UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	PACA-APP Docket No. 06-0008
	)	
Cheryl A. Taylor,	)	
	)	
Petitioner	)	
	)	
	and	
In re:	)	PACA-APP Docket No. 06-0009
	)	
Steven C. Finberg,	)	
	)	
Petitioner	)	**Decision and Order on Remand**

PROCEDURAL HISTORY

On September 24, 2009, I issued a Decision and Order: (1) finding Cheryl A. Taylor and Steven C. Finberg were officers of Fresh America Corporation [hereinafter Fresh America] during the period February 2002 through February 2003, when Fresh America violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to make full payment promptly for more than $1.2 million in produce purchases; (2) finding Ms. Taylor and Mr. Finberg failed to demonstrate by a preponderance of the evidence that they were only nominal officers of Fresh America; and (3) concluding Ms. Taylor and Mr. Finberg were

responsibly connected with Fresh America during the period February 2002 through February 2003, when Fresh America violated the PACA. *In re Cheryl A. Taylor*, 68 Agric. Dec. 1210, 1221-22 (2009). The United States Court of Appeals for the District of Columbia Circuit vacated my Decision and Order on the "nominal officer issue" and remanded the case to me for further proceedings consistent with the Court's opinion. *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608, 618 (D.C. Cir. 2011).

On June 13, 2011, I conducted a conference call with Stephen P. McCarron, counsel for Ms. Taylor and Mr. Finberg, and Charles E. Spicknall, counsel for the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter AMS], to discuss the procedure to be followed in light of the remand order. Mr. McCarron and Mr. Spicknall each requested an opportunity to brief the issues raised in *Taylor*, which requests I granted. In accordance with the agreed on briefing schedule, AMS filed Respondent's Brief on Remand on July 14, 2011, Ms. Taylor and Mr. Finberg filed Petitioners' Brief on Remand on August 2, 2011, and AMS filed Respondent's Reply Brief on September 1, 2011. On September 8, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and a decision on remand.

DECISION ON REMAND

Statutory and Regulatory Background

The PACA was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce[1] and to provide a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.[2]

Under the PACA, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate or foreign commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), 499d(a). Regulated commission merchants, dealers, and brokers are required to "truly and correctly . . . account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had[.]" 7 U.S.C. § 499b(4). An order suspending or revoking a PACA license or a finding that an entity has committed a flagrant violation, or repeated violations, of 7 U.S.C. § 499b(4) has significant collateral consequences in the form of licensing and employment

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[1]H.R. Rep. No. 71-1041 at 1 (1930).

[2]S. Rep. No. 84-2507 at 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; H.R. Rep. No. 84-1196 at 2 (1955).

restrictions for persons found to be responsibly connected with the violator.[3] The term "responsibly connected" is defined as follows:

> **§ 499a. Short title and definitions**
> . . . .
> **(b) Definitions**
>
> For purposes of this chapter:
> . . . .
> (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 chapter 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).

The second sentence of the definition of the term "responsibly connected" creates a two-prong test for rebutting the statutory presumption of the first sentence:

> [T]he first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner for the second prong must meet at least one of two alternatives: that petitioner was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to a license; or that petitioner was not an owner of a violating licensee or entity subject to a license which was the alter ego of its owners[.]

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[3] 7 U.S.C. §§ 499d(b), 499h(b).

In re Lawrence D. Salins, 57 Agric. Dec. 1474, 1488 (1998). Thus, an officer of a violating corporation is presumed to be responsibly connected with that corporation unless the officer can demonstrate by a preponderance of the evidence that he or she (1) was not actively involved in the activities resulting in a PACA violation and (2) was either a nominal officer of the violating corporation or a non-owner of the corporation that was the alter ego of its owners.

Discussion

The following facts relevant to this proceeding are not at issue on remand: (1) during the period February 2002 through February 2003, Fresh America willfully, repeatedly, and flagrantly violated the PACA; (2) during the period of time when Fresh America violated the PACA, Ms. Taylor was an officer (the executive vice president, chief financial officer, and secretary) of Fresh America; (3) during the period of time when Fresh America violated the PACA, Mr. Finberg was an officer (the vice president of sales and marketing and the executive vice president of business development) of Fresh America; (4) during the period of time when Fresh America violated the PACA, Ms. Taylor and Mr. Finberg were not directors or holders of more than 10 per centum of the outstanding stock of Fresh America; (5) Mr. Finberg was not actively involved in the activities resulting in Fresh America's PACA violations; and (6) Fresh America was not the alter ego of its owners. Only three issues remain on remand. Did Ms. Taylor demonstrate by a preponderance of the evidence that she was only nominally an officer of

Fresh America? Did Mr. Finberg demonstrate by a preponderance of the evidence that he was only nominally an officer of Fresh America? Did Ms. Taylor demonstrate by a preponderance of the evidence that she was not actively involved in the activities resulting in Fresh America's violations of the PACA?

