

# AGRICULTURE DECISIONS

**Volume 76**

**Book Two**

Part Three (PACA)

Pages 648 – 792



THIS IS A COMPILATION OF DECISIONS ISSUED BY THE  
SECRETARY OF AGRICULTURE AND THE COURTS  
PERTAINING TO STATUTES ADMINISTERED BY THE  
UNITED STATES DEPARTMENT OF AGRICULTURE



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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**DEPARTMENTAL DECISIONS**

**In re: STEVEN C. FINBERG, a/k/a STEVE FINBERG.**  
**Docket No. 14-0167.**  
**Decision and Order.**  
**Filed July 25, 2017.**

**PACA-APP.**

Stephen P. McCarron, Esq., and Mary Jean Fassett, Esq., for Petitioner.  
Charles L. Kendall, Esq., for AMS.  
*Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.*

**DECISION AND ORDER**

**Decision Summary**

1. Petitioner Steven C. Finberg, full name Steven Craig Finberg, also known as Steve Finberg, was “responsibly connected” with Adams Produce Company LLC during all but the end of Adams Produce Company LLC’s PACA violations August 8, 2011 through May 18, 2012 and is consequently subject to the licensing restrictions under section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)).

**Overview**

2. Two aspects are noteworthy:(a) the Petitioner was convicted of a crime connected to his work at Adams Produce Company LLC and its predecessor Adams Produce Company, Inc.; and (b) the Petitioner is the Finberg in *Taylor and Finberg*, cited as *Taylor v. U.S. Dep’t of Agric.*, 636 F.3d 608 (D.C. Cir. 2011), which resulted in the USDA Judicial Officer’s 2012 Decision and Order on Remand.<sup>1</sup>

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<sup>1</sup> Taylor, Docket Nos. 06-0008, 06-0009, 71 Agric. Dec. 612 (U.S.D.A. 2012) (Decision and Order on Remand). This Decision and Order on Remand is also available at <http://nationalaglawcenter.org/wpcontent/uploads/assets/decisions/taylor3.pdf> (last visited May 2, 2018).

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The Judicial Officer's 2012 Decision and Order on Remand concluded that Steven C. Finberg was NOT "responsibly connected" with Fresh America, as that term is defined by 7 U.S.C. § 499a(b)(9), during February 2002 through February 2003 when Fresh America willfully, repeatedly, and flagrantly violated 7 U.S.C. § 499b(4).<sup>2</sup>

3. Similarities between Steve Finberg's situation in *Taylor and Finberg* described in paragraph 2 and his situation in this case are evident. Both there and here, Steven C. Finberg, full name Steven Craig Finberg, also known as Steve Finberg: (a) was an officer; (b) had an important job with broad duties and responsibilities; (c) primarily marketed and sold produce for his employer (whereas purchasing and payment for produce was done primarily by others); (d) was not the holder of more than 10 per centum of the outstanding stock; (e) was not a director; and (f) was a credible witness (I heard both cases).

4. Steve Finberg's situation in *Taylor and Finberg* and his situation in this case are distinguishable. The USDA Judicial Officer's 2012 Decision and Order on Remand (*see* paragraph 2 for link and citations regarding *Taylor and Finberg*) concluded in accordance with U.S. Court of Appeals guidance that Steve Finberg was only nominally an officer of Fresh America during the time when Fresh America failed to pay produce sellers; that he was powerless to curb Fresh America's PACA violations and lacked the power and authority to direct and affect Fresh America's operations as they related to payment of produce sellers. The Fresh America Directors had usurped the officers' responsibilities. Not so, here.

5. Here, in contrast to *Taylor and Finberg*, I conclude that Steven C. Finberg, full name Steven Craig Finberg, also known as Steve Finberg, the Petitioner, WAS actively involved in the activities resulting in the PACA violations. Steve Finberg is the least culpable of the three officers of the "Executive Team" or "Executive Committee." The "Executive Team" or "Executive Committee" ran Adams Produce Company LLC and its predecessor Adams Produce Company, Inc., including all but the end of the period during which Adams Produce Company LLC violated the Perishable Agricultural Commodities Act. (The period during which

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<sup>2</sup> *Taylor*, 71 Agric. Dec. at 623.

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full payment was not made when due was August 8, 2011 through May 18, 2012; Adams Produce Company LLC ceased operations at the end of April 2012, with produce accepted as late as May 1 and May 2, 2012, according to Schedule A attached to the Complaint filed June 28, 2013 in the disciplinary action, PACA-D Docket No. 13-0284.)

6. The “Executive Team” or “Executive Committee” were (a) Chief Executive Officer Scott Grinstead, full name Scott David Grinstead; (b) Chief Operating Officer Steven C. [“Steve”] Finberg; and (c) Chief Financial Officer John Stephen [“Steve”] Alexander. As I explain below in the Findings of Fact, paragraphs 14 through 30, each of the three officers on the “Executive Team” or “Executive Committee” has some responsibility for the money stolen from the United States and the Department of Defense through fraudulent invoices and purchase orders (\$481,000.00 to which Adams Produce was not entitled, RX 11 at 5) and consequently for the ultimate failure of Adams Produce Company LLC to make full payment promptly for the fruits and vegetables it purchased.

### **Parties and Allegations**

7. This Decision and Order <sup>3</sup> decides a petition brought by an individual, a non-governmental party, challenging a “responsibly connected” determination made in 2014 by the PACA Director. The cases of four petitioners were consolidated for Hearing. This Petitioner, Steven C. Finberg, full name Steven Craig Finberg, also known as Steve Finberg, was an officer of Adams Produce Company LLC who had been hired in 2007 to be Executive Vice President of Adams Produce Company, Inc. (Tr. 223); who remained an officer, becoming Chief Operating Officer in 2009 (Tr. 230; RX 11, p. 3); and who continued as Chief Operating Officer until Adams Produce Company LLC ceased operations at the end of April 2012 (Tr. 231).

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<sup>3</sup> This Decision and Order does *not* address the Petitions of Jonathan Dyer; and Drew Johnson, also known as Drew R. Johnson; and Michael S. Rawlings, for whom an initial decision was issued on May 19, 2017, now on appeal to the Judicial Officer of the United States Department of Agriculture.



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8. The PACA Division is a Division of the Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture.

### **Procedural History**

9. The Hearing was held in Dallas, Texas on March 22, 2016 and in Washington, D.C. on August 31, 2016. The Transcript, Tr. 1 - Tr. 317, is in two volumes.

10. Four Petitions were consolidated for Hearing; this Decision addresses one of those four Petitions. Each Petitioner requested review of (appealed) the determination by the Director, PACA Division, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture, that each was “responsibly connected” with Adams Produce Company LLC during August 8, 2011 through May 18, 2012 when Adams Produce Company LLC failed to make full payment promptly of the purchase prices or balances thereof for fruits and vegetables, all being perishable agricultural commodities. The balance not paid when due totaled \$10,735,186.81 as specified in Appendix A to the Complaint in PACA-D Docket No. 13-0284; of that total, \$1,928,417.74 remained unpaid when that Complaint was filed on June 28, 2013, as stated in paragraph III of that Complaint and confirmed by Mr. Kendall on the second page in the AMS Brief filed March 10, 2017.

11. To understand “responsibly connected”, see section 1(b)(9) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a(b)(9):

(9) The term “responsibly connected” means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity

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subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

12. The parties' Updated Stipulation as to Proceedings was filed on June 11, 2015. Petitioners' Exhibits 1 through 26 (PX 1 - PX 26) were admitted into evidence by stipulation. Tr. 29. Respondent's Exhibits, one volume of Agency Records for each Petitioner, were admitted into evidence (Tr. 11); and Government Exhibit 11 (RX 11) and Government Exhibit 12 (RX 12), were admitted into evidence (Tr. 272). The evidence from any of the four Petitioners' cases is available for each case. Tr. 16.

13. The parties filed briefs: (a) January 13, 2017, Petitioners' Opening Brief; (b) March 10, 2017, AMS's Opposition Brief; and (c) April 10, 2017, Petitioners' Reply Brief.

### **Findings of Fact**

14. Steven C. Finberg, full name Steven Craig Finberg, also known as Steve Finberg, the Petitioner, was an officer (Chief Operating Officer) of Adams Produce Company LLC (Adams Produce), until Adams Produce dissolved at the end of April 2012; he was Chief Operating Officer during all but the end of Adams Produce's PACA violations. Tr. 231.

15. Steve Finberg testified on August 31, 2016 in Washington D.C. (Tr. 221 - 279); his testimony was consistent with the other evidence and was credible.

16. Steve Finberg had been hired by Scott Grinstead and Carl Adams in either September or October 2007 to be Executive Vice President of Adams Produce Company, Inc. Tr. 223. Steve Finberg had become Adams Produce's Chief Operating Officer in 2009. Tr. 230; RX 11 at 3. Steve Finberg was never an owner; although initial documents may have showed him at slightly more than four per cent, no ownership materialized. Tr. 275-76.

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17. Three officers were the “Executive Team” or “Executive Committee” who ran Adams Produce Company LLC and its predecessor Adams Produce Company, Inc., with all three on board by 2007. Tr. 230-31. They were (a) Chief Executive Officer Scott Grinstead, full name Scott David Grinstead; (b) Chief Operating Officer Steven C. [“Steve”] Finberg; and (c) Chief Financial Officer John Stephen [“Steve”] Alexander. All three remained in these critically important jobs managing the company during all but the end of the period during which Adams Produce Company LLC violated the Perishable Agricultural Commodities Act. (The period during which full payment was not made when due was August 8, 2011 through May 18, 2012; Adams Produce Company LLC ceased operations at the end of April 2012, with produce accepted as late as May 1 and May 2, 2012, according to Schedule A attached to the Complaint filed June 28, 2013 in the disciplinary action, PACA-D Docket No. 13-0284.)

18. April 2012 is when Steve Finberg stopped being an Officer (Chief Operating Officer) of Adams Produce, and also when John Stephen [“Steve”] Alexander stopped being an Officer (Chief Financial Officer) of Adams Produce. Tr. 231.

19. Scott Grinstead, full name Scott David Grinstead, Adams Produce Company, Inc.’s Chief Executive Officer, was already an owner when Adams Produce became Adams Produce Company LLC on or about September 29, 2010, to absorb the investment of CIC Partners through a wholly-owned subsidiary named API Holdings LLC. Finberg RX 4, pp. 41-93. Scott David Grinstead remained Chief Executive Officer, became a Director with three of six votes, and owned 44.70% of Adams Produce Company LLC. Finberg RX 1. Tr. 292.

20. Adams Produce’s downfall had begun prior to the API Holdings LLC investment, in early 2010, March 11-16 or earlier, when Chief Executive Officer Scott David Grinstead had been “cooking the books” (focusing on 2009; 2009 was to be audited as part of the investment), to make Adams Produce Company Inc. look more profitable by fraudulently increasing income and had enlisted the help of the Chief Financial Officer John Stephen [“Steve”] Alexander. The email string at PX 9 documents a portion of the fraudulent alterations of the financial

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statements and information that Chief Executive Officer Scott David Grinstead ordered be done. PX 9.

21. Steve Finberg had known Scott Grinstead when they both worked at Gourmet Packing. Tr. 256. Steve Finberg worked at Gourmet Packing while he was still in college, beginning his work in the produce industry at age 20 in 1989. Tr. 222. Scott Grinstead began work at Gourmet Packing probably two years after Steve Finberg arrived. Tr. 256.

22. Chief Executive Officer Scott David Grinstead, Director with three of six votes, through his crimes and fraud and profligate spending, rendered Adams Produce Company LLC's financial statements and information false and misleading beginning with 2009 financial statements and information and continuing thereafter, and destroyed Adams Produce Company LLC's corporate form. For more detail, see my initial decision issued on May 19, 2017, now on appeal to the Judicial Officer of the United States Department of Agriculture, which addressed the petitions of Jonathan Dyer (PACA-APP Docket No. 14-0166); and Drew Johnson, also known as Drew R. Johnson (PACA-APP Docket No. 14-0168); and Michael S. Rawlings (PACA-APP Docket No. 14-0169).<sup>4</sup>

23. Steve Finberg was oblivious to Scott Grinstead's thievery (Tr. 255-58), although he was aware of Scott Grinstead's "we'll say eccentric behavior, Scott had that same behavior as long as I've known him. And I've known Scott Grinstead - - I worked with him at Gourmet Packing probably two years after I arrived. He's always been like that. So I would say that was more excessive and exorbitant." Tr. 256. Tr. 245-46.

24. Steve Finberg became indirectly aware of significant problems with the company in the holiday season of 2011. Tr. 238. "Two things were happening. One, we were getting more calls than before to the general manager or to the home office asking about payment." Tr. 238. The second thing was heated conversations between Chief Executive Officer Scott David Grinstead and Chief Financial Officer John Stephen ["Steve"] Alexander. Tr. 238-39.

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<sup>4</sup> Dyer, 76 Agric. Dec. 159 (U.S.D.A. 2017). The decision is also available at [https://www.oaljdecisions.dm.usda.gov/sites/default/files/170519\\_DO\\_PACA%2014-0166%2C%2014-0168%2C%2014-0169.pdf](https://www.oaljdecisions.dm.usda.gov/sites/default/files/170519_DO_PACA%2014-0166%2C%2014-0168%2C%2014-0169.pdf) (last visited May 2, 2018).

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25. By early March 2012, Chief Restructuring Officer [CRO] Tom Donoghue with Deloitte became management of Adams Produce Company LLC, and Steve Finberg remained in management until Adams Produce dissolved at the end of April 2012.

26. Of the “Executive Team” or “Executive Committee”, Chief Executive Officer Scott David Grinstead was the worst culprit by far. He was not only Chief Executive Officer but also a Director with three of six votes, and Scott David Grinstead was an owner. Tr. 290-92. Finberg RX 1. Scott David Grinstead was already an owner when Steve Finberg joined Adams Produce in 2007. Tr. 225-27.

27. Chief Executive Officer Scott David Grinstead, Director with three of six votes, through his crimes and fraud and profligate spending, destroyed and disrupted the corporate form of Adams Produce Company LLC AND of Grinstead & Associates, LLC, each of which he operated as if he were the lawless sole proprietor. The thievery by Scott David Grinstead took years and millions of dollars to detect and prove. Scott David Grinstead managed to use Adams Produce as his personal piggy bank. For more detail, see my initial decision issued on May 19, 2017, now on appeal to the Judicial Officer of the United States Department of Agriculture, which addressed the Petitions of Jonathan Dyer (PACA-APP Docket No. 14-0166); and Drew Johnson, also known as Drew R. Johnson (PACA-APP Docket No. 14-0168); and Michael S. Rawlings (PACA-APP Docket No. 14-0169).<sup>5</sup>

28. Each of the three “Executive Team” or “Executive Committee” was convicted of a crime connected to his work at Adams Produce Company LLC and its predecessor Adams Produce Company, Inc.: (a) Chief Executive Officer Scott Grinstead, full name Scott David Grinstead; (b) Chief Operating Officer Steven C. [“Steve”] Finberg; and (c) Chief Financial Officer John Stephen [“Steve”] Alexander. PX 1, PX 2, PX 3, PX 4, Government Exhibits 11 & 12 (RX 11, RX 12).

29. Ironically, the crimes in the latter half of 2011 brought stolen money INTO Adams Produce, money stolen from the United States and the

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<sup>5</sup> *Id.*

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Department of Defense through fraudulent invoices and purchase orders. Each of the three officers who were the “Executive Team” or “Executive Committee” has some responsibility for the money stolen from the United States and the Department of Defense through fraudulent invoices and purchase orders (\$481,000.00 to which Adams Produce was not entitled, RX 11 at 5). That stolen money and a whistle-blower led to the Department of Justice investigation, which led to extraordinary expenditures to uncover Scott Grinstead’s crimes and fraud and profligate spending, and consequently led to the ultimate failure of Adams Produce Company LLC to make full payment promptly for the fruits and vegetables it purchased.

30. Steve Finberg is the least culpable of the three officers who were the “Executive Team” or “Executive Committee”: his conviction, Misprision of felony, in violation of 18 U.S.C. § 4, might have been avoided if he had reported, as soon as possible, to a United States authority, what he had learned about the scheme to steal from the United States and the Department of Defense. Instead, he reported what he had learned in mid-October 2011 of the fraudulent scheme to overcharge the United States and the Department of Defense, to his direct supervisor, Scott David Grinstead. Tr. 262, 267.

### **Conclusions**

31. The Secretary of Agriculture has jurisdiction over Steven C. Finberg, full name Steven Craig Finberg, also known as Steve Finberg, the Petitioner, and over the subject matter involved herein.

32. A Default Decision and Order was issued against Adams Produce Company LLC, filed with the USDA Hearing Clerk on November 25, 2013 in PACA-D Docket No. 13-0284, by former Chief Judge Peter M. Davenport. That Default Decision is available on the USDA Office of Administrative Law Judges website.<sup>6</sup>

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<sup>6</sup> Adams Produce Co., 72 Agric. Dec. 907 (U.S.D.A. 2013), *available at* <https://www.oaljdecisions.dm.usda.gov/sites/default/files/DD%20-%20Adams%20Produce%20-%202013-0284.pdf> (last visited May 2, 2018).

