

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	PACA-D
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Tomato Specialties, LLC,)	Docket No. 16-0068
d/b/a The Avocado Company)	
International,)	
)	
Respondent.)	

DECISION AND ORDER

Administrative Law Judge Channing D. Strother

Appearances

Christopher Young, Esq., Office of the General Counsel, United States Department of Agriculture ("USDA"), Washington, D.C., for the Complainant, Specialty Crops Program, Agricultural Marketing Service, USDA ("AMS")

Jason R. Klinowski, Esq., for the Respondent, Tomato Specialties LLC, d/b/a The Avocado Company International ("Tomato Specialties")

SUMMARY OF DECISION

Complainant AMS contends Respondent Tomato Specialties willfully violated the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §§ 499a *et seq.* ("PACA"), by issuing false and misleading statements for a fraudulent purpose and by failing to account accurately to five sellers in forty-one Tomato Suspension Agreement Accountings ("TSA Accountings"). AMS contends that because of the severity of these violations its PACA license should be revoked.

Tomato Specialties contends that, contrary to PACA Section 6¹ requirements, the investigation that lead to the Complaint in this docket was improperly initiated after written

¹ 7 U.S.C. § 499f.

notice from an AMS employee handling certain reparations complaints, including acting as a mediator in them, and not, as required under PACA Section 6(b), after a written notice from an interested party who is not a USDA employee. It also contends that the AMS employee it alleges submitted a written notice was precluded from doing so by PACA and from later acting as an investigator by the Administrative Procedure Act.² It contends, therefore, neither the undersigned nor the USDA has jurisdiction to consider the herein Complaint, and it must be dismissed.

Tomato Specialties also contends that Arizona law as to fraud must be applied in determining whether Tomato Specialties violated PACA and that AMS failed to prove that every required element under Arizona law was met. It contends the sellers to whom it presented the TSA Accountings were not, in fact, misled or harmed by them, therefore PACA could not be violated by those false accountings.

This Decision finds that the investigation was properly initiated under PACA Section 6(c) after interested third parties brought PACA Section 6(a) reparations complaints and that no AMS employee took unlawful action or performed an unlawful role concerning that investigation. Thus, the Complaint is within the jurisdiction of the undersigned and the USDA to consider and resolve. This Decision finds that the Arizona law of fraud has no application to the issues in this proceeding, although, if it did apply, AMS demonstrated that each element of that law was met. This Decision finds that Tomato Specialties, in violation of PACA, made false and misleading statements for a fraudulent purpose and failed to account truly and correctly to five sellers on forty-one TSA Accountings and thereby injured those sellers and others in the market.

This Decision finds that the severity of Tomato Specialties' violations requires revocation of its PACA license.

² 5 U.S.C. §§ 551-559.

JURISDICTION AND BURDEN OF PROOF

This disciplinary proceeding was initiated by a Complaint under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes,³ which alleges violation of PACA and the regulations issued thereunder.⁴ Tomato Specialties' March 28, 2016 timely Answer requested a hearing. The case was reassigned by the Chief Administrative Law Judge to the undersigned on September 26, 2016. Thus, this matter is properly before me for resolution.⁵

The burden of going forward and of ultimate persuasion is on Complainant AMS.⁶ The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act, such as this one, is a preponderance of the evidence.⁷

PROCEDURAL BACKGROUND

On March 1, 2016, AMS⁸ filed a complaint alleging Tomato Specialties willfully, flagrantly, and repeatedly violated PACA Section 2(4)⁹ by issuing false and misleading

³ 7 C.F.R. §§ 1.130 *et seq.*

⁴ 7 C.F.R. §§ 46.1 *et seq.*

⁵ *See also* herein rulings against Tomato Specialties contentions that the Complaint herein was not properly issued because it was based upon an investigation that was initiated without a valid written notice under PACA Section 6(b) and involved a USDA investigator who had acted as a mediator in a related PACA Section 6(a) reparations proceeding.

⁶ 5 U.S.C. § 556(d).

⁷ JSG Trading Corp., 57 Agric. Dec. 710, 724 (U.S.D.A. 1998).

⁸ "AMS" and the pronoun "it" will be used to refer to the Complainant in this Decision and Order, although the March 1, 2016 Complaint recites the Deputy Administrator as initiating the disciplinary proceeding and the Complaint was signed by Associate Deputy Administrator Melissa Bailey.

⁹ 7 U.S.C. § 499b(4).

statements for a fraudulent purpose and by failing to account truly and correctly to five sellers on forty-one TSA Accountings involving sales of perishable agricultural commodities received in interstate and foreign commerce. AMS asserted Tomato Specialties' PACA license should be revoked under PACA section 8(a).¹⁰

Tomato Specialties answered on March 28, 2016, generally denying the allegations. It also asserted certain affirmative defenses.

After preliminary proceedings, a hearing was held before the undersigned October 19 through October 21, 2016, in Nogales, Arizona.¹¹ Wes Hammond,¹² David Studer,¹³ and Michael Jansen,¹⁴ each an employee of the USDA Specialty Crops Program, testified on behalf of AMS, as did Fabiola Cuen of Greenpoint Distributing, LLC,¹⁵ and Jaime Chamberlain of JC

¹⁰ 7 U.S.C. § 499h(a). The Complaint, p. 2, n.2, states:

The transactions in the complaint were subject to the terms of a 2013 Tomato Suspension Agreement (TSA) pursuant to section 734(c) of the Tariff Act of 1930 as amended (19 U.S.C. § 1673c(c)), and section 351.208 of the U.S. Department of Commerce regulations (19 C.F.R. § 351.701). Pursuant to Section 1.14 l(h)(6) of the Rules of Practice (7 CFR 1.141(h)(6)), Complainant requests that the administrative law judge take official notice of the TSA [which is attached hereto as Attachment A].

Besides being Attachment A to the Complaint, the 2013 Tomato Suspension Agreement was admitted as Exhibit RX-K. Tr. II, p. 104-06 and Tr. III, p. 66.

¹¹ Each day's transcript volume begins with page 1, rather than the pages across each volume and then volume to volume being numbered seriatim. This Decision will cite to the transcript in the following format "Tr. __, pp. __," with the blank after "Tr." being a Roman numeral I, II, or III, designating the transcript volume for October 19, 20, or 21, respectively.

¹² Tr. I, pp. 70-110; Tr. II, pp. 258-331; Tr. III, pp. 5-49; and Tr. III, pp. 99-168 (AMS remedies witness).

¹³ Tr. II, pp. 109-225.

¹⁴ Tr. II, pp. 225-58.

¹⁵ Tr. I, pp. 110-240.

Distributing, Inc.,¹⁶ each of produce sellers/shippers involved in transactions with Tomato Specialties relating to this proceeding. Aurelio Martin Lima, an employee of Tomato Specialties, testified for Tomato Specialties as a rebuttal witness immediately after the AMS case-in-chief and before the AMS sanctions witness (Mr. Hammond, again), and his actual testimony went only to the number and types of transactions between Mr. Chamberlain's company, JC Distributing, Inc., and Tomato Specialties.¹⁷ Tomato Specialties subpoenaed a "Mark Jones, from Tepeyak," whom Tomato Specialties reported at one point had "not yet shown up."¹⁸ The documentary exhibits admitted to the record and on-file with the Hearing Clerk are listed in the Index of Exhibits that is Appendix A, attached to this Decision and Order.

Prior to the Nogales hearing, it was thought that the hearing would reconvene in Los Angeles, where among other things AMS indicated it expected to call additional third-party witnesses from other seller-suppliers involved in transactions at issue.¹⁹ But during the Nogales hearing the parties mutually concluded and agreed that a Los Angeles hearing would not be necessary.²⁰

¹⁶ Tr. I, pp. 245-306; and Tr. II, pp. 5-107. Exhibit RX-J consisted of two agreements between Mr. Chamberlain's company and a grower. It was marked, and used in the examination of Mr. Chamberlain, but was not offered or admitted into the record, in part because of confidentiality concerns raised by Mr. Chamberlain. *See* Tr. II, pp. 13-16 and 106. The Exhibit marked as RX-K is the same as the Tomato Suspension Agreement that is Attachment A to the Complaint, and it was used in examination of Mr. Chamberlain but was not offered or admitted into the record then. *See* Tr. II, p. 25. It was later admitted. *See* Tr. III, p. 66.

¹⁷ Tr. III, pp. 54-62.

¹⁸ Tr. II, p. 227.

¹⁹ Tr. II, p. 228.

²⁰ Tr. III, pp. 70-71.

After certain testimony from Mr. Studer, Tomato Specialties moved for a “mistrial,” which was denied.²¹ At the end of the AMS case-in-chief, Tomato Specialties moved for a directed verdict, which was denied with the instruction that Tomato Specialties could raise any of its directed verdict contentions in its briefs.²² Tomato Specialties then stated it would call no witnesses of its own as a case-in-chief, would rely on its previous cross-examination, and “rested.”²³

AMS waived the opportunity to make closing argument.²⁴ Tomato Specialties presented a closing argument.²⁵ At the close of oral argument AMS moved for an oral decision pursuant to 7 C.F.R. § 1.142(c), alleging, in effect, that Tomato Specialties had conceded certain matters so a decision without briefing was appropriate.²⁶ That motion was denied.²⁷

Proposed transcript corrections were provided on January 17, 2017. Those proposed corrections are approved, and the hearing transcript is amended to incorporate them.²⁸ To ensure those corrections are not overlooked, I have issued a separate order approving these corrections.

²¹ Tr. II, p. 156.

²² Tr. III, pp. 75-81.

²³ Tr. III, pp. 86-88. Mr. Lima had at that point had testified on Tomato Specialties behalf. Also, Mr. Chamberlain was a third-party witness called by both AMS and Tomato Specialties. It was agreed that Tomato Specialties’ counsel could examine Mr. Chamberlain beyond the scope of the AMS direct examination without this affecting his procedural ability to move for a directed verdict at the conclusion of the AMS case-in-chief. *See* Tr. I, pp. 269-72.

²⁴ Tr. III, p. 184.

²⁵ Tr. III, pp. 184-224.

²⁶ Tr. III, pp. 225.

²⁷ Tr. III, pp. 225-26.

²⁸ At Tr. II, pp. 155-56, Tomato Specialties’ counsel asked that certain material be stricken from the transcript. I asked that the specific material requested to be stricken be identified “when it comes time to make transcript corrections, or otherwise.” But, such material was not identified in proposed transcript corrections due January 17, 2017 or otherwise. Nevertheless, because AMS

On March 13, 2017, AMS filed Proposed “Findings of Fact, Conclusions and Order” as its initial post-hearing brief (“AMS Initial Brief” or “AMS IB”). Tomato Specialties filed its “Post-Trial Brief” (“Tomato Specialties Initial Brief” or “Tomato Specialties IB”) on March 14, 2017.²⁹ Tomato Specialties filed its “Post-Trial Reply Brief” (“Tomato Specialties Reply Brief” or “Tomato Specialties RB”) on April 17, 2017. Consistent with the schedule established March 23, 2017, AMS filed its Reply Brief (“AMS Reply Brief” or “RB”) on April 25, 2017.

On March 14, 2017, concurrent with its Initial Brief, Tomato Specialties filed a “Motion to Dismiss for Lack of Subject Matter Jurisdiction” (“Motion”). This motion is consistent with a motion it made at hearing after certain testimony by AMS witness and investigator, Mr. David Studer.³⁰ Tomato Specialties’ Initial Brief, pp. 6-12, is nearly verbatim duplicates its Motion. AMS had foreseen and addressed some of these Tomato Specialties contentions in its own Initial Brief, pp. 38-42.

On April 3, 2016 AMS responded to Tomato Specialties’ Motion (“Response to Motion”). Tomato Specialties’ Reply Brief addresses only its contentions this proceeding must be dismissed for lack of subject matter jurisdiction and AMS’s response to those contentions in the AMS Response to Motion. For instance, in its Reply Brief Tomato Specialties challenges no

at hearing consented to the removal, Tr. II, p. 148, lines 2-12, is stricken from the record. Nothing there discussed has been considered in rendering this Decision. Tomato Specialties did not pursue its motion for mistrial—*see* Tr. II, pp. 151-55—on brief. The struck material formed the asserted basis for Tomato Specialties’ motion for mistrial. To the extent such material could form a basis for a mistrial—and I find it could not—I find its removal from the record removes any basis for a “mistrial.”

²⁹ Tomato Specialties submitted this brief to the Hearing Clerk’s office by email on March 13, 2017 after the established 4:30 pm Eastern deadline. The March 23, 2017 Order in this docket accepts that brief for filing out-of-time.

³⁰ Motion, first page; Tr. II, pp. 110-15, 131, 133, 160, 172-73. *See* Motion, third through sixth pages; IB, pp. 8-11.

AMS proposed finding of fact. AMS Reply Brief, p. 2, sets out where in AMS's filings AMS previously addressed Tomato Specialties' jurisdictional contentions and states it will not repeat those arguments. But, AMS states, *id.*, "Respondent does appear to raise a new argument (or a new variation of its earlier argument) on the issue of written notification in its Reply Brief filed on April 17 that merits some response" and then AMS addresses that contention.³¹

All contentions raised in Tomato Specialties' Motion to Dismiss will be addressed in this Decision rather than in a separate order.

Tomato Specialties' briefs do not reference, much less address, many of the points it had specifically raised during the course of the proceeding, including during the hearing, or several contentions Tomato Specialties appeared to be making through cross-examination. And, as noted, Tomato Specialties' April 13, 2017 Reply Brief addresses only its contentions this proceeding must be dismissed for lack of subject matter jurisdiction and a new contention that the Administrative Procedure Act barred Mr. Studer from reporting potential Tomato Specialties accounting irregularities he came across in his work on the reparations cases. Tomato Specialties does not explain whether it intends to waive contentions it did not address on brief. It does not explain whether it concurs with and/or waives any opposition to any points made in AMS's Initial Brief that it does not address in its Reply Brief.

APPLICABLE STATUTORY PROVISIONS, REGULATIONS, AND RULES

AMS alleges Tomato Specialties violated PACA Section 2(4), which provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

* * *

³¹ AMS RB, pp. 1-5.

(4) For any commission merchant, dealer, or broker *to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction* involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker, *or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 5(c).* However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this Act.³²

PACA Section 6 sets out the circumstances under which the Secretary of Agriculture may initiate an investigation of PACA violations, and, in turn, cause a complaint to be issued. Tomato Specialties bases its contentions that the investigation in this proceeding was not properly initiated—and, as a result, there is no jurisdiction to hear the Complaint—on these statutory terms. They provide:

(a) *REPARATION COMPLAINTS.*

(1) *PETITION; PROCESS.* Any person complaining of any violation of any provision of section 2 by any commission merchant, dealer, or broker may, at any time within nine months after the cause of action accrues, apply to the Secretary by petition, which shall briefly state the facts, where upon, if, in the opinion of the Secretary, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Secretary to the commission merchant, dealer, or broker, who shall be called upon to satisfy the complaint, or to answer it in writing

(b) *DISCIPLINARY VIOLATIONS.* Any officer or agency of any State or Territory having jurisdiction over commission merchants,

³² 7 U.S.C. § 499b(4) (emphasis added).

dealers, or brokers in such state or territory and *any other interested person (other than an employee of an agency of the Department of Agriculture administering this Act) may file, in accordance with rules prescribed by the Secretary, a written notification of any alleged violation of this Act by any commission merchant, dealer, or broker....*

(c) Investigation of complaints and notifications

(1) Commencing or expanding an investigation

If there appears to be, in the opinion of the Secretary, reasonable grounds for investigating a complaint made under subsection (a) or a written notification made under subsection (b), the Secretary shall investigate such complaint or notification. In the course of the investigation, if the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.

(2) Issuance of complaint by Secretary; process

In the opinion of the Secretary, if an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued....

(3) Special notification requirements for certain investigations

Whenever the Secretary initiates an investigation on the basis of a written notification made under subsection (b) or expands such an investigation, the Secretary shall promptly notify the subject of the investigation of the existence of the investigation and the nature of the alleged violations of this chapter to be investigated. Not later than 180 days after providing the initial notification, the Secretary shall provide the subject of the investigation with notice of the status of the investigation, including whether the Secretary intends to issue a complaint under paragraph (2), terminate the investigation, or continue or expand the investigation. The Secretary shall provide additional status reports at the request of the subject of the investigation and shall

promptly notify the subject of the investigation whenever the Secretary terminates the investigation.³³

Section 46.49 of the Regulations, 7 C.F.R. § 46.49, implements portions of PACA

Section 6:

Written notifications and complaints.

(a) *Written notification, as used in section 6(b) of the Act, means:*

(1) Any written statement reporting or complaining of a PACA violation(s) filed by any officer or agency of any State or Territory having jurisdiction over licenses or persons subject to license, or any other interested person who has knowledge of or information regarding a possible violation, *other than an employee of an agency of USDA administering this Act or a person filing a complaint under Section 6(c)....*

(b) Any written notification may be filed by delivering it to any office of USDA or any official thereof responsible for administering the Act. *A written notification which is so filed, or any expansion of an investigation resulting from any indication of additional further violations of the Act found as a consequence of an investigation based on written notification or complaint, shall also be deemed to constitute a complaint under section 13(a) of the Act.*

(c) *Upon becoming aware of a complaint under Section 6(a) or 6(b) of this Act, the Secretary will determine if reasonable grounds exist for an investigation of such complaint for disciplinary action. If the investigation substantiates the existence of violations, a formal disciplinary complaint may be filed by the Secretary as described under Section 6(c)(2) of the Act.³⁴*

PACA Section 13 provides that the Secretary and the Secretary's agents have the right to inspect records in the investigation of complaints:

³³ 7 U.S.C. § 499f (emphasis added).

³⁴ 7 C.F.R. § 46.49 (emphasis added).

(a) INVESTIGATION BY SECRETARY OF AGRICULTURE;
INSPECTION OF ACCOUNTS, RECORDS AND
MEMORANDA.

*The Secretary or his duly authorized agents shall have the right to inspect such accounts, records, and memoranda of any commission merchant, dealer, or broker as may be material...in the investigation of Complaints under this Act...*³⁵

PACA Section 8(a) sets out the penalties that may be imposed where PACA Section 2(4) violations are found pursuant to the above procedures:

(a) AUTHORITY OF SECRETARY. Whenever (1) the Secretary determines, as provided in section 6, that any commission merchant, dealer, or broker has violated any of the provisions of section 2, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 14(b) of this Act, *the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.*³⁶

PACA Section 15, last sentence, provides the following as to when state law will be applied under PACA:

*This chapter shall not abrogate nor nullify any other statute, whether State or Federal, dealing with the same subjects of this chapter; but it is intended that all such statutes shall remain in full force and effect except insofar only as they are inconsistent herewith or repugnant hereto.*³⁷

Section 47.2(i) of the PACA regulations (7 C.F.R. § 47.2(i)) sets out which AMS employees are “Presiding Officers” under the Administrative Procedure Act (“APA”) and hears

³⁵ 7 U.S.C. § 499m (emphasis added).

³⁶ 7 U.S.C. § 499h(a) (emphasis added).

³⁷ 7 U.S.C. § 499o (emphasis added).

on Tomato Specialties contentions that Mr. Studer was a "Presiding Officer" under APA and, thus, his actions herein were prohibited by the APA:

(i) Examiner. In connection with reparation proceedings, *the term "examiner" is synonymous with "presiding officer" and means any attorney employed in the Office of the General Counsel of the Department, or in connection with reparation proceedings conducted pursuant to the documentary procedure in § 47.20, the term "examiner" may mean any other employee of the PACA Branch whose work is reviewed by an attorney employed in the Office of the General Counsel of the Department.*³⁸

Section 47.3 (7 C.F.R. § 47.3) sets out how PACA complaint proceedings are to be initiated and handled. It bears on whether the investigation below was properly initiated, and whether a PACA Section 6(a) reparations "complaint" can also be a Section 6(b) written "notice":

(a) Informal complaints.

