UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA-APP Docket No. 09-0161
	)	
Samuel S. Petro,	)	
	)	
Petitioner	)	
	)	
	and	
	)	
In re:	)	PACA-APP Docket No. 09-0162
	)	
Bryan Herr,	)	
	)	**Order Denying Petition to Reconsider**
Petitioner	)	**Decision as to Bryan Herr**

PROCEDURAL HISTORY

On February 29, 2012, Karla D. Whalen, Chief, PACA Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Division Chief], filed Respondent's Petition for Reconsideration of the Decision and Order as to Petitioner Bryan Herr [hereinafter Petition to Reconsider] requesting that I reconsider *In re Samuel S. Petro* (Decision as to Bryan Herr), __ Agric. Dec. ___ (Jan. 18, 2012). On March 20, 2012, Bryan Herr filed a response to the Division Chief's Petition to Reconsider, and on March 26,

2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, the Division Chief's Petition to Reconsider.

DISCUSSION

The Division Chief raises three issues in the Petition to Reconsider. First, the Division Chief contends I erroneously found Mr. Herr demonstrated by a preponderance of the evidence that he was not actively involved in the activities resulting in violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by Kalil Fresh Marketing, Inc., d/b/a Houston's Finest Produce Co. [hereinafter Houston's Finest].[1] The Division Chief identifies three acts and one failure to act which purportedly resulted in Houston's Finest's violations of the PACA: (1) Mr. Herr's involvement with Houston's Finest's obtaining lines of credit; (2) Mr. Herr's July or August 2002 recommendation to John Kalil, president of Houston's Finest, of a person to install refrigeration equipment in Houston's Finest's warehouse; (3) Houston's Finest's payment for some of the produce which Houston's Finest purchased from Country Fresh, Inc.; and

[1]Houston's Finest willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to 55 sellers of the agreed purchase prices in the amount of $1,617,014.93 for 645 lots of perishable agricultural commodities, which Houston's Finest purchased, received, and accepted in interstate and foreign commerce, during the period October 11, 2007, through February 17, 2008. *In re Kalil Fresh Mktg., Inc.*, 69 Agric. Dec. 979 (2010).

(4) Mr. Herr's failure to exercise control over Houston's Finest's finances. (Pet. to Reconsider at 3-13.)

The record establishes that Mr. Herr was involved with Houston's Finest's obtaining a line of credit from Southwest Bank of Texas in July 2002 and a line of credit from Amegy Bank in April 2003. Mr. Herr's involvement with these lines of credit was at the behest of his partner, Samuel S. Petro, whose cousin was Mr. Kalil. Mr. Petro arranged for Houston's Finest's lines of credit from Southwest Bank of Texas and Amegy Bank and paid the banks when Houston's Finest failed to pay. Based upon the record before me, I find Mr. Herr's involvement with Houston's Finest's lines of credit from Southwest Bank of Texas in July 2002 and from Amegy Bank in April 2003 was limited to ministerial functions only and did not constitute active involvement in activities that resulted in Houston's Finest's violations of the PACA, which occurred more than 4 years after Houston's Finest obtained the lines of credit in question. (Tr. 61-64, 73-79, 135-36, 147, 170-72, 228-30.)[2]

As for the recommendation of a person to install refrigeration equipment, Mr. Herr demonstrated that Marriott Corporation, one of Houston's Finest's customers, suggested that Houston's Finest add to its refrigeration capacity and that, in July or August 2002, Mr. Kalil asked Mr. Herr if he could recommend a person to install refrigeration equipment in Houston's

[2]References to the transcript of the January 20-21, 2011, hearing in this proceeding are indicated as "Tr." and the page number.

Finest's warehouse. Mr. Herr recommended a person to Mr. Kalil, and Mr. Kalil subsequently decided to have the additional refrigeration equipment installed by the person recommended by Mr. Herr. (Tr. 357-58, 401-04.) I find Mr. Herr demonstrated by a preponderance of the evidence that his recommendation more than 5 years prior to Houston's Finest's PACA violations did not constitute active involvement in the activities resulting in Houston's Finest's PACA violations.