Ms. Taylor and Mr. Finberg Demonstrated They Were Merely Nominal Officers of Fresh America

The United States Court of Appeals for the District of Columbia Circuit held that I erroneously rejected Ms. Taylor's and Mr. Finberg's claims that they were merely nominal officers of Fresh America, as follows:

> We agree with petitioners that the Judicial Officer erred in rejecting their claims that they were merely nominal officers of Fresh America. Under 7 U.S.C. § 499a(b)(9), an "officer" of the offending company is not considered to be "responsibly connected" to a violating licensee if that person was not actively involved in the PACA violation and was "powerless to curb it," *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir. 1975). *See also Bell v. Dep't of Agric.*, 39 F. 3d 1199, 1202 (D.C. Cir. 1994).

Taylor v. U.S. Dep't of Agric., 636 F.3d 608, 610 (D.C. Cir. 2011). 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:

> 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.
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> * * *
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> 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).

As the Court notes, I found the board of directors, with Arthur Hollingsworth as chairman, ran Fresh America and Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at lower levels of authority. *Taylor v. U.S. Dep't of Agric.*, 636 F.3d at 617 (citing *In re Cheryl A. Taylor*, 68 Agric. Dec. 1210, 1220-21 (2009)). Ms. Taylor and Mr. Finberg proved by a preponderance of the evidence that the board of directors made the decisions governing Fresh America's bills, capital expenditures, and personnel and that neither Ms. Taylor nor Mr. Finberg had any measurable power or authority in board deliberations (Tr. 87-92, 145-50, 523-24, 567-68).[4] Moreover, AMS concedes that Ms. Taylor and Mr. Finberg "ultimately proved powerless to save Fresh America or to see that produce sellers were fully repaid" (Respondent's Brief on Remand at 7). Applying the "actual, significant nexus" test, as explained in *Taylor*, to the facts in the instant proceeding, I conclude Ms. Taylor and Mr. Finberg demonstrated by a preponderance of the evidence that they were merely

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[4]References to the transcript of the January 29-30, 2008, administrative hearing are designated as "Tr."

nominal officers of Fresh America, who were powerless to curb Fresh America's PACA violations and who lacked the power and authority to direct and affect Fresh America's operations as they related to payment of produce sellers.

Ms. Taylor Failed to Demonstrate She Was Not Actively Involved in the Activities Resulting in Fresh America's PACA Violations

Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] concluded that Ms. Taylor failed to demonstrate by a preponderance of the evidence that she was not actively involved in the activities resulting in Fresh America's violations of the PACA. *In re Cheryl A. Taylor* (ALJ's Decision), 68 Agric. Dec. 478, 489-91, 502 ¶¶ 43-51, 102 (2009). Ms. Taylor appealed the ALJ's conclusion (Appeal Pet. filed Apr. 22, 2009); however, I declined to address the issue because, at that point in this proceeding, addressing the issue of Ms. Taylor's active involvement would have been no more than an advisory opinion on the issue. *In re Cheryl A. Taylor*, 68 Agric. Dec. 1210, 1220 (2009). The United States Court of Appeals for the District of Columbia Circuit states "[w]e express no opinion on whether Taylor was actively involved in Fresh America's PACA violations, because the Judicial Officer never reached this issue." *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608, 617 (D.C. Cir. 2011). As I conclude on remand that Ms. Taylor demonstrated by a preponderance of the evidence that she was only nominally an officer

of Fresh America, the issue of her active involvement in the activities resulting in Fresh America's PACA violations is relevant to the disposition of this proceeding as to Ms. Taylor.

The standard for whether a person was actively involved in the activities resulting in a PACA violation was explained in *In re Michael Norinsberg* (Decision on Remand), 58 Agric. Dec. 604, 610-11 (1999), 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.