(1) Any interested person (including any officer or agency of any State or Territory having jurisdiction over commission merchants, dealers, or brokers in such State or Territory, and any employee of the Department) desiring to complain of any violation of any provision of the Act by any commission merchant, dealer, or broker may file with the Deputy Administrator an informal complaint. Informal complaints may be made the basis of either a disciplinary complaint, or a claim for damages, or both. If the informal complaint is to be made the basis of a claim for damages, it must be received by the Deputy Administrator within 9 months after the cause of action accrues; if the informal complaint is not to be made the basis of a claim for damages, it may be filed at any time within 2 years after the violation of the act occurred: Provided, That the 2-year limitation herein prescribed shall not apply to complaints charging flagrant or repeated violations of the act.

(2) *Informal complaints may be made in writing by telegram, by letter, or by facsimile transmission, setting forth the essential details of the transaction complained of.*

³⁸ 7 C.F.R. § 47.2(i) (emphasis added).

So far as practicable, every such informal complaint shall state such of the following items as may be applicable:

(i) The name and address of each person and of the agent, if any, representing him in the transaction involved;

(ii) Quantity and quality or grade of each kind of produce shipped;

(iii) Date of shipment;

(iv) Carrier identification;

(v) Shipping and destination points;

(vi) If a sale, the date, sale price, and amount actually received;

(vii) If a consignment, the date, reported proceeds, gross and net;

(viii) Amount of damages claimed, if any; and

(ix) Statement of other material facts including terms of contract.

(3) The informal complaint should, so far as practicable, be accompanied by true copies of all available papers relating to the transaction complained about, including shipping documents, letters, telegrams, invoices, manifests, inspection certificates, accounts sales, and any special contracts or agreements.

(4) The informal complaint shall be accompanied by a filing fee of \$100 as authorized by the Act.

(b) Investigations and disposition of informal complaints.

(1) Upon receipt of all the information and supporting evidence submitted by the person filing the informal complaint, the Deputy Administrator shall cause such investigation to be made as, in the Deputy Administrator's opinion, is justified by the facts. If such investigation discloses that no violation of the Act has occurred, no

further action shall be taken and the person filing the informal complaint shall be so informed.

(2) If the statements in the informal complaint and the investigation thereunder seem to warrant such action, and, in any case except one of willfulness or one in which public health, interest or safety otherwise requires, which may result in the suspension or revocation of a license, the Deputy Administrator, in an effort to effect an amicable or informal adjustment of the matter, shall give written notice to the person complained against of the facts or conduct concerning which complaint is made, and shall afford such person an opportunity, within a reasonable time fixed by the Deputy Administrator, to demonstrate or achieve compliance with the applicable requirements of the Act and regulations promulgated thereunder.³⁹

BACKGROUND OF PACA

PACA was enacted in 1930 to “suppress unfair and fraudulent practices in the marketing of fresh and frozen fruits and vegetables in interstate commerce.”⁴⁰ Congress sought to provide “a measure of control and regulation 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.”⁴¹

PACA was designed to combat a pattern of unfair practices perceived as then prevalent in the perishable agricultural commodities industry—that is, the victimization of growers and shippers by unscrupulous dealers to whom such commodities were sold or consigned for sale.⁴² Of note, *Quinn* cites as a “conspicuous example” a sale to a dealer followed by a decline in the

³⁹ 7 C.F.R. § 47.3 (emphasis added).

⁴⁰ H.R. Rep. No. 1546, 87th Cong. (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2749.

⁴¹ S. Rep. No. 2507, 84th Cong. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701.

⁴² *See Quinn v. Butz*, 510 F.2d 743, 745-46 (D.C. Cir. 1975).

market for the commodity and the dealer faced financial loss if he accepted shipment, paid the contract price, and then sold on his own account.⁴³ In such instances, dealers frequently rejected shipments on false grounds, notably when the commodities were alleged to have arrived in a condition other than as promised.⁴⁴

Congress enacted PACA to eradicate such schemes to protect producers and other merchants from dishonest and irresponsible conduct.⁴⁵

Every commission merchant, dealer, or broker, as defined in PACA, 7 U.S.C. §§ 499a(5)-(7), must be licensed by the Secretary of Agriculture.⁴⁶ PACA Section 2 sets forth unfair practices which, if committed by a dealer, commission merchant, or broker, are grounds for sanctions by the Secretary.⁴⁷ Section 2(4) makes it unlawful for any commission merchant, dealer, or broker to make, for a fraudulent purpose, a false or misleading statement in connection with any transaction in interstate commerce involving perishable agricultural commodities.⁴⁸ Section 2(4) also makes it unlawful to fail to account truly or correctly, or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction in interstate commerce involving perishable agricultural commodities.

⁴³ *Id.*

⁴⁴ *Id.* at 746.

⁴⁵ See *JSG Trading Corp. v. Dep't of Agric.*, 176 F.3d 536, 543 (D.C. Cir. 1999); *G&T Terminal Packaging Co. v. Dep't of Agric.*, 468 F.3d 86, 96, 97 (2d Cir. 2006), *Chidsey v. Geurin*, 443 F.2d 584, 587-88 (6th Cir. 1971); *Rankin Sales Co. v. Morrie H. Morgan Co.*, 296 F.2d 113, 116-17 (9th Cir. 1961).

⁴⁶ 7 U.S.C. § 499c(a).

⁴⁷ 7 U.S.C. § 499b.

⁴⁸ 7 U.S.C. § 499b(4).

If the Secretary determines in an administrative proceeding that a commission merchant, dealer, or broker has violated the provisions of PACA Section 2(4), the Secretary may publish the facts and circumstances of the violation or suspend the violator's license for up to ninety days.⁴⁹ Where the Secretary determines that the violations were repeated or flagrant, the Secretary may order the violator's PACA license revoked.⁵⁰

THE TOMATO SUSPENSION AGREEMENT

The International Trade Administration's Enforcement and Compliance website,⁵¹ maintained by the United States Department of Commerce, describes the Tomato Suspension Agreement ("TSA"), Attachment A to the Complaint, which is also Exhibit RX-K,⁵² as follows:

On March 4, 2013, the Department of Commerce and producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico signed this agreement suspending the antidumping investigation on fresh tomatoes from Mexico. The basis for the agreement was a commitment by each signatory producer/exporter to sell the subject merchandise at or above the reference price, which will eliminate completely the injurious effects of exports of fresh tomatoes to the United States.

For fresh tomatoes entering the United States from Mexico, which is the product involved in the transactions involved in this proceeding, the TSA establishes reference prices below which those tomatoes cannot be sold.⁵³ TSA, Appendix D, Complaint Attachment A, p. 23, provides for fresh tomatoes from Mexico "procedures for making adjustments to the sales price of signatory

⁴⁹ 7 U.S.C. § 499h(a).

⁵⁰ *Id.*; H.C. MacClaren, Inc., 60 Agric. Dec. 733, 747 (U.S.D.A. 2001).

⁵¹ *2013 Suspension Agreement ~ Fresh Tomatoes from Mexico*, INT'L TRADE ADMIN. (Jan. 12, 2017), <http://ia.ita.doc.gov/tomato/2013-agreement/2013-agreement.html>.

⁵² *See* Tr. III, p. 66.

⁵³ *See* *Fl. Tomato Exch. v. United States*, 973 F. Supp.2d 1334, 1336 (Ct. Int'l Trade 2014); Tr. I, 118-19, 135-36; Attachment A, pp. 2, 12.

tomatoes due to certain changes in condition after shipment, such that the sales price for any tomatoes accepted in a lot does not fall below the reference price.”⁵⁴ In short, on arrival in the United States, tomatoes are inspected by the USDA for quality. Tomatoes on inspection found to be below acceptable quality are deemed “defective” and are treated as “rejected” and as not having been/prohibited from being sold.⁵⁵ Under the TSA, “[t]he receiver may not resell the DEFECTIVE tomatoes. The receiver may choose to have the DEFECTIVE tomatoes destroyed, donated to non-profit food banks, or returned to the Selling Agent.”⁵⁶

Depending upon the percentage of the tomatoes in a lot found upon inspection to be defective, the “receiver”—Tomato Specialties, in this case—may accept the specific lot of tomatoes or reject it. If the lot is accepted, the sales price paid to the shipper may not be below the reference price, but that sales price can be adjusted to take into account the defective tomatoes. Also, subject to proper documentation, the “Selling Agent” may reimburse the receiver for inspection fees and certain actual costs associated with the defective tomatoes, including “destruction costs,” “freight expenses,” and “repacking charges directly associated with salvaging and reconditioning the lot,” without such expenses being considered in the calculation of the price of the accepted tomatoes to determine whether the reference price floor was met.⁵⁷

In other words, under the TSA, sums paid by the shipper/seller to the receiver not for the above types of expenses, or which are not properly documented as of those types and of being actually incurred, will be considered to reduce the price of the accepted tomatoes to determine whether the reference price floor was met. The overall concept under the TSA is that fresh

⁵⁴ Attachment A, p. 23 (footnote omitted).

⁵⁵ *Id.*, pp. 25-26, ¶ 6.

⁵⁶ *Id.* p. 27, ¶ 7.

⁵⁷ *Id.*, p. 27, ¶¶ 1-6.

tomatoes coming into the United States should be sold for no less than certain reference prices to protect United States growers/producers from unfair competition from Mexico.

The U.S. Department of Commerce provides certain “suggested forms” for use by entities involved in bringing fresh tomatoes into the United States from Mexico covered by the TSA. Among them is the underlying form to the Tomato Suspension Agreement Accountings of Sales and Costs (“TSA Accountings”) involved in this case.⁵⁸

As AMS states:

While the TSA is factually part of this case (insofar as Respondent issued accountings to sellers under the TSA), whether Respondent abided by its terms is not the *sine qua non* of whether PACA violations were committed by Respondent. Respondent violated the PACA when it issued false and misleading statements in its accountings to sellers, and when it failed to account truly and correctly to sellers.⁵⁹

FACTUAL BACKGROUND OF THIS PROCEEDING

Essentially, as to the forty-one transactions involved in AMS’s allegations, tomatoes were trucked from Mexico into the United States, where shipments are inspected by the USDA for quality.⁶⁰ The USDA inspectors determined that portions of the particular shipments failed to

⁵⁸ The Department of Commerce’s blank suggested form includes text under the name of each of the “Allowable Expenses Credited” entries such as “Attach Copy of Receipt,” “Attach Copy of Freight Charges,” and the like, which do not appear on the form used by Tomato Specialties. *See Suspension Agreement on Fresh Tomatoes from Mexico: Accounting of Sales & Costs (Sample Condition Defect Accounting Form)*, INT’L TRADE ADMIN., http://enforcement.trade.gov/tomato/2013-agreement/documents/suggested_forms/form11-2013-Sample-Condition-Defect-Accounting-Form-Fillable-20130304.pdf (last visited June 30, 2017); Tr. I, pp. 40, 59, 86, 109, 125-26, 173-78, 202, 208, 221-22, 231, 250, 287, 304; Tr. II, pp. 73, 90-91, 93-94, 96-97, 112-13, 137, 141-44, 147-48, 156-57, 205, 212; T. III, pp. 87, 144-45, 195, 210, 220. *See, e.g.*, CX-18, p. 12.

⁵⁹ IB, p. 10 n.3.

⁶⁰ Witness Cuen described that tomato sales process for her company at Tr. I, 139-41.

meet the TSA quality standards.⁶¹ Tomato Specialties utilized that determination, in part, to fill out a TSA Accounting for each shipment to present to the shipper, and the shipper would be paid by Tomato Specialties based on those TSA Accountings. Tomato Specialties included in these TSA Accountings costs of such things as repacking and disposal it never actually incurred, which reduced its payment to the shipper (or, in some cases, eliminated that payment to the shipper or even reduced it to a “negative” so the shipper actually owed Tomato Specialties money for the shipment).⁶² As noted above, tomatoes that do not pass the USDA quality inspection are not to be sold, but, rather, are to be dumped, or given away to certain qualified charitable-type entities.⁶³ Repacking fees would be incurred to select out tomatoes that would pass quality inspection so those tomatoes could be sold. In the transactions involved, Tomato Specialties would sell the tomatoes to buyers with no repacking.⁶⁴

As discussed in more detail below,⁶⁵ two shippers filed PACA Section 6(c)(1) reparations complaints against Tomato Specialties. USDA investigator and witness at the hearing Mr. David Studer was assigned to one of the cases as a mediator. Among other things, Mr. Studer reported back to his superior that Tomato Specialties’ TSA Accountings appeared to be inaccurate.⁶⁶ An investigation was commenced, which included Ms. Studer as an investigator.⁶⁷ That investigation led to the complaint filed in this docket.

⁶¹ See CX-18, 11; Tr. I, 149.

⁶² See Tr. I, pp. 37-39, 98-103, 120, 260-61, 329.

⁶³ See Tr. I, p. 100; Tr. II, pp. 274-75.

⁶⁴ See Tr. I, pp. 37-38, 329; Tr. II, p. 119, 235-37, 252-53.

⁶⁵ See April 3, 2017 Response to Motion, pp. 5-6.

⁶⁶ See Tr. II, pp. 110-13.

⁶⁷ Tr. II, p. 114.

DECISION

I. Tomato Specialties' Contentions the Investigation in This Proceeding Was Improperly Initiated, and, as a Result, Neither the Undersigned Nor the USDA Has Jurisdiction to Consider the PACA Violations Asserted Herein Are Unavailing.

A. Background of the Briefing of These Issues.

The parties' briefing of these issues has some complications, in part because Tomato Specialties filed both a Motion to Dismiss and an Initial Brief on the due date for the latter, and that Initial Brief also set out its Motion to Dismiss. Specifically, on March 14, 2017, concurrent with its initial post-hearing brief, Tomato Specialties filed a "Motion to Dismiss for Lack of Subject Matter Jurisdiction." This Motion is consistent with a motion it made at hearing⁶⁸ after certain hearing testimony by AMS witness and investigator, Mr. David Studer.⁶⁹ Much of the material in Tomato Specialties' Initial Brief, pp. 6-12, duplicates its Motion to Dismiss. AMS foresaw and addressed at least some of these Tomato Specialties contentions in its own Initial Brief, pp. 38-42.

AMS responded to Tomato Specialties' March 14, 2016 Motion on April 3, 2016. Tomato Specialties' April 25, 2017 Post-Trial Reply Brief addresses only its contentions this proceeding must be dismissed for lack of subject matter jurisdiction, and AMS's response to Tomato Specialties' March 14, 2016 Motion to Dismiss. AMS Reply Brief, p. 2, sets out where in AMS's filings AMS had previously addressed Tomato Specialties' jurisdictional contentions and states it will not repeat those arguments, but states "Respondent does appear to raise a new argument (or a new variation of its earlier argument) on the issue of written notification in its Reply Brief filed on April 17 that merits some response." AMS then responds to Tomato

⁶⁸ Motion, first page; Tr. II, pp. 110-115, 131, 133, 160, 172-173.

⁶⁹ See Motion, third through sixth pages; Tomato Specialties IB, pp. 8-11.

Specialties' contentions that the Administrative Procedure Act ("APA") prohibited AMS witness and investigator Mr. Studer from reporting to his superiors that in his activities as a mediator of a reparations complaint against Tomato Specialties he had come across information indicating PACA violations by Tomato Specialties, and from acting as an investigator of such violations. AMS also there responds to Tomato Specialties' contentions that a PACA Section 6(b) reparations complaint cannot also be a PACA Section 6(b) written notification.

All issues raised in Tomato Specialties' Motion to Dismiss will be addressed in this Decision, rather than in a separate order on that motion.

B. Analysis and Decision Rejecting Tomato Specialties' Contentions the Investigation in This Proceeding Was Improperly Initiated.

1. Tomato Specialties' Contentions the Investigation Herein Was Improperly Initiated.

Tomato Specialties contends AMS failed to adhere to the requirements of PACA Section 6⁷⁰ in initiating the investigation of Tomato Specialties that resulted in the March 1, 2016 Complaint. It contends; therefore, the March 1, 2016 Complaint is defective; neither USDA nor I have jurisdiction to consider it; and the Complaint must be dismissed.

Tomato Specialties contends:

[T]he plain language of PACA's statutory provision regarding written notifications [PACA Section 6(b)] expressly disallows "an employee of an agency of the Department of Agriculture administering this chapter" from "filing" a written notification.⁷¹

Tomato Specialties argues Mr. Studer, a witness and employee of USDA who "administer[ed] this chapter," filed a "written notification" of an alleged violation of this chapter by a

⁷⁰ 7 U.S.C. § 499f.

⁷¹ Motion, first page; IB, p. 6.

commission merchant, dealer, or broker within the meaning of PACA Section 6(b)⁷² that initiated this proceeding. Thus, Tomato Specialties argues, “the Secretary’s jurisdiction and authority to initiate and prosecute the above styled regulatory matter was improperly invoked.”⁷³

Notably, Tomato Specialties’ Motion does not cite, much less expressly analyze, the interaction of PACA Section 6(a) and 6(c), which provide that an investigation may be initiated after a Section 6(a) reparations complaint regardless of any Section 6(b) written notice. This is so even though Tomato Specialties in its Motion, and elsewhere, expressly recognizes that an interested third party made a reparations complaint under Section 6(a).⁷⁴

Tomato Specialties’ Reply Brief, pp. 3-4, contends—notably for the first time in its post-hearing briefs or motion—the APA bars Mr. Studer from performing the role of a mediator as to a reparations complaint as a part of his handling a reparations complaint for AMS and also reporting to his superiors violations of PACA he came across in handling a reparations complaint.

Tomato Specialties also contends, Reply Brief, pp. 4-6, a PACA Section 6(b) reparations complaint cannot also be a PACA Section 6(b) written notification.

2. AMS Response to Tomato Specialties Contentions Regarding the Initiation of the Investigation Herein.

AMS does not dispute Mr. Studer was an employee of the USDA “administering this chapter [of PACA].” But AMS contends, as expressly provided for under PACA Sections 6(a), (b), and (c), the PACA investigation was initiated by USDA after interested third party

⁷² 7 U.S.C. § 499f(b).

⁷³ Motion, first page; IB, p. 6.

⁷⁴ See Motion, third through fifth pages; IB, 9-12.

reparation complaints under PACA Section 6(a) resulted in a determination by the Secretary that investigations were warranted. AMS contends, therefore, the resulting Complaint was properly issued and within my and the USDA's jurisdiction to consider and resolve.⁷⁵

AMS contends the APA does not apply to Mr. Studer or his actions, and thus did not preclude his acting as a mediator in the reparations complaint and later as an investigator.⁷⁶

AMS argues a PACA Section 6(b) reparations complaint can also be a PACA Section 6(b) written notification.⁷⁷ Regardless, AMS contends Section 6(c) allows the Secretary to initiate an investigation after either a Section 6(a) complaint *or* a Section 6(b) notification, and here, there were Section 6(a) complaints.

3. Preliminary Issues

Section 1.143(b)(1) of the Rules of Practice provides: "Any motion will be entertained other than a motion to dismiss on the pleading." 7 C.F.R. § 1.143(b)(1). Neither party addresses whether Tomato Specialties' motion is one to "dismiss on the pleading."

