

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	
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STEVEN C. FINBERG, a/k/a STEVE FINBERG)	PACA- APP Docket No. 14-0167
)	
Petitioner.)	
)	
AND)	
)	
In re:)	
)	
JONATHAN DYER,)	PACA-APP Docket Nos. 14-0166
DREW JOHNSON a/k/a DREW R. JOHNSON, and)	14-0168
MICHAEL S. RAWLINGS)	14-0169
)	
Petitioners.)	

**PROCEDURAL ORDER AFFIRMING APPEAL STATUS
REGARDING DOCKET NOS. 14-0166, 14-0168 AND 14-0169 AND REMAND
ORDER REGARDING DOCKET 14-0167**

Appearances:

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

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

SUMMARY OF PROCEDURAL HISTORY AND PRELIMINARY FINDINGS

This is a "responsibly connected" proceeding under the Perishable Agricultural

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

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

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

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

Washington, DC, before the Administrative law Judge (ALJ) Jill S. Clifton (Judge Clifton).¹ Although the four petitions for review of the Director's responsibly connected determinations were consolidated for hearing, Judge Clifton indicated in her Initial Decision that she would issue a separate decision regarding Steven Finberg's responsibly connected status.

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

On June 21, 2017, Respondent timely filed an appeal of Judge Clifton's Initial Decision seeking to establish that Petitioners Dyer, Johnson and Rawlings have each failed to rebut the presumption that they were "responsibly connected" with Adams at the time it committed violations of section 2 of the PACA and requesting that the determination by the Director of the PACA Division that Petitioners were "responsibly connected" with Adams during the period of its repeated and flagrant violations of the PACA be affirmed. Specifically, Respondent requests that the Judicial Officer reverse the ALJ's holdings in the Initial Decision that: 1) Petitioners Dyer, Johnson, and Rawlings were not owners of Adams when Adams violated the PACA; and 2) Adams was the *alter ego* of Scott Grinstead when Adams violated the PACA. Also, Respondent asserts that if the Judicial Officer agrees that one or both of these conclusions are in error, the determinations by the Director of the PACA Division that Petitioners Dyer, Johnson, and Rawlings were each "responsibly connected" with Adams during the period that Adams willfully, repeatedly

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

and flagrantly violated section 2(4) of the PACA, should be affirmed.

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

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

On December 28, 2017, the Judicial Officer remanded the instant proceeding to Judge Clifton in order to put to rest any Appointments Clause claim that may arise in this proceeding in light of the Solicitor General's position in *Lucia v. SEC* (*Raymond J. Lucia, et al. v. S.E.C.*, 138 S. Ct. 2044 (2018)) (*Lucia*)². On February 1, 2018, the Judicial Officer denied the Petitioners' request for reconsideration of the Remand Order.

On November 30, 2018, Judge Clifton issued her Notice of Completion of Judge's Tasks on Remand (Notice) concluding that Docket Nos. 14-0166, 14-0167, 14-0168 & 14-0169 were ready for return to the Judicial Officer based on the following findings:

- 1) That Petitioners Jonathan Dyer, Drew Johnson, and Michael S. Rawlings have consistently declined to request relief pursuant to the decision of the Supreme Court of the United States issued on June 21, 2018 in *Lucia v. SEC*,

² At the time *Lucia v. SEC*, 138 S. Ct. 2044 (2018) was pending before the Supreme Court of the United States. The Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2.

138 S. Ct. 2044 (2018). (Petitioners' Response filed October 31, 2018, by Stephen P. McCarron, Esq.)

- 2) That Petitioner Steven C. Finberg has respectfully requested a new hearing conducted under the decision of the Supreme Court of the United States issued on June 21, 2018 in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), before a different administrative law judge, who did not previously participate in the matter. (Petitioners' Response filed October 31, 2018, by Stephen P. McCarron, Esq.); and,
- 3) That Respondent did not initiate a challenge to Judge Clifton's authority pursuant to the decision of the Supreme Court of the United States issued on June 21, 2018 in *Lucia v. SEC*, 138 S. Ct. 2044 (2018); further, AMS indicated that if the parties were to waive any challenge to the issue of Judge Clifton's authority to enter a Decision and Order in these cases, Respondent prefers that the cases continue to resolution before the Judicial Officer but that absent such waiver, the cases may need to be set for a new hearing, potentially before a different administrative law judge. (Respondent's Response filed October 10, 2018, by Charles L. Kendall, Esq.).

