

AGRICULTURE DECISIONS

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

AGRICULTURE DECISIONS

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KLEIMAN & HOCHBERG, INC., ET AL. v. USDA.

No. 06-1283.

Court Decision.

Filed August 14, 2007.

Rehearing En Banc Denied Nov. 6, 2007.

(Cite as: 497 F.3d 681).

PACA – Responsibly connected – Bribes, duty to not pay – Extortion, not reasonable cause for paying bribes.

Vice president and 1/3 owner of a PACA licensee was found to have breached his duty to not pay bribes to USDA inspectors over a course of many years. Court found the alleged extortion to pay bribes in order to enhance inspector timeliness for the benefit of his company was not for “reasonable cause.” The high bar to refuting the responsibly connected presumption will be upheld as long as applying it does not abridge a fundamental right or discriminate against or suspect class and it bears a rational relationship to a legitimate legislative goal.

United States Court of Appeals, District of Columbia Circuit.

Before: TATEL, GARLAND, and BROWN, Circuit Judges.

Opinion for the court filed by Circuit Judge GARLAND.

GARLAND, Circuit Judge:

The petitioners in this case are Kleiman & Hochberg, Inc., a wholesale produce merchant, and its president, Michael Hirsch. The company's vice president pled guilty to bribing a federal produce inspector and later admitted that he had been making similar payments for more than a decade. After an administrative enforcement proceeding, the Secretary of Agriculture revoked the company's license to do business under the Perishable Agricultural Commodities Act. The same administrative decision triggered restrictions on Hirsch's ability to work in the produce industry. The petitioners now seek review of that decision. For the reasons explained below, we deny the petition for review.

Kleiman & Hochberg, Inc. (K & H) is a New York corporation operated out of the Hunts Point Terminal Market in the Bronx, New York. Since 1947, K & H has maintained a license to buy and sell produce in interstate commerce under the Perishable Agricultural Commodities Act (PACA), 7 U.S.C. § 499a *et seq.* During the period of time relevant to this case, K & H had three principals: Michael Hirsch, its president; Barry Hirsch, its treasurer and Michael's brother; and John Thomas, its vice president. Each man owned 31.6 percent of the corporation's outstanding stock.

Our recent opinion in *Coosemans Specialties, Inc. v. Department of Agriculture*, 482 F.3d 560 (D.C.Cir.2007), which involved the bribery of the same federal inspector by a different company, sets forth the relevant background information regarding Hunts Point:

The perishable produce that arrives at Hunts Point often travels some distance between the supplier and a buyer, such as [K & H]. As a result, produce may arrive in a condition worse than expected. If the buyer then asks for a price reduction, the [supplier] is at a disadvantage, because it has no way of knowing whether to trust the buyer's representations about the condition of the produce. The [United States Department of Agriculture's (USDA's)] inspection process is intended to level the playing field by providing the faraway [supplier] with an independent evaluation of the produce's condition so he can be assured that the price he receives is fair. A buyer, upon receipt of nonconforming goods, may request an inspection. [A USDA] inspector reviews the produce and issues an official certificate assessing its condition that can help the producer and buyer renegotiate the price....

This inspection system has been subject to abuse. For two decades, corrupt USDA inspectors and buyers at Hunts Point participated in a scheme of illegal payments. An inspector who received a bribe might furnish a falsified certificate indicating that the produce's condition was worse than it actually was. The buyer would use that certificate to negotiate a lower price with the supplier. Once he paid the supplier, the buyer could resell the produce for a price that reflected the produce's

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actual condition. In this way, a buyer who bribed inspectors for this purpose could increase his profit margin to the detriment of the supplier. Additionally, some inspectors who had accepted bribes permitted those companies to jump to the front of the line for inspections, thereby delaying the inspections of their competitors. Produce being perishable, buyers who had to wait for inspections were likely to receive lower prices when the goods were eventually resold.

In 1999, one of the Hunts Point inspectors, William Cashin, was caught taking bribes. After his arrest, he agreed to cooperate with investigators. He conducted inspections from April until August 1999 while wearing audio and/or video recording devices to document the bribes he received.

Coosemans Specialties, 482 F.3d at 562-63. At the end of each day of work, Inspector Cashin met with agents of the FBI and the USDA's Office of Inspector General to turn over bribe money and describe the particulars of the bribes he received that day.

Cashin later testified that he received bribes from K & H Vice President John Thomas in conjunction with K & H produce transactions on twelve separate occasions. In October 1999, a grand jury indicted Thomas on seven counts of bribing a public official, in violation of 18 U.S.C. § 201(b)(1)(A). A year later, Thomas pled guilty to a one-count information stating that he “made cash payments to [USDA] produce inspectors in order to obtain expedited inspections.” J.A. 664.

On July 17, 2002, the USDA's Agricultural Marketing Service filed an administrative complaint charging K & H with violating PACA by bribing a produce inspector. On February 12, 2003, the Service determined that both Michael and Barry Hirsch were “responsibly connected” to K & H within the meaning of PACA. (The significance of this determination is discussed in Part II.) The Hirsches then filed petitions for review of the “responsibly connected” determinations, and an administrative law judge (ALJ) consolidated those proceedings with the ongoing disciplinary proceeding against the company.

In 2004, the ALJ conducted an eight-day hearing. Cashin testified that, beginning in the late 1980s or early 1990s, Thomas paid him a fifty-dollar bribe for each inspection. In return, Cashin said he “help[ed]” K & H by altering some aspects of its inspection certificates, J.A. 29, although he could not recall precisely how he changed the certificates.

When Thomas testified, he admitted paying bribes to USDA produce inspectors. He said that he began this practice in the “mid or late[] ’80s,” when he was visited by a produce inspector named Danny Arcery. J.A. 196. Thomas said that Arcery visited him after Thomas lodged several complaints with the USDA about late inspections. According to Thomas, Arcery told him:

In order to avoid late inspections, here's what has to be done, you will give a tip of \$25.00 to an inspector to come quicker rather than purposely later.... If you follow these instructions, everything will be okay. No more calls. No more calls. Don't call Washington. We've got people down there.

J.A. 197-98.¹

Thomas testified that Arcery also told him that, if he did not make the payments, “[then] don't hold your breath for an inspection ... the shit will rot in the box until somebody comes.” J.A. 198. Thomas explained that the purpose of the bribes was always “to get a quicker inspection,” and he denied ever asking Cashin or any other produce inspector to falsify an inspection report. J.A. 205. He testified that no one else at K & H, including the Hirsches, knew that he was bribing produce inspectors throughout the 1980s and 1990s. When asked why he never reported the corrupt inspectors to the authorities, Thomas testified that he “was afraid.” J.A. 220. But when asked what he was afraid Arcery would do, Thomas replied, “I had no idea.” J.A. 220.

¹ Thomas testified that the amount of the bribes increased to fifty dollars per inspection in the 1990s.

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The ALJ issued his decision and order on December 3, 2004. *See Kleiman & Hochberg, Inc.*, PACA Docket Nos. D02-0021, APP-03-0005, APP-03-0006 (U.S.D.A. Dec. 3, 2004). He found that there was “undisputed evidence that Thomas bribed Cashin in connection with” twelve separate produce inspections. *Id.* at 9. The ALJ concluded that K & H had violated PACA and that the Hirsches were responsibly connected to the company. *Id.* at 18-19. After considering the circumstances of the case, however, he declined to revoke K & H's license, and instead assessed a penalty of \$180,000. *Id.* at 33.

All of the parties appealed to the USDA's Judicial Officer, to whom the Secretary has delegated authority for final decision making in adjudicatory proceedings. *See* 7 C.F.R. § 2.35(a). The Judicial Officer issued his decision and order on April 5, 2006. *See Kleiman & Hochberg, Inc.*, PACA Docket Nos. D-02-0021, APP-03-0005, APP-03-0006 (U.S.D.A. Apr. 5, 2006) (Judicial Officer Decision). He disagreed with the ALJ in only one respect, concluding that the appropriate sanction was revocation of K & H's PACA license. *Id.* at 31-35.

After the Judicial Officer denied their petition for reconsideration, K & H and Michael Hirsch petitioned for review in this court pursuant to 28 U.S.C. § 2342(2). Barry Hirsch also petitioned, but he died on April 10, 2007, and thereafter the petition was dismissed as to him. The Judicial Officer has stayed his orders pending the outcome of our review.

The petitioners raise a series of challenges to the Judicial Officer's decision. In Part II, we review the regulatory regime established by PACA and explain how it was applied in this case. In Part III, we consider the petitioners' challenges.

II

Congress enacted PACA “to facilitate interstate commerce in fresh fruits and vegetables. To help instill confidence in parties dealing with each other on short notice, across state lines and at long distances, it

provides special sanctions against dishonest or unreliable dealing.” *Veg-Mix, Inc. v. USDA*, 832 F.2d 601, 604 (D.C.Cir.1987) (citation omitted). Because the “industry [was] thought to be unusually prone to fraud and to unfair practices,” *Tri-County Wholesale Produce Co. v. USDA*, 822 F.2d 162, 163 (D.C.Cir.1987), PACA erected a strict regulatory regime. The Act requires persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce to have a license issued by the Secretary of Agriculture, *see* 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), and makes it unlawful for a licensee to engage in certain types of unfair conduct, *see id.* § 499b. The relevant prohibition in this case, § 499b(4), makes it unlawful for a licensee to “fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with” any transaction in interstate or foreign commerce involving a perishable agricultural commodity. *Id.* § 499b(4). PACA also includes a respondeat superior provision, which deems the acts of a licensee's agents that fall within the scope of their employment to be the acts of the licensee. *Id.* § 499p.

If the Secretary of Agriculture determines that a PACA licensee has violated § 499b(4), the Secretary is authorized to impose a range of sanctions. *See id.* § 499h. “[I]f the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.” *Id.* § 499h(a). A license revocation can have serious repercussions for individuals who are associated with the licensee. When an entity's PACA license is revoked, the Act prohibits any person who was “responsibly connected” to the entity from working for any other licensee for at least one year. *Id.* § 499h(b).

Prior to 1995, PACA defined “responsibly connected” as (inter alia) “affiliated or connected with a commission merchant, dealer, or broker as ... [an] officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association.” 7 U.S.C. § 499a(b)(9) (1994). Congress amended that definition in 1995. *See* 7 U.S.C. § 499a(b)(9). Under the amended statute, the Secretary “must first determine if an individual” is an officer, director, or holder of more

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than ten percent of the violating licensee's stock. *Norinsberg v. USDA*, 162 F.3d 1194, 1197 (D.C.Cir.1998). “If so, the burden shifts to the individual to demonstrate that he was not actively involved [in the violation] and that he was either only a nominal officer or not an owner of a licensee within the meaning of the statute.” *Id.*; *see infra* Part III.E.

The Judicial Officer applied the foregoing provisions of PACA as follows. First, he concluded that Thomas' payment of bribes to USDA produce inspectors breached an implied duty and thereby violated § 499b(4). Next, he determined that those violations should be imputed to K & H under § 499p. He further concluded that the violations were willful, flagrant, and repeated, and imposed the maximum sanction of license revocation, as authorized by § 499h(a). Finally, he determined that Michael Hirsch was “responsibly connected” to K & H under § 499a(b)(9), a finding that triggered PACA's employment restrictions. The petitioners challenge all of these conclusions.

III

“We review final decisions in PACA cases under the deferential standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (E). Under that standard, we must ‘uphold the Judicial Officer's decision unless we find it to be arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence.’” *Kirby Produce Co. v. USDA*, 256 F.3d 830, 833 (D.C.Cir.2001) (quoting *JSG Trading Corp. v. USDA*, 176 F.3d 536, 541 (D.C.Cir.1999) (“*JSG Trading I*”). As we read their briefs, the petitioners challenge five aspects of the Judicial Officer's decision: (1) the determination that Thomas' payment of bribes to produce inspectors violated the “implied duty” clause of § 499b(4); (2) the treatment of Thomas' actions as the actions of K & H under § 499p; (3) the decision to revoke K & H's license under § 499h(a), rather than to impose a lesser sanction; (4) the Secretary's failure to provide petitioners with notice and an opportunity to halt Thomas' unlawful conduct before revoking K & H's license; and (5) the determination that Michael Hirsch was “responsibly connected”

to K & H under § 499a(b)(9). We consider each objection in turn.

A

We begin with the petitioners' challenge to the Judicial Officer's determination that Thomas' bribes violated 7 U.S.C. § 499b(4), which makes it unlawful to “fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with” a produce transaction. 7 U.S.C. § 499b(4). The Judicial Officer's application of this section proceeded in two stages. First, he held that Thomas failed to perform an implied “duty to refrain from making payments to [USDA] produce inspectors in connection with the inspection of perishable agricultural commodities.” Judicial Officer Decision at 27. Second, he held that Thomas did not have “reasonable cause” for failing to perform the duty. *See id.* at 44-46.

At oral argument before this court, the petitioners did not dispute the Judicial Officer's interpretation of § 499b(4) as encompassing a duty to refrain from bribing government produce inspectors. *See* Oral Arg. Recording at 3:15. This turned out to be a prescient allocation of their legal ammunition, because another panel subsequently affirmed an identical interpretation of § 499b(4). In *Coosemans Specialties*, the court explained that the USDA's interpretation of PACA is entitled to deference under the two-step framework of *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Coosemans Specialties*, 482 F.3d at 564; *see also Norinsberg*, 162 F.3d at 1199. Under that framework, if “the intent of Congress is clear, ... [a court] must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. But “if the statute is silent or ambiguous with respect to the specific issue,” the court must uphold the agency's interpretation as long as it is reasonable. *Id.* at 843, 104 S.Ct. 2778. Applying that framework, *Coosemans Specialties* concluded that the implied duty clause is ambiguous, and that the Judicial Officer's view that it “includes a duty not to bribe USDA inspectors ... is reasonable,” because “[i]t is consistent with the purposes of the Act ... to protect producers and other merchants from

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dishonest and irresponsible conduct.” 482 F.3d at 565-66.²

The Second Circuit reached the same result in *G & T Terminal Packaging Co. v. USDA*, 468 F.3d 86 (2d Cir.2006), another case arising out of the corruption at Hunts Point. After finding the “implied duty” language of § 499b(4) to be ambiguous, it “affirm[ed] as reasonable the Secretary’s conclusion that the PACA imposes an implied duty upon licensees to refrain from making payments to USDA inspectors in connection with produce inspections, irrespective of whether those payments induce, or are intended to induce, the inspectors to issue inaccurate inspection certificates.” *Id.* at 96. “Indeed,” the court said, given PACA’s statutory scheme, “which assigns government inspectors to protect the financial interests of distant shippers by providing impartial assessments of the condition of the produce upon arrival, we can hardly conceive of a duty more clearly implicated than the obligation of recipients not to make side-payments to these inspectors.” *Id.* at 96-97 (citations omitted). We agree.

Rather than attack the Judicial Officer’s construction of “implied duty,” K & H and Hirsch direct their fire at the second part of the Officer’s analysis: his rejection of their argument that Thomas had “reasonable cause” for bribing Cashin because he was the victim of “extortion.” The Judicial Officer rejected that argument for two reasons. He concluded that: (1) Thomas was *not* the victim of “extortion,” Judicial Officer Decision at 45, and (2) even if he was, “[t]he extortion cited by [petitioners] is not a ‘reasonable cause’ under ... PACA,” *id.* at 46 (citation omitted). We affirm both determinations.

² As we noted in *Coosemans Specialties*, we had previously “upheld the Secretary’s construction of the implied duty clause as including a prohibition on commercial bribery,” that is, the payment of bribes by a seller to a buyer’s employee, without the knowledge of the employer. 482 F.3d at 565 (citing, *inter alia*, *JSG Trading Corp. v. Dep’t of Agric.*, 235 F.3d 608, 610-11 (D.C.Cir.2001) (“*JSG Trading II*”); *JSG Trading I*, 176 F.3d at 543).

The Judicial Officer's rejection of the petitioners' claim that Thomas' payments were the result of extortion is reasonable. There is no evidence in the record that Cashin made threats of any kind to induce Thomas to make the payments. Rather, the only evidence that anyone ever threatened Thomas is Thomas' testimony (recounted above) that a different produce inspector, Arcery, did so a full decade prior to the bribes at issue here. According to Thomas, Arcery told him in the mid-to late-1980s that unless he paid bribes, K & H's produce would "rot in the box until somebody comes," and warned him that he should not "call Washington" because "[w]e've got people down there." J.A. 198. These statements do not compel a conclusion that Thomas' payments to Cashin a decade later were involuntary.

The Judicial Officer was also justified in concluding that, even if Thomas' payments were induced by extortion, the type of "extortion cited by [the petitioners] is not a 'reasonable cause' under [PACA] for [K & H]'s failure to perform the implied duty to refrain from [bribing] produce inspectors." Judicial Officer Decision at 46. First, under *Chevron* step one, PACA is ambiguous as to whether extortion provides "reasonable cause" for bribery. *See G & T Terminal*, 468 F.3d at 98. It could hardly be otherwise, as there is nothing in the statute that defines "reasonable cause" or mentions extortion or bribery. The petitioners do not argue to the contrary.

Moving to *Chevron* step two, we find that the Judicial Officer's interpretation of the "reasonable cause" provision is reasonable. Like the Second Circuit, "[w]e may presume that there are species of coercion so extreme that they rob an individual of any meaningful opportunity to resist." *Id.* But there was no such coercion in this case. The "threats" Arcery allegedly made to Thomas were in any event " 'soft' enough to support the view that no reasonable cause existed for the petitioners' breach of duty." *Id.*; *see also id.* (noting that the inspectors at Hunts Point did not "physically threaten[]" the bribe payer and did not threaten "the loss or destruction of his business, harm to his family or employees, blackmail, or the outright denial of produce inspections"). Like the bribe payer in *G & T Terminal*, Thomas had "choices about how to respond

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to [the inspector's] demands for illegal payments-hard choices, perhaps, but meaningful ones all the same.” *Id.* at 99.

In sum, we affirm the Judicial Officer's reasonable determination that Thomas violated § 499b(4): his conduct breached the implied duty not to bribe USDA inspectors, and he had no “reasonable cause” for so doing.

B

The petitioners next challenge the Judicial Officer's determination that Thomas' actions should be deemed the actions of K & H under 7 U.S.C. § 499p, PACA's respondeat superior provision. Section 499p provides that “the act, omission, or failure of any agent, officer, or other person acting for or employed by any [licensee], within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such [licensee].” 7 U.S.C. § 499p. In applying this provision, the Judicial Officer found that “Thomas paid bribes to [USDA] produce inspectors at [K & H's] place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by [K & H].” Judicial Officer Decision at 48. Further, “Thomas was authorized to apply for” produce inspections by K & H, and the bribes he paid “were intended to benefit” the company. *Id.* at 48-49. The Officer concluded that “[t]he record clearly establishes that John Thomas was [acting] within the scope of his employment” when he bribed Cashin. *Id.* at 48. Accordingly, under § 499p, “the knowing and willful bribes by John Thomas are deemed to be knowing and willful bribes by” K & H. *Id.* at 25.

We find no fault in the Judicial Officer's application of § 499p. In a similar case, we upheld the Secretary's determination that an employee's payment of bribes to a USDA inspector for the benefit of his company fell within the scope of his employment. *See Post & Taback, Inc. v. Dep't of Agric.*, 123 Fed.Appx. 406, 408 (D.C.Cir.2005). Other courts have reached the same result. *See, e.g., Koam Produce, Inc. v. DiMare*

Homestead, Inc., 329 F.3d 123, 130 (2d Cir.2003). Indeed, at oral argument, counsel for the petitioners conceded that an officer of a company generally acts “within the scope of his employment” when he pays a bribe to a produce inspector. Oral Arg. Recording at 7:44.

The petitioners offer two reasons why § 499p is nonetheless inapplicable to this case. First, they contend that Thomas' actions were “secret” and “undiscoverable,” Pet'rs Br. 35, and that, as a consequence, K & H “had absolutely no ... ability to control what Thomas did with the inspectors,” *id.* at 34. As the government correctly notes, this rhetoric overstates the situation. Thomas was not, as the petitioners suggest, some third-party actor beyond the company's control; to the contrary, he was the company's one-third owner and treasurer and had worked for the company for thirty years. More important, the petitioners' argument contradicts the express language of the statute. Section 499p provides that the act of an officer, within the scope of his employment, “shall *in every case* be deemed the act” of the licensee. 7 U.S.C. § 499p (emphasis added). As we held in *Post & Taback*, “the plain language of the [section] provides no escape hatch for merchants who allege ignorance of their employees' misconduct.” 123 Fed.Appx. at 408 (internal quotation marks and ellipsis omitted).

Second, the petitioners argue that Thomas' bribes did not have “any connection with or impact on the actual produce transactions between Petitioners and their shippers and suppliers,” and did not cause any “damage.” Pet'rs Br. 33. This second argument has the same flaws as the first. It is factually incorrect because, as we noted in *Coosemans Specialties*, companies that paid bribes to expedite their inspections at Hunts Point “jump[ed] to the front of the line for inspections, thereby delaying the inspections of their competitors.” 482 F.3d at 563; *see id.* at 567 (noting that this “conduct not only gave [the company] a competitive advantage, but it also increased the pressure on other merchants to engage in bribery to remain competitive”); *see also* Judicial Officer Decision at 20 (finding that Thomas pled guilty to making “cash payments to [USDA] produce inspectors in order to obtain expedited inspections”). Moreover, and again more important, the

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statute requires imputation of wrongful conduct to the licensee “in every case,” 7 U.S.C. § 499p-not simply in those cases in which damage was done.

Finally, the petitioners contend that, if § 499p is interpreted according to its express terms, it amounts to “an unconstitutional irrebuttable presumption” because it “provide[s] that certain facts (Thomas' admitted payments) shall be conclusive evidence of guilt of Petitioners,” thereby depriving them of “the right to engage in ... one of the common occupations of life.” Pet'rs Br. 35-36. In fact, § 499p simply makes applicable to wholesale produce merchants the principle of respondeat superior, a substantive legal doctrine widely accepted at common law³ and widely incorporated into federal regulatory statutes.⁴

Whether or not we call that doctrine an “irrebuttable presumption,”⁵ if applying it “does not abridge a fundamental right or discriminate against a suspect class, it [must be] upheld if it ‘bears a rational relation to a legitimate legislative goal.’” *Delong v. Dep't of Health & Human Servs.*, 264 F.3d 1334, 1341 (Fed.Cir.2001) (brackets and ellipsis

³ See Oliver W. Holmes, Jr., *Agency*, 4 HARV. L.REV.. 345, 356 (1891).

⁴ See, e.g., 7 U.S.C. § 63 (cotton standards); *id.* § 87d (grain standards); *id.* § 223 (packers and stockyards); *id.* § 5111 (tobacco inspection); *id.* § 2139 (transportation of animals); *id.* § 8313(c) (animal health protection); 15 U.S.C. § 431(f) (discrimination against farmers' cooperative associations by boards of trade); 21 U.S.C. § 63 (filled milk); *id.* § 461(a) (poultry and poultry products inspection); *id.* § 1041(d) (egg products inspection); 47 U.S.C. § 217 (regulation of common carriers in wire or radio communication).

⁵ Commentators have noted that the Supreme Court “has not applied the irrebuttable presumption doctrine” since the early 1970s. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW § 9.4 n. 65 (3d ed.2006); see GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 915 (13th ed.1997) (stating that the irrebuttable presumption doctrine was “abandoned by the Court” in *Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975)); see generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1621-24 (2d ed.1988).

omitted) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 772, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975)); see *Hawkins v. Agric. Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir.1993); see generally *Edison Elec. Inst. v. EPA*, 391 F.3d 1267, 1272 n. 5 (D.C.Cir.2004); sources cited *supra* note 5.

The petitioners do not claim that there is a fundamental right or suspect class at issue here, and there is no doubt that § 499p bears a rational relation to a legitimate legislative goal. By imposing liability on licensees whose agents violate PACA, the respondeat superior doctrine encourages produce companies to “use [their] control over the employee to prevent” violations of the Act. *Sullivan v. Freeman*, 944 F.2d 334, 336 (7th Cir.1991) (discussing the role of the doctrine in general). “While admittedly the result Congress desired could be harsh in some cases, we cannot say that [the statute] is not reasonably designed to achieve the desired Congressional purpose.” *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.1967) (specifically referring to § 499h(b), which restricts the employment of “responsibly connected” persons).

The petitioners disparage the Judicial Officer's attribution of Thomas' misconduct to the company as a “rote application” of § 499p. Pet'rs Br. 32. In our view, this is just another way of saying that the Officer was faithful to the statutory text. And that is his-and our-responsibility.

C

Third, the petitioners argue that the Judicial Officer's decision to revoke K & H's PACA license is “unsupported by the great weight of the evidence and is arbitrary and capricious.” Pet'rs Br. 44. As we have repeatedly noted, “[w]e will not lightly disturb the [USDA's] choice of a remedy under a statute committed to its enforcement, especially given the Department's superior knowledge of the industry PACA regulates.” *Coosemans Specialties*, 482 F.3d at 566-67 (quoting *JSG Trading II*, 235 F.3d at 617).

If a licensee's violation of PACA § 499b “is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.” 7 U.S.C.

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§ 499h(a). The Judicial Officer found that K & H's violations of § 499b(4) were both flagrant *and* repeated, *see* Judicial Officer Decision at 30-31, and the petitioners do not challenge those findings. The Officer was therefore authorized to revoke K & H's license, and his decision to do so was fully consistent with precedent. In numerous cases arising out of the government's investigation at Hunts Point, revocation was the sanction imposed for bribing produce inspectors. *See, e.g., Coosemans Specialties, Inc.*, PACA Docket No. D-02-0024 (U.S.D.A. Apr. 20, 2006); *In re M. Trombetta & Sons, Inc.*, PACA Docket No. D-02-0025 (U.S.D.A. Sept. 27, 2005); *G & T Terminal Packaging Co.*, PACA Docket No. D-03-0026 (U.S.D.A. Sept. 8, 2005).

The Judicial Officer was not required, of course, to impose the sanction of revocation and could have opted for a lesser punishment. He chose not to do so because of the “egregious” nature of the bribes. Judicial Officer Decision at 34. The petitioners protest that Thomas' conduct was not egregious, because his bribes “had no effect on K & H's dealings with its suppliers.” Pet'rs Br. 45. But the Judicial Officer relied on the testimony of John Koller, an official at the USDA's Agricultural Marketing Service, who testified that bribery of produce inspectors undermines the credibility of the entire PACA inspection process and increases the likelihood that other produce wholesalers will engage in similar illicit conduct. Judicial Officer Decision at 33.⁶ License revocation was necessary, Koller said, in order to “deter other members of the industry from ... making bribery payments.” *Id.* Under these circumstances, we have no ground for finding the Judicial Officer's choice of sanctions unreasonable. *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 188-89, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (“The fashioning of an appropriate and reasonable remedy is for

⁶ *See also Post & Taback, Inc.*, 62 Agric. Dec. 802, 825 (2003) (“[U]nlawful gratuities and bribes paid to [USDA] inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust in the entire inspection system.”), *petition for review denied*, 123 Fed. Appx. 406 (D.C.Cir.2005).

the Secretary, not the court.”).

D

The petitioners' fourth argument is that the Secretary violated the Administrative Procedure Act (APA) by instituting proceedings to revoke K & H's license without first providing the company with notice of Thomas' unlawful conduct and an opportunity to curb it. Once again, the plain text of the statute bars the petitioners' argument. The relevant section of the APA states: “*Except in cases of willfulness* [,] ... revocation ... of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given-(1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements.” 5 U.S.C. § 558(c) (emphasis added). Here, the Judicial Officer found that K & H's violations of PACA were willful, *see* Judicial Officer Decision at 28-31 & n. 8, thus bringing the case within the exception to the APA's notice requirement.

In applying § 558(c) to PACA violations, we have held that “an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.” *Coosemans Specialties*, 482 F.3d at 567 (quoting *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C.Cir.1983)). Applying this standard, the Judicial Officer found that Thomas, and therefore K & H, had willfully violated PACA by paying unlawful bribes to Cashin. This finding is supported by substantial evidence. Thomas pled guilty to an information stating that he “unlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to public officials.” J.A. 664. And Thomas' own description of his bribes during his testimony before the ALJ shows that his conduct was intentional. *See* J.A. 201-06. On virtually identical evidence, *Coosemans Specialties* held that a PACA violation was willful and hence that the APA's notice provision was inapplicable. 482 F.3d at 567-68. We do so here as well. Indeed, we could not do otherwise without requiring the USDA to disclose an undercover law enforcement operation as soon as it detects

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a criminal violation.⁷

E

Finally, petitioner Michael Hirsch challenges the Judicial Officer's determination that he was “responsibly connected” to K & H during the period in which the company violated PACA. Section 499h(b) provides that “any person who is or has been responsibly connected with any [entity] whose license has been revoked” may not be employed by any other PACA licensee for at least one year. 7 U.S.C. § 499h(b). Because the Judicial Officer revoked K & H's license, the determination that Hirsch was responsibly connected to K & H makes him subject to this restriction.

PACA defines a “responsibly connected” person as one who is “affiliated or connected with a [licensee] as ... [an] officer, director, or holder of more than 10 per centum of the outstanding stock.” *Id.* § 499a(b)(9). There is no dispute that Hirsch—who was all three—comes within this definition. As noted above, however, a 1995 amendment qualified the definition. It provided:

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 [PACA] and that the person either was only nominally ... [an] officer, director, or shareholder of a violating licensee ... or was not an owner of a violating licensee ... which

⁷ Petitioners also suggest, obliquely, that Michael Hirsch was individually entitled to notice under APA § 558(c). *See* Pet'rs Br. 25. Section 558(c), however, applies only to “licensees.” It does not require notice to the directors, officers, or owners of a licensee who are not themselves licensed. In this case, K & H was the only party that maintained a license, *see* J.A. 655-62, and that license is the only one at issue in these proceedings.

was the alter ego of its owners.

Id.

Under the amended statute, the Secretary “must first determine if an individual” is an officer, director, or holder of more than ten percent of the violating licensee's stock. *Norinsberg*, 162 F.3d at 1197. “If so, the burden shifts to the individual to demonstrate [by a preponderance of the evidence] that he was not actively involved [in the violation] *and* that he was either only a nominal officer or not an owner of a licensee within the meaning of the statute.” *Id.* (emphasis added). Hirsch did demonstrate that he was not actively involved in Thomas' bribery, *see* Judicial Officer Decision at 37, thus rendering this exception potentially available. However, because he makes no claim that he was “not an owner of a violating licensee ... which was the alter ego of its owners,”⁸ he must prove that he was “only nominally ... [an] officer, director [and] shareholder” of K & H to obtain the exception's benefit.

Hirsch did not prove that he qualified for the “nominal” exception, nor could he do so. As Hirsch concedes, he owned 31.6 percent of the corporation's outstanding stock, was the company's President, and was “actively engaged in the day-to-day operations, management, *and control* of K & H.” Pet'r's Br. 25 (emphasis added).

Nonetheless, Hirsch again notes that Thomas' bribes were undisclosed, and insists that a person cannot be responsibly connected to a violating licensee unless he “either knew or should have known about the violations and then failed to take action to counteract the actions of others constituting the violations.” *Id.* at 27. But neither the statutory

⁸ “[T]he ‘alter ego’ exception applie[s] to ‘cases in which the violator, although formally a corporation, is essentially an alter ego of its owners, so dominated as to negate its separate personality.’ A petitioner who [is] not a true owner of such a corporation [will] be spared the consequences of the responsibly connected determination.” *Coosemans Specialties*, 482 F.3d at 568 (quoting *Norinsberg*, 162 F.3d at 1197).

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definition of “responsibly connected” (an “officer, director, or holder of more than 10 per centum of the outstanding stock,”⁷ U.S.C. § 499a(b)(9)), nor the statutory “nominal” and “alter ego” exceptions suggest such a knowledge requirement. And “the inclusion of a specific exception for persons who make a certain showing ... militate[s] against judicially created exceptions.” *Coosemans Specialties*, 482 F.3d at 569.⁹

IV

PACA “is admittedly and intentionally a tough law.” S.REP. NO. 84-2507, at 3 (1956), U.S.Code Cong. & Admins.News 1956, pp. 3699, 3701 (internal quotation marks omitted). In this case, the USDA's Judicial Officer chose the toughest possible sanction, notwithstanding the active involvement of the USDA's own inspectors in the widespread corruption at Hunts Point. *See Coosemans Specialties*, 482 F.3d at 567. But whether or not we would have levied the same penalty, we cannot say that the Officer's decision in that regard-or any other regard-is arbitrary or unreasonable. Accordingly, the petition for review is

Denied.

⁹ As they did with respect to PACA's respondeat superior provision, *see supra* Part III.B, the petitioners suggest that literal enforcement of the “responsibly connected” provision violates Hirsch's due process rights. We rejected this argument in *Siegel v. Lyng*, 851 F.2d 412, 416 n. 12 (D.C.Cir.1988), as have the other circuits that have considered it, *see Hawkins v. Agric. Mktg. Serv.*, 10 F.3d 1125, 1134 (5th Cir.1993) (“We ... cannot say that the unambiguous language of § 499a(b)(9) ... was irrationally conceived or arbitrary in effecting a legitimate governmental objective, i.e., the protection of producers of perishable agricultural products.”); *Zwick*, 373 F.2d at 118-19; *Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir.1966).

Cooseman's Specialties, et al. v. USDA 1395
66 Agric. Dec. 1395

G & T TERMINAL PACKAGING CO., INC., ET AL. v. USDA.
No. 06-1496.
Court Decision.
Filed October 1, 2007.

(Cite as: 128 S.Ct. 355. Case below, 468 F.3d 86.)

PACA – Bribery.

Supreme Court of the United States

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

COOSEMANS SPECIALTIES, INC. v. USDA.
No. 07-368.
Court Decision.
Nov. 13, 2007.

(Cite as 128 S.Ct. 628. Case below, 482 F.3d 560.)

PACA – Bribery.

Supreme Court of the United States

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

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ANTHONY SPINALE, ET AL. v. USDA.

No. 03 Civ. 1704 (KMW).

Court Decision.

Filed November 19, 2007.

(Cite as: 2007 WL 4115903 (S.D.N.Y.))