Section 1.143(b)(2), provides: "All motions and request[s] concerning the complaint must be made within the time allowed for filing an answer." 7 C.F.R. § 1.143(b)(2). AMS does not argue that Tomato Specialties' motion is out-of-time because that motion was filed after the due date for Tomato Specialties' answer to the Complaint. Tomato Specialties implicitly argues that, if its motion is out-of-time under that rule, there is good cause to grant a waiver of that rule because Tomato Specialties could not have known the facts supporting its motion until the testimony of witness Studer at hearing.⁷⁸

⁷⁵ See AMS Response to Motion to Dismiss and RB, pp. 1-5.

⁷⁶ AMS RB, pp. 2-5.

⁷⁷ See, e.g., AMS Response to Motion to Dismiss, p. 13, p. 13 n.13.

⁷⁸ See Motion, first page; IB, pp. 8-11.

I rule that, to the extent Tomato Specialties' motion could be found to be out-of-time, Tomato Specialties has demonstrated good cause for a waiver, and such waiver is granted.

4. Analysis and Rulings

The AMS analysis of PACA Section 6 is correct. As set out below, PACA Sections 6(a) and 6(b) provide two potentially overlapping paths by which a party can become the subject of a PACA Section 6(c) investigation of alleged PACA violations, including of "additional violations" and the subject of a resulting complaint. Tomato Specialties' contentions ignore that under Section 6(a) the Secretary can, and here did, initiate an investigation and issue a complaint after interested parties filed reparation complaints. AMS is also correct that the APA does not apply to Mr. Studer, and he is not barred by that statute or by anything else cited by Tomato Specialties from handling a reparations complaint including acting as a mediator, reporting potential PACA violations he came across in that role to his superiors, and serving as an investigator after a PACA disciplinary investigation was initiated.

Under PACA Section 6(a), a person complaining of a violation of PACA Section 2(4) may file a "petition" with the USDA Secretary.⁷⁹ Such a "petition" is also referred to in Section 6 as a "complaint."⁸⁰

Under PACA Section 6(b), certain state regulatory agencies or officials or "interested person[s]" (other than an employee of an agency of the Department of Agriculture administering

⁷⁹ 7 U.S.C. § 499f(a)(1).

⁸⁰ *See id.*

this chapter)⁸¹ may file in accordance with rules prescribed by the Secretary, a *written notification* of any alleged violation of this chapter”⁸²

Under PACA Section 6(c)(1), “if there appears to be, in the opinion of the Secretary, reasonable grounds for investigating *a complaint made under subsection (a) or a written notification made under subsection (b)*,” the Secretary “shall” investigate.⁸³ Section 6(c)(1) further provides that if:

In the course of the investigation . . . the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation, the Secretary may expand the investigation to include such additional violations.⁸⁴

PACA Section 6(c)(2) provides that if “[i]n the opinion of the Secretary, . . . an investigation under this subsection substantiates the existence of violations of this chapter, the Secretary may cause a complaint to be issued.”⁸⁵

⁸¹ 7 C.F.R. § 46.49(a) of the PACA regulations, like PACA Section 6(b), defines out of “written notification” one made “an employee of an agency of the Department of Agriculture administering this chapter,” but also one made by “a person filing a complaint under Section 6(c).” A “person filing a complaint under Section 6(c)” is someone with authority to cause a PACA disciplinary Complaint to be filed, such as, the Associate Deputy Administrator, or a member of the Office of the General Counsel, both of whom cause disciplinary Complaints under section 6(c) of PACA to be filed and sign such Complaints. The exclusion of a “person filing a complaint under Section 6(c)” has no application to the current issues. For instance, Mr. Studer is certainly not a “person filing a complaint under Section 6(c).” *See* 7 C.F.R. § 46.49(a) (“If [an] investigation substantiates the existence of violations; *a formal disciplinary complaint may be filed by the Secretary as described under Section 6 (c)(2) of the Act.*”) (emphasis added).

⁸² 7 U.S.C. § 499f(b) (emphasis added).

⁸³ 7 U.S.C. § 499f(c)(1) (emphasis added).

⁸⁴ *Id.* PACA Section 6(c)(3) requires certain specific notice of an expanded investigation be provided to the subject of the investigation. Here such notice was provided, and Tomato Specialties does not contest that it was provided such notice. *See* CX-3; Mr. Studer, Tr. II, p. 133-34; CX-4; Mr. Studer, Tr. II, pp. 134-35, 173.

⁸⁵ 7 U.S.C. § 499f(c)(2).

Tomato Specialties errs by solely analyzing PACA Section 6(b), while ignoring PACA Section 6(a) and that section's interaction with Section 6(c). Tomato Specialties recognizes that at least one interested third party made a reparations complaint against it because it complains that Mr. Studer was in charge of and mediated that complaint as an employee of USDA.⁸⁶ Although PACA Section 6(c) is clearly stated and devoid of ambiguity, Tomato Specialties does not appear to recognize that under PACA Section 6(c) such a Section 6(a) reparations complaint can result in an investigation, including an expanded investigation, being initiated by the Secretary.⁸⁷ Nor does Tomato Specialties recognize that if the Secretary, consistent with PACA Section 6(c)(2), determines investigations initiated after a reparations complaint "substantiate the existence of violations of [PACA]," the Secretary may cause a complaint to be issued.

Tomato Specialties is correct that PACA Section 6(b) provides the Secretary cannot initiate a PACA disciplinary investigation initiated where there is *only* a written notification by "an employee of an agency of the Department of Agriculture administering this chapter."⁸⁸

⁸⁶ See Motion, third through fifth pages; IB, pp. 11-12. Indeed, Tomato Specialties acknowledged and referenced one of these reparation complaints in its March 28, 2016 Answer to the Complaint, p. 3, ¶ 11. Tomato Specialties does not deny that another Section 6(a) reparation complaint was also filed.

⁸⁷ Even apart from the clearly stated, unambiguous terms of PACA Section 6(c), it is well-settled that the Secretary can initiate a disciplinary investigation after a reparations complaint. See *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 749 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *Baiardi Food Chain v. United States*, 482 F.3d 238, 243 (3d Cir. 2007); *United Potato Co. v. Burghard & Sons, Inc.*, 18 F. Supp.2d 894, 898 (N.D. Ill. 1998).

⁸⁸ Tomato Specialties argues PACA Section 6(b) prohibits "an employee of an agency of the Department of Agriculture administering this chapter" from "filing . . . a written notification of any alleged violation of this chapter by any commission merchant, dealer, or broker." But the more accurate way of describing PACA Section 6(b) is that it provides that nothing an employee of an agency of the Department of Agriculture administering this chapter does can constitute the "filing [of a Section 6(b)] written notification of any alleged violation" within the meaning of Section 6(b) or 6(c). "[E]mployee[s] of an agency of the Department of Agriculture administering this chapter" assigned to such things as handling related Section 6(a) reparations complaints, such as Mr. Studer here, need to be able to communicate with other USDA

Tomato Specialties is correct that Mr. Studer is such a USDA employee.⁸⁹ Tomato Specialties avers, IB, p. 5: “David Studer filed the written notice required to initiate a disciplinary proceeding under PACA and he was prohibited from doing so because he is an employee of the USDA charged with administering PACA.”

But this is not what happened. What happened is that interested parties—who were not USDA employees—filed Section 6(a) reparations complaints. Such complaints are sufficient statutory basis for the Secretary “to initiate a disciplinary proceeding under PACA.” AMS details these events in its April 3, 2017 Response to Motion, pp. 5-6:

[I]n late 2014, two PACA informal reparation complaints under section 6 of the Act were made and delivered (by produce shippers and PACA licensees) and were received by the USDA, Specialty Crops Program. (Tr. II, pp. 110-115, 160). Both of these reparation complaints, filed by “persons” (other than employees administering the Act) as contemplated in the Act and regulations, involved allegations of violation of section 2(4) of the Act. (Tr. II, p. 131). Senior Marketing Specialist Dave Studer was assigned to handle both of the reparation complaints. (Tr. II, pp. 110-115, 160). These complaints constituted written notifications under both section 6(a) and 6(b) of the PACA (see further discussion *infra*, see also specific reference at footnote 14), and paragraph (a) of section 46.49 of the regulations (7 C.F.R. § 46.9(a)) (any interested person may file a notification alleging violations of section 2 of the PACA). Based on the receipt and initial stages of handling of at least one of the informal reparation complaints (at hearing, Dave Studer makes specific reference to the reparation complaint attached to this Response as “Complaint A”), the Tucson PACA regional office (agents of the Secretary) found that there were reasonable grounds to open an investigation, (Tr. II, p. 131), as is proper under section 6(c) of the PACA and paragraphs (b) and (c) of section 46.49 of the regulations (7 C.F.R. § 46.9(b) and (c)). The Secretary (Specialty Crops Program) investigated the written notification, found there were grounds to open a formal

employees in the course of their duties. Thus, there is no need to determine whether Mr. Studer’s email report to his superior was some sort of “written notice.” The issue is not whether it could be some sort of generic “written notice,” but whether it was a Section 6(b) “written notice.” Under the explicit terms of Section 6(b), it was not and could in no circumstances be.

⁸⁹ AMS states Mr. Studer is such an employee. Motion Response, p. 3.

disciplinary investigation, and proceeded to conduct a disciplinary investigation. (Tr. II., pp. 131, 133, 172-173). When the disciplinary investigation began, notice pursuant to section 6(c)3 of the Act (7 U.S.C. 499f(c)3) was given to Respondent (CX 3; Tr. II, p. 133), and then again, pursuant to that same section, within 180 days after the investigation began (CX 4; Tr. II, p. 173). Subsequent to the disciplinary investigation, the Secretary (Specialty Crops Program) determined that the investigation substantiated the existence of violations of the Act, and a formal disciplinary Complaint was filed by the Secretary (Specialty Crops Program), as is proper under section 6(c) of the Act and paragraph (c) of section 46.49 of the regulations (7 C.F.R. § 46.9(c)).

Thus, the record is clear that the current Complaint was issued after non-USDA employee interested persons brought informal reparation complaints alleging violations of PACA Section 2(4). These complaints resulted in investigations by USDA pursuant to PACA Section 6(c)(1), which resulted in a determination by USDA to issue the current Complaint pursuant to PACA Section 6(c)(2). This tracks the PACA statutory scheme, which bars the initiation of a PACA investigation based on a written notification by a USDA employee, but provides USDA may investigate after an interested third party reparations complaint, and may expand that investigation as to “additional violations” where “the Secretary determines that violations of this chapter are indicated other than the alleged violations specified in the complaint or notification that served as the basis for the investigation.” PACA Section 6(c)(2) provides that the Secretary cause a complaint to be issued where those investigations, including expanded investigations, “substantiate[] the existence of violations of [PACA].”

Tomato Specialties contends:⁹⁰

Importantly, the reparation proceeding Mr. Studer handled for the USDA's PACA division involved unpaid invoices stemming from a produce transaction with quality issues and not allegations of false statements or misrepresentations. It was Mr. Studer alone that

⁹⁰ Tomato Specialties Motion, seventh page; IB, p. 11.

raised the issue of an alleged PACA violation involving a false or misleading statement.

But AMS is correct when it states, “the complaints were for violations of section 2(4) dealing with both non-payment, and, by the very nature of the documents and complaints involved, with possible false or inaccurate statements issued by Respondent.”⁹¹ As AMS also points out:⁹²

In informal reparation Complaint A, *the complaining party states*, inter alia, that “I talked with ... [Respondent in the instant case] and asked if payment had been mailed.... [Respondent in the instant case] faxed account of sales and federal inspections ... [t]he numbers on the account of sales did not seem to be correct on either file.” (Attachment A, Complaint A, p.1). In informal reparation Complaint B, *the complaining party states*, inter alia, that “I asked [Respondent in the instant case] for receipts on boxes that had supposedly been dumped and [Respondent] stated that [it] didn't have documentation on that either. I became suspicious because [Respondent] was not willing to provide any information that I was requesting, and [Respondent] then told me that instead of [it] paying us for the product we had to pay ... for freight charges.... We are requesting the help of PACA to solve this issue” (Attachment B, Complaint B, p.1). [Emphasis added.]

Thus, it is not true, as Tomato Specialties contends, that the reparations complaints and proceedings did not involve “allegations of false statements or misrepresentations.”

AMS is also correct that “even assuming, *arguendo*, the reparation complaints dealt strictly with non-payment under section 2(4) of the Act, Section 6c states that it is appropriate, when violations other than those complained of are indicated, to expand the investigation.”⁹³ There is simply no PACA Section 6 requirement that Section 6(a) reparations complaint allegations match the allegations of a Section 6(c)(2) disciplinary complaint. PACA Section 6(c)

⁹¹ AMS Response to Motion to Dismiss, pp. 8-10.

⁹² AMS Response to Motion to Dismiss, p. 9.

⁹³ AMS Response to Motion, p. 8.

expressly anticipates that an investigation initiated after Section 6(a) complaint may uncover “additional violations” that may be the subject of a complaint issued by the Secretary.

Tomato Specialties is correct that under PACA Section 6 “the USDA is bound to wait until there is an actual written filing by someone ‘other than an employee of an agency of the Department of Agriculture administering this chapter,’ intending to bring a PACA violation to the USDA’s attention in order to begin an investigation.”⁹⁴ But USDA is not “bound to wait” beyond the filing of a petition/complaint under Section 6(a) and/or a proper written notification under Section 6(b). After a petition/complaint under Section 6(a), as here, and/or a written notification under Section 6(b), is filed, USDA is not required, as Tomato Specialties argues, to turn a blind eye to PACA violations by licensees, including “additional violations” uncovered in the course of its employees’ activities after a reparations complaint has been filed.⁹⁵

⁹⁴ Motion, second page; IB, p. 7.

⁹⁵ Tomato Specialties, RB, p. 5, states “[e]ntire bodies of law on suppression of evidence and the fruit of the poisonous tree doctrine stand for the...proposition,” apparently, that AMS cannot circumvent the asserted PACA Section 6 requirements that must be met before the Secretary can initiate an investigation. Presumably, Tomato Specialties is referring to the body of law on the suppression of evidence obtained as the result of the violation of the Fourth Amendment rights of criminal defendants, such as searches by police without proper subpoenas. *See Nardone v. United States*, 308 U.S. 338(1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). This statement requires little discussion here. Fourth Amendment law requiring the suppression in a criminal proceeding of evidence unlawfully obtained has no application in this regulatory proceeding, even by analogy. Tomato Specialties is a PACA licensee, regulated by AMS. *See* CX-1 (USDA License Record for Tomato Specialties, Hammond, Tr. III, pp. 7-8). It is obligated, among many other things, to maintain accurate records. AMS has the right to review those records in the properly initiated investigation of a complaint. *See* PACA Section 13, 7 U.S.C. § 499m. This is not a criminal proceeding. Tomato Specialties does not allege that it has Constitutional rights that were violated. It simply alleges the statutory requirements were not met for initiating an investigation and a person assigned to that investigation should not have been. This Decision determines Tomato Specialties is incorrect on each point. If the fruit of the poisonous tree doctrine somehow applied, which it does not, presumably whether the “evidence” would have inevitably been discovered through non-tainted means and whether the government personnel involved acted in good faith would have to be considered. *See Nix v. Williams*, 467 U.S. 431, 443–44 (1984), and *United States v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v.*

Tomato Specialties takes issue with the fact that Mr. Studer was a mediator for the informal reparation complaints, before the investigation was initiated, after which he was assigned to the matter as an investigator.⁹⁶ It cites nothing in the statutes or the USDA's regulations or procedures that would preclude Mr. Studer from acting both as a mediator as to the reparation complaints and, later, as a USDA investigator as to the matters at issue here. I am similarly unaware of anything in the applicable regulations or procedures which would require Mr. Studer to refrain from reporting to his superiors facts of which he became aware in handling a reparations case.⁹⁷ A fair reading of Tomato Specialties' Motion—as opposed to its later filed Reply Brief—would be that Tomato Specialties' contention is *not* that Mr. Studer improperly divulged to his superiors information he obtained in his handling of the reparations case,⁹⁸ but,

Sheppard, 468 U.S. 981 (1984). There is no basis on which to conclude that Tomato Specialties' false and misleading accountings would not have inevitably come to USDA's attention, as they in fact did as the result of Section 6(a) reparations complaints. There is no evidence that any USDA personnel acted in anything other than good faith in investigating Tomato Specialties' activities as a PACA licensee.

⁹⁶ Motion, fifth and seventh pages; Tr. II, 159-70; IB, pp. 9-12.

⁹⁷ Tomato Specialties argues, Motion, fifth page; IB, p. 10: "Mr. Studer's role as the USDA/PACA's division mediator to the aforementioned reparation proceeding places him in the exact position contemplated under the prohibition against USDA employees administering PACA stated within U.S.C. § 499f and 7 C.F.R. § 46.49(a)(1)." It is unclear what Tomato Specialties means by this text. But, if Tomato Specialties means to contend PACA Section 6 precluded Mr. Studer from providing his superiors with information he came across in performing his duties in handling a reparation complaint, Tomato Specialties is incorrect. PACA Section 6 disallows the Secretary from investigating or issuing a complaint unless there has been a reparations complaint under Section 6(a) or a written notice under Section 6(b). The fact that Mr. Studer's report to his superiors cannot constitute a written notice under Section 6(b) in no way means he is prohibited from communicating with his superiors as to PACA violations he has come across.

⁹⁸ Tomato Specialties' cross-examination at hearing (*see* cross-examination of AMS witness and investigator Mr. Hammond, Tr. III, pp. 118-19) and its new contentions in its Reply Brief indicate Tomato Specialties contends, even apart from the APA, it is bad policy for USDA to allow its employees who act as reparation complaint mediators, or who otherwise perform a role of seeking to help parties resolve such complaints, to report back to the agency apparent PACA

rather, Tomato Specialties contends solely that Mr. Studer's reporting of that information to his superiors cannot constitute a written notice of violation under PACA Section 6(b) because he is a USDA employee involved in administering PACA. AMS agrees that such a report is not such a PACA Section 6(b) written notice. And, as discussed above, given the Section 6(a) reparations complaints present here, such a report need not be a PACA Section 6(b) notice for this disciplinary proceeding to have been properly initiated and the Complaint properly issued under PACA Section 6(e).

In its Reply Brief— as AMS points out,⁹⁹ for the first time—Tomato Specialties contends Mr. Studer's activities violate the APA. This is a new contention raised for the first time by Tomato Specialties in replying to AMS's response to Tomato Specialties' Motion to Dismiss. In other words, this is a potential improper "sandbagging" by Tomato Specialties.¹⁰⁰ As it happens, Tomato Specialties filed its Reply Brief a week before its due date, providing AMS an opportunity to respond to this new contention in its own reply brief, and AMS did respond. Because AMS has responded and has not otherwise complained that it was sandbagged and thus

violations they discover in such roles. *See also* Motion, third and fifth pages; IB, pp. 8 and 9-10. But, as noted, Tomato Specialties presents nothing in its motion upon which to find that such reports violate any law, regulation, or typical USDA procedure, and only in its reply brief first asserts an APA violation. It is not the role of this Decision to consider and determine whether it would be wise for USDA to revise its procedures as to mediation, much less whether the statutory scheme of PACA Section 6 is optimal. Under the current statutes, regulations, and typical procedures, a party that has had a Section 6(a) reparations complaint brought against it is necessarily on notice that, as a result, it is exposed to the possibility of an investigation and a complaint under Section 6, including for "additional violations." Such a party does not have a reasonable expectation that any USDA employee, including the USDA employee handling the complaint, is bound to silence as to information bearing on PACA violations.

