatever was said to Cheryl Taylor to induce her to accept the responsibilities, once she did, she became part of Fresh America Corp.'s management.

53. Cheryl Taylor testified that her responsibilities did not change from those she had undertaken when she was not an employee of Fresh America Corp. but a contractor. Tr. 362, 749. Her compensation also did not change. Tr. 362, 749. Cheryl Taylor was a certified public accountant who had worked her way up in Coopers & Lybrand, auditing, and had valuable public company experience and valuable bankruptcy experience as controller with the Great Train Store and valuable refinancing experience with Intellisys Group. Tr. 331-34. Cheryl Taylor's compensation, $175,000 per year salary (RX 31 at 30, Tr. 663), was commensurate with her responsibilities. Tr. 740.

54. Cheryl Taylor testified that neither her reporting to the Board nor her signing of Board minutes (which were severely edited by Chairman Arthur W. Hollingsworth to exclude details she believed should be included) was more than administrative. Tr. 526.

55. Cheryl Taylor is an admirable and impressive professional, and I appreciate the courage she exhibited in taking on and in persisting in the work for Fresh America Corp. Her courage and her ethical nature were also exhibited in about October 2002, when she blocked $868,000 from going out of Fresh America Corp. Had those funds gone out, she testified, that

would have been in violation of Fresh America Corp.'s covenant with its senior lender, Bank of America, and would have had to be disclosed in SEC reports. PX 3 at 1, Tr. 407-11.

56. I appreciate the difficult situation Cheryl Taylor found herself in at Fresh America Corp. and would prefer that she not be subjected to licensing restrictions under the PACA and employment restrictions under the PACA. Nevertheless, it is obvious that when Cheryl Taylor became Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., in May 2001, she was from then on vital to Fresh America Corp. and an important and influential officer. There is no question that Cheryl Taylor had "an actual, significant nexus with the violating corporation during the violation period." Thus, she cannot demonstrate that she was only nominally an officer of a corporation. *In re Philip J. Margiotta*, 65 Agric. Dec. 622, 635 (2006), citing *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

57. By being the Executive Vice President, Chief Financial Officer and Secretary of Fresh America Corp., who was **NOT** "***only a nominal***" officer, Cheryl Taylor was **responsibly connected** with Fresh America Corp. as defined by 7 U.S.C. § 499a(b)(9), when Fresh America Corp. violated the PACA.

58. **Was Fresh America Corp. the "*Alter Ego of Its Owners*"?** (paragraphs 58 through 68). Cheryl Taylor was not an owner of Fresh America Corp. She had stock options, but she did not exercise them. During the time she held them, Cheryl Taylor's stock options were or became worthless. Tr. 705.

59. Mr. McCarron's opening statement asserted that **NTOF** (*see* footnote 6) was the dominating influence over Fresh America Corp.; Mr. McCarron's post-hearing briefs asserted that **Arthur Hollingsworth** was the dominating influence over Fresh America Corp.

60. Here, to prove the **alter ego** exception under 7 U.S.C. § 499a(b)(9), Cheryl Taylor must prove that NTOF, or Arthur Hollingsworth, or both, so dominated Fresh America Corp. as to negate its separate identity. *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 388 (2000).

61. When NTOF arrived with its infusion of $5 million (Tr. 376), NTOF did influence the way Fresh America Corp. did business. NTOF had influence in placing the Chairman of the Board (Arthur Hollingsworth), and 3 additional board members, including one who was also the President and Chief Operating Officer (Darren Miles). Tr. 145-46. (If John Hancock had placed a Board member of its choice, NTOF would have placed only three, instead of four, but John Hancock chose not to. Tr. 111.)

62. Mr. Washburn, as CEO of Fresh America Corp., was optimistic about bringing in NTOF (Tr. 157-58):

Mr. Washburn: * * * I felt two responsibilities in the summer of 2001 is that we keep everybody's job, and two, could we pay all of our vendors. And I felt that was the best option was to go to NTOF. And there may have been other options, but we chose NTOF.

Mr. Spicknall: Okay. And when you say, you chose NTOF, you just talked about the fact that as a result of that transaction, they got 50,000 shares of that Series D preferred stock that was created, which gave them significant voting rights in the company, and that it - - is that accurate?

Mr. Washburn: I don't recall the specific number, sir.

Mr. Spicknall: Okay. But essentially you knew at the time of the NTOF transaction before it was signed that they were going to appoint - - they were going to replace you as the CEO. Is that accurate?

Mr. Washburn: Please restate that question.