PACA – Bribery – RICCO, when theory of liability not shown.

Plaintiffs filed civil RICO claim as well as common law breach of contract and fraud against Secretary of Agriculture and nine USDA inspectors. Plaintiff's theory of liability was that (1) other wholesale purchasers were given preferential treatment; and (2) Plaintiffs were damaged by inaccurate inspection when they did not pay bribes to the defendants. At a pretrial conference ten days before trial, Plaintiffs admitted they would not be able to produce additional evidence on the issue of proximate cause necessary for the RICO statute. The court dismissed the case sua sponte due to a lack of genuine issue of material facts.

**United States District Court
S.D. New York.**

OPINION AND ORDER

KIMBA M. WOOD, District Judge.

Plaintiffs Anthony Spinale and G & T Terminal Packaging Co., Inc. bring this action asserting claims for damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (2006). The case is set for trial before a jury on November 26, 2007. At a pretrial conference held on November 15, 2007, Plaintiffs conceded that they had insufficient evidence to establish the proximate cause requirement of their civil RICO claim. Based on this admission, and for the reasons set forth below, the Court grants summary judgment *sua sponte* against Plaintiffs, and dismisses the case.

BACKGROUND

A more detailed description of the facts underlying this action is set

forth in the Court's previous orders, familiarity with which is assumed.

Plaintiff Spinale is the President and sole shareholder of Plaintiff G & T Terminal Packaging Co., Inc., a New York corporation that buys and sells potatoes at the Hunts Point Terminal Market, a produce market in the Bronx. (Compl. §§ 29-31.) In March 2003, Plaintiffs filed a Complaint against the United States, Ann M. Veneman, then-Secretary of Agriculture, and nine former United States Department of Agriculture (“USDA”) inspectors, alleging violations of the civil RICO statute, and against the United States and Secretary Veneman only-common law claims of breach of contract and fraud. (Compl. §§ 71-153.) Plaintiffs' claims against the United States, Secretary Veneman, and one of the USDA agriculture inspectors (William Cashin) were subsequently dismissed on various grounds. Only Plaintiffs' civil RICO claims against the remaining defendants-eight USDA inspectors-survive. Discovery closed in the case on October 15, 2004, and the remaining parties submitted a Joint Pretrial Order to the Court on October 31, 2006. The case was then set down for trial on November 26, 2007.

At a pretrial conference held on November 15, 2007, Plaintiffs acknowledged that they did not have, nor could they obtain sufficient evidence to establish the proximate cause element of their civil RICO claim. (Tr. 9:4-15; 12:9-15.) Following this admission, the Court directed Plaintiffs to show cause why the case should not be dismissed based on Plaintiffs' admitted inability to establish a required element of their claim. Plaintiffs requested time to review their evidence and present the Court with any evidence that could establish proximate cause. The Court allowed Plaintiffs until November 16, 2007 to present “concrete evidence” demonstrating proximate cause under RICO. On November 16, 2007, Plaintiffs submitted a letter to the Court stating that they did not have any additional evidence demonstrating the element of proximate cause.

DISCUSSION

The Court possesses the inherent authority to enter an order granting

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summary judgment *sua sponte* where it determines that there is no genuine issue of material fact for trial, and one party is entitled to judgment as a matter of law. *Lowenschuss v. Kane*, 520 F.2d 255, 261 (2d Cir.1975); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (“One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses.”); *Ramsey v. Coughlin*, 94 F.3d 71, 74 (2d Cir.1996) (“[A] district court’s independent raising and granting of summary judgment ... is an accepted method of expediting litigation.”). A genuine issue of material fact exists if there is sufficient evidence to allow a “reasonable jury” to return a verdict for the party against whom summary judgment is entered. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In making this determination, the Court must view the evidence “in the light most favorable to the [losing party] and draw all reasonable inferences in its favor.” *Am. Cas. Co. v. Nordic Leasing, Inc.*, 42 F.3d 725, 728 (2d Cir.1994) (internal quotations omitted). Evidence based on speculation or conjecture, however, is insufficient to preclude summary judgment. *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998).

In this case, summary judgment against Plaintiffs is warranted because Plaintiffs have admitted that they do not have, nor could they obtain, sufficient evidence to establish the proximate cause element of their civil RICO claim. In order to prevail on a civil RICO claim, a plaintiff must show that the defendant’s alleged RICO violation was the “proximate cause” of the plaintiff’s purported injury. *See Bank of China v. NBM LLC*, 359 F.3d 171, 176 (2d Cir.2004) (citing *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992)). Here, Plaintiffs present two theories of proximate cause: (1) the corrupt system of bribes at Hunts Point Terminal Market, in which the remaining defendants allegedly participated, caused damage to Plaintiffs because other wholesale purchasers were given preferential treatment; and (2) Plaintiffs were damaged by inaccurate inspection when they did not pay bribes to the remaining defendants. (Tr. 4:1-4; 6:20-24.) At the pretrial conference, however, Plaintiffs admitted that they do not have sufficient evidence to prove proximate causation under either theory.

First, Plaintiffs admitted that they do not have any inspections or sales records to substantiate the alleged preferential treatment received by the other wholesale purchasers at Hunts Point Terminal Market. (Tr. 5:13-17.) At the pretrial conference, Plaintiffs readily conceded that without these specific records, it would be impossible for them to establish that other wholesale purchasers received preferential treatment, let alone that this preferential treatment proximately caused Plaintiffs' injuries. (Tr. 8:14-9:15.) Plaintiffs therefore cannot support their civil RICO claim under this theory of proximate cause.

Second, Plaintiffs also admitted that they have insufficient evidence to prove that they were actually damaged by inaccurate inspections they allegedly received from the remaining defendants. At the pretrial conference, Plaintiffs conceded that because they do not have the inspection and sales records of other wholesale purchasers, they could not prove that these inaccurate inspections were the proximate cause of any damages they suffered. (Tr. 11:19-12:15.) Therefore, Plaintiffs cannot establish the required proximate cause under this theory as well.

Based on Plaintiffs' admitted inability to prove proximate cause, the Court concludes that Plaintiffs cannot establish a civil RICO claim against the remaining defendants. Accordingly, the Court grants summary judgment *sua sponte* against Plaintiffs. While it is the "preferable practice" in the Second Circuit to provide parties with ten days notice prior to a *sua sponte* grant of summary judgment, a *sua sponte* order is nonetheless appropriate where the "losing party had no additional evidence to bring" and therefore "cannot plausibly argue that it was prejudiced by the lack of notice." *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 139 (2d Cir.2000). Here, Plaintiffs conceded that they have no additional evidence to bring on the issue of proximate cause. Therefore, a *sua sponte* grant of summary judgment is appropriate in this case.

CONCLUSION

The Court concludes that there is no genuine issue of material fact

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for trial, and therefore grants summary judgment *sua sponte* against Plaintiffs. The trial in this case set for November 26, 2007 is canceled. The Clerk of Court is directed to close this case; all pending motions are moot.

SO ORDERED.

Tuscany Farms, Inc., Joe Genova & Associates, Inc. 1401
Gencon Consulting, Inc., Nicole Wesner
66 Agric. Dec. 1401

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DEPARTMENTAL DECISIONS

**In re: TUSCANY FARMS, INC.,
PACA Docket No. D-04-0015
and
In re: JOE GENOVA & ASSOCIATES, INC.
PACA Docket No. D-04-0016
and
In re: GENCON CONSULTING, INC.
PACA Docket No. D-06-0017
and
In re: JOE A. GENOVA
PACA-APP Docket No. 06-0005
and
In re: NICOLE WESNER
PACA-APP Docket No. 06-0006
Decision and Order.
Filed August 24, 2007.**

PACA – Prompt payment, failure to make – Responsibly connected – Records, duty to keep.

Eric Paul and Jonathan Gordy for AMS
Douglas B. Kerr and Jonathan Barry for Respondents.
Decision and Order by Chief Administrative Law Judge Marc R. Hillson

Decision

In this decision involving five consolidated cases, I find that Tuscany Farms, Inc. and Joe Genova & Associates, Inc. willfully, flagrantly and repeatedly violated the Perishable Agricultural Commodities Act (“PACA” or “the Act”) by failing to fully pay for produce it purchased in a timely manner. I further find that both Nicole Wesner and Joe Anthony Genova were responsibly connected to Tuscany Farms. I also

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find that Respondent Gencon Consulting, Inc. did not show cause as to why its license application should not be denied by the PACA Branch.

Procedural History

On June 2, 2004, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, issued a Complaint against Tuscany Farms, Inc., d/b/a Genovas, alleging that Respondent Tuscany Farms committed willful violations of the PACA by failing to make full payment promptly to three sellers in 2002 in the amount of \$336,200 for 65 lots of perishable agricultural commodities. Tuscany Farms filed an Answer denying the alleged violations.

On June 3, 2004, Mr. Forman issued a Complaint against Joe Genova & Associates, Inc., alleging that between February and November, 2002, Joe Genova & Associates committed willful violations of the PACA by failing to make full payment promptly to nine sellers, in the amount of \$315, 806, for 123 lots of perishable agricultural commodities. Joe Genova & Associates filed an Answer denying the alleged violations.

On January 12, 2006, Karla D. Whalen, Acting Chief , PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Services, USDA, informed Douglas Kerr, counsel to Nicole Wesner, that Ms. Wesner was determined to be responsibly connected with Tuscany Farms. On that same day, Ms. Whalen issued a similar determination with respect to Joe A. Genova (generally referred to in this proceeding as "Joe Anthony Genova"). Both Wesner and Genova filed timely Petitions to review these determinations, which were received by the Hearing Clerk on February 10, 2006.

Also on January 12, 2006, counsel for Complainant in the Tuscany Farms and Joe Genova and Associates cases moved to set the matters for a consolidated hearing. I conducted a telephone conference on April 11, 2006, during which time I consolidated the two disciplinary cases with the two responsibly connected cases, as is required under the Rules of Practice. I set the matter for hearing in September 2006 and established a schedule for the parties to exchange documents and witness lists.

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On July 13, 2006, Eric Forman issued a Notice to Show Cause to Gencon Consulting, Inc., as to why that entity should not be denied a license under the PACA. The Notice alleged that Joe Genova, Jr., the principal of Gencon, was the same individual who was a 100% owner of Respondent Joe Genova & Associates and was a 24% shareholder of Tuscany Farms, and that he was unfit to receive a PACA license. Respondent Gencon filed a timely response. While the rules governing license denial proceedings under the PACA require that an expedited hearing be held within 60 days of the filing of the application for a license, the parties agreed to consolidate the Gencon hearing with the other four consolidated cases.

I conducted a hearing on the five consolidated cases in Santa Ana, California from September 12-15, 2006. Eric Paul, Esq. and Jonathan Gordy, Esq. represented Complainant (Respondent in the two responsibly connected cases). Douglas B. Kerr, Esq. and Jonathan Barry Sexton, Esq. represented Respondents Tuscany Farms, Joe Genova & Associates and Gencon, and Petitioners Nicole Wesner and Joe Anthony Genova. Complainant called seven witnesses, including David Studer, the lead government investigator, and six industry witnesses who testified they had engaged in transactions covered by the PACA with the two Respondent companies without receiving full payment promptly. Respondents/Petitioners called three witnesses, including Joe Anthony Genova. Complainant then called John Koller as a witness concerning what sanctions would be appropriate if I were to find the Respondent companies to have committed the violations as charged.

During the hearing, Counsel for Petitioner Nicole Wesner stipulated that she was responsibly connected to Tuscany Farms. Tr. 689.

Subsequent to the hearing, the parties filed simultaneous opening briefs on January 4, 2007, and simultaneous reply briefs on February 2, 2007.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable agricultural

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commodities. Among other things, it defines and seeks to sanction unfair conduct in transactions involving perishables. Section 499b provides:

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

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

7 U.S.C. § 499a(b)4.

When the Secretary of Agriculture determines that a “merchant, dealer or broker has violated any of the provisions of section 499b of this title”

the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

The regulations define “full payment promptly” and illustrate the default

rule for defining prompt payment and when deviation from the default is acceptable.

(aa) Full payment promptly is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa) (1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": Provided, that the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2.

The Act also imposes on every licensee the duty to "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business." 7 U.S.C. § 499i.

In addition to penalizing the violating merchant, dealer or broker, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended or has been found to have committed flagrant or repeated violations of Section 2 of the Act. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. *Id.*

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A)

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partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

Even if an individual has not been found to be responsibly connected as defined above, the Secretary may withhold a license to an applicant for a period not to exceed thirty days “pending an investigation for the purpose of determining . . . whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker” if the applicant was an officer, director or owner of more than 10% of the stock in a company that “engaged in any practice of the character prohibited by this chapter.”

7 U.S.C. § 499d. If the Secretary believes that an applicant should be denied a license, that individual has the right to a hearing, within 60 days of the date of the application, to show cause why the license should not be refused.

I. The disciplinary investigations

Following the filing of five PACA reparation complaints against Respondent Genova & Associates and six reparation complaints against Respondent Tuscany Farms by suppliers of perishable agricultural commodities, the PACA Branch commenced an investigation to determine whether the payment provisions of the Act had been violated. Senior marketing specialist David Studer, an investigator with extensive experience, was assigned to investigate the complaints involving both companies. On April 21, 2003, Mr. Studer arrived at 987 North Enterprise Street, Orange, California to commence his onsite

investigation, rather than at the listed address of record of 333 North Euclid Way, Anaheim, California because he had already talked with Douglas Kerr, the attorney for both companies, and knew that the companies were no longer doing business and that any records they had were at the facility in Orange. Tr. 21. Mr. Studer served Mr. Kerr with investigative notice letters for each company within five minutes of each other (CX 3, CX 4), and then requested a variety of records. Mr. Kerr handed him CX 7, which Studer referred to as “the attorney prepared accounts payable document.” Tr. 24. This document, which Kerr stated was not fully accurate, was used as a guideline by Studer in the conduct of his investigation. Tr. 28. Studer was later told by Mr. Roper, an attorney who the two companies hired as a reorganization specialist, that the document (CX 7) was a list of the payables for both companies, but that the amounts listed were not accurate. Tr. 26. Studer was also given computerized aging reports¹ for Joe Genova & Associates (CX 8) and Tuscany Farms (CX 9).

Studer spent the better part of two weeks working out of a storage room at 987 North Enterprise, where he found a variety of documents in a not very well-organized state. Tr. 32, 537-539. There were no updated computer printouts available because the computer was no longer available with the respondent companies being shut down. Using CX 7, 8 and 9 as guides, he gathered records from the storage room. When he returned to his office in Tucson, he or Toby Haught of his office attempted to contact each of the creditors that were listed in CX 7. Except for one alleged creditor that was out of business, he or Haught asked each of the listed companies to provide them their accounts receivable for the two respondent companies. Tr. 66-70. Most of the companies complied by sending in invoices and other documents.

Based on CX 7, the numerous documents he discovered at 987 North Enterprise, and documents he and Haught received from the companies listed as creditors in CX 7, and conversations he had with representatives of those creditor companies, Studer calculated the numbers of violations and amounts owed that were stated in the two

¹ Lists of accounts payable and the age of the debt for each account.

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complaints. In making such calculations, Studer discounted transactions that appeared to be in intrastate commerce, amounts that were paid in partial resolution of claims, and other apparent offsets that he was made aware of. In preparing the “no pay” tables used in the complaints, he relied more heavily on what the records of the creditor companies showed and what he was told by those companies’ officials than on the information contained in the reports handed to him by Mr. Kerr. Tr. 278-280.

Salvatore Mangano and Paul Roper testified that, due to a failure in the software program that was supposed to track the finances of the two Respondents, including the payables and receivable, huge numbers of exception reports² were generated that indicated that Respondents owed far less money than alleged. Tr. 614-615, 730-734. However, no such documents were turned over to Studer, Tr. 907, nor were there any written documents disclosed or offered into evidence by the Respondents at the hearing that demonstrated that the amounts owed by the Respondents should have been mitigated due to poor quality of produce, errors in the quantity of produce delivered, or other factors. The more than adequate investigation by Studer, corroborated in most respects by the testimony of many of the creditors of the two Respondents, starkly contrasts with the fuzzy, non-specific, undocumented testimony of the Respondents’ two principal witnesses on the payment issue. The evidence overwhelmingly supports findings that the two companies failed to make full payment promptly as alleged in the complaint.

The Tuscany Farms allegations

Complainant has easily met its burden of proving, by a preponderance of the evidence, its contention that Tuscany Farms failed to make full payment promptly to three sellers for 65 lots of agricultural commodities in the amount of over \$336,200.

G & R--Exhibit CX 7 indicates that G & R was a creditor of Tuscany Farms. Studer testified that he located numerous invoices from G & R

² Documents that would list purported adjustments to invoices.

in the storeroom. CX 14. The aging report for Tuscany Farms, one of the documents presented to Studer during his investigation, indicated that the debt to G & R was nearly \$320,000. Jose Garcia, who at the time of the hearing had been the sole owner of G & R for five years, sold limes to both Respondents for a period of about three years. Tr. 311-312. He testified that since he sold the limes under a price after sale agreement, that final prices for a given load of limes were generally agreed upon 25-30 days after delivery. Tr. 315. Mr. Garcia would routinely pay the freight after he received the bill of lading indicating that delivery had been made, which was the case with all the transactions here. Tr. 314. He testified that he used the Genova name on invoices at first, but was told to start billing Tuscany Farms instead. Tr. 320. Things went relatively smoothly until payments suddenly stopped in 2002. *Id.* When the amount owed to G & R reached \$398,000 they stopped selling to them. *Id.* In November he received a check for \$150,000 and in March, 2003 he received an additional \$10,000.³ Tr. 321. He stated that since the transactions were all priced after sale, then the amount on the invoices would be the price that was settled upon. According to his calculations, he was owed \$238,000 by Tuscany Farms as of the date of his testimony. Tr. 335.

The invoices included in CX 14 establish that there were 41 transactions for which full payment was not promptly made. While the amounts alleged by Complainant are slightly less than the amount currently claimed by Mr. Garcia, the differential is immaterial for the purposes of this decision, particularly where, as Mr. Studer stated, he always went with the lesser amount where there was any indication of discrepancy.

DLJ Produce—Mr. Studer followed a similar methodology with respect to 23 lots of perishable agricultural commodities sold to Tuscany

³ He was also told, when he found out that the companies were going out of business and he had sent a truck to pick up his boxes, that he should take an unused conveyor belt, presumably as partial payment. He took the belt back to Texas but never used it. The belt is depicted in CX 27.

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Farms by DLJ Produce in 2002. All but one of the invoices at issue were discovered by Studer in the storeroom, while the invoice at p. 21 of CX 21 was attached to a PACA reparation complaint (CX 22). While the reparation complaint sought payment of approximately \$231,000, Studer testified that after deducting invoices that he determined were not involved in interstate commerce, the figure was reduced to approximately \$189,000. Studer then deducted the \$77,385 paid by Tuscan Farms pursuant to a settlement agreement with DLJ to arrive at a balance due of \$111,743. Tr. 391.

Mr. Studer was unable to directly contact DLJ, due to the existence of a confidentiality agreement between DLJ and Tuscan Farms, but Lawrence Heidecker, part-owner and president of DLJ, testified at the hearing after being served a subpoena.

Heidecker's testimony was totally consistent with the findings of Studer. He stated that he first filed an informal reparation complaint in November, 2002 and believed at that time that DLJ was owed approximately \$277,000 by Tuscan Farms. Tr. 466-467. He stated that the invoices in question would only have been issued if the product was received, and that the bulk of the product was delivered to a Safeway facility in Santa Fe Springs, California. Tr. 468-469. He stated that Safeway either receives and signs for the product or rejects it, and that the invoices would only be issued after product was accepted. *Id.* He stated that he did not receive any indication that the amount owed was in dispute, nor were there any issues as to the quality of the product. *Id.*

Heidecker signed a document settling DLJ's claims against Tuscan Farms in February, 2003⁴. The letter of acknowledgement he signed, CX 21, p. 29, stated that the \$77,385 was to resolve a disputed claim, but Heidecker testified that he just signed the document because there were rumors that Tuscan Farms was going out of business, including an article in Produce News⁵, that there were people "standing in line" to get whatever they could, and that Joe Genova, Jr. had represented to him that thirty cents on the dollar was the most they would be able to pay

⁴ Douglas B. Kerr signed on behalf of the Respondent companies.

⁵ A trade periodical.

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under the circumstances.⁶ Tr. 473-476. There was no testimony or exhibit that would demonstrate that there was any dispute over the amounts owed, or that there was any issue as to the quality of the products delivered by DLJ. The final amount paid was clearly a compromise based solely on the inability of Tuscany Farm to promptly pay DLJ the full amount owed to it. As such, it demonstrates that the monies owed to DLJ by Tuscany Farms were not paid in either a timely basis or in full, and that there remains a balance of approximately \$111,000 that was never paid to DLJ by Tuscany Farms.

Horizon Marketing—Studer also testified that he discovered one invoice from Horizon Marketing that was unpaid in the amount of \$2,304. He contacted June Anderson, an officer of the company, who indicated that Joe Genova and Tuscany Farms owed Horizon over \$173,000 as of June 4, 2003. CX 19, p. 2. For reasons that are not fully explicated in the testimony, it appears that Studer found that only the one invoice was unpaid. No evidence was elicited indicating that would indicate that this invoice was paid, so it is established that, with respect to this invoice, Horizon Marketing did not receive full payment promptly.

The Joe Genova & Associates, Inc. allegations

Complainant has also easily met its burden of proving, by a preponderance of the evidence, that Joe Genova & Associates (JGA) failed to make full payment promptly to nine sellers for 123 lots of agricultural commodities, in the amount of \$315, 806.

Golden Eagle—Golden Eagle provided invoices indicating that JGA had purchased 18 lots of vegetables (potatoes, with one lot of onions) in September and October, 2002. CX 17, pp. 2-21, Tr. 513. Randy Dunham, a produce broker for Golden Eagle, testified that business with

⁶ The Letter of Acknowledgement refers to “Asbury Ranch, Inc.” but this is clearly a typographical error as the document was signed by Heidecker on behalf of DLJ and the Letter otherwise refers to the Respondent companies.

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Genova was fine until a point when “they just quit paying us.” Tr. 507. He agreed that the invoices in CX 17 were documents generated by his company, and stated they typically would not have invoiced JGA until they had received the product. Tr. 510-511, 518. He stated that no disputes as to the condition of the produce were indicated on any of these invoices, and that there were \$66,185 in uncollected funds relating to those invoices. Tr. 516-517. He stated that if there was any dispute as to the amount of the invoice he would have made the adjustment directly on the invoice. Tr. 524-525.

The only evidence JGA presented to contravene this claim was the testimony of Paul Roper, who became a business consultant for JGA and Tuscany Farms in 2002. He stated that he was never able to speak to anyone at Golden Eagle because they did not return his phone calls, and that he was unable to match the invoices sent to JGA to any shipments to any of JGA’s customers. Tr. 767-768. Given that Golden Eagle was listed as a creditor on JGA’s own records, CX 7, and given that Dunham specifically testified that he compiled the invoices and that they were unpaid, I have given Roper’s testimony very little weight. Complainant has clearly demonstrated that lower figure of \$62,285, which is based on the cumulative amount outstanding on the 18 vouchers, was never fully paid by JGA, let alone paid in a timely manner.

DNE World Fruit Sales/DNE California—Both Richard Carnell, Jr., the general counsel for DNE, a subsidiary of Bernard Egan, and Jeff Smith, a salesperson for DNE California, testified with regard to invoices unpaid by JGA (and Tuscany Farms). Carnell described several efforts to settle the matter, including a payment schedule that was not complied with. Eventually, with over \$63,000 claimed to be owed DNE by JGA, Carnell was told by Kerr that the majority of the creditors of JGA were settling for 25 to 30 cents on the dollar. Tr. 171. Carnell testified that “there was no dispute about the debt” and that the only issue was how much JGA could afford to pay. Tr. 172. The quality or condition of the fruit delivered was never mentioned by anyone as an issue. Id. He calculated the combined debt of Tuscany Farms and JGA to be approximately \$73,000. Tr. 166. After filing informal reparation complaints against both Tuscany Farms and JGA, and being told by

another attorney that that debts owed by JGA were uncollectible, and reading the article in Produce News which indicated that the Respondent companies were failing and settling claims at 25 to 30 cents on the dollar, Carnell referred the matter to Vericore, a collection agency. Tr. 164-165. When Vericore was able to settle the matter for \$17,000 he figured that was the best they could get and the company wrote off the remainder of the debt.

Jeff Smith confirmed much of what Carnell testified to. He described his attempt to work out a payment schedule with Joe Anthony Genova. Tr. 710-712. His information appeared to indicate that the \$10,000 Tuscany Farms debt was eventually paid, and that the settlement for \$17,000 was based on a debt of \$63,000. CX 34. The settlement agreement that was signed by Carnell, CX 10, p. 26, indicated that the compromised amount was \$67,626. While the settlement refers to a disputed claim, Carnell testified, and was never contradicted, that this was an accord and satisfaction, and that the only issue was JGA's inability to pay. While the exact amount owed by JGA is difficult to pinpoint, Complainant's contention that the unpaid amount was over \$40,000 at the time of the hearing was supported by a preponderance of the evidence.

Metro America d/b/a West Coast Distributing—Studer obtained numerous West Coast Distributing invoices in the storeroom. CX 11. Several invoices had handwritten amounts that were lower than the printed amounts that were invoiced, and he utilized the lower amount in calculating the no-pay table. Tr. 93. Thus, he utilized \$968.32 rather than \$8,100 for the amount due according to the invoice at page 4 of CX 11. Brian Bell, the president of West Coast Distributing, testified concerning the complicated payment situation between his company and JGA. With respect to the 46 lots of fruit purchased for a total price of \$278,212 by JGA from West Coast Distributing between February and April 2002, Bell stated that invoices were not issued until after delivery to the JGA facility in Anaheim, and that he was not aware of any issues relating to the quality of the produce. He stated that Joe Genova never indicated to him that the company didn't owe West Coast the money, but just stated that he did not have the money to pay because other

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customers were “stringing him out.” Tr. 247-248.

In an attempt to deal with this large debt, West Coast executed a loan agreement on June 11, 2002 with JGA, personally guaranteed by Joe Genova, Jr., for \$139,509 with a \$10,000 fee added in. CX 26, pp. 9-10. The following day, an additional promissory note for \$15,000 was executed by Tuscany Farms, even though no produce debt existed between the two companies. CX 26, pp. 11-12. Some specific invoices were paid for periodically until about October 31, 2002. In March 2003, West Coast intervened in a PACA Trust Action filed several months earlier by another company against JGA, alleging that JGA owed it over \$278,000, listing in its intervenor complaint the same invoices contained in CX 11. This action was settled for \$161,005 constituting just over 57% of the amount claimed. Mr. Bell testified that with the amount due from the above-described loan, the company would end up being fully compensated. Tr. 235. However, in 2006, having received no payment on the loan, West Coast filed an action to collect on the loan (and was countersued for fraud). Tr. 227, 246. Thus, it appears that \$117, 206⁷ of the debt owed by JGA to West Coast has yet to be paid.

Gold Valley Produce, Spalding Produce, Pacific Sun, Stark Packing and Horizon Marketing, G & R—Studer found a series of invoices from Gold Valley Produce d/b/a Pacific West in the storeroom. CX 12, pp. 2, 4-8 demonstrated that 6 lots of mixed fruit were sold to JGA by Pacific West for a total of over \$62,000. The accounts payable list provided to Studer by Kerr indicated that Pacific West was owed a total of \$139, 234 by JGA and Tuscany Farms, and a letter of acknowledgement signed by Pacific West and by Kerr (on behalf of both Tuscany Farms and JGA) indicates that the combined amount was the basis for a “disputed claim” that was settled for a payment of \$41,771 via an agreement signed in February 2003. CX 12, pp. 9-10. Complainant alleged, in essence, that the settlement amount paid should be subtracted from the \$62,000 shown in the unpaid invoices at CX 12

⁷ \$278,000 minus \$161,005.

to yield an unpaid debt of \$20,270.⁸ Other than the general attacks on Complainant's methodology which will be discussed below, and the generic anecdotal evidence that exception reports existed for a number of invoices, no evidence in refutation of this claim has been offered.

Studer also found invoices for Spalding Produce in the storeroom. CX 13. The complaint alleges that these four invoices, totaling over \$14,100, were unpaid by JGA. Toby Haught, Studer's co-investigator, received a facsimile purporting to be from Spalding Produce which indicated that these four invoices were still open as of May 21, 2003. CX 13. Studer testified that he and Haught made it a practice of asking whether there were any settlements or assignment agreements and they had no such document from Spalding. Tr. 115. The amount Spalding alleged to be owed is over \$5,000 less than that in the accounts payable document supplied by Mr. Kerr at the start of the investigation, CX 7, and is identical to the amount indicated in the JGA accounts payable aging report, CX 8, p. 17, also supplied by Mr. Kerr. Once again, no specific evidence has been introduced to refute this claim.

The Pacific Sun, Stark Packing and Horizon Marketing allegations involve similar scenarios. Thus, invoices showed that JGA had purchased 18 lots of fruits and vegetables from Pacific Sun for \$28,994 for overseas shipment and that Pacific Sun's records indicated that after adjustments and receipt of \$11,497 from JGA, nearly \$17,500 was still owed at the time of the hearing. CX 16. Similarly, Studer located invoices from Stark Packing Company in the storeroom, CX 18, which indicated that JGA had purchased 14 lots of oranges from Stark for shipment in interstate commerce, in the amount of over \$26,829. These

⁸ The methodology by which Complainant chooses the amount alleged to be unpaid by Tuscany Farms and JGA has certain elements of mystery that are not fully understood by me. It appears that with respect to this creditor they could have used the approximately \$98,000 that was unpaid as a result of the settlement of the claims against JGA and Tuscany Farms. However, since the lower amount was alleged in the Complaint, and only the six JGA invoices are alleged to be unpaid for the purpose of this action, I will find that Complainant has proved the lower amount.

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invoices also appeared, along with others, on the accounts payable aging report handed to Studer, CX 9; CX 18, pp. 17-18. And documents included in CX 19 establish two similar transactions with Horizon Marketing, with an alleged unpaid amount of \$16,482. No specific evidence has been introduced to refute these claims.

Finally, there was one invoice from G & R, most of whose transactions were billed to Tuscan Farms, for limes shipped to Mesa Produce, where \$1096.50 remains unpaid. CX 15.

Discussion

Respondents did not put on any specific evidence which demonstrated that in fact the allegations of the complaints were incorrect. Rather, they attacked the methodology of the government investigation, challenging its thoroughness, the government's motivation, and the conclusions that could be drawn from the evidence at hand. They contended that the government needed to provide more evidence that the shipments were in fact received by Tuscan Farms and JGA, and that the figures the government used in determining non-payment were inherently unreliable. I reject Respondents' arguments.

The government investigation in this case followed the same general methodology employed in numerous other non-payment cases, and has been approved at the Agency level in Judicial Officer decisions as well as by the courts. Receipt by the PACA Branch of a number of reparation filings is frequently a trigger for the commencement of an investigation. Inspector Studer and Haught appeared to conduct a diligent investigation, seeking from Respondents all pertinent documents. Studer took the documents offered by Mr. Kerr in response to his requests, and pored through the files in the storeroom, which were apparently not in the most well-organized condition. Although Respondents' witnesses testified that there were large collections of exceptions reports, which would indicate that many of the accounts listed as payable on the reports handed to Studer by Kerr were actually owed a far lesser amount of money, or in some instances actually owed money to the Respondents, not a single piece of paper that might constitute an exception was offered in evidence. Moreover, after

gathering as much information as he could from Kerr and the storeroom, Studer also interviewed Respondents' witnesses Mangano and Roper, and with the assistance of Haught, attempted to contact each creditor listed in the documents obtained from Respondents in an attempt to determine the accuracy of the documents. This methodology is consistent with both past practice and a logical and thorough investigation. Of course, it would have been more than helpful if the exception reports, if they really existed, were provided, as it would have been helpful if Respondents could supply other documentation concerning who they owed and in what amount.⁹ I find that the PACA Branch personnel involved in this investigation, particularly Mr. Studer, conducted as complete an investigation as possible under the circumstances, and that no credible testimony or evidence contradicted the testimony of Mr. Studer or the six other fact witnesses Complainant called in this case.

As Complainant has pointed out in its brief, the case law supports its position on the sufficiency of the evidence. In *Havana Potatoes of New York v. United States*, 136 F. 3d 89 (1997), the Second Circuit upheld a decision of the Judicial Officer on less factual evidence than provided in the instant case, and where the creditor account ended up fully paid. The court held it was appropriate to rely on invoices for unpaid deliveries found in Havana Potatoes files. Here, where Studer took great pains to match invoices listed in the accounts payable and aging documents with invoices he found in the storeroom, and took the extra step in matching those invoices with invoices that the creditor companies had listed on their records as unpaid, and where Complainant secured the testimony of six creditor company officials to confirm the accuracy of the amounts owed, the evidence is far stronger than it was in *Havana Potatoes*. In that case, also like this one, no documentary

⁹ The failure to keep accurate records is in itself a major violation of the PACA with penalties of up to 90 days license suspension. Both Respondents have fallen grievously short of their statutory duties in this regard.

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evidence, just surmise, was offered as a challenge to the evidence Complainant had proffered.

The testimony of Salvatore Mangano and Paul Roper was of no help in convincing me that Respondents did not owe the amounts claimed by Complainant. Neither appeared to have any first-hand knowledge of a single instance where there was an exception that would indicate payment was not owed on a given invoice. Neither of them participated in the process where exceptions were handled. Respondents obviously knew of the problems with their computer system, and Mangano and Roper said they had a paper system to back it up, yet even though they knew Studer was looking to gather all pertinent information on unpaid invoices, and even though they were among the people Studer interviewed, neither of them mentioned the existence of the exception reports to Studer, let alone turn over copies of these reports to him. Tr. 907-914. Respondents had ample opportunity during the course of this four day hearing to introduce exception reports, but they did not do so. Certainly, if evidence of payment or mitigation existed and was solely in the hands of Respondents, one would think they would have been introduced into evidence.