⁹⁹ AMS RB, p. 2.

¹⁰⁰ At the time the briefing schedule was set, the parties were specifically warned that sandbagging would be considered improper. Tr. III, p. 178.

put at an undue disadvantage, I will address these new Tomato Specialties contentions and will not determine whether they should be disregarded because they were made for the first time in Tomato Specialties' Reply Brief.

Tomato Specialties cites the APA requirements in 5 U.S.C. §§ 554(d), 556(b)(3), and 557(d)(1) in arguing that agency employees engaged in the performance of investigative or prosecutorial functions may not participate in decisions in hearing or adjudicative proceedings.¹⁰¹ Tomato Specialties argues that Mr. Studer, who, as noted above, handled the informal reparation cases, was a "Presiding/Hearing Officer" in the reparations, and therefore was prohibited from informing his superior of the potential PACA violations he had become aware of in the informal reparation complaints. Tomato Specialties argues that because Mr. Studer was assigned to the reparations complaints as a "mediator" (the term the Specialty Crops Program of PACA assigns to employees who review and handle reparation complaints in their informal stages),¹⁰² he, and, in effect, the entire PACA Division of AMS/Specialty Crops Program, were prohibited from acknowledging the reparation complaints for PACA Section 6(c) purposes. Tomato Specialties asserts the PACA Division of AMS/Specialty Crops Program was prohibited from making the decision that a disciplinary investigation should be conducted if it was informed by Mr. Studer's reports to his superior. Tomato Specialties argues that once Mr. Studer handled the informal reparation complaints, any subsequent action regarding these complaints, such as performing a disciplinary investigation, making a decision that violations exist, and/or filing of the disciplinary complaint herein, was barred.¹⁰³

¹⁰¹ RB, pp. 3-4.

¹⁰² See Studer testimony Tr. II, pp. 160-68, and Hammond testimony, Tr. III, pp. 114-18.

¹⁰³ Tomato Specialties RB, p. 5.

Tomato Specialties bases these contentions on its assertion that Mr. Studer was a “Hearing Officer presiding over” the reparations.¹⁰⁴ Tomato Specialties is incorrect. Under 7 C.F.R. § 47.2(i), only attorneys with the Office of the General Counsel, or employees of the PACA Division, Specialty Crops Program whose work is reviewed by an attorney with the Office of the General Counsel, can serve that function. Mr. Studer was neither. When Mr. Studer was handling the informal reparations, he functioned as a gatherer of documents and information during the informal stage of the reparation, capable of mediating the informal complaint if so requested by the parties.¹⁰⁵ The 1995 legislative history of PACA from the time when the written notice requirements were added to the Act highlights the propriety of this “mediation” function when it notes “[m]ost complaints are resolved informally with the USDA acting as a mediator.”¹⁰⁶

Presiding officers (referred to in the regulations as “Examiners”) under 7 C.F.R. § 47.2(i) are only appointed after the informal stage of the reparation case is completed and a formal complaint is filed. See 7 C.F.R. § 47.3 describing the handling of informal complaints in general.

AMS notes: “Respondent appears to believe that the USDA cannot investigate an allegation of a violation alleged in a reparation complaint/written notice until the alleged violation becomes an adjudicated violation (see Tomato Specialties Motion, p. 7).”¹⁰⁷ AMS is correct that under the express language of PACA Section 6(a) and 6(c)(1) USDA can begin an investigation immediately after a Section 6(a) complaint. Nothing in Section 6(c), or any

¹⁰⁴ *Id.*, p. 4.

¹⁰⁵ Tr. II, pp. 160-68; Tr. III, pp. 116-18.

¹⁰⁶ H.R. Rep. No. 104-207, 104th Cong. (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 460 (1995).

¹⁰⁷ AMS Motion Response, p. 11 n.9.

regulation, requires that a reparations complaint become an adjudicated violation before the USDA can proceed to an investigation and complaint. Tomato Specialties cites nothing that would even arguably indicate otherwise.¹⁰⁸

As discussed above, AMS is correct that where there has been a PACA Section 6(a) reparations complaint, the Secretary can initiate an investigation and issue a complaint, regardless of whether there has been a Section 6(b) written notice. But AMS also contends that a reparations complaint can be both a petition/complaint under PACA Section 6(a) and a written notice under Section 6(b).¹⁰⁹ I am unaware of what difference this latter point makes for the case before me, and I find that I do not have to reach this issue in order to resolve this proceeding.

For its part, Tomato Specialties, as noted above, never expressly comes to grips with whether a Section 6(a) complaint can be the basis for the Secretary's initiating an investigation or causing a complaint to be issued under Section 6(c), although it argues, as also noted above, that the reparation complaints here were insufficient because they "involved unpaid invoices stemming from a produce transaction with quality issues and not allegations of false statements

¹⁰⁸ Tomato Specialties, Motion, seventh page, states the following in support of its contention that a complaint involving an alleged failure to promptly pay a supplier of produce does not become a PACA violation unless and until the dispute concerning the transaction is resolved and the buyer still refuses to pay: "See 7 C.F.R. 46.2(aa)(1) (stating, in relevant part, that 'if there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of the undisputed amount.')." But 7 C.F.R. § 46.2(aa)(1) does not bear on nor purport to bear on whether and when a complaint or written notice may be filed. PACA Section 6(c) is express that when a complaint or written notice has been filed is what governs whether and when the Secretary can initiate an investigation and, thereafter, cause a complaint to be issued.

¹⁰⁹ AMS Motion Response, p. 7 n.10, p. 12 n.11, p. 13 n.13. AMS actually argues that a PACA Section 6(a) complaint is *always* a PACA Section 6(b) written notice. See AMS Motion Response, p. 13 n.13.

or misrepresentations.”¹¹⁰ Nevertheless, Tomato Specialties strenuously argues that a Section 6(a) reparations complaint cannot also be a Section 6(b) written notice.¹¹¹

Tomato Specialties states, RB, p. 4: “Section 499f contains multiple sections and deals with two separate and distinct types of cases[,] each with their own process and procedures.” But as discussed above, PACA Section 6(c) spells out expressly that either of these two separate and distinct types of cases allows the Secretary, if otherwise appropriate, to initiate an investigation, and a resulting PACA disciplinary complaint. And, while Tomato Specialties’ arguments indicate that not every Section 6(b) written notice is a Section 6(a) complaint, they do not demonstrate the reverse—that a Section 6(a) complaint cannot also be a Section 6(b) written notice, much less that the Section 6(a) reparations complaints here are not also Section 6(b) written notices.¹¹²

Through a Section 6(a) complaint a private party is generally seeking a money recovery. Under Section 6(a)(1), the complaint must “briefly state[] the facts.”¹¹³ There is a nine-month

¹¹⁰ Tomato Specialties Motion to Dismiss, seventh page; IB, p. 11.

¹¹¹ See Tomato Specialties RB, pp. 4-6.

¹¹² Tomato Specialties cites, RB, p. 5, 7 C.F.R. § 1.133 for the proposition that “[u]nlike the Reparation complaint requiring only a brief statement of the facts, a proper notice under § 499f(b) requires the information to be set forth in more detail and an entirely different format.” It is not clear that 7 C.F.R. § 1.133 is not intended to apply to Section 6(a) complaints and 6(b) written notices alike. But even if this regulation applies only to Section 6(b) written notices, there would be no basis for rejecting a complaint that also supplied the Section 1.133 details as inconsistent with the Section 6(b) requirement that the complaint include a “brief statement of the facts. Tomato Specialties also cites in the same section of its brief: “*See also 7 C.F.R. § 46.49.*” Tomato Specialties, thus, provides no explanation whatsoever as to why a Section 6(a) complaint cannot meet all of the criteria of a Section 6(b) written notice.

¹¹³ 7 C.F.R. § 499f(a)(1).

statute of limitations for submitting the complaint,¹¹⁴ and filing fees are required.¹¹⁵ There is no provision that such a complaint be treated on a confidential basis. Section 6(a) requires a “complain[t] of a[] violation of any provision of section 499b of this title by any commission merchant, dealer, or broker....”¹¹⁶

A private party cannot recover money by simply by filing a Section 6(b) written notice. There is no statute of limitations for Section 6(b) written notices. There are no filing fees. There are provisions for keeping the identity of filers of Section 6(b) written notices confidential, nothing *requires* a person filing a Section 6(b) notice to do so on a confidential basis. It is difficult to parse out Tomato Specialties contentions as to why a Section 6(a) complaint cannot also meet the criteria for a Section 6(b) written notice, but it may be that Tomato Specialties is hanging its hat on the Section 6(b) confidentiality provisions.

Section 6(b) can operate to provide confidential treatment to informants to encourage reports of PACA violations by third parties who do not wish to be publicly identified. But Section 6(b) need not always operate that way if the interested party does not wish to remain anonymous, for instance because it must reveal its identity to seek monetary reparations under Section 6(a). Tomato Specialties’ arguments attempt to turn a confidentiality provision intended to encourage and protect interested parties reporting PACA violations into something to shield PACA violators from USDA investigations and complaints.

A Section 6(b) written notification is “a written notification of any alleged violation of this chapter by any commission merchant, dealer, or broker.” Certainly, a Section 6(a) complaint

¹¹⁴ *Id.*

¹¹⁵ 7 C.F.R. § 499f(a)(2).

¹¹⁶ 7 C.F.R. § 499f(a)(1).

is in writing and can “involve an alleged violation of this chapter.” That a party paid a filing fee under Section 6(a) certainly does not mean its complaint does not meet the Section 6(b) criteria.

Thus, a Section 6(a) complaint can clearly also meet the required criteria for a Section 6(b) written notice. Tomato Specialties points to nothing about the specific Section 6(a) complaints here that fail to meet the Section 6(b) written notice criteria.¹¹⁷

Further, as AMS argues, PACA Section 6 is not ambiguous as applied to the facts, and, if it were ambiguous, USDA would be entitled to deference in its interpretation of the statute.¹¹⁸

In conclusion, the investigation herein was properly initiated, and the resulting Complaint is properly before me for resolution.

II. Tomato Specialties Violated PACA.

In its Initial Brief, p. 12, Tomato Specialties states as the second of its two major argument headings: “The USDA Failed to Present Sufficient Evidence to Prove any Allegations that Tomato Specialties Made Misrepresentations or False Statements in Connection with Certain Produce Transactions.” But Tomato Specialties does not contest that AMS presented conclusive evidence that Tomato Specialties personnel made statements in connection with

¹¹⁷ Tomato Specialties walks north and south at the same time on what is required for a Section 6(b) written notice. It contends that Mr. Studer’s email to his superior was such a written notice, defective only because Mr. Studer was not an interested party not employed by the USDA. Yet clearly Mr. Studer’s email to his superior does not meet, say, the 7 C.F.R. § 1.133 “format” and other requirements Tomato Specialties contends preclude the Section 6(a) reparation complaints from being Section 6(b) written notices.

¹¹⁸ AMS Motion Response, pp. 4-5. AMS cites in support, *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir.1998); and *West v. Sullivan*, 973 F.2d 179, 185 (3d Cir. 1992), *cert. denied*, 508 U.S. 962 (1993).

produce transactions that they knew were false.¹¹⁹ AMS clearly did. Tomato Specialties contentions are not, in fact, that AMS failed to show that Tomato Specialties made statements known to be false when they were made in connection with produce transactions, but, that, for numerous asserted reasons, those false statements did not violate PACA, for instance, because they did not violate state law, or the persons to whom those statements were made either did not rely on them or could have requested back-up materials that would show them to be false, or the statements were made in collusion with the persons to whom the false statements were made.

It is Tomato Specialties, not AMS, that fails as to its legal contentions and in proof of alleged defenses. AMS has carried its burden of proof in every instance.

PACA Section 2(4)¹²⁰ makes it unlawful for any commission merchant, dealer or broker to make, for a fraudulent purpose, a false or misleading statement in connection with any transaction in interstate commerce involving perishable agricultural commodities. It also renders unlawful any failure to account truly or correctly, or the failure, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction in interstate commerce involving perishable agricultural commodities.¹²¹

If the Secretary determines in an administrative proceeding that a commission merchant, dealer, or broker has violated the provisions of Section 2(4), the Secretary may publish the facts

¹¹⁹ See Tomato Specialties closing argument, Tr. III, p. 206 (“We will concede[] that Mr. Hammond did do a beautiful job of going through those documents [a]nd there are examples where there are false statements contained on those documents.”).

¹²⁰ 7 U.S.C. § 499b(4).

¹²¹ *Id.*

and circumstances of the violation, or suspend the violator's license for up to 90 days.¹²² Where the Secretary determines that the violations were repeated or flagrant, the Secretary may revoke violator's PACA license.¹²³

Tomato Specialties emphasizes that it is a “broker” in the relevant transactions and it never “sees” or has physical possession of the tomatoes at issue.¹²⁴ It contended at various points of the proceeding it was not covered by the TSA, but it did not brief that contention and has not asserted that contention as a defense to the AMS PACA violation allegations.¹²⁵

Tomato Specialties at various times during the hearing stated it was a “broker” of some type.¹²⁶ Its counsel referenced the terms “buying broker” (or “buyer broker”) and “selling broker” from time to time.¹²⁷ PACA Section 2(4) proscribes violations by commission merchants, dealers, and brokers in all phases of produce transactions in interstate or foreign commerce.¹²⁸ Whether Tomato Specialties was a broker or merchant/dealer purchaser in the forty-one transactions is irrelevant to whether Tomato Specialties violated PACA, because Section 2(4) proscribes violations by all such entities.¹²⁹ Tomato Specialties is a licensee under PACA. For purposes of this Decision, it does not have to be determined precisely which of these

¹²² 7 U.S.C. § 499h(a).

¹²³ *Id.* See H.C. MacClaren, Inc., 60 Agric. Dec. 733, 757, 762-63 (U.S.D.A. 2001).

¹²⁴ See AMS IB, p. 9, n.2.

¹²⁵ See Tr. II, 208-09. Tomato Specialties' counsel states: “[F]rom a legal standpoint, he's not But we are not contesting that as a defense to the case—to the extent that the allegations of misrepresentation are predicated upon my client being subject to the Tomato Suspension Agreement, then he is not.”

¹²⁶ See Tr. I, pp. 50, 54; Tr. II, p. 211; Tr. III, p. 30.

¹²⁷ See Tr. I, p. 334, 336; Tr. II, p. 242.

¹²⁸ See *Coosemans Specialties v. Dep't of Agric.*, 482 F.3d 560, 565-66 (D.C. Cir. 2007).

¹²⁹ See *id.*; *Jacobson Produce, Inc.*, 53 Agric. Dec. 728, 753-54 (U.S.D.A. 1994).

roles Tomato Specialties performed. It is enough to determine, as this Decision does, that Tomato Specialties actions were covered by PACA Section 2(4).

Tomato Specialties contends because “neither PACA nor its regulations provide any type of definition for either a false or misleading statement . . . this Honorable Tribunal must turn to Arizona law for guidance with respect to these definitions and their related elements of proof.”¹³⁰ It contends AMS did not prove each of the “nine elements” required to “establish an intentional misrepresentation or fraud claim” under Arizona law.

The last sentence of PACA Section 15¹³¹ states PACA shall not abrogate nor nullify any existing state or federal statute dealing with the same subject matter as PACA, unless those existing state or federal statutes are “inconsistent” with or “repugnant” to PACA. Tomato Specialties asserts Arizona law and PACA law are not inconsistent with PACA Section 2(4), and cites *A. Sam & Sons Produce Co., Inc.* (“*Sam & Sons*”)¹³² as stating that the last sentence of Section 15 has been interpreted by many U.S. Courts of Appeals to mean that the law of sales under state statute and common law can apply in PACA transactions.¹³³

But, as AMS points out, *Sam & Sons* refers to PACA reparations cases, and specifically the law of sales.¹³⁴ It nothing to do with the PACA ban on false or misleading statements.¹³⁵

¹³⁰ Tomato Specialties RB, p. 13.

¹³¹ 7 U.S.C. § 499o.

¹³² 50 Agric. Dec. 1044, 1056 (U.S.D.A. 1991).

¹³³ AMS RB, p. 13.

¹³⁴ AMS IB, p. 7.

¹³⁵ Each of the Arizona precedents cited by Tomato Specialties involves fraud in contract cases between two private parties requiring proximate damages to a party. None is similar to the current case, which involves a disciplinary violation under a statutory framework designed to protect an entire industry against unfair trade practices by proscribing conduct such as issuing false statements for fraudulent purpose. *Frazer v. Millennium Bank*, No. 2:10-CV-0159 JWS,

Reparations cases involve for failure to pay disputes between specific parties and potentially provide remedies to specific parties, not the overall public interest. The Arizona law cited regarding intentional misrepresentation and consumer fraud is not substantially similar to the PACA Section 2(4) false statement prohibitions. PACA and the cited Arizona law do not deal with the same subject matter, which PACA Section 15 requires be the case for Arizona law to apply in a PACA complaint proceeding such as this proceeding.

What must be determined in this proceeding is whether Tomato Specialties violated PACA Section 2(4) and its specifically articulated proscription against false and misleading statements. "It is well settled that 'Congress is not to be presumed to have used words for no purpose. . . . Courts are to accord a meaning, if possible, to every word in a statute.'"¹³⁶ The Judicial Officer in *The Produce Place*, relying on the wording of PACA and case precedent, found that in order to prove a violation of the Section 2(4), "complainant must . . . show a) that Produce Place made a false or misleading statement . . . [and] b) that the statement was made for a fraudulent purpose."¹³⁷ A statement is false and misleading when the maker knowingly misrepresents and intends for others to rely on the misrepresentation.¹³⁸

2010 WL 4579799 (D. Ariz. Oct. 29, 2010), involves intentional misrepresentation and consumer fraud against a consumer by a bank; *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489 (Ct. App. 1990), involves fraud under the Truth in Lending Act by a bank and mortgage company. *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498 (1982), involves fraud by a builder in a real estate case. *Nielson v. Flashberg*, 101 Ariz. 335 (1966), involves fraud in a contract case.

¹³⁶ *The Produce Place*, 53 Agric. Dec. at 1734 (quoting *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878)).

¹³⁷ *Id.* at 1733-34.

¹³⁸ *See Produce Place v. Dep't of Agric.*, 91 F.3d 173, 177 (D.C. Cir. 1996) (holding that the false and misleading statement clause was violated when the buyer knowingly misrepresented the condition of produce to the seller); *Coosemans Specialties v. Dep't of Agric.*, 482 F.3d 560, 566 (D.C. Cir. 2007).

Here, Tomato Specialties issued false and misleading TSA Accountings, knowing they were false, and sent them to shippers, who relied on them. *See* hereinbelow Findings of Fact.

The Supreme Court interprets a statute designed to regulate business activities according to what “a business person of ordinary intelligence” would understand to be innocent or proscribed conduct.¹³⁹ The elements of a violation of PACA Section 2(4) are clearly set out in the statutory text. A respondent violates PACA when it: 1) makes a statement; 2) that is false or misleading; 3) for a fraudulent purpose; 4) in connection with any transaction involving any perishable agricultural commodity received in interstate or foreign commerce. Each forum confronted with alleged false and misleading statements alleged to be PACA violations has utilized and applied the elements found in Section 2(4) to decide whether a respondent violated PACA, not alleged elements of any state law.¹⁴⁰

Precedent instructs that in dealing with a regulatory statute aimed to achieve a greater societal control through specialized agencies, common-law definitions should be disregarded. Instead the legislation should be considered as a whole, including the evils it sought to eradicate or the control which it aimed to achieve, and the words used with these objectives in view.¹⁴¹

PACA was enacted specifically to deal with trade violations in the perishable agricultural commodities industry. It was designed to provide a general commercial duty on PACA licensees

¹³⁹ Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 501 (1982).