During the course of my February 1, 2019 phone conference with Mr. McCarron on behalf of the Petitioners and Mr. Kendall on behalf of Respondent, the parties reaffirmed their respective positions as reflected by these findings.

REMAND ORDER

Based on the foregoing, it is my determination that Docket Nos. **14-0166, 14-0167, 14-0168 & 14-0169** are properly before the Judicial Officer in accordance with Judge Clifton's November 30, 2018 Notice. However, in light of the fact that Petitioner Finberg has requested that a new hearing be conducted in accordance with *Lucia*, while the other three petitioners

have declined to request such relief, the dockets have become procedurally distinguishable. Accordingly, Docket Nos. **14-0166**, **14-0168** & **14-0169** pertaining to Petitioners Jonathan Dyer, Drew Johnson, and Michael S. Rawlings will remain consolidated and will remain in appeal status before the Judicial Officer, while Docket No. **14-0167** pertaining to Petitioner Steven C. Finberg will be Remanded for further proceedings to be conducted in accordance with *Lucia*.

In a ceremony on July 24, 2017, the Secretary of the United States Department of Agriculture, Sonny Perdue (Secretary Perdue), personally ratified the prior appointments of Chief ALJ Bobbie J. McCartney (retired from that position on 1/20/2018), ALJ Jill S. Clifton, and ALJ Channing D. Strother and personally administered and renewed their Oaths of Office. On December 5, 2017, Secretary Perdue issued a statement affirming that he “conducted a thorough review of the qualifications of this Department’s administrative law judges,” and “affirm[ing] that in a ceremony conducted on July 24, 2017, [he] ratified the agency’s prior written appointments of the [USDA ALJs] before administering their oath of office ...”

On June 21, 2018, almost one year later, the U.S. Supreme Court held that the Securities and Exchange Commission's ALJs are inferior officers of the United States, U.S. Const. Art. II, §2, cl. 2., *Raymond J. Lucia, et al. v. S.E.C.*, 138 S. Ct. 2044 (2018) (*Lucia*) and therefore must be appointed consistent with the Appointments Clause. The actions of the Secretary of Agriculture in reviewing the qualifications of his ALJs, personally ratifying their appointments, and personally administering their renewed Oaths of Office, go well beyond a simple recitation of ratification, are clearly consistent with the Supreme Court’s ruling in *Lucia* and are therefore entitled to full deference. Accordingly, certainly as of July 24, 2017, the USDA's ALJs, as inferior officers of the United States subject to the Appointments Clause,

were duly appointed by a “head of the department” as required by U.S. Constitution, Art. 2, §2, cl. 2 and the Supreme Court’s ruling in *Lucia*.

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

The parties are advised that the newly appointed ALJ shall exercise the full powers conferred by the USDA Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in this matter. Rather, the Decision and Order issued on July 25, 2017 by Judge Clifton in Docket No. 14-0167 is hereby **VACATED** and the written record which has already been made by the parties in this proceeding shall be reviewed *de novo* to determine whether to ratify or revise previous substantive or procedural ALJ actions and to determine whether the written record will be supplemented with any *new* testimony or other evidence.

Testimony taken at USDA hearings are taken under oath and with a full opportunity for both direct and cross examination of witnesses. Further, exhibits offered and admitted into the record are done so with full regard and adherence to applicable administrative due process rules of practice and procedure. Accordingly, the parties may rely on the written record for all purposes moving forward and will not be required to recall witnesses or resubmit exhibits

which have already been admitted into evidence as part of that written record. However, the parties will be given an opportunity to show good cause for the submission of any *new* evidence not previously submitted in the prior proceeding.

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

Done at Washington, D.C.
this ~~7th~~ day of February 2019



Bobbie J. McCartney
Judicial Officer

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