At best, Respondents raise the possibility that some of the accounts payable might have been overstated. This helps their cause not at all, as it does not change the fact that they owed considerable sums of money to their creditors. If the amount actually due and payable was off by a few dollars or even a few thousand dollars, or perhaps one of the creditors was not owed money, they would still be in serious violation of the full payment promptly requirement of the Act.

Nor does the settlement of several of the outstanding claims by their creditors via "settlement agreements" ameliorate matters for Respondents. Each party who testified who entered into an agreement with either Tuscan Farms or JGA or both combined, made it clear that the settlement was not to resolve disputed claims, in the sense that there was a dispute over whether product had been delivered or was damaged, but because it was made clear to them by Respondents or their representatives that they were unable to pay the full amount owed and that this was all they could pay. The inability to pay in this matter is totally consistent with Complainant's claim that Respondents did not

promptly pay for the produce in question in either a full or timely manner. Settlement of a PACA produce debt for a reduced amount based on financial difficulties, while it may resolve the dispute between the parties, does not constitute full payment under the Act. See, e.g., *In re: Kanowitz Fruit and Produce Co.*, 56 Agric. Dec. 917 (1997).

Further, the violations committed by both Tuscany Farms and JGA were willful, flagrant and repeated. In PACA cases, a violation need not be accompanied by evil motive to be regarded as willful. Rather, if a person “intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute,” his acts are regarded as willful. *In re. Frank Tambone, Inc.*, 53 Agric. Dec. 703, 714-15 (1994). Here, where both Respondents continued to order and receive, and not pay for, produce for months, until they closed their doors for good, putting numerous growers and sellers at risk, they were “clearly operat[ing] in disregard of the payment requirements of the PACA,” *Id.*, and have committed willful violations.

In determining whether a violation is flagrant, the Judicial Officer and other judges have factored in the number of violations, the amount of money involved, and the length of time during which the violations occurred. *In re. N. Pugatch, Inc.*, 55 Agric. Dec. 581 (1995), *In re Scamcorp*, 57 Agric. Dec. 527 (1998). The flagrant nature of the violations is demonstrated by the four-month period of time over which the violations occurred with respect to Tuscany Farms and the ten-month period of time for JGA. And the repeated nature of the violation is established by the large number of occurrences (65 for Tuscany Farms and 123 for JGA).

II. The Responsibly Connected Cases Joe Anthony Genova is Responsibly Connected To Tuscany Farms

Joe Anthony Genova, a 24% stockholder in Tuscany Farms, has failed to meet his burden of proving by a preponderance of the evidence that he was not responsibly connected to Tuscany Farms. Petitioner has not met his two-step burden of showing by a preponderance of the

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evidence that he (1) was not actively involved in the activities resulting in a violation of this chapter, and (2) was only nominally a director, officer and 24% shareholder of a violating licensee or entity subject to license.¹⁰

Joe Anthony Genova was listed in pertinent documents as being the secretary- treasurer, director and 24 % owner of Tuscany Farms. The heart of his contention that he was only a nominal officer, director and shareholder is that he was only a worker at Tuscany Farms.

Joe Anthony Genova testified in his own behalf. In addition, Salvatore Mangano, who worked as comptroller for JGA and did some work for Tuscany Farms as well, testified as to some aspects of Joe Anthony Genova's role in the company, as did Paul Roper, the business consultant hired to help the companies weather their difficulties. The two individuals who likely knew the most about the management of Tuscany Farms, Joe Genova, Jr. and Nicole Wesner, did not testify.

Joe Anthony Genova testified that he was essentially ignorant of all financial and managerial decisions that took place at Tuscany Farms. He stated that he worked the same job for both JGA and Tuscany Farms, and that his main jobs were looking out for the quality control of produce, repacking and the general handling of produce. Tr. 818. He said he had no involvement in establishing Tuscany Farms, and that he received the same paycheck from the same person and so could not state when Tuscany Farms was even begun. Tr. 817-819. He was made aware he was an officer, but was surprised that he was listed as vice-president, rather than as secretary-treasurer. Tr. 819. He said he rarely ventured "upstairs" where his sister, Nicole Wesner, basically ran the business. Tr. 820. He received a combined income of \$60,253 from the two companies in 2002. PX 1. He stated that he only signed checks when told to do so by his father or sister, or Sal Mangano, that he never

¹⁰ He also suggests that he is not responsibly connected because Tuscany Farms was the alter ego of his father. While someone who otherwise might be responsibly connected may escape such a finding if they are not an owner of a violating entity which was the alter ego of its owners, Joe Anthony Genova is an owner, and is thus unable to assert this defense.

attended any shareholder or officer meetings of Tuscany Farms, and that he was not aware of accounts payable or accounts receivable. Tr. 827-829, 834-836. When he was called by a creditor about an invoice or a status of payment he would have the caller talk to someone upstairs. Tr. 829. Even though he signed a proposed payment schedule with DNE, he claimed he had no recollection of it and stated that it must have been drafted by someone else for his signature. Tr. 830-834. He stated he had no participation in the payment of vendors, and no involvement in discussion about the financial conditions of Tuscany Farms. Tr. 834. When asked if he was aware of the budget or accounting practices of Tuscany Farms he replied "We had a budget?" Tr. 835. He stated he was terminated before Tuscany Farms shut down. He said he did not become aware that there were possible problems in payments to produce vendors until "I got a subpoena telling me I needed to be here, and I called and asked what was going on."¹¹ Tr. 839.

Joe Anthony Genova is a college graduate with a degree in agricultural business from California Polytechnic Institute. Tr. 844-845. He has been involved in the family produce business since he was a teenager. Tr. 856. His testimony as to his profound ignorance of many of the significant events encompassing this proceeding is not fully credible, particularly when viewed in the context of his education and experience. I find that he has not met his burden of proof with regard to either step of the two-step showing necessary to prevail on his petition.

I find that Joe Anthony Genova was actively involved in matters resulting in violations of the Act. While he clearly was not the most significant shareholder at Tuscany Farms, he signed many checks, and participated in drafting a payment plan with DNE which he signed on behalf of Tuscany Farms. Further, it is uncontroverted that he bought and sold produce for Tuscany Farms at a time when the company was not fully paying its bills, which has been held to constitute involvement in matters resulting in a violation of the Act. *In re: Janet S. Orloff, et al.*, 62 Agric. Dec. 281 (2003) An individual can be actively involved

¹¹ As the Petitioner in PACA-APP 06-0005, Mr. Genova is a party and was not subpoenaed in this case.

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in matters resulting in a violation of the Act even if he does not purchase produce, but is involved in other functions within the company, such as check writing. *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1489 (1998). Even a “passive investor” with little or no day-to-day role in the company can be actively involved. *In re: Ray Justice*, 65 Agric. Dec. (slip op. Aug. 11, 2006). Here, the record is replete with documents signed by Joe Anthony Genova on behalf of Tuscany Farms. His signature is on the PACA license application (RX 1, p. 3), he is listed as being elected vice president at a Board of Directors meeting (RX 2, p. 3), he signed off on “Unanimous Written Consent in Lieu of First Meeting of the Board of Directors” on February 15, 2002, (RX 2, p. 16), his name is on the bank signature card (RX 4), and application to the IRS for an Employer Tax Identification Number (RX 5), and numerous other documents. He signed many checks, including during the period when Tuscany Farms was not paying many of its bills (*See Donald R. Beucke* 65 Agric. Dec. (slip op. Nov.8, 2006)), although he testified that basically anything he signed was on the orders of his father or sister, or Sal Mangano or his brother in law Jason Wesner.

I also agree with Complainant that the timing and amount of the “commission” Joe Anthony Genova received is consistent with a finding that he was actively involved. His getting paid a check of over \$13,000 on November 5, 2002 is inherently suspect given who he was—an officer, shareholder and director of a failing company—and given the timing—when Tuscany Farms was in a financial crisis and not paying its bills. That this was the only commission payment he received that year is a strong indication, given the circumstances of the company, that he was at the least being given preferential treatment by virtue of his status. In *In re. Ray Justice*, 65 Agric. Dec. (slip op. Aug. 11, 2006), I held that the decision of Mr. Justice to pay himself back a loan he made to the company at a time the company was in debt constituted active involvement under the statute, even though it was his intention to be a “passive investor” in the company with no role in day-to-day operations.

In sum, Joe Anthony Genova’s day-to-day involvement with the company, including buying of produce, participating in the negotiation of debt payment, frequent writing of checks, receipt of a relatively large

commission check at a time when Tuscany Farms was not paying for produce in a timely manner, and his status as 24% shareholder, director and officer lead me to conclude that he did not meet his burden of establishing that he was not actively involved in the activities leading to the disciplinary violations.

Even if it were correct that he was not actively involved, Joe Anthony Genova was more than a nominal officer, director and shareholder of Tuscany Farms. The showing required to prove nominality is not an easy one. While someone who is listed as an owner because their spouse or parent put them on corporate records, and had no involvement in the corporation or experience in the produce business may be found to be nominal, *Minotto v. USDA*, 711 F. 2d 406, 409 (D.C. Cir. 1983), this petitioner had worked in the produce business since high school (transactional work experience), had a college degree in agricultural business (advanced education), and was involved in the business on a daily basis (on-site activity) including the writing of checks (trusted position) and negotiation of payments (customer interaction). The fact that Congress utilized 10% ownership as sufficient in and of itself to trigger the presumption regarding responsibly connected is a strong indication that a 20% owner must make a particularly compelling case to meet the burden of proof required under 7 U.S.C. §499a(b)(9). The Judicial Officer and the courts have indicated that ownership of approximately 20% of the stock of a company is strong evidence that a person was not serving in a nominal capacity. *In re Joseph T. Kocot*, 57 Agric. Dec. 1544, 1545 and cases cited thereunder (1998). Here, Petitioner knew he was a 24% stockholder in Tuscany Farms. That he chose not to exercise the authority inherent in his three positions does not relieve him of the duty to do so, and does not make him nominal.

Nicole Wesner is Responsibly Connected to Tuscany Farms

As per the stipulation of counsel during the hearing, there is no dispute that Nicole Wesner is responsibly connected to Tuscany Farms. Tr. 689.

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III. Gencon Consulting Has Not Met its Burden to Show Cause why the PACA Branch Should Issue it a License

Shortly after the disciplinary and responsibly connected cases discussed above were scheduled for hearing, the Secretary received an application for a PACA license from Gencon Consulting. Joe Genova, Jr. is the 100 percent owner of Gencon. Tr. 983. Because the PACA Branch believed that Joe Genova & Associates and Tuscany Farms had each committed serious violations of the Act by their failure to fully pay for produce in a timely manner as discussed above, and because Joe Genova, Jr. was admittedly responsibly connected to both Respondent companies¹², the Secretary refused to issue a license to Gencon. Instead, the Secretary issued a Notice for Gencon to show cause why the Secretary should issue it a PACA license pursuant to 7 U.S.C. §499(d)(d). While a show cause notice in a licensing case must normally be heard within 60 days from the date of the license application, which would have been several weeks before the date the disciplinary and responsibly connected cases would have been heard, counsel for Gencon agreed to waive the 60-day rule and to consolidate the hearing on the license application with the other four scheduled cases.

At the hearing, there was no specific testimony adduced as to why the Secretary should issue Gencon a license. At the conclusion of testimony for all issues in the consolidated cases, counsel for Gencon moved that the Gencon Consulting issue be dismissed as “both premature and prejudicial.” Tr. 1001-1002. Opposing counsel naturally opposed and I established an accelerated briefing schedule for just the Gencon Consulting licensing issue. Tr. 1003-1111. Subsequent to the hearing, both parties briefed this issue, but then Gencon Consulting moved that I defer ruling on its Motion to Dismiss until I received full briefing on all of the consolidated cases. I granted that request.

¹² Joe Genova, Jr. did not contest the Agency’s initial determinations that he was responsibly connected to JGA and Tuscany Farms.

Practically speaking, my ruling that both Joe Genova & Associates and Tuscany Farms committed willful, flagrant and repeated violations of the PACA renders moots the license denial issue, since Joe Genova, Jr. is admittedly a responsibly connected shareholder, officer and director of both companies and is thus barred for the statutory period from receiving a PACA license under section 8(b) of the Act. However, Gencon raises several issues in its Motion to Dismiss License Application Denial concerning the validity of the Secretary's approach that need to be addressed. As Gencon puts it in its Motion, "The seminal question is whether the Secretary can deny a license application on the basis of an allegation not yet proven." Motion to Dismiss, p. 3. The short answer to this question is "yes."

The issuance of a PACA license is not an entitlement, but is a privilege subject to the established rules and regulations of the Secretary. Gencon contends, in essence, that absent a specific finding that Joe Genova, Jr. met one of the four conditions spelled out in section 4(b) of the PACA, the license cannot be refused by the Secretary. However, section 4(d) of the Act allows the Secretary to withhold a license pending investigation for the purpose of determining whether prior to the date of the application "any officer or holder of more than 10 per centum of the stock" of a company which "engaged in any practice of the character prohibited by this Act" is applying for the license. If the Secretary believes that an applicant has engaged in prohibited practices and should be denied a license, he must give the applicant an opportunity within 60 days of the date the license was applied for to show cause why the license should not be refused. Thus section 4(d) deals with a situation where there has not been a final determination of wrongdoing under the statute, but where the Secretary believes there would be a risk to those in the produce industry in granting a license even absent a final determination of wrongdoing. The Secretary's duty is not to merely issue a license to anyone who has not been formally found to have committed wrongdoing under the Act, but rather the Secretary has an affirmative duty to protect participants in the produce industry against fraudulent and unfair practices—part of the very purpose of the PACA. Thus, the Secretary has broad discretionary

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powers to withhold a license under 4(d) which go beyond the specific areas where the withholding of the license is mandatory. *See In re: Boss Fruit and Vegetable*, 53 Agric. Dec. 761 (1994).

Indeed, if the Secretary believed that disciplinary enforcement action was warranted which would result in a particular individual being barred from holding a PACA license, it would be rather ironic if the Secretary were forced to issue such a person a license on behalf of another company, particularly in light of the fragile and unsecured nature of the perishable produce business. If the Secretary licensed someone who he knew had frequently failed to make full payments promptly and whose transactional records were essentially in a shambles, he would arguably be derelict in exercising his statutory duties. This is precisely the type of situation Congress had in mind when they created section 4(d) of the Act.

There is no shortage of due process here. Joe Genova, Jr. had the right to a prompt hearing, which was generally accommodated by consolidation of this action with the other four actions I am deciding today. No evidence was adduced to demonstrate how Mr. Genova would meet his burden of showing that he would be conducting Gencom's produce business in a manner consistent with the dictates of the Act. The evidence at the hearing overwhelmingly indicated that two companies with which Joe Genova was admittedly responsibly connected had repeated, flagrant and willful violations of the Act, including numerous failures to make full payment promptly, and an accounting system apparently not comprehensible to anyone, including themselves. While at the hearing Gencon initially requested that I consider their Motion on an expedited basis, they modified that request and asked me to decide that Motion along with the rest of the consolidated cases. The opportunity for a hearing, which has been exercised by Gencon, obviates any due process claims.

Thus, I find that the Secretary acted properly in denying Gencon a license under the Act.

Findings of Fact

1. Respondent Tuscany Farms, a Nevada corporation which

Tuscany Farms, Inc., Joe Genova & Associates, Inc. 1427
Gencon Consulting, Inc., Nicole Wesner
66 Agric. Dec. 1401

conducted its business in California, held PACA license 2002-1249. Between July and October, 2002, Tuscany Farms failed to make full payment promptly the sum of \$336,200 to three sellers for 65 lots of perishable agricultural goods. In particular:

a. Tuscany Farms failed to make full payment promptly to G & R Produce for 41 lots of limes purchased between August 2 and October 11, 2002. Tuscany Farms made two partial payments, but at the time of the hearing over \$222,000 was unpaid.

b. Tuscany Farms failed to make full payment promptly to DLJ Produce, Inc. for 23 lots of potatoes and onions purchased between July 28 and October 24, 2002. DLJ accepted a settlement of \$77,385 after being informed by Tuscany Farms that was all they could afford to pay on the claim. At the time of the hearing, at least \$111,000 was still owed DLJ by Tuscany Farms.

c. Tuscany Farms failed to make full payment promptly to Horizon Marketing for one lot of grapefruit purchased on September 23, 2002, in the amount of \$2,304.

2. Respondent Joe Genova & Associates (JGA), a California corporation, held PACA license 1984-0041. Between February and November, 2002, JGA failed to make full payment promptly the sum of \$315,807 to nine sellers for 123 lots of perishable agricultural goods. In particular:

a. JGA failed to make full payment promptly to Golden Eagle Produce Distributors for 18 lots of vegetables purchased September 6 and October 18, 2002. At the time of the hearing, Golden Eagle was owed \$62,285 by JGA.

b. JGA failed to make full payment promptly to DNE Fruit Sales/DNE California for 14 lots of fruit purchased between February 2 and 28, 2002. DNE accepted partial payment after the matter was referred to a collection agency, agreeing to settle for \$17,000 when they were informed by Douglas Kerr that the majority of JGA's creditors were settling for 25 to 30 cents on the dollar. At the time of the hearing, DNE was owed over \$40,000 by JGA.

c. JGA failed to make full payment promptly to West Coast Distributing, Inc. for 48 lots of mixed fruit purchased between February

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17 and April, 24, 2002. While partial payment has been made, as a result of West Coast's intervention in a reparations case, at the time of the hearing, \$117,206 was owed West Coast by JGA.

d. JGA failed to make full payment promptly to Gold Valley Produce d/b/a Pacific West for 6 lots of fruit purchased between July 23 and August 8, 2002. While partial payment was received as the result of a combined settlement with Tuscany Farms and JGA, \$20,270 remained unpaid at the time of the hearing.

e. JGA failed to make full payment promptly to Spalding Produce Company for 4 shipments of oranges and grapefruit between July 26 and September 10, 2002. At the time of the hearing, Spalding Produce was owed \$14,118.41 by JGA.

f. JGA failed to make full payment promptly to Pacific Sun Distributing, Inc., for 18 lots of fruit and vegetables purchased between July 23 and September 19, 2002. At the time of the hearing, Pacific Sun was owed \$17,496.15 by JGA.

g. JGA failed to make full payment promptly to Stark Packing Corporation for 14 lots of oranges purchased between October 2 and 15, 2002. At the time of the hearing, Stark Packing was owed \$26,829.60 by JGA.

h. JGA failed to make full payment promptly to Horizon Marketing for two lots of fruit purchased on November 13-14, 2002. At the time of the hearing, Horizon Marketing was owed \$16,482.95 by JGA.

i. JGA failed to make full payment promptly to G & R Produce for one order of limes. At the time of the hearing, G & R was owed \$1,096.50 by JGA.

3. Joe Anthony Genova was a 24% shareholder in Tuscany Farms from the time it received its PACA license until it ceased purchasing produce, and was also an officer and director during that time. Joe Anthony Genova has been working in the produce industry from the time he was 16 through the date of the hearing. He is a college graduate with a degree in agricultural business.

4. Joe Anthony Genova was integrally involved in many of the day-to-day operations of Tuscany Farms, and signed numerous corporate documents, including checks. He was involved in payment negotiations with DNE. He received and cashed a substantial commission check less

than two weeks before Tuscany Farms ceased operations.

5. Joe Genova, Jr. was the president and sole owner of Gencon Consulting at the time it applied for a PACA license. Joe Genova, Jr. was the president and sole owner of JGA and was a 24% shareholder, officer and director of Tuscany Farms at the time the violative actions discussed in Findings 1 and 2 occurred. As such, Joe Genova, Jr. engaged in practices of the character prohibited by the PACA.

Conclusions of Law

1. Respondent Tuscany Farms has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to three sellers of 65 lots of perishable agricultural commodities in the amount of over \$336,000 between July and October 2002.

2. The appropriate sanction for Tuscany Farms, since it is no longer in business, is publication of the facts and circumstances of its violations.

3. Respondent Joe Genova & Associates has violated the PACA willfully, flagrantly and repeatedly by failing to make full payment promptly to nine sellers of 123 lots of perishable agricultural commodities in the amount of over \$315,000 between February and November 2002.

4. The appropriate sanction for Joe Genova & Associates, since it is no longer in business, is publication of the facts and circumstances of its violations.

5. Petitioner Joe Anthony Genova was responsibly connected to Tuscany Farms during the time Tuscany Farms committed violations of the PACA. As such, he is subject to the licensing and employment restrictions of the PACA.

6. Petitioner Nicole Wesner was responsibly connected to Tuscany Farms during the time Tuscany Farms committed violations of the PACA. As such, she is subject to the licensing and employment restrictions of the PACA.

7. Gencon Consulting did not show cause why the Secretary should issue it a license. Joe Genova, Jr., the sole owner of Gencon, was

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responsibly connected to both Tuscany Farms and Joe Genova & Associates while they committed violations of the PACA, engaged in practices of the character prohibited by the PACA, and is subject to the licensing and employment restrictions of the PACA.

Order

The facts and circumstances of the violations committed by Tuscany Farms and Genova & Associates shall be published. Joe Anthony Genova and Nicole Wesner are each found to be responsibly connected to Tuscany Farms and are subject to the employment restrictions imposed by the Act. The Secretary's denial of Gencon Consulting's PACA license is affirmed.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.
Done at Washington, D.C.

Watermelon Express, Inc. v.
Marine Park Farmer's Market, Inc.
66 Agric. Dec. 1431

1431

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATIONS

COURT DECISIONS

**WATERMELON EXPRESS, INC v. MARINE PARK FARMER'S
MARKET, INC., et al.**

No. CV 05-4649(FB)(JO).

Court Decision.

Filed September 14, 2007.

(Cite as: 2007 WL 4125111 (E.D.N.Y.)).

PACA-R – Trustee for benefit of seller required – Trustees, duty of principals.

Buyer of PACA produce along with its principal held personally liable for breach of PACA trustee duties in not making prompt payment for PACA produce. PACA does not ordinarily provide for pre-judgment interest and attorney fees especially without a fee shifting clause in sale documents. A default judgment constitutes an admission of well pleaded facts except as to damages which must still be established with reasonable certainty by competent evidence which can constitute affidavits and records maintained in the ordinary course of business.

**United States District Court, E.D. New York.
REPORT AND RECOMMENDATION**

JAMES ORENSTEIN, Magistrate Judge.

Plaintiff Watermelon Express, Inc. (“Watermelon”) commenced this action on September 30, 2005, against defendants Marine Park Farmers Market (“Marine Park”) and Rocco Rafaniello (“Rafaniello”), seeking relief based on the defendants' failure to pay for certain perishable agricultural commodities—specifically, fruits and vegetables—sold and delivered to Marine Park between July 24, 2004, and October 4, 2004. Docket Entry (“DE”) 1 (Complaint). Over four months later, on February 20, 2006, absent any response to the Complaint, Watermelon

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filed a motion for default judgment. DE 7. On June 19, 2006, the Clerk noted the defendants' default. DE 11. That same day, the Honorable Frederic Block, United States District Judge, entered judgment against the defendants and referred the matter to me for a report and recommendation on damages and costs. DE 12; *see also* DE 13. I now make my report and, for the reasons set forth below, respectfully recommend that the court grant Watermelon a total award in the amount of \$51,121.05, comprised of \$50,871.05 in unpaid invoices and its filing fee of \$250; I further recommend that Watermelon be denied its application for interest, attorney's fees, and a small portion of its claimed costs.

I. Background

The following facts are drawn from Watermelon's Complaint and the documents submitted in support of its motion for default judgment. Corporate defendant Marine Park is a business located in Brooklyn, New York, that also operates under the names Kings Meat and Kings Park Farmer's Market. Complaint ¶ 5. Individual defendant Rafaniello is Marine Park's principal: in addition to serving as an officer and director of the company, he is also a "dealer" and a "commission merchant." Complaint ¶ 6. Each of the latter terms has a specific defined meaning under the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. Ch. 20A ("PACA"). *See* 7 U.S.C. § 499a(b)(5)-(6).

From July 24, 2004, to October 4, 2004, Watermelon entered into a series of contracts with Marine Park for the sale of certain produce. Complaint ¶ 8. In each instance, the sale was documented in an invoice prepared by Watermelon and addressed to Marine Park. Complaint, Ex. A.¹ The defendants received the produce sold by Watermelon without objection and resold it in their ordinary course of business, but they

¹ Watermelon's Complaint refers to certain invoices and states that copies of those invoices "are annexed hereto as Exhibit 'A'." Complaint ¶ 8. Although certain invoices (along with a summary of them) are indeed attached to the Complaint, they are not labeled as an exhibit. From context, however, it is clear that the Complaint uses the term "Exhibit A" to refer to that collection of invoices, and I do likewise here.

never paid for it. Complaint ¶¶ 8, 9. Watermelon claims that the defendants thereby committed both a breach of contract and a violation of PACA. Complaint ¶¶ 19, 33.

Watermelon served the Complaint on both defendants on October 11, 2005. DE 4; DE 5. Neither defendant ever responded. On February 20, 2006, Watermelon moved for default judgment. DE 7. On June 19, 2006, the Clerk entered a notation of default. DE 11. Judge Block granted the default judgment that same day and referred the matter to me for a damages inquest. DE 12; DE 13.

In its default motion, Watermelon requested a total award of \$54,121.05: specifically, Watermelon asked for \$50,871.05 in unsatisfied payments for its produce; reimbursement of its \$250 filing fee; and \$3,000 as reimbursement of its "estimated" attorney's fees. DE 7-2 (Certification of [Watermelon's counsel] Karel S. Karpe in Support of Judgment by Default as to All Defendants ("Karpe Dec.")). ¶ 18. Upon receiving the referral from Judge Block, I directed Watermelon to submit any materials supporting its request for damages, including evidence or a legal memorandum, by March 14, 2007. Electronic Order dated March 6, 2007. One day *after* that deadline, Watermelon submitted a letter detailing its claim for attorney's fees and asking for a revised total award of \$56,824.87, plus pre-judgment interest. DE 15. The revised proposed award is made up of \$50,871.05 in unsatisfied payments, \$278.82 in expenses, and \$5,675.00 in attorney's fees. *Id.* at 4.

II. Discussion

A. Applicable Law

1. Default

Entry of a default judgment constitutes admission of all well-pleaded allegations, except those pertaining to the amount of damages. *Au Bon*

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Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir.1981); *Credit Lyonnais Sec. (USA), Inc. v. Alcantara*, 183 F.3d 151, 155 (2d Cir.1999); Fed.R.Civ.P. 8(d). The court must conduct an inquiry sufficient to establish damages to a “reasonable certainty.” *Credit Lyonnais*, 183 F.3d at 155 (quoting *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir.1997)). Detailed affidavits and other documentary evidence can suffice in lieu of an evidentiary hearing. *Action S.A. v. Marc Rich & Co., Inc.*, 951 F.2d 504, 508 (2d Cir.1991); *Credit Lyonnais*, 183 F.3d at 155.

Watermelon has submitted the following evidence: (1) a declaration from its attorney; (2) a summary statement prepared by Watermelon detailing Marine Park's past due bills from the period between July 24, 2004 through October 4, 2004; (3) copies of eight invoices for produce sold by Watermelon to Marine Park between July 24, 2004 and October 4, 2004; (4) a letter from Watermelon's counsel, submitted on March 15, 2007, detailing counsel's request for litigation costs and attorney's fees. Upon this record, I find no need for an evidentiary hearing. See *Transatlantic Marine Claims Agency*, 109 F.3d at 111; *Action S.A.*, 951 F.2d at 508.

2. PACA

Congress enacted PACA to regulate the sale of produce in interstate commerce. “*R*” *Best Produce v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 241 (2d Cir.2006). PACA was intended to foster fair trade in the produce industry by creating a mechanism for imposing damages on any buyer or seller that failed to satisfy its contractual obligations. *Am. Banana Co., Inc. v. Republic Nat'l Bank of N.Y., N.A.*, 362 F.3d 33, 36 (2d Cir.2004) (citing H.R. Rep. No. 98-543, at *3 (1983), reprinted in 1984 U.S.C.C.A.N. 405, 406). Thus, the statute provides that a buyer must “promptly” make “full payment” for any produce received through a transaction with a seller, 7 U.S.C. § 499b(4), and that failure to do so gives rise to a seller's right to seek damages in either administrative or judicial proceedings. *Id.* § 499e(b); “*R*” *Best Produce*, 467 F.3d at 241.

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Congress amended PACA in 1984 to further protect sellers as "slow-pay and no-pay practices" among buyers rose substantially. *D.M. Rothman & Co., Inc. v. Korea Commercial Bank of N.Y.*, 411 F.3d 90, 93 (2d Cir.2005) (internal citations omitted). It noted that suppliers of perishable goods had to sell quickly, and as a result, sellers often became unsecured creditors to buyers without first checking those buyers' credit histories. See H.R. Rep. No. 98-543, at 3 (1983), reprinted in 1984 U.S.C.C.A.N. 405, 406. When a buyer defaulted, a seller rarely recovered monies owed to it after lenders with superior security interests in the buyer's goods and proceeds took their share. *Id.* Congress therefore sought to ameliorate the risk of loss posed by defaulting buyers by requiring buyers "to hold all perishable commodities purchased on short-term credit, as well as sales proceeds, in trust for the benefit of unpaid sellers" until full payment has been made. *Am. Banana*, 362 F.3d at 37 (citing 7 U.S.C. § 499e(c)(2)).

To preserve the benefit of the trust, sellers must provide buyers with written notice of their intent to do so. 7 U.S.C. § 499e(c)(3). The notice requirement can be satisfied by a seller's regular invoices or billing statements, if they include the following language:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by *section 5(c)* of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received. *Id.* § 499e(c)(4) (emphasis original).

Trust assets are "intended exclusively to benefit produce suppliers," "*R Best Produce*, 467 F.3d at 242, and PACA trustees-a class that includes not only the corporate buyer with whom a seller enters into a contract, but also any individual "in the position to control" trust assets, such as the buyer's principal-are under a duty to ensure that

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those assets are sufficient to guarantee prompt and full payment to trust beneficiaries. *Coosemans Specialties, Inc. v. Gargiulo*, 485 F.3d 701, 705 (2d Cir.2007). PACA trustees must “maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including dissipation of trust assets, is unlawful.” *Id.* (citing 7 C.F.R. § 46.46(d)(1)).² An unpaid seller may file suit against PACA trustees “to enforce payment from a trust,” 7 U.S.C. § 499e(c)(5), and where an individual in a controlling position fails to preserve trust assets, he or she “may be held personally liable to the trust beneficiaries for breach of fiduciary duty.” *Coosemans Specialties, Inc.*, 485 F.3d at 705; *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F.Supp. 346, 349 (S.D.N.Y.1993) (“any failure to account for or preserve trust assets, for whatever reason and however innocent, creates a liability for those trust assets”).

B. Liability

As a threshold issue, I note that the court has already determined that Watermelon “has stated a valid claim under PACA and that the condition precedent to suit to enforce payment from a statutory trust has been met.” DE 12 at 3. The uncontroverted allegations of the Complaint suffice to establish that each defendant was a dealer and commission merchant licensed under the trust provisions of PACA and that Marine Park failed to make payments for eight consecutive sales of produce between July 24, 2004 and October 4, 2004. Complaint ¶¶ 5-6, 8 & Ex. A. That record suffices to establish the liability not only of Marine Park for a violation of PACA, but also that of Rafaniello. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 475, 123 S.Ct. 1655, 155 L.Ed.2d 643

²“Dissipation” is defined as “any act or failure to act which could result in the diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers ... to recover money owed in connection with produce transactions.” *Id.* (citing 7 C.F.R. § 46.46(a)(2)).

(2003) (unlike piercing the corporate veil, the imposition of personal liability under PACA is not a “rare exception”); *see also Coosemans Specialties, Inc.*, 485 F.3d at 707 (imposing individual liability); *Horizon Mktg. v. Kingdom Int'l Ltd.*, 244 F.Supp.2d 131, 145 (E.D.N.Y.2003) (noting that several courts in this jurisdiction “have held that in PACA cases, individuals who are principals in corporations which bought produce, but failed to pay, are individually liable for breach of their fiduciary duties” and citing as examples *Bronia v. Ho*, 873 F.Supp. 854, 861 (S.D.N.Y.1995); *A & J Produce Corp. v. CIT Group/Factoring, Inc.*, 829 F.Supp. 651, 655 (S.D.N.Y.1993); *Morris Okun, Inc.*, 814 F.Supp. at 348)).

C. Damages

1. Unpaid Invoices

Having established the defendants' liability, Watermelon must still establish the amount owed with “reasonable certainty.” In that regard, Watermelon relies on a billing summary prepared for Marine Park showing eight past due bills between July 24, 2004 and October 4, 2004, as well as individual invoices for each of those eight transactions. Complaint, Ex. A. The separate invoices are dated between July 24, 2004 and October 4, 2004, and each reflects the sale of a certain quantity of produce to Marine Park. *Id.* Watermelon correctly calculates the amount owed as the sum of the individual invoices: \$50,871.05. I respectfully recommend that the court award Watermelon that amount with respect to the unpaid invoices.

2. Interest

PACA does not itself create a right to pre-judgment interest. *Top Banana, L.L.C. v. Dom's Wholesale & Retail Center, Inc.*, 2005 WL 1149774, at *2 (S.D.N.Y. May 16, 2005). It is within the court's discretion to award pre-judgment interest on a PACA claim, and courts in this jurisdiction have done so based on congressional intent to protect

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agricultural suppliers. *See Frankie Boy Produce Corp. v. Sun Pacific Enterprises*, 2000 WL 1532914, at *3 (S.D.N.Y. Oct 17, 2000); *E. Armata, Inc. v. Platinum Funding Corp.*, 887 F.Supp. 590, 595 (S.D.N.Y.1995); *Morris Okun, Inc.*, 814 F.Supp. at 351. However, I respectfully recommend that the court exercise its discretion not to award such interest in this case. Watermelon has never provided any information as to the authority for such an award, the reason why such an award is warranted as a matter of discretion, nor even any clue as to the interest rate or relevant dates that might be used in calculating the amount of interest to be awarded. The entirety of its submissions on the subject are the following. First, in its motion for a default judgment, it ignored the matter entirely except for a passing reference in its attorney's declaration, which noted that Watermelon "seeks ... interest," Karpe Dec. ¶ 9, *but see id.* ¶¶ 16, 18 (omitting any reference to interest in lists of requested forms of relief), and similar passing references in its notice of motion, and its proposed default judgment order. *See* DE 7 (notice of motion, asking for "interest"), DE 7-3 (proposed judgment including an award of "interest at the legal rate in effect on the date of this judgment"). Second, in its belated submission of March 15, 2007, Watermelon addressed the subject only in the very last word of counsel's letter. *See* DE 15 (seeking a total award of \$56,824.87, "plus interest at the judicial rate"). If Watermelon cannot be troubled to explain why it should be awarded interest or even how much it wants, the court should not do so for it.