¹⁴⁰ *See* Coosemans Specialties v. Dep't of Agric., 482 F.3d 560, 566 (D.C. Cir. 2007); H.C. MacClaren, Inc., 60 Agric. Dec. 733 (U.S.D.A. 2001); The Produce Place, 53 Agric. Dec. 1715, 1756 (U.S.D.A. 1994); Tipco, Inc., 50 Agric. Dec. 871, 881 (U.S.D.A. 1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir. 1991), *cert. denied*, 506 U.S. 826 (1992); Sid Goodman & Co., 49 Agric. Dec. 1169, 1179-82, 1191 (U.S.D.A. 1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992).

¹⁴¹ Goodman v. Fed. Trade Comm'n, 244 F.2d 584, 591 (9th Cir. 1957).

to deal fairly.¹⁴² PACA is “admittedly and intentionally a ‘tough’ law.”¹⁴³ Against this backdrop it is apparent that state or common law applicable to strictly private contractual parties has no applicability when assessing whether there has been a violation of PACA Section 2(4) for making false and misleading statements:

[W]hen interpreting a statute, the aim of which is to regulate interstate commerce and to control and outroot some evil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of the business activity or the enforcement of standards it has established.¹⁴⁴

The Arizona law of misrepresentation and fraud in sales transactions, in particular that cited by Tomato Specialties, is not applicable to the issues in this case.¹⁴⁵

¹⁴² Sid Goodman & Co., 49 Agric. Dec. 1168, 1182 (U.S.D.A. 1990), *aff’d per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992); H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942).

¹⁴³ S. Rep. No. 2507, 84th Cong., 2d Sess., reprinted in 1956 U.S.C.C.A.N. 3699, 3701. *See* *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781 (D.C. Cir. 1983).

¹⁴⁴ *Sebastopol Meat Co. v. Sec’y of Agric.*, 440 F.2d 983, 985 (9th Cir. 1971).

¹⁴⁵ Assuming, *arguendo*, Tomato Specialties’ strained argument that Arizona state law somehow applies, AMS met each of Tomato Specialties’ alleged state law elements. Tomato Specialties made, in each of the forty-one transactions at issue in this case: 1) representations (the TSA accounting forms are “representations”); 2) that were false (Tomato Specialties so admits); 3) that were material (testimony from the recipients of the accounting forms established that they relied on the forms and that significant price adjustments were granted on the basis of the statements made in the accountings); 4) that Tomato Specialties knew were false (admitted by Tomato Specialties, as noted); 5) the shippers who received the accountings did not know they were false (shippers specifically so testified); 6) The shippers relied on the truth of the accountings (both witnesses Fabiola Cuen, Tr. I, pp. 118-120, 123-125, 130, 178-180, 223, 238, and Jaime Chamberlain, Tr. I, pp. 245, 255-256; CX 9, testified they believed the accountings were true and relied on them in granting adjustments; *see also* Studer, Tr. I, pp. 143-144; CX 7 (describing interviews he conducted); 7) The shippers had a right to rely on the accountings (the shippers were engaged in produce transactions with Tomato Specialties where accountings were sent to them as part of the transaction—under PACA, Tomato Specialties had a duty to make, keep in its records, and send true and accurate accountings; and 8) The shippers and growers (there was testimony at hearing that the growers were shown the accountings to the shippers to

In arguing Arizona law applies rather than the portion of PACA Section 2(4) pertaining to false and misleading statements, Tomato Specialties also ignores other applicable portions of that PACA section that it violated in addition to the specific false and misleading statement proscription. Tomato Specialties ignores that it violated the Section 2(4) proscription on failures to account truly and correctly. As noted previously, Tomato Specialties, at various times during the hearing, stated that it was a broker of some type (references to "buying-broker" and "selling broker" were made).¹⁴⁶ But whether Tomato Specialties was a broker or merchant/dealer purchaser in the forty-one transactions is irrelevant to whether Tomato Specialties violated PACA, because Section 2(4) proscribes violations by commission merchants, dealers, and brokers in all phases of a produce transaction in interstate or foreign commerce.¹⁴⁷ That said, the definition for "buying broker" is instructive on the accounting standards established by PACA and the regulations regarding their truthfulness and accuracy. As set forth in 7 C.F.R. § 46.2 (y)(3), another PACA regulation, for a buying broker¹⁴⁸ to truly and correctly account means "to account by rendering a true and correct itemized statement showing the cost of the produce, the expenses properly incurred, and the amount of brokerage charged." Whether Tomato Specialties acted as a broker or a dealer in the transactions in this case, it had a duty to provide true and accurate accountings in its produce transactions. Tomato Specialties did not account truly and

justify returns) received less money in each of the forty-one transactions as a direct result of Tomato Specialties' false and misleading statements.

¹⁴⁶ Tr. I, p. 50; Tr. II, p. 211; Tr. III, pp. 129-31.

¹⁴⁷ See *Coosemans Specialties*, 482 F.3d at 566.

¹⁴⁸ Only the term "buying broker" is found in the regulations. The term "selling broker" is not defined nor used in the regulations. See 7 C.F.R. § 46.2; see also 7 C.F.R. § 46.28, entitled "Duties of Brokers."

correctly. Instead it issued false accountings in forty-one transactions. *See* hereinbelow Findings of Fact.

In its Answer to the Complaint, p. 2, ¶ 7, by way of “affirmative defense,” Tomato Specialties averred that the TSA Accountings were neither “accountings” nor “statements” under PACA but rather “were used in accordance with instructions from each trading partner receiving them to calculate a liquidated damages formula in wide and common use in the Nogales, AZ area concerning shipments of Mexican tomatoes which failed to meet minimum arrival standards at destination.”¹⁴⁹ Tomato Specialties does not appear to have pursued any contention that the TSA Accountings were not accountings or statements. In any event, shippers were paid based on those TSA Accountings. They comprise accountings and statements under PACA.

Besides violating the Section 2(4) proscription against issuing false and misleading statements for fraudulent purposes, Tomato Specialties also violated the PACA Section 2(4) implied duty clause, which imposes a duty to engage in honest dealing and protects producers and other merchants from dishonest and irresponsible conduct.¹⁵⁰ Issuing false and misleading statements and inaccurate accountings, as Tomato Specialties did, is dishonest and irresponsible conduct proscribed by the Section 2(4) implied duty clause.

Notably, as stated previously, in its Reply Brief Tomato Specialties contests none of the above, but instead addresses only its contentions that the investigation was initiated improperly.

¹⁴⁹ *See also* Tr. I, pp. 51-52.

¹⁵⁰ *See* *Coosemans Specialties v. Dep’t of Agric.*, 482 F.3d 560, 566 (D.C. Cir. 2007). *See, e.g.*, *JSG Trading Corp. v. Dep’t of Agric.*, 176 F.3d 536, 543 (D.C. Cir. 1999); *G&T Terminal Packaging Co. v. Dep’t of Agric.*, 468 F.3d 86, 96, 97 (2d Cir. 2006); *Chidsey v. Geurin*, 443 F.2d 584, 587 (6th Cir. 1971); *Rankin Sales Co. v. Morrie H. Morgan Co.*, 296 F.2d 113, 116-17 (9th Cir. 1961).

In its Initial Brief, p. 14, Tomato Specialties contended AMS failed to make specific allegations in its Complaint or otherwise present either any evidence or sufficient evidence at trial regarding the following pleading elements critical under Arizona law: (i) the materiality of the alleged statement, (ii) the speaker's intent that it be acted upon by the recipient in the manner contemplated; (iii) the hearer's ignorance of its falsity; (iv) the listener's reliance on its truth; (v) the right to rely on it, and (vi) the hearer's damages. As discussed above, PACA Section 2(4) not Arizona law applies in this proceeding. And even if Arizona law applied, AMS demonstrated that each state law element Tomato Specialties claims must be met has been met.

Tomato Specialties asserts¹⁵¹ “no evidence exists that any recipient of the Tomato Suspension Agreement Accounting Worksheets (the ‘Worksheets’) requested or demanded any back-up to support the calculations contained therein” and “because the Government's form Worksheet calls for the inclusion of all of the relevant back-up to support the summary calculations, the recipients of the Worksheets have no right to rely upon a Worksheet that fails to include any of the relevant back-up.”¹⁵² It also contends that, *id.*:

[T]he alleged recipients of the Worksheets (i.e., hearer of the allegedly false or misleading statement) use the Worksheets to justify deductions to their growers that allow them to return less money to said grower, which enables the shippers to keep more of the grower's money. As a result, the recipients of the Worksheets (i.e., the Shippers) were not damaged from any false or misleading statements that were allegedly contained on the face of the Worksheets, but rather benefit[] from it.

¹⁵¹ IB, p. 16

¹⁵² At an earlier stage of this proceeding, Tomato Specialties claimed that shippers accepted its TSA Accountings without the backup support, because they preferred to get paid right away and waiting to obtain the backup support to provide with the Accountings would delay that payment. See Tr. I, pp. 230-40, 327; Tr. III, 186-91.

If this were the result of the application of Arizona law, Arizona law would be “inconsistent []with or repugnant” to PACA and, for that reason, could not be applied under the last sentence of PACA Section 15. As noted above, PACA was designed to combat a pattern of unfair practices perceived as then prevalent in the perishable agricultural commodities industry—that is, the victimization of growers and shippers by unscrupulous dealers to whom such commodities were sold or consigned for sale.¹⁵³ As also noted, *Quinn* points out a particular concern of dealers rejecting shipments on false grounds, notably that the commodities arrived in a condition other than as promised, indicating that Congress in enacting PACA was sensitive to the fact that unfair practices could involve the quality of delivered produce.

In its answer to the Complaint, Tomato Specialties contended:¹⁵⁴

Complainant's Tucson staff handling [a 2014 PACA reparation Complaint] were fully informed that Respondent billed for entire original commercial unit shipments and used the [Tomato Suspension Agreement Accountings of Sales and Costs] damages form, notwithstanding that no evidence of actual dumping, reconditioning, or repacking was ever done by Respondent or its customers, in precisely the same way as said forms were used in the 41 transactions herein. * * * Complainant's failure to inform and educate Respondent and others similarly situated in the use and requirements of the subject forms, and well as failing to require compliance from Respondent's vendors who were primarily responsible for and complicit in the use of the subject forms, precludes Complainant from holding Respondent in violation for its use of the forms as instructed by the trading parties for whom the forms were generated and filled out.

Tomato Specialties contends in this part of its Answer that USDA and its vendors were aware Tomato Specialties did not actually incur the “dumping, reconditioning, or repacking” stated on the forms. And Tomato Specialties states it did not produce evidence of such costs. But Ms.

¹⁵³ See *Quinn v. Butz*, 510 F.2d 743, 745-46 (D.C. Cir. 1975).

¹⁵⁴ Answer, p. 3, ¶¶ 11, 13.

Quinn, the “managing member of Quinn Distributing,” one of the seller/shippers in transactions within this proceeding, someone with decades of experience in the relevant industry,¹⁵⁵ credibly testified she did not know and would be “very disappointed and very surprised” to learn that the 812 cartons of tomatoes shown as dumped on the TSA Accounting in Exhibit CX-18, p. 10, were not actually dumped and the repacking/reconditioning charges shown there were not actually incurred.¹⁵⁶ She testified these accountings had to be shown to the grower, and she “trusted completely this accounting of sales.”¹⁵⁷ She testified that not only the growers, but her seller/shipper company, was harmed by such false accountings, because “[t]he more we sell, the more we get. The less we sell, the less we get.”¹⁵⁸ She testified that the fact that the accounting showed expenses deducted that were not incurred put her “business at risk.”¹⁵⁹

Moreover, as Tomato Specialties focuses upon at length in its Motion and Briefs, AMS staff (Mr. Studer) in handling the PACA reparations complaints that lead to the investigation and complaint at issue here was not complacent about inaccurate TSA Accountings he came across there, but reported them to his superiors, and they became part of this proceeding. The record shows that AMS did not acquiesce in Tomato Specialties use of inaccurate TSA Accountings.

The TSA provides that the TSA Accountings are to be accompanied by documentation of the costs stated on that accounting to have been incurred, and shippers could demand such documentation.¹⁶⁰ But the fact that those accountings were not accompanied by such

¹⁵⁵ Tr. I, 129-30.

¹⁵⁶ Tr. I, 119-120.

¹⁵⁷ Tr. I, 120.

¹⁵⁸ Tr. I, 121.

¹⁵⁹ Tr. I. 121-22.

¹⁶⁰ See Complaint, Attachment A, TSA, Appendix D.

documentation and that shippers did not request it, does not mean they did not contain false and misleading statements under PACA, or mean that Tomato Specialties did not commit willful PACA violations by submitting such TSA Accountings. In a similar vein, on cross-examination Respondent brought out that some inspections reflected in the TSA Accounting at issue may not have, for whatever reasons, been called for within eight hours from the time of arrival at the receiver and performed in a timely fashion thereafter, as required by Appendix G of the TSA,¹⁶¹ or may have been performed at other locations so the inspection was arguably not fully consistent with the TSA.¹⁶² But these events do not render Tomato Specialties' statements in those TSA Accounting any less false and misleading, or otherwise provide Tomato Specialties a defense for PACA violations.

Tomato Specialties argued that the TSA Accountings at issue, signed by Tomato Specialties' personnel were in effect jointly prepared by it and seller-shippers,¹⁶³ but presented scant evidence that could arguably conceivably support such an assertion. It did not present testimony by Tomato Specialty employees or other witnesses that this was the case. Emails between seller-shipper and Tomato Specialties personnel discussing details of certain TSA Accountings appear to be a normal back and forth between entities on whether charges billed by one to the other are accurate and otherwise appropriate, and not part of some scheme between seller-shippers and Tomato Specialties to jointly draft fraudulent TSA Accountings.¹⁶⁴ Nothing it

¹⁶¹ Complaint, Attachment A, p. 31.

¹⁶² See Tr. II, pp. 296-303.

¹⁶³ Tr. III, p. 195.

¹⁶⁴ See Chamberlain testimony, Tr. I, pp. 291-312; Ex. RX-A; AMS IB pp. 50-51.

brought out in cross-examination of witness who are employees of seller-shippers supports there was such a scheme. Any alleged proof by Tomato Specialties of this assertion fails.

Tomato Specialties argues that its admittedly false documentation not only enables it to underpay the shippers but allows the shippers to underpay the growers and this result “benefits” the shippers.¹⁶⁵ The record does not show why, as a matter of fact or logic, this would be a “benefit” to the shippers rather than, arguably, at best, a matter of holding the shippers harmless, unless the contention is that the shippers are “benefited” because they are out less money than they would otherwise be out from Tomato Specialties’ false accounting and payments. But there is no showing of how the shippers would be better off than they would be if Tomato Specialties’ accounting were accurate, as required by PACA, and payments were in the proper amounts. Apparently, Tomato Specialties is alleging that it is conspiring with the shippers to mislead and disadvantage the growers. If shippers disadvantaged shippers by utilizing false accountings, that is no defense to Tomato Specialties for its own violations of PACA. It is indisputable on the record in this proceeding that apart from any alleged beneficial effects of its actions on shippers Tomato Specialties has sold and pocketed the revenues from tomatoes covered by the false accountings and based on those accountings did not pay the shippers for, and has collected and pocketed amounts for the costs of dumping, reconditioning, or repacking that it did not actually incur.

It may also be that Tomato Specialties is on brief implicitly contending, that sellers were agreeable to being paid according to accountings that contained undocumented and even false

¹⁶⁵ Tomato Specialties IB, p. 16. At times, the baseless costs for things such as reconditioning and dumping included in Tomato Specialties’ TSA Accountings more than offset the purchase price it owed the shippers, so that the shippers purportedly owed Tomato Specialties money for a shipment rather than vice versa. *See, e.g.,* Tr. I, pp. 260-61.

expense deductions, because it was to their advantage those accountings show transactions are meeting the TSA reference price or even that Tomato Specialties and these shipper/sellers were colluding in violation of the TSA.¹⁶⁶ But Tomato Specialties does not forthrightly make any such contentions, especially on brief, and the record supports no such contentions. Moreover, a Tomato Specialties collusion with others to violate TSA requirements would not excuse it from its duties under PACA. If it were shown that other PACA licensees violated PACA as well as Tomato Specialties, that would not excuse Tomato Specialties. It is not the role of the undersigned or of USDA to determine whether Tomato Specialties and/or others violated the TSA, and such a determination is unnecessary to determine that Tomato Specialties violated PACA.

During the course of the hearing, Tomato Specialties argued that through TSA Appendix D, which applies to the transactions at issue, the TSA must be applied to determine whether any accounting it gave was false and misleading. Tomato Specialties did not develop this contention on brief, so it is, at best, difficult to discern what this Tomato Specialties argument would have been if Tomato Specialties had pursued it. Tomato Specialties may have argued that because Appendix D provides that for costs such as those from reconditioning and dumping to be deducted from the price of a shipment to determine whether the price meets the TSA reference price, they must be “properly documented,” including in some instances at least “specifically [by] proof-of-payment documentation for the invoice from the repacker,”¹⁶⁷ and where Tomato Specialties provided TSA Accountings without such documentation the seller-shipper should not have relied on them in accepting a lower price and, thus, somehow, the false TSA Accountings

¹⁶⁶ See Tr. I, pp. 308-41.

¹⁶⁷ Appendix D, B, 4. Tomato Specialties does not have its own repacking facilities. See Tr. II, p. 235, 252-53.

were a nullity, and thus not a PACA false statement. But there is no issue that the TSA Accountings were false and the evidence is that shippers-sellers did accept a lower price based on and relying those accountings and that, among other things, Tomato Specialties obtained payments for costs it never actually incurred. The fact that the TSA may apply to a transaction, and that particular accountings may not meet certain TSA requirements, does not make those accounting accurate and does not mean that those accountings, as a result of their falseness, did not have the capacity to harm markets covered by PACA and participants in those markets.¹⁶⁸

As discussed above, under PACA Tomato Specialties had a duty to provide true and accurate accountings in its produce transactions. It repeatedly violated that duty. As also discussed above, PACA Section 2(4) also imposed an “implied duty” on Tomato Specialties to engage in honest dealing to protect producers and other merchants from dishonest and irresponsible conduct. It also repeatedly violated that duty.

FINDINGS OF FACT

Each of AMS’s proposed findings of fact¹⁶⁹ was fully supported and none was contested by Tomato Specialties in its Reply Brief. They were reviewed and are adopted, as follows:

1. Tomato Specialties is a corporation organized and existing under the laws of the state of Arizona. Its business address is 450 West Gold Hill Road, Ste. 6, Nogales, AZ 85621. CX-1, p. 1; Tr. II, p. 252.
2. At all times material herein, Tomato Specialties was licensed under PACA. License number 20100333 was issued to Tomato Specialties on December 17, 2009. CX- 1,

¹⁶⁸ Tomato Specialties asserted that the Mexican growers were the victims of the TSA Accountings being filled out the way the shippers “directed.” See closing argument, Tr. III, p. 210.

¹⁶⁹ IB, pp. 9-37.

p. 1.