Mr. Spicknall: You knew prior to the signing of the NTOF transaction that Darren Miles was going to be the new CEO of the company if the company went through with the NTOF transaction. Is that accurate?

Mr. Washburn: That's accurate.

Tr. 157-58.

63. Cheryl Taylor had helped bring NTOF in (Tr. 159):

Mr. Spicknall: Well, who was responsible for briefing the board on the details of the NTOF transaction? Would that be Cheryl Taylor?

Mr. Washburn: It would have been a combination of myself and Cheryl.

Tr. 159.

64. Cheryl Taylor personally executed the agreement with NTOF on behalf of Fresh America as the company's Chief Financial Officer. TRX 29 at 63.

65. After NTOF's and Arthur Hollingsworth's arrivals at Fresh America Corp., other important influences on Fresh America Corp. remained. Fresh America Corp. had and needed creditors and/or investors beyond NTOF. For example, Bank of America was Fresh America Corp.'s senior debt holder; and John Hancock had invested a $15 million subordinated debt tranche with Fresh America Corp. in about 1997 or 1998 (Tr. 61), with another $5 million added later, which together added up to $20 million. For its $20 million, John Hancock got

27,000 shares of preferred Series D stock. RX 30, p. 2. Tr. 699. TRX 31 at 7. The John Hancock shares were owned by three distinct corporate entities: (1) the John Hancock Life Insurance Company, which held 24,840 shares; (2) the John Hancock Variable Life Insurance Company, which held 1,620 shares; and (3) the Investors Partner Life Insurance Company, which held 540 shares. TRX 29 at 65-66. Mr. William Hasson of John Hancock started attending (to observe, rather than participate in) Fresh America Corp. board meetings after NTOF made their investment in the company. He attended probably 10 to 12 such board meetings. Tr. 64-66, 70-71.

66. John Hancock lost the $20 million (Tr. 93-94) it had loaned to Fresh America Corp., and the John Hancock Board was already prepared to write off its $20 million loan, even when NTOF was bringing $5 million (Tr. 103-05):

Mr. Hasson: Well, you know, the recommendation of John Hancock at the time (when NTOF came in) was to write off the loan and let it go, and I asked them if I could have permission to at least try to get something for our investment. But the board's (John Hancock's board) decision at that time was to write if off and forget about it, and I chose not to do that, tried to at least get something out of it. I ended up not doing - - getting anything out of it. They were right; I was wrong, but I just didn't want to give up.

Mr. Spicknall: What was the mood at Fresh America at the time? Was there real hope that the company could be turned around with the money from NTOF?

Mr. Hasson: There was. Yes.

Mr. Spicknall: Okay. And why was that hope alive, considering the state of the company at that time?

Mr. Hasson: Well, I think they felt with the liquidity, which obviously is the driver of these types of companies, they could rebuild the business at each location with the new management team they had and survive. That just didn't seem to work out for them. Tr. 103-05.

67. Fresh America Corp.'s articles of incorporation permitted the company to issue 10,000,000 shares of common stock. TRX 31 at 7. Fresh America Corp. had 8,410,098 shares of common stock outstanding as of March 22, 2002. TRX 31 at 1, TRX 32 at 6. While NTOF owned no shares of common stock, the common stock was widely held as of March 15, 2002. Entities that owned 5% or less of the outstanding common stock owned roughly 45% of all the outstanding common stock; and the other 55% of all the outstanding common stock was owned by three entities, none of which was NTOF: an individual named Larry Martin owned 37.7% of the outstanding common stock; Gruber & McBaine Capital Management owned 10.6% of the outstanding common stock; and DiMare Homestead, Inc. owned 6.3% of the outstanding common stock. TRX 31 at 33-34.

68. Cheryl Taylor cannot prove that Fresh America Corp.'s owners were NTOF, or Arthur Hollingsworth, or both. Cheryl Taylor also cannot prove that Fresh America Corp. lost its separate identity as a result of the influence of NTOF, or Arthur Hollingsworth, or both. Fresh America Corp.'s distinct identity is evident, for example, to those who lost their investment in Fresh America Corp. (Bank of America presumably salvaged something by selling its receivable). The others described in paragraphs 65 and 67, plus others not specifically mentioned (Fresh America Corp.'s owners, shareholders and other investors, including lenders) lost their investment.