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33.I take official notice of the Default Decision and Order identified in paragraph 32 and conclude accordingly that Adams Produce Company LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during August 8, 2011 through May 18, 2012 of the purchase prices or balances thereof totaling \$10,735,186.81 for fruits and vegetables, all being perishable agricultural commodities that Adams Produce Company LLC purchased, received, and accepted in the course of interstate commerce, as specified in Appendix A to the Complaint in PACA-D Docket No. 13-0284. I conclude further that \$1,928,417.74 remained unpaid when that Complaint was filed on June 28, 2013, as stated in paragraph III of that Complaint and confirmed by Mr. Kendall on the second page in the AMS Brief filed March 10, 2017.

34.Steven C. Finberg, full name Steven Craig Finberg, also known as Steve Finberg, the Petitioner, was an officer of Adams Produce Company LLC during Adams Produce Company LLC's PACA violations described in paragraph 33, who WAS actively involved in the activities resulting in the PACA violations.

35.Steven C. Finberg, full name Steven Craig Finberg, also known as Steve Finberg, the Petitioner, was "responsibly connected" with Adams Produce Company LLC, as defined by 7 U.S.C. § 499a(b)(9), during August 8, 2011 through May 18, 2012, when Adams Produce Company LLC willfully, flagrantly, and repeatedly violated the PACA (7 U.S.C. § 499b(4)).

36.Steven C. Finberg, full name Steven Craig Finberg, also known as Steve Finberg, the Petitioner, is subject to licensing restrictions under section 4(b) of the PACA, 7 U.S.C. § 499d(b); and employment sanctions under section 8(b) of the PACA, 7 U.S.C. § 499h(b).

## **ORDER**

37.This Decision affirms the determination by the Director, PACA Division, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture, that Steven C. Finberg, also known as Steve Finberg, the Petitioner, was "responsibly connected" with Adams Produce Company LLC during Adams Produce Company

LLC's PACA violations (of section 2(4) of the PACA, 7 U.S.C. § 499b(4)), August 8, 2011 through May 18, 2012.

38. Accordingly, Steven C. Finberg, also known as Steve Finberg, is subject to the licensing restrictions under section 4(b) of the PACA (7 U.S.C. § 499d(b)) and the employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). The licensing and employment restrictions are effective on the 11th day after this Decision and Order becomes final.

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

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

#### **Finality**

41. 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 (7 C.F.R. § 1.145, *see* Appendix A).

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

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**In re: TOMATO SPECIALTIES, LLC, d/b/a THE AVOCADO COMPANY INTERNATIONAL.**

**Docket No. 16-0068.**

**Decision and Order.**

**Filed October 18, 2017.**

**PACA-D.**

Christopher Young, Esq., for AMS.

Jason R. Klinowski, Esq., for Respondent.

*Initial Decision and Order entered by Channing D. Strother, Administrative Law Judge.*

#### **DECISION AND ORDER**



### **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 6<sup>1</sup> requirements, the investigation that lead to the Complaint in this docket was improperly initiated after written 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.<sup>2</sup> 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, mislead 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

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<sup>1</sup> 7 U.S.C. § 499f.

<sup>2</sup> 5 U.S.C. §§ 551-559.

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's violations requires revocation of its PACA license.

### **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,<sup>3</sup> which alleges violation of PACA and the regulations issued thereunder.<sup>4</sup> Tomato Specialties's 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.<sup>5</sup>

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

### **Procedural Background**

On March 1, 2016, AMS<sup>8</sup> filed a complaint alleging Tomato Specialties willfully, flagrantly, and repeatedly violated PACA Section

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<sup>3</sup> 7 C.F.R. §§ 1.130 *et seq.*

<sup>4</sup> 7 C.F.R. §§ 46.1 *et seq.*

<sup>5</sup> *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.

<sup>6</sup> 5 U.S.C. § 556(d).

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

<sup>8</sup> "AMS" and the pronoun "it" will be used to refer to the Complainant in this

2(4)<sup>9</sup> by issuing false and misleading 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's PACA license should be revoked under PACA section 8(a).<sup>10</sup>

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.<sup>11</sup> Wes Hammond,<sup>12</sup> David Studer,<sup>13</sup> and Michael Jansen,<sup>14</sup> each an employee of the USDA Specialty Crops Program, testified on behalf of AMS, as did Fabiola Cuen of Greenpoint Distributing, LLC,<sup>15</sup> and

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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.

<sup>9</sup> 7 U.S.C. § 499b(4).

<sup>10</sup> 7 U.S.C. § 499h(a). The Complaint, page 2, note 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 1.141(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 at 104-06 and Tr. III at 66.

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

<sup>12</sup> Tr. I at 70-110; Tr. II at 258-331; Tr. III at 5-49; and Tr. III at 99-168 (AMS remedies witness).

<sup>13</sup> Tr. II at 109-225.

<sup>14</sup> *Id.* at 225-58.

<sup>15</sup> Tr. I at 110-240.

Jaime Chamberlain of JC Distributing, Inc.,<sup>16</sup> 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.<sup>17</sup> Tomato Specialties subpoenaed a "Mark Jones, from Tepeyak," whom Tomato Specialties reported at one point had "not yet shown up."<sup>18</sup> 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.<sup>19</sup> But during the Nogales hearing the parties mutually concluded and agreed that a Los Angeles hearing would not be necessary.<sup>20</sup>

After certain testimony from Mr. Studer, Tomato Specialties moved for a "mistrial," which was denied.<sup>21</sup> 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.<sup>22</sup> Tomato Specialties then stated

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<sup>16</sup> *Id.* at 245-306; Tr. II at 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 at 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 at 25. It was later admitted. *See* Tr. III at 66.

<sup>17</sup> Tr. III at 54-62.

<sup>18</sup> Tr. II at 227.

<sup>19</sup> *Id.* at 228.

<sup>20</sup> Tr. III at 70-71.

<sup>21</sup> Tr. II at 156.

<sup>22</sup> Tr. III at 75-81.

it would call no witnesses of its own as a case-in-chief: would rely on its previous cross-examination, and “rested.”<sup>23</sup>

AMS waived the opportunity to make closing argument.<sup>24</sup> Tomato Specialties presented a closing argument.<sup>25</sup> 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.<sup>26</sup> That motion was denied.<sup>27</sup>

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

On March 13, 2017, AMS filed Proposed “Findings of Fact, Conclusions and Order” as its initial post-hearing brief [AMS Initial

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<sup>23</sup> *Id.* at 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’s 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 at 269-72.

<sup>24</sup> Tr. III at 184.

<sup>25</sup> *Id.* at 184-224.

<sup>26</sup> *Id.* at 225.

<sup>27</sup> *Id.* at 225-26.

<sup>28</sup> At Tr. II, pages 155-56, Tomato Specialties’s 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 at hearing consented to the removal, Tr. II, page 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 at 151-55—on brief. The struck material formed the asserted basis for Tomato Specialties’s 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.”

Brief or AMS IB]. Tomato Specialties filed its “Post-Trial Brief” [Tomato Specialties Initial Brief or Tomato Specialties IB] on March 14, 2017.<sup>29</sup> 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.<sup>30</sup> Tomato Specialties’s Initial Brief, at pages 6 through 12, is nearly verbatim duplicates its Motion. AMS had foreseen and addressed some of these Tomato Specialties contentions in its own Initial Brief, pages 38 through 42.

On April 3, 2016 AMS responded to Tomato Specialties’s Motion [Response to Motion]. Tomato Specialties’s 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 AMS proposed finding of fact. AMS Reply Brief, page 2, sets out where in AMS’s filings AMS previously addressed Tomato Specialties’s 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.<sup>31</sup>

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

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<sup>29</sup> 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.

<sup>30</sup> Motion at 1; Tr. II at 110-15, 131, 133, 160, 172-73. See Motion at 3-6; IB at 8-11.

<sup>31</sup>AMS RB at 1-5.

Tomato Specialties's 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's 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:

\* \* \*

(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.<sup>32</sup>

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, 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*

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<sup>32</sup> 7 U.S.C. § 499b(4) (emphasis added).



*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.<sup>33</sup>

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<sup>33</sup> 7 U.S.C. § 499f (emphasis added).

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 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.*<sup>34</sup>

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

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<sup>34</sup> 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. . . .*<sup>35</sup>

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.*<sup>36</sup>

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.*<sup>37</sup>

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<sup>35</sup> 7 U.S.C. § 499m (emphasis added).

<sup>36</sup> 7 U.S.C. § 499h(a) (emphasis added).

<sup>37</sup> 7 U.S. C. § 4990 (emphasis added).

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 bears on Tomato Specialties’s 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.*<sup>38</sup>

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

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<sup>38</sup> 7 C.F.R. § 47.2(i) (emphasis added).

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.*

*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, Zellers, telegram, invoices, manifests, inspection certificates, accounts sales, and any special contracts or agreements.*

*(4) The informal complaint shall be accompanied by a*

*filing fee of \$/00 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.*<sup>39</sup>

### **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.”<sup>40</sup> 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.”<sup>41</sup>

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<sup>39</sup> 7 C.F.R. § 47.3 (emphasis added).

<sup>40</sup> H.R. REP. NO. 1546, 87th Cong. (1962), *reprinted in* 1962 U.S.C.C.A.N. 2749, 2749.

<sup>41</sup> S. REP. NO. 2507, 84th Cong. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699,

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.<sup>42</sup> Of note, *Quinn* cites as a “conspicuous example” a sale to a dealer followed by a decline in the 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.<sup>43</sup> 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.<sup>44</sup>

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

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.<sup>46</sup> PACA Section 2 sets forth unfair practices which, if committed by a dealer, commission merchant, or broker, are grounds for sanctions by the Secretary.<sup>47</sup> 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.<sup>48</sup> 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

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3701.

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

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 746.

<sup>45</sup> 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).

<sup>46</sup> 7 U.S.C. § 499c(a).

<sup>47</sup> 7 U.S.C. § 499b.

<sup>48</sup> 7 U.S.C. § 499b(4).

in connection with any transaction in interstate commerce involving perishable agricultural commodities.

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.<sup>49</sup> Where the Secretary determines that the violations were repeated or flagrant, the Secretary may order the violator's PACA license revoked.<sup>50</sup>

### **The Tomato Suspension Agreement**

The International Trade Administration's Enforcement and Compliance website,<sup>51</sup> 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,<sup>52</sup> 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

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<sup>49</sup> 7 U.S.C. § 499h(a).

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

<sup>51</sup> *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>.

<sup>52</sup> *See* Tr. III at 66.



sold.<sup>53</sup> TSA, Appendix D, Complaint Attachment A, p. 23, provides for fresh tomatoes from Mexico “procedures for making adjustments to the sales price of signatory 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.”<sup>54</sup> 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.<sup>55</sup> 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.”<sup>56</sup>

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.<sup>57</sup>

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 tomatoes coming into the United States should be sold

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<sup>53</sup> See *Fl. Tomato Exch. v. United States*, 973 F. Supp.2d 1334, 1336 (Ct. Int’l Trade 2014); Tr. I at 118-19, 135-36; Attach. A at 2, 12.

<sup>54</sup> Attach. A at 23 (footnote omitted).

<sup>55</sup> *Id.* at 25-26, ¶ 6.

<sup>56</sup> *Id.* at 27 ¶ 7.

<sup>57</sup> *Id.* at 27 ¶¶ 1-6.

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.<sup>58</sup>

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.<sup>59</sup>

### **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.<sup>60</sup> The USDA

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<sup>58</sup> 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 at 40, 59, 86, 109, 125-26, 173-78, 202, 208, 221-22, 231, 250, 287, 304; Tr. II at 73, 90-91, 93-94, 96-97, 112-13, 137, 141-44, 147-48, 156-57, 205, 212; T. III at 87, 144-45, 195, 210, 220. *See, e.g.*, CX-18 at 12.

<sup>59</sup> IB at 10 n.3.

<sup>60</sup> Witness Cuen described that tomato sales process for her company at Tr. I at 139-41.

inspectors determined that portions of the particular shipments failed to meet the TSA quality standards.<sup>61</sup> 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).<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

As discussed in more detail below,<sup>65</sup> 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’s TSA Accountings appeared to be inaccurate.<sup>66</sup> An investigation was commenced, which included Ms. Studer as an investigator.<sup>67</sup> That investigation led to the Complaint filed in this docket.

## **DECISION**

### **I. Tomato Specialties’s 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.**

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<sup>61</sup> See CX-18, 11; Tr. I at 149.

<sup>62</sup> See Tr. I at 37-39, 98-103, 120, 260-61, 329.

<sup>63</sup> See Tr. I at 100; Tr. II at 274-75.

<sup>64</sup> See Tr. I at 37-38, 329; Tr. II at 119, 235-37, 252-53.

<sup>65</sup> See April 3, 2017 Response to Motion at 5-6.

<sup>66</sup> See Tr. II at 110-13.

<sup>67</sup> *Id.* at 114.

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 hearing<sup>68</sup> after certain hearing testimony by AMS witness and investigator, Mr. David Studer.<sup>69</sup> Much of the material in Tomato Specialties's Initial Brief, pages 6 through 12, duplicate s its Motion to Dismiss. AMS foresaw and addressed at least some of these Tomato Specialties contentions in its own Initial Brief, pages 38 through 42.

AMS responded to Tomato Specialties's March 14, 2016 Motion on April 3, 2016. Tomato Specialties's 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's March 14, 2016 Motion to Dismiss. AMS Reply Brief, page 2, sets out where in AMS's filings AMS had previously addressed Tomato Specialties's 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 Specialties's 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's contentions that a PACA Section 6(b) reparations complaint cannot also be a PACA Section 6(b) written notification.

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<sup>68</sup> Motion at 1; Tr. II at 110-115, 131, 133, 160, 172-173.

<sup>69</sup> See Motion at 3-6; Tomato Specialties IB at 8-11.

All issues raised in Tomato Specialties's 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's Contentions the Investigation in This Proceeding Was Improperly Initiated.

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

Tomato Specialties contends AMS failed to adhere to the requirements of PACA Section 6<sup>70</sup> 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.<sup>71</sup>

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 commission merchant, dealer, or broker within the meaning of PACA Section 6(b)<sup>72</sup> 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."<sup>73</sup>

Notably, Tomato Specialties's Motion does not cite, much less expressly analyze, the interaction of PACA Sections 6(a) and 6(c), which

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<sup>70</sup> 7 U.S.C. § 499f.

<sup>71</sup> Motion at 1; IB at 6.

<sup>72</sup> 7 U.S.C. § 499f(b).

<sup>73</sup> Motion at 1; IB at 6.

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).<sup>74</sup>

Tomato Specialties's Reply Brief, pages 3 through 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 pages 4 through 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 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.<sup>75</sup>

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.<sup>76</sup> AMS argues a PACA Section 6(b) reparations complaint can also be a PACA Section 6(b) written notification.<sup>77</sup> Regardless, AMS contends Section 6(c) allows the

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<sup>74</sup> See Motion at 3-5; IB at 9-12.

<sup>75</sup> See AMS Response to Motion to Dismiss and RB at 1-5.

<sup>76</sup> AMS RB at 2-5.

<sup>77</sup> See, e.g., AMS Response to Motion to Dismiss at 13, 13 n.13.

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’s 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’s motion is out-of-time because that motion was filed after the due date for Tomato Specialties’s 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.<sup>78</sup>

I rule that, to the extent Tomato Specialties’s 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’s 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 banned by that statute or by anything else cited by Tomato Specialties from handling a

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<sup>78</sup> See Motion at 1; IB at 8-11.

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.<sup>79</sup> Such a “petition” is also referred to in Section 6 as a “complaint.”<sup>80</sup>

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

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.<sup>83</sup> Section 6(c)(1) further provides that if:

In the course of the investigation. . . . the Secretary determines that violations of this chapter are indicated

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<sup>79</sup> 7 U.S.C. § 499f(a)(1).

<sup>80</sup> *See id.*

<sup>81</sup> 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)).

<sup>82</sup> 7 U.S.C. § 499f(b) (emphasis added).

<sup>83</sup> 7 U.S.C. § 499f(c)(1) (emphasis added).



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.<sup>84</sup>

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.”<sup>85</sup>

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.<sup>86</sup> 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.<sup>87</sup> 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.

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<sup>84</sup> *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 at 133-34; CX-4; Mr. Studer, Tr. II at 134-35, 173.

<sup>85</sup> 7 U.S.C. § 499f(c)(2).

<sup>86</sup> *See* Motion at 3-5; IB at 11-12. Indeed, Tomato Specialties acknowledged and referenced one of these reparation complaints in its March 28, 2016 Answer to the Complaint at 3 ¶ 11. Tomato Specialties does not deny that another Section 6(a) reparation complaint was also filed.

<sup>87</sup> 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).

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.”<sup>88</sup> Tomato Specialties is correct that Mr. Studer is such a USDA employee.<sup>89</sup> Tomato Specialties avers, IB, page 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, pages 5 through 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

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<sup>88</sup> 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 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.

<sup>89</sup> AMS states Mr. Studer is such an employee. Motion Response at 3.

“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 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:<sup>90</sup>

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 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.”<sup>91</sup> As AMS also points out:<sup>92</sup>

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

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<sup>90</sup> Tomato Specialties Motion to Dismiss at 7; IB at 11.