3. During the period of May 2014 through April 2015, Tomato Specialties entered into forty-one transactions with five produce sellers and shippers, wherein it purchased perishable agricultural commodities received in interstate and foreign commerce, specifically, tomatoes grown in Mexico. AMS Complaint; CX-16-56a.¹⁷⁰

4. In these transactions, Tomato Specialties issued forty-one "Tomato Suspension Agreement"¹⁷¹ "Accountings of Sales and Costs" ("TSA Accountings") to the sellers/shippers of tomatoes. AMS Complaint; CX-16-56a. In each of these transactions, the TSA Accountings set out expenses said to be based on the results of USDA Federal inspections. AMS Complaint; CX-16-56a; Tr. I, pp. 79-84, 118-19, 255-61; Tr. II, pp. 51-53, 261-62, 264-66, 312-13; Tr. III, pp. 10, 12, 20, 23-24).

5. In each, Tomato Specialties stated and claimed it dumped portions of the product with condition defects, and it incurred repacking and reconditioning fees in connection with the transactions. AMS Complaint; CX-16-56a; Tr. I, pp. 83, 98, 100, 123-24, 171-74, 223, 255-56, 261, 303; Tr. II, pp. 51-53, 260, 264-66, 313.

¹⁷⁰ The transactions are 2124, 2129, 2140, 2178, 2244, 2251, 2307, 2317, 2323, 2325, 2326, 2329, 2331, 2332, 2336, 2339, 2340, 2344, 2345, 2346, 2352, 2364, 2365, 2366, 2391, 2393, 2406, 2419, 2420, 2431, 2437, 2439, 2442, 2447, 2448, 2454, 2455, 2461, 2474, 2478, and 2489. Lots 2346 and 2366 appear out of this order in AMS's exhibits: 2346 is CX-55 and 2366 is CX-56).

¹⁷¹ The transactions at issue were subject to the terms of a 2013 Tomato Suspension Agreement ("TSA") pursuant to Section 734(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673c(c), and Section 351.208 of the U.S. Department of Commerce regulations, 19 C.F.R. § 351.701. As discussed above, while the TSA is a part of this case insofar as Tomato Specialties issued accountings to sellers under the TSA, the issues are not whether Tomato Specialties abided by the terms of the TSA, but whether Tomato Specialties violated PACA.

6. For each of the forty-one transactions, the tomato sellers/shippers granted adjustments to the invoice price based on Tomato Specialties' TSA Accountings claimed expenses (dumping, reconditioning, and repacking)." AMS Complaint; CX-16-56a; Tr. I, pp. 81-84, 118-19, 123-25, 139, 171-73, 179-80, 214-15, 233, 255-56, 261-66, 285-88; Tr. II, pp. 51-53, 192, 264-66, 313, 325.

7. In each of the subject forty-one transactions, the dumping, reconditioning and/or repacking expenses claimed by Tomato Specialties were false. In none of the transactions¹⁷² did Tomato Specialties dump, recondition, or repack any tomatoes it obtained in the transaction, nor did it incur any dumping, repacking, or reconditioning expenses. AMS Complaint; Tomato Specialties' Answer, paragraph 11, pg. 3; CX-16-56a; Tr. I, pp. 61-62, 98-101; Tr. II, pp. 141, 181, 234-36, 237, 253, 254, 275-77, 281, 313, 325-27, 329, 331; Tr. III, pp. 26, 39, 102, 111-12, 142-45, 205-06, 208-09, 223-24.

8. In each, after Tomato Specialties obtained credits and price adjustments from sellers/shippers based on false expenses stated on the TSA Accountings, Tomato Specialties sold the tomatoes for which it had claimed adjustments for repacking and reconditioning, including those claimed as dumped. CX-16-56a, Tr. I, pp. 92, 96, 108-110; Tr. II, pp. 266, 268-75, 278, 304-09, 313-22, 325-26.

9. In Tomato Specialties' transaction number 2124, subsequent to the inspection of 792 units, Tomato Specialties tendered to JC Distributing, Inc. ("JC Dist.") a TSA Accounting stating 792 units were inspected, and the following expenses: a price of dumped product, 586 units at

¹⁷² For certain of the transactions, based on documents in each file, including documents of sale from Tomato Specialties to its customer, AMS credited Tomato Specialties with certain expenses. Limited credits were given to Tomato Specialties in lot 2129, lot 2140, lot 2406, lot 2478, and lot 2346. Even after these credits, Tomato Specialties' claimed expenses for these transactions are false. Tr. II, pp. 329-31; Tr. III, pp. 26, 39, 42.

\$7.13 for a deduction of \$4,178.18; a reconditioning fee for 792 units at \$1.00 per unit for a deduction of \$792.00; dump charges for 586 units at \$1.00 per unit for a deduction of \$586.00; and an inspection fee of \$162.50. Tomato Specialties tallied the total deductions at \$5,718.68, for a net return to the seller/shipper of negative \$71.72 (down from the original invoice price of \$5,646.96) for the 792 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$5,556.18. CX-16, pp. 1, 2. Tomato Specialties sold all of the 792 units of tomatoes inspected to its customer, Olympic Fruit & Vegetable (as part of a load of 1056), for a total price of \$6,864.00. The 586 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,809.00. CX-16, p. 1, 2; CX-16a.

10. In Tomato Specialties' transaction number 2129, subsequent to the inspection of 880 units, Tomato Specialties tendered to JC Distributing, Inc. ("JC Dist.") a TSA Accounting stating 880 units were inspected and the following expenses: a price of dumped product, 590 units at \$6.64 for a deduction of \$3,917.60; a reconditioning fee for 880 units at \$1.00 per unit for a deduction of \$880.00; dump charges for 590 units at \$1.00 per unit for a deduction of \$590.00; and an inspection fee of \$134.50. Tomato Specialties tallied the total deductions at \$5,522.10, for a net return to the seller/shipper of \$321.10 (down from the original invoice price of \$5,843.20) for the 880 units. Only the inspection fee (and one unit credited as dumped at \$6.64) was a valid deduction; therefore the falsely claimed deductions totaled \$5,379.96. CX-17, pp. 1, 2, 6. Tomato Specialties sold 879 of the 880 units of tomatoes inspected to its two customers, (a quantity of 527 sold for \$3,162.00) to Giumarra Bros. Fruit, Inc. (CX-17, p. 22), and (a quantity of 352 sold for at least \$2,376.00) to Star Fresh, Inc. (CX-17, p. 3), for a combined total price of at least \$5,538.00 including sale of the 590 units falsely reported to JC Dist. as dumped. CX-17, pp. 3, 22; CX-17a.

11. In Tomato Specialties' transaction number 2140, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to Greenpoint Distributing, LLC, Inc. ("Greenpoint") a TSA Accounting stating 1,600 units were inspected and stated the following expenses: a price of dumped product, 832 units at \$8.30 for a deduction of \$6,905.60; a reconditioning fee for 1,600 units at \$2.00 per unit for a deduction of \$3,200.00; dump charges for 832 units at \$1.00 per unit for a deduction of \$832.00; and an inspection fee of \$185.78. Tomato Specialties tallied the total deductions at \$11,123.38, for a net return to the seller/shipper of \$2,156.62 (down from the original invoice price of \$13,280.00) for the 1,600 units. Only the inspection fee (in addition to 12 units credited as dumped at \$8.30 for a total of 99.60 and 12 units credited as dump charges in at \$1.00 per unit, for a total of \$297.38) were valid deductions; therefore the falsely claimed deductions totaled \$10,826.00. CX-18, pp. 1, 2. Tomato Specialties' sold 1,588 of the 1,600 units of tomatoes inspected to its customer, Olympic Fruit & Vegetable, for a total price of \$10,322.00. The 832 units that Tomato Specialties falsely reported to Greenpoint as dumped sold for an amount of \$5,408.00. CX-18, pp. 1, 26, 27; CX-18a.

12. In Tomato Specialties' transaction number 2178, subsequent to the inspection of 1,620 units, Tomato Specialties tendered to Bravo Fruit, LLC, Inc. ("Bravo") a TSA Accounting stating 1,620 units were inspected and the following expenses: a price of dumped product, 599 units at \$10.25 for a deduction of \$6,139.75 a reconditioning fee for 1,620 units at \$2.00 per unit for a deduction of \$3,240.00; freight on dumped product for a deduction of \$1,198.00; dump charges for 599 units at \$1.00 per unit for a deduction of \$599.00; and an inspection fee of \$152.32. Tomato Specialties tallied the total deductions at \$11,329.07, for a net return to the seller/shipper of \$5,275.93 (down from the original invoice price of \$16,605.00) for the 1,620 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions

totaled \$11,176.75. CX-19, pp. 1, 2. Tomato Specialties sold the entire 1,620 units of tomatoes inspected to its customer, Olympic Fruit & Vegetable, for a total price of \$12,862.00. The 599 units that Tomato Specialties falsely reported to Bravo as dumped sold for an amount of \$4,756.06. CX-19, pp. 1, 2, 20, 21; CX-19a.

13. In Tomato Specialties' transaction number 2244, subsequent to the inspection of 800 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 800 units were inspected and the following expenses: a price of dumped product, 200 units at \$8.95 for a deduction of \$1,790.00; a reconditioning fee for 800 units at \$2.50 per unit for a deduction of \$2,000.00; freight on dumped product for a deduction of \$280.00; dump charges for 200 units at \$1.00 per unit for a deduction of \$200.00 and an inspection fee of \$155.64. Tomato Specialties tallied the total deductions at \$4,425.64, for a net return to the seller/shipper of \$2,734.36 (down from the original invoice price of \$7,160.00) for the 800 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$4,270.00. CX-20, pp. 1, 2. Tomato Specialties sold the entire 800 units of tomatoes inspected to its customer, Giumarra Bros. Fruit, Inc. (as part of a load of 1600 units), for a total of \$4,800.00. The 200 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of at least \$1,200.00. CX-20, pp. 1, 2, 10, 11; CX-20a.

14. In Tomato Specialties' transaction number 2251, subsequent to the inspection of 400 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 400 units were inspected and the following expenses: a price of dumped product, 168 units at \$8.30 for a deduction of \$1,394.40; a reconditioning fee for 400 units at \$2.50 per unit for a deduction of \$1,000.00; freight on dumped product at \$1.40 per dumped unit for a deduction of \$253.20; dump charges for 168 units at \$1.00 per unit for a deduction of \$168.00; and an inspection fee of

\$193.64. Tomato Specialties tallied the total deductions at \$2,991.24, for a net return to the seller/shipper of \$328.76 (down from the original invoice price of \$3,320.00) for the 400 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$2,797.60. CX-21, pp. 1, 2. Tomato Specialties sold the entire 400 units of tomatoes inspected to its customer, Romas R Us (as part of a load of 1,440 units), for a total of \$2,800.00. The 168 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$1,176.00. CX-21, pp. 1, 2, 3, 17-22; CX-21a.

15. In Tomato Specialties' transaction number 2307, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product of 432 units at \$8.30 for a deduction of \$3,585.60; a reconditioning fee for 1,600 units at \$2.00 per unit for a deduction of \$3,200.00; freight on dumped product of \$0; dump charges for 432 units at \$1.00 per unit for a deduction of \$432.00; and an inspection fee of \$184.64. Tomato Specialties tallied the total deductions at \$7,402.24, for a net return to the seller/shipper of \$5,877.76 (down from the original invoice price of \$13,280.00) for the 1,600 units. There were no valid deductions for this load; the inspection appeared to have been previously used (on 4/15/14) and the inspection date for this load was merely changed to 1/29/15. While AMS does not allege that Tomato Specialties altered the inspection, nevertheless, AMS does not credit Tomato Specialties in this transaction with an inspection fee. CX-22, pp. 2-6. Therefore, the falsely claimed deductions totaled \$7,402.24. CX-22, pp. 1-2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Romas R Us, for a total of \$10,000.00 (1,600 units at \$6.25). The 432 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$2,700.00 (432 units at \$6.25). CX-22, pp. 1-2, 15-16, 20- 26; CX-22a.

16. In Tomato Specialties' transaction number 2317, subsequent to the inspection of 384 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 384 units were inspected and the following expenses: a price of dumped product, 134 units at \$8.25 for a deduction of \$1,105.50; a reconditioning fee for 384 units at \$1.50 per unit for a deduction of \$576.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$134.00, dump charges for 134 units at \$1.00 per unit for a deduction of \$134.00; and an inspection fee of \$136.64. Tomato Specialties tallied the total deductions at \$2,086.14, for a net return to the seller/shipper of \$1,081.86 (down from the original invoice price of \$3,168.00) for the 384 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$1,949.50. CX-23, pp. 1, 2. Tomato Specialties sold the entire 384 units of tomatoes inspected to its customer, Giumarra Bros. (as part of a load of 640 units), for a total of \$2,400.00. The 134 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$837.50. CX-23, pp. 1, 2, 3, 17, 18; CX-23a.

17. In Tomato Specialties' transaction number 2323, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and stated the following expenses: a price of dumped product, 352 units at \$8.30 for a deduction of \$2,921.60, a reconditioning fee for 1,600 units at \$2.50 per unit for a deduction of \$4,000.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$352.00; dump charges for 352 units at \$1.00 per unit for a deduction of \$352.00; and an inspection fee of \$167.28. Tomato Specialties tallied the total deductions at \$7,792.88, for a net return to the seller/shipper of \$5,487.12 (down from the original invoice price of \$13,280.00) for the 1,600 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$7,625.60. CX-24, pp. 1, 2. Tomato Specialties sold the entire 1600 units of tomatoes

inspected to its customer, Giunarra Bros., for a total of \$8,800.00. The 352 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$1,936.00. CX-24, pp. 1, 2, 3, 9, 10; CX-24a.

18. In Tomato Specialties' transaction number 2325, subsequent to the inspection of 800 units, CX-25, p. 5, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 896 units at \$8.30 for a deduction of \$7,436.80; a reconditioning fee for 1,600 units at \$1.50 per unit for a deduction of \$2,400.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$896.00; dump charges of 896 units at \$1.00 per unit for a deduction of \$896.00; and an inspection fee of \$149.32. Tomato Specialties tallied the total deductions at \$11,778.12, for a net return to the seller/shipper of \$1,501.88 (down from the original invoice price of \$13,280.00) for the 1,600 units (while the inspection states that 800 units were inspected, the documents in this file show that 1,600 were involved in the transaction between JC Dist. and Tomato Specialties, and that 1,600 were subsequently sold by Tomato Specialties to its customer). Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$11,628.80. CX-25, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Promate Produce, for a total of \$10,400.00. The 896 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$5,824.00. CX-25, pp. 1, 2, 3, 10, 17; CX-25a.

19. In Tomato Specialties' transaction number 2326, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 800 units at \$8.30 for a deduction of \$6,640.00; a reconditioning fee for 1,600 units at \$2.50 per unit for a deduction of

\$4,000.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$800.00; dump charges for 800 units at \$1.00 for a deduction of \$800.00; and an inspection fee of \$192.32. Tomato Specialties tallied the total deductions at \$12,432.56, for a net return to the seller/shipper of \$847.44 (down from the original invoice price of \$13,280.00) for the 1,600 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$12,214.72. CX-26, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Promate Produce, for a total of \$9,600.00. The 800 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$4,200.00. CX-26, pp. 1, 2, 3, 17, 18, 19; CX-26a.

20. In Tomato Specialties' transaction number 2329, subsequent to the inspection of 336 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 336 units were inspected and the following expenses: a price of dumped product, 118 units at \$8.25 for a deduction of \$973.50; a reconditioning fee for 336 units at \$2.00 per unit for a deduction of \$672.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$118.00; dump charges for 118 units at \$1.00 per unit for a deduction of \$118.00; and an inspection fee of \$134.24. Tomato Specialties tallied the total deductions at \$2,015.74, for a net return to the seller/shipper of \$756.26 (down from the original invoice price of \$2,772.00) for the 336 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$1,881.50. CX-27, pp. 1, 2. Tomato Specialties sold the entire 336 units of tomatoes inspected to its customer, Giumarra Bros (as part of a load of 512), for a total of \$504.00. The 118 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$177.00 CX-27, pp. 1, 2, 3, 11, 15, 26, 27; CX-27a.

21. In Tomato Specialties' transaction number 2331, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 688 units at \$8.95 for a deduction of \$6,157.60; a reconditioning fee for 1,600 units at \$1.50 per unit for a deduction of \$2,400.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$688.00; dump charges for 688 units at \$1.00 per unit for a deduction of \$688.00; and an inspection fee of \$135.56. Tomato Specialties tallied the total deductions at \$10,069.16, for a net return to the seller/shipper of \$4,250.84 (down from the original invoice price of \$14,320.00) for the 1,600 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$9,933.60. CX-28, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Giumarra Bros., for a total of \$13,696.00 (this load had a sales average of \$8.56 per unit. CX-28, pp. 1, 27, 28. The 688 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$5,889.28. CX-28, pp. 1, 2, 3, 27, 28; CX-28a.

22. In Tomato Specialties' transaction number 2332, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to Magenta Produce a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 1,184 units at \$8.30 for a deduction of \$9,827.20; a reconditioning fee for 1,600 units at \$1.50 for a deduction of \$2,400.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$1,184.00; dump charges for 1,184 units at \$1.00 for a deduction of \$1,184.00; and an inspection fee of \$130.28. Tomato Specialties tallied the total deductions at \$14,725.48, for a net return to the seller/shipper of negative \$1,445.48 (down from the original invoice price of \$13,280.00) for the 1,600 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$14,595.20. CX-29, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of

tomatoes inspected to its customer, Promate Produce, for a total of \$6,400.00. The 1,184 units that Tomato Specialties falsely reported to Magenta Produce as dumped sold for an amount of \$4,736.00. CX-29, pp. 1, 2, 3, 15, 16, 19, 20; CX-29a.

23. In Tomato Specialties' transaction number 2336, subsequent to the inspection of 956 units, CX-30, p. 5, Tomato Specialties tendered to JC Dist. a TSA Accounting¹⁷³ stating 800 units were inspected and the following expenses: a price of dumped product, 616 units at \$10.00 for a deduction of \$6,160.00; a reconditioning fee for 800 units at \$2.00 per unit for a deduction of \$1,600.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$616.00, dump charges for 616 units at \$1.00 per unit for a deduction of \$616.00; and an inspection fee of \$197.66. Tomato Specialties tallied the total deductions at \$9,189.66, for a net return to the seller/shipper of negative \$1,189.66 (down from the original invoice price of \$8,000.00) for the 800 units. Only the inspection fee (along with credited expenses for 80 dumped units) were valid deductions; therefore, the falsely claimed deductions totaled \$8,032.00. CX-30, pp. 1, 2. Tomato Specialties sold the entire 800 units of tomatoes inspected to its customer, Romas R Us (as part of a load of 1,600 units), for a total of \$7,160.00 (800 units at \$8.95). The 616 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$5,513.20. CX-30, pp. 1-3, 23-26; CX-30a.

24. In Tomato Specialties' transaction number 2339, subsequent to the inspection of 800 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 800 units were

¹⁷³ It is noteworthy the TSA Accounting for this transaction is dated February 19, 2015 and the inspection purportedly did not take place until February 20, 2015. CX-30. This phenomenon occurs in several transactions. AMS assumed that the TSA Accounting form date is entered on the form on the day the inspection is requested in some cases (and the actual values are filled out after the inspection takes place), and in others, it is entered on the day the inspection is completed. These assumptions appear reasonable, and Tomato Specialties did not contest this assumption.

inspected and the following expenses: a price of dumped product, 768 units at \$10.00 for a deduction of \$7,680.00; a reconditioning fee for 800 units at \$2.00 per unit for a deduction of \$1,600.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$768.00; dump charges of 768 units at \$1.00 per unit for a deduction of \$768.00; and an inspection fee of \$125.56. Tomato Specialties tallied the total deductions at \$10,941.56, for a net return to the seller/shipper of negative \$2,941.56 (down from the original invoice price of \$8,000.00) for the 800 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$10,816.00. CX-31, pp. 1, 2. Tomato Specialties sold the entire 800 units of tomatoes inspected to its customer, Promate Produce (as part of a load of 1600 units), for a total of \$5,600.00. The 768 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$5,376.00. CX-31, pp. 1-3, 23-24; CX-31a.

