AGRICULTURE DECISIONS

Volume 72

Book One

Part Three (PACA)

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The Editor regrets having overlooked the timely inclusion of nine (9) Reparations Decisions, specifically:

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(2) *DiMare Homestead, Inc. v. Yzaguirre Farms LLC*, PACA Docket No. S-R-2010-412, Decision and Order, filed on December 22, 2011;

(3) *L&M Companies, Inc. v. Panama Banana Distribution Company*, PACA Docket No. R-09-046, Decision and Order, filed January 12, 2012;

(4) *M & M Packaging, Inc. v. Casa de Campo, Inc.*, PACA Docket No. E-R-2010-288, Decision and Order, Order on Reconsideration, filed March 9, 2012;

(5) *Froerer Farms, Inc., D/B/A Owyhee Produce v. Select Onion LLC*, PACA Docket No. W-R-2007-433, Decision and Order, Order on Reconsideration, filed March 30, 2012;

(6) *Interfresh, Inc. v. B. Sayers, Inc.*, PACA Docket No. W-R-2011-535, Decision and Order, filed July 11, 2012;

(7) *DiMare Homestead, Inc. v. Yzaguirre Farms LLC*, PACA Docket No. S-R-2010-412, Order on Reconsideration, filed August 1, 2012;

(8) *Coastal Marketing Service, Inc. v. Vibo Produce LLC*, PACA Docket No. W-R-2011-118, Decision and Order filed October 17, 2012; and

(9) *Westberry Farms Ltd. v. Sungate Marketing LLC*, PACA Docket No. W-R-2011-192, Decision and Order, filed December 20, 2012.

These decisions follow this page with special pagination for citation guidance.

A list of these decisions was previously posted on the above OALJ website via a link to the Agricultural Marketing Service ("AMS") website.[1] The listing provided the case number and business entities involved in each decision.

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ERRATA

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

70 Agric. Dec.
July – Dec. 2011

CORONA FRUIT & VEGGIES, INC. v. PRODUCE ALLIANCE LLC.
PACA Docket No. S-R-2009-428.
Decision and Order.
Filed July 12, 2011.

[Cite as: 70 Agric. Dec. A (U.S.D.A. 2011), *published in* 72 Agric. Dec. A (U.S.D.A. 2013).]

PACA-R.

Damages – Cover

The remedy of cover is not available to a buyer who has accepted the goods and has not revoked his acceptance.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
McCarron & Diess for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as "the Act." A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $4,941.00 in connection with two (2) truckloads of strawberries and mixed squash shipped in the course of interstate commerce.

Copies of the Report of Investigation 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 in the amount of $4,104.08 for damages allegedly incurred in connection with the strawberries at issue in the Complaint.

Neither the amount claimed in the Complaint nor the Set Off exceeds $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("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. Respondent filed an Answering Statement.[1] Neither party submitted a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is P.O. Box 1106, Santa Maria, CA 93456. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a limited liability company whose post office address is 100 Lexington Drive, Suite 201, Buffalo Grove, IL 60089. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about July 7, 2009, Complainant, by oral contract, sold to Respondent one (1) truckload of strawberries and mixed squash. Complainant issued invoice number 907087 billing Respondent for 240 8/1 lb. flats of strawberries at $4.10 per flat, or $984.00, 56 1-1/9 bu. cartons of medium zucchini at $7.05 per carton, or $394.80, 112 1-1/9 bu. cartons of large straight neck squash at $2.10 per carton, or $235.20, 132 cartons of fancy zucchini at $1.60 per carton, or $211.20, and 44 cartons of fancy straight neck squash at $7.05 per carton, or $310.20, plus $26.00 for a temperature recorder, $60.00 for Tectrol, and $1,109.60

[1] Respondent's Answering Statement consists of affidavits from its produce buyer, Dale S. Jensen, and Ron Foncello, buyer/salesperson for Air Stream Foods.

for cooling and palletization, for a total invoice price of $3,331.00 (ROI Ex. A at 17).

4. The strawberries and squash billed on invoice number 907087 were shipped on July 7, 2009, from loading point in the state of California, to Air Stream Foods, in Oceanside, New York (ROI Ex. C at 19).

5. On or about July 11, 2009, Complainant, by oral contract, sold to Respondent one (1) truckload of strawberries.[2] Complainant issued invoice number 907191 billing Respondent for 240 8/1 lb. flats of strawberries at $4.45 per flat, or $1,068.00, plus $60.00 for Tectrol, $26.00 for a temperature recorder, and $456.00 for cooling and palletization, for a total invoice price of $1,610.00 (ROI Ex. A at 23).

6. The strawberries billed on invoice number 907191 were shipped on July 11, 2009, from loading point in the state of California, to Air Stream Foods, in Oceanside, New York (ROI Ex. A at 25).

7. On July 14, 2009, at 6:54 a.m., a USDA inspection was performed on 200 flats of the strawberries billed on invoice number 907087. At the time of the inspection, the strawberries were stored in the cooler at Air Stream Foods, in Oceanside, New York. The inspection disclosed thirty-seven percent (37%) average defects, including twenty-one percent (21%) overripe, fourteen percent (14%) bruising, and two percent (2%) decay. Pulp temperatures at the time of the inspection ranged from thirty-six (36) to thirty-seven (37) degrees Fahrenheit (ROI Ex. A at 15).

8. On July 14, 2009, at 11:50 a.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating: "Attached are photos of your rejected straws, please advise as to what you are going to do with them. Air Stream cannot work them. Need to know something ASAP!!" (ROI Ex. A at 10).

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[2] Although the invoice prepared by Complainant states the strawberries were sold and shipped on July 13, 2009 (ROI Ex. A at 23.), the bill of lading shows the load was shipped on July 11, 2009 (ROI Ex. A at 25). Based on the assumption that the sale of the strawberries occurred on or before the date of shipment, we are using the date of shipment as the date of sale for the transaction.

9. On July 14, 2009, at 3:26 p.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating:

> Per PACA guidelines (Brian – PACA) Produce Alliance is rejecting the 240 8/1# Clamshell Strawberries on Corona #908087 back to Corona Marketing for Breach of Contract. Please advise as to where you would like your product placed, all costs incurred due to this breach of contract will be determined at a later date once the product has been moved and any and all charges have been totaled. (ROI Ex. A at 9.)

10. At 3:40 p.m. on July 14, 2009, Complainant's Uriel Barbosa sent Respondent's Dale Jensen an e-mail message stating:

> On Bill of lading destination was for Salinas, at no point in time did you confirm these were going to New York. The Strawberries shipped were supposed to go to Salinas, not New York. If we had confirmed that these berries were going to New York, these berries would not have been loaded. There is no adjustment on this product, and we expect payment in full. (ROI Ex. A at 8.)

11. On July 15, 2009, at 8:34 a.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating:

> I am appalled that Uriel (Corona Marketing) is suggesting that these rejected Strawberries were destined for Produce Alliance Salinas, Ca, our buying office is located in Salinas, Ca (we are not a receiver). These strawberries were bought and destined for Air Stream Foods in Oceanside, NY who in fact Uriel (Corona) contacted to sell directly but since PA (Dale Jensen) buys for Air Stream Foods PA contacted Uriel to buy Corona's product for Air Stream Foods.
>
> PA does not buy Corona product for any other PA member besides Air Stream Foods, so for Uriel to

> suggest that these strawberries were going to PA Salinas is completely deceptive, in fact Uriel made several mistakes to this order before Ron & I figured out exactly what Corona shipped (confirmation was correct, initial passing was different than the confirmation, passing was revised to what the confirmation read, but ultimately it wasn't what was received at Air Stream Foods so it was revised yet again).
>
> The pattern of mistakes by Uriel is on record: several mistakes to initial order, called directly to Air Stream saying he couldn't find someone to take the straws (obviously accepting responsibility but since he couldn't find anyone to take the rejected product he tried other angles to shirk his responsibility), then tried the approach that it wasn't a timely inspection (didn't wash with PACA) and to now say the product was not suppose to go to Air Stream Foods in Oceanside, NY is a blatant disregard for the truth.
>
> Once again Produce Alliance will clarify our position regarding the rejected strawberries on this order – PA is rejecting the 240 8/1# clamshell strawberries back to Corona Marketing for them to determine where to place their rejected product, until such time that they decide what to do with their rejected product any and all costs accrued will be the complete and sole responsibility of Corona Marketing. (ROI Ex. A at 4.)

12. On July 15, 2009, at 8:34 a.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating:

> Due to Corona Marketing's many attempts to circumvent responsibility and complete lack of acceptance for their rejected strawberries said product will be moved for Corona Marketing's account and any and all losses incurred by Air Stream Foods & Produce Alliance will be billed to Corona Marketing. If Corona Marketing does not provide relocation information by

> noon pst Air Stream Foods & Produce Alliance will attempt to locate someone to work the 240 8/1# clamshell strawberries for Corona Marketing's account to try to minimize any further damages. (ROI Ex. A at 7.)

13. On July 15, 2009, at 12:12 a.m., Respondent's Dale Jensen sent Complainant's Uriel Barbosa an e-mail message stating:

> To whom it may concern – Jose Corona, Gerry Corona, Steve Ruiz & Uriel Barbosa,
>
> Before you hang your hat on the destination Salinas, Ca theory you may want to rethink that due to the fact that you (Uriel) have already admitted to Ron & I both that you made several input errors on the confirmation, the initial passing & revised passing too, but not only that I have a passing that disputes your position of the ship to on your passing showing the ship to of Buffalo Grove, Ill., there goes the destination Salinas theory.
>
> This will not be a favorable outcome for Corona Marketing if you decide to let PACA rule on it not to mention all the money that will be spent to go through this process. Produce Alliance has many facts not theories that will discredit your position. Uriel do the right thing and move your rejected strawberries so that you can minimize yours & your grower's losses while you still have a chance to. (ROI Ex. A at 7.)

14. Respondent prepared a trouble report for the strawberries billed on invoice number 907087 that reads, in pertinent part, as follows:

> Air Stream foods [sic] found trouble with the 240 8/1# clamshell strawberries when the truck arrived on 7/12/09, called for an inspection on 7/13/09, inspection was completed on 7/14/09 @ 7:18am – product failed to make good delivery per PACA guideline – Rejected back to shipper. Corona marketing wil [sic] be

> responsible for any and all losses incurred due to this breach of contract. Product was moved to J Margiotti – Hunts Point Market for Corona Marketing's account – Air Stream foods located the destination to help minimize Corona Marketing's losses and PA agreed that this was the proper and correct thing to do so that the losses might be minimized rather than letting the strawberries get dumped. (ROI Ex. A at 21.)

15. On July 17, 2009, at 6:32 a.m., a USDA inspection was performed on the 240 flats of strawberries billed on invoice number 907191, which were stored in the cooler at Air Stream Foods, in Oceanside, New York. The inspection disclosed forty-three percent (43%) average defects, including nineteen percent (19%) bruising, seventeen percent (17%) soft, and seven percent (7%) decay. Pulp temperatures at the time of the inspection ranged from thirty-seven (37) to thirty-eight (38) degrees Fahrenheit (ROI Ex. C at 22).

16. On July 17, 2009, at 11:35 a.m., Respondent's Dale Jensen sent correspondence to Complainant's Uriel Barbosa and Jose Corona stating: "It's to [sic] late to take your rejected strawberries to the Hunts Point Market today so the earliest that your rejected strawberries can possibly be moved will be Sunday evening. PA will advise as to when & where your rejected strawberries went to be worked for your account." (ROI Ex. C at 26). On the same date, Mr. Jensen sent additional correspondence to Mr. Barbosa and Mr. Corona stating, in pertinent part, as follows:

> Once again I will refresh your memories – I placed 3 orders with Uriel to be delivered to Air Stream Foods in Oceanside, NY, whom Uriel solicited business with and knew full well where these orders where being delivered, this was discussed at length, besides the fact that I have never talked to or let alone place an order with Uriel before – Uriel obviously has an issue with correctly inputting information and this will easily be proven when necessary, (I have numerous copies of paperwork with error after error on them, this will lend itself to credibility) (ROI Ex. C at 28.)

17. On July 20, 2009, Respondent's Dale Jensen sent correspondence to Complainant's Uriel Barbosa and Jose Corona stating:

> The inspected and rejected strawberries on Corona Marketing #'s 907087 & 907191 will have a follow up USDA condition inspection done due to the severe condition defects for the purpose of dumping the severely distressed product.
>
> J Margiotti has been unsuccessful in selling the distressed strawberries (Corona#907087) that were sent to him to be worked for the account of Corona Marketing because they were and are in such poor condition they were not saleable, this is also the same issue with the strawberries (Corona#907191) that were inspected on 7/17/09 @ Air Stream Foods in Oceanside, NY, Air Stream has not found anyone that would work these strawberries for Corona Marketing's account because the condition of the strawberries is so poor, not saleable.
>
> Unless Corona Marketing has an alternative plan for their rejected strawberries they will be dumped due to the fact that they were not saleable. (ROI Ex. C at 30.)

18. On July 21, 2009, at 7:30 a.m., a second USDA inspection was performed on the 240 flats of the strawberries billed on invoice number 907191, which were stored in the cooler at Air Stream Foods, in Oceanside, New York. The inspection disclosed fifty percent (50%) average defects, including twenty-one percent (21%) soft, fifteen percent (15%) bruising, and fourteen percent (14%) decay. Pulp temperatures at the time of the inspection ranged from forty-one (41) to forty-two (42) degrees Fahrenheit. Under the remarks section of the certificate, the inspector noted: "APPLICANT STATES THIS LOT TO BE DUMPED. APPLICANT STATES THIS LOT WAS PREVIOUSLY INSPECTED ON 7/17/09 AND REPORTED ON CERTIFICATE T-072-0253-04667." (ROI Ex. C at 23).

ERRATA

19. On July 21, 2009, at 3:06 p.m., J. Margiotta faxed Air Stream Foods a dump ticket covering 164 flats of the strawberries billed on invoice number 907087 (ROI Ex. C at 13-14).

20. Respondent has not paid Complainant for the strawberries and mixed squash billed on invoice numbers 907087 and 907191.

21. The informal complaint was filed on August 13, 2009, which is within nine (9) months from the date the cause of action accrued (ROI Ex. A at 1).

Conclusions

Complainant brings this action to recover the agreed purchase price for two (2) truckloads of strawberries and mixed squash sold to Respondent. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling $4,941.00 (Compl. ¶ 8). In response to Complainant's allegations, Respondent admits purchasing the commodities in question but denies that the prices stated in the Complaint are accurate (Answer & Set Off ¶ 2). In addition, Respondent asserts a breach on the part of Complainant based on its alleged failure to ship the kind, quality, and size of strawberries called for in the contracts of sale (Answer & Set Off ¶ B). As a result of the alleged breach, Respondent states it suffered damages equal to the difference between the $2,964.00 (Invoice No. 907191: $1,524.00 and Invoice No. 907087: $1,440.00) delivered contract price of the strawberries, and the $6,780.00 (907191: $3,660.00 and 907087: $3,120.00) cover price/market value of the strawberries, or $3,816.00, plus inspection fees of $288.08, or a total of $4,104.08, which amount Respondent seeks to recover through its Set Off (Answer & Set Off ¶ C).

Turning first to the truckload of strawberries and mixed squash billed on Complainant's invoice number 907087, Respondent's produce buyer, Dale S. Jensen, asserts in his Answering Statement affidavit that shortly after a USDA inspection of the strawberries was completed at Air Stream Foods in New York, he faxed the inspection report to Complainant's salesperson, Uriel Barbosa, and advised him that Respondent was

rejecting the strawberries (Answering Stmt. Affidavit of Dale S. Jensen ¶ 5).[3] We note, however, that the certificate of inspection referenced by Mr. Jensen shows that the strawberries had been unloaded into the cooler at Air Stream Foods before the inspection was performed (ROI Ex. A at 15). The unloading or partial unloading of the transport is considered an act of acceptance. *See* 7 C.F.R. § 46.2(dd)(1). We also note that the load in question included both strawberries *and* mixed squash, but Respondent has only alleged that the strawberries were rejected. The truckload of strawberries and mixed squash comprised a commercial unit which Respondent was obligated to accept or reject in its entirety.[4] We therefore find that Respondent accepted the strawberries.

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. 1700, 1703 (U.S.D.A. 1993); *Salinas Marketing Cooperative v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

The shipment in question reportedly arrived in New York on Sunday, July 12, 2009, five (5) days after shipment, and a USDA inspection was performed on the strawberries two (2) days later, on July 14, 2009, at 6:54 a.m. The inspection disclosed thirty-seven percent (37 %) average defects, including twenty-one percent (21%) overripe, fourteen percent (14%) bruising, and two percent (2%) decay. Pulp temperatures at the time of the inspection ranged from thirty-six (36) to thirty-seven (37) degrees Fahrenheit (ROI Ex. A at 15).

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[3] This is the first of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

[4] The term "commercial unit" means a single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract. A commercial unit must be accepted or rejected in its entirety. 7 C.F.R. § 46.43(ii).

The strawberries were sold under f.o.b. terms[5] (ROI Ex. A at 17). Where goods are sold f.o.b., the warranty of suitable shipping condition is applicable. Suitable shipping condition is defined in the Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j)) as meaning:

> that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.[6]

The warranty of suitable shipping condition extends only to the contract destination agreed between the parties, and the parties herein have made conflicting allegations concerning the contract destination for the subject

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[5] The Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(i)) define f.o.b. as meaning, "that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition ..., and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed."

[6] 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 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).

load of strawberries and squash. Complainant asserts that the contract destination was Respondent's branch location in Salinas, California. Respondent asserts, to the contrary, that the contract destination was Air Stream Foods in Oceanside, New York.

Where the parties put forth affirmative but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish its allegation by a preponderance of the evidence. *E.g., Lookout Mountain Tomato & Banana Co., Inc. v. Case Produce, Inc.*, 51 Agric. Dec. 1470, 1473 (1992). Complainant states the Salinas, California destination is shown on the confirmation, which was faxed to Respondent on July 6, 2009, and also on the bill of lading, which was faxed to Respondent on July 7, 2009, and that both of these documents were received by Respondent without dispute (Compl. ¶ 7). The record includes copies of these documents, both of which list Salinas, California as the destination for the shipment (Compl. Ex. 1, 8). Complainant also submitted a sworn statement from its sales agent, Mr. Uriel Barbosa, wherein Mr. Barbosa states the product was shipped to New York without Complainant's knowledge (Opening Stmt. ¶ 1).

To substantiate its allegation that the contract destination was Air Stream Foods, in Oceanside, New York, Respondent submitted affidavit testimony from its produce buyer, Mr. Dale S. Jensen, wherein Mr. Jensen states, in pertinent part, as follows:

> On June 23, 2009, Uriel Barbosa contacted Yuri Zilber and Ron Foncello, the produce buyers of Air Stream Foods in New York, a Produce Alliance affiliated member. At that time, Mr. Zilber and Mr. Foncello told Uriel that they would buy produce from Corona but only through Produce Alliance in Salinas. See Report of Investigation ("ROI") Ex. C., p. 4. I then made contact with Uriel for the purpose of selling produce to Air Stream. It was stated during our conversation and understood by Uriel Barbosa that I purchased the two loads in question and another load for Air Stream in New York.

(Answering Stmt. Affidavit of Dale S. Jensen ¶ 4). Report of Investigation Exhibit C, page 4, referenced by Mr. Jensen above, is a copy of an e-mail message dated June 23, 2009, from Complainant's Uriel Barbosa, to Yuri Zilber of Air Stream Foods, wherein Mr. Barbosa is providing Mr. Zilber with Complainant's physical and mailing addresses. This evidence shows that Complainant was in direct contact with Air Stream Foods prior to the transactions at issue here, although the message makes no reference to Complainant selling any produce to Air Stream Foods. It appears Mr. Jensen intended to refer to Report of Investigation Exhibit D, page 4, which is a copy of an e-mail message sent by Respondent's salesperson, Kevin Bateman, to Rob Feldgreber, Chief Financial Officer of Respondent, stating, in pertinent part:

> Salesman Uriel Barbosa of Corona Fruits & Veggies, Inc. contacted buyer Yuri Zilber of Air Stream Foods, Oceanside, New York in late June, 2009, soliciting his business for strawberries and various other vegetable items. Buyer Ron Foncello (Air Stream) subsequently directed Dale Jensen, buyer for Produce Alliance, Salinas, to source product for Air Stream from Corona. These are the first transactions that Produce Alliance, as a company, made with Corona. Mr. Barbosa was fully aware that the final consignee for these shipments was Air Stream Foods.

(ROI Ex. D at 4, *also* ROI Ex. C at 1). Respondent also submitted affidavit testimony from Ron Foncello, buyer/salesperson for Air Stream Foods, wherein Mr. Foncello states Complainant's Uriel Barbosa attempted to sell produce to Air Stream Foods on June 23, 2009, at which time Mr. Foncello states he informed Mr. Barbosa that Air Stream Foods would only buy produce from Complainant through Respondent (Answering Stmt. Aff. of Ron Foncello ¶ 4.)

In addition to the affidavit testimony just mentioned, Respondent also cites the use of Tectrol on the strawberries and the inclusion of a temperature recorder in the trailer as evidence that the contract destination for the shipment was New York. In an e-mail message dated September 21, 2009, Respondent's Kevin Bateman questions why, if Mr. Barbosa actually believed that the destination was Salinas, would Tectrol

have been applied to the strawberry pallets for a three-hour in-transit time. Mr. Bateman also questions why a temperature recorder would be placed in a truck for a shipment from Santa Maria to Salinas, a distance of 159 miles (ROI Ex. H at 1).

In *Clark Produce v. Primary Export International, Inc.*,[7] we stated that the significant factors for determining intended contract destination, in descending order of importance, are (1) indication in writing, such as a brokers memorandum or other contract memorandum, of the agreed contract destination; (2) indication of knowledge on the part of the seller as to the ultimate destination; and (3) the absence of an intermediate point of acceptance by the buyer.

While Complainant submitted both a confirmation of sale and an invoice indicating that the shipment in question was destined for Salinas, California, Complainant neglected to submit a statement from Uriel Barbosa to refute the sworn testimony of Dale Jensen and Ron Foncello indicating that Mr. Barbosa first attempted to sell the commodities in question to Air Stream Foods, but was told that such a sale would have to be made through Respondent. A sworn statement which has not been controverted must be taken as true in the absence of other persuasive evidence. *Crawford v. Ralf & Cono Comunale Produce Corp.*, 51 Agric. Dec. 801, 806 (U.S.D.A. 1992); *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (U.S.D.A. 1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (U.S.D.A. 1982). We therefore find that the preponderance of the evidence supports Respondent's contention that Complainant sold the strawberries and squash to Respondent with the knowledge that these commodities were purchased for shipment to Air Stream Foods.

This conclusion is further supported by the fact that Complainant used Tectrol on the strawberries and included a temperature recorder with the shipment, as these are steps normally taken to preserve the quality of the product and monitor its environment during prolonged periods in transit. Such measures would not normally be used for a shipment lasting only several hours. Hence, we conclude that the

[7] 52 Agric. Dec. 1715, 1720-21 (U.S.D.A. 1993).

contract destination for the load of strawberries and mixed squash in question was Air Stream Foods, in Oceanside, New York.

The USDA inspection performed in Oceanside, New York two (2) days following arrival disclosed thirty-seven percent (37%) average defects, twenty-eight percent (28%) of which was scored as serious damage, and two percent (2%) was decay. These results cover 200 flats of the strawberries. Absent any evidence to the contrary, we must assume that the forty (40) flats of strawberries that were not inspected were free of defects. *See Lookout Mountain Tomato & Banana Co., Inc. v. Case Produce, Inc.*, 51 Agric. Dec. 1471, 1478 (U.S.D.A. 1992). When we average the results of the inspection over the 240 flats of strawberries shipped, the average defects are reduced to thirty-one percent (31%), including twenty-three percent (23%) serious damage and two percent (2%) decay.

In *Supreme Berries, Inc. v. R.C. McEntire, Jr.*,[8] we held that the maximum allowance for defects for a coast to coast shipment of strawberries under the suitable shipping condition rule is fifteen percent (15%) for average defects, including no more than eight percent (8%) serious damage and three percent (3%) decay. Although the inspection of the strawberries in question was delayed two (2) days, the strawberries were stored in the receiver's cooler between the time of delivery and the time of inspection, and the pulp temperatures disclosed by the inspection indicate that the strawberries were stored at proper temperatures. We therefore find that the average defects disclosed by the inspection, which total more than double the suitable shipping condition allowance, are sufficiently extreme to establish with reasonable certainty that a more timely inspection would have disclosed excessive defects in the strawberries. Accordingly, we find that the inspection results establish that the strawberries were not in suitable shipping condition.

Complainant's failure to ship strawberries in suitable shipping condition constitutes a breach of contract for which Respondent is entitled to recover provable damages. The general measure of damages for a breach of contract is the difference at the time and place of acceptance between the value of the goods accepted and the value they

[8] 49 Agric. Dec. 1210, 1216 (U.S.D.A. 1990).

would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. *R.F. Taplett Fruit & Cold Storage Co. v. Chinook Marketing Co.*, 39 Agric. Dec. 1537, 1541 (U.S.D.A. 1980).

The trouble report prepared by Respondent states the strawberries were moved to J. Margiotti Company ("Margiotti") on the Hunts Point Market to be worked for Complainant's account (ROI Ex. C at 11). By letter dated July 20, 2009, Respondent's Dale Jensen advised Complainant's Uriel Barbosa that Margiotti was unable to sell the strawberries because they were in such poor condition (ROI Ex. C at 17). On July 21, 2009, Margiotti faxed Air Stream Foods a dump ticket covering 164 flats of the strawberries (ROI Ex. C at 13-14). On the same date, Josef Mortak of Air Stream Foods sent an e-mail message to Respondent's Dale Jensen stating:

> Dale – Here is the paperwork with regards to the dumped berries from last week. Sorry about the Margiotta thing didn't think they were going to be twits!!! They said they understood and were going to do the right thing! I did tell them I wanted USDA, but no one listens to me anyway!

(ROI Ex. C at 12). Mr. Jensen responded on the same date with an e-mail message to Mr. Mortak stating: "Joseph they only show dumping 164 of the 240 straws – need the accounting of the balance of the straws please. Thanks! Dale." (ROI Ex. C at 12). Mr. Mortak replied: "According to Mr. Foncello we will pay for the 76 cs missing." (ROI Ex. C at 12).

As the foregoing e-mail exchanges between Mr. Jensen and Mr. Mortak illustrate, the consignee chosen to handle the strawberries, Margiotta, supplied evidence that 164 flats of the strawberries were dumped (ROI Ex. C at 13-14). Margiotta did not, however, account for the other 76 flats in the shipment. As a result, Air Stream Foods apparently agreed to pay Respondent for the 76 flats of strawberries that were not accounted for. Respondent prepared a trouble report indicating

that it intended to take a deduction in the amount of $1,639.04, which amount represents an allowance of $8.75 per flat for 164 flats of the strawberries plus the $144.04 USDA inspection fee (ROI Ex. K at 2). We presume this means Respondent intended to pay Complainant for the other seventy-six (76) flats of strawberries. We also note, however, that Mr. Jensen asserts in his Answering Statement affidavit that Margiotta "did not remit any proceeds to Air Stream or Produce Alliance for the strawberries."(Answering Stmt. Aff. of Dale S. Jensen ¶ 5).[9] Moreover, Air Stream Foods prepared an accounting of its damage claim against Respondent showing a loss of $9.95 per flat (the delivered price of the strawberries) for 200 flats of the strawberries, plus $144.04 for the cost of the USDA inspection (Answering Stmt. Aff. of Ron Foncello Ex. 2). No explanation is given for the failure of Air Stream Foods to account for the other forty (40) flats of strawberries in the shipment.

Given the confusion concerning the disposition of the strawberries and whether or not any payments were made, we are unable to determine the value of the strawberries as accepted based on the parties' accountings. Therefore, we will resort to an alternate means of determining this value. In instances where an account of sales has not been provided or lacks sufficient detail to be accepted as evidence of the value of accepted goods, we normally determine this value by reducing the value the goods would have had if they had been as warranted by the percentage of condition defects disclosed by a prompt inspection. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1878 (U.S.D.A. 1994).

The first and best method of ascertaining the value the strawberries would have had if they had been as warranted is to use the average price as shown by USDA Market News reports. *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1192, 1197 (U.S.D.A. 1990). The terminal price report for New York City, the nearest reporting location to Oceanside, New York, shows that on July 14, 2009, 8/1-pound flats of California strawberries were selling for $10.00 to $12.00 per flat for large size, and $12.00 to $14.00 per flat for large to extra large size. As there is no indication that the strawberries in question were extra large, we will use the average reported price for

[9] This is the first of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

large strawberries, which results in a value for the strawberries if they had been as warranted of $11.00 per flat, or a total of $2,640.00. When we reduce this amount by thirty-one percent (31%), or $818.40, to account for the condition defects disclosed by the inspection, we arrive at a value for the strawberries as accepted of $1,821.60.

As we mentioned, Respondent's damages are measured as the difference between the value the strawberries would have had if they had been as warranted, $2,640.00, and their value as accepted, $1,821.60, or $818.40. In addition, Respondent may recover the $144.04 USDA inspection fee as incidental damages. Respondent also claims additional damages for the cost to purchase goods in substitution of those due from Complainant (Answer & Setoff ¶ C; Answering Stmt. Aff. of Dale S. Jensen ¶ 5).[10] We note, however, that the alleged "cover" purchases were made by Air Stream Foods, not Respondent (Answering Stmt. Aff. of Ron Foncello ¶ 5; ROI Ex. C at 15). Moreover, official comment 1 to U.C.C. section 2-712, the section of the Code that deals with cover purchases, states "[c]over is not available under this section if the buyer accepts the goods and does not rightfully revoke the acceptance." We have already determined that Respondent accepted the strawberries in question. Therefore, the remedy of cover is not available to Respondent.[11]

Respondent's total damages resulting from the breach of contract by Complainant with respect to the strawberries billed on invoice number 907087 equal $962.44 ($818.40 + $144.04). When this amount is deducted from the $3,331.00[12] contract price of the strawberries and

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[10] This is the first of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

[11] We should note that in *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, citing official comment 1 to U.C.C. § 2-601, which states "[a] buyer accepting a non-conforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover. . . ," we stated that cover is open to an accepting buyer. *See* 49 Agric. Dec. 1192 n.11 (U.S.D.A. 1990). However, as indicated above, the Code has since been revised to make clear that cover is not available to a buyer who accepts and does not revoke his acceptance.

[12] While Respondent maintains that Complainant invoiced at incorrect prices for the commodities in this shipment, the "correct" prices asserted by Respondent total $3,696.20, which is more than the $3,331.00 claimed by Complainant. (ROI Ex. C at 6-7). Complainant's recovery should be limited to the amount claimed. *See, e.g.*, Willoughby v. Frito-Lay, Inc., 45 Agric. Dec. 1245, 1263 (U.S.D.A. 1985). *Also,* Clark

squash billed on invoice number 907087, the net amount due Complainant from Respondent is $2,368.56.

Turning next to the truckload of strawberries billed on Complainant's invoice number 907191, Respondent's produce buyer, Dale S. Jensen, asserts in his Answering Statement affidavit that shortly after a USDA inspection of the strawberries was completed at Air Stream Foods in New York, he faxed the inspection report to Complainant's salesperson, Uriel Barbosa, and advised him that Respondent was rejecting the strawberries. (Answering Stmt. Affidavit of Dale S. Jensen ¶ 5.)[13] We note, however, that the certificate of inspection referenced by Mr. Jensen shows that the strawberries had been unloaded into the cooler at Air Stream Foods before the inspection was performed (ROI Ex. C at 22). The unloading or partial unloading of the transport is considered an act of acceptance. *See* 7 C.F.R. § 46.2(dd)(1). The strawberries were therefore accepted by Air Stream Foods through the act of unloading. The acceptance of the strawberries by Air Stream Foods precluded any subsequent rejection by Respondent. *Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345, 1349 (U.S.D.A. 1996). We therefore find that Respondent accepted the strawberries.

Respondent is liable to Complainant for the full purchase price of the strawberries it accepted less any damages resulting from any breach of contract by Complainant. The strawberries arrived in New York on Thursday, July 16, 2009, five (5) days after shipment. A USDA inspection was performed on the strawberries one (1) day later, on July 17, 2009, at 6:32 a.m., at the cooler of Air Stream Foods, in Oceanside, New York. The inspection disclosed forty-three percent (43%) average defects, including nineteen percent (19%) bruising, seventeen percent (17%) soft, and seven percent (7%) decay. Pulp temperatures at the time of the inspection ranged from thirty-seven (37) to thirty-eight (38) degrees Fahrenheit (ROI Ex. C at 22).

The strawberries in this shipment were sold under f.o.b. terms (ROI Ex. A at 23). Therefore, the warranty of suitable shipping condition is

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Produce v. Primary Export Int'l, Inc., 52 Agric. Dec. 1710, 1718 (U.S.D.A. 1993); Denice &Felice Packing Co. v. Corgan & Son, 45 Agric. Dec. 785, 788 (U.S.D.A. 1986).

[13] This is the second of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

applicable. Although Complainant asserts once again that the contract destination for the strawberries was Salinas, California, for the reasons already discussed with respect to the strawberries billed on invoice number 907087, we find that the contract destination for this shipment of strawberries was Air Stream Foods, in Oceanside, New York. Based on the suitable shipping condition allowances mentioned earlier in our discussion, we find further that the condition defects disclosed by the inspection performed at Air Stream Foods establish that the strawberries were not in suitable shipping condition. Complainant's failure to ship strawberries in suitable shipping condition constitutes a breach of contract for which Respondent is entitled to recover provable damages. Respondent's damages will once again be measured as the difference between the value of the strawberries as accepted and the value the strawberries would have had if they had been as warranted. With respect to the value of the strawberries as accepted, Ron Foncello of Air Stream Foods asserts in his Answering Statement affidavit that he sent the strawberries to the Hunts Point Market to see if any wholesalers could sell them, but because the strawberries were in such bad condition nobody would take them. Mr. Foncello states he then had the strawberries inspected again on July 21, 2009, after which he dumped the strawberries in the presence of the federal inspector (Answering Stmt. Aff. of Ron Foncello ¶ 6). The record includes a copy of the USDA inspection certificate whereon the federal inspector noted that the applicant (Air Stream Foods) intended to dump the strawberries (ROI Ex. C at 23).

In this instance, we find that the evidence submitted by Respondent is sufficient to establish that the strawberries it accepted had no commercial value. With respect to the value the strawberries would have had if they had been as warranted, the terminal price report for New York City, the nearest reporting location to Oceanside, New York, shows that on July 17, 2009, 8/1-pound flats of California strawberries were selling for $8.00 to $10.00 per flat for large size, and $12.00 to $14.00 per flat for large to extra large size. As there is no indication that the strawberries in question were extra large, we will use the average reported price for large strawberries, which results in a value for the strawberries if they had been as warranted of $9.00 per flat, or a total of $2,160.00.

ERRATA

As we mentioned, Respondent's damages are measured as the difference between the value the strawberries would have had if they had been as warranted, $2,160.00, and their value as accepted, $0.00, or $2,160.00. In addition, Respondent may recover the USDA inspection fees totaling $288.08 as incidental damages. Respondent also claims additional damages for the cost to purchase goods in substitution of those due from Complainant (Answer & Setoff ¶ C; Answering Stmt. Aff. of Dale S. Jensen ¶ 5).[14] For the reasons already stated, we find that the remedy of cover is not available to Respondent.