3. *Attorney's Fees*

As with pre-judgment interest, PACA does not create a right to attorney's fees. *Top Banana*, 2005 WL 1149774, at *2. They may be awarded as "sums owing in connection with" a transaction in produce under PACA, *Coosemans Specialties, Inc.*, 485 F.3d at 708 (citing 7 U.S.C. § 499e(c)(2)), but only when a contract between the parties includes such terms; they are not recoverable absent an independent basis for the award. *Top Banana*, 2005 WL 1149774, at *2 (citing *E. Armata, Inc.*, 887 F.Supp. at 594 ("Attorneys fees are not available under the PACA statute where a contractual basis for the fees is

lacking.”); *Morris Okun, Inc.*, 814 F.Supp. at 351 (denying attorney's fees to second plaintiff whose contract did not include relevant terms)).

Watermelon claims that it is entitled to an award of attorney's fees pursuant to section 499g(c) of PACA. Karpe Dec. ¶ 17. It is not. Section 499g(c) applies to a complaint previously subject to administrative review, where the Secretary of Agriculture has entered a reparation order against the party that violated the statute. *See* 7 U.S.C. 499(g)(c). Under those circumstances, the party against whom the reparation order is entered may appeal the Secretary's ruling to the appropriate United States District Court. *Id.* To perfect its appeal, the appellant must file a notice with the court's Clerk-including a copy of the administrative proceedings and a statement of the grounds for overturning the Secretary's decision-and within 30 days of entry of the reparation order post a bond with the court in double the amount of the reparation award. *Id.* If the appellant satisfies those requirements, the court will try the case *de novo*. *Id.* Even then, attorney's fees are only available to the *appellee*, and only if the Secretary's original decision is upheld. *Id.* Watermelon has provided no evidence whatsoever that it pursued administrative remedies prior to initiating the instant action, or, if it had, that Watermelon satisfied any of the statutory conditions precedent to appeal. The court therefore has no basis upon which to award attorney's fees under PACA.

Watermelon's contractual claim for attorney's fees fails for a more basic reason: it is not supported by any facts. Nothing in the record demonstrates that the parties entered into any agreement on this issue. Watermelon's counsel asserts that Watermelon is entitled to recover its attorney's fees “under the terms of the invoices” it sent to Marine Park. Karpe Dec. ¶ 17. That assertion is demonstrably false. The invoices to which counsel refers are attached to the Complaint and incorporated therein by reference. Each such invoice includes only the following information: Watermelon's name and contact information, the name and address of the buyer,; the date of the transaction; the description and unit price of each item of produce sold; the total price for each item; the

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grand total of all invoiced items; and the following pre-printed warning:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. ¶ 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.

Complaint ¶ 11 & Ex. A. There is no mention anywhere of the issue of attorney's fees. The record is clear that the invoices contain no fee-shifting provision, and the applicable law is equally clear that in the absence of such a term Watermelon may not recover its fees. I therefore respectfully recommend that the court reject this prong of the Watermelon request for relief.

4. Other Costs

In its initial motion, Watermelon sought reimbursement of its \$250 filing fee. The record reflects that it did incur such a cost, DE 1, and I therefore recommend that it be included in the award. In its belated submission on March 15, 2007, Watermelon's counsel also listed, without explanation or documentation, two other costs: "Travel Expense: [\$]3.00" and "Messenger/Delivery: [\$]27.82[.]" DE 15 at 4. Absent further explication, I have no way of assessing whether the cited travel and delivery costs—assuming they were actually incurred, as I do—were associated with filing the case or with other aspects of the representation. I therefore lack a sufficient record to recommend that they be reimbursed. Accordingly, I respectfully recommend that the court limit its award of costs to the \$250 filing fee.

III. Recommendation

For the reasons set forth above, I respectfully recommend that the court enter an order awarding Watermelon judgment in the amount of

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\$51,121.05, comprised of \$50,871.05 in unpaid invoices and its filing fee of \$250; and denying its application for interest and attorney's fees.

IV. Objections

I direct plaintiff Watermelon to serve a copy of this Report and Recommendation on defendants Marine Park and Mr. Rafaniello by certified mail, and to file proof of service with the court no later than September 21, 2007. Any objection to this Report and Recommendation must be filed no later than September 28, 2007. Failure to file objections within this period waives the right to appeal the District Court's order. *See* 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72; *Beverly v. Walker*, 118 F.3d 900 (2d Cir.1997); *Savoie v. Merchants Bank*, 84 F.3d 52 (2d Cir.1996).

SO ORDERED.

**WATERMELON EXPRESS, INC. v. MARINE PARK FARMER'S
MARKET, INC. D/B/A KINGS MEAT A/K/A KINGS PARK
FARMERS MARKET, AND ROCCO RAFANIELLO.
No. 05-CV-4649 (FB)(JO).
Filed November 16, 2007.**

(Cite as: 2007 WL 4125105 (E.D.N.Y.)).

PACA-R – Pre-judgment interest – Attorney fees.

Sellers of PACA produce having won default judgement and proved damages failed to show that its business records provided for fee shifting of attorney fees.

United States District Court, E.D. New York.

MEMORANDUM AND ORDER

BLOCK, Senior District Judge.

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On June 14, 2006, the Court granted plaintiff Watermelon Express, Inc.'s motion for default judgment to enforce a statutory trust pursuant to the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C §§ 499(a)-499(q). The matter was referred to Magistrate Judge James Orenstein for a recommendation on damages, attorneys' fees and costs. On September 14, 2007, Magistrate Judge Orenstein issued a Report and Recommendation ("R & R") recommending that a default judgment of \$51,121,05, comprised of \$50,871.05 in unpaid invoices and \$250 in costs, be entered in favor of plaintiff. It further recommended denying plaintiff's request for attorneys' fees, pre-judgment interest, and certain costs.

The R & R recited that "[a]ny objection to this Report and Recommendation must be filed no later than September 28, 2007," and that "[f]ailure to file objections within this period waives the right to appeal the District Court's order." R & R at 11. Pursuant to Magistrate Judge Orenstein's direction, counsel for plaintiff sent a copy of the R & R to defendants' last known addresses on September 20, 2007.

Defendants have not filed objections, but on September 28, 2007, plaintiff filed a letter contesting the R & R's recommendation that pre-judgment interest, attorneys' fees, and certain costs be denied. Docket Entry 19 (the "September 28 Letter").¹

I. Denial of Pre-Judgment Interest

In cases brought under PACA, and "[t]he decision whether to grant prejudgment interest and the rate used if such interest is granted 'are matters confided to the district court's broad discretion.'" *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1071 (2d

¹ On October 1, 2007, Magistrate Judge Orenstein entered an order noting that "[t]he plaintiff had ample opportunity to supplement the record before" the R & R was issued, and stating that, "[t]o the extent the plaintiff's submission seeks reconsideration of [the R & R], it is not only procedurally improper but also meritless." Electronic Order of October 1, 2007.

Cir.1995) (*quoting Commercial Union Assurance Co. v. Milken*, 17 F.3d 608, 613-14 (2d Cir, 1994)). Plaintiff has provided neither a proposed award nor a proposed method of calculating such an award and, in its submissions to Magistrate Judge Orenstein, never articulated why an award of pre-judgment interest is warranted; accordingly, the Court, acting in its broad discretion, denies plaintiff's request for pre-judgment interest.

II. Attorney's Fees

PACA provides two routes by which to recover attorneys' fees. First, when a reparation order of the Secretary of Agriculture is appealed to a district court and the district court upholds the Secretary's order, the appellee may recover attorneys' fees. *See* 7 U.S.C. § 499g(c). Plaintiff concedes that it cannot recover attorneys' fees under this portion of the PACA statute because it "did not submit evidence of administrative remedies in order to trigger Section 499g(c) of PACA."September 28 Letter.

Attorneys' fees can also be recovered under Section 499e(c)(2) of PACA as "'sums owing in connection with' perishable commodities transactions" so long as "the parties' contracts include a right to attorneys' fees." *Coosemans Specialties, Inc. v. Gargiulo*, 485 F.3d 701, 709 (2d Cir.2007). Plaintiff submits that it is entitled to recover attorneys' fees "under the terms of [its] invoices."Docket Entry 7 (Karpe Dec. ¶ 17). The invoices are silent as to attorneys' fees. R & R at 10. Nothing else in the record suggests that there was a side agreement regarding fee-shifting. Since plaintiff has not shown that there was a contractual agreement regarding attorneys' fees, its request for such fees is denied.

III. Additional Costs

Finally, plaintiff objects to the R & R's recommendation that an additional \$30.82 in costs be denied because plaintiff had not articulated

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how the costs were associated with the case². In the September 28 Letter, plaintiff provided additional information regarding these costs, stating that a \$3.00 travel cost “was the cost to travel to Court to file the Complaint” and that a \$27.82 delivery cost was “the cos[t] of federal express [sic] to deliver overnight courtesy copy of the motion for default judgment to the Court.”September 28 Letter. In light of these explanations, the Court will add these costs to the amount recommended in the R & R.

In sum, the Clerk shall enter judgment for plaintiff in the amount of \$51,151.87, comprised of \$50,871.05 in unpaid invoices and \$280.82 in costs.

SO ORDERED.

² In a March 14, 2007 letter to Magistrate Judge Orenstein regarding costs and attorney's fees, plaintiff submitted a “Travel Expense” of \$3.00 and a “Messenger/Delivery” expense of \$25.82, but did not specify how these expenses related to the case.

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REPARATION CASES

DEPARTMENTAL DECISIONS

**BIG CHUY DISTRIBUTORS & SONS, INC. V. MULLER
TRADING COMPANY, INC.**

PACA Docket No. R-07-040.

Decision and Order.

Filed August 15, 2007.

Damages – Not Proven.

Where Respondent sought damages for Complainant's material breach of contract, but failed to submit adequate evidence of its damages and no objective benchmark for determining damages could be found (e.g., percentage of condition defects, differential between USDA Market News price for product as warranted versus product as accepted), damages were not awarded and Respondent was liable for the full contract price less the cost of inspection.

Complainant - Pro se.

Respondent - Pro se.

Andrew Furbee- Examiner.

Patrice Harps - Presiding Officer.

Decision and Order by Judicial Officer William G. Jensen.

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 within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$5,005.10 in connection with one truckload of watermelons 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 formal Complaint was

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served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the formal Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (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. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Neither party elected to submit additional evidence. Respondent filed a Brief.

Findings of Fact

1. Complainant, Big Chuy Distributors & Sons, Inc., is a corporation whose post office address is 11 Bravo Lane, Nogales, Arizona, 85621. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Muller Trading Company, Inc., is a corporation whose post office address is 545 N. Milwaukee Avenue, Suite 201, Libertyville, Illinois, 60048. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about April 18, 2006, Complainant, by oral contract, sold to Respondent 38,320 pounds of medium "Big Chuy" seedless watermelons packed in 56 bulk bins. The watermelons were sold for 15 cents per pound, for a total f.o.b. contract price of \$5,771.50, including \$23.50 for a temperature recorder. On the same date, the watermelons were shipped from loading point in the State of Arizona to a Wal Mart Distribution Center in Washington Court House, Ohio.

4. On April 23, 2006, the watermelons mentioned in Finding of Fact 3 arrived at the Wal Mart Distribution Center in Washington Court House, Ohio, whereupon they were rejected. Wal Mart's representative made the following notation on the bill of lading pertaining to the shipment: "19% UNDERWEIGHT." The watermelons were subsequently moved to Darr Farms, Newcomerstown, Ohio, where they were unloaded.

5. On April 24, 2006, Respondent notified Complainant that the

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watermelons had been rejected by Wal Mart. At some point following the discussion, Complainant issued an amended invoice reflecting a two cent per pound reduction in the original invoice price of 15 cents per pound, resulting in an amended total f.o.b. contract price of \$5,005.10, including \$23.50 for a temperature recorder.

6. On April 25, 2006, a USDA inspection was performed on the watermelons at the place of business of Darr Farms, in Newcomerstown, Ohio, the report of which disclosed the following, in pertinent part:

TEMP.	PRODUCT	BRAND/MARKINGS	ORIGIN	NO.OF CONTAINERS
56 TO 59°F	Watermelons	"Big Chuy," Big Chuy & Sons, Inc., Nogales, AZ, Grown in Mexico, Seedless Watermelons	MX	56 Bulk Bins Half Size (37,800 Lbs)

AVERAGE including
DEFECTS SER DAM. OFFSIZE/DEFECTS

2%	0%	Quality Defects (0 to 5%)(Scars)
1%	0%	Bruising (0 to 5%)
1%	0%	Sunburn (0 to 5%)
1%	0%	Transit Rubs (0 to 5%)
2%	2%	Decay (0 to 5%)
7%	2%	Checksum

GRADE: Meets U.S. No. 1

LOT DESCRIPTION:

Firmness: Generally firm
Stages of Decay: Approx. half advanced, approx. half early.
% of fruit between 8 and 10 lbs: 25% to 70%, avg. 50%.
% of fruit over 10 to 12 lbs: 15% to 65%, avg. 37%.
% of fruit over 12 lbs: 0% to 10%, avg. 4%.
% of fruit under 8 lbs: 0% to 15%, avg. 9%.
Container count: 62 to 80, avg. 71 watermelons per bulk bin.
Net weight ranges 6.75 to 13.0 pounds, average 9.9 pounds.

REMARKS: % of fruit at different weights requested and reported at applicant's request.

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7. Respondent has not paid anything to Complainant for the watermelons.

9.*An informal complaint was filed on May 19, 2006, which is within nine months from the date that the cause of action accrued. *[No # 8 in original - Editor]

Conclusions

Complainant brings this action to recover the agreed purchase price for one truckload of watermelons sold to Respondent. Both parties agree that Complainant shipped watermelons that were both the incorrect size and count, thus constituting a material breach of contract. However, Complainant states that after it was notified of the breach of contract, an agreement was reached whereby Respondent accepted a two cent per pound adjustment, thus reducing the f.o.b. contract price from \$5,771.50 to \$5,005.10, in lieu of filing a damages claim. Respondent confirms discussing the adjustment with Complainant, but states that it at no time committed to the adjustment because it had no way of quantifying potential damages stemming from the breach of contract at the time the adjustment was offered.

As the party claiming a contract modification, Complainant has the burden of proving its allegations by a preponderance of the evidence. *Regency Packing Co., Inc. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983). In his unverified letter of Informal Complaint, Mike Gerardo, Complainant's salesman for the transaction, indicates that the parties agreed to settle the file for a two cent per pound adjustment.¹ Complainant's president, Jesus Lopez, states in his Formal Complaint that Complainant and Respondent agreed to a two cent a pound adjustment.² Respondent's salesman for the transaction, Daniel Pyke, submitted a verified Answer in which he denies that he agreed to settle the file for a two cent per pound adjustment.³ As Complainant's salesman regarding this transaction, Mr. Gerardo had direct personal

¹ See Report of Investigation, Exhibit No. 1A.

² See Formal Complaint, ¶ 5.

³ See Answer, ¶ 5 through 7.

knowledge of the facts. However, his statement was not verified, hence, it cannot be accorded the same weight as the verified Answer provided by Mr. Pyke. *Cambridge Farms, Inc. v. H.R. Bushman & Sons, Inc.*, 46 Agric. Dec. 1526 (1987); *Empire Foods, Inc. v. Fir Grove Farm*, 16 Agric. Dec. 202 (1957). The Formal Complaint submitted by Jesus Lopez, while verified, contains pleadings from a party that was removed from any negotiations that may have transpired between Mr. Gerardo and Mr. Pyke. In that regard Mr. Lopez's testimony cannot be given the same weight as Mr. Pyke's verified Answer. Nowhere in the record does Complainant present any rebuttal affidavit by anyone personally involved in the negotiations with Mr. Pyke. Therefore, we find that Complainant has failed to satisfy its burden of proving that the parties agreed to modify the original contract.

The record indicates that the watermelons were rejected by Wal Mart on April 23, 2006, following which they were shipped to Darr Farms, Newcomerstown, Ohio, where they were received and unloaded the same day. The Regulations (7 C.F.R. § 46.2(dd)(1)) provide that unloading or partial unloading of a transport is an act of acceptance. Having accepted the watermelons by virtue of Darr Farms' act of unloading them, Respondent became liable to Complainant for the contract price of \$5,771.50, less damages resulting from any breach of warranty by Complainant. *Norden Fruit Co., Inc. v. E D P, Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987). The burden of proving both the breach and the damages, by a preponderance of the evidence, rests upon Respondent.

The parties agree that the contract contemplated Complainant's sale of 56 bins of seedless watermelons weighing 38,320 pounds, with an average count of 60 watermelons per bin. This equates to an approximate weight of 11.4 pounds per watermelon. The USDA inspection shows an average count of 71 watermelons per bin and an average weight of approximately 9.9 pounds per watermelon. Accordingly, the inspection indicates a material breach of contract regarding both the weight and count of watermelons that were shipped.

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Complainant's failure to ship watermelons that complied with the contract requirements constitutes a breach of warranty for which Respondent is entitled to recover provable damages. 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. UCC § 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. Respondent provided a summary of sales and expenses on a document bearing its letterhead, entitled "Product Reconciliation."⁴ The Product Reconciliation reflects a total return on 44 60ct Bins that were repacked of \$187.50 per bin, and a total return on 12 bins of repacked small melons of \$75.00 per bin, for total gross sales of \$9,150.00. The Product Reconciliation also lists expenses and fees that were allegedly incurred as a result of Complainant's breach of contract, including repacking (\$800.00), freight (\$3,400.00), inspection (\$562.00), redelivery (\$775.00), late fee (\$300.00), and an administration fee (\$100.00), for total expenses of \$5,937.00. The Product Reconciliation does not contain sufficient detail to show how Respondent, who was not the ultimate consignee, derived its sales figures. Moreover, while UCC § 2-714(3) and § 2-715(1) provide buyers with a means of recovering incidental damages resulting from a seller's breach with respect to accepted goods, Respondent did not provide any information, aside from the \$562.00 charge for the USDA inspection, that verifies that the expenses detailed on its Product Reconciliation were actually incurred as a result of Complainant's breach of contract. In the absence of this information, Respondent's accounting is of negligible value in terms of establishing the accepted value of the watermelons. Where a prompt and proper accounting has not been provided, we frequently use the percentage of condition defects reflected on a timely USDA inspection as a means of assessing damages. The subject watermelons were not inspected at the contract destination, but an inspection performed at the ultimate

⁴ See Report of Investigation, Exhibit No. 1G.

consignee's location shows that the watermelons did not arrive with excessive condition defects, so that method of determining damages is inapplicable here. Where neither of the aforementioned methods of determining damages is found to apply, damages may be assessed by reference to a difference in price at the time and place of delivery between the commodities that were contracted to be shipped, and those that were actually received. Accordingly, we consulted USDA Market News Service reports for several locations with proximity to Newcomerstown, Ohio, including Pittsburgh, Pennsylvania and Detroit, Michigan in order to determine whether there was a difference in price between the watermelons that were contracted for shipment (60 count per bin, 11.4 pounds per watermelon) and those that were actually received (71 count per bin, 9.9 pounds per watermelon). However, we were unable to make such a determination, since relevant price quotations were not published.

Where, as here, no objective benchmark for determining damages can be found, they should not be awarded. *Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979). Given its failure to submit adequate evidence of its damages resulting from Complainant's breach of contract, we find Respondent liable to Complainant for the full contract price of the watermelons, or \$5,771.50, less the \$562.00 cost of the USDA inspection, for a net amount due Complainant of \$5,209.50. In its complaint, however, Complainant seeks to recover \$5,005.10. Accordingly, Respondent's liability to Complainant will be limited to the amount claimed in its complaint, or \$5,005.10.

Respondent's failure to pay Complainant \$5,005.10 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act 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." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty,

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where appropriate, to award interest. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid \$300.00 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.
Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$5,005.10, with interest thereon at the rate of 4.78 % per annum from June 1, 2006, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

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PACA Docket No. R-07-034.

Decision and Order.

Filed August 29, 2007.

Contract – Limitation of Remedies

Where the written contract signed by the parties provided Complainant with a specific remedy for Respondent's failure to purchase the subject bulk bin lettuce, but it was not stated in the contract that this was to be Complainant's exclusive remedy (see U.C.C. § 2-719), Complainant was entitled to recover damages for Respondent's breach as provided in U.C.C. §§ 2-703 and 2-706.

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Complainant Abramson, Church & Stave, LLP.
Respondent Martyn and Assoc.
Leslie Wowk- Examiner.
Patrice Harps - Presiding Officer.
Decision and Order by William G. Jenson, Judicial Officer.

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 within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$141,577.50 in connection with multiple truckloads of lettuce contracted to be 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 formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant and asserting a Counterclaim for unspecified damages resulting from Complainant's alleged failure to supply lettuce in accordance with the quantity and quality requirements of the contract. Complainant filed a reply to the Counterclaim denying liability to Respondent.

Although the amount claimed in the formal Complaint exceeds \$30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (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. 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. Respondent also submitted a Brief.

Findings of Fact

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1. Complainant, Maverick Holdings Group, Inc., doing business as Pacific Marketing Co., is a corporation whose post office address is 22744 Portola Drive, Salinas, California, 93908. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, Community Fruitland, Inc., is a corporation whose post office address is 31 Budlong Road, Cranston, Rhode Island, 02920. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On September 23, 2004, Complainant and Respondent entered the following written agreement concerning the sale by Complainant to Respondent of multiple truckloads of bulk bin lettuce:

BULK LETTUCE AGREEMENT

This agreement made this 17th day of September 2004 by and between Community Fruitland and Pacific Marketing Company.

Purpose: To supply Community Fruitland with an uninterrupted supply of quality lettuce at a fixed price, with the lettuce grower receiving a fair price for its lettuce.

For in and consideration of the promises and mutual covenants contained in this Agreement and in furtherance of the purpose stated above, the parties agree as follows:

Pacific Marketing shall supply Community Fruitland with two loads of first cut bulk bin lettuce per week at a total price of \$.13 per pound.

Pacific Marketing shall supply Community Fruitland with:

a. A steady supply of lettuce as specified in Section 1 above regardless of the lettuce market. It is the responsibility of Pacific Marketing to fulfill its obligations under Section 1 of this Agreement, with the exception of an industry-wide crop failure

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due to acts of God (i.e. hurricane, tornado or a total loss of the lettuce crop due to adverse weather) in Pacific Marketing's growing area. The unaffected crops will be pro-rated at contract price. Act of God exception applies to both parties.

b. The exception described in the previous paragraph applies only if the entire produce industry in Pacific Marketing's growing area is affected. This exception does not allow for Pacific Marketing errors in estimating acreage for fulfilling commitment, poor growing practices or any conditions subject to or under human control.

It is the responsibility of Pacific Marketing to insure that the use of any and all pesticides used with respect to lettuce furnished under this Agreement are used in accordance with all State and Federal laws and regulations.

Community Fruitland shall purchase all lettuce supplied pursuant to Section 1 above at the price set forth in Section 1 regardless of the market price or market conditions, provided all quality requirements set forth below are met. Should Community Fruitland not purchase amounts in any given week, Community Fruitland shall pay Pacific Marketing for all growing cost.

Quality requirements:

Solidity: Firm to firm/hard
Good color, good texture, clean lettuce
Size on 1st cut: Medium to large

(Quality standards shall be adjusted due to industry wide quality problems.)

The information contained in this Agreement is confidential and shall not be disclosed or divulged to third parties unless both parties hereto agree or unless disclosure is required pursuant to a

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valid court order.

Any changes to this Agreement must be confirmed in writing by both parties and signed copies kept on file at each parties' place of business.

The term of this Agreement shall be from approximately November 30, 2004, through approximately November 30, 2005, at which time a new agreement shall be reached.

9/20/04 9/23/04
Date Date

/s/ /s/
Larry Larronde Joseph Lombardo
Pacific Marketing Co. Community Fruitland

4. Between December 1, 2004, and April 25, 2005, Complainant sold and shipped the contracted lettuce to Respondent as follows:

<u>Invoice</u>	<u>Date</u>	<u>Qty</u> <u>(Pounds)</u>	<u>Sales Price</u> <u>(Per Pound)</u>	<u>Amount</u>
16360	12/01/2004	6,670	\$0.13	\$878.80
16365	12/03/2004	39,700	\$0.13	\$5,161.00
16384	12/09/2004	40,490	\$0.13	\$5,263.70
16400	12/10/2004	39,680	\$0.13	\$5,158.40
16391	12/11/2004	39,800	\$0.13	\$5,174.00
16414	12/14/2004	40,290	\$0.13	\$5,237.70
16417	12/16/2004	32,830	\$0.13	\$4,267.90
16424	12/21/2004	38,620	\$0.13	\$5,020.60
16470	12/22/2004	39,040	\$0.10	\$3,904.00
16468	12/23/2004	40,340	\$0.13	\$5,244.20
16505	12/31/2004	41,180	\$0.13	\$5,353.40
16492	12/31/2004	39,340	\$0.13	\$5,114.20
16508	01/03/2005	38,430	\$0.13	\$4,995.90
16493	01/03/2005	40,180	\$0.13	\$5,223.40
16530	01/08/2005	40,890	\$0.13	\$5,315.70
16553	01/14/2005	40,410	\$0.13	\$5,253.30
16572	01/14/2005	41,210	\$0.13	\$5,357.30
16582	01/18/2005	41,200	\$0.13	\$5,356.00

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16594	01/20/2005	41,830	\$0.13	\$5,437.90
16640	02/04/2005	42,450	\$0.13	\$5,518.50
16677	02/11/2005	40,910	\$0.13	\$5,318.30
16705	02/16/2005	32,750	\$0.13	\$4,257.50
16718	02/18/2005	40,890	\$0.13	\$5,315.70
16725	02/21/2005	34,800	\$0.13	\$4,524.00
16725	03/01/2005	34,800	\$0.13	\$4,524.00
16837	03/24/2005	31,360	\$0.13	\$4,076.80
16873	03/31/2005	36,670	\$0.13	\$4,778.80
16880	04/02/2005	43,060	\$0.13	\$5,597.80
16938	04/18/2005	40,780	\$0.13	\$5,301.40
16934	04/18/2005	40,180	\$0.13	\$5,223.40
16962	04/20/2005	40,480	\$0.13	\$5,262.40
16973	04/25/2005	35,960	\$0.13	\$4,674.80

5. Between May 14, 2005, and December 2, 2005, Complainant sold the bin lettuce designated for Respondent to other customers as follows:

<u>Date</u>	<u>Customer</u>	<u>Quantity (Pounds)</u>	<u>Price (Per Pound)</u>	<u>Total Invoice</u>
05/14/2005	Southeast Processing	40,551	\$0.07	\$2,862.07
05/19/2005	Trigent Marketing, Inc.	41,520	\$0.07	\$2,906.40
05/19/2005	Adam Bros. Produce Sales, Inc.	41,380	\$0.07	\$2,896.60
05/24/2005	Santa Maria Produce Mktg.	26,200	\$0.07	\$1,857.50
05/24/2005	Gene Morris Co., Inc.	42,800	\$0.07	\$3,019.50
05/28/2005	Regional Source Produce	14,080	\$0.07	\$1,009.10
05/31/2005	Southeast Processing	40,510	\$0.07	\$2,859.20
06/01/2005	Regional Source Produce	17,360	\$0.07	\$1,238.70
06/03/2005	Regional Source Produce	11,540	\$0.07	\$831.30
06/03/2005	Southeast Processing	14,100	\$0.07	\$1,010.50
06/10/2005	Gene Morris Co., Inc.	40,710	\$0.07	\$2,873.20
06/11/2005	Trigent Marketing, Inc.	33,300	\$0.07	\$2,331.00
06/11/2005	Trigent Marketing, Inc.	33,030	\$0.07	\$2,312.10
06/13/2005	Gene Morris Co, Inc.	39,022	\$0.07	\$2,755.04
06/13/2005	Gene Morris Co., Inc.	41,460	\$0.07	\$2,925.70
06/22/2005	Taylor Farms Texas, Inc.	41,260	\$0.07	\$2,915.70
06/22/2005	Taylor Farms Texas, Inc.	40,760	\$0.07	\$2,880.70
06/24/2005	Taylor Farms Texas, Inc.	42,605	\$0.07	\$3,009.85
06/29/2005	Southeast Processing	21,025	\$0.07	\$1,495.25
06/30/2005	Southeast Processing	16,540	\$0.07	\$1,181.30
07/01/2005	Southeast Processing	18,430	\$0.07	\$1,313.60
07/02/2005	Pacific International Mkt, Inc.	11,080	\$0.07	\$775.60

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07/08/2005	Pacific International Mkt, Inc.	11,160	\$0.07	\$804.70
07/08/2005	Sunterra Produce Traders	8,620	\$0.07	\$603.40
07/09/2005	Adam Bros. Produce Sales, Inc.	42,900	\$0.07	\$3,003.00
07/08/2005	Southeast Processing	19,900	\$0.07	\$1,416.50
07/11/2005	Southeast Processing	15,395	\$0.07	\$1,101.15
07/11/2005	Vaughan Foods, Inc.	39,160	\$0.07	\$2,741.20
07/14/2005	Regional Source Produce	25,946	\$0.07	\$1,839.72
07/16/2005	Pacific International Mkt, Inc.	7,760	\$0.07	\$566.70
07/18/2005	Southeast Processing	16,972	\$0.07	\$1,211.54
07/18/2005	Southeast Processing	16,535	\$0.07	\$1,180.95
07/22/2005	Pacific International Mkt, Inc.	11,140	\$0.07	\$803.30
07/22/2005	Sunterra Produce Traders	10,200	\$0.07	\$714.00
07/23/2005	Southeast Processing	28,050	\$0.07	\$1,987.00
07/25/2005	Del Monte Fresh Produce N.A.	42,200	\$0.07	\$2,977.50
07/26/2005	Del Monte Fresh Produce N.A.	40,560	\$0.07	\$2,862.70
08/01/2005	Del Monte Fresh Produce N.A.	41,930	\$0.07	\$2,958.60
08/02/2005	Southeast Processing	39,515	\$0.07	\$2,789.55
08/12/2005	Sunterra Produce Traders	40,340	\$0.07	\$2,859.30
08/12/2005	Sunterra Produce Traders	41,600	\$0.07	\$2,947.50
08/15/2005	Southeast Processing	7,520	\$0.07	\$549.90
08/15/2005	Del Monte Fresh Produce N.A.	39,520	\$0.07	\$2,793.90
08/18/2005	Regional Source Produce	39,200	\$0.07	\$2,744.00
08/22/2005	Southeast Processing	39,310	\$0.07	\$2,775.20
08/24/2005	Sunterra Produce Traders	41,260	\$0.07	\$2,911.70
08/30/2005	Southeast Processing	39,390	\$0.07	\$2,780.80
09/03/2005	Southeast Processing	40,235	\$0.07	\$2,839.95
09/06/2005	Del Monte Fresh Produce N.A.	41,360	\$0.07	\$2,922.70
09/09/2005	Southeast Processing	39,425	\$0.07	\$2,783.25
09/12/2005	Adam Bros. Produce Sales, Inc.	40,160	\$0.07	\$2,811.20
09/13/2005	Vaughan Foods, Inc.	41,107	\$0.07	\$2,877.49
09/20/2005	Southeast Processing	19,630	\$0.07	\$1,374.10
09/21/2005	Regional Source Produce	25,860	\$0.07	\$1,833.70
09/22/2005	Southeast Processing	39,780	\$0.07	\$2,808.10
09/29/2005	Southeast Processing	41,255	\$0.07	\$2,911.35
10/01/2005	Regional Source Produce	40,660	\$0.07	\$2,846.20
10/08/2005	Southeast Processing	40,480	\$0.07	\$2,857.10
10/08/2005	Trigent Marketing, Inc.	41,464	\$0.07	\$2,902.48
10/10/2005	Trigent Marketing, Inc.	42,360	\$0.07	\$2,965.20
10/14/2005	Southeast Processing	18,745	\$0.07	\$1,335.65
10/14/2005	Southeast Processing	23,000	\$0.07	\$1,633.50
10/18/2005	Adam Bros. Produce Sales, Inc.	34,680	\$0.07	\$2,427.60
10/19/2005	Southeast Processing	30,424	\$0.07	\$2,153.18
10/22/2005	Southeast Processing	40,320	\$0.07	\$2,845.10
10/26/2005	Adam Bros. Produce Sales, Inc.	35,680	\$0.07	\$2,502.60
10/26/2005	Southeast Processing	36,715	\$0.07	\$2,593.55

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10/28/2005	Tom Lange Company, Inc.	13,385	\$0.07	\$960.45
11/04/2005	Southeast Processing	40,170	\$0.07	\$2,835.40
11/05/2005	Regional Source Produce	40,380	\$0.07	\$2,826.60
11/07/2005	Sunterra Produce Traders	40,080	\$0.07	\$2,829.10
11/10/2005	Southeast Processing	40,650	\$0.07	\$2,869.00
11/18/2005	Southeast Processing	40,410	\$0.07	\$2,852.20
11/19/2005	Pacific International Mrk, Inc.	40,400	\$0.07	\$2,851.50
11/21/2005	Southeast Processing	38,385	\$0.07	\$2,710.45
11/21/2005	Sandidge Company	40,600	\$0.07	\$2,865.50
11/26/2005	Trigent Marketing, Inc.	38,880	\$0.07	\$2,721.60
11/29/2005	Southeast Processing	39,375	\$0.07	\$2,779.75
	Totals	2,501,401		\$176,509.27

6. Between May 16, 2005 and November 30, 2005, Complainant invoiced Respondent for the difference between the sales prices listed in Finding of Fact 5, and the contract price, as set forth below:

<u>Invoice</u>	<u>Date</u>	<u>Qty (Pounds)</u>	<u>Sales Price (Per Pound)</u>	<u>Amount</u>
17077	05/16/2005	40,000	\$0.06	\$2,400.00
17371	05/21/2005	80,000	\$0.06	\$4,800.00
17372	05/28/2005	80,000	\$0.06	\$4,800.00
17373	06/04/2005	80,000	\$0.06	\$4,800.00
17374	06/11/2005	80,000	\$0.06	\$4,800.00
17375	06/18/2005	80,000	\$0.06	\$4,800.00
17376	06/25/2005	80,000	\$0.06	\$4,800.00
17377	07/02/2005	80,000	\$0.06	\$4,800.00
17378	07/09/2005	80,000	\$0.06	\$4,800.00
17379	07/16/2005	80,000	\$0.06	\$4,800.00
17380	07/23/2005	80,000	\$0.06	\$4,800.00
17529	07/30/2005	80,000	\$0.06	\$4,800.00
17530	08/06/2005	80,000	\$0.06	\$4,800.00
17531	08/13/2005	80,000	\$0.06	\$4,800.00
17532	08/20/2005	80,000	\$0.06	\$4,800.00
17915	08/27/2005	80,000	\$0.06	\$4,800.00
17916	09/03/2005	79,625	\$0.06	\$4,777.50
17917	09/10/2005	80,000	\$0.06	\$4,800.00
17918	09/17/2005	80,000	\$0.06	\$4,800.00
17919	09/24/2005	80,000	\$0.06	\$4,800.00
17920	10/01/2005	80,000	\$0.06	\$4,800.00
17921	10/08/2005	80,000	\$0.06	\$4,800.00
17922	10/15/2005	80,000	\$0.06	\$4,800.00
17923	10/22/2005	80,000	\$0.06	\$4,800.00

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17924	10/29/2005	80,000	\$0.06	\$4,800.00
17925	11/05/2005	80,000	\$0.06	\$4,800.00
17926	11/12/2005	80,000	\$0.06	\$4,800.00
17927	11/19/2005	80,000	\$0.06	\$4,800.00
17928	11/26/2005	80,000	\$0.06	\$4,800.00
17929	11/30/2005	80,000	\$0.06	\$4,800.00

Total Amount\$141,577.50

7. The informal complaint was filed on December 12, 2005, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover damages allegedly incurred as a result of Respondent's failure to purchase multiple loads of bin lettuce in accordance with the "Bulk Lettuce Agreement" set forth in Finding of Fact 3. Complainant states Respondent accepted lettuce loads through the middle of May 2005, at which time it unilaterally decided to terminate the contract. Complainant states it then sold the lettuce on the open market and invoiced Respondent for two loads per week (80,000 pounds), at \$0.06 per pound, which amount represents the contract price of \$0.13 per pound less the market price received of \$0.07 per pound.¹ The invoices Complainant issued in this manner total \$141,577.50, which amount Complainant seeks to recover from Respondent through this proceeding.²

In response to Complainant's allegations, Respondent submitted a sworn Answer and Counterclaim wherein it asserts that Complainant failed to fulfill its obligations under the contract by failing to deliver two loads of lettuce per week. Respondent states specifically that in January of 2005, Complainant advised that it could only ship one load of lettuce per week. Respondent states further that in March of 2005, Complainant advised that it would not be able to deliver any lettuce under the contract. Respondent also asserts that the lettuce supplied by

¹ See Formal Complaint, paragraph 4.