25. In Tomato Specialties' transaction number 2340, subsequent to the inspection of 800 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 800 units were inspected and the following expenses: a price of dumped product, 600 units at \$10.00 for a deduction of \$8,000.00; a reconditioning fee for 800 units at \$2.00 per unit for a deduction of \$1,600.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$600.00; dump charges for 600 units at \$1.00 per unit for a deduction of \$600.00; and an inspection fee of \$125.56. Tomato Specialties tallied the total deductions at \$8,925.56, for a net return to the seller/shipper of negative \$925.56 (down from the original invoice price of \$8,000.00) for the 800 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$8,800.00. CX-32, pp. 1, 2. Tomato Specialties sold the entire 800 units of tomatoes inspected to its customer, Giumarra Bros. (as part of a load of 1,600 units), for a total

of \$7,400.00. The 600 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$5,550.00. CX-32, pp. 1-3, 17-21, 27-28; CX-32a.

26. In Tomato Specialties' transaction number 2344, subsequent to the inspection of 613 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 613 units were inspected and the following expenses: a price of dumped product, 576 units at \$9.00 for a deduction of \$5,184.00; a reconditioning fee for 613 units at \$2.00 per unit for a deduction of \$1,226.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$576.00; dump charges of 576 units at \$1.00 per unit for a deduction of \$576.00; and an inspection fee of \$124.24. Tomato Specialties tallied the total deductions at \$7,686.24, for a net return to the seller/shipper of negative \$2,169.24 (down from the original invoice price of \$5,517.00) for the 613 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$7,562.00. CX-33, pp. 1, 2. Tomato Specialties sold the entire 613 units of tomatoes inspected to its customer, Promate Produce (as part of a load of 1,600 units), for a total of \$3,984.50. The 576 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,744.00. CX-33, pp. 1-3, 18, 22-25; CX-33a.

27. In Tomato Specialties' transaction number 2345, subsequent to the inspection of 400 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 400 units were inspected and the following expenses: a price of dumped product, 380 units at \$10.00 for a deduction of \$3,800.00; a reconditioning fee for 400 units at \$2.00 per unit for a deduction of \$800.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$380.00; dump charges of 380 units at \$1.00 per unit for a deduction of \$380.00; and an inspection fee of \$199.28. Tomato Specialties tallied the total deductions at \$5,559.28, for a net return to the seller/shipper of negative \$1,559.28 (down from the original invoice price of \$4,000.00) for the

400 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$5,360.00. CX-34, pp. 1, 2. Tomato Specialties sold the entire 400 units of tomatoes inspected to its customer, Romas R Us (as part of a load of 1,600 units), for a total of \$3,400.00 (400 units at \$8.50). The 380 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,230.00 CX-34, pp. 1-3, 16-25; CX-34a.

28. In Tomato Specialties' transaction number 2352, subsequent to the inspection of 960 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 960 units were inspected and the following expenses: a price of dumped product, 739 units at \$8.30 for a deduction of \$6,133.70; a reconditioning fee for 960 units at \$2.00 per unit for a deduction of \$1,920.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$960.00; dump charges for 960 units at \$1.00 per unit for a deduction of \$960.00; and an inspection fee of \$197.66. Tomato Specialties tallied the total deductions at \$10,172.36, for a net return to the seller/shipper of negative \$2,203.36 (down from the original invoice price of \$7,968.00) for the 960 units. There were no valid deductions (the inspection for this transaction appeared to be a previously used and paid for inspection); therefore, the falsely claimed deductions totaled \$10,172.36.00 (AMS does not alleged altered inspections by Tomato Specialties in this case. Even if Tomato Specialties were, *arguendo*, credited with the inspection deduction [perhaps an inspection was inadvertently re-used or some document error not originating with Tomato Specialties occurred], the falsely claimed deductions would total \$9,974.70). CX-35, pp. 1, 2. Tomato Specialties sold the entire 960 units of tomatoes inspected to Tomato Specialties' customer, Romas R Us (as part of a load of 1,600 units), for a total of \$5,760.00 (960 units at \$6.00). The 739 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$4,434.00 CX-35, pp. 1-3, 16-19; CX-35a.

29. In Tomato Specialties' transaction number 2364, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 944 units at \$9.00 for a deduction of \$8,496.00; a reconditioning fee for 1,600 units at \$2.00 per unit for a deduction of \$3,200.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$944.00; dump charges of 944 units at \$1.00 per unit for a deduction of \$944.00. Tomato Specialties did not state an inspection charge for this transaction. Tomato Specialties tallied the total deductions at \$13,584.00, for a net return to the seller/shipper of negative \$816.00 (down from the original invoice price of \$14,400.00) for the 1,600 units. There were no valid deductions (the inspection for this transaction appeared to be a previously used and paid for inspection, see CX-36, pp. 4, 6, and no inspection fee was charged for this transaction); therefore the falsely claimed deductions totaled \$13,584.00. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Romas R Us, for a total of \$11,200.00. The 944 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$6,608.00. CX-36, pp. 1-3, 14-17, 20-24; CX-36a.

30. In Tomato Specialties' transaction number 2365, subsequent to the inspection of 320 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 320 units were inspected and the following expenses: a price of dumped product, 320 units at \$8.30 for a deduction of \$2,656.00; a reconditioning fee of \$0 (no units stated as reconditioned), freight on dumped product at \$1.00 per dumped unit for a deduction of \$320.00, dump charges for 320 units at \$1.00 per unit for a deduction of \$320.00; and an inspection fee of \$279.80. Tomato Specialties tallied the total deductions at \$3,575.80, for a net return to the seller/shipper of negative \$919.80 (down from the original invoice price of \$2,656.00) for the 320 units. Only

the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$3,296.00. CX-37, pp. 1, 2. Tomato Specialties sold the entire 320 units of tomatoes inspected to its customer, Romas R Us (as part of a load of 1,600 units), for a total of \$1,920.00 (320 units at \$6.00); these 320 units were falsely reported as dumped to JC Dist. CX-37, pp. 1-3,19, 24-25, 28-30; CX-37a.

31. In Tomato Specialties' transaction number 2391, subsequent to the inspection of 1,597 units, Tomato Specialties tendered to M&M West Coast Produce, Inc. (M&M) a TSA Accounting stating 1,597 units were inspected and the following expenses: a price of dumped product, 527 units at \$8.90 for a deduction of \$4,690.30; a reconditioning fee for 1,597 units at \$2.00 per unit for a deduction of \$3,194.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$527.00; dump charges for 527 units at \$1.00 per unit for a deduction of \$527.00; and an inspection fee of \$161.56. Tomato Specialties tallied the total deductions at \$9,099.86, for a net return to the seller/shipper of \$5,113.44 (down from the original invoice price of \$14,213.30) for the 1,597 units. Only the inspection fee was a valid deduction; therefore the falsely claimed deductions totaled \$8,938.30. CX-38, pp. 1, 2. Tomato Specialties sold the entire 1,597 units of tomatoes inspected to its customer, Promate Produce, for a total of \$9,582.00. The 527 units that Tomato Specialties falsely reported to M&M as dumped sold for an amount of \$3,162.00 CX-38, pp. 1, 2, 3, 18-22; CX-38a.

32. In Tomato Specialties' transaction number 2393, subsequent to the inspection¹⁷⁴ of 1,600 units, Tomato Specialties tendered to M&M West Coast Produce, Inc. (M&M) a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped

¹⁷⁴ The corresponding TSA Accounting for this inspection included only "scoreable defects" under the TSA. See CX-39, p. 12; Tr. I, p. 303.

product, 544 units at \$8.90 for a deduction of \$4,841.60; a reconditioning fee for 1,600 units at \$2.00 per unit for a deduction of \$3,200.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$544.00; dump charges for 544 units at \$1.00 per unit for a deduction of \$544.00; and an inspection fee of \$157.60. Tomato Specialties tallied the total deductions at \$9,287.20, for a net return to the seller/shipper of \$4,952.80 (down from the original invoice price of \$14,240.00) for the 1,600 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$9,129.60. CX-39, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Promate Produce, for a total of \$9,600.00. The 544 units that Tomato Specialties falsely reported to M&M as dumped sold for an amount of \$3,264.00 CX-39, pp. 1, 2, 3, 15¹⁷⁵-16, 18; CX-39a.

33. In Tomato Specialties' transaction number 2406, subsequent to the inspection of 768 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 768 units were inspected and the following expenses: a price of dumped product, 346 units at \$8.25 for a deduction of \$2,854.50; a reconditioning fee for 768 units at \$3.00 per unit for a deduction of \$2,304.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$346.00; dump charges of 346 units at \$1.00 per unit for a deduction of \$346.00; and an inspection fee of \$165.14. Tomato Specialties tallied the total deductions at \$6,015.64, for a net return to the seller/shipper of \$320.36 (down from the original invoice price of \$6,336.00) for the 768 units. The inspection fee (in addition to 128 units credited as dumped,¹⁷⁶ along with corresponding

¹⁷⁵ This page of CX-39 is a record from Tomato Specialties indicating that \$9442.40 was due for this load. AMS stated it had no explanation for the discrepancy between the amount claimed as owed by Tomato Specialties and the amount paid by its customer, Promate. IB, p. 26, n. 7.

¹⁷⁶ Tomato Specialties' original purchase price from JC Dist. for this load was 1280 units at 8.25 for a total of \$10,560.00. Apparently, at some point, 168 units were dumped and not passed on to Tomato Specialties' customer. A quantity of 1152 was passed on to Tomato Specialties'

charges, for a total of \$1477.14) were valid deductions; therefore, the falsely claimed deductions totaled \$4,538.50. CX-40, pp. 1, 2. Tomato Specialties sold all of the 768 units of tomatoes inspected to its customer, Giumarra Bros (as part of a load of 1152 units), for a total of \$6,144.00. The 346 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$1,845.32 (346 at an average price of \$5.3333, *see* CX-40, p. 1). CX-40, pp. 3, 22, 25, 27-37; CX-40a.

34. In Tomato Specialties' transaction number 2419, subsequent to the inspection of 800 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 800 units were inspected and the following expenses: a price of dumped product, 448 units at \$9.00 for a deduction of \$4,032.00; a reconditioning fee for 800 units at \$2.00 per unit for a deduction of \$1,600.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$448.00; dump charges of 448 units at \$1.00 per unit for a deduction of \$448.00; and an inspection fee of \$149.30. Tomato Specialties tallied the total deductions at \$6,677.32, for a net return to the seller/shipper of \$522.68 (down from the original invoice price of \$7,200.00) for the 800 units. There were no valid deductions stated for this load; the inspection appeared to have been previously used (on 2/20/15) and the inspection date changed to 3/27/15, hence no inspection fee was credited by AMS. CX-41, pp. 2, 4, 6. Therefore, the falsely claimed deductions totaled \$6,677.32. CX-41, pp. 1, 2. Tomato Specialties sold the entire 800 units of tomatoes inspected to its customer, Romas R Us (as part of a load of 1,600 units), for a total of \$6,800.00 (800 units at \$8.50). The 448 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,808.00. CX-41, pp. 1-3, 19-23; CX-41a.

customer—512 units at \$4.50 per unit and 640 units at \$6.00. AMS credits Tomato Specialties with 168 units dumped. CX-40, pp. 2-6; CX-40a; AMS IB, p. 26, n. 8.

35. In Tomato Specialties' transaction number 2420, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 688 units at \$9.00 for a deduction of \$6,192.00; a reconditioning fee for 1,600 units at \$1.00 per unit for a deduction of \$1,600.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$688.00; dump charges for 688 units at \$1.00 per unit for a deduction of \$688.00; and an inspection fee of \$135.56. Tomato Specialties tallied the total deductions at \$9,303.56, for a net return to the seller/shipper of \$5,096.44 (down from the original invoice price of \$14,400.00) for the 1,600 units. There were no valid deductions stated for this load; the inspection appeared to have been previously used (on 2/17/15 and 2/19/15 on load number 2331 of this case) and the inspection date for this load was merely changed to 3/28/15. While AMS does not allege that Tomato Specialties altered the inspection, AMS does not credit Tomato Specialties in this transaction with an inspection fee. CX-42, pp. 2, 4, 5, 7; CX-28, p. 5, 9 (note same official inspection numbers and identical values). Therefore, the falsely claimed deductions totaled \$9,303.56. CX-42, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Romas R Us, for a total of \$13,600.00. The 688 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$5,848.00. CX-42, pp. 1-3, 13, 16-20; CX-42a.

36. In Tomato Specialties' transaction number 2431, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 560 units at \$8.30 for a deduction of \$4,648.00; a reconditioning fee for 1,600 units at \$2.00 per unit for a deduction of \$3,600.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$560.00; dump charges of 560 units at \$1.00 per unit for a deduction of \$560.00; and an inspection fee of

\$160.24. Tomato Specialties tallied the total deductions at \$9,128.24, for a net return to the seller/shipper of \$4,151.76 (down from the original invoice price of \$13,280.00) for the 1,600 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$8,968.00. CX-43, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Promate, for a total of \$11,200.00 (1,600 units at \$7.00—after miscellaneous deductions, a check register shows Promate paid \$11,039.26). The 560 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,920.00. CX-43, pp. 1-3, 10, 16-17; CX-43a.

37. In Tomato Specialties' transaction number 2437, subsequent to the inspection of 1,432 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1432 units were inspected and the following expenses: a price of dumped product, 501 units at \$8.30 for a deduction of \$4,158.00; a reconditioning fee for 1,432 units at \$2.00 per unit for a deduction of \$2,864.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$501.00; dump charges for 501 units at \$1.00 per unit for a deduction of \$501.00; and an inspection fee of \$157.24. Tomato Specialties tallied the total deductions at \$8,181.54, for a net return to the seller/shipper of \$3,704.06 (down from the original invoice price of \$11,885.60) for the 1,432 units. Only the inspection fee was a valid deduction (there was some evidence that the count of this inspection was altered, but since AMS is not alleging that Tomato Specialties made the alteration, the inspection amount is credited by AMS); therefore, the falsely claimed deductions totaled \$8,024.30. CX-44, pp. 1, 2. Tomato Specialties sold the entire 1432 units of tomatoes inspected to its customer, Promate (as part of a load of 1,600 units), for a total of \$9,600.00 (1432 units at \$6.00—a total of \$9,442.60 was actually paid by Promate to Tomato Specialties after miscellaneous expenses, *see* CX-44, pp. 15-16, CX-44a). The 501 units that Tomato

Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,006.00 (501 units at \$6.00). CX-44, pp. 2-4, 15-18; CX-44a.

38. In Tomato Specialties' transaction number 2439, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 448 units at \$8.30 for a deduction of \$3,718.40; a reconditioning fee for 1,600 units at \$2.00 per unit for a deduction of \$3,200.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$448.00; dump charges for 448 units at \$1.00 per unit for a deduction of \$448.00; and an inspection fee of \$314.60. Tomato Specialties tallied total deductions at \$8,129.24, for a net return to the seller/shipper of \$5,151.00 (down from the original invoice price of \$13,280.00) for the 1,600 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$7,814.40. CX-45, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Romas R Us, for a total of \$11,200.00 (1,600 units at \$7.00). The 448 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,136.00. CX-45, pp. 1-3, 23-26; CX-45a.

39. In Tomato Specialties' transaction number 2442, subsequent to the inspection of 1,520 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1520 units were inspected and the following expenses: a price of dumped product, 334 units at \$8.30 for a deduction of \$2,772.20; a reconditioning fee for 1,520 units at \$2.00 per unit for a deduction of \$3,040.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$334.00; dump charges for 334 units at \$1.00 per unit for a deduction of \$334.00; and an inspection fee of \$161.56. Tomato Specialties tallied the total deductions at \$6,641.76, for a net return to the seller/shipper of \$5,974.24 (down from the original invoice price of \$12,616.00) for the 1,520

units. Only the inspection fee was a valid deduction, therefore the falsely claimed deductions totaled \$6,480.20. CX-46, pp. 1, 2). Tomato Specialties sold the entire 1,520 units of tomatoes inspected to its customer, Olympic Fruit & Vegetable (as part of a load of 1,600 units), for a total of \$14,440.00 (1520 units at \$9.50—a total of \$15,200.00 was actually paid by Olympic to Tomato Specialties for the 1,600 units. See CX-46, pp. 15-20, CX-46a. The 334 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,173.00 (334 units at \$9.50). CX-46, pp. 1-3, 15-20; CX-46a.

40. In Tomato Specialties' transaction number 2447, subsequent to the inspection of 1,040 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1040 units were inspected and the following expenses:¹⁷⁷ a price of dumped product, 634 units at \$8.30 for a deduction of \$5,262.20; a reconditioning fee for 1,040 units at \$2.00 per unit for a deduction of \$2,080.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$634.00; dump charges for 634 units at \$1.00 for a deduction of \$634.00; and an inspection fee of \$176.60. Tomato Specialties tallied the total deductions at \$8,786.80, for a net return to the seller/shipper of negative \$154.80 (down from the original invoice price of \$8,632.00) for the 1,040 units. Only the inspection fee was a valid deduction, therefore the falsely claimed deductions totaled \$8,610.20. CX-47, pp. 1, 2. Tomato Specialties sold the entire 1,040 units of tomatoes inspected to its customer, Romas R Us (as part of a load of 1,520), for a total of

¹⁷⁷ It is noteworthy that this "load file" 2447 contains multiple versions of a TSA Accounting. AMS stated it could not explain this. Apparently only one version was performed at Promate's warehouse, and Promate's file contains a different inspection dated "4/10/15." Therefore, the falsely claimed deductions totaled \$10,421.96. CX-50, pp. 1, 2. Tomato Specialties sold all 1,600 units of tomatoes inspected to its customer, Promate, for a total of \$11,200.00. (Promate paid Tomato Specialties \$11,069.72 after miscellaneous expenses). The 688 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$4,816.00. CX-50, pp. 1-3, 17-20; CX-50a.

\$7,280.00 (1040 units at \$7.00—a total of \$10,640.00 was actually paid by Romas R Us to Tomato Specialties for the 1,520 units). The 634 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$4,438.00 to Romas R Us (634 units at \$7.00). CX-47, pp. 1-3, 11, 23-26; CX-47a.

41. In Tomato Specialties' transaction number 2448, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 1,392 units at \$8.30 for a deduction of \$11,553.60; a reconditioning fee for 1,600 units at \$2.00 per unit for a deduction of \$3,200.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$1,392.00; dump charges for 1,392 units at \$1.00 per unit for a deduction of \$1,392.00; and an inspection fee of \$130.28. Tomato Specialties tallied the total deductions at \$17,667.88, for a net return to the seller/shipper of negative \$4,387.88 (down from the original invoice price of \$13,280.00) for the 1,600 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$17,537.60. CX-48, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Romas R Us, for a total of 11,200.00 (1,600 units at \$7.00). The 1,392 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$9,744.00. CX-48, pp. 1-3, 17-20; CX-48a.