Respondent's total damages resulting from the breach of contract by Complainant with respect to the strawberries billed on invoice number 907191 equal $2,448.08 ($2,160.00 + $288.08). When this amount is deducted from the $1,610.00 contract price of the strawberries billed on invoice number 907191, there is a net loss due Respondent from Complainant of $838.08. We will offset this loss against the $2,368.56 owed to Complainant for strawberries and squash billed on invoice number 907087. This results in a net amount due Complainant from Respondent of $1,530.48.

Respondent's failure to pay Complainant $1,530.48 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. The above treatment of the issues between Complainant and Respondent resolves the issues in Respondent's Set Off. The Set Off should, therefore, be dismissed.

Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (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 Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v.*

[14] This is the second of two (2) paragraphs numbered "5" in the Answering Statement Affidavit of Dale S. Jensen.

Producers Mktg. Ass'n, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). 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 (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 under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (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 $1,530.48, with interest thereon at the rate of 0.19 percent (%) per annum from September 1, 2009, until paid, plus the amount of $500.00.

The Set Off is dismissed.

Copies of this Order shall be served upon the parties.

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ERRATA

DIMARE HOMESTEAD, INC. v. YZAGUIRRE FARMS LLC.
PACA Docket No. S-R-2010-412.
Decision and Order.
Filed December 22, 2011.

[Cite as: 70 Agric. Dec. W (U.S.D.A. 2011), *published in* 72 Agric. Dec. W (U.S.D.A. 2013).]

PACA-R.

Jurisdiction – Interstate Commerce – Florida Tomatoes Marketing Order

The sale of Florida-grown tomatoes by a Florida grower/shipper to a "pinhooker" who intended to sell the tomatoes to local buyers for use at farmers' markets and roadside stands is not in interstate commerce because the tomatoes in question are not eligible for shipment outside the state of Florida due to Marketing Order requirements and because the parties never intended or contemplated that these tomatoes would travel in interstate commerce. As a result, these tomatoes cannot be considered a commodity that commonly moves in interstate commerce. As there was no actual or contemplated movement in interstate commerce for the shipments in question, the Secretary is without jurisdiction to consider the dispute.

Shelton S. Smallwood, Presiding Officer.
Leslie Wowk, Examiner.
McCarron & Diess for Complainant.
Meuers Law Firm, P.L. for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as "the Act." A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $45,162.00 in connection with five (5) truckloads of tomatoes allegedly shipped in the course of interstate commerce.

Copies of the Report of Investigation 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.

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 under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Respondent filed an Answering Statement. Respondent's Answering Statement consists of the affidavit of Mr. Armando Yzaguirre, President of Respondent. Complainant filed a Statement in Reply. Complainant's Statement in Reply consists of the affidavit of Mr. Tony DiMare, Vice President of Complainant. Both parties also submitted a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is P.O. Box 900460, Homestead, FL 33090. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a limited liability company whose post office address is 211 E. Market Road, Immokalee, FL 34142. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On March 26, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 1,093 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 10). On May 17, 2010, Complainant issued invoice number 702 billing Respondent for 1,093 twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $6,558.00 (ROI Ex. A at 2).

4. On March 27, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 2,169 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 11). On May 17, 2010, Complainant issued invoice number 593 billing Respondent for 2,169

twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $13,014.00 (ROI Ex. A at 3).

5. On April 1, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 1,051 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 12). On May 17, 2010, Complainant issued invoice number 708 billing Respondent for 1,051 twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $6,306.00 (ROI Ex. A at 4).

6. On April 6, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 1,135 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 13). On May 17, 2010, Complainant issued invoice number 709 billing Respondent for 1,135 twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $6,810.00 (ROI Ex. A at 5).

7. On April 16, 2010, Respondent picked from Complainant's tomato fields located in Homestead, Florida, 2,079 twenty-five pound (25-lb.) boxes of field-pack tomatoes (ROI Ex. D at 14). On May 17, 2010, Complainant issued invoice number 860 billing Respondent for 2,079 twenty-five pound (25-lb.) boxes of field-pack tomatoes at $6.00 per box, for a total f.o.b. invoice price of $12,474.00 (ROI Ex. A at 6).

8. The informal complaint was filed on August 13, 2010 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for five (5) truckloads of tomatoes purchased from Complainant. Complainant states Respondent accepted the tomatoes in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling $45,162.00 (Compl. ¶ 7). To substantiate this contention, Complainant submitted copies of its sales confirmations and invoices showing that Respondent was billed for the five (5) shipments of tomatoes in question at a per unit price of $6.00 per box, for

a total of $45,162.00 for the 7,527 boxes of tomatoes in question (Compl. Ex. 2A-2E).

In response to Complainant's allegations, Respondent submitted an unverified Answer signed by its attorney wherein it asserts as an affirmative defense that "all transactions alleged in Complainant's Formal Complaint were mutually agreed by the parties to be on a "price-after-sale" basis and were never subject to specified pre-sale prices." (Answer at 5). Respondent subsequently submitted affidavit testimony from its President, Mr. Armando Yzaguirre, wherein Mr. Yzaguirre asserts that in March of 2010, he requested and obtained permission from Complainant to pick tomatoes from fields that Complainant's crews had fully harvested and that were no longer producing tomatoes of the kind and quality sold by Complainant (Answering Stmt. ¶ 19). Mr. Yzaguirre explains that after he sells such tomatoes, he settles up with the grower by deducting the harvest, transportation, sorting, packing charges and a commission from the sales proceeds (Answering Stmt. ¶ 13). According to Mr. Yzaguirre, when Respondent engages in this practice, which Mr. Yzaguirre states is sometimes referred to in the produce industry as "pinhooking" (Answering Stmt. ¶ 14), the growers usually do not quarrel with the returns, no matter how low, because there is no market for these tomatoes and any money the growers receive is "free money" on tomatoes that they would otherwise have plowed under (Answering Stmt. ¶ 13).

Before we consider the parties' dispute with respect to the pricing of the tomatoes, there is a jurisdictional issue raised by Respondent that must first be addressed. Specifically, Respondent, in its unverified Answer, asserts an affirmative defense that the tomatoes in question were not intended for sale in interstate commerce (Answer at 5). Respondent's Armando Yzaguirre subsequently testified that the PACA Branch does not have jurisdiction over the sales at issue in this action because the tomatoes were neither intended for sale in interstate or foreign commerce, nor were they in fact sold in interstate or foreign commerce (Answering Stmt. ¶¶ 47-48).

In order for the Secretary to have jurisdiction to hear this matter, the transactions in question must involve either interstate or foreign

commerce. Interstate commerce is defined in sections 499a(3) and (8) of the Act as follows:

> (3) ...commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia.
>
> …
>
> (8) A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this chapter.

The foregoing definition has been interpreted as encompassing the actual physical movement of produce from one state to another (*see, e.g.*, *Clearview Farms v. Noha*, 21 Agric. Dec. 806 (U.S.D.A. 1962)), as well as transactions where the produce never physically crosses state lines but the parties to the transaction are located in different states (*see Tulelake Potato Distributors, Inc. v. Giustino*, 52 Agric. Dec. 752, 757 (U.S.D.A. 1993)). In addition, an even broader interpretation was applied in *Produce Place v. United States Department of Agriculture*, 319 U.S. App D.C. 369 (1996), where it was stated that if the shipment in question is of a type of commodity that is commonly shipped in interstate commerce,

and the shipment was shipped for resale by a produce dealer doing a substantial portion of its business in interstate commerce, the shipment is in interstate commerce under the Act.

Respondent's Armando Yzaguirre asserts, however, that the tomatoes salvaged from Complainant's fields were never intended for sale outside the state of Florida, as they would not meet the minimum grade of U.S. No. 2, nor were they were inspected (Answering Stmt. ¶ 11). In addition, Mr. Yzaguirre states the tomatoes were packed in used boxes (Answering Stmt. ¶ 11). According to Mr. Yzaguirre, Complainant knew that Respondent had no intention of selling the tomatoes in interstate commerce and was aware of Mr. Yzaguirre's intention to haul the tomatoes to Immokalee, Florida for sale to local buyers for use at farmers' markets and roadside stands (Answering Stmt. ¶ 21). Knowing that the tomatoes would not meet the standards for sale to customers outside the state of Florida, Mr. Yzaguirre states Complainant's Tony DiMare told him to "do the best" he could and sell whatever he was able to salvage from the fields (Answering Stmt. ¶ 22).

In response, Complainant submitted affidavit testimony from its Vice President, Mr. Tony DiMare, wherein Mr. DiMare states that tomatoes are a commodity which is commonly shipped in interstate commerce, and that Complainant conducts the majority of its tomato sale business in interstate and foreign commerce in states other than Florida and in Canada. Complainant's normal course of business is, however, of no significance in the instant case, given the evidence showing that Complainant sold the subject tomatoes to a receiver who plainly had no intention of shipping the tomatoes out of state. Moreover, as Respondent's Armando Yzaguirre indicates, the quality of the tomatoes was such that Respondent could not legally ship the tomatoes outside the state of Florida, as tomatoes produced in certain areas of Florida, including the Homestead area where the tomatoes in question were produced, are subject to a Federal Marketing Order which dictates, among other things, the quality of the tomatoes that may be sold outside of the specified growing region between October 10th and June 15th of each growing season. Specifically, the handling regulations under the Marketing Order state that the "[t]omatoes shall be graded and meet the requirements for U.S. No. 1, U.S. Combination or U.S. No. 2 of the U.S. Standards for Grades of Fresh Tomatoes." *See* 7 C.F.R. § 966.323(a)(4).

A federal or federal-state inspection must be obtained to establish that the tomatoes meet the stated requirements. *See* 7 C.F.R. § 966.323(a)(4). In addition, the containers in which the tomatoes are packed must be clean and bright in appearance without marks, stains, or other evidence of previous use. *See* 7 C.F.R. § 966.323(a)(3)(iii).

As we mentioned above, it is Respondent's contention that the parties were well aware when the contract was negotiated that the tomatoes Respondent intended to salvage from Complainant's fields would not be suitable for shipment outside the state of Florida, and that it was Respondent's intention to sell the tomatoes to local buyers for use at farmers' markets and roadside stands. While Complainant's Tony DiMare has testified that he did not know where the tomatoes would be transported or sold (Stmt. in Reply ¶ 13), Mr. DiMare fails to address Mr. Yzaguirre's sworn testimony that Mr. DiMare was aware that the salvaged tomatoes were not suitable for shipment to customers outside the state of Florida (Answering Stmt. ¶ 22). Mr. DiMare also fails to address Mr. Yzaguirre's sworn contention that the salvaged tomatoes were harvested from "old fields" which had already been harvested many times and no longer had any tomatoes that would meet the requirements for the U.S. No. 1, U.S. Combination, or U.S. No. 2 grades (Answering Stmt. ¶¶ 9, 20). Mr. DiMare, as Vice-President of a high-volume shipper of Florida-grown tomatoes, was presumably aware that such tomatoes would not meet the Marketing Order requirements for shipment outside the state of Florida. Hence, while it is true that Complainant is a dealer that conducts a substantial portion of its business in interstate commerce, the off-grade tomatoes at issue in the Complaint cannot be considered a commodity that is commonly shipped in interstate commerce.

We therefore find that the preponderance of the evidence supports Respondent's contention that Complainant was aware of the purely intrastate nature of the transactions in question at the time of contracting, and that there was neither contemplation nor actual involvement of the transactions in interstate commerce. Consequently, the Secretary lacks jurisdiction to consider the matters at issue in the Complaint, so the Complaint must be dismissed.

ORDER

The Complaint is dismissed.

Copies of this Order shall be served upon the parties.

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ERRATA

REPARATION DECISIONS

71 Agric. Dec.
Jan. – June 2012

L&M COMPANIES, INC. v. PANAMA BANANA DISTRIBUTION COMPANY.
PACA Docket No. R-09-046.
Decision and Order.
Filed January 12, 2012.

[Cite as: 71 Agric. Dec. i (U.S.D.A. 2012), *published in* 72 Agric. Dec. i (U.S.D.A. 2013).]

PACA-R.

Agency, employee or agent of principal

According to section 16 of the PACA (7 U.S.C. § 499p), the "act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person."

Agency, apparent authority

When a party acts in a manner which creates apparent authority in an agent it may be bound by the acts of the agent. It is a maxim of agency law that a principal is responsible for its agent's actions, even where the agent exceeds the scope of its actual authority.

Christopher Young, Presiding Officer.
Joseph Choate, Jr. for Complainant.
Mary E. Gardner for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA). A timely Complaint was filed with the Department on September 11,

2008 in which Complainant sought a reparation award against Respondent in the amount of $105,377.50, which was alleged to be past due and owing in connection with sixteen (16) shipments of various perishable agricultural commodities (mostly watermelons) sold to Respondent in the course of interstate commerce.[1]

A Report of Investigation was prepared by the Department and served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto on November 3, 2008, denying liability and requesting an oral hearing.

An oral hearing was held in Chicago, Illinois, on November 9-11, 2011. At the hearing, Complainant was represented by Joseph Choate, Jr., Esq., of Choate and Choate in San Marino, California. Respondent was represented by Mary E. Gardner, Esq., of the law office of Mary E. Gardner P.C. in West Dundee, Illinois. Christopher Young, Esq., attorney with the Office of the General Counsel, Department of Agriculture, served as the Presiding Officer. The parties submitted Joint Exhibits 2-18, 18-1 through 18-8, and 19-22 (JX). Additional evidence is contained in the Department's Report of Investigation (ROI).

At the hearing, two witnesses testified for Complainant and three witnesses testified for Respondent. A transcript of the hearing was prepared (Tr.). The parties filed post-hearing briefs, and claims for fees and expenses, and objections to the claims.

Findings of Fact

1. Complainant, L&M Companies, Inc., is a corporation whose business mailing address is 2925 Huntleigh Drive, Suite 204, Raleigh, NC 27604. At the time of the transactions alleged in the Complaint, Complainant was licensed under the PACA.[2]

2. Respondent, Panama Banana Distribution Company, is a corporation whose business address is Chicago International Produce Market, 2404

[1] During the course of the formal reparation case and hearing, Complainant modified its claim to 14 loads and total damages of $61,650.49.
[2] PACA license number 19980840.

Wolcott Avenue, Chicago, IL 60608. At the time of the transactions alleged in the Complaint, Respondent was licensed under the PACA.[3]

3. Between June 12, 2007, and July 2007, by oral contract(s), Complainant sold to Respondent sixteen loads[4] (16) wholesale loads of watermelons, cantaloupe, cumbers, chili peppers, and broccoli (Complainant's Compl. at 1).

4. Though there is dispute as to whether the oral contract involved "PAS", "Open", or "Consignment" price terms, it is clear from the record that set prices were not agreed upon at the time the oral contracts were reached between Complainant and Respondent, and that prices were to be agreed or settled upon after Respondent sold the produce in question in this case (Complainant's Compl. at 1-2; Resp't's Answer at 1-7; JX 2-18, 18-1 through 18-8, and 19-22, Tr. 15-17, 36, 102, 147, 244-246, 287, 293, 297, 319).

5. Though the Complaint filed in this case claims that the delivery terms of the loads were all f.o.b.[5], it is clear that Complainant arranged for transportation of loads in this case, and that the oral contract(s) reached contemplated that freight charges were to be paid by Complainant (Tr. 246-247, 299-302, 435).

6. The oral contract(s) were reached between Ed Kettyle, a salesman for Complainant, and two individuals who worked for Respondent: Stephen Alexander, operations manager, and Deke Pappas, owner of Respondent (Tr. 242, 380, 423-424, 442-449).

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[3] PACA license number 19153729.

[4] Complainant withdrew its claim as to loads numbers one and eight (Compl's Br. at 2). The remaining claims consist mostly of loads of watermelons.

[5] F.o.b. means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the [buyer] through land transportation at shipping point, in suitable condition . . . and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. 7 C.F.R. § 46.43(i); Primary Export Int'l v. Blue Anchor, Inc., 56 Agric. Dec. 969, 975-76 (U.S.D.A. 1997). The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at the time of shipment . . . . 7 C.F.R. § 46.43(i).

7. Respondent did not order the produce involved in this case; rather, Ed Kettyle, per instructions from his supervisors (Tr. 238) was told to "load trucks" and "get product out of [Complainant's] cooler due to overload of product (*Id*.). Complainant had a policy whereby the sales department had deadlines and "needed to have product out in five days" (Tr. 239, 241-242). As long as produce remained on trucks, Complainant incurred additional freight charges. Complainant had to unload the produce to avoid incurring continued freight charges (JX 19). Ed Kettyle contacted Respondent and "begged" them to take produce loads off Complainant's hands (Tr. 237-243). According to Ed Kettlye, "we kind of forced it" (Tr. 239, 243).

8. Ed Kettyle and Respondent's salesman arrived at an agreement whereby Respondent would keep 15 percent of returns from sale of loads as commission, and remit "whatever was left" to Complainant (Tr. 239). Before Complainant loaded anything, the arrangement was discussed with Ed Kettyle's supervisors (*Id*.). No set price was ever put on the product sent to Respondent, and Respondent never agreed to pay market price for loads sent to them by Complainant (Tr. 244, 263-264).

9. After Complainant delivered the loads in this case to Respondent, Ed Kettyle of Complainant and Deke Pappas of Respondent settled on prices for all of the loads (Tr. 261, 297-304, 309-310, 319, 331-332, 342, 447-449, 461-62, 469-70, 509-510, 513).

10. Following settlement of all of the loads in question, Respondent paid Complainant the settlement amounts by various checks, and Complainant (Tr. 453-456, 511-512, 520).

Conclusions

Complainant alleged in the formal Complaint that Respondent is liable for $105,377.50, in connection with sixteen (16) shipments of grapes sold to Respondent in the course of interstate commerce. During the course of the formal reparation case and hearing, Complainant modified its claim to fourteen (14) loads and total damages of $61,650.49. Complainant claims that all loads in question were ordered by Respondent, under the terms either "open", "PAS", or "F.o.b." (Resp't's Br. at 6, 17). Complainant also claims that invoices were sent

to Respondent when it ordered the loads, and that Respondent agreed to pay the prices listed on each invoice (Resp't's Br. at 7).

Respondent claims that it did not order the produce involved in this case; and that Complainant's salesman, Ed Kettyle contacted Respondent and asked them to handle several "troubled" or "distressed" loads. (Resp't's Br. at 2-4.) Respondent claims that there was no set price on the produce and that the loads were on consignment, and that Respondent would keep fifteen (15) percent of all sales (Resp't's Br. at 4). Respondent further claims that after the loads were accepted and resold by Respondent, an account of sale was provided to Complainant, and that Respondent and Complainant settled on prices for all of the loads (Resp't's Br. at 4-10).

As noted above, at hearing, two (2) witnesses testified for Complainant and three witnesses testified for Respondent. The testimony of the witnesses for Complainant and Respondent, and their accounts of what took place between the parties in June and July of 2007, is vastly different. Complainant's witnesses, Keith Purvis and Greg Cardamone, Ed Kettyle's sales supervisors, testified to Complainant's position (that Respondent ordered the produce and agreed to pay the invoice price [or apparently a top market price], and that Respondent's settled prices were never agreed upon by Complainant). However, Keith Purvis stated that he never had any contact with Respondent about any of the loads involved in this case (Tr. 133-134). Nevertheless, Keith Purvis looked at the documents contained in JX 2-18, and testified that because it was Respondent's general practice to issue a revised invoice in cases where settlement on loads is reached, and because there was no revised invoice in JX 2-18, Complainant and Respondent could not have settled on a price for any of the loads (Tr. 27-28, 38).

Greg Cardamone testified that he was a direct supervisor of Ed Kettyle, but not until mid August 2007, one month *after* the sales involved in this case (Tr. 143, 184). (Wes Summer was Ed Kettyle's direct supervisor in June and July 2007.) (Tr. 184). Greg Cardamore was not directly involved in any of the sales or loads involved in this case (Tr. 144, 184). Mr. Cardamore merely testified that *generally* if Ed Kettyle were to make any adjustments in price, a supervisor would have to "sign off" (Tr. 149). Neither Keith Purvis nor Greg Cardamone were

directly involved in the transactions at issue in this case, while others who testified were.

Ed Kettyle was the salesman for every load at issue in this case[6] (Tr. 232-234; JX 19). He testified that pursuant to instructions from his supervisors (Tr. 238), he was told to "load trucks" and "get product out of [Complainant's] cooler due to overload of product (*Id*.). Complainant had a policy whereby the sales department had deadlines and "needed to have product out in five days" (Tr. 239, 241-242). As long as produce remained on trucks, Complainant incurred additional freight charges. Complainant had to unload the produce to avoid incurring continued freight charges (JX 19). Ed Kettyle contacted Respondent and "begged" them to take produce loads off Complainant's hands (Tr. 237-243). According to Ed Kettyle, "we kind of forced it" (Tr. 239, 243). None of the loads in question in this case were ordered by Respondent (Tr. 239).

Ed Kettyle and Respondent's salesman arrived at an agreement whereby Respondent would keep fifteen (15) percent of returns from sale of loads, and remit "whatever was left" to Complainant (Tr. 239). Before Complainant loaded anything, the arrangement was discussed with Ed Kettyle's supervisors (Tr. 239, 26, 281, 334). No set price was ever put on the product sent to Respondent, and Respondent never agreed to pay market price for loads sent to them by Complainant, nor agreed to pay the prices listed on the invoices (Tr. 244, 246, 299-300). Complainant arranged for transportation of loads in this case, and freight charges were to be paid by Complainant (Tr. 246-247, 299-302, 435).

Mostly at issue were watermelons in this case, and Ed Kettyle testified that some of the watermelons "were so bad [that] if we could just break even, then that would be fine by us. At least that is the gist that I got from everyone. We don't want to see any negatives. Just trying to get to zero. Trying, you know, not to have to pay anything else." (Tr. 250). In many cases, Ed Kettyle asked Respondent not to bother with getting an inspection of the produce in the loads (Tr. 254-255).

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[6] Ed Kettyle is a former employee of Complainant (Tr. 272).

ERRATA

After Complainant delivered the loads in this case to Respondent, Ed Kettyle and Deke Pappas of Respondent settled on prices for all of the loads (Tr. 261, 297-304, 309-310, 319, 331-332, 342, 447-449,461-62, 469-70 , 509-510, 513). Ed Kettyle testified that he obtained approval from his supervisors (either Keith Purvis or Wes Summers) when he settled all the loads in this case (Tr. 256), and that the settlements in this case were what he "thought he was told to do." (Tr. 342). While documents were not presented at hearing to show that the settlement agreements were clearly memorialized in writing, Ed Kettyle testified that he sent emails documenting settlements of the loads in this case (Tr. 280-281, 287 309- 310), and he testified in no uncertain terms that he reached at the least verbal settlement agreements with Respondent as to every load (Tr. 297, 303, 309, 319). This verbal reliance was a necessity in Ed Kettyle's mind because of the pressure of the season, the overload of product, and instructions to him to "get it done" (Tr. 315, 317, 326, 329, 331, 332).

Both Stephen Alexander and Deke Pappas of Complainant provide testimony that corroborates that of Ed Kettyle (Tr. 379-396, 421-507). Following settlement of all of the loads in question, Respondent paid Complainant the settlement amounts by various checks, and Complainant cashed the checks (Tr. 453-456, 511-512, 520).

We find the testimony of those directly involved in the transactions, that of Ed Kettyle, Stephen Alexander, and Deke Pappas, all stating that (1) Complainant contacted Respondent and asked Respondent to receive the loads in question and "do the best they could" with sales; (2) that no set price was agreed on when the produce was sent; and (3) that settled prices were agreed upon after Respondent sold the produce and provided an account of sale to Complainant, to be most credible in this case. Moreover, the documents admitted in the case further corroborate this position. While each load has an accompanying invoice stating a price, each load *also* has a copy of the same invoice with prices crossed out to match an accompanying account of sale from Respondent, (JX 2-18), which corroborates the testimony that the invoices prices were not agreed upon when the produce was sent (Tr. 297, 319), and that settlement occurred based on the accounts of sale (Tr. 264-265, 303). While Complainant claimed in its Complaint that the loads were ordered F.o.b., Complainant appeared to acknowledge at hearing the majority of loads

were "open" as to price, and that all of the loads would have required a settlement after Respondent's sales.[7]

Keith Purvis testified that Complainant has a policy of marking loads as "open" when there is no price because of troubled or distressed loads. (Tr. 92-111, 114.) By Complainant's own admission, ten out of the fourteen loads in question (loads 2-7, load 11, and load 15) contain documentary notations that the loads were "open", and thus troubled or distressed (*see* Complainant's Br. at 3-4).

Each of the loads[8] (with the exception of load number 11) also contain some other independent form of documentary notation (in addition to the "open" notation described above) that the loads in this case were troubled or distressed, and/or that they were not ordered by Respondent under the F.o.b. terms claimed by Complainant in its formal Complaint: a "soft, decay" notation, "no inspection needed per Ed. K" on the bill of lading in JX 2; a "redirected" and "unloaded under protest" notation on the bill of lading and inspection showing damage of six (6) percent and serious damage of one (1) percent in JX 3; a "soft decay" notation on the bill of lading and inspection showing 8 percent damage and one (1) percent decay in JX 4; an "unloaded under protest" notation on the purchase order in JX 5; an "unloaded under protest" notation on the purchase order and inspection showing five (5) percent damage and five (5) percent serious damage with two (2) percent decay in JX 6; an "unloaded under protest" notation on the bill of lading and inspection showing fourteen (14) percent damage and six (6) percent serious damage in JX 7; an "unloaded under protest" notation on the bill of lading and inspection showing twenty (20) percent damage and sixteen (16) percent serious damage in JX 9; an inspection showing twenty-two (22) percent serious damage and inspection showing nineteen (19) percent damage in JX 10; an "unloaded for L&M account" notation on the bill of lading and inspection showing twenty-nine (29) percent

[7] Throughout, Complainant appears to waffle back and forth between the positions that Respondent ordered the produce F.o.b. and simply failed to pay the agreed upon invoice price, that Respondent ordered the produce delivered and failed to pay for both the produce and freight, and that the loads were sold with no set price, but that settlement on them was never properly achieved.

[8] We note again that loads number 1 and 8 have been withdrawn from Complainant's claim.

damage and twenty-nine (29) percent serious damage in JX 12; an inspection showing nineteen (19) percent damage in JX 13; an "unloaded under protest" notation on the bill of lading and inspection showing eleven (11) percent damage and eleven (11) percent serious damage with some decay in JX 14; an "unloaded under protest due to condition" notation on the bill of lading and inspection showing twelve (12) percent damage and twelve (12) percent serious damage in JX 15; and a "rejection" notation on a Fresh Pik Produce invoice and inspection showing percent damage and four (4) percent serious damage (with a notation of "some advanced stages of decay" on the inspection) in JX 16. Accordingly, these documents pertaining to the loads, taken in their entirety, corroborate the testimony that the produce was not "ordered" by Respondent, that much of the produce was distressed, and that Respondent would not have agreed to pay the price listed on the invoice (or a top market price in the alternative, as Complainant suggested at hearing).

The aggregate of documentary evidence and the testimony of the witnesses directly involved in the transactions supports Respondent's position in this case, and Complainant has failed to prove by a preponderance of the evidence all of the material allegations of its Complaint. *See Haywood County Co-operative Fruit v. Orlando Tomato, Inc.*, 47 Agric. Dec. 581, 583 (U.S.D.A. 1988); *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (U.S.D.A. 1987); *Justice v. Milford Packing Co.*, 34 Agric. Dec. 533 (U.S.D.A. 1975).

The proponent of a claim has the burden of proof. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec 893, 894 (U.S.D.A. 1987). The party which has the burden of proof as to a fact must prove the fact by a preponderance of the evidence. *Id*; *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (U.S.D.A. 1969). In this case, based on the testimony of witnesses at hearing and on the documents admitted, Respondent has met its burden to prove by a preponderance its claims that Respondent did not "order" the loads at issue, that Complainant contacted Respondent and asked Respondent to receive the loads in question and "do the best they could" with sales, that no set price was agreed on when the produce was sent (we find that for purposes of this case, it is irrelevant whether the loads

were sold to Respondent price after sale, or open, or on consignment, since settlement based on the resale prices of the loads was made), and that settled prices were agreed upon after Respondent sold the produce and provided an account of sale to Complainant.

Complainant does not appear to deny the fact the Ed Kettyle performed the act of settling the loads in this case with Respondent; rather, Complainant argues that Ed Kettyle did not have authority to do so, and did not obtain the necessary approval of the settlements from his supervisors to properly effectuate the settlements (Complainant's Br. at 8-9). The testimony of Ed Kettyle, which we have already found to be credible (indeed, Mr. Kettyle is the one witness in the proceeding not currently affiliated with either party and with nothing to gain from his testimony[9]), rebuts this argument, and states that not only did he have approval authority[10] (Tr. 260-261), but that approval (both tacit and express) of the settlements from either Keith Purvis or Wes Summers was obtained for all of the loads in question (Tr. 256, 263, 270-271, 342; JX 19). Even were it not the case that either Keith Purvis or Wes Summers (or some higher authority at Complainant[11]) approved settlement with Respondent, Complainant's argument (that Ed Kettyle could not alone effectuate settlements in this case) fails.

According to section 16 of the PACA (7 U.S.C. § 499p), the "act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, *shall in every case* be deemed the act,

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[9] Ed Kettyle's credibility and testimony in this case is further bolstered by several reference letters, all written by L&M employees in the summer of 2006 (prior to the events of this case) which testify to Mr. Kettyle's honesty, good character, good work ethic, responsibility, and good salesmanship (JX 20). Moreover, it does not appear that Mr. Kettyle at this time would gain anything from testifying "in favor" of one party or another (i.e., any current substantial business relationship with either, Tr. 242, 274-275), or that he bears any ill will towards Complainant, his former employer, that might prejudice his testimony (Tr.273-274).

[10] The testimony of Keith Purvis also suggests that salespeople of Complainant have authority to settle loads (Tr. 28).

[11] Ed Kettyle states that the owner of Complainant spoke with him at one point about the settlements, and asked Ed Kettyle to get more on a load, and Ed Kettyle and Deke Pappas "re-worked settlement" (Tr. 263).

omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person" (emphasis added).

The common law of agency and the *respondeat superior* theory of corporate liability support a finding that Ed Kettyle's settlements with Respondent were made "within the scope of his employment and office." The Restatement defines "scope of employment" as follows:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228(1) (1958).

The *respondeat superior* theory of corporate liability provides that to be within the "scope of the employment", the "servant's conduct" must be "the kind which he is authorized to perform, occurs substantially within the authorized limits of time and space, and is actuated at least in part, by a desire to serve the master." *See* PROSSER, TORTS 352 (1955). *See also United States v. Sun Diamond Growers of California*, 138 F.3d 961, 970 (D.C. Cir. 1998); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 406-407 (4th Cir. 1985); *United States v. Cincotta*, 689 F.2d 238, 241-242 (1st Cir. 1982). The doctrine of *respondeat superior* was underlined and strengthened by Congress through its enactment of section 16 of the PACA, which explicitly provides an identity of action between a licensee and its employees, agents, and officers acting within the scope of their employment.

Ed Kettle, Complainant's salesman, settled the loads in this case with Respondent while he was at Complainant's place of business, during regular business hours, and in connection with the sale of produce loads made as part of Respondent's business (Tr. 261, 297-304, 309-310, 319, 331-332, 342, 447-449,461-62, 469-70, 509-510, 513). Moreover, sale of the loads and effectuating the settlements on them in this case were what Ed Kettyle "thought he was told to do" by his employer, the Complainant (Tr. 250, 342). And as stated *supra*, we credit Ed Kettyle testimony that in his mind, Complainant wanted him to, and in fact authorized and instructed him to, sell the loads to Respondent and subsequently settle on a price because of the pressure of the season, the overload of product, and instructions to him to "get it done" (Tr. 250, 315, 317, 326, 329, 331-332). The settlements in this case were intended by Ed Kettyle to benefit Complainant and further Complainant's policy of "getting it done" in a tough selling situation (Tr. 250,331-332, 338, 343-344). Therefore, Ed Kettyle was acting within the scope of his employment when he settled with Respondent on prices for the loads in this case.

Complainant argues that if Ed Kettyle settled the loads in this case, he did so without Complainant's knowledge (Complainant's Br. at 8-9). Recent cases before the Secretary have reviewed the issue of identity of action between a corporate PACA licensee and a licensee's employees, and have specifically addressed the issue of whether the licensee's knowledge of the actions is a necessary element of such identity of action. In each of these cases, the licensee was deemed by the Judicial Officer to be liable for the actions of its employees, agents or officers despite the fact that there was no evidence that the officers and directors of the licensee had actual knowledge that the employee, agent, or officer was committing the violations.

This issue was specifically addressed in *In re: Post & Taback, Inc.*, 2003 WL 22965185 (U.S.D.A. Dec. 16, 2003), wherein we set forth the proper[12] interpretation of section 16 of the PACA stating, "[a]s a matter

[12] We reversed the initial decision of Chief Administrative Law Judge James W. Hunt, who had incorrectly decided that a PACA licensee must have actual knowledge that its employee, agent, or officer made illegal payments before the licensee could be held responsible for the actions of its employee, agent, or officer under section 16 of the PACA. *In re:* Post & Taback, Inc., 2003 WL 22965185 (U.S.D.A. Dec. 16, 2003), at *14.

of law, the knowing and willful violations by [Respondent's employees, agents, or officers] are deemed to be knowing and willful violations by Respondent, even if Respondent's officers, directors and owners have no actual knowledge of unlawful gratuities, conspiracy and bribery and would not have condoned the unlawful gratuities, conspiracy, and bribery had they known of them." *Id.* at *13. We further stated that, "the knowledge that can be attributed to a corporate PACA licensee, such as Respondent, is not limited to that which is known by its officers, owners, and directors." *Id.* at *11.

On *de novo* review of a PACA reparation case against Hunts Point wholesaler Koam Produce, the United States District Court for the Southern District of New York found that bribery payments made by Koam's employee were within the scope of his employment and therefore were the acts of Koam. *See Koam Produce, Inc. v. Dimare Homestead, Inc.*, 213 F. Supp. 2d 314 (S.D.N.Y. 2002). The United States Court of Appeals for the Second Circuit affirmed this decision. *Koam Produce, Inc. v. Dimare Homestead, Inc.*, 329 F. 3d 123, 130 (2d Cir. 2003).

In the reparation case, *Dimare Homestead, Inc. v. Koam Produce, Inc.*, 59 Agric. Dec. 866 (U.S.D.A. 2000), a produce seller sued Koam Produce alleging that the price allowance it gave the wholesaler on a load of produce should be set aside on the grounds of misrepresentation or mistake. The seller claimed that its price reduction was based on falsified inspection certificates, resulting from bribes paid to USDA produce inspectors, and that it would not have agreed to the reductions if it had been aware that bribery had taken place. One of the arguments made by Koam was that it should not be held liable for the actions of its employee, Marvin Friedman, who was convicted of bribery. The Judicial Officer disagreed, stating that "although there is no explicit testimony in the record that Friedman was authorized by Koam to bribe the federal inspectors, we conclude that the bribing of the federal inspectors was within his inherent agency power, and was done by Friedman within the scope of his employment." *Id.* at 874. On appeal, the Court upheld this decision, noting that section 16 of the PACA provides that an employer is responsible for the actions of its employees, agents, or officers made "within the scope of his employment or office",

and the bribe payments made by Friedman were within the scope of his employment:

> Koam's attempt to distance itself from Friedman's criminality fails. Friedman was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission, merchant dealer, or broker ...." 7 U.S.C. § 499p. Thus, Friedman's acts--bribing USDA inspectors--are deemed the acts of Koam.