69. **Discussion Specifically as to Steven Finberg** (paragraphs 69 through 87): Fresh America Corp. had exciting roots. Its predecessor, Gourmet Packing Company (frequently herein, "Gourmet Packing"), had been created to supply Sam's Club with produce and to run those departments. Tr. 756, 752. Sam's Club was about 99.9% of Gourmet Packing's business. Tr. 756.

70. Gourmet Packing became Fresh America Corp. through an IPO (initial public offering), in about 1993. Tr. 758.

71. At its peak, Fresh America Corp. provided produce to 375 Sam's Club locations throughout the country. TRX 31 at 6.

72. Steven Finberg first worked for Gourmet Packing beginning when he was still in college, during summers when he was in Houston Texas. Tr. 752. Steven Finberg then "resigned" to return to college, but before his two weeks "notice" was effective, Gourmet Packing called to put him to work as general manager of two locations in Austin, Texas, while he was completing college. Tr. 753-54. Three days after that call, Gourmet Packing called again to make Steven Finberg district manager of three additional locations, in San Antonio, Texas. I believe this was about August 1989. Tr. 753.

73. Sam's Club was growing, Gourmet Packing was growing, and Steven Finberg was growing. Steven Finberg's description is helpful. This excerpt of Steven Finberg's testimony begins about 1992 (Tr. 756-59):

> To make a long story short, out of about 400-plus employees of Gourmet Packing at the time, I was selected and offered a position to go work in the Sam's Club home office in Bentonville, Arkansas, as the corporate liaison and to learn supply chain. Sam's Club wanted someone to understand the

mentality and their culture and be able to convey that throughout our organization.

And at that time, again, Sam's Club was our business. I usually say 99.9 percent. We were created to supply Sam's Club with produce and run those departments. We may have had some outside business, but it would barely register a percentage point of the overall sales contribution.

I was in Bentonville, Arkansas, moved there July of 1992, less about two weeks prior to my getting married in Austin, and started my career, that phase of my career, as the customer service manager of Gourmet Packing.

In December of 1992, I was promoted to director of customer service. My role as director of customer service was to work closely and coordinate the different initiatives of the Sam's Club buyers within our own organization, and at that time, the one distribution center in Houston, Texas had expanded to also include locations in Dallas and Atlanta.

By 1995, when I departed Bentonville, Arkansas, to return to what was still our corporate office of Gourmet Packing in Houston, Texas, I was now, I believe, director of national programs. Sam's Club was still in the high 90s as far as the percent of our business. I was with - - at that time, the Sam's Club program - -

It's very important, if I could have a little latitude to explain this - - we mentioned the Sam's - - we mentioned Wal-Mart quite frequently throughout the last two days' testimonials. There is a distinction. Gourmet Packing had and built distribution centers - - I'm sorry. And there was also an IPO [Initial Public Offering] where we became Fresh America in 1993.

Gourmet Packing, now Fresh America, built distribution centers to function as a perishable distribution center for the Wal-Mart Corporation, to supply Sam's Clubs with perishable commodities. These were large distribution centers that would do in excess of about $50 million a sale. This is before Sam's Club and Wal-Mart got into the business of perishable distribution. They used to have dry and select freezer and

> refrigerated capabilities. Now they were starting to build perishable distribution centers.
>
> We entered into an agreement in 1995, a five-year agreement, which was going to allow our company enough time to divest our business, knowing that the Sam's Club distribution piece of the business was going away, not because of any performance issues, but the parent company, Wal-Mart, was building distribution centers. So that's why I returned back in 1995 to our corporate office.
>
> In December of 1995, I was hired and promoted to general manager of our Arlington, Texas, distribution center, right up the road. For two years, I was the general manager of that location, responsible for the entire P&L, under parameters set by corporate of that operation. At that time, all of my business was to supply the neighboring Sam's Clubs in this part of the state of Texas and Oklahoma and, I believe, Arkansas with product for the Sam's Club produce departments.

Tr. 756-59.

74. During 1995, Steven Finberg went from being Fresh America Corp.'s director of national programs (with Sam's Club still being in the "high 90s" percentage of Fresh America Corp.'s business), to being promoted to general manager of the Arlington, Texas distribution center. Tr. 757-59.

75. Fresh America Corp. was at a crossroads in 1995. When Wal-Mart / Sam's Club entered into a 5-year contract with Fresh America Corp. to cover 1995 through 2000, everyone understood that at the end of that 5 years, Fresh America Corp. would lose its Sam's Club business, because Sam's Club would be doing internally what Fresh America Corp. had been doing for Sam's Club. Tr. 758-59.