<sup>91</sup> AMS Response to Motion to Dismiss at 8-10.

<sup>92</sup> *Id.* at 9.

[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.”<sup>93</sup> 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) 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".<sup>94</sup> 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

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<sup>93</sup> *Id.* at 8.

<sup>94</sup> Motion at 2; IB at 7.

licensees, including "additional violations" uncovered in the course of its employees' activities after a reparations complaint has been filed.<sup>95</sup>

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.<sup>96</sup> 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

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<sup>95</sup> Tomato Specialties, RB, page 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 at 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. Sheppard*, 468 U.S. 981 (1984). There is no basis on which to conclude that Tomato Specialties's 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.

<sup>96</sup> Motion at 5-7; Tr. II at 159-70; IB at 9-12.

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.<sup>97</sup> A fair reading of Tomato Specialties's Motion—as opposed to its later filed Reply Brief—would be that Tomato Specialties's contention is not that Mr. Studer improperly divulged to his superiors information he obtained in his handling of the reparations case,<sup>98</sup> but, rather, Tomato Specialties contends solely that

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<sup>97</sup> Tomato Specialties argues, Motion at 5; IB at 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.

<sup>98</sup> Tomato Specialties’s cross-examination at hearing (*see* cross-examination of AMS witness and investigator Mr. Hammond, Tr. III at 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 violations they discover in such roles. *See also* Motion at 3-5; IB at 8, 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.

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(c).

In its Reply Brief—as AMS points out,<sup>99</sup> 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.<sup>100</sup> 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 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's 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.<sup>101</sup> 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

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<sup>99</sup> AMS RB at 2.

<sup>100</sup> At the time the briefing schedule was set, the parties were specifically warned that sandbagging would be considered improper. Tr. III at 178.

<sup>101</sup> RB at 3-4.



review and handle reparation complaints in their informal stages),<sup>102</sup> 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 PAC 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.<sup>103</sup>

Tomato Specialties bases these contentions on its assertion that Mr. Studer was a "Hearing Officer presiding over" the reparations.<sup>104</sup> 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.<sup>105</sup> 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."<sup>106</sup>

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 handing of informal complaints in general.

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<sup>102</sup> *See* Studer testimony, Tr. II at 160-68; Hammond testimony, Tr. III at 114-18.

<sup>103</sup> Tomato Specialties RB at 5.

<sup>104</sup> *Id.* at 4.

<sup>105</sup> Tr. II at 160-68; Tr. III at 116-18.

<sup>106</sup> H.R. REP. NO. 104-207, 104th Cong. (1995), *reprinted in* 1995 U.S.C.C.A.N. 453, 460 (1995).

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).”<sup>107</sup> 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 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.<sup>108</sup>

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).<sup>109</sup> 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

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<sup>107</sup> AMS Motion Response at 11 n.9.

<sup>108</sup> 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.

<sup>109</sup> AMS Motion Response at 7 n.10, 12 n.11, 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 at 13 n.13.

unpaid invoices stemming from a produce transaction with quality issues and not allegations of false statements or misrepresentations.”<sup>110</sup> Nevertheless, Tomato Specialties strenuously argues that a Section 6(a) reparations complaint cannot also be a Section 6(b) written notice.<sup>111</sup>

Tomato Specialties states, RB, page 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’s 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.<sup>112</sup>

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.”<sup>113</sup> There is a nine-month statute of limitations for submitting the complaint,<sup>114</sup> and filing fees are required.<sup>115</sup> There is no provision that such a complaint be treated on a confidential basis.

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<sup>110</sup> Tomato Specialties Motion to Dismiss at 7; IB at 11.

<sup>111</sup> See Tomato Specialties RB at 4-6.

<sup>112</sup> Tomato Specialties cites, RB, page 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 the criteria of a Section 6(b) written notice.

<sup>113</sup> 7 C.F.R. § 499f(a)(1).

<sup>114</sup> *Id.*

<sup>115</sup> 7 C.F.R. § 499f(a)(2).

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. . . .”<sup>116</sup> 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’s 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 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.<sup>117</sup>

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<sup>116</sup> 7 C.F.R. § 499f(a)(1).

<sup>117</sup> 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

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.<sup>118</sup>

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, page 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 produce transactions that they knew were false.<sup>119</sup> 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.

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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.

<sup>118</sup> AMS Motion Response at 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).

<sup>119</sup> See Tomato Specialties closing argument, Tr. III at 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.”).

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)<sup>120</sup> 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.<sup>121</sup>

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

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.<sup>124</sup> 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.<sup>125</sup>

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<sup>120</sup> 7 U.S.C. § 499b(4).

<sup>121</sup> *Id.*

<sup>122</sup> 7 U.S.C. § 499h(a).

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

<sup>124</sup> See AMS IB at 9 n.2.

<sup>125</sup> See Tr. II at 208-09. Tomato Specialties’s 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.”

Tomato Specialties at various times during the hearing stated it was a “broker” of some type.<sup>126</sup> Its counsel referenced the terms “buying broker” (or “buyer broker”) and “selling broker” from time to time.<sup>127</sup> PACA Section 2(4) proscribes violations by commission merchants, dealers, and brokers in all phases of produce transactions in interstate or foreign commerce.<sup>128</sup> 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.<sup>129</sup> Tomato Specialties is a licensee under PACA. For purposes of this Decision, it does not have to be determined precisely which of these roles Tomato Specialties performed. It is enough to determine, as this Decision does, that Tomato Specialties’s 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.”<sup>130</sup> 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 15<sup>131</sup> 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]*<sup>132</sup> as stating that the last sentence of Section 15 has been

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<sup>126</sup> See Tr. I at 50, 54; Tr. II at 211; Tr. III at 30.

<sup>127</sup> See Tr. I at 334, 336; Tr. II at 242.

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

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

<sup>130</sup> Tomato Specialties RB at 13.

<sup>131</sup> 7 U.S.C. § 4990.

<sup>132</sup> 50 Agric. Dec. 1044, 1056 (U.S.D.A. 1991).

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.<sup>133</sup>

But, as AMS points out, Sam & Sons refers to PACA reparations cases, and specifically the law of sales.<sup>134</sup> It has nothing to do with the PACA ban on false or misleading statements.<sup>135</sup> 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.’”<sup>136</sup> 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

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<sup>133</sup> AMS RB at 13.

<sup>134</sup> AMS IB at 7.

<sup>135</sup> 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, 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; and *Nielson v. Flashberg*, 101 Ariz. 335 (1966), involves fraud in a contract case.

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



statement was made for a fraudulent purpose.”<sup>137</sup> A statement is false and misleading when the maker knowingly misrepresents and intends for others to rely on the misrepresentation.<sup>138</sup>

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.<sup>139</sup> 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.<sup>140</sup>

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

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<sup>137</sup> *Id.* at 1733-34.

<sup>138</sup> *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).

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

<sup>140</sup> *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).

control which it aimed to achieve, and the words used with these objectives in view.<sup>141</sup>

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 to deal fairly.<sup>142</sup> PACA is “admittedly and intentionally a ‘tough’ law.”<sup>143</sup> 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.<sup>144</sup>

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.<sup>145</sup>

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<sup>141</sup> Goodman v. Fed. Trade Comm’n, 244 F.2d 584, 591 (9th Cir. 1957).

<sup>142</sup> 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).

<sup>143</sup> 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).

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

<sup>145</sup> Assuming, *arguendo*, Tomato Specialties’s strained argument that Arizona state law somehow applies, AMS met each of Tomato Specialties’s 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

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).<sup>146</sup> 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.<sup>147</sup> 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 broker<sup>148</sup> 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

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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 at 118-120, 123-I 25, 130, 178-180, 223, 238, and Jaime Chamberlain, Tr. I at 245, 255-256; CX-9, testified they believed the accountings were true and relied on them in granting adjustments; *see also* Studer, Tr. I at 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 justify returns) received less money in each of the forty-one transactions as a direct result of Tomato Specialties’s false and misleading statements.

<sup>146</sup> Tr. I at 50; Tr. II at 211; Tr. III at 129-31.

<sup>147</sup> *See Coosemans Specialties*, 482 F.3d at 566.

<sup>148</sup> 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.”

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

In its Answer to the Complaint, page 2, paragraph 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.”<sup>149</sup> 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.<sup>150</sup> 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.

In its Initial Brief, page 14, Tomato Specialties contended AMS failed to make specific allegations in its Complaint or otherwise present either

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<sup>149</sup> See also Tr. I at 51-52.

<sup>150</sup> 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).

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 asserts<sup>151</sup> “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.”<sup>152</sup> 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.

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

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<sup>151</sup> IB at 16.

<sup>152</sup> 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 at 230-40, 327; Tr. III at 186-91.

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.<sup>153</sup> 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:<sup>154</sup>

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. 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,<sup>155</sup> credibly testified she

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

<sup>154</sup> Answer at 3 ¶¶ 11, 13.

<sup>155</sup> Tr. I at 129-30.

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, page 10, were not actually dumped and the repacking/reconditioning charges shown there were not actually incurred.<sup>156</sup> She testified these accountings had to be shown to the grower, and she “trusted completely this accounting of sales.”<sup>157</sup> 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.”<sup>158</sup> She testified that the fact that the accounting showed expenses deducted that were not incurred put her “business at risk.”<sup>159</sup>

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.<sup>160</sup> But the fact that those accountings were not accompanied by such 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,<sup>161</sup> or may have been performed at other locations so the inspection was arguably not

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<sup>156</sup> *Id.* at 119-120.

<sup>157</sup> *Id.* at 120.

<sup>158</sup> *Id.* at 121.

<sup>159</sup> *Id.* at 121-22.

<sup>160</sup> *See* Complaint, Attach. A, TSA, Appx D.

<sup>161</sup> Complaint, Attach. A at 31.

fully consistent with the TSA.<sup>162</sup> But these events do not render Tomato Specialties's statements in those TSA Accountings 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's personnel were in effect jointly prepared by it and seller-shippers,<sup>163</sup> 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.<sup>164</sup> Nothing it 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.<sup>165</sup> 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's false accounting and payments. But there is no showing of how the shippers would be better off than they would be if Tomato Specialties's accounting were accurate, as required by PACA, and payments were in the proper amounts.

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<sup>162</sup> See Tr. II at 296-303.

<sup>163</sup> Tr. III at 195.

<sup>164</sup> See Chamberlain testimony, Tr. I at 291-312; Ex. RX-A; AMS IB at 50-51.

<sup>165</sup> Tomato Specialties IB at 16. At times, the baseless costs for things such as reconditioning and dumping included in Tomato Specialties's 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 at 260-61.



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 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.<sup>166</sup> 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 defemination 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

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<sup>166</sup> See Tr. I at 308-41.

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,”<sup>167</sup> 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 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.<sup>168</sup>

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 fact<sup>169</sup> 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 at 1; Tr. II at 252.

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<sup>167</sup> Appx. D, B, 4. Tomato Specialties does not have its own repacking facilities. See Tr. II at 235, 252-53.

<sup>168</sup> 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 at 210.

<sup>169</sup> IB at 9-37.

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 at 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.<sup>170</sup>
4. In these transactions, Tomato Specialties issued forty-one “Tomato Suspension Agreement<sup>171</sup> 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-6-56a; Tr. I at 79-84, 118-19, 255-61; Tr. II at 51-53, 261-62, 264-66, 312-13; Tr. III at 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 at 83, 98, 100, 123-24, 171-74, 223, 255-56, 261, 303; Tr. II at 51-53, 260, 264-66, 313.

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<sup>170</sup> 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.

<sup>171</sup> 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

6. For each of the forty-one transactions, the tomato sellers/shippers granted adjustments to the invoice price based on Tomato Specialties's TSA Accountings claimed expenses (dumping, reconditioning, and repacking). AMS Complaint; CX-I6-56a; Tr. I at 81-84, 118-19, 123-25, 139, 171-73, 179-80, 214-15, 233, 255-56, 261-66, 285-88; Tr. II at 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 transactions<sup>172</sup> 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's Answer at 3 ¶ 11; CX-16-56a; Tr. I at 61-62, 98-101; Tr. II at 141, 181, 234-36, 237, 253, 254, 275-77, 281, 313, 325-27, 329, 331; Tr. III at 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 at 92, 96, 108-110; Tr. II at 266, 268-75, 278, 304-09, 313-22, 325-26.
9. In Tomato Specialties's 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

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Specialties abided by the terms of the TSA, but whether Tomato Specialties violated PACA.

<sup>172</sup> 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's claimed expenses for these transactions are false. Tr. II at 329-31; Tr. III at 26, 39, 42.

inspected, and the following expenses: a price of dumped product, 586 units at \$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 at 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 at 1, 2; CX-16a.

10. In Tomato Specialties's 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 at 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 at 22), and (a quantity of 352 sold for at least \$2,376.00) to Star Fresh, Inc. (CX-17 at 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 at 3, 22; CX-17a.

11. In Tomato Specialties's 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 at 1, 2. Tomato Specialties's 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 at 1, 26, 27; CX-18a.

12. In Tomato Specialties's 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 at 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 at 1, 2, 20, 21; CX-19a.

13. In Tomato Specialties's 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 at 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 at 1, 2, 10, 11; CX-20a.
14. In Tomato Specialties's 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 at 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 at 1, 2, 3, 17-22; CX-21a.

15. In Tomato Specialties's 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 at 2-6. Therefore, the falsely claimed deductions totaled \$7,402.24. CX-22 at 1-2. Tomato Specialties sold the entire 1600 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 at 1-2, 15-16, 20- 26; CX-22a.

16. In Tomato Specialties's 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 at 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 at 1, 2, 3, 17, 18; CX-23a.

17. In Tomato Specialties's 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 at 1, 2. Tomato Specialties sold the entire 1600 units of tomatoes inspected to its customer, Giumarra 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 at 1, 2, 3, 9, 10; CX-24a.

18. In Tomato Specialties's transaction number 2325, subsequent to the inspection of 800 units, CX-25 at 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 at 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 at 1, 2, 3, 10, 17; CX-25a.

19. In Tomato Specialties's 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 at 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 at 1, 2, 3, 17, 18, 19; CX-26a.

20. In Tomato Specialties's 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 at 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 at 1, 2, 3, 11, 15, 26, 27; CX-27a.

21. In Tomato Specialties's 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 at 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 at 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 at 1, 2, 3, 27, 28; CX-28a.

22. In Tomato Specialties's 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 at 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 at 1, 2, 3, 15, 16. 19, 20; CX-29a.

23. In Tomato Specialties's transaction number 2336, subsequent to the inspection of 956 units, CX-30 at 5, Tomato Specialties tendered to JC Dist. a TSA Accounting<sup>173</sup> 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;

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<sup>173</sup> 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.

therefore, the falsely claimed deductions totaled \$8,032.00. CX-30 at 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 at 1-3, 23-26; CX-30a.

24. In Tomato Specialties's transaction number 2339, 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, 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 at 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 at 1-3, 23-24; CX-31a.
25. In Tomato Specialties's 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 at 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 at 1-3, 17-21, 27-28; CX-32a.

26. In Tomato Specialties's 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-3 at 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 at 1-3, 18, 22-25; CX-33a.
27. In Tomato Specialties's 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 at 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 at 1-3, 16-25; CX-34a.

28. In Tomato Specialties's 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 at 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 at 1-3, 16-19; CX-35a.

29. In Tomato Specialties's 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 at 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 at 1-3, 14-17, 20-24; CX-36a.
30. In Tomato Specialties's 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 at 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 at 1-3,19, 24-25, 28-30; CX-37a.

31. In Tomato Specialties's 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 at 1, 2. Tomato Specialties sold the entire 1,597 units of tomatoes inspected to its customer, Promatc 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 at 1, 2, 3, 18-22; CX-38a.

32. In Tomato Specialties's transaction number 2393, subsequent to the inspection<sup>174</sup> 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 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

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<sup>174</sup> The corresponding TSA Accounting for this inspection included only "scoreable defects" under the TSA. See CX-39 at 12; Tr. I at 303.

fee was a valid deduction; therefore, the falsely claimed deductions totaled \$9,129.60. CX-39 at 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 at 1, 2, 3, 15<sup>175</sup>-16, 18; CX-39a.

33. In Tomato Specialties's 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,<sup>176</sup> along with corresponding charges, for a total of \$1477.14) were valid deductions; therefore, the falsely claimed deductions totaled \$4,538.50. CX-40 at 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 at 1). CX-40 at 3, 22, 25, 27-37; CX-40a.

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<sup>175</sup> 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 at 26 n. 7.

<sup>176</sup> Tomato Specialties's 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's customer. A quantity of 1152 was passed on to Tomato Specialties' customer—512 units at \$4.50 per unit and 640 units at \$6.00. AMS credits Tomato Specialties with 168 units dumped. CX-40 at 2-6; CX-40a; AMS IB at 26 n.8.

34. In Tomato Specialties's 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 AMS IB 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 at 2, 4, 6. Therefore, the falsely claimed deductions totaled \$6,677.32. CX-41 at 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 at 1-3, 19-23; CX-41a.
35. In Tomato Specialties's 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 at 2, 4, 5, 7; CX-28 at 5, 9 (note same official inspection numbers and identical values). Therefore, the falsely claimed deductions totaled \$9,303.56. CX- 42 at 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 at 1-3, 13, 16-20; CX-42a.