² See Formal Complaint, Exhibit 4.

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Complainant did not meet the quality requirements of the contract.³

Complainant, in its Opening Statement and Answer to Counterclaim, denies informing Respondent in January of 2005 that it could only supply one load of lettuce per week. Complainant asserts, to the contrary, that it supplied Respondent with seven loads of lettuce that month. In addition, Complainant asserts that Respondent failed to order any lettuce during the last week of January, 2005. Complainant also denies informing Respondent in March of 2005 that it could not supply any lettuce. Complainant states that during the first week of March, Respondent failed to order any lettuce. During the second week of March, Complainant states Respondent ordered, then cancelled, one load. During the third week of March, Complainant states its crops suffered adverse weather conditions which prevented it from supplying any lettuce. During the fourth week of March, Complainant states it had insufficient supply due to the weather conditions, but that it was able to prorate its supplies and provide Respondent with one load. During the last week of March, Complainant states it supplied Respondent with two loads. Finally, with respect to Respondent's allegation that Complainant supplied poor quality lettuce, Complainant states a few loads had quality problems that were based on transportation issues, and that it resolved these disputes with Respondent at the time they occurred.⁴

In its sworn Answering Statement, Respondent asserts that on December 27, 2004, Complainant supplied Respondent with a load of lettuce (Complainant's file 16450 and Respondent's P.O. 1928), and that on the same day, the load was inspected and deemed a loss of \$4,890.22.⁵ On January 23, 2005, Respondent states Complainant supplied another load of lettuce (Complainant's file 16582 and Respondent's P.O. 2016), which was inspected on January 24, 2005, and deemed a loss of \$2,235.78.⁶ After delivering the January 23, 2005 load, Respondent states Complainant advised that it would only be able to ship one load per week instead of two as required under the contract.

³ See Answer and Counterclaim, paragraphs 17 through 20.

⁴ See Opening Statement, paragraphs 9 and 10.

⁵ See Answering Statement, paragraph 6.

⁶ See Answering Statement, paragraph 7.

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According to Respondent, Complainant advised that it would not be able to fulfill its obligations under the contract because of quality issues in the region.⁷ In February of 2005, Respondent states Complainant delivered only five loads of lettuce, which did not fulfill its obligations under the contract.⁸ On February 28, 2005, Respondent states Complainant supplied a load of lettuce (Complainant's file 16725 and Respondent's P.O. 3050), which was inspected on March 1, 2005, and deemed a total loss.⁹ After delivering the February 28, 2005 load, Respondent states Complainant advised that it would not be able to deliver any lettuce until it began harvesting a new section.¹⁰ Respondent states Complainant only shipped two loads during the entire month of March 2005, which did not fulfill its obligations under the contract. During this time, Respondent states it was forced to buy product from other sources, at increased costs, due to Complainant being unable to supply lettuce that complied with the quality requirements of the contract.¹¹

Complainant, in its Statement in Reply, points out first that the December 27, 2005 load of lettuce referenced by Respondent is a load of romaine that is not part of the contract at issue herein.¹² With respect to the lettuce shipped under purchase order number 2016 and invoice number 16582, Complainant states a partial rejection of the load was made due to transportation issues, and that Respondent was given a credit of \$2,235.78, after which it paid the remaining invoice amount of \$3,143.72.¹³ Complainant denies advising Respondent at that point that it could only ship one load of lettuce per week. Complainant states it was Respondent who breached the contract by only ordering one load per week during the month of February 2005. Complainant states it was willing and able to ship two loads per week. As evidence in support of this contention, Complainant submitted copies of invoices showing that it shipped five truckloads of bulk bin lettuce to other customers during

⁷ See Answering Statement, paragraph 8.

⁸ See Answering Statement, paragraph 9.

⁹ See Answering Statement, paragraph 10.

¹⁰ See Answering Statement, paragraph 11.

¹¹ See Answering Statement, paragraph 12.

¹² See Statement in Reply, paragraph 2.

¹³ See Statement in Reply, paragraph 3.

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the last week of January 2005 and the month of February 2005.¹⁴ Complainant does, however, admit that above normal temperatures in the desert (Yuma, Arizona), and below normal temperatures in Bakersfield, California, caused a shortage when transitioning from the desert to Bakersfield in March of 2005; however, Complainant states the shortage only affected its customers during the third week of that month. Other than that one week, Complainant states it was fully capable of supplying two loads of bulk bin lettuce during the entire term of the contract.¹⁵ As evidence in support of this contention, Complainant submitted copies of invoices showing that it sold four truckloads of bulk bin lettuce to other customers during the first two weeks of March 2005.¹⁶ Finally, while Complainant admits that a claim was made on the lettuce shipped under invoice number 16725, Complainant states the loss was due to transportation issues and was not caused by any act of Complainant or the shipper. Complainant adds that Respondent was given full credit for its losses.¹⁷

Upon review, we note first that Respondent, in its Brief, repeatedly asserts that the contract did not obligate Respondent to order two loads of lettuce per week. This assertion is patently false. Section 1 of the contract states that Complainant shall supply Respondent with two loads of first cut bulk bin lettuce per week at a price of \$0.13 per pound. Section 4 of the contract states that Respondent “*shall purchase all lettuce supplied pursuant to Section 1 above at the prices set forth in Section 1 regardless of the market price or market conditions, provided all quality requirements are met.*” (Emphasis supplied). The same section also states that if Respondent does not purchase “amounts” in any given week, Respondent shall pay Complainant for all growing costs. Complainant has not, however, submitted any evidence of its growing costs.¹⁸ Instead, Complainant has elected to pursue damages as set forth in U.C.C. §§ 2-703 and 2-706, which provide that where the

¹⁴ See Statement in Reply, Exhibit B.

¹⁵ See Statement in Reply, paragraph 4.

¹⁶ See Statement in Reply, Exhibit D.

¹⁷ See Statement in Reply, paragraph 6.

¹⁸ See Formal Complaint, Exhibit 1.

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buyer repudiates, the seller may resell the goods and recover the difference between the contract price and the resale price plus incidental damages, but less any expenses saved in consequence of the breach.

The contract period was twelve months, from November 30, 2004, to November 30, 2005. During this period, Complainant was obligated to supply, and Respondent was obligated to purchase, approximately eight loads of lettuce per month. For the first month the contract was in effect, December 2004, Respondent purchased ten loads of lettuce at the contract price. In January 2005, Respondent purchased seven loads of lettuce at the contract price. In February 2005, Respondent purchased five loads of lettuce at the contract price. In March 2005, Respondent purchased three loads of lettuce at the contract price. In April 2005, Respondent purchased five loads of lettuce at the contract price. For the remainder of the contract period, Respondent did not purchase any loads of bulk bin lettuce from Complainant.

In defense of its failure to purchase the number of loads contracted for, Respondent asserts that it was advised by Complainant in January of 2005 that Complainant could only supply one load of lettuce per week. Respondent further asserts that in March of 2005, Complainant advised that it would not be able to provide any lettuce at all. Complainant vehemently denies this allegation and asserts that it was able to supply two loads of lettuce per week for the entire contract period, with the exception of the third week of March 2005, when it was unable to supply any lettuce, and the fourth week of March 2005, when it was only able to supply one load. Respondent submitted no further evidence to substantiate its contention that Complainant was unable to supply two loads of lettuce per week at any time other than the third and fourth weeks of March 2005.

While the admitted failure on the part of Complainant to supply two loads of lettuce per week during the third and fourth weeks of March 2005 constitutes a breach by Complainant with respect to those particular installments¹⁹, this interruption in supply was brief and is explained by Complainant as resulting from the transfer of production

¹⁹ The circumstances which caused Complainant's failure to supply lettuce during the last two weeks of March 2005 do not constitute an Act of God, as delineated in Section 2 of the contract. Therefore, Complainant was not excused from supplying lettuce during this period and must be considered in breach for its failure to do so.

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from Yuma, Arizona, to Bakersfield, California.²⁰ Under the circumstances, we do not believe that Respondent was given sufficient cause to question Complainant's ability to fulfill the balance of the contract. Moreover, if, in fact, the temporary shortage created such uncertainty on the part of Respondent, Respondent was obligated to provide Complainant with a written demand for adequate assurance of performance before taking any further action.²¹ Respondent has not supplied any evidence showing that it notified Complainant of its concerns when Complainant failed to supply the contracted quantity of lettuce during the month of March 2005, or at any time during the contract period. Accordingly, we find that Respondent has failed to prove by a preponderance of the evidence that it was excused from performance under the contract by repudiation on the part of Complainant.

²⁰ See Statement in Reply, paragraph 4.

²¹ See U.C.C. § 2-609, which states:

§ 2-609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

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Respondent also asserts that the quality of the lettuce supplied by Complainant was not in accordance with the requirements of the contract; however, Respondent submitted evidence of only two shipments that arrived in poor condition, and Complainant has asserted that there were transportation issues that contributed to the poor condition of the lettuce in those shipments. Moreover, even if it was determined that Complainant supplied poor quality lettuce in these two instances, the two shipments in question comprised only a small fraction of the approximately ninety-six loads that Complainant promised to ship during the contract period. Hence, we do not find that a breach with respect to these shipments would be sufficient to establish a breach of the contract as a whole.²²

Since Respondent has failed to prove that Complainant breached the contract as a whole, Respondent was obligated to purchase two loads of bulk bin lettuce per week from Complainant during the contract period. For the period from May 1, 2005, through November 30, 2005, Respondent did not purchase any lettuce from

²² See U.C.C. § 2-612, which states:

§ 2-612. "Installment contract"; Breach.

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments. (Emphasis supplied).

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Complainant.²³ Complainant submitted evidence that during that period it sold the approximate equivalent of two loads of bulk bin lettuce per week to other customers at a price of \$0.07 per pound.²⁴ Since Respondent breached the contract by failing to order any lettuce during this period, Complainant is entitled to recover as damages resulting from this breach the difference between contract price and resale price of the lettuce. The invoices submitted by Complainant show that it sold 2,501,401 pounds of lettuce between May 14, 2005, and November 29, 2005, for invoice prices totaling \$176,509.27.²⁵ According to Complainant, two shipments per week is the equivalent of approximately 80,000 pounds of lettuce.²⁶ At this rate, Complainant would have shipped 2,320,000 pounds of lettuce to Respondent during the twenty-nine week period between May 14, 2005, and November 29, 2005, and collected the contract price of \$0.13 per pound, or a total of \$301,600.00. Complainant has shown that it sold the same lettuce to other customers for only \$0.07 per pound, or a total of \$162,400.00, for the 2,320,000 pounds committed to Respondent under the contract. Complainant is, therefore, entitled to recover as damages resulting from Respondent's breach the difference between this amount and the \$301,600.00 that it would have collected from Respondent, or \$139,200.00.

There remains for our consideration Respondent's Counterclaim. However, before we consider the merits of this claim, there are a number of affirmative defenses raised in Respondent's Answer that we must address. For its first affirmative defense, Respondent asserts that the Complaint is barred by Complainant's failure to fulfill its obligations under the contract. We have already determined, however, that the evidence submitted by Respondent is insufficient to establish that

²³ Although the record shows Respondent also purchased less than two loads of bulk bin lettuce per week during the months of January through April 2005, Complainant's claim is based on Respondent's alleged unilateral termination of the contract in May of 2005, so Complainant's damage claim covers the period from May 2005, until the end of the contract period, November 30, 2005.

²⁴ See Formal Complaint, Exhibits 5 through 34.

²⁵ See Note 23.

²⁶ See Formal Complaint, paragraph 4.

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Complainant breached the contract as a whole. Respondent has, therefore, failed to establish that the Complaint is barred by Complainant's failure to fulfill its obligations under the contract.

For its second affirmative defense, Respondent asserts that the Complaint is barred due to Complainant's failure to provide goods in the quantity specified and of the quality and/or grade of produce contemplated by the parties. With respect to Complainant's alleged failure to deliver the quantity specified in the contract, the only instance where this is established is the third and fourth weeks of March 2005, when Complainant admits it was unable to supply Respondent with two loads of bulk bin lettuce per week. We will consider what, if any, damages are due Respondent for this breach when we consider Respondent's Counterclaim. With respect to the quality of the lettuce delivered by Complainant, Respondent only submitted evidence of two loads that arrived in poor condition, and Complainant has asserted that there were transportation issues with those shipments and that the loads were nevertheless settled to the satisfaction of both parties.

For its third affirmative defense, Respondent asserts that the Complaint is barred due to Complainant's own fraud. Respondent does not, however, explain the nature of the fraud allegedly committed by Complainant. Absent more detail, we conclude that this defense is without merit.

For its fourth and final affirmative defense, Respondent asserts that the Complaint is barred by the doctrines of waiver, laches, accord and satisfaction, and/or payment and release. Respondent does not, however, point us to any evidence in the record showing that Complainant either waived its right to assert this claim, or that it waited an undue amount of time to assert the claim. There is also no evidence in the record indicating that the necessary elements for an accord and satisfaction or payment and release are present.

We now turn to Respondent's Counterclaim, which seeks unspecified damages for Complainant's alleged failure to supply lettuce in accordance with the quantity and quality requirements of the contract. As we already mentioned, Respondent has only submitted evidence of two loads that arrived in poor condition, and Complainant has asserted that there were transportation issues with those shipments and that the loads were nevertheless settled to the satisfaction of both parties. With

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respect to the alleged breach with respect to the quantity of lettuce supplied by Complainant, it is established by Complainant's own admission that it was unable to supply any lettuce during the third week of March 2005, and that it was only able to supply one load of lettuce during the fourth week of that month. For the remainder of the contract period, Respondent did not submit sufficient evidence to establish that Complainant was unable to supply the contract quantity of lettuce. In fact, Complainant submitted evidence that it supplied such lettuce to other customers from May 14, 2005, through November 29, 2005.

For the three loads of lettuce that Complainant admittedly was unable to supply, Respondent is entitled to recover as damages the difference between the cost of cover and the contract price, plus incidental or consequential damages, but less expenses saved in consequence of Complainant's breach. See U.C.C. § 2-712. Respondent did not, however, supply any evidence showing that purchased replacement supplies of lettuce.²⁷ Consequently, Respondent may not recover the measure of damages set forth in U.C.C. § 2-712, and is instead relegated to the measure of damages set forth in U.C.C. § 2-713, *i.e.*, the difference between the market price and the contract price, plus incidental and consequential damages, but less expenses saved in consequence of the Complainant's breach. However, Respondent also did not submit any evidence of the market price at the time of the breach. We have checked relevant U.S.D.A. Market News reports and have been unable to find any f.o.b. price quotes for bulk bin lettuce shipped from either Yuma, Arizona, or Bakersfield, California. Consequently, we are without any evidence with which to establish Respondent's damages resulting from Complainant's failure to supply the three loads of lettuce in question. The Counterclaim should, therefore, be dismissed.

We have already determined that the evidence submitted by Complainant establishes that it incurred damages totaling \$139,200.00

²⁷ While Respondent did submit as Exhibit 10 to its Brief a list of bin lettuce purchases for the period from May 2005 through September 2005, the Brief is not in evidence. Moreover, Respondent did not submit copies of invoices and proof of payment to establish that it actually purchased and paid for the lettuce at the prices listed.

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as a result of Respondent's failure to purchase the contracted quantity of lettuce. Respondent's failure to pay Complainant \$139,200.00 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act 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." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid \$300.00 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.

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Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$139,200.00, with interest thereon at the rate of 4.14 % per annum from January 1, 2006, until paid, plus the amount of \$300.00.

The Counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

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**D M ROTHMAN CORP., INC. v. GOOD LUCK PRODUCE, INC.
PACA Docket No. R-07-073.**

Decision and Order.

Filed November 7, 2007.

Acceptance – Revocation of Damages – Failure to prove commercially reasonable.

Respondent returned a portion of a lot that it had previously purchased and accepted, and sought to prove that Complainant agreed to a contract modification assenting to the return of the commodities. As a result of Respondent's failure to obtain an inspection, failure to revoke its acceptance in a timely manner, and failure to prove its allegations of a prior course of dealings whereby Complainant issued credits for returned merchandise, Respondent failed to prove that it properly revoked its acceptance of the commodities. As a consequence, damages were awarded to Complainant.

Complainant failed to prove that it resold the commodities in a commercially reasonable manner. Damages awarded to Complainant based on the difference between prevailing market price and the original contract price (UCC § 2-708).

Complainant - Pro se.

Respondent - Gentile & Dickler, LLP.

Andrew Furbee - Examiner.

Patrice Harps - Presiding Officer.

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

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 within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$10,574.52 in connection with one truckload of loquats and cucumbers 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 formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the formal Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (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. 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. Complainant filed a Statement in Reply. Neither party submitted a Brief.

Findings of Fact

1. Complainant, D M Rothman Corp., Inc., is a corporation whose post office address is Hunts Point & East Bay Avenue, Row A-106, NYC Terminal Market, Bronx, New York, 10474. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Good Luck Produce, Inc., is a corporation whose post office address is 16-28 Prince Street, Brooklyn, New York, 11201. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about May 25, 2006, Complainant, by written contract, sold to Respondent, 50 cartons of large cucumbers at \$7.00 per carton, and 540 cartons of Spanish loquats at \$33.00 per carton, for a total invoice price of \$18,170.00. (Complainant's Invoice No. 61242).

4. On or about May 30, 2006, Respondent returned 398 cartons of the loquats referenced in Finding of Fact 3 to Complainant's place of business.

5. On June 22, 2006, Complainant's salesman, George Uribe, faxed a letter to Respondent's "Johann." The letter reads, in relevant part:

PER OUR MANY CONVERSATIONS REGARDING THE
PICK-UP OF LOQUATS:

-I HAVE EXHAUSTED ALL OPTIONS IN SELLING THE
REMAINING 140 BXS LEFT IN MY COOLER. PLEASE
COME AND PICK THEM UP FOR I CAN'T SELL THEM.

-I NEED TO CLOSE THIS FILE AND FINALIZE IT.

*-YOU HAVE IGNORED ALL PREVIOUS REQUESTS IN

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HELPING TO SELL THEM.

*-REMEMBER THAT YOU ARE NOT GETTING CREDIT FOR THEM AND YOU WILL OWE THE DIFFERENCE BETWEEN THE ORIGINAL SALE @ \$33 AND WHATEVER IS SALVAGED.

*-IGNORING ME WILL NOT MAKE THIS PROBLEM GO AWAY.

*-NEXT MOVE WILL BE GOING TO PACA FOR I AM NOT PREPARED TO LOSE ALL THIS MONEY.

(signed)

George Uribe

6. On June 26, 2006, Complainant's Mr. Uribe faxed another letter to Respondent's "Johann." The letter reads, in relevant part:

PER YOUR CONVERSATION THIS MORNING WITH MRS. HUNT: YOU ARE NOW SAYING THAT I KNEW AND APPROVED THE RETURN OF 398 COUNTED [sic] BOXES, WHEN YOU KNOW YOURSELF THAT YOU MENTIONED ONLY SOME (20 – 40 BOXES). UPON HEARING OF THE TOTAL AMOUNT OF BOXES YOU HAD LEFT HERE THAT MORNING, I CALLED YOU IMMEDIATELY AND TOLD (you) THAT I WOULD HELP MOVE SOME FRUIT SOUTH (POSSIBLY JESSUP, MARYLAND) BUT THAT I COULDN'T POSSIBLY GIVE YOU CREDIT FOR ALL THOSE BOXES IN THAT TRYING TO RETURN ITEMS IN A LOCAL MARKET IS IMPOSSIBLE AFTER FIVE DAYS. THE RULE IS ONE DAY (24 HOURS).

AFTER AN UNSUCCESSFUL ATTEMPT IN MOVING THEM SOUTHWARD, I CALLED YOU BACK THE FOLLOWING DAY AND TOLD YOU SO. I REQUESTED THAT YOU RETURN AND PICK THEM UP. YOUR REPLY WAS THAT THEY WERE TOO EXPENSIVE, AT WHICH TIME I TOLD YOU THAT YOU SHOULD SELL THEM AT A DISCOUNT, FOR YOUR FIRST LOSS IS ALWAYS YOUR BEST CASE SCENARIO. YOUR REPLY AT THE TIME WAS

ONLY THAT YOU WOULD CALL ME BACK AND THAT YOU WOULD PICK SOME UP. I SAID THAT I WOULD ASSIST YOU IN SELLING SOME AS WELL. THIS SAME CONVERSATION WENT ON FOR HALF A DOZEN TIMES, AND YOU COMPLETELY IGNORED YOUR RESPONSIBILITY TO THIS SITUATION. YOU NOW RECENTLY CUT THE INVOICE FOR THE PRODUCT YOU LEFT HERE, AND CLAIM THAT YOU'VE DONE NOTHING WRONG. I HAVE VERY LITTLE RECOURSE WITH THE SHIPPER BECAUSE OF THE TIME LAPSE IN YOUR ATTEMPTED RETURN FOR CREDIT. I URGE YOU TO CALL ME BACK FOR A POSSIBLE RESOLUTION, OTHERWISE, I WILL BE FORCED TO TAKE THIS MATTER TO PACA.

(signed)
George Uribe

7. A "Statement of Account," issued by Complainant on or about July 11, 2006 reflects sales of 275 cartons of the loquats referenced in Finding of Fact 4 for gross proceeds of \$3,364.00, and no return for the remaining 123 cartons of the commodities. From the gross proceeds, Complainant deducted a handling fee of \$199.00 and an 18% commission, or \$605.52, resulting in net proceeds of \$2,559.48.

8. Respondent has paid Complainant a total of \$5,036.00, representing payment of the agreed upon invoice price of \$7.00 per carton for the 50 cartons of large cucumbers that were a part of the shipment, and the agreed upon invoice price of \$33.00 per carton for 142 cartons of loquats that were not returned to Complainant.

9. An informal complaint was filed on July 20, 2006, which is within nine months from the date that the cause of action accrued.

Conclusions

Complainant brings this action to recover the purchase price of one truckload of loquats and cucumbers (\$18,170.00), less the net proceeds of its resale (\$2,559.48) and Respondent's payment (\$5,036.00), or

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\$10,574.52. As Respondent's remittance represented full payment of the original invoice amount for 50 cartons of cucumbers and 142 cartons of loquats which were a part of the shipment, only the disposition of the balance of the transaction, comprised of 398 cartons of loquats, is in dispute.

In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it cites two defenses. Respondent's first defense asserts that Complainant assented to a contract modification after being informed that the loquats were in poor condition. Specifically, after informing Complainant that the loquats were exhibiting bad color and skin damage, Respondent maintains that Complainant agreed with its assessment of the defects, but requested that it sell as many cartons of the commodities as it could. Respondent maintains that in accordance with the parties' prior course of dealings, Complainant informed Respondent that it would take back any cartons of the loquats that Respondent was unable to sell, and that it instructed Respondent to return any unsold cartons the following Tuesday, May 30, 2006. In accordance with the alleged agreement, Respondent states that it sold 142 cartons of the loquats and returned the balance of the shipment, 398 cartons, to Complainant on May 30, 2006. Respondent maintains that Complainant took back the loquats without protest, and that as a result, the original agreement between the parties was modified. As its second defense, Respondent maintains that based upon a prior course of dealings wherein Complainant permitted it to return unsold merchandise that was in poor condition, Complainant is estopped from pursuing its claim. Respondent states that Complainant's untimely and fraudulent written objection to its return of the loquats is barred by Complainant's laches.

In addition to its Answer, Respondent submitted as its Answering Statement the sworn Affidavit of Siew Kheng Chu. Ms. Chu confirms that as Respondent's buyer, she ordered the commodities that pertain to this transaction from Complainant's salesman, George Uribe. Ms. Chu states that per a long standing agreement with Mr. Uribe, it was understood that her firm could return to Complainant any product that could not be sold, for any reason, and that in accordance with established custom and Mr. Uribe's instructions, her firm returned 398 cartons of the loquats to Complainant on May 30, 2006.

In response to Ms. Chu's version of events, Complainant submitted the sworn Affidavit of George Uribe (inadvertently titled by Complainant as an Answering Statement) as its Statement in Reply. Mr. Uribe confirms that he sold the loquats to Ms. Chu, and states that the commodities were "brought in exclusively for the Respondent at an agreed upon price."¹ While Mr. Uribe acknowledges discussing the possibility of issuing a credit to Respondent for the return of as many as 40 cartons of the loquats, he denies Ms. Chu's contention that he authorized her firm to return any quantity of product in excess of 40 cartons. Mr. Uribe states that he issued a timely objection to Ms. Chu's return of 398 cartons of the loquats on May 31, 2006, during which he rescinded his credit offer and requested that she immediately pick up the commodities.

Respondent asserts two defenses in support of its failure to pay the full dollar amount reflected on the invoice which pertains to this transaction. Accordingly, the burden is upon Respondent to affirmatively prove, by a preponderance of the evidence, each of its defenses. *Newmiller Farms v. Nicolls*, 36 Agric. Dec. 1230, 1232 (1977); *Bodine Produce Co., Inc. v. Wholesale Produce Supply, Inc., and/or Misty Mountain Trading Co.*, 38 Agric. Dec. 245, 248 (1979).

In terms of Respondent's first defense, wherein it alleges that Complainant assented to a contract modification regarding this transaction, the parties agree that on May 26, 2006, Ms. Chu informed Mr. Uribe that the loquats were exhibiting defects that detrimentally impacted their salability. However, Mr. Uribe states that Ms. Chu informed him that the defects were restricted to between 20 and 40 cartons of the commodities, and on that basis, states that he advised her that "...I could work with her on the 20-40 boxes and (if) she did not want to do that, I would accept a return on them on Monday night, which was the beginning of the next business day..."² On the other hand, Ms. Chu states that Mr. Uribe advised her to sell what she could, and maintains that he agreed to take back any amount of unsold product in accordance with an established custom whereby her firm was allowed

¹ See Statement in Reply, Affidavit of George Uribe, ¶ 3.

² See Statement in Reply, Affidavit of George Uribe, ¶6.

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to return "...any product that I could not sell for any reason."³ Ms. Chu states that she returned 398 cartons of the loquats to Complainant on May 30th, and that they were received without protest. Mr. Uribe denies that he had an ongoing practice of issuing credits to Respondent for produce that it could not sell, and states that he immediately called Ms. Chu to take exception to her firm's return of the loquats.

Aside from the statement contained in Ms. Chu's sworn Affidavit, which is controverted by the verified statement of Mr. Uribe, Respondent did not provide any other evidence that the parties had an established course of dealing that permitted Respondent to return produce that it was unable to sell. Although Respondent maintains that the loquats were defective, and that Complainant "did not want or request an inspection,"⁴ a failure to prove poor arrival so as to show a motive for the seller to modify the contract is a factor to be considered as to whether Respondent's burden of proof has been met. In addition, while Ms. Chu submitted into evidence a copy of an undated receipt for the loquats that allegedly was issued by a representative of Complainant's firm at the time they were returned,⁵ Mr. Uribe states that the document does not conform to his firm's procedure for crediting customers for returned produce, and as such, it does not signify Complainant's agreement to credit Respondent for the loquats that it returned.⁶ We have held that the mere fact that a seller takes back goods following a rejection by the

buyer without disputing the rejection does not, in and of itself, establish that there was a mutual rescission of the original contract of sale. *G & S Produce Company v. L.R.*

Morris Produce Exchange, 31 Agric. Dec. 1167 (1972). As the moving party, the burden was upon Respondent to prove its claim as to the contract modification and prior course of dealings. From the evidence submitted, it cannot be concluded that Respondent has met that burden.

Likewise with Respondent's second defense, wherein it asserts that Complainant is estopped from pursuing its claim based on

³ See Answering Statement, Affidavit of Siew Kheng Chu, ¶ 3.

⁴ See Answer, ¶ 12.

⁵ See Answering Statement, Affidavit of Siew Kheng Chu, Exhibit A.

⁶ See Statement in Reply, Affidavit of George Uribe, ¶ 7 and 12.

Complainant's past conduct in accepting the return of produce that was in poor condition, Respondent failed to provide any substantive proof of such past conduct upon which an estoppel could be based. In its second defense, Respondent also states that Complainant's untimely and fraudulent written objection to Respondent's return of the loquats, an apparent reference to documents issued by Complainant to Respondent which are cited in Findings of Fact 6 and 7, is barred by Complainant's laches. Mr. Uribe, in his sworn Affidavit, states that as soon as he learned that Ms. Chu had returned 398 cartons of the loquats, he verbally advised her that he was unable to issue a credit to her firm, and that she should immediately pick up the fruit from his facility. In her verified testimony, Ms. Chu confirms that Mr. Uribe contacted her on a number of occasions following the date that she returned the loquats to Complainant to request that she take the product back, but that she declined to do so.⁷ The "written objections" to which Respondent refers as being untimely and fraudulent appear to represent synopses drafted by Mr. Uribe of his conversations with Ms. Chu concerning disposition of the loquats. While these documents clearly were issued a number of weeks after the loquats were returned to Complainant by Respondent, based on the sworn testimony provided by both Mr. Uribe and Ms. Chu, it is apparent that Respondent was aware of Complainant's protestations regarding its rejection of the 398 cartons of loquats well before the documents referenced in Findings of Fact 6 and 7 were issued. Accordingly, Respondent's defense that Complainant is guilty of laches on the basis of an untimely and fraudulent objection to Respondent's return of the commodities is without merit.

There can be no doubt that Respondent accepted the loquats, since Respondent's representative signed the delivery ticket for the commodities upon receiving them and Respondent admits selling a portion of the load. Where, as here, a portion of the lot is returned to the seller following a buyer's acceptance, we find that the circumstances warrant reference to Section 2-608 of the Uniform Commercial Code (U.C.C.), entitled "Revocation of Acceptance in Whole or in Part." In

⁷ See Answering Statement, Affidavit of Siew Kheng Chu, ¶ 9.

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applying U.C.C. § 2-608, we have held⁸ that in order for a buyer to establish a proper revocation of acceptance, it must first establish, by a preponderance of the evidence, the following:

(1) That the produce failed to conform to the requirements of the parties' contract;

(2) That its acceptance was based on the reasonable assumption that the nonconformity would be cured and it was not seasonably cured; or that it was induced to accept the produce without discovery of the nonconformity because of the difficulty of such discovery before acceptance or by the seller's assurances; and,

(3) That its revocation of acceptance was made within a reasonable time after it discovered the nonconformity and before any substantial change occurred in the produce which was not caused by its own defects.

Once a proper revocation of acceptance is made, the buyer has the same rights and duties with regard to the goods involved as if they originally were rejected.