Koam Produce, Inc. v. Dimare Homestead, Inc., 329 F. 3d at 130. Similarly, in *In re: Geo A. Heimos Produce Co., Inc.*, 2003 WL 22680351 (U.S.D.A. Oct. 29, 2003), the Respondent objected to a finding that it had violated the Act, and claimed that it had no actual knowledge of, and did not approve of, alterations of USDA inspection certificates by what it termed a "rogue employee". *Id.* at *19. The Judicial Officer stated that lack of actual knowledge of its employee's actions is not a defense to Respondent's responsibility for its employee's violations of section 2(4) of the PACA. *Id.*

Assuming *arguendo* that Complainant was not aware of Ed Kettyle's settlements until well after they were made (the record shows that the settlements were made and Respondent paid the settled amounts, and then Complainant later [about two months after payment] took issue with the settlement amounts) (Tr. 144, 456, 505; JX 22), under section 16 of the PACA, Complainant is nevertheless bound by Ed Kettyle's settlements. Indeed, the language of section 16 could not be more explicit. The act of employees, agents or officers of a licensee "shall in every case" be the act of the licensee. Moreover, in the case at hand, Ed Kettyle can in no way be deemed to be a "rogue employee", as Mr. Kettyle's testimony establishes that he was acting pursuant to directives of superiors in terms of "getting it done" in a tough selling situation for Complainant (Tr. 250,315, 317, 326, 329, 331-332, 338, 343-344). Ed

Kettyle was acting within the scope of his employment when he settled all of the loads in this case with Respondent, and thus, as a matter of law, Ed Kettyle's acts are deemed the acts of Complainant in this case. (7 U.S.C. § 499p).

We have held in numerous reparation cases that when a party acts in a manner which creates apparent authority in an agent it may be bound by the acts of the agent. *A.P.S. Marketing, Inc. v. M. Degaro Co., Inc.*, 59 Agric. Dec. 416 (U.S.D.A. 2000); *Joe Phillips, Inc. v. City Wide Distributors, Inc.*, 44 Agric. Dec. 468, 1400 (U.S.D.A. 1985); *Western Cold Storage v. Schons*, 38 Agric. Dec. 903 (U.S.D.A. 1979); *Johnson Produce v. R. L. Burnett Brokerage Co.*, 37 Agric. Dec. 1743 (U.S.D.A. 1978); *Arakelian v. O'Day*, 31 Agric. Dec. 1395 (U.S.D.A. 1972); *G. Fava Co. v. Parkhill Produce Co.*, 19 Agric. Dec. 928 (U.S.D.A. 1960); *Johnson v. Fritchey*, 16 Agric. Dec. 1082 (U.S.D.A. 1957); *Tri-State Sales Agency v. Palmetto Fruit & Produce Co.*, 14 Agric. Dec. 1140 (U.S.D.A. 1955).

We have further held that it is a maxim of agency law that a principal is responsible for its agent's actions, even where the agent exceeds the scope of its actual authority. *Westside Produce Co. v. E.L. Kempf & Son, Inc.*, 39 Agric. Dec. 727 (U.S.D.A. 1980). Here, whether Ed Kettyle had authority (or obtained authority) to settle loads (his testimony, which I have already found credible, suggests he did, *see supra*), Complainant was bound by Ed Kettyle's agreed settlements. *See Dragonberry Produce, LLC v. Pic Fresh Global, Inc.*, R-06-053 (U.S.D.A. Oct. 31, 2006) (where we held that the company must honor settlements negotiated by a former salesperson). We stated in that case that it was not unreasonable for Respondent to presume that granting price adjustments was within the scope of employment as salesperson for Complainant, even though Complainant claimed that granting settlements was outside the salesperson's "job description."

Moreover, the testimony of Complainant's own witnesses, when taken together, suggests that each of the loads in question in this case was indeed settled by Complainant. According to Keith Purvis' testimony, it appears that Complainant would not have paid the grower involved on any of the loads in this case until settlement with the buyer was actually made (Tr. 85-93). Greg Cardamone of Complainant testified that the

grower has in fact been paid for all of the loads in question in this case (Tr. 185-186). It follows, then, according to this testimony, that Complainant *in fact* has already "settled" every load in this case with Respondent. Finally, it is not disputed by Complainant that Respondent wrote checks to Complainant for the settled upon amounts, and that Complainant cashed the checks. Based on the foregoing, payment in full for the loads in question in this case has been tendered by Respondent and accepted by Complainant. (*See* U.C.C. § 3-311 and *Pacific Tomato Growers, LTD v. American Banana Co., Inc.*, 60 Agric. Dec. 352 (U.S.D.A. 2001), which states that there can be an accord and satisfaction where the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.))

Here, Complainant knew or had reason to know that Ed Kettyle had settled the payment for the loads in question with Respondent; the aggregate of evidence shows that loads were in fact settled, that Complainant knew or had reason to know that payment of checks tendered by Respondent was for the agreed upon settlement[13], and that the checks were cashed in August of 2007, within one month after the last load in question was shipped to Respondent.

We will briefly note that Complainant bafflingly puts on its case (from the informal stage on up to brief) as if Respondent contacted Complainant, ordered the produce in each load in question (Complainant appears to switch back and forth between a claim that the produce was ordered on an F.o.b. or delivered basis), the produce in each load was of exceptional quality, and Respondent simply failed to pay for most, if not any, of it. From the arguments presented at informal stage and in the formal complaint (and at hearing), Complainant seems to turn a blind eye to the "back story" in the case, or even recognize that a back story could exist. From the arguments presented in brief post-hearing, Complainant

[13] Ed Kettyle states that he sent an email to his supervisors after the checks were cashed by Complainant, and Complainant waited two months to then contact Respondent and inform it that they were unhappy with Respondent's returns in its accounts of sale. The email stated that Mr. Kettyle had already settled the loads in question in this case and questioned why Complainant was "going back on it now" (Tr. 280).

seems to ignore (and will that we in turn do so) some of the testimony of its own witnesses and all of the testimony of Respondent's witnesses, and more, the existence of all documents involving each load, which establish that there *was* in fact a situation *other* than a straight F.o.b. or delivered sale involved as to every load (i.e. Respondent did not contact Complainant and order/purchase the loads), that Complainant prevailed upon Respondent to handle the loads, that the price was settled after Respondent handled the loads, and that Respondent paid Complainant (and Complainant accepted) the settled amounts. We further note that Complainant puts on a case for damages that asks that Respondent pay the full market value for seemingly exceptional, or at least, good quality produce, plus freight, for every load (Tr. 141-229, 150-152; Complainant's Brief, pgs. 11-17). Based on the testimony of all witnesses and documents, that shows, *inter alia*, that Respondent did not specifically order the produce, that Respondent never agreed to pay for freight[14], that there was clearly an issue of distressed produce in this case, and clearly an issue of settling on a prices after Respondent sold the loads in question, Complainant's position on damages borders on absurd.

While management (or ownership) at Complainant company may have reviewed the settlements reached *after* the fact and decided that the settlements did not provide Complainant with enough money (Tr. 443, 452-454), we find that the settlement amounts presented by Respondent in the case were indeed authorized by Complainant, and that Complainant accepted and cashed the checks provided by Respondent as payment for the agreed upon settlement amounts. Accordingly, Complainant has failed to prove its case, and its Complaint should be dismissed. Complainant is therefore not entitled to damages or attorney's fees.

Fees and Expenses

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853, 864 (U.S.D.A. 2000); *Mountain Tomatoes,*

[14] Complainant admits that many of the loads in this case were redirected to Respondent after being delivered elsewhere by Complainant and rejected (Tr. 223-225); a fact that makes Complainant's position that Respondent "ordered" the produce and somehow agreed to pay for, or should, pay for freight, even more baffling.

Inc. v. E. Patapanian & Son, Inc., 48 Agric. Dec. 707, 715 (U.S.D.A. 1989). The question of which party is the prevailing party is one that depends upon the facts of the case. *Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric Dec. 343 (U.S.D.A. 2003). In hearing cases, it is the province of the Secretary to determine what are reasonable fees and expenses. *Mountain Tomatoes*, 48 Agric. Dec. 707 (U.S.D.A. 1989).

Each party made claims for fees and expenses in this case. Since Complainant failed to carry its burden of proof for which its Complaint should be dismissed, it is not the prevailing party. As Respondent is the prevailing party here it is entitled to reasonable fees and expenses. Respondent claimed $8,423.00 of duly itemized fees and expenses incurred in preparation for the hearing in this case. We find these fees and expenses reasonable, and allow them.

Respondent also claimed $6,022.80 in fees and expenses in connection with attendance at hearing. Of those, the itemization for "travel time: roundtrip from office to courthouse", in the amount of $1,777.50, is disallowed. *See Golden Harvest Farms, Inc. v. Stanley Produce Co., Inc.*, 38 Agric. Dec. 727 (U.S.D.A. 1979); *East Produce, Inc., v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (U.S.D.A. 2000) (attorney's fees claimed for time spent in travel disallowed). Therefore, $4,245.30 is allowed in connection with attendance at hearing. We note that in the itemization for fees and expenses in connection with hearing, Respondent claims costs associated with one of Respondent's witnesses, Ed Kettyle. Fees for voluntary non-subpoenaed witnesses are allowable. *Watson Distributing v. Fruit Unlimited, Inc.*, 42 Agric. Dec. 1613, 1618 (U.S.D.A. 1983).

The fees and expenses provision under section 7(a) of the PACA has been interpreted to exclude any fees or expenses which would have been incurred in connection with the case if that case had been heard by documentary procedure. *Mountain Tomatoes, Inc. v. Patapanian & Son*, 48 Agric. Dec. 707 (U.S.D.A. 1989); *Pinto Bros. v. F.J. Bolestrieir Co.*, 38 Agric. Dec. 269 (U.S.D.A. 1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 24 (U.S.D.A. 1977); *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (U.S.D.A. 2000). Accordingly, we deny the "post hearing fees and costs" claim of

Respondent's attorney for hours expended on the post hearing brief and costs for photocopies of legal research, and find that such activity is not connected to the oral hearing. This activity takes place entirely after the hearing is completed.

While it is true that in preparing a post hearing brief, time spent in review of the transcript and citation to same would not occur had the case been decided under the documentary procedure (as there would be no transcript to review and cite when preparing the brief), in this case, Respondent's attorney has given no indication of the portion of time preparing the post hearing brief that was actually spent reviewing and citing to sections of the transcript in the brief (the time spent reviewing the transcript and performing legal research for the brief is lumped together) (Resp't's Fee Req., Ex. C.) Therefore, we disallow the entire amount claimed by Respondent's attorney for preparation of Respondent's brief. However, we will allow the costs of transcript copies, $48.24, claimed by Respondent's attorney, as that amount was incurred as a direct result of the hearing, and the expense would not have been incurred had the case been decided by documentary procedure. Based on the foregoing, the allowable amount of expenses claimed by Respondent's attorney is $12,716.54 ($8,423.00 plus $4,245.30 plus $48.24).

ORDER

The Complaint in this case is dismissed.

Within thirty (30) days from the date of this Order, Complainant shall pay Respondent, the prevailing party, the amount of $12,716.54 in attorney's fees and expenses.

Copies of this Order shall be served upon the parties.

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M & M PACKAGING, INC. v. CASA DE CAMPO, INC.
PACA Docket No. E-R-2010-288.
Decision and Order; Order on Reconsideration.
Filed March 9, 2012.

[Cite as: 70 Agric. Dec. xx (U.S.D.A. 2011), *published in* 72 Agric. Dec. xx (U.S.D.A. 2013).]

PACA-R.

Procedure – Prejudgment interest limited to amount sought in complaint

Complainant sought interest in a specified amount on the past due debt at the rate stated on its invoices. Because Complainant sought a specified amount of prejudgment interest in its complaint, the award of prejudgment interest was limited to the dollar amount sought in the complaint.

Shelton S. Smallwood, Presiding Officer.
Earl E. Elliott, Examiner.
Robert N. Isseks, Counsel for Complainant.
Andrew Squire, Counsel for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act ("PACA"), 1930, as amended (7 U.S.C. § 499a *et seq*.) ("Act"). A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $53,575.40,[1] allegedly due in connection with eleven (11) truckloads of potatoes and onions shipped in the course of interstate 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 that admits liability

[1] $51,156.00 plus $345.00 for bank charges and $2,074.40 for interest at the rate of eighteen percent (18%) per annum for amounts due over thirty (30) days.

to Complainant in the amount of $31,616.00 and asserts an affirmative defense.

On September 15, 2010, in accordance with section 7(a) of the Act, an Order Requiring Payment of the Undisputed Amount was issued, requiring Respondent to pay Complainant $31,616.00, plus interest at the rate of .26% per annum from June 1, 2010, until paid, plus the $500.00 handling fee Complainant paid to file the Complaint. Respondent has not made payment to Complainant on the Order. Respondent's liability for payment of the disputed amount was left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

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 under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the ROI. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant did not file additional evidence. Respondent submitted an Answering Statement which was not filed timely within the Department's allotted filing period. Neither party filed briefs.

Findings of Fact

1. Complainant is a corporation whose post office address is 401 Pulaski Hwy. Rd. #2, Goshen, NY 10924. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a corporation whose post office address is 4 Dundee Ave., Patterson, NJ 07503. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. Complainant, by oral contract, sold and shipped eleven (11) truckloads of potatoes and onions to Respondent, f.o.b.[2] Ten (10) of

[2] Complainant's invoices are silent as to the terms of delivery, therefore f.o.b. terms are assumed. Hunts Point Tomato Co., Inc. v. S & K Farms, Inc., 42 Agric. Dec. 1224, 1225 (U.S.D.A. 1983).

Complainant's eleven (11) invoices state "Interest is charged on all accounts 30 days past due at the monthly Periodic Rate of 1-1/2 % which approximates AN ANNUAL PERCENTAGE RATE OF 18%." (Compl. Ex. 3, 5, 7, 9, 11, 13, 15, 17, 19, 21). One invoice, number 20797, does not contain the eighteen percent (18%) interest terms (Compl. Ex. 1). Complainant's 11 invoices are set forth more fully below:

Inv. No.	***Date***	***Description***	***Price***	***Total***
20797	12-24-2009	200 10-LB BAGS ONIONS	$1.50	$300.00
		50 20/2-LB BAGS RED ONIONS	$11.00	$550.00
		20 50-LB BAGS WHITE ONIONS	$13.00	$260.00
		40 50-LB BAGS SPANISH ONIONS	$9.00	$360.00
		80 25-LB BAGS RED JUMBO	$7.00	$560.00
		160 10/5-LB BAGS EASTERN POTATOES	$6.50	$1,040.00
		25 10/5-LB BAGS RED POTATOES	$13.50	$337.50
		50 50-LB BAGS CHEF POTATOES	$7.00	$350.00
		Invoice Total		*$3,757.50*

(Compl. Ex. 1).

Inv. No.	***Date***	***Description***	***Price***	***Total***
20893	1-06-2010	200 10-LB BAGS ONIONS	$1.50	$300.00
		200 10-LB BAGS RED ONIONS	$2.00	$400.00
		50 20/2-LB BAGS ONIONS	$8.00	$400.00
		50 20/2-LB BAGS RED ONIONS	$11.00	$550.00
		45 50-LB BAGS YELLOW ONIONS	$4.00	$180.00
		21 50-LB BAGS WHITE JUMBO ONIONS	$13.50	$283.50
		150 10/5 LB BAGS EASTERN POTATOES	$7.00	$1,050.00
		42 50-LB BAGS RED A POTATOES	$13.50	$567.00
		15 WHITE C'S	$40.00	$600.00
		40 50-LB BAGS SPANISH ONIONS	$11.00	$440.00
		Invoice Total		*$4,770.50*

(Compl. Ex. 3).

ERRATA

Inv. No.	***Date***	***Description***	***Price***	***Total***
19817	1-09-2010	45 50-LB BAGS SPANISH COL ONIONS	$11.00	$495.00
		50 20/2 LB BAGS ONIONS	$8.00	$400.00
		50 20/2 LB BAGS RED ONIONS	$11.00	$550.00
		250 10/5-LB BAGS EASTERN POTATOES	$8.00	$2,000.00
		7 50-LB BAGS RED C POTATOES	$45.00	$315.00
		Invoice Total		*$3,760.00*

(Compl. Ex. 5).

Inv. No.	***Date***	***Description***	***Price***	***Total***
19839	1-16-2010	200 10-LB BAGS ONIONS	$1.50	$300.00
		200 10-LB BAGS RED ONIONS	$2.00	$400.00
		90 50-LB BAGS ONIONS	$5.00	$450.00
		30 50-LB BAGS WHITE ONIONS	$32.00	$960.00
		50 20/2-LB BAGS ONIONS	$8.50	$425.00
		50 20/2-LB BAGS RED ONIONS	$13.00	$650.00
		100 10/5-LB BAGS EASTERN POTATOES	$7.50	$750.00
		126 50-LB BAGS RED A POTATOES	$13.50	$1,701.00
		84 80-CT RUSSET	$10.00	$840.00
		14 WHITE C'S	$40.00	$560.00
		Invoice Total		*$7,036.00*

(Compl. Ex. 7.)

Inv. No.	***Date***	***Description***	***Price***	***Total***
19918	1-23-2010	50 20/2-LB BAGS ONIONS	$9.00	$450.00
		80 25-LB BAGS RED MEDIUM ONIONS	$7.00	$560.00
		160 10/5-LB BAGS EASTERN POTATOES	$8.00	$1,280.00
		120 5/10 LB BAGS RUSSET POTATOES	$8.50	$1,020.00
		50 50-LB BAGS CHEF POTATOES	$8.00	$400.00
		84 50-LB BAGS RED A POTATOES	$13.50	$1,134.00
		Invoice Total		*$4,844.00*

(Compl. Ex. 9).

Inv. No.	*Date*	*Description*	*Price*	*Total*
20005	2-06-2010	200 10-LB BAGS RED ONIONS	$2.50	$500.00
		50 20/2 LB BAGS ONIONS	$10.00	$500.00
		50 20/2 LB BAGS RED ONIONS	$14.00	$700.00
		80 25-LB BAGS RED MEDIUM ONIONS	$8.00	$640.00
		100 10/5-LB BAGS EASTERN POTATOES	$8.00	$800.00
		25 10/5-LB BAGS RED POTATOES	$13.50	$337.50
		42 50-LB BAGS RED A POTATOES	$13.50	$567.00
		Invoice Total		*$4,044.50*

(Compl. Ex. 11).

Inv. No.	*Date*	*Description*	*Price*	*Total*
21121	2-18-2010	200 10-LB BAGS YELLOW ONIONS	$1.75	$350.00
		72 10-LB BAGS RED ONIONS	$2.50	$180.00
		50 20/2-LB BAGS YELLOW ONIONS	$10.00	$500.00
		50 20/2-LB BAGS RED ONIONS	$15.50	$775.00
		90 50-LB BAGS YELLOW ONIONS	$5.00	$450.00
		100 10/5-LB BAGS EASTERN POTATOES	$8.00	$800.00
		50 5/10-LB BAGS RED POTATOES	$10.00	$500.00
		168 50-LB BAGS RED A POTATOES	$13.50	$2,268.00
		Invoice Total		*$5,823.00*

(Compl. Ex. 13).

Inv. No.	*Date*	*Description*	*Price*	*Total*
21197	2-25-2010	200 10-LB BAGS RED ONIONS	$3.50	$700.00
		50 20/2-LB BAGS YELLOW ONIONS	$11.00	$550.00
		50 20/2-LB BAGS RED ONIONS	$16.00	$800.00
		90 50-LB BAGS SPANISH ONIONS	$16.00	$1,440.00
		25 50-LB BAGS WHITE ONIONS	$50.00	$1,250.00

		84 50-LB BOXES RED POTATOES	$13.50	$1,134.00
		Invoice Total		*$5,874.00*

(Compl. Ex. 15).

Inv. No.	***Date***	***Description***	***Price***	***Total***
21308	3-25-2010	50 20/2-LB BAGS SMALL YELLOW ONIONS	$12.00	$600.00
		50 20/2-LB BAGS RED ONIONS	$28.00	$1,400.00
		50 50-LB BAGS SMALL YELLOW ONIONS	$15.00	$750.00
		50 50-LB BAGS SPANISH ONIONS	$25.00	$1,250.00
		Invoice Total		*$4,000.00*

(Compl. Ex. 17).

Inv. No.	***Date***	***Description***	***Price***	***Total***
21353	4-02-2010	199 10-LB BAGS ONIONS	$3.50	$696.50
		50 20/2-LB BAGS SMALL YELLOW ONIONS	$12.00	$600.00
		30 20/2-LB BAGS RED ONIONS	$28.00	$840.00
		50 50-LB BAGS SPANISH ONIONS	$26.00	$1,300.00
		30 25-LB BAGS RED MEDIUM	$17.00	$510.00
		Invoice Total		*$3,946.50*

(Compl. Ex. 19).

Inv. No.	***Date***	***Description***	***Price***	***Total***
21393	4-7-2010	50 20/2-LB ONIONS PP	$12.00	$600.00
		30 20/2-LB BAGS RED ONIONS	$28.00	$840.00
		50 50-LB BAGS SPANISH ONIONS	$27.00	$1,350.00
		30 25-LB BAGS RED MEDIUM	$17.00	$510.00
		Invoice Total		*$3,300.00*

(Compl. Ex. 21).

4. On September 7, 2010, subsequent to the filing of the Complaint, Complainant advised the Department that it received payments of $1,000.00 from Respondent on August 3, 2010, and $1,000.00 from

Respondent on August 13, 2010, or $2,000.00 in total payments. Respondent attempted to make additional payments to Complainant with checks which were returned by Complainant's bank for insufficient funds, resulting in $345.00 in bank charges for Complainant (Compl. Ex. 23-45, 47-50).

5. The informal Complaint was filed on April 20, 2010 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover $53,575.40, arising from $51,156.00 allegedly due in connection with 11 truckloads of potatoes and onions shipped in the course of interstate commerce, plus $345.00 in bank charges for checks tendered by Respondent as payment which were returned by Complainant's bank for insufficient funds, and $2,074.40 for interest at the rate of 18% per annum for amounts due over 30 days. (Compl. ¶¶ 6, 8, Ex. 46.)

Complainant states that Respondent accepted the potatoes and onions in compliance with the contracts of sale, but that it has since failed, neglected, and refused to pay Complainant the amount of $53,575.40 as explained above (Compl. ¶¶ 6, 8). However, on September 7, 2010, subsequent to the filing of the Complaint, Complainant advised the Department that it received payments of $1,000.00 from Respondent on August 3, 2010, and $1,000.00 from Respondent on August 13, 2010, or $2,000.00 in total payments. Complainant's total claim is therefore reduced by $2,000.00, to $51,574.54, which is the amount Complainant seeks to recover in this proceeding.

Complainant, as the moving party, has the burden of proving its allegations by a preponderance of the evidence. *Sun World Int'l, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (U.S.D.A. 1987); *W.W. Rodgers & Sons v. Cal. Produce Distribs., Inc.*, 34 Agric. Dec. 914, 919 (U.S.D.A. 1975). To support its claim, Complainant submitted copies of its 11 invoices billing Respondent for the potatoes and onions (Compl. Ex. 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21) and invoices from its bank, totaling $345.00, for checks Respondent tendered as payment which

were returned by Complainant's bank for insufficient funds (Compl. Ex. 23-45, 47-50), and a spreadsheet showing Complainant's calculation that $2,074.4 0 is due for interest at the rate of eighteen percent (18%) per annum (Compl. Ex. 46).

In response to Complainant's allegations, Respondent submitted an unsworn Answer that admits liability to Complainant in the amount of $31,616.00 (Answer at 1). On September 15, 2010, in accordance with section 7(a) of the Act, an Order Requiring Payment of Undisputed Amount was issued, requiring Respondent to pay Complainant $31,616.00, plus interest at the rate of .26% per annum from June 1, 2010, until paid, plus the $500.00 handling fee Complainant paid to file the Complaint. Respondent has not made payment to Complainant on the Order.

Since Respondent admits liability to Complainant for the potatoes and onions and does not allege that it rejected any of the potatoes and onions, we conclude that Respondent accepted the eleven (11) truckloads of potatoes and onions at issue. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2 (dd)(3). 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. *Ocean Breeze Export, Inc. v. Rialto Distrib., Inc.*, 60 Agric. Dec. 840, 844 (U.S.D.A. 2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (U.S.D.A. 1988). The burden to prove a breach of contract rests with the buyer of the accepted goods. U.C.C. § 2-607(4); *see also Grower-Shipper Potato Co. v. Sw. Produce Co.*, 28 Agric. Dec. 511 (U.S.D.A. 1969).

There is no dispute that the potatoes and onions were sold f.o.b. The Regulations (Other than Rules of Practice) Under the Act (7 C.F.R. § 46.43(i)) define f.o.b. as follows:

> F.o.b. means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the [buyer] through land transportation at shipping point, in suitable shipping condition, and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. . . .

"Suitable shipping condition" is defined in the Regulations (Other than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j)) as meaning "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties." By definition, the suitable shipping condition warranty is applicable only where transportation service and conditions are normal.[3] Where goods are accepted, the burden is upon the buyer to prove that the transportation conditions were normal. *Dave Walsh Co. v. Rozak's Produce Co.*, 39 Agric. Dec. 281, 284 (U.S.D.A. 1980). As the issue of abnormal transportation has not been raised here by either of the parties, we assume that the transportation service and conditions were normal. *Dave Walsh Co., Inc.* at 284; *Veg-A-Mix v. Wholesale Produce Supply*, 37 Agric. Dec. 1296, 1299 (U.S.D.A. 1978); *Hartsell v. Angel Produce Co.*, 29 Agric. Dec. 153, 156 (U.S.D.A. 1970). We conclude therefore that Complainant's suitable shipping condition

[3] 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 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).

warranty applies to the eleven (11) shipments of potatoes and onions at issue.

The next issue we will discuss is whether Respondent has asserted any legitimate affirmative defenses. "[T]he burden is on [R]espondent to establish, by a preponderance of the evidence, [its] affirmative defense." *Newmiller Farms, Inc. v. Nicolls*, 36 Agric. Dec. 1230, 1232 (U.S.D.A. 1977). Respondent submitted an unsworn Answering Statement which was not filed timely within the Department's allotted time period. Statements that are unsworn or unverified are without evidentiary value. *C. H. Robinson Co. v. ARC Fresh Food System, Inc.*, 50 Agric. Dec. 950, 952 (U.S.D.A. 1991); *Prillwitz v. Sheehan Produce*, 19 Agric. Dec. 1213, 1215 (U.S.D.A. 1960). Although the unverified pleadings are not evidence, they do serve to frame the issues between the parties. *J.R. Norton Co. v. Corgan & Son, Inc.*, 44 Agric. Dec. 2130, 2132 (U.S.D.A. 1985). Respondent asserts an affirmative defense in its unsworn and untimely Answering Statement that several adjustments were authorized by an employee of Complainant and that Complainant agreed to allow Respondent to sell "off product" price after sale (Answering Statement at 1). The party that claims the contract was modified has the burden of proof. *Garren-Teed Co., Inc. v. Mo-Bo Enters., Inc.*, 51 Agric. Dec. 811, 813 (U.S.D.A. 1992); *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506, 508 (U.S.D.A. 1975); *Regency Packing Co., Inc. v. Auster Co., Inc.*, 42 Agric. Dec. 2042, 2045 (U.S.D.A. 1983). Respondent did not provide evidence to support its unverified claim that Complainant's employee agreed to price adjustments or evidence, such as USDA inspection reports, to prove that it received "off product" from Complainant or that Complainant agreed to amend the terms of any of the eleven (11) sales contracts to price after sale. For the reasons stated, we find that Respondent's affirmative defense is without merit.

We find Respondent liable to Complainant for the full purchase price for eleven (11) truckloads of potatoes and onions, or $51,156.00. Complainant submitted evidence showing that it incurred $345.00 in bank charges for Respondent's checks tendered as payments which were returned by Complainant's bank for insufficient funds (Compl. Ex. 23-45, 47-50). We find that Complainant is entitled to reimbursement for the bank charges as consequential damages. *J&C Enters., Inc. v. Homeland*

Produce, 58 Agric. Dec. 1102, 1105 (U.S.D.A. 1999). This brings the amount due Complainant from Respondent to $51,501.00.

In addition, Complainant seeks $2,074.40 for interest at the rate of eighteen percent (18%) per annum for amounts due over thirty (30) days (Compl. ¶ 6, Ex. 46). Complainant's claim is based on its invoices, containing the statement, "Interest is charged on all accounts 30 days past due at the monthly Periodic Rate of 1-1/2 % which approximates AN ANNUAL PERCENTAGE RATE OF 18%" and a spreadsheet showing Complainant's calculation that $2,074.40 is due for interest at the rate of eighteen percent (18%) per annum up to May 28, 2010. As mentioned above, on September 15, 2010, in accordance with section 7(a) of the Act, an Order Requiring Payment of Undisputed Amount was issued, requiring Respondent to pay Complainant $31,616.00, plus interest at the rate of .26% per annum from June 1, 2010, until paid, plus the $500.00 handling fee Complainant paid to file the Complaint. Respondent has not made payment to Complainant on the Order.

If parties contract for the payment of interest at a rate which is different than that normally awarded in reparation proceedings, this forum will award the percent of interest for which the parties contracted. Terms contained in the seller's invoice become part of the parties' contract unless (1) the buyer expressly limited the seller's acceptance to the terms of the offer; or (2) the buyer objects to the new terms within a reasonable time; and (3) the additional terms materially alter the contract. *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 223 (2d Cir. 2000). Here, Respondent has made no claim that it limited its offer or timely objected to the interest provision in the invoices, or that the interest provision materially altered[4] the contract. The parties contracted, via the invoices issued to Respondent for the payment of interest at a rate of eighteen percent (18%) per annum on balances unpaid after thirty (30) days. In accordance with PACA precedent case, *Dennis B. Johnston v. AG Grower Sales LLC*, PACA Docket No. R-08-137,

[4] It was held in *Dayoub Mktg., Inc. v. S.K. Produce Corp.*, 2005 U.S. Dist. Lexis 26974 (S.D.N.Y. 2005) that a one and one-half percent (1.5%) interest charge per month does not materially alter the parties contract. *See also* Morris Okun, Inc. v. Harry Zimmerman, Inc., 814 F.Supp. 346, 351 (S.D.N.Y 1993) (enforcing a term in the invoice through which the defendant agreed that "past due accounts will accrue 1.25% interest per month").

decided July 2, 2010, Complainant could be entitled to claim eighteen percent (18%) interest for the period of time until an Order is entered in this case (prejudgment interest) which greatly exceeds the contractual interest of $2,074.40 which Complainant seeks to recover in this proceeding. As Complainant seeks to only recover contractual interest until May 28, 2010, or $2,074.40 in this proceeding, we shall limit Complainant's prejudgment interest to the amount requested, or $2,074.40, less $230.58 requested for invoice number 20797 (Compl. Ex 1) which does not contain the 18% interest terms, for a total of $1,843.82. *Clark Produce v. Primary Export Int'l, Inc.*, 52 Agric. Dec. 1715, 1723 (U.S.D.A. 1993); *Willoughby v. Frito-Lay, Inc.*, 45 Agric. Dec. 1245, 1263 (U.S.D.A. 1985). Adding $1,843.82 for Complainant's prejudgment interest, brings the balance due Complainant by Respondent to $53,344.82. Subtracting Respondent's total payments of $2,000.00,[5] we find Respondent liable to Complainant for $51,344.82.

Respondent's failure to pay Complainant $51,344.82 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (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 Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). 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.

[5] On September 7, 2010, subsequent to the filing of the Complaint, Complainant advised the Department that it received a payment of $1,000.00 from Respondent on August 3, 2010, and that it received another payment of $1,000.00 from Respondent on August 13, 2010, for $2,000.00 in total payments.

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 Under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (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 issuance of this Order, Respondent shall pay Complainant as reparation $51,344.82, with interest at the rate of .26% per annum on the amount of $31,616.00 from the date of this Order, until paid, plus interest at the rate of 0.10% per annum on the amount of $19,728.82 from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), a Decision and Order was issued on September 22, 2011, in which Respondent was ordered to pay Complainant as reparation $51,344.82, with interest thereon at the rate of 0.26 percent per annum on the amount of $31,616.00 from the date of the Order, until paid. Respondent was further ordered to pay Complainant interest at the rate of 0.10 percent per annum on the amount of $19,728.82 from the date of this Order, until paid, plus the amount of $500.00. Initially, we note that the September 22, 2011, Decision and Order concerned only the sum of $19,728.82 that remained in dispute between the parties, as Respondent had already been ordered to pay Complainant the undisputed sum of $31,616.00, plus interest at the rate of 0.26 percent per annum from June 1, 2010, until paid, plus the amount of $500.00, by Order dated September 15, 2010.

Therefore, the Decision and Order of September 22, 2011, should have awarded Complainant the sum of $19,728.82, with interest thereon at the rate of 0.10 percent per annum from September 22, 2011, until paid.

On October 13, 2011, the Department received from Complainant a Petition for Reconsideration of the Order. Respondent was served with a copy of the Petition and afforded the opportunity to submit a reply. Respondent did not submit a timely reply to Complainant's Petition.

In its Petition, Complainant states that it erred in calculating interest only up to date of the Complaint, May 28, 2010 (Pet. at 1). Complainant states it never intended to limit the amount of interest awarded and that it should not have stated a specific amount of interest in the Complaint (Pet. at 1). Accordingly, Complainant requests that we "honor the 18% Interest language" stated on its invoices, i.e., that we allow Complainant to recover pre-judgment interest at the rate of eighteen percent (18%) per annum from the date payment was due through the date of the Decision and Order (Pet. at 1).

A petition for reconsideration "shall state specifically the matters claimed to have been erroneously decided and the alleged errors." 7 C.F.R. § 47.24(a). Complainant has not alleged that the decision was erroneously decided or contained errors; rather, Complainant is requesting that reconsideration be given for its error in the Complaint. Since Complainant had ample opportunity to discover and correct its mistake during the course of the documentary procedure under which the case was heard, we are denying Complainant's request.

Based on our review of the evidence and for the reasons cited, we conclude that Complainant's petition is without merit and should be denied. There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in section 7 of the Act (7 U.S.C. § 499g).

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant, as reparation, $19,728.82, with interest thereon at the rate of 0.10 percent per annum from September 22, 2011, until paid.

Copies of this Order shall be served upon the parties.

_____

FROERER FARMS, INC., D/B/A OWYHEE PRODUCE v. SELECT ONION LLC.
PACA Docket No. W-R-2007-433.
Decision and Order; Order on Reconsideration.
Filed March 30, 2012.

[Cite as: 71 Agric. Dec. xxxiv (U.S.D.A. 2012), *published in* 72 Agric. Dec. xxxiv (U.S.D.A. 2013).]

PACA-R.