36. In Tomato Specialties's 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 at 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 at 1-3, 10, 16-17; CX-43a.

37. In Tomato Specialties's 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 at 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 at 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 at 2-4, 15-18; CX-44a.

38. In Tomato Specialties's 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 at 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 at 1-3, 23-26; CX-45a.

39. In Tomato Specialties's 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 at 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 at 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 at 1-3, 15-20; CX-46a.

40. In Tomato Specialties's transaction number 2447, subsequent to the inspection of 1,040 units, Tomato Specialties tendered to JC Dist. a TSA Accounting stating 1 040 units were inspected and the following expenses:<sup>177</sup> 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

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<sup>177</sup> 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 at 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 at 1-3, 17-20; CX-50a.

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 at 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 \$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 at 1-3, 11, 23-26; CX-47a.

41. In Tomato Specialties's 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 at 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 at 1-3, 17-20; CX-48a.

42. In Tomato Specialties's 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 \$1,0089.72, 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 at 6, 8 (moreover, it appears possible that the true inspections were in Tomato Specialties's customer's files, CX-49, pages 21 through 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 at 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 at 1-3, 17-20; CX-49a.

43. In Tomato Specialties's 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 at 5, 6, 8. Moreover, it appears possible that the true inspections were in Tomato Specialties's customer's files, CX-50 at 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 at 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 at 1-3, 17-20; CX-50a.

44. In Tomato Specialties's 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 at 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 at 1-3, 11, 15-17; CX-51a.

45. In Tomato Specialties's 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 at 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 at 1-3, 15-18; CX-52a.
46. In Tomato Specialties's 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 at 2, 14-15) were valid deductions; therefore, the falsely claimed deductions totaled \$8,997.65. CX-53 at 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 at 1-3, 23-26; CX-53a.

47. In Tomato Specialties's 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 at 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 at 1-3, 11, 16- 17; CX-54a.<sup>178</sup>

48. In Tomato Specialties's 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 at 2, 10, were

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<sup>178</sup> CX-54, page 2, calculates an average sale price from Tomato Specialties to Promate based on Tomato Specialties's lot-activity report.

valid deductions. Therefore, the falsely claimed deductions totaled \$10,147.64. CX-55 at 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 at 1-3, 23-26; CX-55a.

49. In Tomato Specialties's 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 at 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 at 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.<sup>179</sup> A statement is false and misleading when the maker knowingly misrepresents and intends for others to rely on the misrepresentation.<sup>180</sup> 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,<sup>181</sup> which Tomato Specialties essentially admitted.<sup>182</sup>
9. Those false and misleading statements were made with fraudulent purpose. False and misleading statements and false accounts are egregious, “conspicuously bad” violations of PACA, and a fraudulent purpose is shown when the false and misleading statements and false accounts cause monetary loss to produce shippers.<sup>183</sup>
10. Tomato Specialties’s 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

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<sup>179</sup> 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).

<sup>180</sup> *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).

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

<sup>182</sup> See, e.g., *Tomato Specialties’s Answer* ¶¶ 8, 11; Tr. I at 61-62; Tr. II at 234-37, 253; Tr. III at 205-06, 208-09, 223-24.

<sup>183</sup> *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).

honest dealing and protects producers and other merchants from dishonest and irresponsible conduct.<sup>184</sup>

11. The Tomato Suspension Agreement provides no defense to Tomato Specialties's 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.<sup>185</sup> PACA is "admittedly and intentionally" a tough law.<sup>186</sup> When 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.<sup>187</sup>
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

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<sup>184</sup> *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).

<sup>185</sup> *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).

<sup>186</sup> 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).

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

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.<sup>188</sup> 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.<sup>189</sup>
16. Tomato Specialties's violations were repeated.
17. Tomato Specialties's violations were flagrant because of the number of violations, the amount of money involved, and the time period over which the violations occurred.<sup>190</sup>
18. The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act, such as this one, is the preponderance of the evidence.<sup>191</sup> AMS's burden to prove that Tomato Specialties violated PACA Section 2(4) has been met.

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2001).

<sup>188</sup> *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).

<sup>189</sup> *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.

<sup>190</sup> *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 fifty-one 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 fifteen-month period involving over \$135,000.00 to be frequent and flagrant violations of the payment provisions of PACA).

<sup>191</sup> *JSG Trading Corp.*, 57 Agric. Dec. 710, 724 (U.S.D.A. 1998).



19. The Department's sanction policy is set forth in *S.S. Farms Linn County, Inc.*,<sup>192</sup> 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."<sup>193</sup>

20. Wes Hammond, Senior Marketing Specialist with the Specialty Crops Program, recommended revocation of Tomato Specialties's PACA license.<sup>194</sup> 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's PACA license is necessary to deter future violations of this type by both Tomato Specialties and other potential violators.<sup>195</sup>

### **ORDER, FINALITY, AND EFFECTS OF DECISION AND ORDER**

WHEREFORE:

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<sup>192</sup> 50 Agric. Dec. 476, 497 (U.S.D.A. 1991).

<sup>193</sup> *Id.*

<sup>194</sup> Tr. III at 101.

<sup>195</sup> 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).

1. Tomato Specialties's PACA license, No. 2010033, 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 thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to Section 1.145 of the Rules of Practice.<sup>196</sup>
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)<sup>197</sup> will take effect on the eleventh (11<sup>th</sup>) day after this Decision and Order becomes final. Persons "responsibly connected" to Tomato Specialties during the period of the Tomato Specialties's 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.
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.

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<sup>196</sup> 7 C.F.R. § 1.145.

<sup>197</sup> 7 U.S.C. §§ 499d(b) and 499h(b).

## PERISHABLE AGRICULTURAL COMMODITIES ACT

**In re: J&R FRESH PRODUCE, LLC.**  
**Docket No. 17-0224.**  
**Decision and Order.**  
**Filed December 6, 2017.**

**PACA-D.**

Christopher P. Young, Esq., for AMS.  
Shaheed Jimmy Ackbar for Respondent.  
Initial Decision and Order by Channing D. Strother, Administrative Law Judge.

### **DECISION AND ORDER WITHOUT HEARING** **BASED ON RESPONDENT'S ADMISSIONS**

#### **Preliminary Statement**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) [PACA], and the regulations promulgated thereunder (7 C.F.R. Part 46) [Regulations]. The proceeding was instituted by a complaint [Complaint] filed on February 23, 2017, by the Associate Deputy Administrator of the Agricultural Marketing Service, Specialty Crops Program, PACA Division [Complainant] against J&R Fresh Produce, LLC [Respondent].

The Complaint alleges that, during the period August 2015 through June 2016, Respondent failed to make full payment promptly to seven sellers of the agreed purchase prices in the total amount of \$281,225.30 for thirty lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce. The Complaint requested that I find that Respondent willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) and issue an order revoking Respondent's PACA license.<sup>1</sup>

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<sup>1</sup> Following the filing of the Complaint, Respondent's license terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)) on April 15, 2017, when Respondent failed to pay the required annual fee. Complainant subsequently requested, by motion, that an order be issued publishing the facts and circumstances of Respondent's PACA violations pursuant to Section 8(a) of the PACA (7 U.S.C. § 499h(a)).

J&R Fresh Produce, LLC  
76 Agric. Dec. 741

On March 14, 2017, Respondent requested a twenty-day extension to file an answer, which I granted by order dated March 15, 2017. On April 4, 2017, Respondent filed with the Hearing Clerk's Office, via email, an answer [Answer], but, as discussed below, that Answer failed to deny the material allegations of the Complaint.<sup>2</sup>

On April 19, 2017, I issued an "Order Setting Deadlines for Submissions," wherein I: (1) directed Complainant to exchange with Respondent its proposed hearing exhibits and to file with the Hearing Clerk its exhibit and witness list by June 19, 2017; and (2) directed Respondent to exchange with Complainant its proposed hearing exhibits and to file with the Hearing Clerk its exhibit and witness list by August 18, 2017. Complainant filed its witness and exhibit list with the Hearing Clerk's Office on August 18, 2017. As of this date, Respondent has not filed its list.

On October 31, 2017, Complainant filed a "Motion for Decision Without Hearing and Supporting Memorandum" [Motion] and a proposed decision based upon the admissions provided in Respondent's Answer. Respondent filed a response to the Motion with the Hearing Clerk's Office via email on November 3, 2017 [Answer to Motion].

Based upon Complainant's Motion and Respondent's failure to deny the material allegations of the Complaint, I find that circumstances exist that obviate the need for a hearing and warrant the issuance of a decision without hearing in this case. Accordingly, this Decision and Order is issued pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **Discussion**

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [Rules of Practice], set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. Section 1.139 of the Rules of Practice allows for a decision without hearing by reason of admissions: "The failure to file an

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<sup>2</sup> See Answer at 1.

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answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing.” (7 C.F.R. § 1.139). It is well settled that “a respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held.”<sup>3</sup>

Respondent has failed to deny the allegations that it failed to pay fully the past-due produce debt identified in the Complaint, and a recent follow-up investigation has shown that the amounts alleged as unpaid in the Complaint are still owed. Respondent cannot show full compliance with the PACA within 120 days after having been served with the Complaint. Therefore, I find that no hearing is warranted in this matter.<sup>4</sup>

### **I. Respondent Failed to Deny the Allegations of the Complaint and Has Admitted Liability.**

Pursuant to the PACA, “it is unlawful for buyers of produce to fail to make prompt payment for a shipment of produce.”<sup>5</sup> The PACA requires licensed produce dealers to make full payment promptly for fruit and vegetable purchases within ten days after the produce is accepted, provided that the parties may elect to use different payment terms so long as the terms are reduced to writing prior to the transaction.<sup>6</sup> In cases where a respondent has failed to make full payment promptly and “admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served . . . or the date of hearing, whichever occurs first, the [matter] will be treated as a no-pay case.”<sup>7</sup>

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<sup>3</sup> H. Schnell & Co., 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998); *see, e.g.*, KDLO Enters., Inc., 70 Agric. Dec. 1098, 1104; (U.S.D.A. 2011); Kirby Produce Co., 58 Agric. Dec. 1011, 1027 (U.S.D.A. 1999).

<sup>4</sup> *See id.*

<sup>5</sup> Biardi Food Chain v. United States, 482 F.3d 328, 241 (3d Cir. 2007).

<sup>6</sup> 7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11).

<sup>7</sup> Scamcorp, Inc., 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998).

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In its Answer, Respondent did not deny that it had failed to timely pay seven sellers for thirty lots perishable agricultural commodities.<sup>8</sup> The Answer states:

Ayco farms>>> These sales were all price after sale. documents showed that product was mediocre and the market was flooded ..vendor agent requested to sell for whatever..

Tindall cattle>> Information provided to show the farmer did not use proper harvest techniques resulting in poor quality..

Agrifact>>>information provided to show vendor did not ship the quality as requested ...

Supreme Harvest>>>information showed rejected load with an inspection ... I was pressured to help the vendor which I did, but could not recover any monies from the poor quality product..<sup>9</sup>

First, Respondent's Answer addresses only four out of the seven sellers listed in Appendix A to the Complaint. Respondent makes no mention of the seller Seminole Produce Distributing, Inc., owed \$15,600.00; of the seller EA Parker & Sons LLC, d/b/a Parker Farms, owed \$50,101.80; or of the seller La Familia Produce, owed \$90,391.50. These three sellers, whom Respondent fails to address in the Answer, are collectively owed a total in past-due and unpaid produce debt of \$156,093.30. Respondent's failure to address these sellers or the debt owed to them constitutes an admission that Respondent violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay those sellers promptly for that debt.<sup>10</sup>

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<sup>8</sup> See Answer at 1.

<sup>9</sup> *Id.*

<sup>10</sup> See 7 C.F.R. § 1.136(c) (“[F]ailure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation. . . .”); Van Buren Cnty. Fruit Exch., Inc., 51 Agric. Dec. 733, 740 (U.S.D.A. 1992).

## PERISHABLE AGRICULTURAL COMMODITIES ACT

Second, as to the four sellers mentioned in the Answer, Respondent offers unsubstantiated explanations as to why it believes that its failure to make full payment promptly to these sellers was somehow appropriate.<sup>11</sup> Such explanations do not satisfy the specific requirements for an answer under Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), which requires Respondent to “clearly admit, deny, or explain”<sup>12</sup> the allegations that it failed to pay for produce in accordance with Section 2(4) of the PACA (7 U.S.C. § 499b(4)).<sup>13</sup> Moreover, these explanations are not relevant to whether Respondent actually violated Section 2(4) of the PACA. As the Judicial Officer has previously held, “the Act calls for payment -- not excuses,”<sup>14</sup> and the damage to the produce industry is the same regardless of the reasons underlying Respondent’s payment violations.<sup>15</sup>

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<sup>11</sup> See Answer at 1.

<sup>12</sup> 7 C.F.R. § 1.136(b) (“The answer shall: (1) *Clearly admit, deny, or explain each of the allegations of the Complaint* and shall clearly set forth any defense asserted by the respondent; or (2) State that the responding admits all the facts alleged in the complaint; or (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.”) (emphasis added).

<sup>13</sup> See Blaser, 45 Agric. Dec. 1727, 1728 (U.S.D.A. 1986) (holding that an answer which admits one allegation of the complaint and fails to respond to the other allegations constitutes an admission of allegations in the complaint); Stolfus, 44 Agric. Dec. 1161, 1162 (U.S.D.A. 1985) (holding that an answer stating “no violation was intended” does not deny or otherwise respond to the complaint and is deemed an admission of the allegations of the complaint under 7 C.F.R. § 1.136(c)); Lucas, 43 Agric. Dec. 1721, 1722, 1725 (U.S.D.A. 1984) (where an answer which raised concerns that were extraneous to the complaint failed to admit, deny, or otherwise respond to the allegations of the complaint and was deemed an admission of the complaint allegations).

<sup>14</sup> The Caito Produce Co., 48 Agric. Dec. 602, 615 (U.S.D.A. 1989).

<sup>15</sup> See Great Am. Veal, Inc., 48 Agric. Dec. 182, 211 (U.S.D.A. 1989) (comparing the failure-to-pay provisions under the Packers and Stockyards Act to the failure-to-pay provisions under the PACA); *The Caito Produce Co.*, 48 Agric. Dec. at 614 (“Even though a respondent has good excuses for payment violations, perhaps beyond its control, such excuses are never regarded as sufficiently mitigating to prevent a respondent’s failure to pay from being considered flagrant or willful.”).

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Moreover, Respondent's explanations in its Answer to the Complaint do not provide an acceptable defense to liability in a case such as this, wherein a complaint has been filed alleging violation of Section 2(4) of the PACA due to the failure to make full payment promptly. The Judicial Officer has ruled:

PACA requires *full payment promptly*, and commission merchants, dealers, and brokers are required to be in compliance with the payment provisions of the PACA at all times .... In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance within the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case .... In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "slow-pay" case.<sup>16</sup>

Further, "[i]n any 'no-pay' case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked."<sup>17</sup> The Judicial Officer has also stated that "full compliance" requires "not only that a respondent have paid all produce sellers in accordance with the PACA, but also that a respondent have no credit agreements with produce sellers for more than 30 days."<sup>18</sup>

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<sup>16</sup> Scamcorp, Inc., 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998) (emphasis added).

<sup>17</sup> *Id.* at 549 n.13.

<sup>18</sup> *Id.* at 549.



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Respondent has made no assertion—in either its Answer to the Complaint or its Response to Complainant’s Motion—that full payment will be made or full compliance will be achieved pursuant to the policy established in *Scamcorp*.<sup>19</sup> By the statements provided in Respondent’s own Answer to the Complaint and Answer to the Motion—which do not clearly deny or respond to all material allegations of the Complaint—Respondent has violated the prompt payment provisions of the PACA. The Judicial Officer has long held that default is appropriate where a respondent has failed to deny the material allegations of the complaint.<sup>20</sup> Therefore, a hearing is not necessary in this case, and Respondent shall be found to have willfully, flagrantly, and repeatedly violated the PACA.<sup>21</sup>

### **II. Follow-Up Investigation Shows that Respondent Owes More than a *De Minimis* Amount.**

A follow-up compliance investigation revealed that, as of September 26, 2017, the sellers listed in Appendix A to the Complaint were still owed substantial balances. The outstanding balance due exceeds \$5,000.00 and axiomatically represents more than a *de minimis* amount.<sup>22</sup> During the follow-up investigation, AMS Marketing Specialist Todd Gilbert contacted representatives of each seller listed in Appendix A to the Complaint, discussed in the amounts listed as owed in Appendix A to

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<sup>19</sup> See *supra* note 9 and accompanying text.

<sup>20</sup> See, e.g., *Van Buren Cnty. Fruit Exch., Inc.* 51 Agric. Dec. 733, 740 (U.S.D.A. 1992) (holding that the failure to deny an allegation of the complaint is deemed admitted by virtue of the respondent’s failure to deny the allegation); *Kaplinsky*, 47 Agric. Dec. 613, 617 (U.S.D.A. 1988).