The first element that Respondent must prove is that the loquats failed to conform to contract terms and, therefore, that their value to Respondent was substantially impaired. Ms. Chu contends that she informed Mr. Uribe that the loquats were discolored after discovering the defect the morning following receipt of the commodities. Mr. Uribe, while not denying this allegation, states that Ms. Chu informed him that the defect was restricted to 40 cartons of the loquats at most, to which he responded by informing her that he would accept her firm's return of up to that number of cartons of the fruit. Mr. Uribe's offer to accept the return of a portion of the lot notwithstanding, in order to have properly documented the nature and degree of the defects which allegedly were present in the loquats, it was necessary for Respondent to have obtained a neutral inspection, such as might have been obtained from the Fresh Products Branch of USDA's Fruit and Vegetable Programs, showing the exact extent of non-conforming product. *Mutual Vegetable Sales v.*

⁸ See *Highland Grape Juice Co. v. T.W. Garner Food Co.*, 38 Agric. Dec. 1001 (1979); *Cal-Swiss Foods v. San Antonio Spice Co.*, 37 Agric. Dec. 1475 (1978); *Pappageorge Produce Co. v. Dixon Produce Co.*, 33 Agric. Dec. 1160 (1974).

Select Distributors, Inc., 38 Agric. Dec. 1359 (1979). Respondent has not shown that USDA inspection services were unavailable, or that it even made an attempt to obtain such inspection services. In the absence of an inspection by a neutral party at destination, a buyer fails to prove a breach of contract. *Gordon Tantum v. Phillip R. Weller*, 41 Agric. Dec. 2456 (1982), *O.D. Huff, Jr., Inc. v. Pagano & Sons*, 21 Agric. Dec. 385 (1962).

In terms of the second element, Ms. Chu states that she purchased the loquats on the basis of Mr. Uribe's representation that they were in excellent condition,⁹ and indicates that the commodities were picked up by her employee, who did not inspect the fruit.¹⁰ The morning after the loquats were received, Ms. Chu states "...we placed the product outside for our customers and the product turned black, either before it could be sold or shortly after the customers purchased it."¹¹ Based on Ms. Chu's description of the timing and manner in which the defects became visible, they likely would not have been noticeable to her employee the evening he picked up the loquats, even if he had examined or otherwise inspected the fruit. Here again, however, Respondent has provided no evidence in the form of a timely USDA inspection that documents the nature and extent of the defects, or that the loquats contained inherent defects that would only have manifested themselves as the fruit ripened.

Respondent also relies upon an alleged course of dealings whereby Complainant allowed Respondent to return unsold produce for any reason as its basis for assuming that a failure of the loquats to conform to the contract would be cured. However, as previously discussed, Respondent failed to provide any evidence that such a course of dealings existed.

With respect to the third element, revocation of acceptance must be made within a reasonable time after the alleged nonconformity is discovered. The Regulations [7 C.F.R. § 46.2(cc)(2)] define "reasonable time," as it relates to any rejection following an act of acceptance of shipments by truck, as "not to exceed 8 hours after the receiver or a responsible representative is given notice of arrival and the produce is

⁹ See Answering Statement, Affidavit of Siew Kheng Chu, ¶ 3.

¹⁰ See Answering Statement, Affidavit of Siew Kheng Chu, ¶ 4.

¹¹ See Answering Statement, Affidavit of Siew Kheng Chu, ¶ 5.

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made accessible for inspection.” The record indicates that Mr. Uribe made an exception to the 8 hour requirement with respect to as many as 40 cartons of the commodities, granting Respondent until the evening of Monday, May 29th to return them since his firm was closed on the weekend and intervening Memorial Day holiday. Complainant alleges that Respondent ultimately returned the commodities the morning of May 31st, while

Respondent maintains that they were returned at some point on May 30th. Irrespective of whether the loquats were returned on May 30th or 31st, Respondent’s revocation of acceptance of almost 75% of the lot, coming as it did some five to six days after it received the commodities, was not reasonable. This is because loquats, as a perishable commodity, could not be expected to remain forever in the same state of ripeness as that in which they were initially received. Under these circumstances, we find that Respondent has not established by a preponderance of the evidence that it properly revoked its acceptance of the commodities.

U.C.C. § 2-703 provides, in part, that “where the buyer wrongfully rejects or revokes acceptance of goods...the aggrieved seller may...(d) resell and recover damages as hereafter provided (section 2-706).”

U.C.C. § 2-706 provides that “where the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this article (U.C.C. § 2-710), but less expenses saved in consequence of the buyer’s breach.” In this case, Complainant’s accounting, which is dated July 11, 2006, reflects that it sold 275 cartons of the loquats for \$3,364.00, representing an average price of \$12.23 per carton, and that sales ranged from \$3.00 per carton to \$18.00 per carton. Complainant’s accounting is devoid of sales dates, however, and Complainant’s June 22, 2006 letter to Respondent, referenced in Finding of Fact 6, indicates that 140 cartons, or 35% of the lot, remained to be sold as of that date.

Complainant’s accounting indicates that 123 cartons of the loquats ultimately did not achieve any return. Accordingly, the evidence in the record calls into question whether Complainant undertook reasonable efforts to affect a prompt sale of the commodities.

As a consequence, we are relegated to the measure of damages provided in U.C.C. § 2-708, which provides that “the measure of

damages for non-acceptance or repudiation by the buyer is the difference between the market price (see U.C.C. § 2-723 for proof of market price) at the time and place for tender and the unpaid contract price together with any incidental damages provided (in U.C.C. § 2-710), but less expenses saved in consequence of the buyer's breach."

The record reflects that Complainant advised Respondent that it would accept its return of up to 40 cartons of the loquats when it opened for business the evening of May 29, 2006. Had Respondent tendered the commodities as instructed by Complainant, the first full day upon which Complainant could have been expected to achieve sales was May 30, 2006.

The USDA's New York, New York Market News report for May 30, 2006, reflects that Spanish loquats were selling for an average price of \$29.00 per carton. Based on this figure, the 398 cartons of loquats were worth \$11,542.00. The original contract price of the 398 cartons of loquats was \$13,134.00. The difference between these figures, \$1,592.00, represents the damages sustained by Complainant.

U.C.C. § 2-710 provides that "incidental damages to an aggrieved seller include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, or resale of the goods, or otherwise resulting from the breach." Complainant's accounting reflects that a commission of 18% and handling charge of \$.506 per carton were incurred as a result of having to resell the loquats. Complainant's commission is disallowed as an incidental damage, since the method by which damages are calculated under U.C.C. § 2-708 contemplates a profit within the difference of the market news price and the original contract price. Complainant's handling charge, however, is deemed reasonable in view of Respondent's improper revocation of acceptance, and thus will be allowed. By multiplying the handling charge of \$.506 per carton by the 398 cartons that were returned, we determine that Complainant's incidental damages are \$201.39. By adding Complainant's damages of \$1,592.00 to its incidental damages of \$201.39, Complainant's total damages are therefore \$1,793.39.

Respondent's failure to pay Complainant \$1,793.39 is a violation of Section 2 of the Act, for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the

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person or persons injured by a violation of Section 2 of the Act “the full amount of damages sustained in consequence of such violations.” Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid \$300.00 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.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$1,793.39, with interest thereon at the rate of 3.93 % per annum from July 1, 2006, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.
Done at Washington, DC.

William S. Kinzer, d/b/a Kountry Lane Harvest v. 1485
Nathel & Nathel, Inc., and/or Orlando Tomato, Inc.
66 Agric. Dec. 1485

**WILLIAM S. KINZER, d/b/a KOUNTRY LANE HARVEST v.
NATHEL & NATHEL, INC. AND/OR ORLANDO TOMATO, INC.
PACA Docket No. R-07-009.
Order on Reconsideration.
Filed November 15, 2007.**

Broker – Breach of Duty.

Where Respondent A, a broker, was in violation of the Regulations for hiring a second broker without authority from Complainant to do so, Respondent A was held liable to Complainant for the difference between the original contract price of the produce, and the reduced price paid by the buyer, Respondent B, in accordance with a revised confirmation received from the second broker. Complaint dismissed against Respondent B.

Complainant Pro se.
Respondent Andrew Squire.
Leslie Wowk - Examiner
Presiding Officer Patricia Harps
Decision and Order by William G. Jenson, Judicial Officer.

Decision

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 April 18, 2007, in which Respondent Orlando Tomato, Inc. (“Orlando”) was ordered to pay Complainant as reparation \$6,245.75, with interest thereon at the rate of 4.97% per annum from September 1, 2005, until paid, plus the amount of \$300.00. The Complaint against Respondent Nathel & Nathel, Inc. was dismissed. On May 24, 2007, the Department received from Respondent Orlando a Petition for Reconsideration of the Order. Complainant was served with a copy of the Petition and afforded the opportunity to submit a response. By letter dated June 19, 2007, Complainant notified the Department that it did not intend to file a reply.

In the Petition, Respondent Orlando refers first to our conclusion that Orlando employed a second broker, Dino Mainolfi, to sell the tomatoes

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to Respondent Nathel & Nathel, and specifically to our finding that Mr. Mainolfi confirmed a price of \$1.75 per carton with Nathel & Nathel for the tomatoes, which were sold price after sale. In the decision, we concluded that Nathel & Nathel paid Complainant in accordance with the price confirmed by Mr. Mainolfi, and that Nathel & Nathel therefore had no further liability to Complainant. Respondent Orlando requests that we reconsider this conclusion because, Orlando argues, a broker does not have the authority to set a price in a P.A.S. transaction after the sale is consummated, and there is no basis for abrogating this rule because a second broker is involved in the transaction.

Initially, we hasten to point out that our conclusion that Respondent Nathel & Nathel's liability should be limited to the \$1.75 per carton price confirmed by Dino Mainolfi was not in any way influenced by the fact that there were two brokers involved in the transaction. The repercussions of Respondent Orlando bringing a second broker into the transaction without authority from Complainant will be addressed later in our discussion. First, however, we will consider Respondent Orlando's contention that a broker does not have authority to negotiate a price in a P.A.S. transaction, unless it can be shown that the broker was granted explicit authority by its principal to do so.

As Respondent Orlando correctly points out, we have repeatedly held that the authority of a broker generally terminates after the negotiation and formulation of a purchase and sale agreement. *See, e.g., Fowler Packing Co. v. Associated Grocers Co. of St. Louis*, 36 Agric. Dec. 87 (1977); *Maurice L. Saunders v. Greenburg Fruit Co.*, 32 Agric. Dec. 1856 (1973); and *Spector v. Markoff*, 25 Agric. Dec. 397 (1966). In the majority of the cases where this issue has been addressed, all of the essential details of the transaction, including the price of the goods sold, were negotiated at the time of sale, and the buyer's attempts to show that the broker subsequently ratified a modification of the contract, absent proof that the seller granted the broker explicit authority to do so, were summarily rejected. In the instant case, however, the tomatoes were sold price after sale, so one of the essential terms of the contract, the price, was not settled at the time of sale. While the U.C.C. provides that a contract of sale can nevertheless be formed with the price left to be negotiated by the parties at a future date, when the sale in question is negotiated through a broker, the obvious question arises as to whether

the broker's duties are completed upon negotiation of a price after sale agreement, given that the sales price remains to be negotiated. It would seem that if the parties intended to conduct the transaction through a broker, rather than dealing directly with one another, they would anticipate that the price negotiations would be handled by the broker, regardless of whether such negotiations occurred before or after the contract of sale was actually formed. It appears that the Complainant dealt with Respondent Orlando while Respondent Nathel & Nathel dealt with Mr. Mainolfi, to complete the transaction. Respondent Orlando told Complainant the invoice amount to bill Nathel & Nathel, and Mr. Mainolfi provided the invoice, with the price lowered, to Nathel & Nathel for payment. Based on the facts in this case, we conclude that in the absence of evidence showing otherwise, the authority of a broker to negotiate a price in a price after sale transaction is implicit in the terms of sale. In the instant case, Respondent Orlando admittedly enlisted the services of Dino Mainolfi to sell the tomatoes price after sale, and while Orlando has asserted that it did not agree upon a price with Mr. Mainolfi, Orlando has not alleged that Mr. Mainolfi was not authorized to handle the price negotiations. Accordingly, we find that Mr. Mainolfi did not exceed his authority as broker when he conducted such negotiations between Respondents Orlando and Nathel & Nathel. Respondent Orlando also points out that while we acknowledged that Dino Mainolfi may have acted outside his authority as broker by confirming the \$1.75 per carton price, we nevertheless concluded that Orlando was strictly liable because it brought Mr. Mainolfi into the transaction in violation of the Regulations. Respondent Orlando argues that there is no basis cited for such a holding. Moreover, citing *California Artichoke and Vegetable Growers Corporation v. Lowell J. Schy d/b/a Lowell Schy Brokerage*, 47 Agric. Dec. 1324 (1988), Respondent Orlando states the Secretary has always held that a broker is only liable for a violation of the Regulations that causes the loss. In the *California Artichoke* case cited, the buyer repudiated, and while the broker was found to have breached its duties by failing to prepare and issue to the parties a confirmation or memorandum of sale, the evidence nevertheless indicated that both parties believed a valid and binding contract had been formed. The failure of the broker to prepare a

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confirmation of sale was not the cause of, nor was it in any way related to, the buyer's repudiation, so the complaint against the broker was dismissed. In the instant case, however, the second broker, Dino Mainolfi, would not have had the opportunity to confirm a reduced price to Nathel & Nathel had he not been brought into the transaction by the first broker, Orlando. Thus, Respondent Orlando's violation of its duties as broker was the proximate cause of Complainant receiving the amount that it did as payment for the tomatoes from Nathel & Nathel.

On the issue of whether Mr. Mainolfi acted outside the authority granted to him by Orlando by confirming a price of \$1.75 per carton for the tomatoes to Nathel & Nathel, there is no evidence in the file indicating that this was the case. While Orlando's Don Turner has testified that he did not agree on a price for the tomatoes with Mr. Mainolfi, the testimony Mr. Turner has submitted in this proceeding is confused and often contradictory. For example, in his initial response to the informal complaint submitted by Complainant, Mr. Turner stated that "[t]o the best of my knowledge I have not acted as the sale/grower agent for the sale to Nathel & Nathel."¹ Then, in an affidavit submitted as Orlando's Answering Statement, Mr. Turner states that he "sold the load of tomatoes in this case, on behalf of Kountry Lane Harvest, to Nathel & Nathel on a PAS basis."² Such a complete turnabout certainly casts doubt upon the credibility of Mr. Turner's testimony, or at the very least his ability to recall the details of the transaction. We also note that Orlando's original counsel³ submitted correspondence during the Department's informal handling of this claim stating, in pertinent part, as follows:

The evidence reflects that Orlando Tomato successfully negotiated purchase transactions in these situations, and recorded them in a

¹ See Report of Investigation, Exhibit No. 5.

² See Answering Statement, paragraph 1.

³ Respondent Orlando was represented by Devin J. Oddo of Martyn and Associates, Cleveland, Ohio, until the close of the Department's informal handling of this claim, at which time the Department was advised that this firm was no longer representing Orlando. See Report of Investigation, Exhibit No. 14. Respondent Orlando was thereafter represented by Stephen P. McCarron of McCarron and Diess, Attorneys at Law, Washington, D.C.

confirmation of sale. If the produce was sold on a price after sale basis, it was done so with the full knowledge and approval of Kountry Lane. Indeed, Kountry Lane afforded Orlando Tomato much discretion in selling its product based upon the quality. Unfortunately, the produce was of such poor quality that there had to be a substantial reduction to the purchase price or the sale would have fallen through.⁴

The record also includes previous correspondence from counsel stating that “the price for the tomatoes was reduced drastically because of their inferior quality.”⁵ Attached to this correspondence is a copy of the confirmation prepared by Orlando showing the sale of the tomatoes to Nathel & Nathel on a P.A.S. basis, as well as a copy of Complainant’s invoice to Nathel & Nathel with the handwritten notations made by Dino Mainolfi indicating that the price of the tomatoes was reduced to \$1.75 per carton.⁶ Given these statements made by counsel on behalf of Respondent Orlando, we conclude that Orlando was aware and acquiesced to the reduced price of \$1.75 per carton that Dino Mainolfi confirmed to Nathel & Nathel.

Finally, Respondent Orlando states that if we refuse to reconsider the liability of Orlando, then we should reconsider the amount of reparation awarded. In the decision, we held that the reasonable price of the tomatoes was \$6.20 per carton, which is the price that Orlando advised Complainant to bill Nathel & Nathel. We also found that while this was a delivered sale, the \$6.20 per carton price was more comparable with f.o.b. shipping point prices, so we did not afford Respondent Orlando a deduction for freight. Respondent Orlando argues that since it was determined that this was a delivered sale, Orlando should be entitled to recover its \$2,000.00 freight expense.

In response to Orlando’s claim for freight, Complainant asserted that all sales were to be made on an f.o.b. basis.⁷ Complainant apparently assumed, on this basis, that the \$6.20 per carton price that Orlando instructed Complainant to bill Nathel & Nathel for the tomatoes was an

⁴ See Report of Investigation, Exhibit No. 12-1.

⁵ See Report of Investigation, Exhibit No. 9-2.

⁶ See Report of Investigation, Exhibit Nos. 9-4 and 9-5.

⁷ See Answers to Counterclaim of Respondent Orlando Tomato, Inc., paragraph B.

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f.o.b. price. We note, however, that Complainant fails to direct us to any evidence in the record, aside from its own testimony, to substantiate its contention that Orlando agreed to negotiate all sales of the tomatoes on an f.o.b. basis. Moreover, we note that Orlando's confirmation for the shipment, a copy of which was submitted by Complainant with its informal letter of complaint, lists the terms of sale for the transaction in question as "delivered."⁸ There is no indication in the record that Complainant took exception upon receipt of this confirmation to the delivered terms listed thereon. We therefore find that Complainant acquiesced to the sale of the tomatoes in question on a delivered basis.

In the decision, we nevertheless came to the conclusion that the \$6.20 per carton price that Orlando instructed Complainant to bill Nathel & Nathel for the tomatoes was an f.o.b. price because this price was within the price range listed on the August 8, 2005 shipping point price report for similar tomatoes shipped from Asheville, North Carolina, which is the nearest reporting location to the shipping point for the tomatoes in question, Marshall, North Carolina. (See D&O, p.7). Further review of relevant U.S.D.A. Market News reports also discloses, however, that on August 9, 2005, the estimated date of arrival, the New York Terminal Price Report was showing that both large and extra large pink vine-ripe tomatoes originating from Eastern Tennessee were selling for \$5.00 to \$6.00 per carton. As we mentioned, the tomatoes in question were shipped from Marshall, North Carolina, which is in the western part of North Carolina, near the border with Tennessee. We therefore find that the prices reported for tomatoes originating from Eastern Tennessee are relevant to Complainant's tomatoes. Moreover, although the prices listed in the Market News report are for "fair appearance" tomatoes, we find that the overwhelming testimony in the record indicates that the field-pack tomatoes shipped by Complainant were at most "fair appearance" tomatoes. Therefore, given that the New York market for tomatoes similar to those shipped by Complainant was at \$5.00 to \$6.00 per carton, and in light of the evidence showing that this was a delivered sale, we conclude that the preponderance of the evidence indicates that the \$6.20 per carton price quoted by Orlando was a delivered price.

Upon reconsideration of the evidence and for the reasons cited, we

⁸ See Report of Investigation, Exhibit No. 1-7.

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are granting Respondent Orlando's petition to the extent that the April 18, 2007, Decision and Order should be amended to show that the \$6.20 price per carton billed to Nathel & Nathel for the tomatoes, which amounted to a total invoice price of \$8,680.00, was a delivered price from which Orlando is entitled to deduct \$2,000.00 for freight, which leaves a balance due Complainant for the tomatoes of \$6,680.00. Complainant received \$2,434.75 for the tomatoes from Nathel & Nathel. Complainant is, therefore, entitled to recover from Respondent Orlando the difference of \$4,245.75, as damages resulting from Orlando's violation of its duties as broker. See 7 C.F.R. § 46.28(b).

There will be no further stays of this Order based on further petitions for reconsideration to this forum. Respondent's right to appeal to the district court is found in section 7 of the Act.

Order

Within 30 days from the date of this Order, Respondent Orlando Tomato, Inc. shall pay Complainant as reparation \$4,245.75, with interest thereon at the rate of 4.97% per annum from September 1, 2005, until paid, plus the amount of \$300.00.

The Complaint against Respondent Nathel & Nathel, Inc. is dismissed.

Respondent Orlando Tomato Inc.'s Counterclaim is dismissed.
Copies of this Order shall be served upon the parties.
Done at Washington, DC

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**PROGRESO PRODUCE LIMITED 1 LP v. THE FRESH GROUP,
LTD.**

PACA Docket No. R-07-022.

Decision and Order.

Filed December 19, 2007.

Burden of Proof

When Complainant sent Respondent invoices for each transaction showing the sales prices for the limes, and also sent Respondent weekly statements showing the sales prices for limes sold that week, to which Respondent did not object, and Respondent's former salesperson who was principally responsible for handling the contract with Complainant offered testimony that did not support Respondent, Complainant was found to have sustained its burden of proving that the lime prices were to be based on what Complainant elected to charge plus a packing fee, rather than Respondent's claim that the lime prices were to be based on prices set forth in the Market News Service Reports.

Counterclaim

When Respondent's claim that it was impossible for Complainant to have repacked U.S. No. 2 limes to obtain a quantity of U.S. No. 1 limes was rejected and Respondent failed to provide evidence that Complainant actually shipped U.S. No. 2 limes, and Respondent's claim that the contract was breached because the limes were not of a uniform size was also rejected as the contract did not specify that the limes were to be of one particular size but only that they be of uniform shape and that each bag contain 25 pieces of fruit, Respondent's counterclaim and set-off was denied.

Fees and Expenses

As Complainant failed to establish that two attorneys were necessary to be present and represent it at the hearing, Complainant was only awarded the fees and expenses attributed to its lead attorney.

Complainant's claim for fees and expenses related to post-hearing expenses, including the preparation of its brief, were determined not to be in connection with the oral hearing and were denied.

Patricia Rynn for Complainant.

McCarron & Dries for Respondent.

Andrew Stanton - Presiding Officer.

Decision and Order by William G. Jenson Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (hereinafter, "PACA"). A timely Complaint was filed with the Department in which Complainant sought a reparation award against Respondent in the amount of \$77,263.93, which was alleged to be past due and owing from Respondent in connection with Respondent's purchase of 66 orders of limes and other perishable agricultural commodities, in the course of interstate commerce.

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, denying liability and requesting an oral hearing. Respondent also asserted a counterclaim in the amount of \$206,070.53, although Respondent subsequently amended its counterclaim to \$80,956.14.¹ Complainant filed a reply to the counterclaim, in which it denied liability to Respondent and asserted several affirmative defenses thereto.

An oral hearing was held in Milwaukee, Wisconsin on June 12 and 13, 2007. At the hearing, Complainant was represented by Patricia J. Rynn and Elise C. O'Brien of the law firm Rynn and Janowsky, Newport Beach, California. Respondent was represented by Stephen P. McCarron of the law firm McCarron and Diess, Washington, D.C. Andrew Y. Stanton, an attorney with the Office of the General Counsel, Department of Agriculture, acted as the Presiding Officer. Complainant submitted 82 exhibits into evidence (CX 1-82) and Respondent submitted 14 exhibits into evidence (RX 1-14). Additional evidence is contained in the Department's Report of Investigation (hereinafter, "ROI").

At the hearing, three witnesses testified for Complainant and two witnesses testified for Respondent. A transcript of the hearing was prepared (hereinafter, "Tr."). Both parties filed briefs and claims for fees and expenses. In addition, both parties filed objections to the other party's claim for fees and expenses. Respondent filed a reply to

¹See hearing transcript (Tr.) 587.

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Complainant's objection.

Findings of Fact

1. Complainant, Progreso Produce Limited 1, LP, is a partnership, composed of Curtis DeBerry and Progreso Produce Management, LLC, whose address is P.O. Drawer R, Hidalgo, Texas 78557. At the times of the transactions alleged in Respondent's counterclaim, Complainant was licensed under the PACA.

2. Respondent, The Fresh Group Ltd., which is also known as Market Source, is a corporation whose address is 4287 N. Port Washington Road, Glendale, Wisconsin 53212-1031. At the times of the transactions alleged in the Complaint, Respondent was licensed under the PACA.

3. In September 2005, the parties entered into an oral contract in which Complainant would sell limes to Respondent, which Respondent would be selling to Costco, a warehouse club chain. Complainant would ship the limes to Costco's distribution centers, f.o.b., in accordance with instructions from Respondent (Tr. 75, 429-430). The oral contract was entered into between Respondent's employees, Melinda Goodman and Frank Zingale, and Complainant's President, Curtis DeBerry (Tr. 191). Ms. Goodman had developed the Costco business when she was employed by another produce firm, Four Seasons Produce, Inc. (Tr. 635), which also employed Curtis DeBerry (Tr. 185). Ms. Goodman left Four Seasons Produce, Inc., to work for Respondent and brought the Costco business with her (Tr. 248-249, 635). Ms. Goodman left Respondent's employment on January 22, 2006 (Tr. 634). While Ms. Goodman worked for Respondent, the lime arrangement with Complainant and Costco was primarily her responsibility (Tr. 253-254). After Ms. Goodman left Respondent's employ, Mr. Zingale began working on Respondent's arrangement with Complainant and Costco on a day-to-day basis (Tr. 254).

4. There was an understanding between the parties that Complainant would provide limes to Respondent that met Costco's specifications, set forth in a Costco document dated April 2003 (Tr. 34-35, 253) (RX 1). The Costco specifications were as follows, in relevant part:

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Grade: U.S. #1
Varieties: Persian
Countries of Origin: U.S.A., Mexico

Packaging Specifications

Pack Size/Count: 8/5 lb. bags
Pack Cube/Weight: 40 lb. case
Packaging Details: mesh bags

...

Item Details-Visual Specifications

Color: Green
Shape: Uniform

...

Unacceptable Defects

Yellowing, Decay, Skin Breakdown, Shriveled

Item Details - Technical Specifications

Weight: 5 lbs. (net weight)
Size: Maximum of 25 limes per bag

5. The parties agreed that Respondent would pay Complainant a packing charge, which was initially set at \$3.85 per box and was raised to \$4.25 sometime in February 2006 (Tr. 40, 190-192, 291, 553). The parties did not agree that the limes prices would be based on the prevailing market price (RX 10) (Tr. 178-179, 191-192, 636). When Ms. Goodman was employed by Respondent, she had no knowledge of any pricing arrangements between Complainant and Respondent as she was only aware of the pricing arrangements Respondent had with Costco (Tr. 636).

6. Complainant sold limes to Respondent and shipped them to various Costco distributions centers designated by Respondent from September 2005 through the end of April 2006 (Tr. 44, 188). Francis "Bubba" DeBerry, Complainant's director of sales, handled the transactions on behalf of Complainant (Tr. 28, 33). Starting in approximately January 2006, limes began to become more difficult for Complainant to obtain from its regular sources, and Complainant purchased some of the limes it needed from Respondent (RX 10) (Tr. 47, 234, 443, 449-451, 645).

7. In packing the limes for Costco, Complainant preferred to use size

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175 limes (175 limes in a 40 pound box) (Tr. 240). However, sometimes Complainant used limes of many different sizes in the same box (Tr. 137-139) as Complainant did not believe the size of the limes was required to be uniform (Tr. 138). Complainant sometimes used limes that it had purchased as U.S. number 2 but then resorted to separate out the limes that Complainant believed met the U.S. number 1 grade required by Costco (Tr. 137-138)..

8. During the period October 25, 2005, through April 29, 2006, Complainant sold 66 lots of limes and other commodities to Respondent. Complainant shipped the limes to various Costco distribution centers designated by Respondent and shipped the other commodities directly to Respondent (CX 2-67). Complainant prepared invoices and sent them to Respondent, along with the bills of lading (CX 2-67) (Tr. 76, 83). Once per week, on Thursdays, Complainant sent Respondent a statement, reflecting each transaction and the balance owed by Respondent (CX 1) (Tr. 49).

9. Sometime in November 2005, Mr. Zingale became concerned about the prices being charged by Complainant on two or three shipments and complained to Bubba DeBerry, who referred Mr. Zingale to Curtis DeBerry. Mr. Zingale and Curtis DeBerry agreed to adjust the prices to make them more consistent with the market (Tr. 268-269, 654).

10. On April 6, 2006, at 2:09 p.m., Mr. Zingale sent an email to Curtis DeBerry, complaining about the prices of the limes. The email reads as follows:

Curtis, I need some of your help with the invoice[s] I will list here in this email. It is very apparent that these invoices were all billed off of lime size 175 count. It is also apparent that these invoices need some of your attention so they may be billed correctly. Working on the honor system here and me trusting you or your people all I ask is I get billed for the size fruit packed in my bags. Please take some time to research these invoices and find out what size fruit was packed. It is my belief that most if not all of these and possibly more might have been priced incorrectly. Again all I ask is to be billed for the size fruit used to pack. After researching these invoice[s] please contact me so that I may get them entered immediately for payment. Thanks for all of your help here, I know we can find an acceptable meeting

of the minds with these. Below I will list the invoices for you. [invoice numbers omitted] I may have missed a few invoices here. If you find any I may have missed please include them here for me. Again thanks for all of your help here. (RX 3)

Curtis DeBerry responded that same day at 2:24 p.m., as follows:

Frank. These invoices go all the way back to March 4th. The growers have already been paid. We will not make any changes to these invoices. How the lime deal works is you pay 50% before they ship the load and the balance at the end of the week we receive the load. That is what I was trying to explain to you when I was trying to collect \$. I have told Kenny not to fax any outs until Bubba has a chance to figure the packout so this will slow down the paperwork getting to you but it will have your price on them. But again we will not change any back invoices as we have paid the growers. Call me when you have time on my cell. (RX 3)

11. Respondent sent Complainant a check dated April 27, 2006, in the amount of \$190,893.12 covering 30 transactions that took place from January 2006 through March 2006. The amount of the check was approximately \$32,000.00 less than Complainant's invoice prices (CX 3). On April 29, 2006, Complainant sent Respondent a memorandum objecting to Respondent's April 27, 2006, check (RX 4, page 1).

12. In May 2006, Respondent sent Complainant a check in the amount of \$152,248.50, covering 26 transactions that occurred in March and April 2006. The amount of the check was approximately \$21,000.00 less than Complainant's invoice prices (CX 71, RX 4, page 2). On May 16, 2006, Complainant sent Respondent a memorandum objecting to Respondent's check (Id.).

13. In July 2006, Respondent sent Complainant a check in the amount of \$40,086.25 covering eight transactions that took place in April 2006. The amount of the check was approximately \$9,276.05 less than Complainant's invoice prices (CX 72). On July 5, 2006, Complainant sent Respondent a memorandum objecting to Respondent's check (Id.).

14. As of August 1, 2006, Respondent had paid less than the invoice price on 66 transactions, shipped from October 25, 2005, through April 29, 2006, for a total of \$77,263.93 (CX 1).

15. Complainant issued invoice number 5048, dated October 12, 2005

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(RX 8, 50846, p. 3), which indicates that Complainant sold Respondent 322 cartons of limes, for which Complainant charged Respondent \$12.90 per carton plus \$3.85 per carton for packing, plus 15 pallets at \$6.50 per pallet, or \$97.50, for a total of \$5,498.70. At some point the order was changed to 600 cartons (RX 8, 50846, p. 1) (Tr. 68). In order to fill the order, Complainant purchased an additional 324 cartons of limes from Respondent, which Complainant repacked into 278 cartons of U.S. No. 1 limes (Tr. 71). The parties agreed that Respondent would not charge Complainant for the 324 cartons of limes and Complainant would bill Respondent for only the \$3.85 per carton packing fee of \$1,247.40 (Tr. 70-71, 73, 75-76). However, Respondent sent an invoice to Complainant for \$2,592.00 for the 324 cartons of limes, which Complainant paid (CX 2, pp. 8-11). Melinda Goodman handled this file on behalf of Respondent (Tr. 298)

16. A bill of lading was issued by Complainant when it loaded the truck that was to transport the limes in Complainant's invoice number 5048 to a Costco distribution center in Seattle, Washington (CX 2, p. 6). The bill of lading states, under "Quantity Shipped" a handwritten notation of "600-278=322". The bill of lading also includes, under "Description" the following handwritten notations: "8/5 # Limes 322 @ 12.90 15 cheps @ 6.50 13 324 @ 3.85 repacking 278 packout 12 & 14."

17. Complainant sent a corrected invoice number 5048 to Respondent, dated October 12, 2005, which reflected the sale of 322 cartons of limes, for which Complainant charged Respondent \$12.90 per carton plus \$3.85 per carton for packing, plus 15 pallets at \$6.50 per pallet or \$97.50, and a repacking fee of \$3.85 per carton for 324 cartons of limes, for a total of a \$8,090.70 (CX 2, p. 4) (Tr. 76-77).

18. Respondent paid \$4,251.30 for Complainant's invoice number 5048 on November 4, 2005 (CX 1, p. 1). Respondent's payment was \$3,839.40 less than Complainant's corrected invoice price.

19. Complainant issued invoice number 6443, dated January 13, 2006 (CX 3, pp. 12-13), which indicates that Complainant sold Respondent 160 cartons of limes at Complainant's invoice price of \$26.50 per carton plus four pallets at \$5.00 per pallet, for a total of \$4,260.00. Complainant shipped the 160 cartons of limes in invoice number 6443 on January 13, 2006, to Costco at its Morris, Illinois distribution center (RX 8, 50976, p. 3). The bill of lading indicates that the Costco

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purchase order was 2680104128 (RX 8, 50976, p. 3). On January 17, 2006, Respondent's employee, Ms. Goodman, received an email from Costco complaining about the cartons: "PO#2680104128-Item #81393-Limes; the boxes were kind of damp and soggy, its like they loaded the pallets in the rain; we took the item in but they were extremely difficult to clamp." Costco also included photographs of the damaged cartons (RX 8, 50976, pp 4-5). There is no evidence indicating that Respondent ever gave a credit to Costco for the damaged cartons (Tr. 451-452).

20. Respondent paid \$3,195.20 for Complainant's invoice number 6443 on May 1, 2006 (CX 3, p. 13). Respondent's payment was \$1,064.80 less than Complainant's invoice price.

21. Complainant issue invoice number 6832, dated January 24, 2006 (CX 4, p. 15), which indicates that Complainant sold Respondent 100 bags of carrots and 132 cartons of honeydew melons for a total of \$1,234.00. The transaction was not part of the Costco deal (Tr. 86).