As for the payments made by Houston's Finest to Country Fresh, Inc., for produce purchases, Mr. Herr demonstrated by a preponderance of the evidence that he was not involved with Houston's Finest's purchase of, or payment for, perishable agricultural commodities from any produce seller (Tr. 167-68).

Moreover, I reject the Division Chief's contention that Mr. Herr's failure to exercise control over Houston's Finest's finances constitutes active involvement in the activities resulting in Houston's Finest's violations of the PACA. Generally, active involvement in activities resulting in a violation of the PACA requires more than a failure to act.[3] While I disagree with the Division Chief's contention that Mr. Herr's failure to act supports the conclusion that Mr. Herr was actively involved in the activities resulting in Houston's Finest's

[3] *In re Donald R. Beucke*, 65 Agric. Dec. 1341, 1356-58 (2006) (stating, generally, active involvement in activities resulting in a violation of the PACA requires more than an act of omission), *aff'd*, 314 F. App'x 10 (10th Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009); *In re Edward S. Martindale*, 65 Agric. Dec. 1301, 1318-20 (2006) (same).

violations of the PACA, I do not hold that an act of omission can never constitute active involvement in activities resulting in a violation of the PACA. I only conclude, based on the record before me, that Mr. Herr's failure to act does not constitute active involvement in the activities resulting in Houston's Finest's PACA violations.

Second, the Division Chief contends I erroneously failed to state clearly whether the actual, significant nexus test used to determine whether a person was only nominally a partner, officer, director, or shareholder of a violating PACA licensee was superceded by the test articulated in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011) (Pet. to Reconsider at 18-19).

The Court in *Taylor* states it was not articulating a new test that would supercede the actual, significant nexus test used to determine whether a person was only nominally an officer of a violating PACA licensee. Instead, the Court emphasized that, under the actual, significant nexus test, the crucial inquiry in determining whether a person is merely a nominal officer is whether the person who holds the title of officer has the power and authority to direct and affect a company's operations, as follows:

> Under the "actual, significant nexus" test, "the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority." *Veg–Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (internal quotation marks omitted). Although we have consistently applied the 'actual, significant nexus' test, our cases make clear that what is really important is whether the

person who holds the title of an officer had actual and significant power and authority to direct and affect company operations.

* * *

> As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry.

Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 615, 617 (D.C. Cir. 2011).

The "actual, significant nexus" test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9)[4] wherein Congress amended the definition of the term "responsibly connected" specifically to provide partners, officers, directors, and shareholders who would otherwise fall within the statutory definition of "responsibly connected" a two-prong test whereby they could rebut the statutory presumption of responsible connection. Congress could have explicitly adopted the "actual, significant nexus" test; however, the two-prong test in the 1995 amendment to 7 U.S.C. § 499a(b)(9) contains no reference to "actual, significant nexus," power to curb PACA violations, or power to direct and affect operations. Instead, Congress provides that a partner, officer, director, or shareholder, for the second prong of the two-prong test, could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was "only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license" (7 U.S.C. § 499a(b)(9)).

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[4] *See Bell v. Dep't of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994) (stating a petitioner may demonstrate he was only a nominal officer, director, or shareholder by proving that he lacked "an actual, significant nexus" with the violating company); *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983) (stating the finding that an individual was responsibly connected must be based upon evidence of "an actual, significant nexus" with the violating company).

In my view, continued application of the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), could result in persons who Congress intended to include within the definition of the term "responsibly connected" avoiding that status. For example, a minority shareholder, who is not merely a shareholder in name only, generally will not have the power to prevent (or even discover) the corporation's PACA violations or the power to direct and affect the corporation's operations. Similarly, a real director, who is a member of a 3-person board of directors, generally will not have the power to prevent the corporation's PACA violations or the power to direct and affect the corporation's operations. Likewise, a partner with a 40 percent interest in a partnership, who fully participates in the partnership as a partner, generally will not have the power to prevent the partnership's PACA violations or the power to direct and affect the partnership's operations. If the minority shareholder, the director on the 3-person board of directors, and the partner with a 40 percent interest in the partnership demonstrates the requisite lack of power, application of the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), would result in each of these persons being designated "nominal."