<sup>21</sup> See *H.M. Shield, Inc.*, 48 Agric. Dec. 573, 581 (U.S.D.A. 1989) (“[T]here is no need for complainant to prevail as to each of the transactions, since the same order would be entered in any event, as long as the violations are not *de minimis*.”); *Moore Mkt’g Int’l*, 47 Agric. Dec. 1472, 1482 (U.S.D.A. 1988) (Order Dismissing Appeal) (“It is well-settled under the Department’s sanction policy that the license of a produce dealer who fails to pay more than a *de minimis* amount of produce is revoked, absent a legitimate dispute between the parties as to the amount due.”); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (Ruling on Certified Question) (“[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed.”).

<sup>22</sup> *Fava & Co.*, 46 Agric. Dec. 79, 81 (U.S.D.A. 1984).

the Complaint, and was told the current balance of the debt owed past due and unpaid to each seller as of the date of the compliance investigation.<sup>23</sup> Mr. Gilbert learned that, as of the date of his compliance investigation, out of the \$281,225.30 alleged as owed in the Complaint, the entire balance of \$281,255.30 was still owed to the seven produce sellers listed in Appendix A.<sup>24</sup> Respondent does not deny that this is true in its November 3, 2017 Answer to the Motion.

Under the policy set forth in *Scamcorp*,<sup>25</sup> this is a “no-pay” case for which revocation of Respondent’s license is warranted.<sup>26</sup> Respondent failed to pay promptly for more than a *de minimis* amount of produce.<sup>27</sup> A hearing is not necessary in this case.<sup>28</sup>

### **III. Respondent’s Violations Were Flagrant, Repeated, and Willful.**

It is plain that Respondent’s violations were flagrant, repeated, and willful.<sup>29</sup> “A violation is repeated whenever there is more than one violation of the Act,” and a violation is flagrant “whenever the total amount due and owing exceeds \$5,000.00.”<sup>30</sup> “A violation willful under the Administrative Procedure Act (5 U.S.C. § 558(c)), if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.”<sup>31</sup>

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<sup>23</sup> Mot. for Decision Without Hr’g, Attachment at 1 ¶¶ 2-9.

<sup>24</sup> *Id.* at 2 ¶ 10.

<sup>25</sup> *Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998); *see supra* note 9 and accompanying text.

<sup>26</sup> *See Scamcorp, Inc.*, 57 Agric. Dec. at 548-49. Revocation is no longer possible as Respondent’s PACA license has terminated; therefore, publication is the appropriate sanction. *See supra* note 1; *Post & Taback, Inc.*, 62 Agric. Dec. 802, 831 (U.S.D.A. 2003).

<sup>27</sup> *Scamcorp, Inc.*, 57 Agric. Dec. at 548-49; *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (“[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed.”).

<sup>28</sup> *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. at 82-83.

<sup>29</sup> *See D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

<sup>30</sup> *Id.*

<sup>31</sup> *Cox v. U.S. Dep’t of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 560 (1991) (citations omitted).

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Here, Respondent's violations were "repeated" because there was more than one violation. Respondent's violations were "flagrant" due to the number of violations, the large sum of money involved, and the lengthy time period during which the violations occurred.<sup>32</sup> Finally, Respondent's violations are also "willful," as that term is used in the Administrative Procedure Act:

The Respondent knew or should have known that it could not make prompt payment for the large number of perishables it ordered, yet it continued to make purchases over a lengthy period of time. Respondent should have made sure that it had sufficient capitalization with which to operate. It did not and, consequently, could not pay its suppliers. Under these circumstances, Respondent intentionally violated the PACA and clearly operated in careless disregard of the payment requirements of PACA. Its actions constitute violations that were willful.<sup>33</sup>

Willfulness is reflected by Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which Respondent committed the violations and the number and dollar amount of Respondent's violative transactions.

#### **4. Respondent Did Not File Meritorious Objections to Complainant's Motion for Decision Without Hearing.**

The Rules of Practice provide:

**§ 1.139 Procedure upon failure to file an answer or admission of facts.**

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<sup>32</sup> See *Five Star Food Distribs., Inc.*, 56 Agric. Dec. 880, 895 (U.S.D.A. 1997).

<sup>33</sup> See *D.W. Produce, Inc.*, 53 Agric. Dec. at 1678.

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The failure to file an answer, or *the admission by the answer of all the material allegations of fact contained in the complaint*, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof. . . . Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. *If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.*<sup>34</sup>

Although Respondent filed an email Answer to Complainant's Motion in this case, stating certain objections, those objections in effect admit the material allegations of fact contained in the Complaint. The Answer states, without attachments:

. . . . I would contest as follows[:]

Ayco Farms.. As mentioned in my report and findings, they shipped product that was below US #stds(overripe[sic] and shipped PAS), but PACA failed to acknowledge this. Todd claims to have spoken to them but no findings were presented to me in writing. seems totally biased.

Supreme Harvest> Adrian Bazan has acknowledge[ d] to me as early as this week, he would remove his PACA claim against me. please contact him for the TRUTH.

Tindall Cattle> they still have to prove to PACA and me that my claims in writing to PACA was[sic] false. How can a grower pack his product in unsanitary conditions and expect to be paid for it. USDA needs to do a full investigation on this farm before putting blame on me.

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<sup>34</sup> 7 C.F.R. § 1.139 (emphasis added).

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all the peppers bought from them were packed in unapproved facility as mentioned in my claims.

Todd Gilbert requested to meet me but did not mention he was doing an investigation on my company. Upon arrival at his hotel in Tampa FL, he told me he was in town to discuss the PACA claims against me.<sup>35</sup>

At least three of these four items involve sellers referenced in Respondent's Answer to the Complaint—"Ayco Farms," "Supreme Harvest," and "Tindall Cattle." Respondent has not even referenced—much less denied—Complaint allegations, as to all seven sellers in its Answer to Complaint and Answer to the Motion, combined.

As was the case with its Answer to the Complaint, Respondent's "objections" are essentially excuses for not making timely payments are thus not defenses to violations Section 2(4) of the PACA alleged in the Complaint.<sup>36</sup> These excuses do not negate the fact that Respondent failed to make full payment promptly in accordance with the PACA and cannot show that compliance will be achieved. I find that Respondent's objections are not "meritorious" under Rule 1.139<sup>37</sup> and, therefore, issue this decision without further procedure or hearing pursuant to that Rule.

### **Findings of Fact**

1. Respondent is or was a limited liability company organized and existing under the laws of the state of Florida. Respondent's business and mailing address is or was 8601 Chadwick Drive, Tampa, Florida 33635.
2. At all times material herein, Respondent was licensed and/or operating subject to the provisions of the PACA. License number 20140661 was issued to Respondent on April 15, 2014. The license terminated pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)) on April 15, 2017, when Respondent failed to pay the required annual fee.

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<sup>35</sup> Resp. at 1.

<sup>36</sup> See *supra* note 13 and accompanying text.

<sup>37</sup> 7 C.F.R. § 1.139.

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3. Respondent, during the period of August 2015 through June 2016, on or about the dates and in the transactions set forth in Appendix A attached hereto and incorporated herein by reference, failed to make full payment promptly to seven sellers for thirty lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$281,255.30.

**Conclusions of Law**

1. The Secretary has jurisdiction in this matter.
2. Respondent willfully violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
3. The failure of Respondent to make full payment promptly of the agreed purchase prices, or balances thereof, for the perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant, and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

**ORDER**

1. I find Respondent committed willful, flagrant, and repeated violations of Section 2(4) of the PACA.
2. The facts and circumstances of Respondent's violations shall be published.
3. This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145).
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) will take effect on the 11th day after this Decision and Order becomes final. Persons "responsibly

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connected” to Respondent during the period of the Respondent's violations are hereby alerted that they will be subject to the licensing restrictions under PACA Section 4(b) and the employment restrictions under Section 8(b) of the PACA.

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 upon each of the parties.

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**REPARATION DECISIONS**

**WARD THOMAS, d/b/a MAJESTIC PRODUCE SALES CO.  
v. TOTAL GREEN TROPICALS, INC.**

**Docket No. S-R-2016-239.**

**Decision and Order.**

**Filed November 16, 2017.**

**PACA-R.**

**Recorded Phone Conversations – Admissibility**

While a party's recorded phone conversations are permissible under federal law (18 U.S.C. § 2511(2)(d)), they nevertheless cannot be considered absent a sworn statement from the party seeking to introduce them attesting that the recordings have not been tampered with, and that they truly represent the conversations recorded.

Stokes Law Office LLP for the Complainant, Ward Thomas, d/b/a Majestic Produce Sales Co.

Robert Goldman for the Respondent, Total Green Tropicals, Inc.

Leslie Wowk, Examiner.

Shelton S. Smallwood, Presiding Officer.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

**DECISION AND ORDER**

**Preliminary Statement**

Complainant instituted this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [PACA], and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) [Rules of Practice], by filing a timely complaint. Complainant seeks a reparation award against Respondent in the amount of \$11,565.00 in connection with two truckloads of carrots shipped in the course of interstate and foreign commerce. A copy of the Complaint was served upon the Respondent, which filed an answer thereto, denying liability to Complainant.

The amount claimed in the Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in section 47.20 of the



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Rules of Practice is applicable (7 C.F.R. § 47.20). Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is any report of investigation prepared by the Department. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an opening statement, a statement in reply, and a brief. Respondent filed an answering statement and a brief.

### **Findings of Fact**

1. Complainant is an individual doing business as Majestic Produce Sales Co., whose post office address is [REDACTED].\* At the time of the transactions involved herein, Complainant was licensed under the PACA.
2. Respondent is a corporation whose post office address is 1247 NW 21<sup>st</sup> Street, Miami, FL 33142. At the time of the transactions involved herein, Respondent was licensed under the PACA.
3. On August 5, 2015, Complainant prepared bill of lading number 21017 for the shipment of 850 fifty-pound sacks of carrots from their loading point in the state of Texas, to Respondent in Miami, Florida. (Compl. Ex. A at 1).
4. On August 14, 2015, Complainant prepared invoice number 21017 billing Respondent for 850 fifty-pound sacks of carrots at \$11.00 per sack, for a total f.o.b. invoice price of \$9,350.00. (Compl. Ex. A at 2). The invoice identifies the salesman for the transaction as "WARD" and the broker as "OSCAR MEJIA."
5. Oscar Mejia issued invoice number 1077, dated August 3, 2015, billing Complainant \$297.50 (850 @ \$0.35) for a brokerage fee/sales commission in connection with P.O. number 21017. (Compl. Ex. A at 3).
6. On August 13, 2015, Complainant prepared bill of lading number 21045 for the shipment of 773 fifty-pound sacks of jumbo carrots and forty-three fifty-pound sacks of medium carrots from their loading point

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\* Redacted by the Editor for personal privacy considerations.

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in the state of Texas, to Respondent in Miami, Florida. (Compl. Ex. A at 4).

7. On August 14, 2015, Complainant prepared invoice number 21045 billing Respondent for 773 fifty-pound sacks of jumbo carrots at \$9.00 per sack, or \$6,957.00, and forty-three fifty-pound sacks of medium carrots at \$6.00 per sack, or \$258.00, for a total f.o.b. invoice price of \$7,215.00. (Compl. Ex. A at 5).

8. The informal complaint was filed on April 22, 2016, which is within nine months from the date the cause of action accrued.

**Conclusions**

Complainant brings this action to recover the unpaid balance of the invoice price for two truckloads of carrots allegedly sold and shipped to Respondent. Complainant states Respondent accepted the carrots in compliance with the contracts of sale but has since paid only \$5,000.00 of the agreed purchase prices thereof,<sup>1</sup> leaving a balance due Complainant of \$11,565.00. (Compl. ¶ 5). Respondent denies purchasing or accepting the carrots in question from Complainant. (Answer ¶¶ 4-5).

As the moving party, Complainant bears the burden of proving his case. *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506 (U.S.D.A. 1975). The party with the burden of proof must meet the preponderance of the evidence test. *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (U.S.D.A. 1969). To substantiate his allegations, Complainant submitted copies of his invoices billing Respondent for the carrots and copies of his bills of lading indicating that the carrots were shipped to Respondent. (Compl. Ex. A).

Complainant also submitted a sworn declaration wherein he asserts that Respondent's Jorge "George" Herrera initially admitted receiving the carrots as well as Complainant's invoices billing Respondent for the

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<sup>1</sup> Complainant states he received a payment of \$5,000.00 from Respondent for the carrots; however, Respondent denies making any payment to Complainant, and the only evidence submitted by Complainant to substantiates the allegation of payment is a handwritten notation on the invoice stating that \$5,000.00 was paid on August 17, 2015. (Compl. Ex. A at 5).

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carrots; however, Complainant states Mr. Herrera later denied owing Complainant any money for the carrots billed on invoice 21017 and asserted that the transaction was between Respondent and Oscar Mejia, and since Mr. Mejia owed money to Respondent, Respondent would not be paying this invoice. (Opening Stmt. at 2). For invoice 21045, Complainant states Mr. Herrera admitted owing the \$2,215.00 remaining due but stated Respondent would not pay this invoice without a release from Complainant for all sums due on invoice 21017. (Opening Stmt. at 2).

In response to Complainant's allegations, Mr. Jorge Herrera, general manager of Respondent, denies telling Complainant that Respondent purchased the carrots from or owed any money to Complainant or Oscar Mejia. (Answering Stmt. at 4). On the contrary, Mr. Herrera states Respondent has never done business with Complainant and that he negotiated the purchase of the two truckloads of carrots in question with Virginio Moreno of Freshpack Distribution Services, LLC (Freshpack). (Answering Stmt. at 2-3). Mr. Herrera states the purchases were made on a price after sale basis and that on or about the date of purchase, Respondent received invoices from Freshpack showing a target price that was later renegotiated after Respondent completed its sale of the carrots. (Answering Stmt. at 2-3). At some point following Respondent's receipt of the carrots, Mr. Herrera states he received invoices from Complainant and immediately contacted Mr. Moreno to tell him that he received invoices from Complainant that seemed to match up with the two loads of carrots that he purchased from Freshpack. (Answering Stmt. at 4). According to Mr. Herrera, Mr. Moreno stated he purchased the two loads of carrots from Complainant, that he would pay Complainant for the carrots and that Complainant must have mistakenly sent the invoices to Respondent. (Answering Stmt. at 4).

Complainant submitted additional evidence in the form of a sworn Statement in Reply wherein he asserts once again that he sold the carrots to Respondent and states Respondent admittedly received his invoices and did not dispute the invoices until months later. (Stmt. in Reply at 2). In addition, Complainant asserts he recorded phone conversations with Mr. Herrera wherein Mr. Herrera admitted receiving and unloading the shipments and receiving invoices from Complainant and agreed to pay Complainant for the carrots if he received a release from Oscar Mejia.

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(Stmt. in Reply at 2). Complainant submitted with his statement transcripts and audio files of the alleged conversations. (Stmt. in Reply Ex. B-C).

Complainant argues that the recorded phone conversations are proper evidence of exactly what was said by each party because at the time he recorded the phone conversations, he was in Texas and the state of Texas only requires one person on the call to agree to being recorded. The Texas wiretapping law is a “one-party consent” law, meaning that Texas makes it a crime to intercept or record any “wire, oral, or electronic communication” unless one party to the conversation consents. TEX. PENAL CODE § 16.02. In contrast, the wiretapping law in the state of Florida, where Respondent is located, is a “two-party consent” law, meaning that Florida makes it a crime to intercept or record a “wire, oral, or electronic communication” unless all parties to the communication consent. *See* FLA. STAT. § 934.03.<sup>2</sup> Complainant’s recording is, however, permissible under federal law (18 U.S.C. § 2511(2)(d)), and on that basis we find that it is admissible. *See United States v. D’Antoni*, 874 F.2d 1214 (7th Cir. 1989); *see also A. Sam & Sons Produce Co. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, 1055-65 (U.S.D.A. 1991).

While the recording itself is admissible, we must nevertheless conclude that the statements made therein cannot be considered because the recording is not accompanied by a sworn statement from Complainant attesting that the tape has not been tampered with, and that it truly represents the conversations recorded. *Big Apple Pineapple Corp. v. Fashion Fruit Co.*, 58 Agric. Dec. 1106, 1110 (U.S.D.A. 1999). Moreover, even if the recorded statements could be considered, the relevant matters Complainant seeks to establish by means of those statements are either already established elsewhere in the record or are not established by the statements recorded.

Specifically, Complainant maintains that the recordings show: (1) Mr. Herrera admitted receiving Complainant’s invoices for the carrots; (2) Mr. Herrera acknowledged that Respondent owed money for the carrots; (3) Mr. Herrera admitted he was aware that purchase orders were issued

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<sup>2</sup> DIGITAL MEDIA LAW PROJECT, *Recording Phone Calls and Conversations*, BERKMAN CTR. FOR INTERNET & SOC’Y, [www.dmlp.org/legal-guide/recording-phone-calls-and-conversations](http://www.dmlp.org/legal-guide/recording-phone-calls-and-conversations) (last visited Apr. 20, 2018).

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and that he received confirmation of the orders from Complainant at the time of shipment; and (4) Mr. Herrera agreed Respondent would pay for the carrots if it received a release from Mr. Mejia. (Stmt. in Reply at 2).