22. Respondent's copy of Complainant's invoice contains handwritten notations which indicate that Respondent changed the price of the carrots from \$4.75 per bag to \$.65 per bag. It also contains the notation "OK per Bubba/FZ" (RX 8, 51028, p 5). These notations were written by Mr. Zingale (Tr. 306).

23. The carrots and honeydew melons were shipped to Respondent on January 24, 2006 (RX 8, 51028, p. 5). A Department of Agriculture inspection was obtained on January 30, 2006, of 100 bags of carrots, located in the cooler, at the place of business of A.J. Wholesale, Sheboygan, Wisconsin. Sheboygan is approximately 50 miles from Milwaukee and 1,600 miles from Hidalgo, Texas. The inspection certificate (RX 8, 51028, p. 3) reads as follows, in relevant part:

Temp: 43E to 49E F.

Number of Containers: 100 sack(s)

Markings: Brand: D/O Markings: Progreso Produce
Hidalgo Texas Produce of Mexico Net Weight 50 lbs.

...

Damage 12

Ser. Dam. 2

...

Offsize/Defects Quality defects (10 to 14%) (sunburn, mechanical damage, not fairly well formed)

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...

Damage 3
Ser. Dam. 1

...

Offsize/Defects Fresh cracks (2 to 4%)

...

Damage 3
Ser. Dam. 3

...

Offsize/Defects Soft rot (0 to 6%)

...

Damage 18
Ser. Dam. 6

Offsize/Defects Checksum

Grade: Fails to grade U.S. No. 1 Jumbo account quality.

24. Respondent paid \$824.00 for Complainant's invoice number 6832 on March 24, 2006 (CX 1, p. 1) (Tr. 87). Respondent's payment was \$410.00 less than Complainant's invoice price.

25. Complainant issued invoice number 7175, dated February 9, 2006 (CX 5, p. 17), which indicates that Complainant sold Respondent 120 cartons of limes at Complainant's invoice price of \$47.75 per carton plus three pallets at \$5.00 per pallet, for a total of \$5,745.00. Complainant shipped the 120 cartons of limes on February 9, 2006, to Costco's Morris, Illinois, distribution center (CX 5, p. 19). Respondent's lotting jacket, an internal document maintained by Respondent, contains a handwritten notation "told Bubba we gave credit to Costco 2/14/06" (RX 8, 51061, p. 1). This notation was written by Mr. Zingale (Tr. 310-311). There was no federal inspection taken of this load.

26. Respondent paid \$4,231.92 for Complainant's invoice number 7175 on May 1, 2006 (CX 1, p. 1; CX 5, p. 18). Respondent's payment was \$1,513.08 less than Complainant's invoice price.

27. Complainant issued invoice numbers 7511 (CX 8, p. 27) and 7602 (CX 9, p. 30), both dated March 4, 2006, Complainant's invoice number 7511 involved 80 cartons of limes at a price of \$52.35 per carton plus two pallets at \$5.00 per pallet, for a total of \$4,198.00, and invoice number 7602 involved 80 cartons of limes at a price of \$50.35 per carton

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plus two pallets at \$5.00 per pallet, for a total of \$4,038.00, for a combined invoice price of \$8,236.00.

28. Complainant shipped the limes to Costco's Dallas, Texas, distribution center on March 8, 2006 (RX 8, 51111, pp. 1-5). The record contains no evidence of any federal inspections taken on these loads.

29. Respondent made a combined payment of \$7,740.00 for Complainant's invoice numbers 7511 and 7602, on May 12, 2006 (CX 1, p. 1; CX 8, p. 28). Respondent's payment was \$496.00 less than Complainant's invoice prices.

30. Complainant issued invoice numbers 7992 (CX 30, p. 111) and 7991 (CX 33, p. 125), dated March 24, 2006, and March 28, 2006, respectively. Number 7992 involved 120 cartons of limes at a price of \$40.75 per carton plus three pallets at \$6.00 per pallet, for a total of \$4,908.00. Number 7991 involved 440 cartons of limes at a price of \$44.00 per carton plus 11 pallets at \$6.00 per pallet, for a total of \$19,426.00.

31. Complainant shipped the 120 cartons of limes in Complainant's invoice number 7992 to Costco's Tolleson, Arizona, distribution center on March 24, 2006, where they were rejected because of an absence of a packing date and small size (RX 8, 51162, pp. 2-3) (Tr. 343-344).

32. Complainant shipped the 440 cartons of limes in Complainant's invoice number 7991 to Costco's Tracy, California, distribution center on March 28, 2006 (RX 8, 51161, p. 4). However, Costco increased the order to 560 (Tr. 350). To fill this order, Complainant sent the 120 cartons that had been rejected at Costco's Tolleson, Arizona, distribution center (Tr. 345-347). The combined order was received and accepted by Costco, though only 559 cartons were actually received (RX 8, 51161, p. 3 (Tr. 490)). Respondent was paid for these limes by Costco (Tr. 491). There is no evidence that Costco had any complaints about the 559 cartons of limes.

33. Respondent paid \$17,584.00 for Complainant's invoice number 7991 on May 12, 2006 (CX 1, p. 2; CX 33, p. 126). Respondent made no payment for Complainant's invoice number 7992 but took a credit of \$780.00 (CX 1, p. 2) (Tr. 200). Respondent's payment was \$7,530.00 less than the combined invoice prices of Complainant's invoice numbers 7992 and 7991 (based on 560 cartons of limes) plus the credit taken by Respondent.

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34. Complainant issued invoice number 7993, dated March 28, 2006 (CX 34, p. 130), indicating that Complainant sold Respondent 200 cartons of limes at Complainant's invoice price of \$40.75 per carton plus five pallets at \$6.00 per pallet, for a total of \$8,180.00. Complainant shipped the 200 cartons of limes on March 28, 2006, to Costco's Tolleson, Arizona, distribution center (RX 9, 51163, p. 3).

35. Respondent paid \$6,280.00 for Complainant's invoice number 7993 on July 5, 2006 (CX 1, p. 2). Respondent's payment was \$1,900.00 less than Complainant's invoice price.

36. Regarding Complainant's invoice number 8332, dated March 29, 2006 (CX 36, p. 139), the transaction involved 400 bags of carrots at \$5.00 per bag and 100 cartons of onions at \$10.00 per carton, for a total of \$3,000.00. The transaction was not part of the Costco deal.

37. Respondent offset the \$3,000.00 it owned on Complainant's invoice number 8332 from \$3,000.00 that Complainant owed for 150 cartons of limes at \$20.00 per carton that Complainant had purchased from Respondent on February 10, 2006 (RX 8, 51190, p. 4) (Tr. 359-360). These 150 cartons of limes had originally been purchased by Respondent from Coast Tropical on February 10, 2006 (RX 8, 51190, pp. 7-10) (Tr. 359-360). Respondent's employee, Mr. Zingale, prepared a lotting jacket for the purchase from Coast Tropical which indicates that the 150 cartons of limes were sold to Complainant (RX 8, 51190, p. 7) (Tr. 359). Complainant's receiving records show that Complainant received 150 cartons of limes on February 10, 2006 (RX 6, p. 10).

38. Complainant issued invoice number 8271, dated April 1, 2006 (CX 37, p. 141), indicating that Complainant sold Respondent 450 cartons of limes at Complainant's invoice price of \$28.50 per carton plus ten pallets at \$6.00 per pallet, for a total of \$12,885.00. Complainant shipped the 450 cartons of limes on April 1, 2006, to Costco's Tracy, California distribution center (RX 8, 51174, p. 3).

39. Respondent paid \$10,412.50 for Complainant's invoice number 8271 on July 5, 2006 (CX 1, p. 2). Respondent's payment was \$2,472.50 less than Complainant's invoice price.

40. Complainant filed a formal complaint on August 16, 2006, which was within nine months from when the alleged causes of action herein accrued. Complainant also paid the required handling fee of \$300.00 along with the submission of its formal Complaint.

41. Respondent filed an answer, counterclaim and request for oral hearing on October 6, 2006. The counterclaim was based on transactions alleged in the complaint as well as additional transactions not alleged in the complaint. The counterclaim was filed within nine months from when the causes of action for most of these additional transactions accrued, but was filed in excess of nine months from when the causes of action for some of these additional transactions accrued.

Conclusions

Complainant claims that Respondent is liable for \$77,263.93 which is alleged to be past due and owing in connection with Respondent's purchase of 66 orders of limes and other perishable agricultural commodities, in the course of interstate commerce, from September 2005 through April 2006. Respondent denies liability and has filed a counterclaim, which was originally \$206,070.53, but was amended at the hearing to \$80,956.14 (Tr. at 587). In Respondent's counterclaim, it alleges that it was overcharged by Complainant on numerous transactions from December 2005 through April 2006 because the grade and size of the limes shipped by Complainant did not comply with the contract terms agreed to by the parties.

Respondent does not deny that it purchased the commodities set forth in the Complaint, or that it has failed to pay Complainant the amount claimed, \$77,263.93, for these transactions, but raises two defenses to liability. One defense is that many of Complainant's invoice prices exceeded the average f.o.b. prices for Mexican limes set forth in the Market News Service Reports on the dates of shipment, and Respondent claims the contract required the invoice prices to equal the average of the market prices evidenced by the Market News Service Reports (Respondent's Brief, p. 7). The other defense is that, on certain transactions, Respondent was entitled to take deductions from Complainant's invoice prices for reasons other than the failure of the invoice prices to equal the average of the market prices in the Market News Service Reports (Respondent's Brief, pp. 16-21).

The Pricing Issue

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Respondent's first defense is that the contract between parties included the provision that Complainant's invoice price would be the average f.o.b. prices for Mexican limes set forth in the Market News Service Reports on the dates of shipment (Respondent's Brief, p. 7). Complainant disputes this, claiming that, other than the packing charge, the parties did not agree to any particular pricing term (Complainant's Brief, pp. 5-6). 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. *Vernon C. Justice v. Eastern Potato Dealers of Maine, Inc.*, 30 Agric. Dec. 1352 (1971); *Harland W. Chidsey Farms v. Bert Guerin*, 27 Agric. Dec. 384 (1968).

The contractual relationship between the parties began in September 2005, and provided that Complainant would sell limes to Respondent, which Respondent would sell to Costco, a warehouse club chain. Complainant would ship the limes to Costco's distribution centers on an f.o.b. basis, in accordance with instructions provided by Respondent (Tr. 75, 429-430). An oral contract was entered into between Respondent's employees, Melinda Goodman and Frank Zingale, and Complainant's President, Curtis DeBerry (Tr. 191). Ms. Goodman had developed the Costco business when she was employed by another produce firm, Four Seasons Produce, Inc. (Tr. 635), which at that time also employed Curtis DeBerry (Tr. 185). Ms. Goodman left Four Seasons Produce for Respondent and brought the Costco business with her (Tr. 248-249, 635). When Ms. Goodman moved to Respondent, the lime arrangement with Complainant was primarily her responsibility (Tr. 253-254). Ms. Goodman left Respondent's employment on January 22, 2006 (Tr. 634). After Ms. Goodman left Respondent's employment, Mr. Zingale began working on Respondent's arrangement with Complainant and Costco on a day-to-day basis (Tr. 254).

The contract required Complainant to provide limes that met Costco's specifications, as set forth in a Costco document dated April 2003 (Tr. 34-35, 253) (RX1). Respondent agreed to pay Complainant a packing charge, which was initially set at \$3.85 per box and was raised to \$4.25 sometime in February 2006 (Tr. 40, 190-192, 291, 553). During the period October 25, 2005, through April 29, 2006, Complainant sold 66 lots of limes and other commodities to Respondent.

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Complainant shipped the limes to various Costco distribution centers designated by Respondent (CX 2-67). Complainant prepared invoices and sent them to Respondent, along with the bills of lading (CX 2-67) (Tr. 76, 83). Once per week, on Thursdays, Complainant sent Respondent a statement, reflecting each transaction and the balance owed by Respondent (CX 1) (Tr. 49).

Complainant's President, Curtis DeBerry, testified that there was no agreement with Respondent that the lime prices would be based on the average market prices reported by the Market News Service (191-192). Complainant's director of marketing, Bubba DeBerry, testified that he never had any discussion with anyone from Respondent regarding basing prices on Market News Service Reports price quotations (Tr. 178-179). Respondent's employee, Mr. Zingale, testified that his understanding was that the prices were supposed to be based on the average Market News Service Reports price quotations, but stated that this understanding came not from any direct knowledge but from what he was told by Ms. Goodman (Tr. 267):

A Well, going back to the conception of the deal and the correspondence that was given to me it was supposed to be at market price or below it. And Melinda was always running numbers off the USDA market news. She had that website on her computer.

And that's the deal that was sold to me by Melinda.

However, Ms. Goodman, who testified at the hearing, did not support Mr. Zingale's claim, as Ms. Goodman stated that she had no knowledge of any pricing arrangements between Respondent and Complainant (Tr. 636):

Q Were you aware of any pricing arrangements between Market Source and Progreso?

A No. The only pricing arrangements I was aware of was with Costco.

Respondent argues that the parties' agreement to base Complainant's prices on the average Market News Service quotations is shown by an incident in November 2005, where Mr. Zingale became concerned about the prices being charged by Complainant on two or three shipments and

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complained to Bubba DeBerry, who referred Mr. Zingale to Curtis DeBerry (Respondent's Brief, p. 9). Mr. Zingale testified that Curtis DeBerry agreed to adjust the prices to make them more consistent with the market (Tr. 268-269). Although Complainant never denied that Curtis DeBerry agreed to adjust prices on two or three transactions, this does not prove that the parties agreed that the pricing for all loads was to be based on Market News Service Reports price quotations.

Respondent points to Mr. Zingale's testimony that in February 2006 he had conversations with Bubba DeBerry and Curtis DeBerry about the lime prices starting in February 2006 (Respondent's Brief, p. 11) (Tr. 273-275), but Mr. Zingale did not specifically state that these conversations concerned the failure of the invoice prices to correspond to Market News Service quotes:

A Sure, my, my questions started to come up beginning of February I start seeing these invoices come across. I'm looking at the pricing. I make a couple phones with Bubba. I make a couple phone calls with Curtis. We're discussing, you know, we're discussing that it's not the way it was, it's, it's not the deal that was presented to me in the beginning.

Respondent claims Mr. Zingale notified Complainant of this pricing issue in an April 6, 2006, email to Curtis DeBerry (RX 3) (Respondent's Brief, p. 14). However, Mr. Zingale's email message does not complain that the invoice prices failed to conform to the average Market News Service Reports price quotations; Mr. Zingale's email mentions only that the sizes of the limes actually shipped were different than the sizes of the limes referenced in Complainant's invoices, as follows:

Curtis, I need some of your help with the invoice[s] I will list here in this email. It is very apparent that these invoices were all billed off of lime size 175 count. It is also apparent that these invoices need some of your attention so they may be billed correctly. Working on the honor system here and me trusting you or your people all I ask is I get billed for the size fruit packed in my bags. Please take some time to research these invoices and find out what size fruit was packed. It is my belief that most if not all of these and possibly more might have been priced incorrectly. Again all I ask is to be billed for the size fruit used

to pack. After researching these invoice[s] please contact me so that I may get them entered immediately for payment. Thanks for all of your help here, I know we can find an acceptable meeting of the minds with these. Below I will list the invoices for you. [invoice numbers omitted] I may have missed a few invoices here. If you find any I may have missed please include them here for me. Again thanks for all of your help here.

It is concluded that the preponderance of the evidence supports Complainant's claim that it did not agree that its lime prices were to be tied to the average price quotations of the Market News Service Reports. Respondent argues that, since there were no price terms agreed upon by the parties, it is assumed a reasonable price was intended, and that what constitutes a "reasonable price" is determined by consulting the Market News Service Reports price quotations (Respondent's Brief, p. 12). However, the evidence does not support Respondent's claim that there were no price terms in effect. Complainant's prices were clearly set forth in the invoices it regularly sent Respondent (CX 2-67) (Tr. 76, 83) and in its weekly statement (CX 1) (Tr. 49). Despite receiving these documents on a regular basis, Respondent never indicated any objection to the pricing of the limes until it sent Complainant a check dated April 27, 2006, showing deductions for numerous transactions from January 2006 through March 2006. A failure promptly to complain as to the terms set forth in an invoice is considered strong evidence that such terms were correctly stated. *Pemberton Produce, Inc. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 1630 (1983); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311 (1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218 (1960). We conclude that the prices in Complainant's invoices and weekly statements were the prices agreed upon by the parties for the transactions at issue.

The Individual Transactions

We next turn to Respondent's second defense to liability. On several transactions, Respondent asserts that its failure to pay the invoice prices are justified for reasons other than the alleged failure of the invoice prices to equal the average of the Market News Service price quotations

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(Respondent's Brief, pp. 16-21). These transactions concern shipments that were received and accepted by Respondent or its customers. Once these loads were accepted, it became Respondent's burden to prove that the contract requirements were breached upon delivery to the contract destination as well as proving damages resulting from the breach. *Santa Clara Produce, Inc., v. Caruso Produce, Inc.*, 41 Agric. Dec. 2279 (1982); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971).

The first transaction in this category concerns Complainant's invoice number 5048, dated October 12, 2005 (RX 8, 50846, p. 3). Complainant claims it is owed \$3,839.40, the difference between Respondent's payment of \$4,251.30 and Complainant's invoice price of \$8,090.70 (CX 1, p. 1). According to the testimony of Bubba Deberry, this transaction originally involved Respondent's order of 322 cartons of limes for shipment to Costco which, at some point, was increased to 600 cartons (RX 8, 50846, p. 1) (Tr. 68). In order to provide the increased amount of limes, Complainant purchased an additional 324 cartons of limes from Respondent, which Complainant repacked into 278 cartons of U.S. No. 1 limes and loaded onto the truck for shipment to a Costco distribution center in Seattle, Washington (CX 2, p. 6) (Tr. 71). The parties agreed that Respondent would not charge Complainant for the 324 cartons of limes and Complainant would bill Respondent for only the \$3.85 per carton repacking fee of \$1,247.40 (Tr. 70-71, 73, 75-76), but Respondent sent an invoice to Complainant for \$2,592.00 for the 324 cartons of limes, which Complainant paid (CX 2, pp. 8-11) (Tr. 78). Complainant's invoice number 5048 includes \$4,153.80 for the 322 cartons, \$2,592.00 for the 324 cartons for which it erroneously paid, \$97.50 for "cheps" (pallets), and \$1,247.40 for repacking the 324 cartons, for a total of \$8,090.70 (CX 2, p. 4) (Tr. 76-77).

Respondent claims that the bill of lading (CX 2, p. 6), shows that only 322 cartons of limes were shipped to Costco's distribution center in Seattle and that Respondent's liability was limited to these cartons. The bill of lading contains, under "quantity shipped", the handwritten notation "600-278=322". However, the invoice also contains, under "Description" the handwritten notations: "8/5 # Limes 322 @ 12.90 15 cheps @ 6.50 13 324 @ 3.85 repacking 278 packout 12 & 14." While the bill of lading is somewhat ambiguous, it does indicate that two

quantities of limes were shipped, one for 322 cartons and one for 278 cartons. Respondent did not present any evidence that Costco failed to receive the 600 cartons, and Mr. Zingale admitted that he had no personal knowledge about this transaction, as it was handled by Ms. Goodman (Tr. 298). Mr. Zingale said that he was told by Ms. Goodman that this matter had been “cleared up with Bubba” (Tr. 301). Ms. Goodman was present at the hearing, but never testified about invoice number 5048.

It is concluded that a preponderance of the evidence supports Complainant’s version of events, although just barely. Therefore, Respondent is liable for the unpaid invoice price of \$3,839.40 for Complainant’s invoice number 5048.

The next transaction concerns Complainant’s invoice number 6443, dated January 13, 2006 (CX 3, pp. 12-13). Complainant claims it is owed \$1,064.80, the difference between Respondent’s payment of \$3,195.20 and Complainant’s invoice price of \$4,260.00 (CX 1, p. 1). The transaction involved 160 cartons of limes at Complainant’s invoice price of \$26.50 per carton plus four pallets at \$5.00 per pallet, for a total of \$4,260.00. The limes were sold on a delivered basis (Tr. 82). Complainant shipped the 160 cartons of limes on January 13, 2006, to Costco at its Morris, Illinois distribution center (RX 8, 50976, p. 3). This was a transaction that was handled on Respondent’s behalf by Ms. Goodman (Respondent’s Brief, p. 17)

Respondent claims that the cartons were damaged upon delivery to Costco and, therefore, Respondent “took a credit of \$1,064.80 due to the damaged boxes” (Respondent’s Brief, p. 17). Under a delivered contract, as was the case here, the goods are required to meet contract requirements at the time and place specified in the contract for delivery. *Robert Villalobos v. American Banana Co.*, 56 Agric Dec. 1969 (1997). Respondent introduced into evidence a January 17, 2006, email from Costco to Ms. Goodman complaining about the cartons: “the boxes were kind of damp and soggy, its like they loaded the pallets in the rain; we took the item in but they were extremely difficult to clamp.” Costco also included photographs of the damaged cartons (RX 8, 50976, pp 4-5). Respondent did not provide any evidence that it ever gave a credit to Costco for the damaged cartons (Tr. 451-452, 482). While Ms. Goodman did not present any testimony at the hearing about this

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transaction, Respondent introduced into evidence a memorandum Ms. Goodman prepared for Complainant (RX 10), which contains language that appears to relate to this transaction: "During the time that I worked for Market Source we did have a few rejections of some cases of limes where Costco requested adjustments. At that time . . . we shared the pictures that Costco provided and negotiated a settlement with Progreso." Both parties had the opportunity at the hearing to question Ms. Goodman about this transaction but neither did so.

The evidence provided by Respondent indicates that there may have been a problem with some cartons in Complainant's invoice 6443. However, Respondent has not presented any evidence that Costco failed to pay full price for this transaction. In the absence of any proof of damages incurred by Respondent, it is liable for the \$1,064.80 it deducted from Complainant's invoice.

The next transaction concerns Complainant's invoice number 6832, dated January 24, 2006 (CX 4, p. 15). Complainant claims it is owed \$410.00, the difference between Respondent's payment of \$824.00 and the invoice price of \$1,234.00 (CX 1, p. 1) (Tr. 87). This transaction involved Complainant's January 24, 2006, sale and shipment of 100 bags of carrots and 132 cartons of honeydew melons to Respondent on an f.o.b. basis. No grade was specified for either commodity. The transaction was not part of the Costco deal (Tr. 86).

Respondent claims the carrots had condition and quality problems when they arrived at the place of business of Respondent's customer (Respondent's Brief, p. 17). Complainant, as the seller and shipper of the carrots in this f.o.b. transaction, gave the implied warranty of suitable shipping condition, which requires that the commodity, at time of billing, be 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. *Mendelson-Zeller Co., Inc. v. James Ferrera & Sons, Inc.*, 46 Agric. Dec. at 1577; 7 C.F.R. § 46.43(j).

Respondent has submitted a Department of Agriculture inspection certificate, taken on January 30, 2006, at the place of business of A.J. Wholesale, Sheboygan, Wisconsin, Respondent's customer. The certificate covers 100 bags of carrots that were stored in A.J. Wholesale's cooler. Sheboygan is approximately 50 miles from Milwaukee and 1,600 miles from Hidalgo, Texas, the point of shipment.

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The inspection certificate (RX 8, 51028, p. 3) reads as follows, in relevant part:

Temp: 43E to 49E F.

Number of Containers: 100 sack(s)

Markings: Brand: D/O Markings: Progreso [sic] Produce Hidalgo Texas Produce of Mexico Net Weight 50 lbs.

...

Damage 12

Ser. Dam. 2

...

Offsize/Defects Quality defects (10 to 14%) (sunburn, mechanical damage, not fairly well formed)

...

Damage 3

Ser. Dam. 1

...

Offsize/Defects Fresh cracks (2 to 4%)

...

Damage 3

Ser. Dam. 3

...

Offsize/Defects Soft rot (0 to 6%)

...

Damage 18

Ser. Dam. 6

Offsize/Defects Checksum

Grade: Fails to grade U.S. No. 1 Jumbo account quality.

While the inspection found that the carrots failed to grade U.S. No. 1 due to quality problems, this finding is irrelevant, as carrots at issue were not U.S. No. 1 grade. With respect to the inspection's finding of condition defects, they cannot be given any evidentiary weight because the inspection was taken six days after shipment, which is three days later than it should have been if normal transportation conditions had been in effect, thus rendering Complainant's warranty inapplicable. Even if the warranty had applied, the degree of damage resulting from condition defects is insufficient to constitute a breach of warranty with respect to these no-grade carrots.

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Respondent asserts that its deduction for the carrots was approved by Bubba DeBerry in a conversation with Mr. Zingale on approximately January 30, 2006 (Tr. 306-307), which Mr. Zingale noted on Respondent's copy of the invoice (RX 8, 51028, p. 5). Bubba DeBerry testified that he never issued any deductions or credits on this file (Tr. 86-87). It is difficult to believe that Bubba DeBerry would have approved a deduction for the carrots if he had been fully informed of the inspection results, as it is obvious that they do not show any breach by Complainant. Therefore, with respect to Complainant's invoice 6832, it is concluded that Respondent is liable for the unpaid amount of \$410.00.

We next turn to Complainant's invoice number 7175, dated February 9, 2006 (CX 5, p. 17), in which Complainant claims it is owed \$1,513.08, the difference between the \$4,231.92 paid by Respondent and Complainant's invoice price of \$5,745.00 (CX 1, p. 1). The transaction involved 120 cartons of limes at Complainant's invoice price of \$47.75 per carton plus three pallets at \$5.00 per pallet, for a total of \$5,745.00. Complainant shipped the 120 cartons of limes on February 9, 2006, to Costco's Morris, Illinois distribution center (CX 5, p. 19). Respondent claims that Costco rejected the load and that Bubba DeBerry approved of a \$1,513.08 deduction in a conversation with Mr. Zingale on February 14, 2006 (Respondent's Brief, p. 18) (Tr. 310-311). Mr. Zingale claims he noted the agreement on Respondent's lotting jacket, an internal document maintained by Respondent, which the handwritten notation "told Bubba we gave credit to Costco 2/14/06" (RX 8, 51061, p. 1) (Tr. 310-311). Bubba DeBerry testified that he did not grant any discount or credit nor did he agree to any price modification or change (Tr. 96).

There is no documentation which indicates that the load was rejected by Costco because of some defect in the limes, such a federal inspection certificate. Mr. Zingale's testimony is directly contradicted by Bubba DeBerry. Therefore, we conclude that Respondent has failed to meet its burden of proving any breach by Complainant and is liable for the \$1,513.08 it wrongfully deducted from Complainant's invoice number 7175.

The next transactions are a combined order, Complainant's invoice numbers 7511 (CX 8, p. 27) and 7602 (CX 9, p. 30), both dated March 4, 2006, in which Complainant claims it is owed \$496.00, the difference

between the \$7,740.00 it received from Respondent and Complainant's combined invoice prices of \$8,236.00 (CX 1, p. 1). Complainant's invoice number 7511 involved 80 cartons of limes at a price of \$52.35 per carton plus two pallets at \$5.00 per pallet, for a total of \$4,198.00. Complainant's invoice number 7602 involved 80 cartons of limes at a price of \$50.35 per carton plus two pallets at \$5.00 per pallet, for a total of \$4,038.00. Respondent does not address these transactions in its Brief and Mr. Zingale provided no justification for Respondent's deduction at the hearing (Tr. 327-328). Therefore, we conclude that Respondent is liable for the \$496.00 it wrongfully deducted from Complainant's invoices 7511 and 7602.

We now turn to another combined order, Complainant's invoice numbers 7992 (CX 30, p. 111) and 7991 (CX 33, p. 125), dated March 24, 2006, and March 28, 2006, respectively, for which Complainant claims it is owed \$7,530.00. Respondent took a \$780.00 credit on Complainant's invoice number 7992, (CX 1, p. 2) (Tr. 200) and paid \$17,584.00 (CX 1, p. 2) for Complainant's invoice number 7991. Respondent's net payment of \$16,804.00 was \$7,530.00 less than the combined invoice prices of Complainant's invoice numbers 7992, \$4,908.00, and 7991, \$19,426.00, totaling \$24,334.00.

Complainant's invoice number 7992 involved 120 cartons of limes at a price of \$40.75 per carton plus three pallets at \$6.00 per pallet, for \$4,908.00, and number 7991 involved 440 cartons of limes at a price of \$44.00 per carton plus 11 pallets at \$6.00 per pallet, for \$19,426.00, for a combined price of \$24,334.00. Complainant shipped the 120 cartons of limes in Complainant's invoice number 7992 to Costco's Tolleson, Arizona, distribution center on March 24, 2006, where they were rejected (RX 8, 51162, pp. 2-3) (Tr. 343-344). Complainant shipped the 440 cartons of limes in Complainant's invoice number 7991 to Costco's Tracy, California, distribution center on March 28, 2006 (RX 8, 51161, p. 4). However, Costco increased the order to 560 (Tr. 350). To fill this order, Complainant sent the 120 cartons that had been rejected at Costco's Tolleson, Arizona, distribution center (Tr. 345-347). The combined order was received and accepted by Costco, though only 559 cartons were actually received (RX 8, 51161, p. 3 (Tr. 490).

Respondent argues that Complainant overcharged it for both invoices (Respondent's Brief, p. 19). The evidence shows that only 559 cartons of limes were received by Costco, rather than the 560 set forth in

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Complainant's combined invoices. Therefore, we will give Respondent credit for one carton from Complainant's invoice number 7991 at \$44.00. However, with regard to the remaining 559 cartons, Respondent's claim of overcharging is apparently based on Respondent's assertion that its contract with Complainant required the limes to be priced in accordance with the Market News Service price quotations, which we have already rejected. Mr. Zingale testified that the limes were rejected by Costco because they were too small (Tr. 344).

However, but this is insufficient justification for failing to pay Complainant the full invoice price, as the Costco specifications, which the parties agree Complainant was required to meet, did not specify that the limes were to be any particular size, so long as there were no more than 25 limes per bag ((Tr. 34-35, 253) (RX 1)). Therefore, Respondent has not presented adequate evidence to justify its failure to pay the full invoice prices for the two accepted loads other than the \$44.00 for the one missing carton from Complainant's invoice 7991, and is thus liable for \$7,530.00 minus \$44.00, or \$7,486.00.

The next transaction at issue is Complainant's invoice number 7993, dated March 28, 2006 (CX 34, p. 130). Complainant claims it is owed \$2,287.00, which is the difference between Respondent's payment of \$5,893.00 and Complainant's invoice price of \$8,180.00. The transaction involved 200 cartons of limes at Complainant's invoice price of \$40.75 per carton plus five pallets at \$6.00 per pallet, for a total of \$8,180.00. Complainant shipped the 200 cartons of limes on March 28, 2006, to Costco's Tolleson, Arizona, distribution center (RX 9, 51163, p. 3). Respondent claims that Complainant's invoice was in excess of the average Market News Service Reports price (Respondent's Brief, p. 19), but we have already concluded that the parties' contract did not provide for pricing to be based on the Market News Service Reports price quotations. Respondent also claims it paid Complainant \$6,280.00 for this invoice (Respondent's Brief, p. 20), which is \$387.00 more than the \$5,893.00 Complainant has alleged was paid. Respondent's claimed payment is evidenced by its check stub (CX 34, p. 131) and Mr. Zingale's testimony (Tr. 356). Complainant has not presented any evidence supporting its claim that Respondent paid only \$5,893.00. Therefore, we find that Respondent is liable for \$8,180.00 less \$6,280.00, or \$1,900.00, for this invoice, which is \$387.00 less than the \$2,287.00 claimed by Complainant.

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We next turn to Complainant's invoice number 8332, dated March 29, 2006 (CX 36, p. 139). This transaction involved 400 bags of carrots at \$5.00 per bag and 100 cartons of onions at \$10.00 per carton, for a total of \$3,000.00. The transaction was not part of the Costco deal. Respondent claims that it offset the \$3,000.00 it owed on this invoice from \$3,000.00 that Complainant owed for 150 cartons of limes at \$20.00 per carton that Complainant had purchased from Respondent on February 10, 2006 (RX 8, 51190, p. 4) (Tr. 359-360). These 150 cartons of limes had originally been purchased by Respondent from Coast Tropical on February 10, 2006 (RX 8, 51190, pp. 7-10) (Tr. 359-360). Respondent's employee, Mr. Zingale, prepared a lotting jacket for the purchase from Coast Tropical which indicates that the 150 cartons of limes were sold to Complainant (RX 8, 51190, p. 7) (Tr. 359). Curtis DeBerry testified that he thought Complainant had received these 150 cartons of limes (Tr. 209). Complainant's receiving records show that Complainant did receive 150 cartons of limes on February 10, 2006 (RX 6, p. 10). While the evidence in support of Respondent's claim is not overwhelming, we believe that a preponderance of the evidence shows that Respondent sold 150 cartons of limes to Complainant, which Complainant received on February 10, 2006, and that Complainant did not pay for the limes. Consequently, Respondent's offset of \$3,000.00 in this transaction was justified.

The final transaction at issue is Complainant's invoice number 8271, dated April 1, 2006 (CX 37, p. 141). Complainant claims it is owed \$2,472.50, which is the difference between Respondent's payment of \$10,412.50, and Complainant's invoice price of \$12,885.00 (CX 1, p. 2). The transaction involved 450 cartons of limes at Complainant's invoice price of \$28.50 per carton plus ten pallets at \$6.00 per pallet, for a total of \$12,885.00. Complainant shipped the 450 cartons of limes on April 1, 2006, to Costco's Tracy, California, distribution center (RX 8, 51174, p.3). Respondent claims its deductions were for freight charges for limes that were rejected by Costco in three other transactions (Respondent's Brief, pp. 20-21). However, Respondent has presented very little evidence that the alleged rejections occurred, and no evidence that the rejections, even if they did occur, were warranted. Mr. Zingale testified that Bubba DeBerry said that Complainant would pay for the freight on these rejected loads (Tr. 367), but Bubba DeBerry denied giving any adjustments on the invoice prices of any of the loads at issue

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(Tr. 119). Respondent has failed to provide adequate proof for its allegations and is thus liable for \$2,472.50 for Complainant's invoice number 8271.