76. Gourmet Packing, and then Fresh America Corp., had built perishable distribution centers to serve the Wal-Mart corporation, to supply Sam's Club with perishable

commodities. Tr. 758. Fresh America Corp. had about 8 such distribution facilities by the end of 2001. TRX 31 at 3.

77. The "Acquisitions/Divestitures" section of Fresh America Corp.'s SEC Annual Report for the year ending December 2001, includes the following:

> Because the Company understood the Sam's Agreement would expire in 2000, in 1995 the Company began to implement a strategy to attract new customers over a wider geographical area and diversify its customer base into other areas of produce distribution. In executing its strategy, the Company completed 16 acquisitions from 1995 through 1998 and added various customer alliances involving fresh produce procurement, warehousing, distribution and/or marketing. Through these acquisitions and new customer relationships, the Company expanded its cold chain distribution network to become national in scope, diversified its customer and supplier relationships and expanded its value-added processing capabilities. Six of these acquisitions in the specialty food service business never achieved sufficient market presence and were closed or sold during the period from September 1999 to May 2001.

TRX 31 at 6.

78. Fresh America Corp. had to operate "full speed ahead" for the 5 years 1995-2000, to take good care of Sam's Club, its primary customer. At the end of that 5 years, Fresh America Corp. needed to have "divest"ed the business: closed down, scaled back, or otherwise changed proportions to match the loss of Sam's Club; or, Fresh America Corp. needed to have developed additional customers, to replace the Sam's Club business, and Fresh America Corp. tried. Losing the Sam's Club business was the beginning of the end, looking back at Fresh America Corp.'s boom-to-bust.

79. **Was Steven Finberg Actively Involved?** (paragraphs 79 through 81). Fresh America Corp. did not pay its produce sellers ***full payment promptly***, as required by the PACA. AMS argues that Steven Finberg was actively involved by virtue of his oversight responsibilities including his participation in Board meetings. I disagree. Steven Finberg was not a Director; he was not a Board member. He was invited to the meetings to report the state of sales. Steven Finberg did not purchase product; he did not issue purchase orders. Tr. 835. Steven Finberg had no authority to determine payment priorities. I am persuaded that Steven Finberg worked valiantly to increase sales, trying to replace the loss of most of the Wal Mart business. Mr. Finberg testified about some of the happenings that interfered with his attempts to improve the "top" line (Tr. 846), but I need not detail those here. Steven Finberg's responsibilities, as Vice President of Sales and Marketing OR Executive Vice President of Business Development, did not ***actively involve*** him in the activities that resulted in the PACA violations.

80. I am reminded of *Philip J. Margiotta*, who, even though he was the manager of the business (who was also a corporate officer), was not ***actively involved*** when, unbeknownst to Mr. Margiotta, another employee paid unlawful bribes and gratuities to a USDA produce inspector:

> . . . Being actively involved in innocent activities can result in a violation of the PACA; however, I find, under the circumstances in the instant proceeding, Petitioner's management of M. Trombetta & Sons, Inc.'s Hunts Point Terminal Market facility alone is not sufficient to constitute active involvement in the activities resulting in M. Trombetta & Sons, Inc.'s violations of the PACA.

65 Agric. Dec. 622, 638 (2006).

81. Steven Finberg's circumstances can of course be distinguished from those of *Philip J. Margiotta*, in part regarding awareness. Steven Finberg was aware that Fresh America Corp. was not timely paying its produce sellers ("suppliers"); *Philip J. Margiotta* was unaware that M. Trombetta & Sons, Inc., through an employee, was paying unlawful bribes and gratuities. Nevertheless, I cite *Philip J. Margiotta* to show that being a highly responsible, highly placed corporate officer does not automatically make one "***actively involved***."

82. **Was Steven Finberg "*Only a Nominal*" Officer?** (paragraphs 82 through 85): During produce buyer Fresh America Corp.'s PACA violations, that is, from February 2002 through February 2003, Steven Finberg was Vice President of Sales and Marketing OR Executive Vice President of Business Development (*see* footnote 2). There was nothing "nominal" about Steven Finberg's responsibilities. There is no question whether he had "an actual, significant nexus with the violating corporation" - - clearly, he did. He was a valuable member of the team that tried to keep Fresh America Corp. in business (*see* paragraphs 8 through 11). Steven Finberg cannot prove the second prong of the two-prong exception; he cannot demonstrate that he was only nominally an officer of a corporation. *In re Philip J. Margiotta*, 65 Agric. Dec. 622, 635 (2006), citing *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