42. In Tomato Specialties' transaction number 2454, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 656 units at \$8.30 for a deduction of \$5,444.80; a reconditioning fee for 1,600 units at \$2.00 per unit for a deduction of \$3,200.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$656.00; dump charges of 656 units at \$1.00 per unit for a deduction of \$656.00; and an inspection fee of

\$132.92. Tomato Specialties tallied the total deductions at \$10,089.72, for a net return to the seller/shipper of \$3,190.28 (down from the original invoice price of \$13,280.00) for the 1,600 units. There were no valid deductions stated for this load; the inspection appeared to have been previously used (on 2/13/15) and the inspection date for this load was merely changed to 4/8/15. While AMS does not allege that Tomato Specialties altered the inspection, nevertheless, AMS does not credit Tomato Specialties in this transaction with an inspection fee. CX-49, pp. 6, 8 (moreover, it appears possible that the true inspections *were* in Tomato Specialties' customer's files, CX-49, pp. 21-22—the inspection was performed at Promate's warehouse, and Promate's files contain a *different* inspection dated 4/8/15). Therefore, the falsely claimed deductions totaled \$10,089.72. CX-49, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Promate, for a total of \$11,200.00. The 656 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$4,592.00. CX-49, pp. 1-3, 17-20; CX-49a.

43. In Tomato Specialties' transaction number 2455, subsequent to the inspection of 1,600 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,600 units were inspected and the following expenses: a price of dumped product, 688 units at \$8.30 for a deduction of \$6,710.40; a reconditioning fee for 1,600 units at \$2.00 per unit for a deduction of \$3,200.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$688.00; dump charges for 688 units at \$1.00 for a deduction of \$688.00; and an inspection fee of \$135.56. Tomato Specialties tallied the total deductions at \$10,421.96, for a net return to the seller/shipper of \$2,858.04 (down from the original invoice price of \$13,280.00) for the 1,600 units. There were no valid deductions stated for this load. The inspection appeared to have been previously used (on 2/17/15–2/19/15) and the inspection date for this load was merely changed

to 4/10/15. It appears that this same inspection has been used in transactions 2331 (CX-28) and 2420 (CX-42) in this case. While AMS does not allege that Tomato Specialties altered the inspection, nevertheless, AMS does not credit Tomato Specialties in this transaction with an inspection fee. CX-50, pp. 5, 6, 8. Moreover, it appears possible that the true inspections *were* in Tomato Specialties' customer's files, CX-50, p. 21. The inspection was performed at Promate's warehouse, and Promate's file contains a different inspection dated 4/10/15). Therefore, the falsely claimed deductions totaled \$10,421.96. CX-50, pp. 1, 2. Tomato Specialties sold the entire 1,600 units of tomatoes inspected to its customer, Promate, for a total of \$11,200.00 (Promate paid Respondent \$11,069.72 after miscellaneous expenses). The 688 units that Respondent falsely reported to JC Dist. as dumped sold for an amount of \$4,816.00. CX-50, pp. 1-3, 17-20; CX-50a.

44. In Tomato Specialties' transaction number 2461, subsequent to the inspection of 810 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 810 units were inspected and the following expenses: a price of dumped product, 527 units at \$7.40 for a deduction of \$3,899.80; a reconditioning fee for 810 units at \$2.00 per unit for a deduction of \$1,620.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$527.00; dump charges for 527 units at \$1.00 per unit for a deduction of \$527.00; and an inspection fee of \$120.28. Tomato Specialties tallied the total deductions at \$6,694.08, for a net return to the seller/shipper of negative \$700.08 (down from the original invoice price of \$5,994.00) for the 810 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$6,573.80. CX-51, pp. 1, 2. Tomato Specialties sold the entire 810 units of tomatoes inspected to its customer, Romas R Us (as part of a load of 1,760), for a total of

\$5,467.50 (810 units at \$6.75). The 527 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,557.25. CX-51, pp. 1-3, 11, 15-17; CX-51a.

45. In Tomato Specialties' transaction number 2474, subsequent to the inspection of 880 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 880 units were inspected and the following expenses: a price of dumped product, 871 units at \$8.00 for a deduction of \$6,968.00; a reconditioning fee of \$0; freight on dumped product at \$1.00 per dumped unit for a deduction of \$871.00; dump charges of 871 units at \$1.00 per unit for a deduction of \$871.00; and an inspection fee of \$164.20. Tomato Specialties tallied the total deductions at \$8,874.20, for a net return to the seller/shipper of negative \$1,834.20 (down from the original invoice price of \$7,040.00) for the 880 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$8,710.00. CX-52, pp. 1, 2. Tomato Specialties sold the entire 880 units of tomatoes inspected to its customer, Romas R Us (as part of a load of 1760), for a total of \$6,380.00 (880 units at \$7.25). The 871 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$6,314.75. CX-52, pp. 1-3, 15-18; CX-52a.

46. In Tomato Specialties' transaction number 2478, subsequent to the inspection of 1,760 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1,760 units were inspected and the following expenses: a price of dumped product, 1,056 units at \$7.15 for a deduction of \$7,550.40; a reconditioning fee for 1,760 units at \$1.00 per unit for a deduction of \$1,760.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$1,056.00; dump charges for 1,056 units at \$1.00 per unit for a deduction of \$1,056.00; and an inspection fee of \$189.92. Tomato Specialties tallied the total deductions at \$11,612.32, for a net return to the seller/shipper of \$971.68 (down from the original invoice price of \$12,584.00) for the 1,760

units. Only the inspection fee (along with credited expenses for 265 dumped units, *see* CX-53, pp. 2, 14-15) were valid deductions; therefore, the falsely claimed deductions totaled \$8,997.65. CX-53, pp. 1, 2. Tomato Specialties sold 1,495 of the 1,760 units of tomatoes inspected to its customer, Romas R Us, for a total of \$8,970.00 (1,495 units at \$6.50). The 1,056 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$6,336.00. CX-53, pp. 1-3, 23-26; CX-53a.

47. In Tomato Specialties' transaction number 2489, subsequent to the inspection of 450 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 450 units were inspected and the following expenses: a price of dumped product, 446 units at \$9.00 for a deduction of \$4,014.00; a reconditioning fee for 450 units at \$2.00 per unit for a deduction of \$900.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$446.00; dump charges for 446 units at \$1.00 per unit for a deduction of \$446.00; and an inspection fee of \$133.48. Tomato Specialties tallied the total deductions at \$5,939.48, for a net return to the seller/shipper of negative \$1,889.48 (down from the original invoice price of \$4,050.00) for the 450 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions totaled \$5,806.00. CX-54, pp. 1, 2. Tomato Specialties sold the entire 450 units of tomatoes inspected to its customer, Promate (as part of a load of 1,600 units), for a total of \$2,887.74 (450 units at an average sale price of \$6.4172). The 446 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$2,862.07. CX-54, pp. 1-3, 11, 16-17; CX-54a.¹⁷⁸

¹⁷⁸ CX-54, p. 2 calculates an average sale price from Tomato Specialties to Promate based on Tomato Specialties' lot-activity report.

48. In Tomato Specialties' transaction number 2346, subsequent to the inspection of 800 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 800 units were inspected and the following expenses: a price of dumped product, 784 units at \$10.00 for a deduction of \$7,840.00; a reconditioning fee for 800 units at \$2.00 per unit for a deduction of \$800.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$784.00; dump charges for 784 units at \$1.00 per unit for a deduction of \$784.00; and an inspection fee of \$199.28. Tomato Specialties tallied the total deductions at \$11,207.28, for a net return to the seller/shipper of negative \$3,207.28 (down from the original invoice price of \$8,000.00) for the 800 units. Only the inspection fee (along with credited expenses for 80 dumped units, *see* CX-55, pp. 2, 10, were valid deductions. Therefore, the falsely claimed deductions totaled \$10,147.64. CX-55, pp. 1, 2. Tomato Specialties sold all 800 of the units of tomatoes inspected to its customer, Romas R Us (as a part of a load of 1,600 units), for a total of \$6,200.00 (800 units at \$7.75). The 784 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$6,076.00. CX-55, pp. 1-3, 23-26; CX-55a.

49. In Tomato Specialties' transaction number 2366, subsequent to the inspection of 720 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 720 units were inspected and the following expenses: a price of dumped product, 454 units at \$9.00 for a deduction of \$4,086.00 a reconditioning fee for 720 units at \$2.00 per unit for a deduction of \$1440.00; freight on dumped product at \$1.00 per dumped unit for a deduction of \$454.00; dump charges for 454 units at \$1.00 per unit for a deduction of \$454.00; and an inspection fee of \$124.34. Tomato Specialties tallied the total deductions at \$6,558.34, for a net return to the seller/shipper of negative \$78.34 (down from the original invoice price of \$5,480.00) for the 720 units. Only the inspection fee was a valid deduction; therefore, the falsely claimed deductions

totaled \$6,434.00. CX-56, pp. 1, 2. Tomato Specialties sold all 720 of the units of tomatoes inspected to its customer, Romas R Us (as a part of a load of 1,600 units), for a total of \$5,040.00 (720 units at \$7.00). The 454 units that Tomato Specialties falsely reported to JC Dist. as dumped sold for an amount of \$3,178.00. CX-56, pp. 1-3, 10, 15-19; CX-56a.

CONCLUSIONS OF LAW

This Decision determines that AMS has carried its burden of proof in every instance.

Tomato Specialties fails as to its legal contentions and in proof of its alleged defenses.

1. The transactions at issue were subject to the terms of the 2013 Tomato Suspension Agreement, Complaint Attachment A, Exhibit RX-K, pursuant to Section 734(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673c(c), and Section 351.208 of the United States Department of Commerce regulations, 19 C.F.R. § 351.701.
2. PACA Section 6(c) provides the Secretary may initiate an investigation after the filing of a Section 6(a) reparations complaint by an interested third party, can expand that investigation to “additional violations,” and can thereafter cause a PACA disciplinary complaint to be filed.
3. Mr. Studer, who handled the reparations complaints, was not a “Presiding Officer” under the Administrative Procedure Act (“APA”), and was not barred by the APA from reporting to his superior apparent violations of PACA he had come across in handling the reparations complaints. Nor was Mr. Studer barred from being assigned to investigate Tomato Specialties PACA violations.
4. Based upon the plain language of PACA and the facts of record, the investigation of Tomato Specialties was properly initiated, and the PACA disciplinary complaint properly filed. The undersigned has jurisdiction to consider it.

5. A PACA Section 6(a) reparations complaint can also meet the standards and perform the role of a PACA Section 6(b) written notification under PACA Section 6(c).
6. The TSA Accountings were “accountings” and “statements” under PACA.
7. Tomato Specialties violated PACA Section 2(4) in each of the forty-one transactions at issue in this case, when it issued false and misleading statements for fraudulent purposes, when it failed to account truly and correctly, and when it failed to perform its express and implied duties in connection with produce transactions indisputably within PACA.
8. Under PACA Section 2(4), a “false or misleading statement” can be made by written documents.¹⁷⁹ A statement is false and misleading when the maker knowingly misrepresents and intends for others to rely on the misrepresentation.¹⁸⁰ In each of the forty-one transactions, CX-16-56a, there is no question the TSA Accountings issued to the shippers contained false and misleading statements,¹⁸¹ which Tomato Specialties essentially admitted.¹⁸²
9. Those false and misleading statements were made with fraudulent purpose. False and misleading statements and false accounts are egregious, “conspicuously bad” violations of

¹⁷⁹ See *Tipco, Inc.*, 50 Agric. Dec. 871, 881 (U.S.D.A. 1991), *aff'd per curiam*, 953 F.2d 639 (4th Cir. 1992), *cert. denied*, 506 U.S. 826 (1992) (false invoices); *Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1179-82, 1191 (U.S.D.A. 1990) (*per curiam*), 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992) (false invoices and accounting).

¹⁸⁰ *Produce Place v. Dep't of Agric.*, 91 F.3d 173, 177 (D.C. Cir. 1996) (holding that the false and misleading statement clause was violated when the buyer knowingly misrepresented the condition of produce to the seller). See also *Coosemans Specialties v. Dep't of Agric.*, 482 F.3d 560, 566 (D.C. Cir. 2007).

¹⁸¹ Tr. II, pp. 324-27, 329; Tr. III, pp. 102-03) (the dump amounts and corresponding charges, the reconditioning fees, and a statement that no monies were received for dumped product).

¹⁸² See, e.g., *Tomato Specialties' Answer*, ¶¶ 8, 11; Tr. I, pp. 61-62; Tr. II, pp. 234-37, 253; Tr. III, pp. 205-06, 208-09, 223-24.

PACA, and a fraudulent purpose is shown when the false and misleading statements and false accounts cause monetary loss to produce shippers.¹⁸³

10. Tomato Specialties' false and misleading statements and failures to account truly and correctly on its "Tomato Suspension Agreement Accountings of Sales and Costs" also violated the implied duty clause of PACA Section 2(4), which imposes a duty to engage in honest dealing and protects producers and other merchants from dishonest and irresponsible conduct.¹⁸⁴

11. The Tomato Suspension Agreement provides no defense to Tomato Specialties' PACA violations. TSA Appendix D provides that deductions of certain expenses must be "properly documented" in determining whether the reference price is met and shippers could have requested backup materials to Tomato Specialties invoices. But that does not mean that those invoices were not false and misleading and issued for fraudulent purposes and provides no defense for PACA violations by Tomato Specialties.

12. PACA was enacted in order to ensure that a general commercial duty to deal fairly would be required of PACA licensees.¹⁸⁵ PACA is "admittedly and intentionally" a tough law.¹⁸⁶ When

¹⁸³ H.C. MacClaren, Inc., 60 Agric. Dec. 733, 747 (U.S.D.A. 2001). See *Sid Goodman & Co. v. United States*, 945 F.2d 398 (4th Cir. 1991) (*per curiam*), 1991 WL 93489, at *6 (false and misleading statements that conceal the amount of money received for sale of produce are made for a fraudulent purpose).

¹⁸⁴ *Coosemans Specialties v. Dep't of Agric.*, 482 F.3d 560, 566 (D.C. Cir. 2007). See, e.g., *JSG Trading Corp. v. Dep't of Agric.*, 176 F.3d 536, 543 (D.C. Cir. 1999); *G&T Terminal Packaging Co. v. Dep't of Agric.*, 468 F.3d 86, 96, 97 (2d Cir. 2006); *Chidsey v. Geurin*, 443 F.2d 584, 587 (6th Cir. 1971); *Rankin Sales Co. v. Morrie H. Morgan Co.*, 296 F.2d 113, 116-17 (9th Cir. 1961).

¹⁸⁵ *Sid Goodman & Co.*, 49 Agric. Dec. 1168, 1182 (U.S.D.A. 1990), *aff'd per curiam*, 945 F.2d 398 (4th Cir. 1991), *cert. denied*, 503 U.S. 970 (1992); H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942).

¹⁸⁶ S. Rep. No. 2507, 84th Cong., 2d Sess., *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701. See *Finer Food Sales Co. v. Block*, 708 F.2d 774, 781 (D.C. Cir. 1983).

a licensee violates PACA, particularly by the egregious violation of issuing false and misleading statements for a fraudulent purpose and falsely accounting, revocation of the violator's PACA license is the appropriate sanction.¹⁸⁷

13. PACA, not the laws of Arizona, is to be applied in determining whether Tomato Specialties violated PACA.

14. Even if the laws of Arizona as to fraud in sales transactions were to be applied here to determine whether Tomato Specialties violated PACA, Tomato Specialties would still be found to have violated PACA.

15. A violation is willful under the Administrative Procedure Act, 5 U.S.C. § 558(c), and PACA if a prohibited act is done intentionally, irrespective of evil intent, or if it is done with careless disregard of statutory requirements.¹⁸⁸ Willfulness is reflected by a respondent's violations of express requirements of PACA, the length of time during which the violations occurred, and the number and dollar amount of violative transactions involved.¹⁸⁹

16. Tomato Specialties' violations were repeated.

17. Tomato Specialties' violations were flagrant because of the number of violations, the amount of money involved, and the time period over which the violations occurred.¹⁹⁰

¹⁸⁷ 7 U.S.C. § 499h(a); H.C. MacClaren, Inc., 60 Agric. Dec. 733, 747 (U.S.D.A. 2001).

¹⁸⁸ Coosemans Specialties, Inc. v. Dep't of Agric., 482 F.3d 560, 567-68 (D.C. Cir. 2007); *Finer Food Sales Co.*, 708 F.2d at 778. See *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991).

¹⁸⁹ Scamcorp, Inc., 57 Agric. Dec. 527, 552-53 (U.S.D.A. 1998); Five Star Food Distribs., Inc., 56 Agric. Dec. 880, 895 (U.S.D.A. 1997); see *Finer Foods Sales Co.*, 708 F.2d at 781-82.

¹⁹⁰ See *Scamcorp, Inc.*, 57 Agric. Dec. at 551; *Farley & Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of PACA falls plainly within the permissible definition of "repeated"); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000.00 to be frequent and flagrant violations of the payment provisions of PACA).

18. The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act, such as this one, is the preponderance of the evidence.¹⁹¹ AMS's burden to prove that Tomato Specialties violated PACA Section 2(4) has been met.

19. The Department's sanction policy is set forth in *S.S. Farms Linn County, Inc.*,¹⁹² which states:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The Judicial Officer in *S.S. Farms Linn County* went on to state that the recommendation of the administrative sanction witness "is entitled to great weight, in view of the experience gained by the administrative officials during their day-to-day supervision of the regulated industry."¹⁹³

20. Wes Hammond, Senior Marketing Specialist with the Specialty Crops Program, recommended revocation of Tomato Specialties' PACA license.¹⁹⁴ His recommendations were well-explained and are supported by the record.

21. A lesser sanction such as civil penalty or suspension could lead to Tomato Specialties or others in the industry viewing the sanction as the "cost of doing business," essentially the cost of violating PACA (and getting caught). Revocation of Tomato Specialties' PACA license is

¹⁹¹ JSG Trading Corp., 57 Agric. Dec. 710, 724 (U.S.D.A. 1998).

¹⁹² 50 Agric. Dec. 476, 497 (U.S.D.A. 1991).

¹⁹³ *Id.*

¹⁹⁴ Tr. III, p. 101.

necessary to deter future violations of this type by both Tomato Specialties and other potential violators.¹⁹⁵

ORDER, FINALITY, AND EFFECTS OF DECISION AND ORDER

WHEREFORE:

1. Tomato Specialties' PACA license, No. 20100333, is revoked.
2. Tomato Specialties, its agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating PACA and the Regulations promulgated thereunder.
3. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to Section 1.145 of the Rules of Practice.¹⁹⁶
4. Potentially interested or affected parties are alerted that any licensing and/or employment sanctions attendant to this Decision and Order pursuant to PACA Sections 4(b) and 8(b)¹⁹⁷ will take effect on the 11th day after this Decision and Order becomes final. Persons "responsibly connected" to Tomato Specialties during the period of the Tomato Specialties' violations are hereby alerted that they will be subject to the licensing restrictions under PACA Section 4(b) and the employment restrictions under PACA Section 8(b) of PACA.

¹⁹⁵ H.C. MacClaren, Inc., 60 Agric Dec. 733, 753 (U.S.D.A. 2001) (revocation is the appropriate sanction for the egregious violation of false and misleading statements and false accounting).

¹⁹⁶ 7 C.F.R. § 1.145.

¹⁹⁷ 7 U.S.C. § 499d(b) and § 499h(b).

5. Provisions allowing licensing after a finding of responsible connection are found in 7 U.S.C. § 499d.
6. Provisions allowing employment after a finding of responsible connection are found in 7 U.S.C. § 499h.

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

Done at Washington, D.C.,
this 18th day of October 2017



Channing D. Strother
Administrative Law Judge

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**UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE**

In re:)
)
 Tomato Specialties, LLC,) PACA-D Docket No. 16-0068
 d/b/a The Avocado Company International,)
)
 Respondent.)

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