With respect to the first assertion, Mr. Herrera has already testified that Respondent received Complainant's invoices. (Answering Stmt. at 4). Moreover, Respondent's receipt of Complainant's invoices during the normal course of business would not create a sale which was otherwise non-existent. *Floriza Sales Co. v. Pamco Air Fresh, Inc.*, 47 Agric. Dec. 1328, 1340 (U.S.D.A. 1988). Regarding the second assertion, Mr. Herrera stated repeatedly that he purchased the carrots from Mr. Moreno of Freshpack and that he would pay Freshpack for the carrots. As to the third assertion, Mr. Herrera never admitted receiving order confirmations from Complainant. Finally, with respect to the fourth assertion, Mr. Herrera stated he would need approval from Mr. Moreno to pay Complainant for the carrots; there is no mention of Mr. Mejia in the conversation.

As we just mentioned, Respondent's Jorge Herrera repeatedly asserts that Respondent purchased the carrots in question from Freshpack, and Respondent submitted copies of the invoices that it received from Freshpack to support this assertion. (Answering Stmt. Ex. A-1, C). Mr. Herrera also states he was told by Freshpack's Virginio Moreno that Freshpack purchased the carrots from Complainant and would pay Complainant for the carrots. Complainant did not, in any of his statements submitted throughout this proceeding, address Respondent's contention that Complainant sold the carrots to Freshpack who, in turn, sold the carrots to Respondent, nor did Complainant address Freshpack's alleged involvement in the transaction in any fashion. Rather, Complainant repeatedly asserts that the transactions were negotiated by a broker, Oscar Mejia. Complainant did not, however, submit a statement from Mr. Mejia, or copies of confirmations of sale from Mr. Mejia, to support this assertion. Negative inferences may be taken when a party fails to provide obviously necessary documents or testimony. *Mattes Livestock Co.*, 42 Agric. Dec. 81, 96 (U.S.D.A. 1982); *Speight*, 33 Agric. Dec. 280, 300-01 (U.S.D.A. 1974); *SEC v. Scott*, 565 F. Supp. 1513 (S.D.N.Y. 1983).

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As Respondent has shown that it received invoices from both Freshpack and Complainant for the carrots, and Complainant has both failed to address the issue of Freshpack's involvement in the transactions *and* failed to submit any evidence apart from his invoices to establish the existence of a contract with Respondent, we find that Complainant has failed to sustain his burden to prove that Respondent purchased the carrots from Complainant. While the evidence nevertheless shows Respondent received the carrots, Respondent raised the allegation that it purchased the carrots from Freshpack, who purchased the carrots from Complainant, and Complainant never addressed this allegation. In light of this, and given the omissions in the evidence submitted by Complainant, we conclude that Complainant has failed to sustain its burden to prove that Respondent is liable to Complainant for the carrots. Since Complainant has not proven that Respondent purchased the carrots from Complainant or that Respondent is otherwise liable, the Complaint should be dismissed.

**ORDER**

The Complaint is dismissed.

Copies of this Order shall be served upon the parties.

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**Decision and Order.**  
**Filed November 21, 2017.**

**PACA-R.**

**Contract – Intent of the Parties**

Where the parties' intent cannot be ascertained from the agreement itself, and the record is lacking any extrinsic evidence supporting one interpretation over the other, we consider whether one or both of the parties' interpretations of the contract are reasonable. Further, where both parties provide a reasonable interpretation of the contract, preference will be given to the meaning that operates against the party who supplied the words or writing upon which the agreement was based, as that party had the opportunity to clearly state the terms of the agreement but failed to do so.

## **PERISHABLE AGRICULTURAL COMMODITIES ACT**

Coogan & Martin PC for the Complainant, Malena produce, Inc.  
McCarron & Diess for the Respondent, Fruit Royale, Inc.  
Leslie Wowk, Examiner.  
Shelton S. Smallwood, Presiding Officer.  
*Decision and Order entered by William G. Jenson, Judicial Officer.*

### **DECISION AND ORDER**

#### **Preliminary Statement**

Complainant instituted this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [PACA], and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) [(Rules of Practice)], by filing a timely complaint. Complainant seeks a reparation award against Respondent in the amount of \$30,887.30 in connection with ten truckloads of grapes shipped in the course of interstate and foreign commerce.

Copies of the Report of Investigation [ROI] prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an answer thereto, admitting liability to Complainant in the amount of \$479.00 but denying the remaining allegations of the Complaint. Respondent also asserts a setoff in the amount of \$15,369.00 for materials costs related to the transactions at issue in the Complaint.

Although the amount claimed in the Complaint exceeds \$30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice is applicable (7 C.F.R. § 47.20). Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's ROI. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an opening statement and a statement in reply. Respondent filed an answering statement. Both parties also submitted a brief.

#### **Findings of Fact**

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1. Complainant is a corporation whose post office address is P.O. Box 4678, Rio Rico, AZ 85648. At the time of the transactions involved herein, Complainant was licensed under the PACA.
2. Respondent is a corporation whose post office address is P.O. Box 970, Delano, CA 93216. At the time of the transactions involved herein, Respondent was licensed under the PACA.
3. On May 12, 2016, at 7:11 a.m., Complainant's Scott Terry forwarded to Respondent's Louie Galvan a message he received from Complainant's Gonzalo Avila on May 11, 2016, that reads:

Here is the program with the pricing the grower agreed on for the first 3 weeks. After that we prefer that Louie sources the Sugraones elsewhere and we continue with the flames for 2 more weeks.

Please remember that the perlettes for the week starting May 30<sup>th</sup> will be packed the week prior so we will need those orders during the week of May 23<sup>th</sup> [sic].

Please confirm the pricing so we can send materials down tomorrow and please confirm if we can still source the flames the weeks starting June 6<sup>th</sup> and June 13<sup>th</sup>.

(Compl. Ex. A). Attached to the email message is a table, the pertinent details of which are summarized below:

Week	5/15/16 to 5/22/16	5/23/16 to 5/29/16	5/30/16 to 6/5/16	6/6/16 to 6/12/16	6/13/16 to 6/19/16	6/20/16 to 6/26/16	6/27/16 to 7/3/16
2015 Season Pricing with this year s volumes				Mexico Program	2016 10x2	Fixed	Weight
Perlettes	\$22.95	\$18.95	\$18.95				
Flames	\$20.95	\$18.95	\$18.95	\$16.00	\$16.00		
Sugraone				\$16.00	\$16.00		



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2016 Season with new pricing							
<b>Perlettes</b>							
Volume	2,000	2,200	2,600				6,800
	\$32.45	\$23.45	\$21.45				
<b>Flames</b>							
Volume	4,000	5,000	7,500	4,000	3,500	1,800	25,800
	\$26.45	\$20.45	\$18.45	\$16.45	\$16.45	\$16.45	
<b>Sugraone</b>							
Volume				4,000	3,000	2,000	9,000
				\$16.45- 18.45	\$16.45- 18.45	\$16.45- 18.45	

(Compl. Ex. A). On May 12, 2016, at 7:17 a.m., Mr. Galvan responded with a message to Mr. Terry stating:

Confirmed.... We will begin to move forward on Sugraone with other sources

First green load loading Saturday 5/14  
First red load loading Tuesday 5/17

Please be advised that new this season ... the receiver is asking that all boxes be stamped with packed on date (BOXES ONLY)

THANK YOU FOR YOUR CONTINUED SUPPORT  
(and please be sure to let us know if anything changes on Sugraones)

(Compl. Ex. A).

4. On May 14, 2016, Complainant shipped to Respondent one truckload of Perlette grapes. On May 17, 2016, Complainant prepared invoice number 702559 billing Respondent for 1,199 cartons of 10X2Lb Perlette grapes (Product of Mexico) at \$32.45 per carton, or \$38,907.55, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$38,932.55. Respondent deducted \$0.70 per carton, or a total of \$839.30, from the invoice price of the grapes and paid Complainant

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\$38,093.25 with check number 010189, dated June 14, 2016. (Compl. Ex. B).

5. On May 19, 2016, at 3:39 p.m., Respondent's Louie Galvan sent the following via email to Complainant's Scott Terry:

Red AD 6/1 & 6/8 – Unprecedented!

FRUIT ROYALE Scheduled Procurement

	Mon	Tue	Wed	Thu	Fri	Sat	
SHIP-DATE	23-May	24-May	25-May	26-May	27-May	28-May	
Red	1,800	1,800	1,050	1,800	1,050	3,600	11,100
Green			375		375		750
Black			375		375		750
	1,800	1,800	1,800	1,800	1,800	3,600	

SHIP-DATE	30-May	31-May	01-Jun	02-Jun	03-Jun	04-Jun	
Red	1,800	1,800	1,800	1,425	1,800	825	8,625
Green		1,425				600	2,025
Black		375		375		375	1,125
	1,800	3,600	1,800	1,800	1,800	1,800	

(Compl. Ex. A1).

6. On May 23, 2016, Complainant shipped to Respondent one truckload of Flame grapes. On May 31, 2016, Complainant prepared invoice number 702593 billing Respondent for 2,160 cartons of large Flame grapes (Product of Mexico) at \$18.95 per carton, or \$40,932.00, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$40,957.00. (Compl. Ex. D). Respondent deducted \$0.25 per carton, or a total of \$540.00, from the invoice price of the grapes and paid Complainant \$40,417.00 with check number 010222, dated July 13, 2016. (ROI Ex. A at 19).

7. On June 1, 2016, Complainant shipped to Respondent one truckload of Flame grapes. On June 7, 2016, Complainant prepared invoice number

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702595 billing Respondent for 1,767 cartons of 10X2Lb Flame grapes (Product of Mexico) at \$20.45 per carton, or \$36,135.15, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$36,160.15. Respondent deducted \$4.00 per carton, or a total of \$7,068.00, from the invoice price of the grapes and paid Complainant \$29,092.15 with check number 010209, dated July 1, 2016. (Compl. Ex. E).

8. On June 1, 2016, Complainant shipped to Respondent one truckload of Flame grapes. On June 7, 2016, Complainant prepared invoice number 702597 billing Respondent for 1,760 cartons of 10X2Lb Flame grapes (Product of Mexico) at \$20.45 per carton, or \$35,992.00, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$36,017.00. Respondent deducted \$4.00 per carton, or a total of \$7,040.00, from the invoice price of the grapes and paid Complainant \$28,977.00 with check number 010209, dated July 1, 2016. (Compl. Ex. F).

9. On June 2, 2016, Complainant shipped to Respondent one truckload of Flame grapes. On June 7, 2016, Complainant prepared invoice number 702598 billing Respondent for 1,759 cartons of 10X2Lb Flame grapes (Product of Mexico) at \$20.45 per carton, or \$35,971.55, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$35,996.55. Respondent deducted \$4.00 per carton, or a total of \$7,036.00, from the invoice price of the grapes and paid Complainant \$28,960.55 with check number 010209, dated July 1, 2016. (Compl. Ex. G).

10. On June 3, 2016, Complainant shipped to Respondent one truckload of Perlette grapes. On June 7, 2016, Complainant prepared invoice number 702590 billing Respondent for 374 cartons of 10X2Lb Perlette grapes (Product of Mexico) at \$23.45 per carton, or \$8,770.30, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$8,795.30. Respondent deducted \$25.00 from the invoice price of the grapes and paid Complainant \$8,770.30 with check number 010209, dated July 1, 2016. (Compl. Ex. C).

11. On June 4, 2016, Complainant shipped to Respondent one truckload of Flame grapes. On June 7, 2016, Complainant prepared invoice number 702599 billing Respondent for 1,759 cartons of 10X2Lb Flame grapes (Product of Mexico) at \$18.45 per carton, or \$32,435.55, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of

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\$32,478.55. (Compl. Ex. H). Respondent deducted \$2.00 per carton, or a total of \$3,518.00, from the invoice price of the grapes and paid Complainant \$28,960.55 with check number 010222, dated July 13, 2016. (ROI Ex. A at 19).

12. On June 4, 2016, Complainant shipped to Respondent one truckload of Flame grapes. On June 7, 2016, Complainant prepared invoice number 702625 billing Respondent for 879 cartons of 10X2Lb Flame grapes (Product of Mexico) at \$20.45 per carton, or \$17,975.55, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$18,000.55. (Compl. Ex. I). Respondent deducted \$4.00 per carton, or a total of \$3,516.00, from the invoice price of the grapes and paid Complainant \$14,484.55 with check number 010222, dated July 13, 2016. (Compl. Ex. I).

13. On June 10, 2016, Complainant shipped to Respondent one truckload of Flame grapes. On June 16, 2016, Complainant prepared invoice number 702628 billing Respondent for 1,124 cartons of 10X2Lb Generic Flame grapes (Product of Mexico) at \$16.45 per carton, or \$18,489.80, and 640 cartons of 10X2Lb Panuelo 10X2Lb Flame grapes at \$18.45 per carton, or \$11,808.00, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$30,322.80. (Compl. Ex. J). Respondent deducted \$1,280.00 from the invoice price of the grapes and paid Complainant \$29,042.80 with check number 010222, dated July 13, 2016. (ROI Ex. A at 19).

14. On June 14, 2016, Complainant shipped to Respondent one truckload of Flame grapes. On June 16, 2016, Complainant prepared invoice number 702630 billing Respondent for 975 cartons of 10X2Lb Flame grapes (Product of Mexico) at \$16.45 per carton, or \$16,038.75, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$16,063.75. (Compl. Ex. K). Respondent deducted \$25.00 from the invoice price of the grapes and paid Complainant \$16,038.75 with check number 010222, dated July 13, 2016. (Compl. Ex. K).

15. The informal complaints were filed on July 12 and 18, 2016 (ROI Ex. A at 1, 18), which is within nine months from the date the cause of action accrued.

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### Conclusions

Complainant brings this action to recover the unpaid balance of the invoice price for ten truckloads of grapes sold to Respondent. When Complainant initiated this claim, the dispute concerned: (1) an alleged price adjustment of \$839.30 for the grapes billed on invoice number 702559; (2) Respondent's failure to pay \$25.00 each for the temperature recorders billed on invoice numbers 702590 and 702630; (3) a \$0.25 per carton brokerage fee that Respondent deducted from the invoice price of the grapes billed on invoice number 702593; and (4) a disagreement concerning the contract price of the grapes billed on invoice numbers 702595, 702597, 702598, 702599, 702265, and 702628. Complainant subsequently agreed to credit Respondent \$889.30 in connection with the three shipments of grapes referenced in (1) and (2). Therefore, the only issues remaining for our consideration are the brokerage fee deduction on invoice number 702593 referenced in (3), and the contract price dispute concerning the six other shipments referenced in (4).

Turning first to the brokerage fee that Respondent deducted from the invoice price of the grapes billed on invoice number 702593, Respondent states the parties agreed to a "customary brokerage fee" of \$0.25 per carton for this load of grapes. (Answer ¶ 6). Respondent did not, however, provide any evidence to substantiate this contention, nor did Respondent explain why this fee, if it was "customary" as Respondent suggests, was not deducted from the invoice price of the other nine shipments of grapes at issue in the Complaint. Consequently, we find that Respondent has failed to establish that it is entitled to deduct a brokerage fee of \$0.25 per carton, or a total of \$540.00, from the invoice price of the grapes billed on invoice number 702593. Accordingly, we find that there remains a balance due Complainant from Respondent of \$540.00 for the grapes billed on this invoice.

For the remaining six shipments of grapes at issue in the Complaint, the dispute concerns the manner in which the sales price of the grapes was determined. Specifically, Complainant asserts the sales price of the grapes was based on the original requested pickup date, not the actual pickup date or the arrival date to destination. (Compl. ¶ 4). Respondent asserts, to the contrary, that the agreement set pricing based on the actual ship date of the product. (Answer ¶ 4). Where the parties put forth

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affirmative but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish his allegation by a preponderance of the evidence. *Vernon C. Justice v. Eastern Potato Dealers of Maine, Inc.*, 30 Agric. Dec. 1352, 1356 (U.S.D.A. 1971); *Harland W. Chidsey Farms v. Bert Guerin*, 27 Agric. Dec. 384, 386 (U.S.D.A. 1968).

Both parties cite as evidence in support of their respective positions an email message sent by Complainant's Gonzalo Avila to Complainant's Scott Terry and Peter Hayes on May 11, 2016, and forwarded to Respondent's Louie Galvan on May 12, 2016, that reads:

Here is the program with the pricing the grower agreed on for the first 3 weeks. After that we prefer that Louie sources the Sugraones elsewhere and we continue with the flames for 2 more weeks.

Please remember that the perlettes for the week starting May 30<sup>th</sup> will be packed the week prior so we will need those orders during the week of May 23<sup>th</sup> [sic].

Please confirm the pricing so we can send materials down tomorrow and please confirm if we can still source the flames the weeks starting June 6<sup>th</sup> and June 13<sup>th</sup>.

(Compl. Ex. A). This message references the table set forth in Finding of Fact 3, which lists prices and volume for six one-week periods beginning on May 15, 2016 and ending on June 26, 2016. (Compl. Ex. A). While the table shows dates and prices, there is no mention of how the date for pricing purposes would be determined, *i.e.*, whether it would be based on the order date, the ship date, or some other date.