Revocation of Acceptance

Where Complainant delivered onions to Respondent that were grown in fields treated with the pesticide Furadan after it expressly warranted that the onions sold to Respondent would be Furadan-free, Complainant materially breached the contract. Respondent's subsequent communication to Complainant concerning the unfitness of the onions, its refusal to pay Complainant's invoices, and its demand for a refund of the sums it had already paid, constituted a revocation of acceptance. As the nonconformity of the onions, which was both difficult to discover and obscured by Complainant's assurances, substantially impaired the onions' value to Respondent, and the revocation was communicated to Complainant within a reasonable time after the breach was discovered, Respondent's revocation was held permissible.

Charles Kendall, Presiding Officer.
Leslie Wowk, Examiner.
Meuers Law Firm, P.C., Counsel for Complainant
Rynn & Janowsky, LLP, Counsel for Respondent
Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as "the Act." A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against

Respondent in the amount of $36,956.71 in connection with ten truckloads of onions shipped in the course of interstate commerce.

Copies of the Report of Investigation 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 Counterclaim in the amount of at least $125,393.04 for damages allegedly sustained in connection with its purchase of the ten truckloads of onions at issue in the Complaint, and for payments that Respondent made to Complainant for earlier purchases of Complainant's onions. Complainant filed a reply to the Counterclaim denying liability to Respondent.

The amount claimed in both the Complaint and the Counterclaim exceeds $30,000.00, and Respondent, in its Answer and Counterclaim,[1] requested an oral hearing. On July 28, 2009, the parties entered a Joint Stipulation Setting Deadlines under the Documentary Procedure 7 C.F.R. 47.20 ("Joint Stipulation"), whereby they agreed "to have the documentary procedure set forth in the regulations at 7 C.F.R. § 47.20 govern the case," but with "slight modifications to the deadlines for the required filings." Joint Stipulation ¶¶ iv-v. Therefore, by agreement of the parties, the case proceeded under the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20), although the times prescribed for filings in sections 47.20 (c), (d), (e) and (g) were replaced with the times agreed upon by the parties in their Joint Stipulation.

Under the documentary procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("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.[2]

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[1] Respondent's submission entitled "Respondent Select Onion's Answer to Formal Complaint with Affirmative Defenses and Counterclaim; Request for Oral Hearing" is referred to here and throughout this decision as "Answer and Counterclaim."

[2] Complainant's Opening Statement is an affidavit signed and sworn to by its Manager, Craig Froerer, its General Manager, Shay Myers, and its Office Manager, Robin Froerer.

Respondent filed an Answering Statement.[3] Both parties also submitted a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 3150 Echo Road, Nyssa, OR 97913. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a limited liability company whose post office address is P.O. Box 1010, Ontario, OR 97914. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On August 3, 2006, the United States Environmental Protection Agency ("EPA") issued an Interim Reregistration Eligibility Decision concerning the pesticide carbofuran wherein it concluded:

> The Agency is proposing to cancel all uses of carbofuran based on ecological, occupational, and dietary risks of concern, and to revoke all tolerances, with the exception of bananas, rice, sugarcane, and coffee. These tolerances will be maintained for import purposes only. Several uses were identified as having moderate benefits to growers, and the Agency is proposing to implement a 4-year phase-out for those crops. Therefore EPA is proposing to delay the effective date of revocation of the tolerances for artichokes, corn, peppers, and sunflowers until 2010. All other tolerances will be proposed for revocation following completion of this IRED.

(ROI Ex. E at 16-41.)

4. On September 1, 2006, the Oregon Department of Agriculture ("ODA") sent correspondence to local onion growers advising that the Idaho and Oregon Departments of Agriculture had initiated investigations concerning the reported use of the restricted pesticide,

[3] Respondent's Answering Statement is an affidavit signed and sworn to by its Managing Member, Farrell Larson, its Vice-President of Sales and Marketing, Susan Williams, and its Director of Operations, Loney Larson.

carbofuran, in an off-label manner to treat onion crops for control of thrips (ROI Ex. E at 8).

5. Between September 5 and 15, 2006, onion samples from Complainant's fields were tested for the presence of carbofuran by the Idaho Food Quality Assurance Laboratory. No carbofuran was detected in the onions (ROI Ex. E at 11, 114, 116, 118-121).

6. On or about September 9, 2006, Respondent paid Complainant for the onions it received as of that date with check number 20516 in the amount of $6,000.00. (Answering Stmt. ¶ 9; ROI Ex. E at 3.)

7. Between September 10 and 15, 2006, onion samples from Complainant's fields were tested for the presence of carbofuran by ODA Laboratory Services. No carbofuran was detected in the onions (ROI Ex. E at 111-113, 115).

8. On September 24, 2006, ODA investigator Michael Babbitt ("Babbitt") and ODA brand inspector Darrell Cochran ("Cochran") made an unannounced visit to the place of business of Complainant, where they spoke with Complainant's Craig Froerer ("Froerer"). At that time, Froerer advised Babbitt and Cochran that he had not applied Furadan (carbofuran)[4] to onions or to any of his other crops. Froerer provided Babbitt and Cochran with a list of the applications of pesticides that he had made to his onions in 2006 (ROI Ex. E at 46).

9. On September 26, 2006, the ODA collected samples from Complainant's fields, analyzed the samples, and found the following residues (except where indicated otherwise, the samples were of soil):

[4] Carbofuran is the active ingredient in Furadan.

Farm Service Tract. field	carbofuran (ppm)	3-hydroxycarbofuran*
825-1	0.024 (vegetative)	<0.01
840-5	0.071	<0.01
840-5	0.011 (vegetative)	0.03 (vegetative)
847-6&7	0.057 (vegetative)	<0.01
847-5	0.027	<0.01
1189-2	0.013	<0.01
803-3	0.010	<0.01
803-4&5	0.100	0.024

*3-hydroxycarbofuran is a degradant of carbofuran.

(ROI Ex. E at 52, 147-160.)

10. On October 4, 2006, Bob Spencer, agricultural resources program manager for the Idaho Department of Agriculture, advised Dale Mitchell ("Mitchell"), assistant administrator of the ODA Pesticides Division, that 10 parts per billion (ppb) of carbofuran had been detected in onion bulbs collected from an Idaho field of Complainant. Mitchell called Froerer and again asked whether Complainant had applied Furadan to its onions. Froerer replied that they had. On the same date, the ODA issued an embargo on all onions grown by Complainant in Oregon (ROI Ex. E at 47, 102-107).

11. On October 5, 2006, after reviewing market assurance analytical results of onion bulb samples taken from Complainant's fields, the ODA released Complainant from the embargo (ROI Ex. E at 125-128). On the same date, Complainant and Respondent entered a written "Agreement" providing as follows:

> Complainant will:
>
> • Rent Respondent's rail loading facility in Ontario, Oregon no longer than April 1, 2006;

- Supply all personnel and equipment to load rail cars at the facility;

- Pay utilities of $50.00 per month to Respondent;

- Repair any damage done to the rail loading facility; and

- Allow Respondent the right to match the price for any processing onions and super colossal onions that Complainant has for sale.

Respondent will:

- Allow Complainant to use rail cars assigned to Respondent at no charge;

- Allow Complainant to use Respondent's customer base to sell their onions; and

- Pay for all onions purchased from Complainant within 30 days of receipt of invoice.

(ROI Ex. E at 9.)

12. On November 4, 2006, Complainant and Respondent entered a written "Onion Purchase Contract" providing as follows:

- Complainant will supply US #1 yellow onions packaged in plastic bins (supplied by Respondent) and supply grade sheets;

- Complainant will supply, upon request by Respondent, a data sheet listing all fertilizers, herbicides, pesticides, and fungicides that have been used to produce the onions covered under the contract, and any other information needed under the Food Securities Act;

- The minimum size of the onions will be 4 ½ inches (no more than 5% under) with no maximum size;

- A minimum of 80 percent of the onions supplied under the contract will have single centers;

- The contract will begin on November 1, 2006, and end on March 31, 2007;

- Demands for quantity will be made with four days notice;

- The total volume of onions committed under the contract is 10,000 pounds;

- Respondent will pay market price at time of each order minus $0.0250/lb bag cost; and

- Respondent will pay for the onions in 30 days.

(ROI Ex. A at 24.)

13. On or about November 17, 2006, a supplemental Furadan sales report was submitted to the ODA by JC Watson Company ("Watson"), Homedale, Idaho. The report included an invoice showing that on or about December 20, 2005, Watson sold to Complainant forty-five (45) gallons of FMC Corp. Furadan 4F insecticide (ROI Ex. E at 47, 91-97).

14. On or about November 27, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217479 billing Respondent for 252 fifty (50) pound sacks of super colossal onions at $14.50 per sack, plus $1,615.60 for plastic bins, for a total invoice price of $5,269.60 (ROI Ex. A at 4).

15. On or about November 28, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions.

Complainant issued invoice 217494 billing Respondent for fifteen (15) wooden bins of colossal onions at $172.00 per bin, or $2,580.00, and 2,760 pounds of #2 onions in three (3)plastic bins at $0.07 per pound, or $193.20, for a total invoice price of $2,773.20 (ROI Ex. A at 7).

16. On or about November 29, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217491 billing Respondent for ten (10) select plastic bins of colossal yellow onions at $110.00 per bin, or $1,100.00, and eighteen (18) wooden bins of colossal onions at $172.00 per bin, or $3,096.00, for a total invoice price of $4,196.00 (ROI Ex. A at 5).

17. On or about December 4, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217252 billing Respondent for 19,664 pounds of #2 onions in eighteen (18) plastic bins at $0.07 per pound, for a total invoice price of $1,376.48 (ROI Ex. A at 9).

18. On or about December 6, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217256 billing Respondent for 6,060 pounds of #2 onions in five (5) plastic bins at $0.07 per pound, for a total invoice price of $424.20 (ROI Ex. A at 11).

19. On or about December 13, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217263 billing Respondent for 400 fifty (50) pound sacks of jumbo yellow onions at $12.00 per sack, or $4,800.00, plus $10.00 for an inspection fee and $54.00 for nine (9) pallets at $6.00 each, for a total invoice price of $4,864.00 (ROI Ex. A at 17).

20. On December 15, 2006, Respondent paid Complainant for the onions it received as of that date with check number 22279 in the amount of $8,568.28. (Answering Stmt. ¶ 16; ROI Ex. E at 4).

21. On December 18, 2006, the parties entered a written "Select Onion Company Supply Contract" providing:

- Complainant agrees to sell onions to Respondent at a price of $850 per hundred-weight;

- The onions shall be U.S. No. 2 grade, with a diameter greater than 3 inches;

- Payment for the onions is due 30 days from invoice;

- Complainant is responsible for loading the onions at its facility;

- Respondent shall tare the onions upon delivery at its facility; and

- Respondent will pay $0.025 per pound for onions between 2¾ and 3 inches in diameter.

(ROI Ex. E at 10.)

22. On or about December 20, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217275 billing Respondent for 513 fifty (50) pound sacks of super colossal onions at $18.00 per sack, or $9,234.00, twelve (12) pallets at $6.00 each, or $72.00, and 7,870 pounds of #2 onions in eight (8) plastic bins at $0.085 per pound, or $668.95, for a total invoice price of $9,974.95 (ROI Ex. A at 13).

23. On or about December 21, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 217279 billing Respondent for 14,615 pounds of #2 onions in two (2) plastic bins and eleven (11) wooden bins at $0.085 per pound, for a total invoice price of $1,242.28 (ROI Ex. A at 15).

24. On January 12, 2007, Respondent paid Complainant for the onions it received as of that date with check number 22279 in the amount of $8,568.28 (Answering Stmt. ¶ 18; ROI Ex. E at 4).

25. On or about February 6, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one truckload of onions. Complainant issued invoice 217440 billing Respondent for 84 50-pound sacks of super colossal onions at $21.00 per sack, or $1,764.00, plus 2 pallets at $6.00 each, or $12.00, for a total invoice price of $1,776.00. (ROI Ex. A at 20.)

26. On or about February 6, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Oregon, to Respondent, in Ontario, Oregon, one (1) truckload of onions. Complainant issued invoice 226607 billing Respondent for 230 fifty (50) pound sacks of super colossal onions at $22.00 per sack, for a total invoice price of $5,060.00. (ROI Ex. A at 22.)

27. On March 29, 2007, the ODA found Froerer in violation of ORS 634.372(4), which provides: "A person may not: Perform pesticide application activities in a faulty, careless or negligent manner." (ROI Ex. E at 187). Froerer was fined $10,693.00 for this violation (ROI Ex. E at 88). Froerer did not contest the finding or penalty, and a Final Order by Default was issued on April 25, 2007 (ROI Ex. E at 195-201).

28. Respondent learned of the March 29, 2006, ODA finding when it was published on April 6, 2006, by the The Capitol Press in Oregon. (ROI Ex. E at 5, 12-13.) Respondent communicated its view of the breach to Complainant by letter dated April 10, 2007 (Answering Stmt. ¶ 24; ROI Ex. E at 14-15).

29. The informal complaint was filed on August 22, 2007, which is within nine (9) months from the date the cause of action accrued (ROI Ex. A at 1).

30. Respondent filed its response to the informal complaint, asserting facts forming the basis of its Counterclaim, on October 5, 2007 (ROI Ex. E at 1-213).

Conclusions

This dispute concerns Respondent's liability for ten truckloads of onions purchased from Complainant. Complainant states Respondent accepted the onions in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices totaling $36,956.71 (Compl. ¶ 6). Respondent asserts, in response, that its agreement to purchase the onions was conditioned upon the onions being free from the illegal use of the carbofuran insecticide (commercially marketed as "Furadan")[5], and that Complainant breached this agreement by supplying onions that were not "Furadan-free." Respondent also asserts that Complainant breached its agreement to supply certain documents specified in the contract of sale, including grade sheets and a data sheet listing all fertilizers, herbicides, pesticides and fungicides used in the production of the onions (Answer & Countercl. ¶ 4).

Although Respondent maintains that the onions supplied by Complainant did not comply with the contract requirements, Respondent acknowledges that the onions were accepted and resold to its customers (Answer & Countercl. ¶ I). 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. 1700, 1703 (U.S.D.A. 1993); *Salinas Marketing Cooperative v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

We will first consider Respondent's allegation that Complainant breached the contract by supplying onions that were not "Furadan-free."

[5] *See* ROI Ex. E at 93.

Respondent, as the party asserting that Complainant warranted that the onions would be free from Furadan, has the burden to prove this allegation by a preponderance of the evidence.[6] Respondent asserts that in September of 2006, which is prior to the transactions in question, Complainant's Robin Froerer verbally assured Respondent's Susan Williams that Complainant did not use Furadan on its onions. Respondent states its concern about the possible use of Furadan was based on the warnings issued by Oregon and Idaho, and because Respondent needed to assure its customers that the onions they were purchasing were free of Furadan. (Answering Stmt. ¶ 8.)

While Complainant asserts that neither Craig Froerer, Robin Froerer, nor Shay Myers ever denied using Furadan to Respondent, Complainant acknowledges that on November 4, 2006, Robin Froerer provided Respondent's Loney Larson with copies of lab test results showing that no carbofuran was detected on Complainant's onions (Opening Stmt. ¶¶ 31-33). Complainant states further that Loney Larson's subsequent agreement to execute the Onion Purchase Contract on November 4, 2006,[7] was based on his satisfaction with the test results and the safety of the product grown by Complainant (Opening Stmt. ¶ 34).

Given that Complainant provided Respondent with documents indicating there was no Furadan detected on the onions that it intended to sell to Respondent, we find that Complainant expressly warranted that the onions at issue in this dispute would be free from Furadan.[8]

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[6] The buyer carries the burden of proof as to special terms. World Wide Brokerage, Inc. v. Calhoun Fruit & Produce, Inc., 49 Agric. Dec. 613, 616 (U.S.D.A. 1990).

[7] This is a written agreement wherein Respondent agreed to purchase 10,000 pounds of U.S. No. 1 yellow onions from Complainant between November 1, 2006, and March 1, 2007 (ROI Ex. A at 24).

[8] Express warranties are representations made by a seller to a buyer that relate to the quality or performance of the product sold. The seller must deliver goods that conform to his representations unless he proves that those representations did not create an enforceable express warranty:

> Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

Complainant asserts, however, that Respondent has failed to submit evidence showing that the onions it purchased were grown in the fields that Complainant treated with Furadan, or that the onions Respondent received contained any Furadan residue (Complainant's Br. ¶ B). Complainant asserts specifically that it grew 309 acres of onions in seventeen (17) fields located in eastern Oregon (Opening Stmt. ¶ 13). In the summer of 2006, Complainant states Craig Froerer applied the insecticide Furadan in some of Complainant's seventeen (17) Oregon fields in an effort to control thrips, but that there were ten (10) fields where Furadan was not used (Opening Stmt ¶ 14). According to the Final Order by Default issued by the ODA, however, Craig Froerer "stated he applied FMC Furadan 4f EPA Reg. No. 279-2876 to his seventeen (17) onions fields."[9] (ROI Ex. E at 199).

We conclude, on this basis, that the preponderance of the evidence supports Respondent's contention that the onions Complainant sold to Respondent were produced in fields that were treated with Furadan.
Next we must consider whether Complainant's use of Furadan on the fields where the onions were grown constitutes a breach of warranty, even in the absence of any evidence that there was any Furadan residue

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> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

U.C.C. § 2-313.

[9] Respondent states it chose not to appeal the factual findings of the Notice of Imposition of Civil Penalty to Craig Froerer in order to avoid additional time and expense. (Opening Stmt. ¶ 40.) As a result, a Final Order by Default was issued based on the prima facie case made on the record. (ROI Ex. E at 194-210.)

present on the onions Respondent purchased.[10] The record shows that at the time of the transactions in question, producers of onions in the states of Oregon and Idaho had been notified that the Oregon and Idaho Departments of Agriculture were investigating the off-label use of Furadan in onion fields. The Oregon and Idaho Departments of Agriculture further advised that the off-label use of this pesticide is considered a violation of pesticide law, and that since the EPA has not established a tolerance for carbofuran on onions, it is vitally important to assure that no onions with residues of carbofuran enter the food chain (ROI Ex. E at 57).

In all sales of goods where the seller is considered a merchant with respect to the goods in question, there is an implied warranty that the goods will be merchantable. *See* U.C.C. § 2-314(1). For goods to be merchantable they must:

> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promise or affirmations of fact made on the container or label if any.

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[10] Furadan (carbofuran) residue was never detected in any of the onion bulbs sampled by the Oregon and Idaho Departments of Agriculture. (ROI Ex. E at 11, 111-116, 118-121.) Residue from the pesticide was only detected in the soil and plant samples. (ROI Ex. E at 52, 147-160.)

In light of the advisory that was issued by the Oregon and Idaho Departments of Agriculture prior to the transactions in question, we can reasonably presume that onions produced in fields treated with Furadan, and sold subsequent to the advisory, would not pass without objection in the trade. Moreover, such onions would not be considered fit for the ordinary purpose for which onions are used, i.e., resale and, ultimately, consumption. Accordingly, we find that Complainant breached the implied warranty of merchantability by shipping Respondent onions that were produced in fields treated with the pesticide Furadan.

As we mentioned, Respondent has also alleged that Complainant breached its agreement to supply certain documents specified in the contract of sale, including grade sheets and a data sheet listing all fertilizers, herbicides, pesticides and fungicides used in the production of the onions. Whether or not Complainant breached its agreement to supply these documents is of no consequence given that we have already determined that the evidence establishes a breach of warranty by Complainant. Respondent is, therefore, entitled to seek remedies for Complainant's breach.

The general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The first comment to Oregon's version of U.C.C. § 2-714, however, points out that, "1. This section deals with the remedies available to the buyer after the goods have been accepted and the time for revocation of acceptance has gone by." Here, the time for revocation of acceptance had not gone by when Respondent communicated the fact of the breach to Complainant. Respondent discovered the breach on April 6, 2007, and communicated it to Complainant on April 10, 2007. In effect, Respondent's communication of the unfitness of the onions, its refusal to pay on Complainant's invoices, and its demand for a refund of sums it had already paid to Complainant for purchases of Complainant's onions in transactions before those in the Complaint, constitute a revocation of acceptance.

We have previously permitted revocation of acceptance, but only in limited, particular circumstances where the goods were unsuitable for the buyer's purposes, and the unsuitability could not have been readily discovered by the buyer. *Highland Juice Co., Inc. v. T.W. Garner Food Co.*, 38 Agric. Dec. 1001, 1008-11 (U.S.D.A. 1979); *Cal-Swiss Foods v. San Antonio Spice Co.*, 37 Agric. Dec. 1475, 1479-80 (U.S.D.A. 1978). The analysis of whether Respondent's revocation of acceptance in this case is permissible comes under U.C.C. § 2-608. The Oregon version of that section states:

> 72.6080. UCC 2-608. Revocation of acceptance in whole or in part
>
> (1) The buyer may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the buyer if the buyer has accepted it:
>
> (a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) Without discovery of such nonconformity if the acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if the buyer had rejected them.

O.R.S. § 72.6080

Complainant's onions, at the time they were accepted by Respondent, appeared to be ordinary onions fit for sale and consumption as Furadan-free. The fact that they were not was both difficult to discover and obscured by Complainant's assurances. Respondent's revocation of acceptance, then, complied with (1)(b) of U.C.C. 2-608. Respondent's revocation of acceptance also complied with (2) of U.C.C. 2-608, because, as noted above, Respondent notified Complainant that the nonconformity substantially impaired the onions' value to Respondent within four days of Respondent's discovery of the nonconformity.

As a buyer who revoked acceptance, Respondent has the same rights and duties with regard to the goods involved as if Respondent had rejected them. Respondent is relieved of a duty to pay Complainant for the nonconforming onions, and has a right to demand a refund of money it has already paid for Complainant's nonconforming onions. Ordinarily, a buyer who rejects goods has a duty to return them to the seller, or make them available for the seller's disposition. Comment 6 to Oregon's U.C.C. 2-608 says in this regard, "[w]orthless goods, however, need not be offered back and minor defects in the articles reoffered are to be disregarded." For these purposes, we take notice of the fact that perishable agricultural commodities in fields with illegal pesticide application are worthless goods.

Complainant's material breach relieved Respondent of any duty to perform, that is, to pay Complainant for its onions. Therefore, the Complaint should be dismissed.

Respondent asserts in its Answer and Counterclaim that it has been damaged due to Complainant's misrepresentations in the amount of at least $125,393.04, which it says consists of the amount Respondent paid Complainant for the onions that were treated with the illegal pesticide application ($25,810.04)[11], plus the amount of $99,583.00, which is the amount that Respondent resold the onions to its customers for, and is the amount to be refunded to Respondent's customers in order to make those customers whole. Respondent also asserts that for the unforeseen future

[11] Respondent apparently made an error in calculating this total, as the payments it claimed to have made to Complainant total $25,809.99.

it will be subject to liability to the customers to whom it sold the Furadan-treated onions (Answer & Countercl. ¶ I).

Respondent provided evidence that it made payments of $6,000.00, $8,568.28, and $11,241.71 to Complainant for the onions from Complainant's 2006-2007 crop, for a total of $25,809.99. Complainant did not dispute these allegations. Respondent asserted these payments in response to Complainant's informal complaint. Counterclaims arising out of different transactions than those covered by a timely complaint must be filed within nine (9) months after the cause of action as to such counterclaims accrued. Respondent filed its response on October 5, 2007, which was well within nine (9) months of when its cause of action accrued, upon discovery of Complainant's breach, on April 6, 2007.

In regard to refunds to Respondent's customers, Respondent did not include with its Answer and Counterclaim any evidence showing that its customers requested or were given a refund of the purchase price they paid for the onions. Since Respondent presumably received and retained full payment from its customers for the ten truckloads of onions in question, we find that Respondent has failed to establish that it was damaged in this regard. We rejected a similar request for damages for refunds to the buyer's customers in *Cal-Swiss Foods*, 37 Agric. Dec. at 1480-1481 (U.S.D.A. 1978), reasoning that any refunds were offset by the customers' payments to the buyer.

Respondent's assertion that for the unforeseen future it will be subject to liability to the customers to whom it sold the Furadan-treated onions is not accompanied by any evidence, and is not stated with any specificity. Any award in this regard would be purely speculative, and thus none will be considered.

Complainant's failure to pay Respondent $25,809.99 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Respondent. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (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 Louisville & Nashville R.R. v. Ohio Valley Tie Co., 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). 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 (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).

Respondent in this action paid $300.00 to file its counterclaim as required by section 47.8(a) of the Rules of Practice under the Act (7 C.F.R. § 47.8(a)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

ORDER

The Complaint is dismissed.

Within thirty (30) days from the date of this Order, Complainant shall pay Respondent as reparation $25,809.99, with interest thereon at the rate of 0.19 percent per annum from March 1, 2007, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), a Decision and Order was issued on June 3, 2011, dismissing the

Complaint and ordering Complainant to pay Respondent, as reparation, $25,809.99, with interest thereon at the rate of 0.19 percent per annum from March 1, 2007, until paid, plus the amount of $300.00. On June 22, 2011, Complainant filed an Unopposed[12] Motion to Stay Enforcement of Reparation Order and to Enlarge Time to File Petition for Reconsideration (Motion). On October 7, 2011, an Order was issued granting Complainant's Motion and providing Complainant with twenty (20) days from the date of the Order to file a petition for reconsideration. Complainant's Petition for Reconsideration was subsequently received by the Department on October 27, 2011. Respondent was served with a copy of the Petition and afforded twenty (20) days from receipt of the Petition to submit a reply. Respondent did not submit a reply to the Petition within the time provided.

In the Petition, Complainant asserts that the Decision and Order is erroneous on the issues of liability and damages (Pet. at 2). With respect to the issue of liability, Complainant argues that the Department erred in finding that Respondent properly revoked its acceptance of the subject onions without conducting the two-step analysis required under U.C.C. § 2-608 to make that finding (Pet. at 2). In addition, Complainant states the Department found that Complainant's misuse of carbofuran breached express and implied warranties made to Respondent while overlooking the fact that the use was disclosed to Respondent prior to the sales, and that the onions were tested by the Oregon and Idaho Departments of Agriculture, neither of which found carbofuran in the onions (Pet. at 2).

While Complainant refers in its Petition to "the fact that the use [of carbofuran] was disclosed to [Respondent] prior to the sales" (Pet. at 2), Complainant fails to point us to any evidence in the record showing that its use of carbofuran was disclosed to Respondent prior to the onion sales in question. On the contrary, the record includes testimony from Respondent's representatives asserting that they were not made aware of Respondent's use of carbofuran prior to agreeing to purchase the subject onions (Answering Stmt. ¶¶ 12, 15, 17, 19). We also note that the published finding of Complainant's use of carbofuran is dated March 29, 2007, which is more than a month after the last sale of the subject onions to Respondent. (ROI Ex. A at 22; ROI Ex. E at 5, 12-13). Moreover, the

[12] Complainant's counsel indicated that she contacted Respondent's counsel, who expressed no opposition to the relief sought (Motion at 1, n.1).

issue of whether or not carbofuran was detected in the onions themselves is irrelevant, as there is always an implied warranty that crops are produced without illegal application of pesticides or other banned chemicals, and the evidence plainly shows that Complainant breached this warranty.

Also in connection with the issue of liability, Complainant asserts that any revocation of acceptance based on worthless goods requires a two-step analysis, with the first step involving a subjective determination of the value of the goods based on the unique circumstances of the buyer, which is then followed by an objective determination of the value of the goods. (Petition at 3-4.) In support of this contention, Complainant cites *Jorgensen v. Pressnall*, 274 Or. 289-90, 545 P.2d 1382, 1384-85 (1976), wherein the Court held:

> Whether plaintiffs proved nonconformities sufficiently serious to justify revocation of acceptance is a two-step inquiry under the code. Since ORS 72.6080(1) provides that the buyer may revoke acceptance of goods "whose nonconformity substantially impairs its value *to him*," the value of conforming goods *to the plaintiff* must first be determined. This is a subjective question in the sense that it calls for a consideration of the needs and circumstances of the plaintiff who seeks to revoke; not the needs and circumstances of an average buyer.[13] The second inquiry is whether the nonconformity in fact substantially impairs the value of the goods to the buyer, having in mind his particular needs. This is an objective question in the sense that it calls for evidence of something more than plaintiff's assertion that the nonconformity impaired the value to him; it requires evidence from which it can be inferred that plaintiff's needs were not met because of the nonconformity. In

[13] *See* U.C.C. § 2-608, comment 2: "The test is not what the seller had reason to know at the time of contracting; the question is whether the non-conformity is such as will in fact cause a substantial impairment of value to the buyer though the seller had no advance knowledge as to the buyer's particular circumstances." *See also* Tiger Motor Co. v. McMurtry, 284 Ala. 283, 292, 224 So.2d 638 (1969): "We are aware that what may cause one person great inconvenience of financial loss, may not another."

> short, the nonconformity must *substantially* impair the value of the goods to the plaintiff buyer.[14] The existence of substantial impairment depends upon the facts and circumstances in each case.[15]

Complainant argues that while the Department's statement "we take notice of the fact that perishable agricultural commodities in fields with illegal pesticide application are worthless goods" may arguably constitute the first step of the analysis, it completely omits the second step, i.e., to determine the objective value of the onions supplied by Complainant (Pet. at 5, *citing* Decision at 17). Complainant states there is no evidence that the value of the onions was in any way impaired and that, to the contrary, the Department found that Respondent failed to prove any damages stemming from the onions, which it resold and was paid in full for (Pet. at 5, *citing* Decision at 18).

The decision found that the onions were intrinsically, objectively without value (Decision at 14). Contrary to Complainant's argument, this finding has nothing to do with the first step of the analysis. Rather, it decides the second step. A nonconformity that renders the onions worthless logically must substantially impair the value of the onions to Respondent. Moreover, since the nonconforming onions were devoid of value in and of themselves, they perforce did not meet the needs of Respondent.

With respect to damages, Complainant states our finding that Respondent is not liable to Complainant for the 10 unpaid loads, and that Respondent is entitled to recover all amounts paid to Complainant for other purchases in 2006, wholly ignores vital aspects of Oregon's codification of U.C.C. § 2-314, which requires proof of both causation and damages. (Petition at 2.) Complainant states further that by misapplying U.C.C. § 2-608 and ordering Complainant to repay over $25,000.00 to Respondent, the Department fails to consider the fact that Respondent was paid in full for the onions, and must return the value

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[14] *See* U.C.C. § 2-608, comment 2; Herbstram v. Eastman Kodak Co., 68 N.J. 1, 342 A.2d 181, 185 (1975): "Whether there has been a substantial impairment is based upon an objective factual evaluation rather than upon a subjective test of whether the buyer believed the value was substantially impaired."

[15] Tiger Motor Co. v. McMurtry, *supra* note 13.

received to Complainant if it is revoking acceptance. (Petition at 2-3.) Finally, Complainant states the Decision and Order effectively results in a windfall in favor of Respondent, who pays nothing for over $60,000.00 in onions that it resold and was paid for. (Petition at 3.)

Respondent submitted a Counterclaim which was made up of two parts, the first of which was a request for recovery of the $25,810.04 that it paid Complainant "for onions that were treated with the illegal pesticide application and therefore were in breach of the agreement." (Counterclaim ¶ I.) This sum was awarded to Respondent in accordance with U.C.C. § 2-608, and Oregon's codification thereof, which gives a buyer who revokes acceptance the same rights and duties with regard to the goods involved as if the buyer had rejected them, and thereby entitled Respondent to a refund of the funds remitted to Complainant for the worthless onions. (Decision at 16-17.)

The remainder of Respondent's Counterclaim consisted of a request for damages in the amount of $99,583.00 for the sales proceeds Respondent collected from its customers, which Respondent stated would be refunded. (Counterclaim ¶ I.) As Complainant acknowledges in its petition (Petition at 10), Respondent's claim for such damages was denied because Respondent failed to prove that it actually incurred the losses it claimed. (Decision at 18). In the decision we stated specifically:

> … Respondent did not include with its Answer and Counterclaim any evidence showing that its customers requested or were given a refund of the purchase price they paid for the onions. Since Respondent presumably received and retained full payment from its customers for the ten truckloads of onions in question, we find that Respondent has failed to establish that it was damaged in this regard. …

(Decision at 18). Complainant nevertheless claims that the decision results in a windfall for Respondent, who pays nothing for over $60,000.00 in onions that it resold and was paid for (Pet. at 3). However, the issue of whether or not Respondent resold and collected proceeds for the onions deemed worthless and effectively rejected by Respondent due

to Complainant's use of an illegal pesticide is between Respondent and its customers and has no relevance here. Complainant should not be rewarded for its wrongdoing by obtaining the decision it seeks.

Based on our review of the evidence and for the reasons cited, we are denying Complainant's petition. There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in section 7 of the Act (7 U.S.C. § 499g).

ORDER

The Complaint is dismissed.

Within thirty (30) days from the date of this Order, Complainant shall pay Respondent as reparation $25,809.99, with interest thereon at the rate of 0.19 percent per annum from March 1, 2007, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

_____

ERRATA

REPARATION DECISIONS

71 Agric. Dec.
July – Dec. 2012

INTERFRESH, INC. v. B. SAYERS, INC.
PACA Docket No. W-R-2011-535.
Decision and Order.
Filed July 11, 2012.

[Cite as: 71 Agric. Dec. a (U.S.D.A. 2012), *published in* 72 Agric. Dec. a (U.S.D.A. 2013).]

PACA-R.

Accord and Satisfaction – Unjustified late payment was not made in "Good Faith"

U.C.C. § 3-311(a) includes several requirements for accord and satisfaction, the first of which is that the payment be tendered in "Good Faith". We were unable to find that Respondent's late payment was made in "Good Faith" as defined in U.C.C. § 3-103(a)(4). "Good Faith" as defined in U.C.C. § 3-103(a)(4) means honesty in fact and the observance of reasonable commercial standards of fair dealing.

The payment terms in Complainant's invoice were PACA prompt, which means within ten days after acceptance. 7 C.F.R. § 46.2(aa)(5). Respondent's check is dated far beyond ten days. There is nothing to indicate that Respondent objected to the payment terms stated in Complainant's invoice. In the absence of a timely objection by Respondent, the payment terms stated in Complainant's invoice became incorporated into the sales contract. U.C.C. § 2-207(2).

Shelton S. Smallwood, Presiding Officer.
Earl E. Elliott, Examiner.
Complainant, *pro se.*
Respondent, *pro se.*
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act 1930 ("PACA"), as amended, (7 U.S.C. § 499a *et seq*.) ("Act"). A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $5,772.00 in connection with one (1) truckload of onions sold and shipped to Respondent in the course of interstate 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 affirmative defenses.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in the Rules of Practice Under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the 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 filed briefs.

Findings of Fact

1. Complainant is a corporation whose post office address is 2019 West Orangewood Ave., Ste. A, Orange, CA 92868. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent is a corporation whose post office address is 8024 West Arapaho Ct., Boise, ID 83714. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about June 21, 2011, Complainant, by oral contract, sold to Respondent, and agreed to ship one truckload of onions from a loading point in California, to Respondent in Boise, Idaho. On the same day,

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Complainant issued invoice number 366881 billing Respondent for 900 fifty (50) pound (lb.) bags jumbo USA yellow onions, at $10.00 per bag, or $9,000.00, f.o.b., plus $120.00 for pallets and $83.55 for inspections, for a total invoice price of $9,203.55. Payment terms were PACA prompt (Compl. Ex. 1).