Ms. Taylor did not buy or pay for produce and did not determine the preference or priority for paying for produce compared to other payables. *In re Cheryl A. Taylor* (ALJ's Decision), 68 Agric. Dec. 478, 490-91 ¶¶ 45, 48 (2009). Moreover, Ms. Taylor introduced evidence that Helen Mihas, Fresh America's controller, Mr. Hollingsworth and the board of directors, and Darren Miles, Fresh America's president and chief executive officer, controlled payment decisions (Tr. 531-33, 544-46). *In re Cheryl A. Taylor* (ALJ's Decision), 68 Agric. Dec. 490-91 ¶ 47 (2009). Nonetheless, Ms. Taylor signed signature cards of corporate checking accounts (Tr. 654); Ms. Taylor allowed her name and title to be used by Fresh America to pay bills, as her signature was stamped on

Fresh America's checks by machine (Tr. 538); Ms. Mihas was Ms. Taylor's subordinate and Ms. Mihas "had to pick and choose which checks could go out the door." (Tr. 39, 535.) Therefore, I affirm the ALJ's conclusion that Ms. Taylor failed to demonstrate by a preponderance of the evidence that she was not actively involved in activities resulting in Fresh America's failures to pay for produce promptly as required by 7 U.S.C. § 499b(4).

The "Actual, Significant Nexus" Test, As Described in Taylor

The "actual, significant nexus" test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9)[5] 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

[5]*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).

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)).

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."[6] While power to curb PACA violations or to direct and affect the operations may, in certain circumstances, be a factor

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[6] *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").

to be considered under the "nominal inquiry," it will not be the *sine qua non* of responsible connection to a PACA-violating entity.[7]

Findings of Fact

1. Fresh America, a Texas corporation, was a PACA licensee and ceased operations January 22, 2003.

2. During the period February 2002 through February 2003, Fresh America 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 Fresh America received and accepted in interstate and foreign commerce, in violation of 7 U.S.C. § 499b(4).

3. During the period of time in which Fresh America failed to pay produce sellers, Cheryl A. Taylor was only nominally an officer of Fresh America.

4. During the period of time in which Fresh America failed to pay produce sellers, Cheryl A. Taylor was not a director or holder of more that 10 per centum of the outstanding stock of Fresh America.

5. Cheryl A. Taylor was actively involved in the activities that resulted in Fresh America's violations of the PACA.

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[7] *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).

6. During the period of time in which Fresh America failed to pay produce sellers, Steven C. Finberg was only nominally an officer of Fresh America.

7. During the period of time in which Fresh America failed to pay produce sellers, Steven C. Finberg was not a director or holder of more that 10 per centum of the outstanding stock of Fresh America.

8. Steven C. Finberg was not actively involved in the activities that resulted in Fresh America's violations of the PACA.

9. Fresh America was not the alter ego of its owners.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.

2. Fresh America's failures 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 during the period February 2002 through February 2003 are willful, repeated, and flagrant violations of 7 U.S.C. § 499b(4). *In re Fresh America Corp.*, 66 Agric. Dec. 953 (2007).

3. Cheryl A. Taylor was "responsibly connected" with Fresh America, as that term is defined by 7 U.S.C. § 499a(b)(9), during the period February 2002 through February 2003, when Fresh America willfully, repeatedly, and flagrantly violated 7 U.S.C. § 499b(4).

4. Steven C. Finberg was not "responsibly connected" with Fresh America, as that term is defined by 7 U.S.C. § 499a(b)(9), during the period February 2002 through February 2003, when Fresh America willfully, repeatedly, and flagrantly violated 7 U.S.C. § 499b(4).

For the foregoing reasons, the following Order is issued.

ORDER

1. AMS' June 23, 2006, determination that Cheryl A. Taylor was responsibly connected with Fresh America, Arlington, Texas, during the period of time Fresh America violated the PACA, is affirmed. Accordingly, Cheryl A. Taylor is subject to the licensing restrictions under 7 U.S.C. § 499d(b) and the employment restrictions under 7 U.S.C. § 499h(b), effective 60 days after service of this Order on Cheryl A. Taylor.

2. AMS' August 11, 2006, determination that Steven C. Finberg was responsibly connected with Fresh America, Arlington, Texas, during the period of time Fresh America violated the PACA, is reversed.

RIGHT TO JUDICIAL REVIEW

Cheryl A. Taylor has the right to seek judicial review of the Order in this Decision and Order on Remand in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial Review must be sought within 60 days after entry of the Order in this Decision and Order on Remand.[8] The date of entry of the Order in this Decision and Order on Remand is May 22, 2012.

Done at Washington, DC

May 22, 2012

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William G. Jenson
Judicial Officer

[8] 28 U.S.C. § 2344.