The cardinal rule of contract construction is that the joint intent of the parties is dominant if it can be ascertained. *See United States v. Bethlehem Steel Co.*, 205 U.S. 105, 119 (1907); *J.W. Bateson Co. v. United States*, 450 F.2d 896, 902 (Cl. Ct. 1971). There is no evidence of any joint intent of the parties concerning the date that would be used to determine the contract price of the grapes in question. To interpret the meaning of a contract provision that is either ambiguous or indefinite, as

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is the method for determining the sales price of the grapes at issue here, the courts will look to the construction the parties have given to the instrument by their conduct before a controversy arises. *United States v. Cross*, 477 F.2d 317, 318 (10th Cir. 1973).

Complainant contends that pricing based upon the weekly availability schedule, and not on the actual ship date or arrival date, was the agreement for the 2015 season as well as the 2016 season in question. (Compl. ¶ 7). Complainant did not, however, submit any evidence showing that the prices Respondent paid for the 2015 season grapes were based on the price for the scheduled ship date. Moreover, Respondent makes the contrary assertion that all orders were based on Respondent's customer's requirements and subject to change and that Complainant was aware of this from the parties' engagement during the 2015 season. (Answer ¶ 7).

As the parties' intent cannot be ascertained from the agreement itself, and the record is lacking any extrinsic evidence supporting one interpretation or the other, we will consider whether one or both of the parties' interpretations of the contract are reasonable. Under Complainant's interpretation, the price of the grapes was based on the scheduled shipment date provided by Respondent when it placed its orders. We see nothing unreasonable about this interpretation. Respondent, on the other hand, avers that the price was based on the date the grapes were actually shipped. While Complainant argues that such an arrangement would give Respondent an incentive to delay shipments in order to take advantage of the downward price trend that was built into the agreement, this presumes that neither Respondent nor its customer had any real need for the product and could make their purchases at any time. Assuming, more realistically, that the purchases were completed and shipped based on demand for the product, the determination of price based on the actual ship date also is not unreasonable.

The Restatement (Second) of Contracts § 206 (1981) states, "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." Both parties assert that their agreement is manifested in the email drafted by Complainant's Gonzalo Avila. When he drafted this

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agreement, Mr. Avila had the opportunity to clearly state the method for determining how the price for a particular shipment of grapes would be determined. Mr. Avila chose not to do so. Consequently, we will resort to the contract interpretation less favorable to Complainant, i.e., the determination of price based on actual shipment date, to determine the contract price for the six shipments of grapes in question.

Invoice No. 702595

Complainant invoiced Respondent for the 1,767 cartons of grapes in this shipment at \$20.45 per carton, plus \$25.00 for a temperature recorder, for a total invoice price of \$36,160.15. (Compl. Ex. E). The grapes were shipped on June 1, 2016, on which date the sales price according to the pricing schedule was \$18.45 per carton. (Compl. Ex. A). At this price, the total contract price of the grapes, including \$25.00 for the temperature recorder, was \$32,626.15. Respondent paid Complainant \$29,092.15 for the grapes. (Compl. Ex. E). Therefore, there remains a balance due Complainant from Respondent of \$3,534.00.

Invoice No. 702597

Complainant invoiced Respondent for the 1,760 cartons of grapes in this shipment at \$20.45 per carton, plus \$25.00 for a temperature recorder, for a total invoice price of \$36,017.00. (Compl. Ex. F). The grapes were shipped on June 1, 2016, on which date the sales price according to the pricing schedule was \$18.45 per carton. (Compl. Ex. A). At this price, the total contract price of the grapes, including \$25.00 for the temperature recorder, was \$32,497.00. Respondent paid Complainant \$28,977.00 for the grapes. (Compl. Ex. F). Therefore, there remains a balance due Complainant from Respondent of \$3,520.00.

Invoice No. 702598

Complainant invoiced Respondent for the 1,759 cartons of grapes in this shipment at \$20.45 per carton, plus \$25.00 for a temperature recorder, for a total invoice price of \$35,996.55. (Compl. Ex. G). The grapes were shipped on June 2, 2016, on which date the sales price according to the pricing schedule was \$18.45 per carton. (Compl. Ex. A). At this price, the total contract price of the grapes, including \$25.00 for



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the temperature recorder, was \$32,478.55. Respondent paid Complainant \$28,960.55 for the grapes. (Compl. Ex. G). Therefore, there remains a balance due Complainant from Respondent of \$3,518.00.

### Invoice No. 702599

Complainant invoiced Respondent for the 1,759 cartons of grapes in this shipment at \$18.45 per carton, plus \$25.00 for a temperature recorder, for a total invoice price of \$32,478.55. (Compl. Ex. H). The grapes were shipped on June 4, 2016, on which date the sales price according to the pricing schedule was \$18.45 per carton. (Compl. Ex. A). At this price, the total contract price of the grapes, including \$25.00 for the temperature recorder, was \$32,478.55. Respondent paid Complainant \$28,960.55 for the grapes. (ROI Ex. A at 19). Therefore, there remains a balance due Complainant from Respondent of \$3,518.00.

### Invoice No. 702625

Complainant invoiced Respondent for the 879 cartons of grapes in this shipment at \$20.45 per carton, plus \$25.00 for a temperature recorder, for a total invoice price of \$18,000.55. (Compl. Ex. I). The grapes were shipped on June 4, 2016, on which date the sales price according to the pricing schedule was \$18.45 per carton. (Compl. Ex. A). At this price, the total contract price of the grapes, including \$25.00 for the temperature recorder, was \$16,242.55. Respondent paid Complainant \$14,484.55 for the grapes. (Compl. Ex. I). Therefore, there remains a balance due Complainant from Respondent of \$1,758.00.

### Invoice No. 702628

Complainant invoiced Respondent for the 1,764 cartons of grapes in this shipment at \$16.45 per carton for 1,124 cartons and at \$18.45 per carton for 640 cartons,<sup>1</sup> plus \$25.00 for a temperature recorder, for a total invoice price of \$30,322.80. (Compl. Ex. J). The grapes were shipped on

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<sup>1</sup> Complainant billed Respondent at a higher price for the Panuelo brand grapes in this shipment, and while the record shows Complainant informed Respondent that it had Panuelo brand grapes in inventory and that the price was higher (Compl. Ex. O), Complainant did not submit any evidence showing that Respondent agreed to pay more than the agreed contract price for these grapes.

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June 10, 2016, on which date the sales price according to the pricing schedule was \$16.45 per carton. (Compl. Ex. A). At this price, the total contract price of the grapes, including \$25.00 for the temperature recorder, was \$29,042.80. Respondent paid Complainant \$29,042.80 for the grapes. (ROI Ex. A at 19). Therefore, Respondent owes Complainant nothing further for the grapes in this shipment.

As summarized below, the total amount due Complainant from Respondent for the grapes is \$16,388.00.

INVOICE:	AMOUNT DUE:
702593	\$540.00
702595	\$3,534.00
702597	\$3,520.00
702598	\$3,518.00
702599	\$3,518.00
702625	\$1,758.00
 TOTAL:	 \$16,388.00

Respondent filed a setoff in the amount of \$15,369.00 for packing materials sold to Complainant in connection with the subject grapes. (Answer at 6; Answering Stmt. Ex. 4). Complainant, in its reply to the setoff, admits owing Respondent \$15,369.00 but asserts this sum is offset by monies owed to Complainant for the grapes. (Reply to Counterclaim/Setoff ¶ 2). Accordingly, the \$15,369.00 that Complainant admits owing Respondent should be set off against the \$16,388.00 that Respondent owes Complainant for the grapes, leaving a net amount due Complainant from Respondent of \$1,019.00.

Respondent's failure to pay Complainant \$1,019.00 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the PACA (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925);

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*see also Rou v. Severt Sons Produce, Inc.*, 70 Agric. Dec. 489, 498 (U.S.D.A. 2011); *Roger Bros. Farms, Inc. v. Skyline Potato Co.*, 69 Agric. Dec. 1599, 1618 (U.S.D.A. 2010).

Complainant seeks pre-judgment interest on the unpaid produce shipments listed in the Complaint at a rate of twenty-four percent per annum. (Compl. ¶ 17). Complainant's claim is based on its invoices to Respondent which expressly state: "AFTER PAYMENT IS DUE, INTEREST WILL ACCRUE ON UNPAID BALANCES AT A RATE OF 24% PER ANNUM UNTIL PAID." (Compl. Ex. B-K). There is nothing to indicate that Respondent objected to the interest charge provision stated on Complainant's invoices. In the absence of a timely objection by Respondent, the interest charge provision stated on Complainant's invoices was incorporated into each sales contract. *See Coliman Pacific Corp. v. Sun Produce Specialties LLC*, 73 Agric. Dec. 639, 646 (U.S.D.A. 2014). Accordingly, pre-judgment interest will be awarded to Complainant at the rate of twenty-four percent per annum. Post-judgment interest to be applied

shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

*PGB International, LLC v. Bayache Companies, Inc.*, 65 Agric. Dec. 669, 672 (U.S.D.A. 2006).

Both parties paid a handling fee of \$500.00 to file their respective claims as required by sections 47.6(c) and 47.8 of the Rules of Practice (7 C.F.R. §§ 47.6(c) and 47.8(a)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the PACA (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party. As both parties prevailed in their respective claims, the handling fees offset one another so neither party will be awarded the handling fee paid by the other.

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**ORDER**

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation \$1,019.00, with interest thereon at the rate of 24 percent per annum from July 1, 2016, up to the date of this Order. Respondent shall also pay Complainant interest at the rate of percent per annum on the sum of \$1,019.00 from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

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**Docket No. W-R-2016-170.**  
**Decision and Order.**  
**Filed November 27, 2017.**

**PACA-R.**

**Risk of Loss**

Where goods are sold under the "FCA" or "free carrier" Incoterm, the seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place, and the risk of loss or damage passes to the buyer upon delivery at that location. The warranty of suitable shipping condition is not applicable under the FCA term.

Complainant Agricola Cuyama SA, pro se.  
Respondent Jacobs Malcolm & Burt, pro se.  
Leslie Wowk, Examiner.  
Shelton S. Smallwood, Presiding Officer.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

**DECISION AND ORDER**

**Preliminary Statement**

Complainant instituted this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [PACA]; and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) [Rules of Practice], by filing a timely complaint. Complainant seeks a reparation award against Respondent in the amount

## **PERISHABLE AGRICULTURAL COMMODITIES ACT**

of \$83,740.00 in connection with two truckloads of asparagus shipped in the course of interstate and foreign commerce.

Copies of the Report of Investigation [ROI] prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an answer thereto, denying liability to Complainant and asserting a set-off/counterclaim in the amount of \$84,998.71 in connection with one of the shipments of asparagus at issue in the Complaint. Complainant filed a reply to the Counterclaim denying liability to Respondent.

Although the amounts claimed in both the Complaint and the Counterclaim exceed \$30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice is applicable (7 C.F.R. § 47.20). Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's ROI. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an opening statement and a brief. Respondent filed an answering statement and a brief.

### **Findings of Fact**

1. Complainant is a corporation whose post office address is Calle Luis Arias Schreiber 225 Int. 303, Miraflores, Lima, Peru. Complainant is not licensed under the PACA.
2. Respondent is a corporation whose post office address is 18 Crow Canyon Court, Suite 210, San Ramon, CA 94583. At the time of the transactions involved herein, Respondent was licensed under the PACA.
3. On or about December 17, 2015, Complainant agreed to sell to Respondent twenty to twenty-four pallets of asparagus at a price of \$20.50 per box. (Compl. Ex. 1-1, 1-3).
4. On December 18, 2015, at 9:00 p.m., twenty-two pallets of asparagus were loaded onto a truck hired by Complainant and transported to the cargo agent, New Transport, at the Jorge Chavez International Airport in Lima, Peru, where the shipment arrived on December 19, 2015, at 11:31 p.m. (ROI Ex. C at 12). A temperature recorder placed on the truck

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disclosed temperatures ranging from 3 to 3.75° Celsius between December 18, 2015, at 9:14 p.m., and December 20, 2015, at 4:14 p.m. (ROI Ex. C at 17-18).

5. On December 20, 2015, Frio Aereo Asociacion Civil, the cold storage facility at the Jorge Chavez International Airport, recorded a temperature for twenty-one pallets of the asparagus. The temperatures ranged from 3.1 to 10.1° Celsius, and the average reported temperature was 6.3° Celsius. (ROI Ex. C at 14).

6. The asparagus was shipped via Atlas Air on December 24, 2015, to Respondent in Miami, Florida. (ROI Ex. C at 7).

7. Upon arrival in Miami, Florida, the asparagus was delivered to American Consolidation & Logistics – Produce Inspection Service, where an inspection was performed on December 25, 2015, the report of which states: “This product arrived with serious defects. Found few bunches with few appearance of spears decay (wet tips with odor)/occasional to few poor trimming, seeding, and spreading.” (ROI Ex. C at 11).

8. Between December 25 and December 28, 2015, Respondent’s John Early [John] and Complainant’s Angello Flores [Angello] discussed the asparagus via text messages that read, in pertinent part, as follows:

**December 25, 2015**

John:	The asparagus has arrived with some issues in Miami What do you want us to do?
Angello:	Hi John let’s do a QC
John:	We have one from cold storage You want usda?
Angello:	Could you send it now?
John:	Yes Need to know what to do with the shipment Just sent

**December 26, 2015**

John:	Definitely have a problem with this shipment
Angello:	I saw pictures but it does not show quantities
John:	Has bad smell

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	What do you want us to do with this asparagus?
Angello:	Let's see if it's possible to do labor on it.
John:	Do you think best to sell in Miami it [sic] bring to west coast and re work?
Angello:	Of course The product is quite tired ow [sic]
John:	Ok we will do it Do you want usda inspection?
Angello:	Yes

### December 28, 2015

Angello:	What about the sales of the load with issues
John:	We are getting usda now They were closed over the weekend We will rework as soon as we have
Angello:	But couldn't be worked around? That takes days of sales as well
John:	Of course
Angello:	As is gets older would be worse
John:	It will take some time but we will do our best to move quickly
Angello:	We can help there but can't afford lose [sic] the lot Thanks
John:	If you wanted to give to crystal We are happy to do that They can rework for you
Angello:	The lot is from JMB. I don't think they would like to take it as it is not their brand
John:	We will do our best but there is already breakdown and smell so it's

(Answering Stmt. Ex. 6).

9. On December 28, 2015, at 9:52 a.m., a USDA inspection was performed on 3,080 boxes of asparagus at American Consolidation & Logistics in Opa Locka, Florida. The inspection disclosed 27% average defects, including 11% damage (11% serious damage) by flabby, 7% damage by spreading, 4% damage by shriveling, 2% damage by broken tips, and 3% decay affecting tips. Pulp temperatures at the time of the inspection ranged from 37 to 39° Fahrenheit. (ROI Ex. E at 10).

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10. Complainant issued invoice number 612 billing Respondent for 1,677 boxes of standard asparagus at \$20.50 per box, or \$34,378.50, 1,256 boxes of large asparagus at \$20.50 per box, or \$25,748.00, and 147 boxes of extra-large asparagus at \$20.50 per box, or \$3,013.50, for a total invoice price of \$63,140.00. (ROI Ex. C at 5).

11. Respondent has not paid Complainant for the asparagus billed on invoice number 612.

12. On or about December 28, 2015, Complainant sold a second load of asparagus to Respondent at \$14.00 per box. (Answer and Counterclaim Ex. 4).

13. Complainant delivered the asparagus mentioned in Finding of Fact 12 to Jorge Chavez International Airport on December 31, 2015, at 1:04 a.m. (ROI Ex. A at 2). On January 1, 2016, the asparagus was shipped via Atlas Air to Respondent in Miami, Florida. (ROI Ex. A at 5).

14. Upon arrival in Miami, Florida, the asparagus was delivered to American Consolidation & Logistics – Produce Inspection Service, where an inspection was performed on January 3, 2016, the report of which states: “GOOD APPEARANCE. FOUND OCCASIONAL BUNCHES OF ASPARAGUS WITH APPEARANCE OF POOR TRIMMING, SEEDING AND SPREADING/ASPARAGUS OVERALL HAS GOOD QUALITY AND CONDITIONS.” (ROI Ex. A at 8).

15. Complainant issued invoice number 624 billing Respondent for 697 boxes of standard asparagus at \$14.00 per box, or \$9,758.00, 655 boxes of large asparagus at \$14.00 per box, or \$9,170.00, and forty-eight boxes of extra-large asparagus at \$14.00 per box, or \$672.00, for a total invoice price of \$19,600.00. (ROI Ex. A at 3).

16. Respondent paid Complainant \$19,530.00 for the asparagus billed on invoice number 624. (Answering Stmt. at 2; Br. at 6).



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17. The informal complaints were filed on March 14 and 18, 2016 (ROI Ex. A at 1, C at 1)<sup>1</sup>, which is within nine months from the dates the respective causes of action accrued.