4. Respondent paid Complainant $3,431.55 with check number 7116, dated August 2, 2011, for invoice number 366881. "Full & Final Pymt Inv 366881" is handwritten on the face of Respondent's check (ROI Ex. C at 2). Complainant deposited Respondent's check on August 8, 2011 (*Id*. at 3), and prepared a "Customer Payment Discrepancy Form" on the same day which indicated that the reason for the short payment by Respondent was market decline/damages (ROI Ex. A at 4). A copy of Complainant's invoice contains a handwritten breakdown by Respondent of its deductions for market decline and damages (ROI Ex. A at 6).

5. The informal complaint was filed on September 14, 2011 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the balance of the contract price for one truckload of jumbo yellow onions sold and shipped to Respondent in the course of interstate commerce. Complainant states that Respondent accepted the onions in compliance with the sales contract for a total price of $9,203.55, but that it has since paid only $3,431.55, leaving a balance due of $5,772.00, which Respondent has failed, neglected and refused to pay. (Compl. ¶¶ 4-6-8.)

Complainant, as the moving party, has the burden of proving its allegations by a preponderance of the evidence. *Sun World Int'l, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (U.S.D.A. 1987); *W.W. Rodgers & Sons v. Cal. Produce Distribs., Inc.*, 34 Agric. Dec. 914, 919 (U.S.D.A. 1975). As evidence to substantiate its allegations, Complainant submitted a copy of its invoice number 366881 billing Respondent for the onions, which were shipped on June 21, 2011, from a loading point in California, to Respondent in Boise, Idaho. Payment

terms on the invoice were PACA prompt (Compl. Ex. 1), which means within ten (10) days after acceptance. 7 C.F.R. § 46.2(aa)(5).

In response to Complainant's allegations, Respondent submitted a sworn Answer that denies Complainant's allegations and asserts affirmative defenses (Answer ¶¶ 1-5). Respondent has the burden of proving its affirmative defense(s) by a preponderance of the evidence. *Jules Produce Co., Inc. v. Quality Melon Sales, Inc.*, 40 Agric. Dec. 152, 154 (U.S.D.A. 1981); *Walker v. Amato*, 27 Agric. Dec. 1543, 1545 (U.S.D.A. 1986). Respondent does not allege, however, that it attempted to reject any of the onions to Complainant. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2(dd)(3). We conclude therefore that Respondent accepted the onions billed on Complainant's invoice number 366881. 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. *Ocean Breeze Export, Inc. v. Rialto Distrib., Inc.*, 60 Agric. Dec. 840, 844 (U.S.D.A. 2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (U.S.D.A. 1988). The burden to prove a breach of contract rests with the buyer of the accepted goods. U.C.C. § 2-607(4); *see also Grower-Shipper Potato Co. v. Sw. Produce Co.*, 28 Agric. Dec. 511, 514 (U.S.D.A. 1969).

We will now determine whether Respondent has asserted any legitimate affirmative defenses. Respondent's first affirmative defense is that Complainant breached three contracts, which are unrelated to the onions billed on Complainant's invoice number 366881, and also that Complainant granted Respondent allowances for market decline on invoice number 366881 (Answer ¶¶ 2-4; Answering Statement at 1). A copy of Complainant's invoice number 366881 contains a handwritten breakdown by Respondent of its deductions for market decline and damages (ROI Ex. A at 6). Complainant denies Respondent's first affirmative defense (ROI Ex. A at 5; Opening Statement at 1-2; Statement in Reply at 1-2; Complainant's Br. at 1-2). Respondent has not furnished any evidence in support of either the breaches of contract it alleges by Complainant or the allowances for market decline it alleged that Complainant granted on invoice number 366881. Lacking evidence to support its allegations, we find that Respondent's first affirmative defense is without merit.

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Respondent's second affirmative defense is that the balance due alleged by Complainant was resolved in full by accord and satisfaction. Respondent alleges that Complainant knew that a dispute existed but deposited Respondent's check number 7116, dated August 2, 2011, for $3,431.55, with "Full & Final Pymt Inv 366881" handwritten on the face of the check (ROI Ex. C at 2; Answer ¶¶ 4-5; Answering Statement at 1-2; Resp't's Br. ¶¶ 1-3). Complainant deposited Respondent's check on August 8, 2011 (*Id.* at 3), and prepared a "Customer Payment Discrepancy Form" on the same day which indicated that the reason for the short payment by Respondent was market decline/damages (ROI Ex. A at 4). There is no evidence that Respondent advised Complainant of any dispute before tendering its check. Complainant denies that Respondent's check met all of the essential elements for accord and satisfaction (Opening Statement at 1-2; Statement in Reply at 1-2; Complainant's Br. at 1-2).

Section 3-311 of the Uniform Commercial Code ("U.C.C."), entitled "Accord and Satisfaction By Use of Instrument," states, in pertinent part:

> (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.
>
> (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
>
> (c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:
>
> (1) The claimant, if an organization, proves that (i)

> within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.
>
> (2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).
>
> (d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

U.C.C. § 3-311.

Subsection (a) above includes several requirements, the first of which is that the payment be tendered in good faith. "Good faith" as defined in U.C.C. § 3-103(a)(4) means honesty in fact and the observance of reasonable commercial standards of fair dealing. In *Lindemann Produce, Inc. v. ABC Fresh Mktg., Inc.*, 57 Agric. Dec. 738, 745 (U.S.D.A. 1998), we held that the lumping of full payments on undisputed invoices with partial payments on disputed invoices together in one check which requires a creditor to accept the partial payments in order to receive the undisputed full payments in a timely manner constitutes a lack of good faith. Another example of a lack of good faith, described in Official Comment 4 to U.C.C. section 3-311, is the practice of some business debtors of routinely pre-printing full satisfaction language on all of their

checks so that all or a large part of the debtor's obligations are paid by checks bearing the full satisfaction language, whether or not there is a dispute with the creditor as to the amount due. U.C.C. § 3-311 Official Comment 4. We do not find either circumstance present in the instant case, as Respondent issued an individual check specifically as payment of Complainant's invoice number 366881, and the full satisfaction language on the check is not pre-printed (ROI Ex. C at 2). Moreover, even if it were pre-printed, in *Lindemann* we stated "references to specific invoices serve to particularize the full satisfaction language so as to remove the uncertainty referred to in the Official Comment's example." *Id*. at 744. However, we do find that Respondent's payment was very late. Complainant shipped the onions on June 21, 2011, from a loading point in California, to Respondent in Boise, Idaho. As mentioned above, the payment terms on Complainant's invoice were PACA prompt (Compl. Ex. 1), which means within ten (10) days after acceptance. 7 C.F.R. § 46.2(aa)(5). Respondent's check number 7116 is dated August 2, 2011 (ROI Ex. C at 2), which was far beyond the agreed payment terms in the sales contract. There is nothing to indicate that Respondent objected to the payment terms stated on Complainant's invoice. In the absence of a timely objection by Respondent, the payment terms stated on Complainant's invoice becomes incorporated into the sales contract. U.C.C. § 2-207(2). Terms contained in the seller's invoice become part of the parties' contract unless (1) the buyer expressly limited the seller's acceptance to the terms of the offer; or (2) the buyer objects to the new terms within a reasonable time; and (3) the additional terms materially alter the contract. *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 223 (2d Cir. 2000). Here, Respondent has made no claim that it limited its offer or timely objected to the payment terms in Complainant's invoice, or that the payment terms materially altered the contract. As mentioned above, "Good faith" as defined in U.C.C. section 3-103(a)(4) means honesty in fact and the observance of reasonable commercial standards of fair dealing. Based upon the evidence and the reasons stated, we cannot find that Respondent's late payment was made in "Good Faith" as defined in U.C.C. § 3-103(a)(4).

In addition, U.C.C. section 3-311(a) also specifies that the claim must be unliquidated or subject to a bona fide dispute. A refusal of one party to pay another an amount justly owed is not deemed a bona fide dispute.

Roll Packing House v. Bracker Vegetable Sales Co., 18 Agric. Dec. 975, 982-83 (U.S.D.A. 1959). The existence of a good faith dispute is important, as it puts the creditor on notice so that the payment may not be accidentally processed in a routine manner. *A. Sam & Sons Produce Co., Inc. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, 1053 n.13 (1991). It also furnishes a reason for compromising, or failing to pay according to the original agreement, an indebtedness otherwise valid on its face. *Id.* Where the agreed purchase price of the goods is not in dispute, the issuance of a partial payment check listing deductions and a protest of the deductions by the party receiving the partial payment check does not establish the existence of a bona fide dispute. *Eustis Fruit Co., Inc. v. Auster Co., Inc.*, 51 Agric. Dec. 861, 881-82 (U.S.D.A. 1992). In the instant case there was no disagreement over the quality and condition of the onions at issue upon delivery and Respondent failed to prove that any bona fide dispute existed between the parties (*supra* p. 4). Therefore, based upon the evidence and the reasons stated, we find that the balance due on the onions at issue was not resolved by accord and satisfaction. Respondent's second affirmative defense is therefore without merit.

Having considered all of the evidence in the record, Respondent's affirmative defenses, and the statements of the parties, we find Respondent liable to Complainant for the full purchase price for the onions, or $9,203.55, less Respondent's payment of $3,431.55, leaving a balance due Complainant of $5,772.00, which Respondent has failed to pay.

Respondent's failure to pay Complainant $5,772.00 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (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. *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). 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 Under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (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 play Complainant as reparation $5,772.00, with interest thereon at the rate of 0.20% per annum from August 1, 2011, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

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DIMARE HOMESTEAD, INC. v. YZAGUIRRE FARMS LLC.
PACA Docket No. S-R-2010-412.
Order on Reconsideration.
Filed August 1, 2012.

[Cite as: 71 Agric. Dec. j (U.S.D.A. 2012), *published in* 72 Agric. Dec. j (U.S.D.A. 2013).

PACA-R.

Jurisdiction – Interstate Commerce – Florida Tomatoes Marketing Order

The sale of Florida-grown tomatoes by a Florida grower/shipper to a "pinhooker" who intended to sell the tomatoes to local buyers for use at farmers' markets and roadside stands is not in interstate commerce because the tomatoes in question are not eligible for shipment outside the state of Florida due to Marketing Order requirements and because the parties never intended or contemplated that these tomatoes would travel in interstate commerce. As a result, these tomatoes cannot be considered a commodity that commonly moves in interstate commerce. As there was no actual or contemplated movement in interstate commerce for the shipments in question, the Secretary is without jurisdiction to consider the dispute.

Shelton S. Smallwood, Presiding Officer.
Leslie Wowk, Examiner.
McCarron & Diess for Complainant.
Meuers Law Firm, P.L. for Respondent.
Ruling by William G. Jenson, Judicial Officer.

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), a Decision and Order was issued on December 22, 2011, dismissing the Complaint. On January 10, 2012, the Department received from Complainant a petition for reconsideration of the Order. Respondent was served with a copy of the petition and afforded the opportunity to submit a reply. Respondent requested and was granted an extension until March 12, 2012 to file its reply to the petition. On March 9, 2012, the Department received a reply from Respondent requesting that the petition be denied.

In the Petition, Complainant argues that our decision to dismiss the Complaint for lack of jurisdiction is based on two (2) erroneous

conclusions. Complainant states first that in drawing this conclusion we shifted the burden of proving the condition of the produce received by Respondent to Complainant and reduced the standard of proof to establish such condition to oral representations made by Respondent's representative (Pet. at 1). Complainant also contends that we changed the standard for finding interstate commerce by reinterpreting the meaning of the term "commodity." (Pet. at 1, 5).

We will first address Complainant's contention that we shifted the burden to prove the condition of the tomatoes Respondent accepted to Complainant. As Complainant notes in its Petition, Respondent submitted detailed testimony from its President, Mr. Armando Yzaguirre, wherein Mr. Yzaguirre states the tomatoes in question were picked from fields that Complainant's crews had fully harvested and were no longer producing tomatoes of the kind and quality sold by Complainant (Answering Stmt. ¶ 19); that the growers normally consider the return on such tomatoes as "free money" because the tomatoes would have otherwise been plowed under (Answering Stmt. ¶ 13); and that the tomatoes were packed in used boxes and would not meet the minimum grade U.S. No. 2, so they were only suitable for sale to local buyers at farmers' markets and roadside stands (Answering Stmt. ¶¶ 11, 21). Respondent submitted this testimony to establish that at the time of contracting, both parties were aware that the tomatoes in question were "salvaged" tomatoes that were not suitable for shipment outside the state of Florida. In other words, Mr. Yzaguirre's testimony concerns the nature of the commodity contracted for, rather than the specific condition of the tomatoes accepted. Hence, Complainant's contention that we accepted such testimony as evidence of the condition of the tomatoes is a misrepresentation of the discussion.

Where a buyer has accepted produce and is attempting to prove a breach of contract by the seller, testimonial evidence of the condition of produce cannot stand in place of a USDA inspection.[1] There is, however,

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[1] *See* Declo Produce, Inc. v. Sun Valley Potatoes, Inc., 59 Agric. Dec. 433, 438 (U.S.D.A. 2000), wherein we stated "[w]e have held many times that the only way to prove a breach as to condition is by a neutral inspection of produce … we will not accept testimonial evidence of an interested party as to condition." *See also* Tantum v. Weller, 41 Agric. Dec. 2456 (U.S.D.A. 1982); O. D. Huff, Jr., Inc. v. Pagano & Sons, 21 Agric. Dec. 385 (U.S.D.A. 1962).

no such bar to the use of testimonial evidence to establish the terms of the contract,[2] including the type of produce contracted for. For example, a buyer's statement that a seller sold potatoes as U.S. No. 1 is evidence that the contract called for U.S. No. 1 potatoes, at least until such statement is rebutted by the seller. Similarly here, Respondent submitted detailed testimony concerning the nature of the tomatoes that Complainant sold to Respondent, and the testimony submitted by Complainant failed to specifically address any of Respondent's contentions. It is well-established that sworn statements that have not been controverted must be taken as true in the absence of other persuasive evidence. *Crawford v. Ralf & Cono Comunale Produce Corp.*, 51 Agric. Dec. 804, 808 (U.S.D.A. 1992); *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (U.S.D.A. 1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (U.S.D.A. 1982). Therefore, the decision appropriately held that the preponderance of the evidence supported Respondent's contention that Complainant was aware at the time of contracting that the tomatoes it agreed to sell to Respondent were "salvage" tomatoes that were not suitable for shipment outside the state of Florida.

Complainant next asserts that we changed the meaning of the term "commodity" by concluding that off-grade tomatoes are not a commodity that is commonly shipped in interstate commerce (Pet. at 5). This argument concerns the application of current precedent concerning the meaning of "interstate commerce" to the circumstances in this case. Specifically, we referred in the decision to *Produce Place v. United States Department of Agriculture*, 319 U.S. App. D.C. 369 (1996), wherein the D.C. Circuit Court held that if a shipment is of a type of commodity that is commonly shipped in interstate commerce, and the shipment is shipped for resale by a produce dealer doing a substantial portion of its business in interstate commerce, the shipment is in interstate commerce under the Act (Decision at 5-6). Considering the evidence Respondent submitted concerning the type of tomatoes it

[2] *See, e.g.*, Agri-National Sales Co., Inc. v. Caamano Bros., Inc., Caamano Bros., Inc. v. Agri-National Sales Co., Inc., 46 Agric. Dec. 983, 985 (U.S.D.A. 1987), wherein we stated "the uncontroverted statement of Caamano is sufficient for it to have carried its burden of persuasion that the actual price was $5.05."

purchased from Complainant, we concluded that the tomatoes were not a type of commodity that is commonly shipped in interstate commerce.

Complainant argues that this conclusion is erroneous because the term "commodity" means a particular kind of fruit or vegetable (e.g., grapes, broccoli, tomatoes, etc.), so the commodity in question is tomatoes, which is a commodity that is commonly shipped in interstate commerce. (Pet. at 5). There is, however, no indication that the reference in the decision to the off-grade tomatoes in question as a commodity that is not commonly shipped in interstate commerce was intended to create a new class of commodity or suggest that commodities that don't meet grade standards in general are not shipped in interstate commerce. Rather, this statement was merely a summation of our earlier finding that Respondent's uncontroverted sworn testimony concerning the quality of the tomatoes and the circumstances of their harvesting, and the Florida Marketing Order which prohibited their sale outside the state of Florida, established that the parties never intended nor contemplated that the tomatoes in question would travel in interstate commerce. Consequently, we find that Complainant's claim that this interpretation "changes" the meaning of the term "commodity" is without merit.

Finally, we should note that Complainant also mentions our statement that "there was neither contemplation nor actual involvement of the transactions in interstate commerce" (Decision at 8), and states this applies another meaning of interstate commerce that is at odds with the meaning of "interstate commerce" in *Produce Place*, et al.[3] (Pet. at 5). This statement was, however, merely an acknowledgement that there was no evidence of either actual or intended movement in interstate commerce, so unless the other criteria set forth in *Produce Place* were met, which they were not, the transactions could not be considered as involving interstate commerce.

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[3] Complainant also cites *Produce Supply, Inc. v. Guy E. Maggio*, PACA Docket No. R-08-042 (December 12, 2008), wherein we held that a shipment of broccoli was in interstate commerce because broccoli is a commodity that is commonly shipped in interstate commerce, and because the broccoli in question was shipped for resale by a produce dealer doing a substantial portion of its business in interstate commerce; and *In re Southland + Keystone*, 132 B.R. 632, 640-41 (9th Cir. BAP 1991), wherein the court held that produce transactions are in interstate commerce and subject to PACA when commodities are of the type typically sold in interstate commerce because the sellers are those Congress intended to protect by enacting PACA.

Based on our reconsideration of the evidence and for the reasons cited, we are denying Complainant's petition. There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in section 7 of the Act (7 U.S.C. § 499g).

ORDER

The Complaint is dismissed.

Copies of this Order shall be served upon the parties.

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COASTAL MARKETING SERVICE, INC. v. VIBO PRODUCE LLC.
PACA Docket No. W-R-2011-118.
Decision and Order.
Filed October 17, 2012.

[Cite as: 71 Agric. Dec. n (U.S.D.A. 2012), *published in* 72 Agric. Dec. n (U.S.D.A. 2013).]

PACA-R.

Procedure - Condition Precedent
An Express Condition to Performance of a Contract
Pay-when-paid agreement

Complainant (seller) agreed to wait to be paid until Respondent (buyer) was paid by a third party, Respondent's customer, which filed for bankruptcy after the pay-when-paid agreement was made. Pay-when-paid agreements usually arise in construction contracts where the general contractor pays the sub-contractor when it is paid by the homeowner or some other responsible party. *See Thos. J. Dyer Co. v. Bishop Int'l Eng'g Co.*, 303 F.2d 655, 658-60 (6th Cir. Ohio 1962). Courts have held that when a pay-when-paid provision in a contract does not address the possibility of insolvency that payment would be postponed for a reasonable period of time to afford a payer the opportunity to collect the funds necessary to pay a payee, but have found it unreasonable to conclude that a pay-when-paid agreement should require a payee to wait to be paid for an indefinite period of

time, which may never occur, when the parties did not provide for this condition at the time the contract was entered into. *Id.*

The fact that such act is not performed or that such event does not happen does not discharge the contract and performance is required in at least a reasonable time, but if such was not the intention of the parties, the possibility of insolvency could have been expressed in unequivocal terms in the contract. *See L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co*., 189 Ariz. 178, 181 (Ariz. Ct. App. 1997), citing *Thos. J. Dyer Co*. Unless the contract clearly shows that an act or event is an express condition, it is not a "condition precedent" to performance under the contract. *See Brady Farms, Inc. v. Crosby*, 37 Agric. Dec. 1962, 1966-70 (U.S.D.A. 1978).

The Regulations Under the Act (7 C.F.R. § 46.2(aa)(5)) require payment for produce by a buyer within ten (10) days after the day on which the produce is accepted. Respondent's invoices to its third-party customer indicate that payment was due Respondent from that customer within twenty-one (21) days. We found it reasonable under the pay-when-paid agreement for Respondent to have collected the funds within twenty-one (21) days and to have paid Complainant within thirty-one (31) days after the day on which the produce was accepted.

Shelton S. Smallwood, Presiding Officer.
Earl E. Elliott, Examiner.
Complainant, *pro se.*
Respondent, *pro se.*
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act 1930 (PACA), as amended (7 U.S.C. § 499a *et seq*.) ("Act"). A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $24,917.03 in connection with two (2) truckloads of mixed vegetables sold and delivered in the course of interstate 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 affirmative defenses.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in the Rules of Practice

Under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the 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 and a brief.

Findings of Fact

1. Complainant is a corporation whose post office address is 1705 Colonial Blvd., Ste C3, Ft. Meyers, FL 33907. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent is a limited liability company whose post office address is 44 Kents Ave., Rio Rico, AZ 85642. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about April 30, 2010, Complainant's Salesperson, George Hardwick, sold one (1) truckload of mixed vegetables to Respondent and delivered the vegetables from loading points in Los Angeles, California and Nogales, Arizona, to Respondent's customer, Action Produce in South San Francisco, California (Compl. ¶ 4). Complainant's passing indicates that Complainant shipped the vegetables on the same day (Compl. Ex. 9 at 2). On the same day, Complainant issued invoice number 5492 billing Respondent for 29,903 pounds of watermelons (produce of Mexico), at $.275 per pound, or $8,223.33, and 200 cartons of white corn (produce of USA) at $15.25 per carton, or $3,050.00, for a total sales price of $11,273.33 delivered. Payment was due in twenty-one (21) days (Compl. Ex. 9 at 1).

4. On May 3, 2010, Respondent issued invoice number 302929 billing its customer, Action Produce, for 29,903 pounds of watermelons size-5, at $.285 per pound, or $8,522.36, and 200 48-count cartons of white corn at $15.75 per carton, or $3,150.00, for a total sales price of $11,672.36. Payment was due in twenty-one (21) days (Compl. Ex. 5 at 10).

5. On or about May 1, 2010, Complainant's Salesperson, George Hardwick, sold one (1) truckload of mixed vegetables to Respondent and delivered the vegetables from loading points in Los Angeles, California

and Nogales, Arizona, to Respondent's customer, Action Produce in South San Francisco, California (Compl. ¶ 4). Complainant's passing indicates that Complainant shipped the vegetables on the same day (Compl. Ex. 10 at 2). On the same day, Complainant issued invoice number 5493 billing Respondent for 23,460 pounds of watermelons (produce of Mexico), at $.26 per pound, or $6,099.60, 158 cartons of white corn (produce of USA) at $13.95 per carton, or $2,204.10, and 400 cartons of Roma tomatoes (produce of Mexico) at $13.35 per carton, or $5,340.00, for a total sales price of $13,643.70 delivered. Payment was due in twenty-one 21 days (Compl. Ex. 10 at 1).

6. On May 3, 2010, Respondent issued invoice number 302927 billing its customer, Action Produce, for 23,460 pounds of watermelons size-5, at $.27 per pound, or $6,334.20, 160 cartons of white corn 48-count at $16.00 per carton, or $2,560.00, and 400 cartons of Roma tomatoes at $13.85 per carton, or $5,540.00, for a total sales price of $14,434.20. Payment was due in twenty-one (21) days (Compl. Ex. 5 at 8).

7. Complainant has not been paid for the two (2) shipments of mixed vegetables described in Findings of Fact 3 and 5. At some point, Complainant and Respondent verbally entered a "pay-when-paid" agreement which was not reduced to writing at the time of the agreement (Compl. ¶ 6). However, in a signed letter, dated February 1, 2011, to the Department's Western Regional Office of PACA, Complainant's President, Carl J. Denholtz, stated "[w]e reluctantly agreed with Vibo [Respondent] that due to the unusual circumstances that we were both in we would wait to be paid by Vibo when they were paid by Action [Respondent's customer]. Unfortunately Action has filed for Bankruptcy. . . ." (ROI Ex. E at 2).

8. The informal complaint was filed on December 29, 2010 (ROI Ex. A at 1), which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the sales price of $24,917.03 for two (2) truckloads of mixed vegetables sold to Respondent and delivered to Respondent's customer, Action Produce, in

the course of interstate commerce. Complainant states that it never received payment (Compl. ¶¶ 4-6).

Complainant, as the moving party, has the burden of proving its allegations by a preponderance of the evidence. *See Sun World Int'l, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (U.S.D.A. 1987); *see also W.W. Rodgers & Sons v. Cal. Produce Distrib., Inc.*, 34 Agric. Dec. 914, 919 (U.S.D.A. 1975). As evidence to substantiate its allegations, Complainant submitted copies of its invoices numbers 5492 and 5493 billing Respondent for the vegetables and the corresponding passings (Compl. Ex. 9 at 1-2, Ex. 10 at 1-2).

In response to Complainant's sworn allegations, Respondent submitted a sworn Answer that generally denies the allegations in the Complaint and asserts affirmative defenses. Respondent has the burden of proving its affirmative defense(s) by a preponderance of the evidence. *See Jules Produce Co. v. Quality Melon Sales, Inc.*, 40 Agric. Dec. 152, 154 (U.S.D.A. 1981); *see also Walker & Hagen v. Amato*, 27 Agric. Dec. 1543, 1545 (U.S.D.A. 1986). We will now determine whether Respondent has asserted any legitimate affirmative defenses.

Respondent's first affirmative defense is that it owes no money to Complainant because it was only a Broker in these transactions and that the record does not contain evidence to prove it purchased or accepted the vegetables at issue (Answer at 1-2).

In response, Complainant's President, Carl J. Denholtz, submitted a sworn Opening Statement that denies Respondent's claim that it was only a broker in the transactions at issue. In an effort to further support its claims, Complainant submitted a copy of an analysis letter prepared by the Department's Western Regional Office of PACA advising Respondent to contact Complainant in an effort to settle this matter (Opening Statement at 1, Ex. 1-2). In *Carmack v. Selvidge*, 51 Agric. Dec 892, 902 (1992) we stated:

> The report [ROI] contains both factual findings . . . and advisory opinions . . . and is included as evidence in the proceeding to be considered by the Presiding Officer. The report itself is neither binding on the Presiding

> Officer nor determinative of the Presiding Officer's final legal judgment. Each party is given the opportunity to rebut the investigator's findings in the same manner as each is allowed to submit other evidence. When the record is presented to the Presiding Officer for preparation of a decision, the Presiding Officer examines all evidence: the Report of Investigation, the pleadings submitted by the parties, and any other evidence contained in the record. The Presiding Officer considers each piece of evidence and renders a decision based on the totality of the evidence contained in the record.

"Where the parties put forth affirmative, but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish its allegation by a preponderance of the evidence." *Lookout Mountain Tomato & Banana Co. v. Case Produce, Inc.*, 51 Agric. Dec. 1471, 1475 (U.S.D.A. 1992).

Complainant's invoices clearly reflect that Respondent was the buyer of the vegetables at issue (Compl. Ex. 9 at 1-2, Ex. 10 at 1-2). "An invoice, while not fully dispositive of the terms and conditions of a transaction, must be given great weight, particularly where it has not been timely challenged." *Action Produce v. Ward's Fruit & Produce, Inc.*, 46 Agric. Dec. 1845, 1847 (U.S.D.A. 1987); *see also Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (U.S.D.A. 1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218, 224-25 (U.S.D.A. 1960). There is no evidence that Respondent promptly challenged the terms in Complainant's invoices. It simply did not pay the invoices. In addition, there is no evidence that Respondent prepared broker confirmations or memorandums of sale setting forth truly and correctly all of the essential details of the agreement between the parties, including any express agreement as to the time when payment is due as required by the Regulations Under the Act (7 C.F.R. 46.28(a)). Further, Respondent billed its customer, Action Produce, for the two shipments of vegetables (Compl. Ex. 5 at 8, 10). If Respondent were a broker, it would have invoiced its customer, Action Produce, for broker fees only. Instead it billed Action Produce for the price of the produce with a mark-up for profit. This type of invoicing strongly suggests that Respondent was a buyer who resold produce rather than a

broker. For the reasons stated, we conclude that Respondent purchased the two shipments of vegetables at issue. In addition, we conclude that Respondent accepted the two (2) shipments of vegetables as it has not alleged that it attempted to reject any of the vegetables to Complainant. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2 (dd)(3). 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. *See Ocean Breeze Export, Inc. v. Rialto Distrib., Inc.*, 60 Agric. Dec. 840, 903 (U.S.D.A. 2001); *see also World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (U.S.D.A. 1988). The burden to prove a breach of contract rests with the buyer of the 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 Mktg. Coop. v. Tom Lange Co.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987). In the instant case, Respondent has not alleged that Complainant breached the contracts. Respondent's first affirmative defense that it was merely a broker is without merit.

Respondent's second affirmative defense is that it had a payment agreement with Complainant that was visible in black and white (Answering Statement at 2). The record reflects that at some point Complainant and Respondent verbally entered a pay-when-paid agreement which was not reduced to writing at the time of the agreement (Compl. ¶ 6). However, the verbal agreement was later confirmed in writing by Complainant in a signed letter, dated February 1, 2011, to the Department's Western Regional Office of PACA. In the signed letter, Complainant's President, Carl J. Denholtz, stated "[w]e reluctantly agreed with Vibo [Respondent] that due to the unusual circumstances that we were both in we would wait to be paid by Vibo when they were paid by Action [Respondent's customer]. Unfortunately Action has filed for Bankruptcy. . . ." (ROI Ex. E at 2). Further evidence of the verbal pay-when-paid agreement was confirmed by Complainant to Respondent in an e-mail note, dated December 22, 2010, in which Complainant's President, Carl J. Denholtz, stated "[y]ou and I had agreed that payment of our invoices would be deferred until you received payment from Action. Unfortunately this course can no longer be pursued. . . ." (ROI Ex. G at 9). We have repeatedly held that unsworn evidence may be treated as evidentiary pursuant to 7 C.F.R. § 47.7 of the Rules of Practice Under the Act if contained within the ROI, and that either party shall be

permitted to submit evidence in rebuttal. *Tanita Farms, Inc. v. City Wide Distrib., Inc.*, 44 Agric. Dec. 1738, 1739 (U.S.D.A. 1985). We find no evidence in rebuttal to these letters in the record. Respondent has proven its second affirmative defense that it had a payment agreement with Complainant by a preponderance of the evidence.

Next, we must determine the effect of the pay-when-paid agreement upon the outcome of this case. In the instant case, Complainant (seller) agreed to wait to be paid until Respondent (buyer) was paid by a third party, Respondent's customer, Action Produce, which filed for bankruptcy after the pay-when-paid agreement was made. Pay-when-paid agreements usually arise in construction contracts where the general contractor pays the sub-contractor when it is paid by the homeowner or some other responsible party. *See Thos. J. Dyer Co. v. Bishop Int'l Eng'g Co.*, 303 F.2d 655, 658-60 (6th Cir. Ohio 1962). Courts have held that when a pay-when-paid provision in a contract does not address the possibility of insolvency that payment would be postponed for a reasonable period of time to afford a payer the opportunity to collect the funds necessary to pay a payee, but have found it unreasonable to conclude that a pay-when-paid agreement should require a payee to wait to be paid for an indefinite period of time, which may never occur, when the parties did not provide for this condition at the time the contract was entered into. *Id.* The fact that such act is not performed or that such event does not happen does not discharge the contract and performance is required in at least a reasonable time, but if such was not the intention of the parties, the possibility of insolvency could have been expressed in unequivocal terms in the contract. *See L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 181 (Ariz. Ct. App. 1997), citing *Thos. J. Dyer Co*. Unless the contract clearly shows that an act or event is an express condition, it is not a "condition precedent" to performance under the contract. *See Brady Farms, Inc. v. Crosby*, 37 Agric. Dec. 1962, 1966-70 (U.S.D.A. 1978).

Lastly, as the possibility of insolvency was not addressed in the oral contract between Complainant and Respondent, we must determine a reasonable time for payment by Respondent. The Regulations Under the Act (7 C.F.R. 46.2(aa)(5) require payment for produce by a buyer within ten days after the day on which the produce is accepted. Respondent's invoices to its customer, Action Produce, indicate that payment was due

Respondent within twenty-one (21) days or no later than May 24, 2010 (Compl. Ex. 5 at 8, 10). In light of the pay-when-paid agreement, it would therefore be reasonable to expect Respondent to have paid Complainant within ten (10) days of May 24, 2010, or no later than June 4, 2010.

In summary, based upon the evidence in the record, we find Respondent liable to Complainant for $24,917.03 for the mixed vegetables billed on Complainant's invoices, numbers 5492 and 5493, and that payment was due on June 4, 2010. Respondent has not paid Complainant.

Respondent's failure to pay Complainant $24,917.03 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (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. *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). 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 Under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. §

499e(a), the party found to have violated section 2 of the Act (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 $24,917.03, with interest thereon at the rate of 0.18% per annum from July 1, 2010, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

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WESTBERRY FARMS LTD. v. SUNGATE MARKETING LLC.
PACA Docket No. W-R-2011-192.
Decision and Order.
Filed December 20, 2012.

[Cite as: 71 Agric. Dec. w (U.S.D.A. 2012), *published in* 72 Agric. Dec. w (U.S.D.A. 2013).]

PACA-R.

Joint Account Transactions

Practice and Procedure – Necessary Parties

Where the counterclaim submitted by Respondent concerned produce that was part of a joint venture, and one of the joint venture partners had not and could not be joined in the proceeding, determined that the counterclaim must be dismissed, as any amount due Complainant or Respondent under the venture was dependent, at least in part, upon the contribution of and the proceeds due the third party, so an adequate judgment could not be rendered without the presence of the third party, (a necessary party to the action), to provide evidence and testimony in this regard.

Shelton S. Smallwood, Presiding Officer.
Leslie Wowk, Examiner.
Complainant, *pro se.*
Respondent, *pro se.*
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as "the Act." A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $41,107.84 in connection with eight (8) trucklots of blueberries shipped in the course of foreign commerce.

Copies of the Report of Investigation 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 Counterclaim in the amount of $80,418.40 in connection with five (5) truckloads of pomegranates that Respondent allegedly sold to Complainant.[1] Complainant filed a reply to the Counterclaim denying liability to Respondent.[2]

While the amounts claimed in the Complaint and in 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 under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("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. Complainant also submitted a brief.

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[1] Respondent submitted one (1) untitled document with paragraphs 1 through 11 comprising its Answer, and paragraphs A though I comprising its Counterclaim.

[2] Complainant submitted one document entitled "Opening Statement/Counter Claim Response" which served as both its Opening Statement and its reply to Respondent's Counterclaim.

ERRATA

Findings of Fact

1. Complainant is a corporation whose post office address is 34488 Bateman Road, Abbotsford, British Colombia, V2S7Y8. Complainant is not licensed under the Act.

2. Respondent is a limited liability company whose post office address is 822 Amy Court, East Wenatchee, WA 98802. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On July 16, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Los Angeles, California, one trucklot of blueberries (Compl. Ex. 7).Respondent prepared a confirmation dated July 16, 2010, listing the sale by Complainant to Respondent of 960 cartons (12x6 oz.) of blueberries at $8.55 per carton, for a total purchase price of $8,208.00 (Compl. Ex. 6). Complainant issued invoice number 20052689, dated August 6, 2010, billing Respondent for 960 cartons (12x6 oz.) of fresh blueberries at $8.55 per carton, for a total invoice price of $8,208.00 (Compl. Ex. 5). Respondent has not paid this invoice.