83. I would prefer that Steven Finberg not be subjected to licensing restrictions under the PACA and employment restrictions under the PACA. I agree with Mr. Spicknall, though, that the PACA Act and regulations are "tough" for good reason (AMS's initial Brief at 10):

> The PACA "is admittedly and intentionally a 'tough' law," that was "designed primarily for the protection of the producers of perishable agricultural products -- most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing. . . ." *See* S. Rep. No. 2507, 84th Cong., 2d Sess. at 3 (1956). Any person who is or has been responsibly connected with a business entity that has been found to have committed any flagrant or repeated violations of Section 2 of the PACA may not be employed by any PACA licensee for at least one year. *See* 7 U.S.C. § 499h(b).[10] After one year, if the prospective employer furnishes and maintains a surety bond in an amount set by the Secretary, the responsibly connected person may be employed by a PACA licensee. *See id*.[11] The Secretary may approve employment of the responsibly connected person without a bond after two years. *See id*.

AMS's initial Brief at 10.

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[10] The Secretary's power to refuse to issue a PACA license to individuals responsible for PACA violations was initially limited to situations in which the applicant or one closely connected with the applicant was responsible for any violation that had led to the prior revocation of a PACA license. *See* H.R. Rep. No. 1041, 71st Cong., 2d Sess. at 3-4. Over time, the PACA was amended to increase the Secretary's power in order to prevent individuals who were responsible for violations of the PACA from evading the statute's penalties. *See* H.R. Rep. No. 489, 73rd Cong., 2d Sess. at 2-3 (1934); H.R. Rep. No. 2116, 70th Cong., 2d Sess. at 1-2 (1936); S. Rep. No. 2233, 70th Cong., 2d Sess. at 1-2 (1936); S. Rep. No. 956, 75th Cong., 1st Sess. at 1-3 (1937); S. Rep. No. 2507, 84th Cong., 2d Sess. at 3 (1956).

[11] "Employment" is defined by the PACA as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." *See* 7 U.S.C. § 499a(b)(10).

84. The PACA, by "casting a wide net," deters people in responsible positions from allowing produce sellers to go unpaid - - nay, from allowing produce sellers even to wait for the prompt payments to which they are entitled. These people in responsible positions include all partners, officers, directors, and holders of more than 10 percent of the outstanding stock of a corporation.

85. By being the Vice President of Sales and Marketing OR Executive Vice President of Business Development of Fresh America Corp., who was **NOT** "***only a nominal***" officer, Steven Finberg was **responsibly connected** with Fresh America Corp. as defined by 7 U.S.C. § 499a(b)(9), when Fresh America Corp. violated the PACA.

86. **Was Fresh America Corp. the "*Alter Ego of Its Owners*"?** (paragraphs 86 through 87). Steven Finberg was an owner of Fresh America Corp., but the parties stipulated that he owned less than 10% per cent of the outstanding common stock; in fact, Steven Finberg owned far less than 5% of the outstanding common stock. Steven Finberg also had stock options that he did not exercise, which, during the time he held them, were or became worthless. Nevertheless, for the "**alter ego**" analysis, Steven Finberg was an owner.

87. The remainder of the "**alter ego**" analysis with regard to Steven Finberg is identical to that for Cheryl Taylor, and I incorporate paragraphs 59 through 68, applying them to Steven Finberg rather than Cheryl Taylor.

Findings of Fact and Conclusions

88. Paragraphs 88 through 108 contain intertwined Findings of Fact and Conclusions.

89. The Secretary of Agriculture has jurisdiction over Cheryl A. Taylor, over Steven C. Finberg, also known as Steve C. Finberg, and over the subject matter involved herein.

90. Fresh America Corp., a Texas corporation, "ceased operations January 22, 2003," according to the PACA License Renewal Application form marked "NOT RENEWING," received by AMS December 2, 2003. JRX 41.

91. During February 2002 through February 2003, Fresh America Corp. failed to make full payment promptly in the amount of $1,223,284.48, to 82 sellers in 1,149 transactions, for the purchase of perishable agricultural commodities that it received and accepted in interstate and foreign commerce, in willful, repeated and flagrant violation of section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)). *See* Default Decision and Order issued on January 19, 2007 against Fresh America Corp. by U.S. Administrative Law Judge Peter M. Davenport. *In re Fresh America Corp.*, 66 Agric. Dec. 953, 959 (2007).