In the *Taylor* dissent, Judge Brown points out that the United States Department of Agriculture is not forever bound to apply the "actual, significant nexus" test, as follows:

> I do not mean to suggest the Department is bound forever to apply the "actual, significant nexus" test. We have previously indicated the 1995 amendment to 7 U.S.C. § 499a(b)(9) might call for different criteria. *See Norinsberg v. USDA*, 162 F.3d 1194, 1199 (D.C. Cir. 1998). . . . But the Judicial Officer in this case explicitly employed the "actual, significant nexus" test . . . and neither the parties nor my colleagues have seen fit to challenge its applicability.

Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 621-22 (D.C. Cir. 2011) (footnote omitted). *Taylor* makes clear to me that I was remiss in failing to abandon the "actual, significant nexus" test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the "actual significant nexus" test, the power to curb PACA violations, or the power to direct and affect operations. In future cases that come before me, I do not intend to apply the "actual, significant nexus" test, as described in *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). Instead, my "nominal inquiry" will be limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder "in name only."[5] While power to curb PACA violations or to direct and affect

[5]*See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1534 (2002) (defining the noun "nominal" as "an individual that exists or is something in name or form but not in reality"); BLACK'S LAW DICTIONARY 1148 (9th ed. 2009) (defining the adjective "nominal" as "[e]xisting in name only").

operations may, in certain circumstances, be a factor to be considered under the "nominal inquiry," it will not be the *sine qua non* of responsible connection to a PACA-violating entity.[6]

[6]*See Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608, 618 (D.C. Cir. 2011) (Judge Brown stating, the majority makes "power and authority" the *sine qua non* of responsible connection).

Third, the Division Chief contends I erroneously found Mr. Herr demonstrated by a preponderance of the evidence that he was only nominally a 25 percent shareholder of Houston's Finest during the period October 11, 2007, through February 17, 2008 (Pet. to Reconsider at 13-23). The Division Chief's position that Mr. Herr had authority to alter the course of Houston's Finest's operations, and, therefore, was not nominal, is based in large part on the July 10, 2002, Stock Purchase Agreement executed by Messrs. Kalil, Petro, and Herr (Appeal Pet. at 28-31).[7]

On its face, the Stock Purchase Agreement gives Mr. Herr authority to curb Houston's Finest's PACA violations. However, Mr. Herr introduced ample evidence to demonstrate that the Stock Purchase Agreement did not reflect Mr. Herr's actual authority within Houston's Finest. Instead, the record establishes that Mr. Herr, based upon his relationship with his partner, Mr. Petro, merely infused Houston's Finest with capital. In exchange, Messrs. Kalil, Petro, and Herr executed the July 10, 2002, Stock Purchase Agreement, which Mr. Herr did not negotiate or draft (Tr. 159). Mr. Herr never performed any duties or exercised any authority under the Stock Purchase Agreement (Tr. 160-67), and Mr. Herr

[7]Dean Klint Johnson, the Acting Assistant Regional Director for the Agricultural Marketing Service and a witness for the Division Chief, testified the sole indicator that Mr. Herr had authority within Houston's Finest is the Stock Purchase Agreement (Tr. 480-81).

demonstrated by a preponderance of the evidence that, despite the terms of the Stock Purchase Agreement, he lacked the actual authority to curb Houston's Finest's violations of the PACA.

For the foregoing reasons, the following Order is issued.

ORDER

The Division Chief's Petition to Reconsider, filed February 29, 2012, is denied.

Done at Washington, DC

November 13, 2012

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William G. Jenson
Judicial Officer