4. On August 4, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Vernon, California, one trucklot of blueberries (Compl. Ex. 4). Respondent prepared a confirmation dated August 4, 2010, listing the sale by Complainant to Respondent of 288 cartons (pint) of blueberries at $11.65 per carton, or $3,355.20, and 192 cartons (6 oz.) of blueberries at $7.60 per carton, or $1,824.00, for a total purchase price of $5,179.20 (Compl. Ex. 3). Complainant issued invoice number 20052688, dated August 6, 2010, billing Respondent for 288 cartons (12x1 lb.) of fresh blueberries at $11.65 per carton, or $3,355.20, and 240 cartons (12x6 oz.) of fresh blueberries at $7.60 per carton, or $1,824.00, for a total invoice price of $4,814.40 (Compl. Ex. 2). The invoice shows the quantity of 240 cartons for the 6 oz. blueberries crossed through and “192” handwritten beside it; however, the dollar amount for these blueberries was not adjusted (Compl. Ex. 2). Respondent has not paid this invoice.

5. On August 4, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Vernon, California, one (1) trucklot

of blueberries (Compl. Ex. 9). Respondent prepared a purchase order listing the purchase by Respondent of eighty (80) cartons (12x1 pint) of blueberries at $11.63 per carton (Compl. Ex. 9). Complainant issued invoice number 20052690, dated August 6, 2010, billing Respondent for eighty (80) cartons (12x1 pint) of fresh blueberries at $11.63 per carton, for a total invoice price of $930.40 (Compl. Ex. 8). Respondent has not paid this invoice.

6. On August 4, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Vernon, California, one trucklot of blueberries (Compl. Ex. 11). Respondent prepared a purchase order listing the purchase by Respondent of 288 cartons (4x2#) of blueberries at $10.93 per carton (Compl. Ex. 11). Complainant issued invoice number 20052691, dated August 6, 2010, billing Respondent for 288 cartons (4x2 lbs.) of fresh blueberries at $10.93 per carton, for a total invoice price of $3,147.84 (Compl. Ex. 10). Respondent has not paid this invoice.

7. On August 4, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Vernon, California, one (1) trucklot of blueberries (Compl. Ex. 14). Respondent prepared a purchase order listing the purchase by Respondent of 960 cartons (12x6 oz.) of blueberries at $7.60 per carton (Compl. Ex. 13). Complainant issued invoice number 20052692, dated August 6, 2010, billing Respondent for 960 cartons (12x6 oz.) of fresh blueberries at $7.60 per carton, for a total invoice price of $7,296.00 (Compl. Ex. 12). Respondent has not paid this invoice.

8. On August 5, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Richmond, British Columbia, one (1) trucklot of blueberries (Compl. Ex. 17). Respondent prepared a confirmation dated August 4, 2010, listing the sale by Complainant to Respondent of 192 cartons (12x125 gram) of blueberries at $8.55 per carton, for a total purchase price of $1,641.60 (Compl. Ex. 16). Complainant issued invoice number 20052701, dated August 9, 2010, billing Respondent for 192 cartons (12x125 gram) of fresh blueberries at $8.55 per carton, for a total invoice price of $1,641.60 (Compl. Ex. 15). Respondent has not paid this invoice.

ERRATA

9. On August 13, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in Los Angeles, California, one (1) trucklot of blueberries. (Compl. Ex. 23.) Respondent prepared a purchase order listing the purchase by Respondent of 864 cartons (12x1 pint) of blueberries at $14.75 per carton. (Compl. Ex. 22.) Complainant issued invoice number 20052725, dated August 19, 2010, billing Respondent for 864 cartons (12x1 pint) of fresh blueberries at $14.75 per carton, for a total invoice price of $12,744.00 (Compl. Ex. 21). Respondent has not paid this invoice.

10. On August 18, 2010, Complainant shipped from loading point in the country of Canada, to Respondent, in San Francisco, California, one (1) trucklot of blueberries (Compl. Ex. 20). Respondent prepared a confirmation dated August 18, 2010, listing the sale by Complainant to Respondent of 144 cartons (pint) of blueberries at $16.15 per carton, for a total purchase price of $2,325.60 (Compl. Ex. 19). Complainant issued invoice number 20052735, dated August 23, 2010, billing Respondent for 144 cartons (12x1 pint) of fresh blueberries at $16.15 per carton, for a total invoice price of $2,325.60 (Compl. Ex. 18). Respondent has not paid this invoice.

11. The informal Complaint was filed on February 4, 2011, which is within nine (9) months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the agreed purchase price for eight trucklots of fresh blueberries sold and shipped to Respondent. Complainant states Respondent accepted the blueberries in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices totaling $41,107.84 (Compl. ¶ 7). In response to Complainant's allegations, Respondent admits purchasing the subject blueberries but asserts that due to quality issues, only $26,009.00 is owed to Complainant for the blueberries (Answer ¶¶ 4-10). In addition, Respondent asserts in its Counterclaim that Complainant owes Respondent $80,418.40 for five (5) trucklots of pomegranates that Complainant purchased from Respondent (Countercl. ¶ F).

We will first address the eight (8) trucklots of fresh blueberries at issue in the Complaint. As we just mentioned, Respondent admits purchasing the blueberries but contends that it owes less than the amount sought in the Complaint for the blueberries. We will consider Respondent's specific defenses individually by invoice number below.

Invoice No. 20052689

Respondent states there were not any noted problems on this load and states the invoice should be paid in full for the amount of $8,208.00 (Answer Ex. 1). We therefore find that Respondent owes Complainant the invoice price of $8,208.00 for the blueberries in this shipment.

Invoice No. 20052688

Respondent states the blueberries in this shipment were rejected by its customer, Northgate, due to softness and decay, and that an internal inspection showed twelve percent (12%) soft with one percent (1%) decay (Answer Ex. 1). Respondent states further that the 191 cartons of blueberries in six-ounce (6 oz.) containers were accepted with an adjustment (Answer Ex. 1). Respondent states that per conversations had with "Navtej and Parm,"[3] the rejected fruit was sent to Marina Produce to repack, after which the repacked fruit was sent to a different customer with an open price (Answer Ex. 1). Respondent states it has yet to receive any remittance from that customer and is in the process of filing a PACA claim (Answer Ex. 1). Finally, Respondent states Northgate remitted for 191 cartons at $9.00 per carton, for a total of $1,719.00, from which Respondent will deduct its commission in the amount of $171.90, and $218.00 for freight, leaving a balance due Complainant of $1,329.10 (Answer Ex. 1).

Complainant's CEO, Mr. Parm Bains, states the bill of lading for the shipment bears a statement in bold lettering that reads "all claims must be filed upon receipt of delivery," and asserts that a claim is understood in the industry to mean that the receiver upon discovering quality issues will normally call a federal inspection and inform the supplier via e-mail

[3] This is apparently a reference to Respondent's former intern, Mr. Navtej Singh Bains, and Complainant's CEO, Mr. Parm Bains.

as to the quality issues and make a mutually agreed settlement (Opening Stmt. at 1-2). Mr. Bains states further that Complainant was never informed by Navtej (Bains) of any quality issues with respect to any of the shipments, either verbally or via e-mail, or through any other communication (Opening Stmt. at 2). According to Mr. Bains, Navtej is a student who interned under Respondent and its manager, Mr. Dominic Farinelli, to learn marketing and sales in the fresh fruit and vegetable industry (Opening Stmt. at 2). Mr. Bains states Mr. Farinelli and Respondent's Mr. Chris Hartmann were the appropriate people to inform Complainant of quality issues, and that there were in fact two occasions when these individuals notified Complainant of problems with its product (Opening Stmt. at 2). Mr. Bains states it was not until January 25, 2011, after many attempts were made via e-mail to get information on why Complainant was not getting paid, that Complainant became aware of quality issues with the shipments, other than the two just mentioned (Opening Stmt. at 2). Mr. Bains states this was a shock and a surprise to Complainant, as it had not been informed of any problems or received any federal inspections (Opening Stmt. at 2). Finally, Mr. Bains states Respondent made its own decisions as to what to do with the product without consulting Complainant, causing Complainant to incur a substantial loss (Opening Stmt. at 2).

Attached to the Opening Statement of Mr. Parm Bains are a number of documents submitted to substantiate his statements. The first is a copy of one of Complainant's bills of lading bearing the statement "ALL CLAIMS MUST BE FILED UPON RECEIPT OF DELIVERY." (Opening Stmt. Ex. 1). The bill of lading is, however, a contract of haul between Complainant and the carrier, and as such it is not an appropriate place to find the obligations of Respondent pursuant to the sales contract negotiated with Complainant.

The next document is a sworn statement from Mr. Navtej Singh Bains, wherein Mr. Bains states he was employed as an intern with Respondent at the time of the subject transactions (Opening Stmt. Ex. 2). While acting in this capacity, Mr. Bains states he did not discuss quality issues relating to the blueberry shipments with representatives of Respondent, nor was he requested to communicate any concerns about the quality of the blueberries to his father, Mr. Parm Bains, who was the General Manager of Complainant (Opening Stmt. Ex. 2). As a result, Mr.

Bains states he never communicated any concerns about quality to Parm Bains while he was interning with Respondent (Opening Stmt. Ex. 2).

The next two (2) documents submitted by Complainant are copies of e-mail messages sent by Respondent's Mr. Dominic Farinelli to Complainant, dated August 16 and 17, 2010, respectively, stating in the first case that blueberries delivered to Nippon in Vancouver were too soft, and in the second case, that six pallets of blueberries were too soft and a little wet (Opening Stmt. Ex. 3-4). Neither message mentions a specific transaction.

Complainant also submitted evidence that Mr. Parm Bains sent a number of e-mail messages to Respondent's Mr. Chris Hartmann in October and November of 2010 requesting payment for the blueberries (Opening Stmt. Ex. 19-21). In response, Mr. Hartmann sent messages on November 1 and November 15, 2010, informing Complainant that Respondent was still attempting to collect from its customers (Opening Stmt. Ex. 20-21). On January 25, 2011, Mr. Hartmann sent Complainant an e-mail message containing a breakdown of the amount due for each shipment and advising that Respondent still had not been paid on many of the files (Opening Stmt. Ex. 5-20).

In response to the statement of Mr. Parm Bains and the additional evidence submitted therewith, Respondent submitted a sworn Answering Statement signed by Mr. Chris Hartmann, managing partner of Respondent. Mr. Hartmann states that while notification of issues was given as noted in Complainant's Opening Statement Exhibits 3 and 4, most notifications were verbal (Answering Stmt. ¶ 4). Mr. Hartmann also admits not securing federal inspections; however, Mr. Hartmann states Respondent believed it was covered by the verbal notifications (Answering Stmt. ¶ 4). According to Mr. Hartmann, Navtej was in the Clovis, California office with Mr. Dominic Farinelli and had daily contact with his father, Mr. Parm Bains, gathering and disseminating information for Respondent (Answering Stmt. ¶ 4). Mr. Hartman also asserts that Complainant knew of the quality issues, as they stopped shipments for some time in the U.S. because of complaints from receivers (Answering Stmt. ¶ 4).

ERRATA

In response to Mr. Hartmann's testimony, Complainant submitted a sworn Statement in Reply signed by Mr. Parm Bains, attached to which is a notarized, but not sworn, statement from Mr. Dominic Farinelli that reads as follows:

> During the time that Nav Bains was working with me in Fresno for Sungate Marketing he was present in the capacity of an intern and a student. In an effort to increase his knowledge about the processes of the produce industry he participated in a variety of capacities including but not limited to website design, communicating with customers and with Westberry Farms upon request. All actions performed by Nav were done at my request; this included communication with Westberry Farms regarding orders. Regarding dealing with quality issues on Westberry's blueberry shipments to us, Nav was never asked nor did he address those with Parm or any other staff member at Westberry Farms. Ultimately it was my responsibility to initiate any and all communications.

(Stmt. in Reply Ex. 1). Although Mr. Farinelli's statement is not sworn, it is in evidence under the documentary procedure and may be considered by the trier of facts. *Woods v. Conagra Inc.*, 50 Agric. Dec. 1018, 1022-23 (U.S.D.A. 1991). In reference to this statement, Mr. Parm Bains states "we now have two notarized statements one from Navtej and one from his supervisor Mr. Dominic that no verbal notification was ever given and only on two occasions as noted in exhibits 3 and 4 that written notifications were ever made." (Stmt. in Reply ¶ 5). Further, Mr. Parm Bains states "no verbal notifications were made as the respondent claims to have been made through my son, Navtej to me." (Stmt. in Reply ¶ 10).

Respondent acknowledges accepting all of the blueberry shipments at issue in this dispute (Answer ¶ 8). The Uniform Commercial Code, section 2-607(3)(a), provides that "where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy." Complainant has submitted testimony from the individual employed by Respondent who purportedly provided notice to

Complainant, as well as the individual who purportedly received the notice, both of whom deny that such notice was given or received. Moreover, while Complainant acknowledges receiving written notice via e-mail messages in two instances, there is no indication that this notice relates to any of the blueberry shipments at issue in this dispute. Consequently, we find that Respondent has failed to sustain its burden to prove that prompt notice of a breach was provided to Complainant.

As a result of its failure to establish that it provided Complainant with prompt notice of a breach, Respondent is barred from recovering any damages that may have resulted from the alleged breach of contract by Complainant. We should note that even if Respondent were successful in showing that Complainant was timely notified of a breach, Respondent still would not be entitled to recover damages in the absence of any independent evidence, such as a USDA inspection, to establish that the blueberries did not conform to the contract requirements, or proof that Complainant specifically waived its right to receive such proof.[4] Accordingly, we find that Respondent is liable to Complainant for the blueberries it accepted in this shipment at the full invoice price of $4,814.40.

Invoice No. 20052690

Respondent states the blueberries in this shipment were noted to have some softness on arrival, and that per conversations had with Navtej and Parm, the blueberries were left with the understanding that remittance would be lower than originally expected (Answer Ex. 1). Respondent states its customer, Cooseman's, remitted $10.00 per carton, for a total of $800.00, from which it will deduct its commission of $80.00 and freight of $468.57, leaving a balance due Complainant of $251.43 (Answer Ex. 1).

For the reasons already stated, we find that Respondent is barred from recovering the damages claimed due to its failure to provide independent evidence that the blueberries failed to comply with the contract

[4] 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 Mktg. Coop. v. Tom Lange Co., Inc., 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

requirements or establish that Complainant was given timely notice of the alleged breach. Consequently, Respondent is liable to Complainant for the blueberries it accepted in this shipment at the full invoice price of $930.40.

Invoice No. 20052691

Respondent states the blueberries in this shipment were noted to have some softness on arrival which meant that the product necessitated repacking due to the strictness of the receiver (Answer Ex. 1). Per conversations had with Navtej and Parm, Respondent states the fruit was taken to Marina Produce to be repacked (Answer Ex. 1). Respondent adds that an internal analysis of the fruit showed fifteen percent (15%) soft, and the repacking charge was $1.50 per box (Answer Ex. 1). Respondent states its customer, Coast Produce, remitted for 288 cartons at $15.00 per carton, for a total of $4,320.00, from which it will deduct its commission of $432.00, repacking fees of $436.78 and freight of $3,019.22, leaving a balance due Complainant of $3,019.22 (Answer Ex. 1).

For the reasons already stated, we find that Respondent is barred from recovering the damages claimed due to its failure to provide independent evidence that the blueberries failed to comply with the contract requirements or establish that Complainant was given timely notice of the alleged breach. Consequently, Respondent is liable to Complainant for the blueberries it accepted in this shipment at the full invoice price of $3,147.84.

Invoice No. 20052692

Respondent states the blueberries in this shipment were noted to be soft upon arrival but were accepted, and that its customer, VIP, paid in full so Respondent will pay Complainant the full invoice amount of $7,296.00 (Answer Ex. 1). Accordingly, we find that Respondent owes Complainant $7,296.00 for the blueberries in this shipment.

Invoice No. 20052701

Respondent states there were not any noted problems on this load and states the invoice should be paid in full for the amount of $1,641.60 (Answer Ex. 1). Accordingly, we find that Respondent owes Complainant $1,641.60 for the blueberries in this shipment.

Invoice No. 20052725

Respondent states the blueberries in this shipment were rejected upon arrival due to softness, and that per conversations had with Navtej and Parm, the product was sent to Marina Produce to be repacked and used on other orders (Answer Ex. 2). Respondent states a total of 432 cartons were shipped to its customer, Northbay, on file numbers 19259 and 19270, and the repacking fee was $2.15 per carton (Answer Ex. 2). Respondent states Northbay remitted for 288 cartons at $12.00 per carton, for a total of $3,456.00, on file number 19259, and for 144 cartons at $18.00 per carton, for a total of $2,592.00, on file number 19270 (Answer Ex. 2). From the total of $6,048.00 remitted by Northbay, Respondent states it will deduct its commission in the amount of $604.80, repacking fees of $1,857.60 and freight in the amount of $1,647.55, leaving a net amount due Complainant for the blueberries of $1,938.05 (Answer Ex. 2).

For the reasons already stated, we find that Respondent is barred from recovering the damages claimed due to its failure to provide independent evidence that the blueberries failed to comply with the contract requirements or establish that Complainant was given timely notice of the alleged breach. Consequently, Respondent is liable to Complainant for the blueberries it accepted in this shipment at the full invoice price of $12,744.00.

Invoice No. 20052735

Respondent states there were not any noted problems on this load and states the invoice should be paid in full for the amount of $2,325.60 (Answer Ex. 2). Accordingly, we find that Respondent owes Complainant $2,325.60 for the blueberries in this shipment.

The total amount due Complainant from Respondent for the eight trucklots of blueberries at issue in the Complaint is $41,107.84.

Next we will consider Respondent's counterclaim, wherein Respondent seeks to recover $80,418.40 in connection with five truckloads of pomegranates that Respondent allegedly sold to Complainant. Respondent states specifically that on or about various dates between June 29, 2010, and January 11, 2011, in the course of foreign commerce, Complainant purchased and accepted five (5) truckloads of pomegranates from Respondent for which it has since failed, neglected and refused to pay Respondent the agreed purchase prices totaling $80,418.40 (Countercl. ¶¶ D, F).

In response to Respondent's allegations, Complainant states there is no money owed to Respondent for the pomegranates shipped to Complainant because Respondent was an active financial contributor and player in a joint project that was started in March 2010, by Complainant, Respondent and a third party, R.K. Foods (Countercl. Resp. ¶ 8). Complainant states the project was the brain child of Mr. Richard Robinson of R.K. Foods, and involved extracting and packing fresh pomegranate arils at a packing/processing facility owned by Complainant, creating a finished fresh product that would then be marketed and distributed in North American markets by Respondent. Complainant states it injected over $100,000 in new and used equipment, labor and the use of its facilities and management to the project, and Mr. Richard Robinson of R.K. Foods contributed close to $20,000 of his time (Countercl. Resp. ¶ 11I). The fresh pomegranate arils, Complainant states, were Respondent's financial contribution to the project (Countercl. Resp. ¶ 11D.) If the project had been successful, Complainant states Respondent would have been paid for the actual volume of pomegranate arils supplied; however, Complainant states the project had to be shut down due to lack of markets, the poor quality of the pomegranates supplied, production issues and cost overruns (Countercl. Resp. ¶ 8).

Respondent's Managing Partner, Mr. Chris Hartmann, submitted a sworn Answering Statement, wherein he acknowledges that ideas were bantered about, but denies that any partnership agreement was ever entered into or executed (Answering Stmt. ¶ 11). We note, however, that during the informal handling of this claim, Mr. Hartmann submitted a letter to the Department wherein he stated, in pertinent part:

> Complaint #2 on the Pomegranate Arils.
> This project was a joint venture of our two companies. All product arrived with some type of issue some with decay, underweight product, short codes on dates. Sungate attempted in some of the problems to repack or clean the product. Again this was a joint venture and ALL of the issues at the time were addressed promptly with either Mr Bains, Simran Bains or our contact Manjinder.

(ROI Ex. E at 1). Moreover, Complainant submitted copies of a number of e-mail messages exchanged between the parties discussing the project, including one sent by Mr. Hartmann to Complainant on December 23, 2010, stating, in pertinent part:

> I have in the neighborhood of 100K invested here now between fruit purchased, Labor and storage fees, Transportation, Travel. Promotions. Samples. and more. Not in tangibles like equipment and such but in perishables [sic] commodities much of which has been lost.
>
> My participation to this level was never my intention, ability, nor our agreement. We were to secure fruit for you and we were to recoup that investment. It wasn't until September that you asked that we take equal cost sharing in any of this.
>
> Sungate purchased for cash some 30K worth of Chilean product much of which you recouped through whole carton sales but I haven't been paid for that fruit.

(Opening Stmt./Countercl. Resp. Ex. 26B at 2). These messages plainly support Complainant's contention that the pomegranate arils which form the basis of Respondent's Counterclaim were part of a joint venture agreement. While there appears to be some dispute as to the details of the venture, the record clearly indicates that a joint venture agreement existed between Complainant, Respondent, and a third party, R.K.

Foods, rather than a simple sale of the pomegranate arils by Respondent to Complainant.

The Secretary may consider a claim for damages under a joint venture agreement where the venture involves the sale of a perishable agricultural commodity and an agreement to share in the proceeds of such sale. *See Eady v. Eady § Associates*, 37 Agric. Dec. 1589, 1592-93 (U.S.D.A. 1978), *citing Lloyd v. Dellartini*, Secretary's Decision 325, PACA Docket No. 366 (1933). We are, however, unable to consider the subject claim for damages because the joint venture involves a third party, R.K. Foods, who has not and cannot be joined in this proceeding. R.K. Foods cannot be joined at this point because any claim filed by or against this firm concerning the joint venture would have to be filed within nine months from the date the cause of action accrued (7 U.S.C. § 499f(a)), which has long since passed for the joint venture in question. Where a joinder is not feasible, Rule 19(b) of the Federal Rules of Civil Procedure states:

> (b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

While the Federal Rules of Civil Procedure are not applicable to administrative proceedings that are conducted before the Secretary of Agriculture under the Act, in accordance with the Rules of Practice,[5] they provide guidance in making these types of determinations. *In re: Fresh*

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[5] *See generally* Morrow v. Dep't of Agric., 65 F.3d 168 (Table) (per curiam) 1995 WL 523336 (6th Cir. 1995), printed in 54 Agric. Dec. 870 (U.S.D.A. 1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); Mister Discount Stockbrokers, Inc. v. SEC, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re* United Foods, Inc., 57 Agric. Dec. , slip op. at 19-20 (U.S.D.A. Mar. 4, 1998) (stating that the Federal Rules of Civil Procedure are not applicable to proceedings which are conducted before the Secretary of Agriculture under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, and in accordance with the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs); *In re* Kreider Dairy Farms, Inc., 57 Agric. Dec., slip op. at 12 (U.S.D.A. Feb. 20, 1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re* Byard, 56 Agric. Dec. 1543, 1559 (U.S.D.A. 1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no **rules of** civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice); *In re* Far W. Meats, 55 Agric. Dec. 1045, 1055-56 (U.S.D.A. 1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted under the Rules of Practice); *In re* Far W. Meats, 55 Agric. Dec. 1033, 1039-40 (U.S.D.A. 1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to USDA proceedings conducted under the Rules of Practice); *In re* Hickey, 53 Agric. Dec. 1087, 1096-99 (U.S.D.A. 1994) (stating the Federal Rules of Civil Procedure are not applicable to USDA's disciplinary proceedings conducted in accordance with the Rules of Practice), *aff'd,* 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (U.S.D.A. 1989); *In re* Shasta Livestock Auction Yard, Inc., 48 Agric. Dec. 491, 504 n.5 (U.S.D.A. 1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before USDA).

Prep, Inc., In re: Lech, In re: Raab, 58 Agric. Dec. 683, 687 (U.S.D.A. 1999).

As we mentioned, the record contains copies of e-mail messages exchanged between the parties discussing the details of the venture, many of which mention how the profit was to be shared among the parties. (Opening Stmt./Countercl. Resp. Ex. 25 at 1-2; Ex. 26A at 1-8.) Given that any amount due Complainant or Respondent under the venture is dependent, at least in part, upon the contribution of and the proceeds due R.K. Foods, an adequate judgment cannot be rendered without the presence of R.K. Foods to provide evidence in this regard. Without such evidence, any judgment rendered would potentially prejudice R.K. Foods, and we cannot lessen any prejudice by shaping the relief as any amount owed to the parties under the joint venture is dependent upon the contribution of and proceeds due R.K. Foods, which cannot be determined in its absence. For these reasons, we conclude that R.K. Foods is a necessary party to this proceeding who cannot be joined. Since R.K. Foods is a necessary party to the counterclaim who cannot be joined, the counterclaim must be dismissed for nonjoinder.

Furthermore, dismissal of the counterclaim is appropriate because Respondent may seek an adequate remedy in state or federal court. Accordingly, we are dismissing Respondent's Counterclaim.

Respondent's failure to pay Complainant $41,107.84 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (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 Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). 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 (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 Under the Act (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (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 $41,107.84, with interest thereon at the rate of fifteen percent (15%) per annum from September 1, 2010, 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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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT DECISIONS

MEZA SIERRA ENTERPRISES, INC. v. USDA.
No. 12-60816.
Court Decision.
Filed June 20, 2013.

PACA—Rules of Practice—Official notice.

[Cite as: 531 Fed. Appx. 460 (2013)].

United States Court of Appeals,
Fifth Circuit.

Court denied the Petitioner's Petition for Review, finding that the Judicial Officer ("JO") did not err in: (1) affirming the initial Decision and Order by the Administrative Law Judge ("ALJ") in which the ALJ revoked Petitioner's PACA license; (2) rejecting Petitioner's argument that the ALJ lacked jurisdiction to adjudicate the case; and (3) ruling that the ALJ acted properly in taking official notice of documents from proceedings in Texas state court. The Court also held that the Department's Rules of Practice Governing Formal Adjudicatory Proceedings ("Rules of Practice") apply to adjudication of PACA cases instituted under 7 U.S.C. § 499b(4) and that while a finding of liability is required prior to final revocation of a PACA license it is not a prerequisite for mere initiation of a license-revocation proceeding.

Before: BEAVLEY, JOLLY, and DAVIS, Circuit Judges.

OPINION

PER CURIAM:*

Respondent Secretary of Agriculture ("the Secretary") moved to revoke the perishable commodities merchant license of Petitioner Meza Sierra Enterprises, Inc. ("Meza Sierra") for its willful, flagrant, and repeated failure to pay for perishable agricultural commodities purchased

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances as set forth in 5TH CIR. R. 47.5.4.

in interstate commerce. The Administrative Law Judge ("ALJ") found that it possessed subject matter jurisdiction to adjudicate the dispute and that it was proper for it to take official notice of the facts found in a parallel Texas state court proceeding, and accordingly revoked Meza Sierra's license. Finding no error, we DENY the petition for review.

I.

This appeal stems from the alleged failure of Meza Sierra to pay Kingdom Fresh Produce, Inc. ("Kingdom Fresh") $215,385 for tomatoes it purchased and received between November 2008 and January 2009.

Meza Sierra is a Texas corporation licensed by the Department of Agriculture to participate in the wholesale market for perishable agricultural commodities under the Perishable Agricultural Commodities Act ("PACA"). 7 U.S.C. §§ 499a–499s. From November to December of 2008, Meza Sierra placed a series of orders—twelve lots in total—for tomatoes from Kingdom Fresh, which Kingdom Fresh successfully delivered in accordance with the terms of the orders. Kingdom Fresh, however, alleged that Meza Sierra never paid for any of the delivered lots and filed suit against Meza Sierra for breach of contract in Texas state court. The Deputy Administrator,[1] acting on behalf of the Secretary, also filed an administrative complaint alleging that Meza Sierra failed to pay Kingdom Fresh for the twelve lots of tomatoes in violation of 7 U.S.C. § 499b(4).[2] Under the authority of 7 U.S.C. § 499h(a), the Deputy Administrator petitioned the ALJ to permanently revoke Meza Sierra's license for its flagrant and repeated PACA violations.

In lieu of a hearing, the ALJ took official notice of records from the suit between Meza Sierra and Kingdom Fresh in Texas state court.[3] From these records, the ALJ determined that (a) the tomatoes at issue in the Texas state court proceeding were the same tomatoes at issue in the Deputy Administrator's complaint, (b) the Texas state court suit was fully litigated, and (c) Meza Sierra had in fact failed to pay Kingdom

[1] Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture.

[2] The Deputy Administrator also alleged Meza Sierra failed to pay a separate grower, Grand Produce LTD Co. The ALJ ultimately dismissed the claim pertaining to Grand Produce LTD Co. with prejudice.

[3] Case No. C-1990-09A in the District Court, 92nd Judicial District, Hidalgo County.

Fresh the agreed purchase price of $215,385 for the twelve lots of tomatoes it received. The ALJ ruled that Meza Sierra's failure to pay Kingdom Fresh constituted repeated and flagrant violations of 7 U.S.C. § 499b(4) and ordered the permanent revocation of Meza Sierra's PACA license. Meza Sierra appealed this ruling to the Secretary. The Judicial Officer ("JO"), acting on behalf of the Secretary, affirmed the ALJ's order revoking Meza Sierra's license.[4] The JO rejected Meza Sierra's claims that the ALJ lacked jurisdiction to adjudicate this case and that the ALJ improperly took official notice of the proceedings in Texas state court. Meza Sierra now petitions this court to review that judgment.

II.

Our review of the Department of Agriculture's decision under PACA is limited to the question of whether it was "arbitrary, capricious, or an abuse of discretion." *Faour v. U.S. Dep't of Agric.,* 985 F.2d 217, 219 (5th Cir.1993) (citing 5 U.S.C. § 706(2)(A)). We will also uphold an agency's interpretation of its own regulations unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 359, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)).

III.

A.

Meza Sierra first argues that the ALJ lacked jurisdiction to adjudicate this case because the Department of Agriculture's Rules of Practice Governing Formal Adjudicatory Proceedings ("Rules of Practice") were inapplicable to the Deputy Administrator's complaint. *See* 7 C.F.R. §§ 1.130–1.151.

The Rules of Practice comprise the procedural rules governing an adjudicative proceeding instituted by the Secretary and include the rules of procedure before an ALJ. *Id.* According to § 1.131(a) of the Rules of

[4] The JO vacated the ALJ's alternative sanction, which ordered the publication of the events surrounding Meza Sierra's PACA violation, because the Deputy Administrator did not seek this sanction in its complaint.

Practice, however, the rules only apply to a PACA adjudicatory proceeding if the Deputy Administrator brings the proceeding under the following exclusive list of statutes: 7 U.S.C. §§ 499a(b)(9), 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499h(e), 499i, and 499m(a). Meza Sierra contends that because the only provision of PACA which it allegedly violated, § 499b(4), is not listed in § 1.131(a) of the Rules of Practice, the Rules of Practice are inapplicable to this case.

This argument ignores the structure of PACA's administrative enforcement scheme. As the Deputy Administrator's complaint makes clear, it is moving to revoke Meza Sierra's license "pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a))," a statute which § 1.131(a) of the Rules of Practice explicitly enumerates and under which a violation of § 499b is an element. Section 499h(a) provides in pertinent part,

Whenever ... the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title ... the Secretary may ... by order, revoke the license of the offender.

7 U.S.C. § 499h(a).

A violation of § 499b is thus a prerequisite to license revocation under § 499h(a). However, if the ALJ were not empowered to adjudicate violations of § 499b, then it could never revoke a license under § 499h(a). We decline to adopt an interpretation of the Rules of Practice that would render one of its provisions void.[5] The Deputy Administrator's complaint asserts that Meza Sierra violated § 499b(4) by failing to pay Kingdom Fresh for twelve lots of tomatoes,[6] and unambiguously petitions the ALJ to revoke Meza Sierra's PACA license for its violations pursuant to § 499h(a). Because § 1.131(a) of the Rules

[5] *See Corley v. United States*, 556 U.S. 303, 315, 129 S.Ct. 1558, 173 L.Ed. 2d 443 (2009) (finding that "one of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks omitted)).

[6] Section 499b(4) makes it illegal 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." 7 U.S.C. § 499b(4). Under 7 C.F.R. § 46.2(aa)(11), a buyer fails to make "full payment promptly" if it has not paid the grower within the time indicated by a written agreement between the parties.

of Practice identifies § 499h(a) in its list of applicable statutes, the Rules of Practice apply to this case.

Meza Sierra in turn submits that the Deputy Administrator's reliance on § 499h(a) was premature. Specifically, Meza Sierra argues that § 499h(a) only grants the ALJ the power to revoke a license *after* there has been a separate administrative determination that a person has violated § 499b. Thus, Meza Sierra contends that invoking § 499h(a) in the initial complaint effectively presumed a § 499b determination which had not yet occurred.

This argument, though artful, misconstrues the wording of the statute. Section 499h(a) states only that "Whenever ... the Secretary determines ... that any commission merchant, dealer, or broker has violated any of the provisions of section 499b ..., the Secretary may, by order, revoke the license of the offender." Nothing in this language supports a requirement that there must be some separate ALJ or administrative determination of § 499b liability before the Secretary can file a formal complaint to revoke a merchant's PACA license. While a finding of § 499b liability is a prerequisite to final revocation of a license under § 499h(a), it is not a prerequisite to the mere institution of license revocation proceedings. The ALJ's decision to revoke Meza Sierra's license under § 499h(a) was therefore proper.[7]

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[7] Meza Sierra also argues that the Secretary failed to make its determination in accordance with § 499f, as required by § 499h(a), because Kingdom Fresh as the injured party never filed a formal complaint. However, § 499f requires the injured third party to file a complaint within nine months only if the injured party wants to initiate a reparation proceeding, i.e., file a federal PACA claim to compel the delinquent party to pay for the delivered agriculture goods. *See* 7 U.S.C. § 499f(a)(1) ("*Any* person complaining of any violation of any provision of section 499b of this title ... at any time within nine months after the cause of action accrues [may petition the Secretary to file a complaint].") (emphasis added); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 780–81 (D.C.Cir.1983) (concluding that 7 U.S.C. § 499f does not require the injured party to file a complaint unless it chooses to initiate reparation proceedings). But this is not a reparation proceeding because Kingdom Fresh sought pecuniary relief in state court and the Secretary seeks here only to revoke Meza Sierra's PACA license. *See also Melvin Beene Produce Co. v. Agric. Mktg. Serv.*, 728 F.2d 347, 349 (6th Cir.1984)("We find that the nine-month limit applies only to reparations actions ... not disciplinary actions by the Secretary.").

B.

Meza Sierra next argues that the ALJ improperly took official notice of documents from the state court suit before the Texas District Court, 92nd Judicial District, and the Court of Appeals, 13th District of Texas. Those documents establish that Kingdom Fresh obtained a judgment for the purchase price of $215,385 for tomatoes which Meza Sierra had purchased but failed to pay Kingdom Fresh. Meza Sierra alleges, however, that there has not been a final judgment in this suit and consequently it was improper for the ALJ to take official notice of any documents stemming from the suit. [8]

Meza Sierra's contention hinges on what it alleges to be a post-judgment order issued by the Texas state court vacating its judgment against Meza Sierra. Responding to Meza Sierra's Motion to Reconsider the court's summary judgment in favor of Kingdom Fresh, the court issued an order on May 18, 2010, which, due to handwritten alterations to the order, appeared to simultaneously both grant and deny the Motion to Reconsider. Meza Sierra has interpreted this conflicting order as an abatement of the summary judgment that rendered all subsequent decisions in Texas state court a legal nullity.