92. Fresh America Corp. was not the alter ego of Arthur Hollingsworth. Paragraphs 58 through 68.

93. Fresh America Corp. was not the alter ego of North Texas Opportunity Fund LP. Paragraphs 58 through 68.

94. An officer need not control a company to be found ***responsibly connected***.

95. During Fresh America Corp.'s failure to pay produce sellers (as specified in paragraph 91), Cheryl Taylor was an officer of Fresh America Corp., to-wit: Executive Vice President, Chief Financial Officer, and Secretary of Fresh America Corp. TRX 4.

96. During Fresh America Corp.'s failure to pay produce sellers (as specified in paragraph 91), Steven Finberg was an officer of Fresh America Corp., to-wit: Vice President of Sales and Marketing OR Executive Vice President of Business Development (*see* footnote 2).

97. Cheryl Taylor was not a director of Fresh America Corp.

98. Steven Finberg was not a director of Fresh America Corp.

99. Cheryl Taylor did not own Fresh America Corp. stock. [Cheryl Taylor had stock options, never exercised.]

100. Steven Finberg owned Fresh America Corp. stock, but the parties stipulated that he owned less than 10% per cent of the outstanding common stock (Tr. 851-52); in fact, Steven Finberg owned far less than 5% of the outstanding common stock (TRX 31 at 33-34). Steven Finberg also had stock options that he never exercised.

101. The burden is on each Petitioner to demonstrate by a preponderance of the evidence that he or she was not responsibly connected with Fresh America Corp., despite being an officer of Fresh America Corp.

102. Cheryl Taylor failed to prove that, while she was an officer of Fresh America Corp. (Executive Vice President, Chief Financial Officer, and Secretary), **she was not *actively involved*** in Fresh America Corp.'s activities that resulted in Fresh America Corp.'s PACA violations. Paragraphs 43 through 51.

103. Steven Finberg carried his burden of proof and proved that, while he was an officer of Fresh America Corp. (Vice President of Sales and Marketing OR Executive Vice President of Business Development), **he was not *actively involved*** in Fresh America Corp.'s activities that resulted in Fresh America Corp.'s PACA violations. Paragraphs 79 through 81.

104. In order for a petitioner to demonstrate that he or she was only nominally an officer of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating corporation during the violation period. Under the actual, significant nexus standard, responsibilities are placed

upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others. *In re Philip J. Margiotta*, 65 Agric. Dec. 622, 635 (2006), citing *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

105. Cheryl Taylor failed to prove that, while she was an officer of Fresh America Corp. (Executive Vice President, Chief Financial Officer and Secretary), **she was *only a nominal*** officer of Fresh America Corp. Paragraphs 52 through 57.

106. Steven Finberg failed to prove that, while he was an officer of Fresh America Corp. (Vice President of Sales and Marketing OR Executive Vice President of Business Development), **he was *only a nominal*** officer of Fresh America Corp. Paragraphs 82 through 85.

107. Cheryl Taylor was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9), during February 2002 through February 2003, when Fresh America Corp. willfully, flagrantly, and repeatedly violated the PACA (7 U.S.C. § 499b(4)). Paragraphs 43 through 57.

108. Steven Finberg was ***responsibly connected*** with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9)), during February 2002 through February 2003, when Fresh America Corp. willfully, flagrantly, and repeatedly violated the PACA (7 U.S.C. § 499b(4)). Paragraphs 79 through 85.

Order

109. This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, contained in his letter dated June 23, 2006, that Cheryl A. Taylor was ***responsibly connected*** with Fresh America Corp., Arlington, Texas, during Fresh America Corp.'s PACA[12] violations.

110. Accordingly, Cheryl A. Taylor is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499d(b), 499h(b)), effective 35 days after service of this Order on Cheryl A. Taylor.

111. This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, contained in his letter dated August 11, 2006, that Steven C. Finberg, also known as Steve C. Finberg, was ***responsibly connected*** with Fresh America Corp., Arlington, Texas, during Fresh America Corp.'s PACA[13] violations.

112. Accordingly, Steven C. Finberg, also known as Steve C. Finberg, is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499d(b), 499h(b)), effective 35 days after service of this Order on Steven C. Finberg.

113. This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed within thirty (30) days after service,

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[12] when Fresh America Corp. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during February 2002 through February 2003.

[13] when Fresh America Corp. violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during February 2002 through February 2003.

pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.
this 19th day of March 2009

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Bldg Room 1031
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Washington, DC 20250-9203
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APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition*. Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record*. Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed

in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument*. A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument*. Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement*. The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument*. The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs*. By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal*. As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145