### Conclusions

Complainant initiated this action seeking to recover the invoice price for two truckloads of asparagus sold to Respondent. During the evidentiary stages of the proceeding, Respondent submitted a sworn answering statement wherein it asserted that it no longer disputed its liability for the asparagus billed on invoice number 624 and that it paid Complainant for that invoice. (Answering Stmt. at 2). Complainant subsequently acknowledged receipt of this payment in its brief.<sup>2</sup> While there is, therefore, no longer a dispute with respect to Respondent's liability for the asparagus billed on invoice number 624, Complainant asserts that Respondent still owes late fees and interest for that transaction. (Br. at 7).

Complainant's claim for interest and late fees is easily disposed of, as there is no mention of a charge for interest or late fees in any of the documents prepared by Complainant in connection with the sale of the asparagus to Respondent. Complainant is not entitled to recover pre-judgment interest or late fees absent evidence that language providing for the payment of such was incorporated into the contract.

This leaves for our consideration the dispute concerning Respondent's liability for the asparagus billed on invoice number 624. Complainant states it shipped the kind, quality, grade, and size of asparagus called for in the contract of sale to the loading point at the Jorge Chavez International Airport, in Lima, Peru and that Respondent accepted the asparagus but has since failed, neglected and refused to pay Complainant the agreed purchase price of \$63,140.00. (Compl. ¶¶ 6-8).

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<sup>1</sup> Complainant filed separate informal complaints for each of the two transactions at issue in the formal Complaint.

<sup>2</sup> Complainant states Respondent wired payment of \$19,530.00 for the invoice in question. While neither party explains why this payment is \$70.00 short of the full invoice price of \$19,600.00, both parties indicate that this payment satisfied the amount due for the asparagus.

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In response to Complainant's allegations, Respondent admits that Complainant sold to Respondent 3,080 ten-pound boxes of asparagus at the agreed upon price; however, Respondent asserts that it ordered eleven-pound boxes. This statement is apparently based on paragraph four of the Complaint, wherein Complainant refers to the asparagus as "10 lb." (Compl. ¶ 4). There is, however, no evidence in the record showing that the asparagus sold and shipped by Complainant was packed in anything other than eleven-pound boxes. It therefore appears that Complainant's reference to ten-pound boxes in the Complaint was erroneous.

Respondent also asserts that the asparagus was defective, failed to meet good delivery standards, and was not of the quality or condition called for in the contract of sale. (Answer and Counterclaim ¶¶ 4, 6). Respondent also asserts that it "timely and reasonably rejected the asparagus." (Answering Stmt. at 2).

Turning first to Respondent's alleged rejection of the asparagus, Complainant states Respondent had over seventy-two hours from the time the asparagus was delivered to the cold storage facility at the Jorge Chavez International Airport, until the time it was loaded onto the aircraft, to notify Complainant that it was rejecting the asparagus. (Opening Stmt. at 9-10). Complainant states Respondent failed to give notice of rejection at that time and that it was not until the asparagus arrived in Miami that Respondent "raised concerns" about the asparagus. (Opening Stmt. at 10).

For a rejection to be effective, it must be made in clear, unmistakable terms. *Farm Market Service, Inc. v. Albertson's, Inc.*, 42 Agric. Dec. 429, 431 (U.S.D.A. 1983). A rejection is not effective unless the buyer seasonably notifies the seller and the burden of proving seasonable notice rests with the buyer. *San Tan Tillage Co., Inc. v. Kap's Foods, Inc.*, 38 Agric. Dec. 867, 871 (U.S.D.A. 1979); *Sun World Marketing v. Bayshore Perishable Distributors, Inc.*, 38 Agric. Dec. 480, 483 (U.S.D.A. 1979). We have reviewed the evidence outlined in Finding of Fact 8 above, and we are not persuaded that Respondent communicated a clear, timely rejection of the asparagus to Complainant.

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Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2(dd)(3). Accordingly, we find that Respondent accepted the asparagus. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Company v. Ben Gatz Company*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971). The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4); *see also W. T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1705, 1710 (U.S.D.A. 1993); *Salinas Marketing Cooperative v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

As we mentioned, Respondent asserts that the asparagus was defective, that it failed to meet good delivery standards, and that it was not of the quality or condition called for in the contract of sale. As evidence to substantiate these contentions, Respondent cites the results of an inspection performed at the time of arrival, on December 25, 2015, by American Consolidation & Logistics, and a USDA inspection performed several days later, on December 28, 2015. (Answer ¶ 6).

The inspection performed by American Consolidation & Logistics states the asparagus arrived with “serious defects” and that there were a “few bunches with few appearance of spears decay.” (ROI Ex. C at 11). There is, however, no indication of the sampling method used by the inspector or the qualification of the inspector to perform such an inspection, and there are also no percentages showing the actual extent to which the asparagus was affected by the defects noted. Pulp temperatures at the time of the inspection also were not provided. For these reasons, we are unable to consider this inspection as evidence of the condition of the asparagus at the time of arrival.

The USDA inspection of the asparagus disclosed 27% average defects, including 11% damage (11% serious damage) by flabby, 7% damage by spreading, 4% damage by shriveling, 2% damage by broken tips, and 3% decay affecting tips, and pulp temperatures ranging from 37 to 39° Fahrenheit. (ROI Ex. E at 10). With respect to the timing of this inspection, Respondent states the shipment arrived four days late, on

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Friday, December 25, 2015, in the evening, so the inspection could not be performed until Monday, December 28, 2015. (Answer ¶ 6.)

Complainant asserts that the asparagus was sold under the “FCA” or “free carrier” Incoterm, and Respondent does not dispute this assertion. (Compl. ¶ 6; Answer ¶ 6). The “free carrier” term means that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller’s premises or another named place, and the risk of loss or damage passes to the buyer upon delivery at that location.<sup>3</sup>

While Respondent states the asparagus “failed to meet good delivery standards,” Respondent is apparently referring to the suitable shipping condition warranty that is applicable when produce is sold f.o.b., or “free on board.” In an f.o.b. sale, the seller warrants that the commodity meets the requirements of the contract at time of loading or sale and, if the shipment is handled under normal transportation service and conditions, will arrive at the contract destination without abnormal deterioration, or what is commonly referred to as “good delivery.”<sup>4</sup>

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<sup>3</sup> *Incoterms® rules 2010*, INT’L CHAMBER OF COMMERCE, <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> (last visited Apr. 20, 2018).

<sup>4</sup> The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)), which require delivery to contract destination “without *abnormal* deterioration,” or what is elsewhere called “good delivery” (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping

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However, as the subject asparagus was sold under the FCA term, not f.o.b., the warranty of suitable shipping condition is not applicable.

A warranty of merchantability exists even though no suitable shipping condition warranty applies. The merchantability warranty is, however, only applicable at shipping point. *See David Pepper Co. v. Jack Keller Co.*, 28 Agric. Dec. 474, 477-78 (U.S.D.A. 1969). We have defined the term merchantable as:

goods which are reasonably suited for the ordinary uses and purposes of goods or the general type described by the terms of the sale and which are capable of passing in the market under the name of description by which they are sold.

*L. Gillarde Sons Co. v. Mority*, 21 Agric. Dec. 590, 595 (U.S.D.A. 1962); *see also* U.C.C. § 2-314. In order for us to find on the basis of a destination inspection that there was a breach of the warranty of merchantability such inspection would have to disclose condition defects so severe as to make it reasonably certain that the commodity was not merchantable at the time of shipment. *North American v. Eddie Arakelian*, 41 Agric. Dec. 759, 762 (U.S.D.A. 1982).

The USDA inspection of the asparagus was performed on December 28, 2015, eight days after Complainant delivered the asparagus to the cargo agent, New Transport, at the cold storage facility at the Jorge Chavez International Airport, in accordance with the FCA terms of the contract. That inspection disclosed 27% average damage by condition defects, including 14% that was scored as serious damage. While the defects disclosed by the inspection are substantial, given that approximately seven days elapsed between the time of delivery and the

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point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is “normal” or abnormal deterioration is judicially determined. *Harvest Fresh Produce, Inc. v. Clarke-Ehre Produce Co.*, 39 Agric. Dec. 703, 708-09 (U.S.D.A. 1980) (internal citations omitted).

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time of inspection, we cannot be reasonably certain that the asparagus was not merchantable at the time of shipment, *i.e.*, when Complainant delivered the asparagus to New Transport.

Respondent nevertheless asserts that Complainant breached the contract by shipping asparagus that was inherently defective due to latent defects and/or quality problems. (Answer at 4). Respondent asserts specifically that Complainant failed to pre-cool the asparagus. Respondent bases this allegation on the temperatures recorded by the cold storage facility upon arrival at the Jorge Chavez International Airport, which ranged from 3.1 to 10.1° Celsius, and averaged 6.3°Celsius (ROI Ex. C at 14), and the temperature report from the truck that carried the asparagus from the packing shed to the airport, which shows temperatures were maintained in the range of 3 to 3.75°Celsius. (ROI Ex. C at 17-18). Since the truck temperatures were not elevated, Respondent concludes that the elevated temperatures recorded by the cold storage facility resulted from the asparagus being loaded warm at the packing shed.

In further support of its argument that the asparagus was inherently defective because it was not properly precooled at shipping point, Respondent submitted correspondence prepared by Dr. Patrick Becht, Postharvest Physiologist for PEB Commodities, Inc. (Answering Stmt. Ex. 9). In this correspondence, Dr. Brecht states asparagus has one of the highest initial rates of respiration of any fruit or vegetable, and that such respiration, which increases at higher temperatures, decreases the shelf-life of the asparagus. On this basis, Dr. Brecht concludes,

the elevated pulp temperatures [up to 10°C (50°F)] of the asparagus reported at the onset of the trip and the elevated temperature reported at the end of the trip would have markedly reduced the storage life and contributed in large part to the 27% condition defects that were reported by the USDA Officer on December 28, 2015.

The evidence submitted by Respondent also includes a picture of an email message stating that the asparagus was registered at the cold storage facility at the Jorge Chavez International Airport at 8:43 p.m. on

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December 20, 2015, at which time the temperature was 6° Celsius. (ROI Ex. E at 11). The same email shows that four days later, on December 24, 2015, at 4:00 p.m., temperatures ranged from 5 to 6° Celsius.

Under the FCA terms of sale, the risk of damage or loss shifted to Respondent when Complainant delivered the asparagus to the cargo agent, New Transport, at the cold storage facility at the airport. Therefore, while Complainant was responsible for the temperature of the asparagus and its condition at that time, the record shows the asparagus was held for an additional four days at elevated temperatures before it was shipped to Miami. Respondent bore the risk of damage or loss during that period, and since Respondent made the arrangements for the international transport of the asparagus, Respondent was also responsible for the delay in shipment. For these reasons, we are unable to conclude that the damage disclosed by the USDA inspection shows that the asparagus supplied by Complainant was inherently defective.

As Respondent accepted the asparagus and has failed to establish a breach of contract by Complainant, Respondent is liable to Complainant for the asparagus it accepted at the agreed purchase price of \$63,140.00.

In defense of its failure to pay Complainant for the asparagus, Respondent raises a number of affirmative defenses. Many of the defenses raised by Respondent have already been considered in the foregoing discussion; however, there are several that remain to be addressed. For its first affirmative defense, Respondent asserts that the Complaint fails to state facts sufficient to constitute a cause of action against Respondent. Complainant has, however, asserted that Respondent failed to pay promptly and in full for a perishable agricultural commodity purchased in the course of interstate and foreign commerce. Such failure, if proven, would constitute a violation by Respondent of section 2 of the PACA. The alleged violation of section 2 of the PACA is the cause of action for this claim. Respondent's first affirmative defense is therefore without merit.

Respondent's second through sixth, twelfth, and fifteenth affirmative defenses concern the alleged breach of contract by Complainant and the damages resulting therefrom, issues which have already been addressed above.

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For its eighth, eleventh, and fourteenth affirmative defenses, Respondent asserts that any damages suffered by Complainant resulted from Complainant's contributory negligence, that Complainant would be unjustly enriched if it were awarded its claimed damages and that any damages incurred by Complainant resulted from the actions of third parties not controlled by Respondent. Respondent fails to state the specific actions by Complainant that allegedly constitute contributory negligence, to explain how Complainant would be unjustly enriched by an award of damages, or to identify the third party allegedly responsible for Complainant's alleged damages. Absent more detail, we find that these defenses are without merit.

For its ninth affirmative defense, Respondent states Complainant failed to exercise reasonable effort to mitigate the damages it allegedly sustained. Complainant had no control over the handling of the asparagus after it was accepted and resold by Respondent, so any duty to mitigate damages was held by Respondent, not Complainant.

For its tenth affirmative defense, Respondent states Complainant waived any issues with the inspections or the quality of the asparagus when they agreed to repack. This allegation is based on correspondence prepared by the Western Regional PACA Division office stating, "Complainant requested the asparagus be repacked in Miami, FL." (ROI Ex. L at 2). In response to this allegation, Complainant states it "tried to help" and gave Respondent advice as to what to do with the asparagus, but Complainant asserts that it had no responsibility for the asparagus.

While the record shows Respondent's John Early and Complainant's Angello Flores discussed the disposition of the asparagus via text messaging between December 25 and 28, 2015 (Answering Stmt. Ex. 6), there was, as we already determined, no communication of rejection by Respondent to Complainant, nor is there any indication that Complainant otherwise agreed to accept responsibility for the asparagus. That Complainant consulted with Respondent concerning the disposition of the asparagus and gave advice as to where the repacking should occur does not establish that it accepted such responsibility.



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For its sixteenth and final affirmative defense, Respondent asserts that it maintained sufficient trust assets to satisfy any and all trust claims arising under 7 U.S.C. § 499(e). Complainant did not, however, allege a failure on the part of Respondent to maintain sufficient trust assets, so this defense is inconsequential.

Finally, Respondent's Counterclaim, which seeks to offset the damages Respondent incurred as a result of the alleged breach of contract by Complainant, should be dismissed because Respondent failed to sustain its burden to prove that Complainant breached the contract.

Respondent's failure to pay Complainant \$63,140.00 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the PACA (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Rou v. Severt Sons Produce, Inc.*, 70 Agric. Dec. 489, 498 (U.S.D.A. 2011); *Rogers Bros. Farms, Inc. v. Skyline Potato Co.*, 69 Agric. Dec. 1599, 1618 (U.S.D.A. 2010). The interest to be applied

shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

*PGB Int'l, LLC v. Bayche Cos.*, 65 Agric. Dec. 669, 672-73 (U.S.D.A. 2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Complainant in this action paid \$500.00 to file its formal Complaint as required by section 47.6(c) of the Rules of Practice (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated

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section 2 of the PACA (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

**ORDER**

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation \$63,140.00, with interest thereon at the rate of \_\_\_\_ percent per annum from February 1, 2016, until paid, plus the amount of \$500.00.

The Counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

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## MISCELLANEOUS ORDERS & DISMISSALS

## MISCELLANEOUS ORDERS & DISMISSALS

*Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Substantive Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: <https://oalj.oha.usda.gov/current>.*

### PERISHABLE AGRICULTURAL COMMODITIES ACT

**JONATHAN DYER; DREW JOHNSON; AND MICHAEL S. RAWLINGS.**

**Docket Nos. 14-0166; 14-0167; 14-0168.**

**Remand Order.**

**Filed December 28, 2017.**

**PACA-APP – Appointments Clause – Remand.**

Stephen P. McCarron, Esq., for Petitioners.

Charles L. Kendall, Esq., for AMS.

Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

Remand Order issued by William G. Jenson, Judicial Officer.

### **REMAND ORDER**

On May 19, 2017, Administrative Law Judge Jill S. Clifton issued a “Decision and Order” in the instant proceeding. On June 19, 2017, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture [AMS], filed “Respondent’s Appeal Petition;” and on June 30, 2017, Jonathan Dyer, Drew Johnson, and Michael S. Rawlings filed “Petitioners’ Opposition to Respondent’s Appeal Petition.” On July 10, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision.

On November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief in *Lucia v. SEC*, (No. 17-130), in which the Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers for purposes

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of the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2. On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and Administrative Law Judge Channing Strother and renewed their oaths of office.<sup>1</sup>

To put to rest any Appointments Clause claim that may arise in this proceeding, I remand this proceeding to Administrative Law Judge Clifton who shall:

Issue an order giving the AMS, Mr. Dyer, Mr. Johnson, and Mr. Rawlings an opportunity to submit new evidence;

Consider the record, including any newly submitted evidence and all her previous substantive and procedural actions;

Determine whether to ratify or revise in any respect all her prior actions; and

Issue an order stating that she has completed consideration of the record and setting forth her determination regarding ratification.

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<sup>1</sup> Attach. 1.

## DEFAULT DECISIONS

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*Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: <https://oalj.oha.usda.gov/current>].*

## PERISHABLE AGRICULTURAL COMMODITIES ACT

**K & A PRODUCE.**

**Docket No. 17-0252.**

**Default Decision and Order.**

**Filed July 18, 2017.**

**LUCAS TRADING COMPANY, LLC.**

**Docket No. 17-0264.**

**Default Decision and Order.**

**Filed October 17, 2017.**

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**CONSENT DECISIONS**

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**Yuqing (Henry) Wang.**

Docket No. 16-0147.

Consent Decision and Order.

Filed July 31, 2017.

**Hop Hing Produces, Inc.**

Docket No. 16-0148.

Consent Decision and Order.

Filed July 31, 2017.

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