The full record belies this contention. On April 19, 2010, the 92nd Texas Judicial District issued a Final Summary Judgment in favor of Kingdom Fresh. Though the same court's May 18, 2010 ruling on Meza Sierra's Motion to Reconsider the summary judgment was indeed ambiguous, a May 28, 2010 order clarified the May 18 ruling by unequivocally denying reconsideration of the summary judgment. Though Meza Sierra moved to vacate the May 28, 2010 order, the court denied the motion on September 15, 2010, ruling that the May 28, 2010 motion should remain in full effect. Meza Sierra appealed the summary judgment, but the Texas court of appeals dismissed the appeal for untimely filing.

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[8] An ALJ may take official notice of "such matters as are judicially noticed by the courts of the United States and of any matter of technical, scientific, or commercial fact of established character." 7 C.F.R. § 1.141(h)(6). Meza Sierra does not contest whether § 1.141(h)(6) provided the ALJ with sufficient authority to take official notice of records from a state court proceeding.

Both the May 28, 2010 order and the September 15, 2010 order confirm that the ambiguous May 18, 2010 order denied, rather than granted, Meza Sierra's motion to reconsider the summary judgment. With the trial court's rulings unanimously in favor of Kingdom Fresh, the Texas appellate court's denial of Meza Sierra's appeal means that the Texas state court suit of which the ALJ took notice was fully litigated and therefore the ALJ's official notice of facts in those proceedings was proper.

IV.

For the reasons more fully set forth above, the petition for review is DENIED.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: MARKET 52, INC.
Docket No. 13-0011.
Default Decision and Order.
Filed March 8, 2013.

PACA-D.

Shelton S. Smallwood, Esq. for Complainant.
Kaleb L. Judy, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DEFAULT DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151).

Complainant, Fruit and Vegetable Program, Agricultural Marketing Service, initiated this proceeding against Market 52, Inc. (Respondent) by filing a disciplinary Complaint on October 4, 2012, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 9 sellers of the agreed purchase prices, or balances thereof, in the total amount of $842,429.81 for 48 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and foreign commerce. The Complaint alleges the violations occurred in commerce between July 23, 2011, and November 11, 2011 on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference. The Complaint requested that an Administrative Law Judge find that

Respondent has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and order that the facts and circumstances of those violations be published.

As Respondent failed to answer the Complaint, the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 (7 C.F.R. § 1.139) of the Rules of Practice.

Findings of Fact

1. Market 52, Inc., (Respondent), is a corporation organized and existing under the laws of the state of California with a business address in Kingsburg, California. Respondent is out of business and the Complaint was served on Respondent's attorney.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 2011 1238 was issued to Respondent on July 29, 2011. This license status was changed to Active with Bankruptcy on January 27, 2012, and terminated on July 29, 2012, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when Respondent failed to submit the required annual renewal fee.

3. Respondent, during the period July 23, 2011, through November 11, 2011, on or about the dates and in the transactions set forth in Appendix A of the Complaint and incorporated herein by reference, failed to make full payment promptly to 9 sellers of the agreed purchase prices, or balances thereof, in the total amount of $842,429.81 for 48 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

4. On January 27, 2012, Respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 701 *et seq.*) in the United States Bankruptcy Court for the Eastern District of California. The petition was designated Case No. 12-10694. Respondent admitted in its Schedule F that all 9 of the sellers listed in Appendix A, hold unsecured claims for unpaid produce debt totaling $839,096.34.[9]

[9] The amount of claims listed on the Schedule F for four of the nine sellers is less than the amount listed in Appendix A to the Complaint. The Schedule F was attached to the Complaint as Attachment A. Complainant, pursuant to section 1.141(h)(6) of the Rules

PERISHABLE AGRICULTURAL COMMODITIES ACT

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, flagrantly and repeatedly violated section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations shall be published.

2. Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceeding 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision and Order shall be served upon the parties.

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of Practice (7 C.F.R. § 1.141(h)(6)), respectfully requested that the ALJ take official notice of that court record.

In re: DELICIAS PRODUCE CO., INC.
Docket No. 12-0469.
Decision and Order.
Filed April 9, 2013.

PACA-D.

Shelton Smallwood, Esq. for Complainant.
Respondent, pro se.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER WITHOUT HEARING

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. §§ 1.130 through 1.151).

Complainant, Fruit and Vegetable Program, Agricultural Marketing Service, initiated this proceeding against Respondent Delicias Produce Co., Inc. by filing a Complaint on June 13, 2012, alleging that Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $519,883.71 for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of or in contemplation of interstate and/or foreign commerce. The Complaint alleges the violations occurred in commerce between September 15, 2010, and July 18, 2011 on or about the dates and in the transactions set forth in Appendix A to the Complaint, incorporated herein by reference.

On January 17, 2013, I issued an Order requiring Respondent to demonstrate it made full payment of $519,883.71 owed to 15 sellers, as alleged in the Complaint, by October 18, 2012. In that Order, I informed

Respondent that if it failed to provide such evidence, this case would be treated as a "no pay" case and that a Decision Without Hearing would be issued finding that it had committed willful, flagrant and repeated violations of section 2(4) of the PACA, and ordering that Respondent's violations be published. Respondent failed to respond to the Order. The time for responding to my January 17, 2013 Order having passed, and upon the motion of Complainant for the issuance of a Decision Without Hearing, the following Decision and Order is issued without further procedure or hearing.

Findings of Fact

1. Respondent is a corporation incorporated and existing under the laws of the State of Tennessee.

2. At all times material herein, Respondent operated subject to the licensing requirements of the PACA. License No. 2007 1245 was issued to Respondent on August 28, 2007. This license terminated on August 28, 2010, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)) when Respondent failed to submit the required annual renewal fee.

3. Respondent, during the period of September 15, 2010, through July 18, 2011, on or about the dates and in the transactions set forth in Appendix A attached the Complaint and incorporated herein by reference, failed to make full payment promptly to 15 sellers of the agreed purchase prices, or balances thereof, in the total amount of $519,883.71 for 62 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and/or foreign commerce.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, flagrantly and repeatedly violated section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations shall be published.

2. This Decision will become final without further proceeding 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies of this Decision and Order shall be served upon the parties.

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In re: PACIFIC RIM ONION, INC.
Docket No. 13-0014.
Decision and Order.
Filed April 17, 2013.

PACA.

Charles L. Kendall, Esq. for Complainant.
Michael C. Petersen, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) ("PACA"), instituted by a Complaint filed on February 27, 2009, by the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture on October 11, 2012. The Complaint alleged that Respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to two (2) sellers for purchases of 67 lots of perishable agricultural commodities in the course of interstate and foreign commerce in the amount of $340,687.50 during the period September 4, 2008 through February 10, 2009.

Respondent submitted an Answer which stated, "Respondent denies the allegations set forth in paragraphs 3 and 4." (Answer, p. 1 of 2). Subsequent investigation however indicated that as of February 27, 2013, the amount of $340,687.50 due to the two (2) sellers named in the Complaint remained unpaid. Citing the results of that investigation and Respondent's response to the allegations in the Amended Complaint, Complainant filed a Motion requesting an Order Requiring Respondent To Show Cause Why a Decision Without Hearing Should Not Be Issued against Respondent due to its failure to make full and prompt payment for produce purchases, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Department's policy is set forth in *Scamcorp, Inc.*, No. D-95-0502, 57 Agric. Dec. 527, 548-49, 1998 WL 92817 (U.S.D.A. Jan. 29, 1998), which held that when a Complaint is filed alleging the failure to make full payment promptly under the PACA, if the Respondent is not in full compliance with the PACA within 120 days after the complaint is served upon the Respondent or the date of the hearing, whichever occurs first, the case will be treated as a "no pay" case for which the sanction is license revocation. Complainant moved for the issuance of an Order requiring Respondent to demonstrate that it made full payment of the $340,687.50 which the Complaint alleges Respondent owed to two (2) produce sellers, by February 11, 2013 and requested that should Respondent fail to demonstrate that it made full payment of the $340,687.50 by February 11, 2013, a Decision Without Hearing be issued, finding that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA, and ordering that the facts and circumstances of Respondent's violations be published.

Consistent with the Department's policy set forth in the *Scamcorp* decision, I issued an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued on March 5, 2013, allowing Respondent 30 days from the date of service of the Order to demonstrate that it made full payment of $340,687.50 owed to the two (2) produce sellers, as alleged in the Complaint, by February 11, 2013. Respondent failed to respond to the Order. Accordingly, this case will be treated as a "no pay" case under the policy set forth in the *Scamcorp* decision.

Findings of Fact

1. Pacific Rim Onion, Inc. (Respondent) is a corporation organized and existing under the laws of the State of Oregon; however, Respondent is now out of business.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 2007 1217 was issued to Respondent on August 21, 2007. This license terminated on August 21, 2009, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

3. During the period September 4, 2008, through February 10, 2009, Respondent failed to make full payment promptly of the agreed purchase price for 67 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate commerce from two (2) sellers, in the total amount of $340,687.50.

4. Subsequent investigation indicated that as of February 27, 2013, the amount of $340,687.50 due to these two (2) sellers remained unpaid.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, repeatedly and flagrantly violated section 2(4) of the Act (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations shall be published.

2. This order shall take effect on the 11th day after this Decision becomes final.

3. Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R.

§§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

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In re: CARDILE BROTHERS MUSHROOM PACKAGING, INC.
Docket No. 13-0173.
Default Decision and Order.
Filed April 24, 2013.

PACA-D.

Charles L. Kendall, Esq. for Complainant.
Kenneth Federman, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DEFAULT DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (PACA), instituted by a Complaint filed on January 30, 2013, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period September 26, 2010, through January 23, 2012, Cardile Brothers Mushroom Packaging, Inc., (Respondent) failed to make full payment promptly of the agreed purchase price for 1,806 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce from 126 sellers, in the total amount of $2,988,273.98.

A copy of the Complaint was mailed to the address of Respondent's attorney by certified mail and was delivered on February 4, 2013. Respondent failed to answer the Complaint. The time for filing an Answer expired, and Complainant has moved for the issuance of a Default Order.

Accordingly, the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq*.) (Rules of Practice).

Findings of Fact

1. Cardile Brothers Mushroom Packaging, Inc., (Respondent) is a corporation organized and existing under the laws of the state of Pennsylvania with a former business address in Avondale, Pennsylvania. Respondent is not currently operating.

2. At all times material herein, Respondent was licensed under the provisions of the PACA. License No. 2001 0771 was issued to Respondent on April 3, 2001. The license terminated on April 3, 2012, after Respondent failed to submit the required annual fee, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499g(d)).

3. During the period September 26, 2010, through January 23, 2012, on or about the dates and in the transactions set forth in Appendix A to the Complaint and incorporated therein by reference, Respondent failed to make full payment promptly to 126 sellers of the agreed purchase prices, or balances thereof, for lots of perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate commerce, in the total amount of $2,988,273.98.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully, repeatedly and flagrantly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

1. The facts and circumstances of the violations shall be published.

2. This Order shall take effect on the 11th day after this Decision becomes final.

3. Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

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In re: MARK SANDLER.
Docket No. 12-0622.
Decision and Order.
Filed June 19, 2013.

PACA-APP.

Petitioner, pro se.
Shelton Smallwood, Esq. and Christopher Young, Esq. for Respondent.
Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a, *et seq.*) (Act) by the petition for review filed by the Petitioner Mark Sandler of the determination made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that he was "responsibly connected" (as that term is defined in Section 1(b)(9) of the Act (7 U.S.C. § 499a(b)(9))) to Sandler Bros., during the period of time that Sandler Bros. violated Section 2 of the Act (7 U.S.C. § 499b).

Sandler Bros., a PACA licensee, was the subject of a disciplinary complaint that resulted in a Default Decision and Order being entered

against it on August 15, 2012.[10] The Default Decision and Order authorized publication of the finding that Sandler Bros. willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 8 sellers of the agreed purchase prices in the amount of $234,385.14 for 314 lots of perishable agricultural commodities which Sandler Bros. purchased, received, and accepted in the course of interstate commerce during the period June 18, 2008 through March 4, 2009.

The matter was set for a telephonic hearing with the Petitioner appearing by telephone from Maine and the Respondent in Washington, DC on June 19, 2013. At the hearing, the Petitioner testified and one witness testified for the Respondent. The certified Agency Records containing 13 exhibits along with one additional exhibit were admitted on behalf of the Respondent.[11] The parties have waived briefs and the matter is now ripe for disposition.

Statutory Background

The Perishable Agricultural Commodities Act, 1930,[12] was enacted to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate or foreign commerce.[13] When enacted, the legislation had the approval of the entire organized fruit and vegetable trade, including commission merchants, dealers and brokers, all of whom benefit from the Act's protections.[14] The Act was intentionally a "tough" law enacted for the purpose of providing a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business

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[10] Sandler Bros., No. 12-0111, 71 Agric. Dec. 1267, 2012 WL 3877393 (U.S.D.A. Aug. 15, 2012).

[11] Respondent's Exhibits are indicated as "RX 1-14."

[12] 7 U.S.C. § 499a-499s.

[13] H.R. REP. NO. 1041, 71st Cong, 2d Session 1 (1930).

[14] *Id.* 2, 4. In 1949, both the House and Senate found that the PACA regulatory program had "become an integral part of the marketing of fruit and vegetables and it has the unanimous support of both producers and handlers in the fruit and vegetable industry." H.R. REP. NO. 1194, 81st Cong, 1st Session 1 (1949); *accord,* S. REP. NO. 1122, 1st Session 2 (1949).

conduct, and unfair methods are numerous.[15] *Kleiman v. U.S. Dep't of Agric.*, 497 F.3d 681, 693 (D.C. Cir. 2007).

Under the Act, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), and 499d(a). The Act makes it unlawful for a licensee to engage in certain types of unfair conduct and requires regulated merchants, dealers, and brokers to "truly and correctly…account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C § 499b(4).

Orders suspending or revoking a license, or a finding that an entity has committed a flagrant or repeated violation of Section 2 of the Act have significant collateral consequences in the form of employment restrictions for persons found to be "responsibly connected" with the violator.[16] Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator "in any responsible position.[17]" 1962 amendments replaced the "in any responsible position" language with a "responsibly connected" provision. The term "responsibly connected" is currently defined as follows:

(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 percentum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a

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[15] S. REP. NO. 2507, 84th Cong, 2d Session 3-4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; H.R. REP. NO. 1196, 84th Cong, 1st Session 2 (1955).

[16] 7 U.S.C. § 499h(b). Under the Act, PACA licensees may not employ, for at least one year, any person found "responsibly connected to any person whose license has been revoked or suspended, or who has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b.

[17] 7 U.S.C. § 499h(b) (1958).

violating licensee or entity subject to license which was the alter ego of its owners. 7 U.S.C. § 499a(9).

A second sentence was added to the provision by a 1995 amendment[18] and affords those who would otherwise fall within the statutory definition of "responsibly connected" an opportunity to demonstrate that they were not responsible for the violation. Extensive analysis of and comment upon the amendment has been made in a number of decisions, including *Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194, 1196-97 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-67, 1998 WL 1806410 (U.S.D.A. 1998); *Salins*, No. 96-0010, 57 Agric. Dec. 1474, 1482-87, 1998 WL 202147 (U.S.D.A. Feb. 26, 1998); and *Mendenhall*, No. 97-0008, 57 Agric. Dec. 1607, 1615-19, 1998 WL 799194 (U.S.D.A. Nov. 10, 1998).

The amendment created a two prong test for rebutting the statutory presumption of the first sentence:

…the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive ("and"), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner must meet at least one of two alternatives: that a petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to license which was the alter ego of its owners. *Salins*, 57 Agric. Dec. 1474, 1487-1488.

Norinsberg articulated the standard for the first prong as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those

[18] Prior to the amendment, the circuits were divided as to whether the presumption of §499a(b)(9) was irrebutable. Most adopted a per se rule. *See, e.g.*, Faour v. U.S. Dep't of Agric., 985 F. 2d 217, 220 (5th Cir. 1993); Pupillo v. United States, 755 F. 2d 638, 643-44 (8th Cir. 1985); Birkenfield v. United States, 369 F.2d 491, 494 (3rd Cir. 1966); Zwick v. Freeman, 373 F.2d 110, 119 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). The D.C. Circuit however had adopted a rebuttable presumption test. *See* Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975), 34 Agric. Dec. 7 (U.S.D.A. 1975).

activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to performance of ministerial functions only. Thus, if a petitioner demonstrates that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test. *Norinsberg,* 58 Agric. Dec. at 610-11.

This case accordingly turns upon whether the Petitioner met his burden of proof and rebutted the statutory presumption.

Discussion

Initially, it is clear that the statutory threshold contained in the first sentence of § 499a(b)(9) is met in this case as the Petitioner admitted and the evidence is uncontroverted that the Petitioner was an officer and director of Sandler Bros. being referred to as Clerk and later President. RX-1, 6-9.

Petitioner professes a lack of involvement with the violating corporation, indicating that although he was President of the corporation, at the time of the violations, he had nothing to do with the financial side of the business. In view of the obvious fact that he was a signatory on the bank account, signed checks, and knew of the corporation's failure to pay suppliers without taking appropriate action prior to his resignation, any claim that he was only a *nominal* director and officer, lacking any actual, significant nexus with the violating company is clearly without merit. *See Bell v. Dep't of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994).

Well prior to the 1995 amendment to Section 499(a)(9), the DC Circuit had considered the statutory presumption of the section to be rebuttable. *Quinn v. Butz*, 510 F.2d 743, 757 (D.C. Cir. 1975), 34 Agric. Dec. 7 (U.S.D.A. 1975); *Hart v. Dep't of Agric.*, 112 F.3d 1228, 1230 (D.C. Cir. 1997). Where responsibility was not based on an individual's personal fault, it could be based upon his or her failure to counteract or obviate the fault of others. *Bell*, 39 F.3d at 1201. In the past, knowledge of the violations, whether actual or constructive, was found to be highly significant. In discussing the actual, significant nexus test in *Minotto v.*

U.S. Dep't of Agric., 711 F.2d 406 (D.C. Cir. 1983) the court indicated that "…In order to prove that one was **only** a nominal officer or director, one must establish that one lacked any 'actual, significant nexus with the violating company' and therefore, neither '**knew [n]or should have known of the [c]ompany's misdeeds.**'" *Minotto*, 711 F.2d at 408, 409 (emphasis added). An affiliation would however be considered nominal if a so-called officer was unsophisticated and the position had no powers at all. *Bell*, 39 F.3d at 1201; *Minotto*, 711 F.2d at 408; *Quinn*, 510 F.2d at 756.

A significant difference was found to exist however between situations where the affiliation was purely nominal with the so-called officer having no authorized powers at all and those in which a genuine officer [or director] simply did not use the powers of his office. Quinn, 510 F.2d at 756, n.84. In *Hart v. Dep't of Agric.*, 112 F.3d 1228 (D.C. Cir. 1997), the court made it clear that the Act was designed to strike at persons in authority who acquiesced in the wrongdoing as well as the wrongdoers themselves and that individuals seeking to avoid employment restrictions must demonstrate that they were "powerless to curb" the wrongdoing. *Hart*, 112 F.3d at 1230-31.

Sandler admitted having actual knowledge of the corporation's failure to pay suppliers as early as January or February of 2009, but failed to resign as an officer and director until March 20, 2009. RX-6; *Martino v. U.S. Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986).

Accordingly, on the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Petitioner Mark Sandler is an individual residing in Scarborough, Maine.

2. Sandler Bros. began as a family business originally started by Petitioner's grandfather in 1929 and was later incorporated and operated as a Maine corporation by his father Herbert Sandler and James Sandler, until Herbert Sandler's death in 2006. RX-6.

3. During the period between June 18, 2008 and March 4, 2009, Sandler Bros. was found to have willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 8 sellers of the agreed purchase prices in the amount of $234,385.14 for 314 lots of perishable agricultural commodities which Sandler Bros. purchased, received, and accepted in the course of interstate commerce during the period June 18, 2008 through March 4, 2009.[19]

4. Mark Sandler became a Clerk and/or President and director of Sandler Bros. following his father's death in 2006 and continued to hold such officer until his resignation on March 20, 2009.

5. Despite being an officer and director of the corporation and having knowledge that creditors were not being paid as early as January or February of 2009, he failed to take appropriate action to stop such violations and remained an officer and director until March 20, 2009 when he finally resigned.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Mark Sandler is an individual responsibly connected to Sandler Bros. by virtue of his active participation in corporate operations and his status as an officer and director of the corporation.

3. By virtue of being responsibly connected to a violating corporation, Petro is subject to the employment restrictions of the Act.

ORDER

1. The determination of the Chief of the PACA Branch that Mark Sandler was responsibly connected to Sandler Bros. during the period between June 18, 2008 and March 4, 2009 when the corporation was committing willful, flagrant and repeated violations of the Act is **AFFIRMED.**

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[19] Sandler Bros., *supra* note 1.

2. Mark Sandler is accordingly subject to the licensing restrictions and employment sanctions contained in Section 4(b) and 8(b) of the Act (7 U.S.C. § 499d(b) and § 499h(b)).

3. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Petitioner, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to Section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

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

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS DECISIONS

DIMARE FRESH, INC. v. CASTRO PRODUCE, LLC.
PACA Docket No. W-R-2011-372.
Decision and Order.
Filed May 8, 2013.

PACA-R.

Supply contract–goods identified

Tomatoes to be provided under a supply contract were not goods "identified to the contract" because the contract did not refer to specified acreage. Therefore, when the distributor failed to deliver tomatoes as required by the contract, its default was not excused under U.C.C. 2-613 or 2-615, and the buyer was entitled to cover damages.

Charles Kendall, Presiding Officer.
Stephen P. McCarron for Complainant.
George Krauja and Hector G. Arana for Respondent.
Decision and Order entered by William G. Jenson, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) ("PACA"). Complainant instituted this proceeding under the 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 seeking reparation against Respondent, in the amount of $1,925,229.73, in connection with Respondent's agreement to sell Roma tomatoes to Complainant in interstate and foreign commerce. The Complaint sought reparation for two things: (1) repayment of an advance purchase price of $1,000,000.00 which Complainant had forwarded to Respondent, plus interest and minus the value of tomatoes which Respondent had supplied; and (2) cover damages for tomatoes which Respondent did not supply under the contract.

A copy of the Complaint was served upon Respondent, and Respondent filed an Answer admitting that a portion of the amount claimed by Complainant, for the advance purchase price, was due and owing to Complainant. Complainant filed a Motion for Payment of Undisputed Amount, and Respondent filed a Reply to that Motion. An Order was issued on April 25, 2012, directing Respondent to pay the undisputed amount of $951,140.95, with interest, plus the amount of $500.00. Respondent's liability, if any, for payment of the disputed amount was left for subsequent determination in the same manner and under the same procedure as if no order for the payment of the undisputed amount had been issued.

With its Response to Complainant's Motion for Payment of Undisputed Amount, Respondent also filed a Motion for Judgment as a Matter of Law, arguing that upon Respondent's payment of the undisputed amount to Complainant, Complainant's claims were fully satisfied and Complainant was not entitled to seek further damages. Complainant filed a Reply to Respondent's Motion. On May 23, 2012, an Order Denying Respondent's Motion to Dismiss was issued.

Complainant DiMare's remaining claim, after the Order for payment of the undisputed amount, is for "cover" damages that DiMare allegedly incurred as a result of Respondent Castro's failure to supply Roma tomatoes in accordance with the supply contract between the parties. Respondent asserts that it did not breach the parties' contract, and that the law excuses Respondent from performance under the contract. Complainant additionally claims that the amount awarded in the Order for Payment of Undisputed Amount was incorrectly calculated, such that additional payment is due for interest on the advance purchase price. Respondent disputes that claim as well.

Since the amount claimed as damages exceeds $30,000.00 and Respondent requested an oral hearing, an oral hearing was held in accordance with section 47.15 of the Rules of Practice (7 C.F.R. § 47.15). The oral hearing was held on Wednesday, October 24, 2012 and Thursday, October 25, 2012 in Tucson, Arizona before Charles L. Kendall, Presiding Officer. The Complainant was represented by Stephen P. McCarron, Esq., of McCarron & Diess, located in Washington, DC, and Respondent was represented by George Krauja, Esq., and Hector G.

Arana, Esq., of Fennemore Craig, PC, located in Tucson and Nogales, Arizona. Complainant presented two witnesses, and offered nine (9) exhibits which were entered into the record (herein designated "CX-1" through "CX-9"). Respondent presented four (4) witnesses, and offered seventeen (17) exhibits which were entered into the record (herein designated "RX-1" through "RX-17").

At the conclusion of the hearing, a schedule was set for filing post-hearing briefs and requests for fees and expenses. Both parties submitted their findings of fact and supporting briefs as well as claims for fees and expenses by the imposed deadline. The documents were served on the respective parties by the Department and neither party elected to file objections to the opposing party's claim for fees and expenses within the time period set forth in section 47.19(5) of the Rules of Practice (7 C.F.R. § 47.19(5)). Complainant's and Respondent's briefs are referred to herein as "CB" and "RB", respectively. The transcript of the proceeding is designated "Tr." The Department's Report of Investigation is considered as evidence in this proceeding, pursuant to section 47.7 of the Rules of Practice (7 C.F.R. § 47.7), and is designated "ROI."

Findings of Fact

1. Complainant, DiMare Fresh, Inc. is a corporation, whose address is 1049 Avenue H, East Arlington, Texas 76011. At the time of the transactions involved in this proceeding, Complainant was licensed under the PACA (ROI, cover sheet).

2. Respondent, Castro Produce LLC, is a limited liability corporation, whose address is 1440 N. Mariposa Ranch Road, Nogales, Arizona 85621. At the time of the transactions involved herein, Castro was licensed under the PACA (ROI, cover sheet).

3. Agricola Pony, LLC ("Agricola Pony") is a grower of Roma tomatoes in Culiacan, Sinaloa, Mexico. Agricola Pony's owners and members were the same as the owners and members of Respondent at the time of the transactions (Tr. at 144, 149-150, 289), but Respondent and Agricola Pony are separate companies (Tr. at 289). Respondent is the exclusive U.S. distributor for Agricola Pony (Tr. at 294), distributing the Pony

label, Paloma label, and Omar label tomatoes produced by Agricola Pony (Tr. at 145-146). The Pony label is a highly regarded (Tr. at 94), premium label (Tr. at 164), and is a registered trademark with the United States Patent and Trademark Office (Tr. at 146).

4. On September 1, 2010, the parties entered into a written contract (CX-1 or RX-1 at 1-3). Under the contract, Complainant advanced $1,000,000 to Respondent by wire transfer on September 3, 2010 (RX-4 at 22), in exchange for anticipated shipments by Respondent of twenty-five (25) pound (lb.) boxes of Pony Label Roma tomatoes. The Supply Calendar, attached as Exhibit A to the contract, called for Respondent to ship the $1,000,000 worth of tomatoes as follows: five (5) loads of large or medium sized Pony Label Roma tomatoes per week for fifteen (15) weeks from February 1, 2011 through May 15, 2011. Respondent was to deliver 118,343 boxes of Pony Label Roma Tomatoes to Complainant at $8.45 per twenty-five (25) pound (lb.) box. The contract also required Respondent to pay Complainant interest of six percent (6%) per annum, in monthly installments at the end of each month, on the then current balance of the advance.

5. On February 3 and 4, 2011, there was a severe freeze in Culiacan, Mexico (RX-8, RX-10; Tr. at 72, 382, 404). Even for vegetable crops grown in shade houses such as those used by Agricola Pony, losses were in the neighborhood of eighty percent (80%) (Tr. at 406-407; RX-14 at 20).

6. On February 7, 2011, Respondent's general manager, Rosendo Flores, sent an email to Complainant's owner, Paul DiMare, notifying Complainant of the freeze and advising that Agricola Pony "had been damaged in a lesser extent than others, but we are still assessing damages. The freeze has set back our program at least 4 weeks, and as of tomorrow morning I will be traveling to Culiacan, to have a more accurate assessment on the impact of our production." (RX-4, pg. 41).

7. On February 23, 2011, Rosendo Flores sent an email to Complainant's Eric Janke, with copies to Paul DiMare and to Complainant's buyer, Sam Licato, regarding the effect of the freeze on the Agricola Pony Roma crop (CX-21-2). The email reported that Respondent has incurred very moderate damages due to the Sinaloa

Freeze on Feb 4th, and would be able to have a very good production, estimating a conservative number of 600,000 packages. Respondent reported to Complainant that Respondent would start supply the next week (thru March 5) with up to 3 loads, and would commit to 5 loads a week starting by the 3d week of March (March 21 2011).

8. In its February 23, 2011 email, Respondent proposed that Complainant advance additional funding of $500,000, and invoice Respondent for tomatoes supplied from that point forward at a rate of market price minus fifteen percent (15%), with a minimum price of $5.85 per box.

9. On March 3, 2011, Complainant, through counsel, declined Respondent's proposed modification of the supply contract, expressed its expectation that Respondent would perform under the existing contract, and advised that if Respondent failed to perform, Complainant would purchase cover loads (RX-5 at 1-2).

10. On March 11, 2011, Respondent, through counsel, notified Complainant that Respondent would not be able to supply Complainant with tomatoes as provided in the Supply Calendar, and further notified Complainant of Respondent's intent to allocate the remaining crop of Pony label Roma tomatoes during the term of the Supply Calendar amongst its customers on a pro-rata basis. Respondent projected that it would allocate approximately 7,423 boxes of tomatoes to Complainant over the remaining term of the Supply Calendar, and stated that it had no duty to provide tomatoes to cover the remaining supply for which the parties had contracted (RX-5 at 3-4).

11. Starting the week of March 7, 2011, and continuing each week through May 15, 2011, Complainant sent purchase orders to Respondent for the tomatoes Complainant had purchased from Respondent under the contract (CX-5; Tr. at 39).

12. Between March 14 and May 16, 2011, Respondent shipped a total of 6,845 boxes of Roma tomatoes to Complainant (CX-6; RB at 6), with a total value of $57,840.25 (6,845 boxes times the contract price of $8.45 per box).

13. Between March 10 and May 18, 2011, Complainant purchased 73,155 boxes of Roma tomatoes, which Complainant intended as cover for the Roma tomatoes Respondent failed to supply (CX-6; CX-7).

14. On November 7, 2011, Complainant filed a Motion for Payment of Undisputed Amount seeking payment of the $1,000,000 advance, plus interest, minus the value of the tomatoes Complainant received from Respondent and the interest payment from Respondent.

15. On April 26, 2012, the Secretary issued an Order requiring Respondent to pay Complainant $951,140.95, plus 0.10 percent interest from May 15, 2011, until paid, plus the amount of $500.00.

16. On May 21, 2012, Respondent wired $952,607.80 to Complainant, as payment of the undisputed amount in accordance with the Order.

17. On June 3, 2011, Complainant filed its informal complaint, which was within nine months of when the cause of action accrued.

Conclusions

The parties agree on these essential facts: (1) that the parties entered into a supply contract under which Complainant gave Respondent an advance purchase price of $1,000,000.00; (2) in exchange for the advance, Respondent would deliver to Complainant 118,343 twenty-five 25) pound (lb.) boxes of medium and large Pony label Roma tomatoes in fifteen (15) weekly deliveries, delivering 8,000 twenty-five (25) pound (lb.) boxes per week for fourteen (14) weeks, and 6,343 boxes in week fifteen (15); (3) that the shipments would take place each week from February 1, 2011 through May 15, 2011; (4) that each box shipped by Respondent would reduce the balance due on the advance by $8.45; (5) that Respondent would pay interest monthly at a rate of six percent (6%) per annum on the balance of the advance, from the time it was received on September 1, 2010 until paid; (6) that Respondent delivered 6,845 boxes of tomatoes to Complainant under the contract.

Complainant seeks damages pursuant to UCC §§ 2-711 and 2-712 (CB at 11), codified in the Arizona statutes[20] as A.R.S. §§ 47-2711 and 47-2712. A.R.S. §§ 47-2711 provides in pertinent part:

A. Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (§ 47-2612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:

1. "Cover" and have damages under § 47-2712 as to all the goods affected whether or not they have been identified to the contract;

A.R.S. §§ 47-2712 provides:

A. After a breach within § 47-2711 the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

B. The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§ 47-2715), but less expenses saved in consequence of the seller's breach.

C. Failure of the buyer to effect cover within this section does not bar him from any other remedy.

The seller, Respondent, failed to make delivery as required by the supply contract, so Complainant, in addition to recovering so much of the price as has been paid [the advance], may "cover" with reasonable purchases made in good faith and without unreasonable delay.

Respondent identifies the pivotal issue in this case, noting that the ultimate question is whether Complainant is entitled to cover damages (RB at 1). Respondent argues that Complainant is not entitled to cover

[20] The Arizona enactments of the U.C.C. are referenced herein because the contract called for delivery of the goods at Nogales, AZ.

damages because Respondent's performance under the contract was excused under A.R.S. § 47-2613, which addresses casualty to identified goods (RB at 7 *et seq*.), and/or by A.R.S. § 47-2615, which provides for excuse by failure of presupposed conditions (RB at 7 *et seq*.).

A.R.S. § 47-2613 provides:

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (§ 47-2324) then:

1. If the loss is total the contract is voided; and

2. If the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

Two factors, then, determine whether A.R.S. § 47-2613 applies, such that handling under "1)", for total loss, or "2)", for partial loss, is prescribed. First, does the contract require for its performance goods identified when the contract is made; and second, did the goods suffer casualty without fault of either party before the risk of loss passed to the buyer?[21] Both of these conditions must be present in order for A.R.S. § 47-2613 to excuse a seller's failure to supply goods contracted for.

Respondent argues that its contract with Complainant did require for its performance goods identified to the contract (RB at 7 *et seq*.). A.R.S. § 47-2613 itself does not define the term "identified to the contract". Respondent urges that the provisions of A.R.S. § 47-2501(A) apply to the question of whether goods were "identified when the contract is made" for A.R.S. § 47-2613 purposes, citing that section as follows: "Goods can be identified to a contract in several ways: (1) by explicit agreement at any time and in any manner agreed to by the parties; (2)

[21] The alternative basis, for a contract with a "no arrival, no sale" term, is not relevant here.

when goods are already existing and identified when the contract is made; (3) when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers; or (4) when crops are planted or otherwise become growing crops, if the contract is for the sale of crops to be harvested within twelve months or the next normal harvest season (whichever is longer)." (RB at 7).

A.R.S. § 47-2501, however, is titled, "Insurable interest in goods; manner of identification of goods." The first comment to the section states, "The present section deals with the manner of identifying goods to the contract so that an insurable interest in the buyer and the rights set forth in the next section will accrue." That next section, A.R.S. § 47-2502, provides for, as its title says, "Buyer's right to goods on seller's insolvency." Further, Comment 4 to A.R.S. § 47-2501 notes "the limited function of identification" and makes clear that A.R.S. § 47-2501 and A.R.S. § 47-2502 are protections for a buyer upon seller's default. These sections, then, do not provide a guide to whether goods were "identified when the contract is made" for A.R.S. § 47-2613 purposes.

The issue of identification under U.C.C. § 2-613 has, however, has been addressed under the PACA. In *G. & H. Sales Corp. v. C. J. Vitner Co., Inc*., 50 Agric. Dec. 1892 (U.S.D.A. 1991), the parties entered into a contract calling for the future shipment of potatoes f.o.b. Florida, and potato production in the state of Florida was affected in varying degrees by a freeze. It was found that the potatoes had not been shown to have been "identified goods" within the meaning of U.C.C. § 2-613 at the time of the freeze, and that the potatoes were not contracted to be grown on designated land so as to come within the category of "excuse by failure of presupposed conditions" as contemplated by U.C.C. § 2-615.

Respondent argues that, "As a threshold issue, the requirement of identifying certain crops arises under U.C.C. § 2-615, not Section 2-613 and therefore is inapplicable to Castro's argument its performance is excused under A.R.S. § 47-2613." (RB at 10). While "impossibility" because of the nonexistence of identified goods under U.C.C. § 2-613 might be seen as simply a special case of commercial impracticability due to the failure of presupposed conditions under U.C.C. § 2-615, the test of whether agricultural goods have been identified to a contract has been specifically addressed in regard to an affirmative defense under

U.C.C. § 2-613 not only by USDA but by the courts as well. *Semo Grain Co. v. Oliver Farms, Inc*., 530 S.W.2d 256, 258 (Mo. App. 1975). There, the court held that a farmer's failure to perform in accordance with a supply contract was not excused by U.C.C. § 2-613 because ". . . the contract of the parties makes no reference to soybeans grown (or to be grown) by the defendant on any identified acreage, . . ." *Id.* at 260.

Respondent points out that it is a wholesale distributor, not a farmer, and asserts that therefore the requirement that agricultural goods be identified to specified acreage does not apply (RB at 9). Rather, Respondent urges that the goods at issue were to come from a particular source of supply, as contemplated by Comment 5 to A.R.S. § 47-2615. A.R.S. § 47-2615 provides:

Except so far as a seller may have assumed a greater obligation and subject to § 47-2614 on substituted performance:

1. Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs 2 and 3 of this section is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

2. Where the causes mentioned in paragraph 1 of this section affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

3. The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph 2 of this section, of the estimated quota thus made available for the buyer.

In regard to whether performance is excused under U.C.C. § 2-615 for failure to supply agricultural goods, however, Respondent is not

aided under PACA precedent by the fact that it is a distributor rather than a farmer. We have held:

[The text of UCC section 2-615] must be jointly read with comment No. 9 which states that 'a farmer who has contracted to sell crops to be grown on designated land (emphasis added)' is excused under this section when there is a failure of the specific crop. Most cases adhere to this principle: Harrell v. Olin Price, 31 A.D. 331 (1972) and Holt v. Shipley, 25 A.D. 436 (1966). The impossibility-act of God exemption should have its widest application to farmers, the berth narrowing as one moves in middlemen degrees towards the ultimate consumer. Hence, if designation of the land upon which crops will be grown is contractually mandatory before a farmer will fall within the UCC section 2-615 exemption, **it is even more necessary that land designation apply to dealers before exemption be legally allowed**.

Bliss Produce Co. v. A. E. Albert & Sons, 35 Agric. Dec. 742, 20 UCC Reporting Service 917 (1976). [Emphasis added.]

Respondent argues, in essence, that the "Pony" label uniquely identifies the goods which it contracted to supply. Unlike the farmers who contracted for "Arizona Kennebec potatoes" as in *Bliss*, or for "U.S. No. 1 yellow soybeans" as in *Semo*, Respondent asserts:

The parties' Contract is not for fungible Roma tomatoes. The Contract specifies the brand, type, and size of the tomatoes: "Pony" Label, Roma tomatoes, sizes Medium and Large. As Castro established at trial, Pony Label Roma tomatoes come only from one particular source, grown by Castro's affiliated grower, Agricola Pony, at the Rincón de Guadalupe farm in North Culiacán, Sinaloa, Mexico. [See, e.g., 10/24/12 Tr. at 52:14-53:1; 150:2-16.] "Pony" Label is a registered trademark with the United States Patent and Trademark Office, first used in 1980, and registered since November 21, 2006. [Id. at 145:17-146:19.] As a result, other growers' tomatoes cannot be substituted for Agricola Pony's Pony Label tomatoes. DiMare insisted the Contract be for Pony Label product. DiMare's witness, Sam Licato, admitted the Pony Label is known as a superior quality product and is "if not the best, one of the best Roma [tomato] labels and quality labels and grower[s] in Mexico." [Id. at 94:2-4.]

The evidence at hearing did establish that the Pony label is a premium quality label (Tr. at 94, 291). "Pony" label is a registered trademark with the United States Patent and Trademark Office. Respondent's general manager testified that Pony is a label, not a variety of tomato, and that there is no patent on Pony label tomatoes (Tr. at 291-292). The trademark is held by Respondent, Castro Produce LLC, an Arizona limited liability company licensed under the PACA. As Respondent has noted, Respondent is a wholesale distributor, not a farmer. The trademark gives Respondent, the distributor, the exclusive right to market tomatoes in the United States using the "Pony" label. That fact does not resolve the question of where the tomatoes can or must be grown.

The relevant inquiry is either: whether the contract required for its performance goods identified when the contract was made as per U.C.C. § 2-613; or alternatively stated, whether the goods were contemplated by the parties as coming exclusively from a sole source of supply, as addressed by U.C.C. § 2-615. Respondent cites Comment 5 to U.C.C. § 2-615 as follows (RB at 9):

Where a particular *source of supply* is exclusive under the agreement and fails through casualty, the present section applies rather than the provision on destruction or deterioration of specific goods. The same holds true where a particular *source of supply* is shown by the circumstances to have been contemplated or assumed by the parties at the time of contracting. [Emphasis in RB]

In regard to supply contracts for agricultural commodities, the analysis is the same whether a seller seeks to excuse its failure to perform under U.C.C. § 2-613 or under U.C.C. § 2-615. PACA reparation cases and cases arising outside the PACA have both dealt with the application of these U.C.C. provisions by first resolving the threshold question: Does the contract call for the agricultural products to be supplied to be crops grown on designated land? If so, either of these U.C.C. provisions may apply. If not, they do not. *G. & H. Sales*, 50 Agric. Dec. 1892 (U.S.D.A. 1991); *Semo*, 530 S.W.2d 256, 258 (Mo. App. 1975).

Respondent contends that "Pony" label tomatoes come from only one source, grown by Castro's affiliated grower, Agricola Pony, at the Rincón de Guadalupe farm in North Culiacán, Sinaloa, Mexico. Respondent did not establish, however, that "Pony" label tomatoes *must* come from only one source. Complainant's buyer testified that Complainant had a preference for the "Pony" label because of the quality of the product they consistently had (Tr. at 94) and that both the "Pony" label tomatoes (Tr. at 96) and the tomatoes Complainant purchased for "cover" (Tr. at 97) were eight-five percent (85%) or better U.S. No. 1 quality.

Respondent presented extensive testimony and exhibits related to the Rincón de Guadalupe farm (RX-6, RX-7, RX-9, RX-11). The pertinent question, however, is whether the Rincón de Guadalupe farm was designated land such that the crops therefrom were identified to the contract. Alternatively stated, was the Rincón de Guadalupe farm contemplated by the parties as the sole source of supply when the contract was executed? The contract itself is devoid of any geographic reference. It does not require state of origin, like the Florida potatoes called for in *G. & H. Sales*[22], or even a country of origin. The term "Rincón de Guadalupe" does not appear anywhere in the Department's Report of Investigation, or in any pleadings or filings submitted prior to the hearing.

Respondent, at hearing, sought to establish that the parties contemplated a sole source. For example, Respondent asserts that, "DiMare admits Pony Label Roma tomatoes come from only one source, Agricola Pony. [Id. at 52:14-53:1.]" (RB at 2). The testimony of Complainant's buyer on cross examination which Respondent cites, however, establishes only that Respondent was not a grower itself, but a distributor, and a distributor for Agricola Pony. Complainant's buyer also agreed with the assertion that Respondent was a distributor for only Agricola Pony. Nothing in the record establishes, however, that Respondent was in any way limited or bound to distribute only products from Agricola Pony. Further, Respondent's general manager testified that Agricola Pony itself is not a farm or ranch, but a corporate entity (Tr. at 148-149). Rincón de Guadalupe is the specific farm (Tr. at 149).

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[22] 50 Agric. Dec. 1892 (U.S.D.A. 1991).

As we noted above, the requirement that the crops to be supplied must be specified as coming from designated land in order for a delinquent supplier to be excused under U.C.C. § 2-613, or under U.C.C. § 2-615, is even more necessary for dealers than for farmers. Since the contract does not specify designated land, can we infer that the parties contemplated crops from designated land based on extrinsic evidence? Even for a farmer seeking excuse because of adverse weather effects, the 8th Circuit declined to permit that inference. The Court stated, "Obviously, appellee could have fulfilled its contractual obligation by acquiring the beans from any place or source as long as they were grown within the United States. To permit the introduction of parol evidence to show that the beans were to be grown on a particular acreage would completely circumvent the provisions of [the Missouri version of U.C.C. § 2-202]." *Bunge Corp. v. Recker*, 519 F.2d 449, 451 (C.A.Mo. 1975).

Here, Respondent could have fulfilled its contractual obligation by acquiring eighty-five percent (85%) or better U.S. No. 1 medium and large Roma tomatoes from any place or source, applying the Pony label to them, and delivering them to Complainant. Respondent's failure to fulfill its contractual obligation is not excused by U.C.C. § 2-613 or U.C.C. § 2-615.

Since U.C.C. § 2-613 does not apply to excuse Respondent's failure to deliver in accordance with the terms of the supply contract, Complainant is not limited to the option to "either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller." U.C.C. § 2-613(b). Similarly, since U.C.C. § 2-615 does not apply to excuse Respondent's failure, there is no need to assess whether Respondent complied with its duty to allocate in a manner which is fair and reasonable, and to notify the buyer seasonably that there would be delay or non-delivery and of the estimated quota made available for the buyer. Further, since there is no need to assess whether Respondent's purported allocation was fair and reasonable, there is no need to resolve the parties' disagreement as to the extent of crop loss attributable to the Sinaloa freeze.

Complainant, then, has available to it the remedies provided in UCC §§ 2-711 and 2-712. A.R.S. § 47-2712 provides that after a breach

within § 47-2711 the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. Having made such purchases, the buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as defined (A.R.S. § 47-2715), but less expenses saved in consequence of the seller's breach.

Complainant seeks to recover damages for its cover purchases, and has offered a summary spreadsheet of purchases of Roma tomatoes that it made during the eleven (11) weeks from the week of March 7, 2011, through the week of May 16, 2011(CX-6) and the invoices from those purchases (CX-7). Complainant's spreadsheet depicts the total costs of cover purchases above the contract price, with an overall total of $998,201.88. Respondent offered the expert testimony of a certified public accountant, who re-sorted CX-6 by size of Roma tomato purchased, and identified errors and credits due to Respondent. Complainant acknowledges that Respondent is due credits in the amount $5,007.06 for the costs saved on cover loads purchased for less than the contract price (CB at 13; RX-15 at 4). Complainant seeks the total costs of its cover purchases above the contract price minus credits for purchases below the contract price, for a net claim of $993,194.82.

Respondent's expert expressed concern that not all of Complainant's cover purchases were of medium and large Roma tomatoes, but included other sizes (Tr. at 438-440), and thus questioned whether they were comparable replacement products. Complainant asserts (CB at 12):

DiMare Fresh purchased Jumbo, Extra-large and Small Roma tomatoes to fulfill its contractual requirements to its customers because these sizes were substantially similar to the ones sought under the contract. TR 459, 464. Thus, they were "commercially usable a reasonable substitute under the circumstances." §2-712, Comment 2. In addition, the prices DiMare Fresh paid for the Jumbo and Extra-Large were identical to the prices for Large Romas. See RX-15, comparing purchase prices for Jumbo, Extra-Large and Large for April 8, April 14 and April 21, and showing that each of these sizes sold for $34.95/box; TR 462. Similarly, the four (4) loads from Nova Produce, for which no size was specified (RX-15, p.4), were purchased at prices that were

comparable to the prices paid for the other cover loads on the same days. CX-6, p. 3; CX-7, pp. 36, 41, 43 and 45.

Finally, the cover tomatoes were at a reasonable price as can be seen comparing the prices DiMare Fresh paid for the cover tomatoes (CX-6, CX-7), and the prices for Mexican Romas crossing at Nogales. CX-8, CX-9.

We have previously found that the reasonableness of cover purchases of white onions in substitute for yellow onions was shown by the similarity in price for those purchases with the prices given for yellow onions at or about the same times. *Al Campisano Fruit Company, Inc. v. Shelton*, 50 Agric. Dec. 1875, 1883 (U.S.D.A. 1991). A review of the exhibits cited by Complainant indicates that the prices it paid for sizes of Roma tomatoes other than medium and large were comparable to those for medium and large sizes, and that the prices paid by Complainant for its cover purchases were within the range of reported prices at the times of Complainant's purchases (CX-8; CX-9). Therefore, those purchases by Complainant were reasonable under the circumstances.

Complainant's cover purchases were timely, as they coincided (RX-17) with the delivery schedule under the contract (RX-1). Complainant's purchases began after the four-week delay in the supply schedule that Respondent reported to Complainant (RX-4 at 41). Complainant waited for the four (4) weeks, and did not make cover purchases for the first month's missed deliveries from Respondent. Having foregone a portion of cover to which it was theoretically entitled, Complainant covered the remaining missed deliveries in a timely fashion.

Respondent's breach of its supply contract is a violation of section 2 of the Act for which reparation should be awarded to Complainant in the net amount of $993,194.82.

Complainant also claims that the award it received in the Order to Pay Undisputed Amount was incorrectly calculated. Complainant asserts:

By Order dated April 26, 2012, the Secretary awarded DiMare Fresh an undisputed amount of $951,140.95, with interest at the rate of 0.10 percent per annum from May 15, 2011, until paid. However, under the

foregoing authorities, DiMare Fresh was entitled to interest of 6% per annum from May 15, 2011 to April 26, 2012, the date the Order for the undisputed amount was issued. Only after April 26, 2012, would interest be assessed at 0.9% in accord with PGB Int'l, LLC v. Bayche Cos., supra, and 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's Motion for Payment of Undisputed Amount, however, already had incorporated the 6% interest into its claim. Page 2 of the Motion reads, in relevant part:

7. Therefore, the undisputed amount due totals $951,140.95, which is determined as follows:

Advance payment	$1,000,000.00
Interest accrued at 6% APR	$44,510.38
Less Castro's Interest Payments	($29,787.64)
Less Castro's admitted quantity of tomatoes supplied	($63,581.79)
Total	$951,140.95

Since Complainant only asserted damages, with the six percent (6%) interest already accrued, of $951,140.95 in its Motion, Complainant's award on that matter is limited to the amount originally requested. *Willoughby v. Frito-Lay, Inc.*, 45 Agric. Dec. 1245, 1263 (U.S.D.A. 1986). Complainant did, however, note that Respondent's asserted deduction for the quantity of tomatoes supplied by Respondent, $63,581.79, was applied solely for the purposes of the Motion. Complainant asserted that Respondent only supplied 6,845, rather than the 7,591 boxes figure upon which the deduction in the Motion was based. Respondent's subsequent assertions (RB at 6) supported Complainant's assertion. Therefore, the credit will be reduced, and Complainant's award increased, by an amount of $5,741.54, bringing the amount awarded as reparation in this decision to a total of $998,936.36.

Complainant in this action paid $500.00 to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party. The $500.00 in this case, however, has already been awarded to Complainant

in the Order to Pay Undisputed Amount, and paid to Complainant by Respondent.

Section 7(a) of the Act (7 U.S.C. § 499g(a)) states that after an oral reparation hearing the "Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any such hearing." Complainant is the prevailing party in this case, so fees and expenses will be awarded to Complainant to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc*., 59 Agric. Dec. 853, 864 (U.S.D.A. 2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc*., 48 Agric. Dec. 707, 715 (U.S.D.A. 1989).

In accordance with 7 CFR § 47.19(d), Mr. Stephen McCarron, attorney for Complainant, timely filed a Claim of Complainant for Fees and Expenses in Connection with Oral Hearing ("Claim"). Respondent entered no objection to the Claim. Mr. McCarron claims total attorneys' fees for hearing preparation of $31,830.00 as detailed in Exhibit 1 to the Claim. There are seventy-seven (77) Line items in Exhibit 1; we will refer to them in order as Lines 1 through 77. Mr. McCarron also claims attorneys' fees for attendance at the hearing itself in the amount of $5,600.00.

Certain work and costs are not recoverable, as they would have been incurred if the case had proceeded under the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.A.R. § 47.20). *Mountain Tomatoes, Inc. v. E. Panamanian & Son, Inc*., 48 Agric. Dec. 707 (U.S.D.A. 1989); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (U.S.D.A. 1977).

Disallowed items, regarding the acquisition, preparation, or review of evidence, or legal research and review, are those listed in Exhibit A as follows: lines 3, 17, 18, 20, 46, 55, 56, 63, 64, 65, 67. This evidence presumably would have been generated and/or reviewed, and these legal issues researched, if the case had proceeded under the documentary procedure, and therefore the costs involved are not recoverable. These items represent a total of $3,073.75, which will not be allowed. After

making the noted adjustments, the attorney fees Complainant may recover in connection with the oral hearing total $34,356.25.

Costs associated with attendance at the hearing are listed in the Claim, both for Mr. McCarron and for Complainant's two (2) witnesses. The enumerated expenses will be allowed. Expenses that Complainant may recover total $5,249.72.

Respondent's breach of its supply contract is a violation of section 2 of the Act for which reparation should be awarded to Complainant in the net amount of $993,194.82. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of Section 2 of the Act (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 Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n, Inc*., 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). 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 (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).

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation $998,936.36, with interest thereon at the rate of 0.11 per annum from June 1, 2011, until paid.

Within thirty (30) days from the date of this Order, Respondent shall pay to Complainant, as additional reparation for fees and expenses,

$39,605.97, with interest thereon at the rate of _____ per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

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MISCELLANEOUS ORDERS

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: OASIS CORPORATION, D/B/A ONE OF A KIND PRODUCE.
Docket No. D-12-0423.
Miscellaneous Order.
Filed January 25, 2013.

PACA.

Charles L. Kendall, Esq. for Complainant.
Rosendo Gonzalez, Esq. for Respondent.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER DISMISSING PURPORTED APPEAL PETITION

Procedural History

On October 26, 2012, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Decision and Order in which the Chief ALJ: (1) concluded Oasis Corporation willfully, flagrantly, and repeatedly violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) ordered publication of the facts and circumstances of Oasis Corporation's violations of the PACA.[1]

On November 5, 2012, the Hearing Clerk served Oasis Corporation with the Chief ALJ's Decision and Order.[2] On November 27, 2012, Oasis Corporation filed "Michelle Iovino's Notice of Appeal Re: Decision and Order Issued on October 26, 2012" [hereinafter Notice of Appeal], which states as follows:

TO THE CHIEF ADMINISTRATIVE JUDGE AND TO THE COMPLAINANT ASSOCIATE DEPUTY ADMINISTRATOR, FRUIT

[1] Chief ALJ's Decision and Order at 7-8.
[2] United States Postal Service Domestic Return Receipt for article number 7005 1160 0002 7836 8835.

AND VEGETABLE PROGRAM AND AGRICULTURAL MARKETING SERVICE:

Michelle Iovino, a former officer, director and shareholder Oasis Corporation dba One of a Kind Produce, the respondent in this proceeding ("Oasis" or the "Respondent") ("Iovino"), through her counsel, Gonzalez & Associates, A Professional Law Corporation, respectfully submits this notice of the "decision and order" issued on October 26, 2012, and served on October 31, 2012, with respect to the motion filed by the Associate Deputy Administrator, Fruit and Vegetable Program, and Agricultural Marketing Service (collectively, the "Claimant"), seeking a decision without hearing by reason of admissions (the "Motion for Decision") (the "October 2012 Decision"). A copy of the October 2012 Decision is attached hereto and is incorporated herein as Exhibit "1."

Dated: November 26, 2012.

GONZALEZ & ASSOCIATES
A Professional Law Corporation

By:_____/s/
ROSENDO GONZALEZ
Counsel for Counsel for Michelle Iovino,
Respondent's Representative

By letter dated January 15, 2013, the Hearing Clerk, L. Eugene Whitfield, informed Oasis Corporation that the Chief ALJ's Decision and Order had not been appealed to the Secretary of Agriculture within the allotted time and, in accordance with the applicable rules of practice,[3] the Chief ALJ's Decision and Order had become final and effective on December 10, 2012. On January 22, 2013, Oasis Corporation filed a response to the Hearing Clerk's January 15, 2013, letter, stating as follows:

Dear Mr. Whitfield:

[3] The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

I just received a notice from your office that the decision and order issued on October 26, 2012, were "not appealed" and became final on December 10, 2012.

That is not accurate.

On November 26, 2012, we filed and served the notice of appeal. I am enclosing a copy of that notice.

Hence, please provide an explanation why the decision would become final in spite of the timely submitted appeal.

If you have any questions or comments with respect to this matter, please do not hesitate to call me.

Very truly yours,
/s/
Rosendo Gonzalez

On January 24, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Discussion

The Rules of Practice set forth the requirements for an appeal petition, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition*. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal.

Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

7 C.F.R. § 1.145(a). Oasis Corporation's Notice of Appeal does not identify any purported error by the Chief ALJ, does not identify any portion of the Chief ALJ's Decision and Order or any ruling by the Chief ALJ with which Oasis Corporation disagrees, and does not allege any deprivation of rights. In short, Oasis Corporation's Notice of Appeal does not remotely conform to the requirements of 7 C.F.R. § 1.145(a). I have long dismissed filings which are purported to be appeal petitions but which do not remotely conform to the requirements of the Rules of Practice.[4] Since no appeal has been filed which remotely conforms to the requirements of 7 C.F.R. § 1.145(a) and it is now too late to file an appeal, I conclude the Chief ALJ's October 26, 2012, Decision and Order became final and effective 35 days after November 5, 2012, when the Hearing Clerk served Oasis Corporation with the Chief ALJ's Decision and Order.

For the foregoing reasons, the following Order is issued.

ORDER

1. Oasis Corporation's purported appeal from the Chief ALJ's October 26, 2012, Decision and Order is dismissed.

2. The Chief ALJ's October 26, 2012, Decision and Order became final and effective December 10, 2012.

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[4] Gentry, No. D-07-0152, 68 Agric. Dec. ___, 2009 WL 875371 (U.S.D.A. Mar. 18, 2009) (Order Dismissing Purported Appeal); Breed (Order Dismissing Purported Appeal), 50 Agric. Dec. 675 (1991); Lall, No. 88-28, 49 Agric. Dec. 895, 1990 WL 322153 (U.S.D.A. July 5, 1990) (Order Dismissing Purported Appeal).

MISCELLANEOUS ORDERS

In re: CUSTOM CUTS, INC. AND CUSTOM CUTS FRESH, LLC.
Docket Nos. D-12-0443, D-12-0444.
Miscellaneous Order.
Filed February 20, 2013.

PACA.

Shelton S. Smallwood, Esq. for Complainant.
Respondent, pro se.
Initial Decision and Order by
Ruling by William G. Jenson, Judicial Officer.

ORDER DENYING LATE APPEAL

Procedural History

Charles W. Parrott, Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on May 21, 2012. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Deputy Administrator alleges Custom Cuts, Inc., and Custom Cuts Fresh, LLC, willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) by failing to make full payment promptly to produce sellers of the agreed purchase prices, or the balances of the agreed purchase prices, for perishable agricultural commodities which Custom Cuts, Inc., and Custom Cuts Fresh, LLC, purchased in the course of interstate and foreign commerce.[1] On June 8, 2012, Custom Cuts, Inc., and Custom Cuts Fresh, LLC, filed a response to the Complaint, in which Custom Cuts, Inc., and Custom Cuts Fresh, LLC, admitted a majority of the material allegations of the Complaint.

[1] Compl. at ¶¶, III-IV and Apps. A-B.

On June 28, 2012, in accordance with 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Without Hearing by Reason of Admissions and a proposed Decision Without Hearing Based on Admissions. On August 10, 2012, the Hearing Clerk served Custom Cuts, Inc., and Custom Cuts Fresh, LLC, with the Deputy Administrator's Motion for Decision Without Hearing by Reason of Admissions and proposed Decision Without Hearing Based on Admissions.[2] Custom Cuts, Inc., and Custom Cuts Fresh, LLC, failed to file objections to the Deputy Administrator's Motion for Decision Without Hearing by Reason of Admissions and proposed Decision Without Hearing Based on Admissions within 20 days after service, as required by 7 C.F.R. § 1.139.

On September 25, 2012, pursuant to 7 C.F.R. § 1.139, Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] issued a Decision and Order concluding Custom Cuts, Inc., and Custom Cuts Fresh, LLC, willfully violated 7 U.S.C. § 499b(4) and ordering publication of the facts and circumstances of the PACA violations.[3] On November 14, 2012, the Hearing Clerk served Custom Cuts, Inc., and Custom Cuts Fresh, LLC, with the Chief ALJ's Decision and Order.[4]

On February 15, 2013, Custom Cuts, Inc., and Custom Cuts Fresh, LLC, filed an appeal petition. On February 19, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Conclusions by the Judicial Officer

The Rules of Practice provide that an administrative law judge's written decision must be appealed to the Judicial Officer by filing an appeal petition with the Hearing Clerk within 30 days after service.[5] The Hearing Clerk served Custom Cuts, Inc., and Custom Cuts Fresh, LLC,

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[2] Mem. to File issued by Fe C. Angeles, Legal Technician, Office of the Hearing Clerk, on August 10, 2012.
[3] Chief ALJ's Decision and Order at 4.
[4] Mem. to File issued by Fe C. Angeles, Legal Technician, Office of the Hearing Clerk, on November 14, 2012.
[5] 7 C.F.R. § 1.145(a).

with the Chief ALJ's Decision and Order on November 14, 2012;[6] therefore, Custom Cuts, Inc., and Custom Cuts Fresh, LLC, were required to file their appeal petition with the Hearing Clerk no later than December 14, 2012. Instead, Custom Cuts, Inc., and Custom Cuts Fresh, LLC, filed their appeal petition with the Hearing Clerk on February 15, 2013. Therefore, I find Custom Cuts, Inc., and Custom Cuts Fresh, LLC's appeal petition is late-filed.

Moreover, the Judicial Officer has continuously and consistently held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge's decision becomes final.[7] The Chief ALJ's Decision and Order became final 35 days after the Hearing Clerk served Custom Cuts, Inc., and Custom Cuts Fresh, LLC, with the Decision and Order,[8] namely, December 19,

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[6] *See supra* note 4.

[7] *See, e.g.*, Self, No. D-12-0167, 71 Agric. Dec. ___, 2012 WL 10767600 (U.S.D.A. Sept. 24, 2012) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 18 days after the chief administrative law judge's decision became final); Mays, No. 08-0153, 69 Agric. Dec. 631, 2010 WL 10079822 (U.S.D.A. Feb. 5, 2010) (Order Denying Late Appeal) (dismissing the respondent's appeal petition filed 1 week after the administrative law judge's decision became final); Noble, No. 09-0033, 68 Agric. Dec. 1060, 2009 WL 8382895 (U.S.D.A. Dec. 17, 2009) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Edwards, No. D-06-0020, 66 Agric. Dec. 1362, 2007 WL 7277763 (U.S.D.A. Oct. 30, 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the administrative law judge's decision became final); Tung Wan Co., No. D-06-0019, 66 Agric. Dec. 939, 2007 WL 3170291 (U.S.D.A. Jan. 8, 2007) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 41 days after the chief administrative law judge's decision became final); Gray, No. 01-D022, 64 Agric. Dec. 1699, 2005 WL 6231833 (U.S.D.A. Mar. 10, 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the chief administrative law judge's decision became final); Mokos, No. 03-0003, 64 Agric. Dec. 1647, 2005 WL 2251945 (U.S.D.A. Sept. 6, 2005) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 6 days after the chief administrative law judge's decision became final); Blackstock, No. 02-0007, 63 Agric. Dec. 818, 2004 WL 1842435 (U.S.D.A. July 13, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 2 days after the administrative law judge's decision became final); Gilbert, No. 04-0001, 63 Agric. Dec. 807, 2004 WL 2823368 (U.S.D.A. Nov. 30, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed 1 day after the administrative law judge's decision became final); Nunez, No. 03-0002, 63 Agric. Dec. 766, 2004 WL 2031430 (U.S.D.A. Sept. 8, 2004) (Order Den. Late Appeal) (dismissing the respondent's appeal petition filed on the day the administrative law judge's decision became final).

[8] *See* 7 C.F.R. § 1.139; Chief ALJ's Decision and Order at 4-5.

2012. Custom Cuts, Inc., and Custom Cuts Fresh, LLC, filed their appeal petition on February 15, 2013, 1 month 27 days after the Chief ALJ's Decision and Order became final. Therefore, I have no jurisdiction to hear Custom Cuts, Inc., and Custom Cuts Fresh, LLC's appeal petition.

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final. Therefore, under the Rules of Practice, I cannot extend the time for Custom Cuts, Inc., and Custom Cuts Fresh, LLC's filing an appeal petition after the Chief ALJ's Decision and Order became final.

Accordingly, Custom Cuts, Inc., and Custom Cuts Fresh, LLC's appeal petition must be denied. For the foregoing reasons, the following Order is issued.

ORDER

1. Custom Cuts, Inc., and Custom Cuts Fresh, LLC's appeal petition, filed February 15, 2013, is denied.

2. The Chief ALJ's Decision and Order, filed September 25, 2012, is the final decision in this proceeding.

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In re: PERFECTLY FRESH FARMS, INC, PERFECTLY FRESH CONSOLIDATION, INC., AND PERFECTLY FRESH SPECIALTIES, INC. (RESPONDENTS); AND JAIME O. REVOLE, JEFFREY LON DUNCAN, AND THOMAS BENNETT, PETITIONERS.
Docket Nos. D-05-0001, D-05-0002, D-05-0003, 05-0010, 05-0011, 05-0012, 05-0013, 05-0014, 05-0015.
Miscellaneous Order.
Filed March 26, 2013.

MISCELLANEOUS ORDERS

PACA-APP.

Christopher Young-Morales, Esq. for Complainant.
Christopher F. Bryan, Esq. for Respondents and Appellant.
Initial Decision and Order by Peter M. Davenport, Chief Administrative Law Judge.
Ruling by William G. Jenson, Judicial Officer.

ORDER LIFTING STAY ORDER AS TO PERFECTLY FRESH FARMS, INC.; PERFECTLY FRESH CONSOLIDATION, INC.; PERFECTLY FRESH SPECIALTIES, INC.; AND JEFFREY LON DUNCAN

On June 12, 2009, I issued a Decision and Order: (1) concluding Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; and Perfectly Fresh Specialties, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) ordering publication of the facts and circumstances of Perfectly Fresh Farms, Inc.'s; Perfectly Fresh Consolidation, Inc.'s; and Perfectly Fresh Specialties, Inc.'s violations of the PACA; (3) concluding Thomas Bennett was responsibly connected with Perfectly Fresh Farms, Inc., when Perfectly Fresh Farms, Inc., violated the PACA; (4) concluding Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., when Perfectly Fresh Consolidation, Inc., violated the PACA; and (5) subjecting Thomas Bennett and Jeffrey Lon Duncan to the licensing and employment restrictions set forth in 7 U.S.C. §§ 499d(b) and 499h(b).[1]

On July 16, 2009, Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; and Jeffrey Lon Duncan requested a stay of the Order in the June 12, 2009, Decision and Order, pending the outcome of proceedings for judicial review, which I granted on September 2, 2009.[2] On February 12, 2013, the Agricultural

[1] Perfectly Fresh Farms, Inc., Nos. D-05-0001 – D-05-0003, Nos. 05-0010 – 05-0015, 68 Agric. Dec. 507, 2009 WL 1702292 (U.S.D.A. June 12, 2009) (Decision as to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; Jeffrey Lon Duncan; and Thomas Bennett).

[2] Perfectly Fresh Farms, Inc. Nos. D-05-0001 – D-05-0003, 68 Agric. Dec. 1311, 2009 WL 8382935 (U.S.D.A. Sept. 2, 2009) (Stay Order as to Perfectly Fresh Farms, Inc.;

Marketing Service, United States Department of Agriculture [hereinafter AMS], filed a Request to Lift Stay Order of Judicial Officer stating proceedings for judicial review of the June 12, 2009, Decision and Order are concluded. No response to the Request to Lift Stay Order of Judicial Officer was filed, and on March 25, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for a ruling on the Request to Lift Stay Order of Judicial Officer.

As no opposition to AMS' Request to Lift Stay Order of Judicial Officer has been filed and proceedings for judicial review of the June 12, 2009, Decision and Order are concluded, the September 2, 2009, Stay Order is lifted and the Order in the June 12, 2009, Decision and Order as it relates to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; and Jeffrey Lon Duncan, is effective, as follows:

ORDER

1. Perfectly Fresh Consolidation, Inc., has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4). The facts and circumstances of Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Consolidation, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Consolidation, Inc.

2. Perfectly Fresh Farms, Inc., has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4). The facts and circumstances of Perfectly Fresh Farms, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly Fresh Farms, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Farms, Inc.

3. Perfectly Fresh Specialties, Inc., has committed willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4). The facts and circumstances of Perfectly Fresh Specialties, Inc.'s violations of the PACA shall be published. The publication of the facts and circumstances of Perfectly

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Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; and Jeffrey Lon Duncan).

Fresh Specialties, Inc.'s violations of the PACA shall be effective 60 days after service of this Order on Perfectly Fresh Specialties, Inc.

4. Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., when Perfectly Fresh Consolidation, Inc., willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4). Accordingly, Jeffrey Lon Duncan is subject to the licensing and employment restrictions set forth in 7 U.S.C. §§ 499d(b) and 499h(b), effective 60 days after service of this Order on Mr. Duncan.

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DEFAULT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

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: www.dm.usda.gov/oaljdecisions].

PERISHABLE AGRICULTURAL COMMODITIES ACT

DELTA FRESH FRUIT, INC.
Docket No. 12-0565.
Default Decision and Order.
Filed January 3, 2013.

DELTA PRODUCE, LP.
Docket No. 12-0612.
Default Decision and Order.
Filed January 15, 2013.

UNITED POTATO DISTRIBUTORS, INC., D/B/A UNITED DISTRIBUTORS, INC.
Docket No. 12-0555.
Default Decision and Order.
Filed February 5, 2013.

LUCAS BROTHERS, INC.
Docket No. 12-0525.
Default Decision and Order.
Filed February 7, 2013.

FRESHCO FOODSERVICE, INC.
Docket No. 13-0048.
Default Decision and Order.
Filed February 7, 2013.

DEFAULT DECISIONS

MISTER BEE POTATO CHIP COMPANY.
Docket No. 13-0056.
Default Decision and Order.
Filed February 7, 2013.

WORLDWIDE PRODUCE & GROCERIES, INC.
Docket No. 13-0055.
Default Decision and Order.
Filed March 21, 2013.

SUTTON FRUIT AND VEGETABLE COMPANY.
Docket No. 13-0047.
Default Decision and Order.
Filed March 29, 2013.

HUNTS POINT TROPICALS, INC.
Docket No. 12-0276.
Default Decision and Order.
Filed April 9, 2013.

SUPERIOR TOMATO-AVOCADO, LTD.
Docket No. 13-0165.
Default Decision and Order.
Filed April 9, 2013.

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Sam Rodio Produce, LLC.
Docket No. D-12-0593.
Filed January 9, 2013.

Avocado Importers International, Inc., D/B/A Ultimate Avocado.
Docket No. D-13-0112.
Filed February 1, 2013.