In summary, we have concluded that Complainant has proven Respondent's liability for all of the transactions set forth in the Complaint, with the exception of \$44.00 for Complainant's invoice number 7991, \$387.00 for Complainant's invoice number 7993 and \$3,000.00 for Complainant's invoice number 8332, thus resulting in \$77,263.93 less \$3,431.00, or \$73,832.93.

Respondent's Counterclaim

Respondent initially filed a counterclaim in the amount of \$206,070.53 but, at the hearing, reduced its claim to \$80,956.14 (Tr. 587). Respondent claims that Complainant's lot reports show that Complainant packed and delivered U.S. No. 2 limes and limes that were sizes 230 and 250 (230 and 250 pieces of fruit per 40 pound carton), which were in violation of Complainant's contract obligations (Respondent's Brief, p. 21).

Respondent has not submitted any solid evidence that Complainant shipped U.S. No. 2 limes to Costco's distribution centers. Complainant's lot reports do not show that Complainant delivered U.S. No. 2 limes to Costco, but indicate only that Complainant sometimes received U.S. No. 2 limes from its shippers (RX 6) (Tr. 166). The reason why Complainant had to purchase U.S. No. 2 limes was explained by Ms. Goodman, who testified that there were severe weather conditions in late 2005 that led to a shortage of Mexican limes (Tr. 639) and that, by January of 2006, there were "virtually no No. 1 limes even crossing the border." (Tr. 640). This made it necessary for Complainant to purchase U.S. No. 2 limes, which Complainant repacked, removing the U.S. No. 1 limes for shipment to Costco (Tr. 137-138, 166, 643). Mr. Zingale testified that it is not possible to obtain U.S. No. 1 limes from a carton of U.S. No. 2 limes (Tr. 395), but Mr. Zingale is mistaken. A carton of limes will not receive a U.S. No. 1 grade if more than 10 percent of the fruit fails to meet the requirements for the grade (7. C.F.R. § 51.1000(c)). Thus, a carton of limes graded U.S. No. 2 may consist of as much as 89 percent U.S. No. 1 limes. Therefore, we conclude that there is no merit to Respondent's claim that Complainant shipped U.S.

No. 2 limes to Costco.

Complainant does not deny shipping some size 230 and 250 limes, but claims that it did not fail to meet Costco's specifications as those limes were blended to meet Costco's requirement of 25 pieces of fruit per five pound bag (Complainant's Brief, p. 9) (Tr. 38). Costco's specification sheet (RX 1) does not require all pieces of fruit in a bag to be of the same size, only that each bag contains 25 limes. The specification sheet does require the limes to be of a "uniform" shape, but there is no evidence that the limes shipped by Complainant failed to meet that requirement. Therefore, the fact that Complainant occasionally shipped size 230 and 250 limes did not violate the terms of its contract with Respondent.

Respondent's counterclaim is hereby dismissed. Therefore, we do not need to address the affirmative defenses Complainant asserted in its reply to the counterclaim.

We have found Respondent liable to Complainant for \$73,832.93 and dismissed Respondent's counterclaim. Respondent's failure to pay \$73,832.93 to Complainant is a violation of section 2 of the PACA (7 U.S.C. § 499b), for which reparation will be awarded.

Fees and Expenses

Section 7(a) of the PACA (7 U.S.C. § 499g(a)) states that, after an oral reparation hearing under the PACA, 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 and has submitted a claim for fees and expenses in the amount of \$38,140.57. Respondent has objected to Complainant's claim on the grounds that it includes fees and expenses incurred after the hearing.

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 (2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715 (1989). Complainant's claim includes \$6,792.50 for the appearance at the hearing of its counsel, Ms. Rynn, and \$91.31 for fees and mileage for Complainant's witness, Ms. Goodman. These expenses are reasonable

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and will be awarded. Complainant also includes \$31,256.76 for additional fees and expenses dating back to November 21, 2006. Fees and expenses are only awarded for work done specifically in preparation for the hearing, as expenses which would have been incurred in connection with a case if that case had been heard by the documentary procedure may not be awarded under section 7(a) of the Act. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. at 864. Complainant's claim includes \$812.50 in expenses that were incurred prior to January 16, 2007, when the Presiding Officer notified counsel for the parties that the case would be heard by means of an oral hearing. These expenses are considered not to be for legal services in connection with the hearing in this case and will be disallowed. We will also disallow the charges for time spent traveling to and returning from the hearing, which amounts to \$1,492.50, as it not our policy to include fees paid an attorney for time spent traveling to and from the hearing in an award of fees and expenses. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. at 865. We note that Complainant has included hotel charges totaling \$1,363.70 for two individuals, presumably Ms. Rynn and co-counsel Elise O'Brien. However, Complainant has not shown why Ms. O'Brien was required to be present at the hearing. Therefore, we will allow only Ms. Rynn's hotel expense of \$681.85. We will also disallow fees and expenses that were incurred after the hearing ended on June 13, 2007, with the exception of the cost of the hearing transcript. *See West Coast Produce Sales, Inc. v. J & J Distributing Co.*, 41 Agric. Dec. 1605, 1609 (1982). The fees and expenses that Complainant incurred after the hearing, which we will disallow, total \$7,239.95. Therefore, the amount of Complainant's claim for fees and expenses which we will not allow, \$812.50 plus \$1,492.50 plus \$681.85 plus \$7,239.95, totals \$10,226.80. Subtracting \$10,226.80 from Complainant's claim of \$38,140.57 leaves \$27,913.77 in fees and expenses which will be awarded to Complainant.

Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding

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damages, he/she also has the duty, where appropriate, to award interest. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). Interest will be determined in accordance with the method set forth in 28 U.S.C. § 1961, *i.e.*, the rate of interest will equal 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 ending prior to the date of the Order. *See PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid \$300.00 to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the PACA is liable for any handling fee paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay to Complainant, as reparation, \$73,832.93, with interest thereon at the rate of 3.20% per annum from April 1, 2005, until paid, plus \$300.00 as reimbursement for Complainant's handling fee.

Within 30 days from the date of this Order, Respondent shall pay to Complainant, as additional reparation for fees and expenses, \$27,913.77, with interest thereon at the rate of 3.20% per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

**ARMAND T. CIMINO, STEPHANIE G. CIMINO AND VINCENT
CIMINO, d/b/a CIMINO BROTHERS PRODUCE v. NATURES
WAY FARMS LLC.**

PACA Docket No. R-07-057.

Decision and Order.

Filed December 19, 2007.

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PACA-R – Inspection – Suspension Agreement.

Where the December 4, 2002, Suspension Agreement for Fresh Tomatoes from Mexico was found to be applicable to the sale by Complainant of one truckload of tomatoes to Respondent, and Respondent secured an inspection of the tomatoes at a destination in Canada, it was determined that Respondent is not entitled to an adjustment of the sales price of the tomatoes, because a U.S.D.A. inspection certificate was not provided.

Complainant Pro se.
Respondent Pro se.
Leslie Wowk - Examiner.
Presiding Officer Patrice Harps
Decision and order by William G. Jenson.

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 within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$12,178.50 in connection with one truckload of tomatoes shipped in the course of interstate and foreign commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

The amount claimed in the formal Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (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. Both parties also submitted a Brief.

Findings of Fact

1. Complainant is a partnership comprised of Armand T. Cimino, Stephanie G. Cimino, and Vincent A. Cimino, doing business as Cimino Brothers Produce, whose post office address is 33 Market Street, Salinas, California, 93901-2640. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Natures Way Farms LLC, is a limited liability company whose post office address is P.O. Box 4207, Rio Rico, Arizona, 85648-4207. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about October 5, 2005, Complainant, by oral contract, sold to Respondent 2,210 flats of greenhouse tomatoes, sizes 39 and 45, at \$5.50 per flat, or \$12,155.00, plus \$23.50 for a temperature recorder, for a total f.o.b. contract price of \$12,178.50. (ROI, Ex. 1a). On the same date, the tomatoes were shipped via a Griffith Transportation truck from loading point in Laredo, Texas, to Taylor, Michigan, where the load was scheduled to arrive on October 8, 2005. (ROI, Ex. 3e).

4. Respondent resold the tomatoes mentioned in Finding of Fact 3 to J-D Marketing, Inc., Leamington, Ontario, Canada, under the terms "FOB: TAYLOR, MI., NET 21 DAYS." (ROI, Ex. 3c).

5. On October 11, 2005, a Canadian Food Inspection Agency inspection was performed on 1,785 flats of the tomatoes at the place of business of Respondent's customer, J-D Marketing, Inc., in Leamington, Ontario, Canada, the report of which disclosed 24% average defects, including 5% decay, 5% immature, 1% mature green, 10% soft specimens, and 3% soft watery translucent. The inspection was requested for and restricted to condition only. (ROI, Ex. 3i).

5. J-D Marketing, Inc. reportedly paid Respondent \$8,925.00 for the tomatoes. (ROI, Exs. 3a and 3b). Respondent has not remitted the invoice price of the tomatoes, nor any portion thereof, to Complainant. (Note: Numbered as in original - Editor).

6. The informal complaint was filed on June 12, 2006, which is within nine months from the accrual of the cause of action.

Conclusions

There is no dispute that Respondent agreed to purchase the subject

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load of tomatoes from Complainant for a total contract price of \$12,178.50.¹ Complainant asserts that Respondent accepted the tomatoes in compliance with the contract of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase price thereof.² Respondent asserts, to the contrary, that the tomatoes were rejected to Complainant based on the results of an inspection performed at the place of business of Respondent's customer, after which the parties agreed that Respondent's customer would work the tomatoes for Complainant's account.³

Upon review, we find that the evidence fails to support Respondent's allegation of a rejection and subsequent consignment. In reaching this conclusion, we note that Complainant's Sales Representative, Mike Moreno, asserts in Complainant's sworn

Opening Statement that "[t]he load in question falls under the Mexican Tomatos [sic] suspension agreement with all of the regulations and privileges stated there in."⁴ Mr. Moreno is apparently referring to the December 4, 2002 agreement (hereafter "Suspension Agreement") between the Department of Commerce and producers/exporters of tomatoes from Mexico to suspend an antidumping investigation concerning fresh tomatoes from Mexico.⁵ The basis for the suspension of the antidumping investigation, as stated in the Summary to the Federal Register notice, is an agreement on the part of each signatory producer/exporter, accounting for substantially all imports of fresh tomatoes from Mexico, to revise its prices to eliminate completely the injurious effects of imports of fresh tomatoes into the United States. Support for Mr. Moreno's contention that the tomatoes were sold subject to the Suspension Agreement is found on Complainant's passing, which states, in pertinent part: "All sales are subject to the terms of the US Dept of Commerce's Suspension Agreement on Fresh Tomatoes from Mexico."⁶ We note that Respondent also submitted copies of Complainant's passings. The first shows a price of \$7.00 per flat for the

¹ Formal Complaint, paragraph 4, and Answer, paragraph 4.

² Formal Complaint, paragraph 8.

³ Answering Statement Affidavit of Larry Martin, paragraph 13.

⁴ Opening Statement, paragraph 4.

⁵ Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, Federal Register: December 16, 2002 (Volume 67, Number 241).

⁶ ROI, Ex. 1b.

greenhouse 39's and a handwritten comment that reads, "Agreed price is \$5.50. Please refax."⁷ Complainant complied with this request and later faxed Respondent another passing, showing the price of \$5.50 per flat for all sizes of tomatoes shipped.⁸ It is important to note that the passings bear a fax legend indicating that Complainant faxed the passings to Respondent on October 7, 2005; the first was sent at 9:31 a.m., and the second corrected passing was faxed at 9:53 a.m. The passings indicate that the tomatoes were shipped on October 6, 2005. Therefore, the passings were issued after the parties reached their agreement for the sale and purchase of the tomatoes. Appendix G of the Suspension Agreement provides that:

. . . if, prior to making the sale, the signatory, or the Selling Agent acting on behalf of the signatory through a contractual arrangement, informs the customer that the sale is subject to the terms of the Agreement and identifies those terms, PACA will recognize the identified terms of the Agreement as integral to the sales contract. (Emphasis added.)⁹

Therefore, pursuant to Appendix G of the Suspension Agreement, we are not required to apply the terms of the Agreement to the contract that is the subject of this dispute.

We note, however, that Respondent's President, Larry Martin, in an affidavit submitted as Respondent's Answering Statement, fails to refute or even address Mr. Moreno's sworn contention that the Suspension Agreement is applicable to the subject sale. Statements that are sworn and that have not been controverted must be taken as true in the absence of other persuasive evidence. *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675 (1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265 (1982). In addition, we note that while Respondent asserts that the tomatoes were handled for the account of Complainant by Respondent's customer, J-D Marketing, Inc.,

⁷ ROI, Ex. 3g.

⁸ ROI, Ex. 3f.

⁹ 67 Fed. Reg. 77044, 77052 (2002).

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Respondent accounted to Complainant for the tomatoes in a manner that is more consistent with the rules set forth in the Suspension Agreement.¹⁰ We conclude, therefore, that the preponderance of the evidence supports Complainant's contention that the load of tomatoes in question was sold subject to the Suspension Agreement.

While the Suspension Agreement sets a reference price at or above which all tomatoes subject to the agreement must be sold, the agreement also provides a procedure for making adjustments to the sales price of signatory tomatoes due to certain changes in condition after shipment.¹¹ There are, however, a number of conditions that must be met before such adjustments can be made. First, an unrestricted U.S.D.A. inspection must be provided to support claims for rejection of all or part of a lot.¹² In the instant case, Respondent's customer secured an unrestricted inspection performed by the Canadian Food Inspection Agency.¹³ A Canadian inspection was supplied because Respondent's customer, J-D Marketing, Inc., is located in Leamington, Ontario, Canada.¹⁴ We note, however, that Complainant's Mike Moreno asserts in Complainant's sworn Opening Statement that Complainant had no knowledge of a Canadian delivery destination.¹⁵

Review of the record discloses that both Complainant's invoice and its bill of lading list Respondent's post office box in Rio Rico, Arizona, as the shipping destination for the tomatoes.¹⁶ Obviously, the parties did not contract for the shipment of the tomatoes to a post office box.

¹⁰ ROI, Ex. 3a.

¹¹ 67 Fed. Reg. 77044 (2002), Appendix D—Suspension of Antidumping Investigation—Fresh Tomatoes from Mexico—Procedures for Making Adjustments to the Sales Price Due to Certain Changes in Condition After Shipment.

¹² The term "reject," as it is used by the Department of Commerce in the Suspension Agreement, is interpreted in most instances as meaning to give notice of a breach to the seller. See *Ta-De Distributing Company, Inc. v. R. S. Hanline & Co., Inc.*, 58 Agric. Dec. 658 (1999).

¹³ See Report of Investigation, Exhibit No. 3i.

¹⁴ The Suspension Agreement refers only to inspections performed by the U.S.D.A., as sales of tomatoes to buyers located in the country of Canada would not be subject to the agreement, provided that none of the subsequent resales occurred within the United States. 67 Fed. Reg. 77044 (2002), Appendix E—Suspension of Antidumping Investigation—Fresh Tomatoes from Mexico—Contractual Arrangement for Documenting Sales of Signatory Merchandise To Canada.

¹⁵ Opening Statement, paragraph 1.

¹⁶ ROI, Exs. 1a and 1b.

Respondent's Larry Martin, in his Answering Statement affidavit, asserts that the tomatoes were to be delivered to J-D Marketing, Inc., in Leamington, Ontario; however, Mr. Martin does not claim that this information was shared with Complainant prior to shipment.¹⁷ Moreover, although Mr. Martin asserts that the tomatoes were destined for Canada, Respondent's own load sheet lists the destination for the shipment as Taylor, Michigan.¹⁸ We therefore find that the evidence fails to establish that Leamington, Ontario, Canada was the contract destination for the subject shipment of tomatoes.

The inspection of the subject tomatoes took place at J-D Marketing, Inc., in Leamington, Ontario, Canada. There is absolutely no indication that Complainant specified this location as the destination for the tomatoes. Consequently, since there was no U.S.D.A. inspection certificate submitted, Respondent is barred from claiming any adjustments pursuant to the Suspension Agreement under which tomatoes in question were purchased. Respondent is therefore liable to Complainant for the full purchase price of the tomatoes, or \$12,178.50.

Respondent's failure to pay Complainant \$12,178.50 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act 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." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66

¹⁷ Answering Statement Affidavit of Larry Martin, paragraph 4.

¹⁸ ROI, Ex. 3c. The load sheet also provides additional instructions that read: "PU# 110988 @ US COLD STORAGE LAREDO, TX CALL DAVID @ 956-726-1251 FOR DIRECTIONS DEL TO TAYLOR, MICH SAT 10/8/05 8 AM."

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(1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid \$300.00 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.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$12,178.50, with interest thereon at the rate of 3.20 % per annum from November 1, 2005, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.
Done at Washington, DC

B.T. Produce Co Inc., Louis R. Bonino,
Nat Taubenfeld
66 Agric. Dec. 1527

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MISCELLANEOUS ORDERS

In re: B.T. PRODUCE CO., INC.

PACA Docket No. D-02-0023.

In re: LOUIS R. BONINO.

PACA Docket No. APP-03-0009.

In re: NAT TAUBENFELD.

PACA Docket No. APP-03-0011.

Stay Order.

Filed July 3, 2007.

PACA – Perishable agricultural commodities – Stay order.

Christopher Young-Morales and Ann Parnes for the Agricultural Marketing Service and the Chief.

Mark C. H. Mandell, Annandale, NJ, for Respondent/Petitioners.

Order issued by William G. Jenson, Judicial Officer.

On May 4, 2007, I issued a Decision and Order: (1) concluding B.T. Produce Co., Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) revoking B.T. Produce Co., Inc.'s PACA license; (3) concluding Petitioner Louis R. Bonino and Petitioner Nat Taubenfeld were responsibly connected with B.T. Produce Co., Inc., when B.T. Produce Co., Inc., violated the PACA; and (4) subjecting Petitioner Louis R. Bonino and Petitioner Nat Taubenfeld to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).¹

On July 2, 2007, B.T. Produce Co., Inc., Petitioner Louis R. Bonino, and Petitioner Nat Taubenfeld filed a request for a stay of the Order in *In re B.T. Produce Co.*, 66 Agric. Dec. 774 (2007), pending the outcome of proceedings for judicial review. The Chief and the Agricultural Marketing Service have no objection to the request for a stay.

In accordance with 5 U.S.C. § 705, B.T. Produce Co., Inc.'s, Petitioner Louis R. Bonino's, and Petitioner Nat Taubenfeld's request

¹*In re B.T. Produce Co.*, 66 Agric. Dec. 774 (2007).

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for a stay is granted.

For the foregoing reasons, the following Order is issued.

ORDER

The Order in *In re B.T. Produce Co.*, 66 Agric. Dec. 774 (2007), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

In re: DONALD R. BEUCKE.
PACA-APP Docket No. 04-0014.
In re: KEITH K. KEYESKI.
PACA-APP Docket No. 04-0020.
Order Lifting Stay Order as to Keith K. Keyeski.
Filed August 9, 2007.

PACA-APP – Perishable agricultural commodities – Order lifting stay order.

Charles L. Kendall, for Respondent.
Paul W. Moncrief, Salinas, CA, for Petitioner Keyeski.
Order issued by William G. Jenson, Judicial Officer.

On November 8, 2006, I issued a Decision and Order: (1) concluding Keith K. Keyeski [hereinafter Petitioner Keyeski] was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Petitioner Keyeski to the licensing restrictions and the employment restrictions under the PACA.¹

On November 29, 2006, Petitioner Keyeski filed motion for stay stating Petitioner Keyeski intends to seek judicial review of *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), and requesting a stay of the order as to Petitioner Keyeski in *In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006), pending the outcome of proceedings for judicial

¹*In re Donald R. Beucke*, 65 Agric. Dec. 1372 (2006).

review. On November 30, 2006, I granted Petitioner Keyeski's motion for stay.²

On April 6, 2007, the United States Court of Appeals for the Ninth Circuit dismissed Petitioner Keyeski's petition for review.³ On June 7, 2007, the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed a motion to lift the November 30, 2006, Stay Order as to Keith K. Keyeski. Petitioner Keyeski failed to file a response to Respondent's motion to lift stay, and on August 8, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's motion to lift stay.

Proceedings for judicial review are concluded, and Petitioner Keyeski has filed no objection to Respondent's motion to lift stay. Therefore, Respondent's motion to lift stay is granted; the November 30, 2006, stay order is lifted; and the Order as to Petitioner Keyeski in *In re Donald Beucke*, 65 Agric. Dec. 1372 (2006), is effective as follows.

ORDER

I affirm Respondent's August 13, 2004, determination that Petitioner Keyeski was responsibly connected with Bayside Produce, Inc., when Bayside Produce, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Petitioner Keyeski is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Petitioner Keyeski.

²*In re Donald R. Beucke* (Stay Order as to Keith K. Keyeski), 66 Agric. Dec. 933 (2007).[Case filed Nov. 30, 2006 -Ed]

³*Keyeski v. U.S. Dep't of Agric.*, No. 07-70140 AGRI No. 04-0020 (9th Cir. Apr. 6, 2007).

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In re: THE MILES SMITH FAMILY CORP., D/B/A CAL FRESH PRODUCE.

PACA Docket No. D-03-0005.

Ruling Denying Motion for Default Decision.

Filed October 17, 2007.

Chris Young-Morales for AMS.
Miles Smith Family for Respondent
Ruling by Administrative Law Judge Jill S. Clifton

This disciplinary proceeding was initiated by a Complaint filed on October 30, 2002, under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (herein frequently, “the PACA” or “the Act”). Because my Decision, issued on June 6, 2003, was issued in error, I reopened the case and vacated the Decision. [I had erroneously asserted in the Decision: “A copy of the complaint was served upon Respondent, and Respondent has not filed an answer.”]

Before me are (1) the Complainant’s Motion for Decision Without Hearing By Reason of Default, filed September 26, 2007; (2) White and Laramie’s Response to Request for Default, filed October 9, 2007; and (3) the Complainant’s Notice of Service, filed October 15, 2007.

The Complaint has not yet been served upon the Respondent, The Miles Smith Family Corp., d/b/a Cal Fresh Produce (“Respondent”). The attempt to serve the Respondent by delivery to FORMER officers/directors of the Respondent corporation was not effective. What we still have in this case, PACA Docket No. D-03-0005, *In re: The Miles Smith Family Corp., d/b/a Cal Fresh Produce*, Respondent, is lack of service in accordance with 7 C.F.R. § 1.147(c). Corporate officers and directors who, when served, are currently officers or directors, have authority and responsibility with regard to the corporation under 7 C.F.R. § 1.147(c). FORMER officers and directors do not. Consequently, I am in agreement with White and Laramie’s Response to Request for Default, filed October 9, 2007; the Complainant’s Motion filed on September 26, 2007, is **DENIED**.

This Ruling is appealable to the Judicial Officer. *See* 7 C.F.R. § 1.139, providing that denial of a motion for a default decision may be appealed pursuant to 7 C.F.R. § 1.145. (7 C.F.R. § 1.145, see enclosed Appendix A). Copies of this Ruling (by regular mail), shall be served

Baiardi Chain Food Corp.
66 Agric. Dec. 1531

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by the Hearing Clerk upon each of the parties, **and the Respondent shall be served at all three addresses:**

Cal Fresh Produce
2705 5th Street, Ste 5
Sacramento, California 95818

and

The Miles Smith Family Corp., d/b/a Cal Fresh Produce
385 Inverness Drive **South, Suite 380**
Englewood, Colorado 80112

and

The Miles Smith Family Corp., d/b/a Cal Fresh Produce
c/o CrossPoint Foods Corporation
1050 17th Street, Suite 195
Denver, Colorado 80265

and

a courtesy copy (by regular mail) shall be served on counsel for Mssrs.
White and Laramie,

Luis A. Toro, Esq.
1801 California St 4300
Denver Colorado 80202-2604.

Done at Washington, D.C.

In re: BAIARDI CHAIN FOOD CORP.
PACA Docket No. D-01-0023.
Order Lifting Stay Order.
Filed November 13, 2007.

PACA – Perishable agricultural commodities – Order lifting stay – Publication of facts and circumstances.

Christopher Young-Morales, for Complainant.
Paul T. Gentile, New York, NY, for Respondent.
Order issued by William G. Jenson, Judicial Officer.

On September 2, 2005, I issued a Decision and Order concluding

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Baiardi Chain Food Corp. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], and ordering publication of the facts and circumstances of Baiardi Chain Food Corp.'s violations.¹ On October 21, 2005, Baiardi Chain Food Corp. filed a petition for reconsideration, which I denied.²

Baiardi Chain Food Corp. filed a petition for review of *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (2005), and *In re Baiardi Chain Food Corp.* (Order Denying Pet. for Recons.), 64 Agric. Dec. 1994 (2005), with the United States Court of Appeals for the Third Circuit. On May 12, 2006, Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Associate Deputy Administrator], filed a "Motion for a Stay Order as to Respondent Baiardi Food Chain Corp." [hereinafter Motion for Stay] requesting a stay of the Orders in *In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (2005), and *In re Baiardi Chain Food Corp.* (Order Denying Pet. for Recons.), 64 Agric. Dec. 1994 (2005), pending the outcome of proceedings for judicial review. On May 12, 2006, Baiardi Chain Food Corp. informed the Office of the Judicial Officer, by telephone, that it had no objection to the Associate Deputy Administrator's Motion for Stay. On May 15, 2006, I issued a Stay Order.³

On March 2, 2007, the United States Court of Appeals for the Third Circuit denied Baiardi Chain Food Corp.'s petition for review.⁴ On October 1, 2007, the Supreme Court of the United States denied Baiardi Chain Food Corp.'s petition for writ of certiorari.⁵ On October 5, 2007, the Associate Deputy Administrator filed a motion to lift the May 15, 2006, Stay Order. Baiardi Chain Food Corp. failed to file a timely response to the Associate Deputy Administrator's motion to lift the May 15, 2006, Stay Order.

Proceedings for judicial review are concluded. Therefore, the May 15, 2006, Stay Order is lifted; and the Order issued in *In re*

¹*In re Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822 (2005).

²*In re Baiardi Chain Food Corp.* (Order Denying Pet. for Recons.), 64 Agric. Dec. 1994 (2005).

³*In re Baiardi Chain Food Corp.* (Stay Order), 65 Agric. Dec. 717 (2006).

⁴*Baiardi Food Chain v. United States*, 482 F.3d 238 (3d Cir. 2007).

⁵*Baiardi Food Chain v. United States*, 128 S. Ct. 307 (Oct. 1, 2007).

G & T Terminal Packaging Co., Inc., and Tray-Wrap, Inc. 1533
66 Agric. Dec. 1533

Baiardi Chain Food Corp., 64 Agric. Dec. 1822 (2005), and *In re Baiardi Chain Food Corp.* (Order Denying Pet. for Recons.), 64 Agric. Dec. 1994 (2005), is effective as follows.

ORDER

Baiardi Chain Food Corp. has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances of Baiardi Chain Food Corp.'s violations shall be published.

The publication of the facts and circumstances of Baiardi Chain Food Corp.'s violations shall be effective 60 days after service of this Order on Baiardi Chain Food Corp.

In re: G & T TERMINAL PACKAGING CO., INC., AND TRAY-WRAP, INC.
PACA Docket No. D-03-0026.
Order Lifting Stay Order.
Filed November 14, 2007.

PACA – Perishable agricultural commodities – Order lifting stay order.

Andrew Y. Stanton, for Complainant.
Linda Strumpf, New Canaan, CT, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On September 8, 2005, I issued a Decision and Order concluding G & T Terminal Packaging Co., Inc., and Tray-Wrap, Inc. [hereinafter Respondents], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA] and revoking Respondents' PACA licenses.¹

Respondents filed a petition for review of *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), with the United States Court of Appeals for the Second Circuit. On November 29, 2005, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable

¹*In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005).

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Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Associate Deputy Administrator], filed a Motion for Stay requesting a stay of the Order in *In re G & T Terminal Packaging Co.* pending the outcome of proceedings for judicial review. On December 1, 2005, I granted the Associate Deputy Administrator's Motion for Stay.²

The United States Court of Appeals for the Second Circuit affirmed *In re G & T Terminal Packaging Co.*,³ and, on October 1, 2007, the Supreme Court of the United States denied Respondents' petition for writ of certiorari.⁴ On October 2, 2007, the Associate Deputy Administrator filed a Motion to Lift Stay Order. On November 13, 2007, Respondents filed a response opposing the Associate Deputy Administrator's Motion to Lift Stay Order.

I issued the December 1, 2005, Stay Order to stay of the Order in *In re G & T Terminal Packaging Co.* pending the outcome of proceedings for judicial review. Proceedings for judicial are concluded. I find Respondents' Opposition to Motion to Lift Stay Order without merit. Therefore, the December 1, 2005, Stay Order is lifted; and the Order issued in *In re G & T Terminal Packaging Co.* is effective as follows.

ORDER

1. Respondent G & T Terminal Packaging Co., Inc.'s PACA license is revoked. The revocation of Respondent G & T Terminal Packaging Co., Inc.'s PACA license shall become effective 60 days after service of this Order on Respondent G & T Terminal Packaging Co., Inc.

2. Respondent Tray-Wrap, Inc.'s PACA license is revoked. The revocation of Respondent Tray-Wrap, Inc.'s PACA license shall become effective 60 days after service of this Order on Respondent Tray-Wrap, Inc.

²*In re G & T Terminal Packaging Co.* (Stay Order), 64 Agric. Dec. 2004 (2005).

³*G & T Terminal Packaging Co. v. U.S. Dep't of Agric.*, 468 F.3d 86 (2d Cir. 2006).

⁴*G & T Terminal Packaging Co. v. U.S. Dep't of Agric.*, 128 S. Ct. 355 (2007).

Kleiman & Hochberg, Inc.
Michael H. Hirsch, Barry J. Hirsch
66 Agric. Dec. 1535

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**In re: KLEIMAN & HOCHBERG, INC.
PACA Docket No. D-02-0021.
In re: MICHAEL H. HIRSCH.
PACA Docket No. APP-03-0005.
In re: BARRY J. HIRSCH.
PACA Docket No. APP-03-0006.
Order Lifting Stay as to Kleiman & Hochberg, Inc.
Filed December 7, 2007.**

PACA – Perishable agricultural commodities – Order lifting stay order.

Charles L. Kendall and Christopher Young-Morales for the Agricultural Marketing Service.

Mark C.H. Mandell, Annandale, NJ, for Kleiman & Hochberg, Inc.
Order issued by William G. Jenson, Judicial Officer.

On April 5, 2006, I issued a Decision and Order: (1) concluding Kleiman & Hochberg, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) revoking Kleiman & Hochberg, Inc.'s PACA license.¹ On April 24, 2006, Kleiman & Hochberg, Inc., filed a petition to reconsider *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), which I denied.²

Kleiman & Hochberg, Inc., filed a petition for review of *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), and *In re Kleiman & Hochberg, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 720 (2006), with the United States Court of Appeals for the District of Columbia Circuit. On August 2, 2006, Kleiman & Hochberg, Inc., filed a motion for a stay of the orders in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), and *In re Kleiman & Hochberg, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 720 (2006), pending the outcome of proceedings for judicial review. On September 22, 2006, I granted Kleiman & Hochberg, Inc.'s motion for

¹*In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006).

²*In re Kleiman & Hochberg, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 720 (2006).

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a stay.³

On August 14, 2007, the United States Court of Appeal for the District of Columbia Circuit issued a decision denying Kleiman & Hochberg, Inc.'s petition for review.⁴ On December 6, 2007, Kleiman & Hochberg, Inc., requested that, effective close of business December 7, 2007, I lift the September 22, 2006, Stay Order as it relates to Kleiman & Hochberg, Inc. On December 6, 2007, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Kleiman & Hochberg, Inc.'s request to lift the stay as to Kleiman & Hochberg, Inc.

Proceedings for judicial review as to Kleiman & Hochberg, Inc., are concluded. Therefore, as to Kleiman & Hochberg, Inc., the September 22, 2006, Stay Order is lifted; and the orders issued in *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), and *In re Kleiman & Hochberg, Inc.* (Order Denying Pet. to Reconsider), 65 Agric. Dec. 720 (2006), as they relate to Kleiman & Hochberg, Inc., are effective as follows.

ORDER

Kleiman & Hochberg, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Kleiman & Hochberg, Inc.'s PACA license is revoked, effective at the close of Kleiman & Hochberg, Inc.'s business December 7, 2007.

³*In re Kleiman & Hochberg, Inc.* (Stay Order), 66 Agric. Dec. 928 (2006).

⁴*Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681 (DC Cir. 2007).

PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISIONS

In re: CHATO DISTRIBUTORS, INC.
PACA Docket No. D-07-0037.
Default Decision.
Filed September 4, 2007.

PACA – Default.

Leah C. Battaglioli for AMS.
Respondent Pro se.
Default Decision by Administrative Law Judge Jill S. Clifton.

**Decision and Order
by Reason of Default**

This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (herein frequently “the PACA” or “the Act”), by a complaint filed on December 13, 2006.

The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently “AMS” or “Complainant”), is represented by Leah C. Battaglioli, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

The complaint alleged, among other things, that during November 20, 2005, through April 16, 2006, the Respondent, Chato Distributors, Inc. (herein frequently “Chato” or “Respondent”), failed to make full payment promptly to 13 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$279,364.06 for 36 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The complaint requested that the Administrative Law Judge find that

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Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order that the facts and circumstances be published.

A copy of the complaint was mailed, by certified mail, together with the Hearing Clerk's Notice Letter and a copy of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-1.151; hereinafter "Rules of Practice"), to Chato's registered agent for service of process by certified mail on March 6, 2007, and it was returned to the Hearing Clerk as "refused" on March 16, 2007. The Hearing Clerk re-mailed the complaint using regular mail on March 16, 2007. When the Complaint was returned as "refused" after being mailed by certified mail, "it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address," under section 1.147(c)(1) of the Rules of Practice, 7 C.F.R. § 1.147(c)(1). No answer to the complaint has been received. The time for filing an answer expired on April 5, 2007.

The Complainant's Motion for Decision Without Hearing by Reason of Default is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the complaint, which are admitted by Chato's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Chato Distributors, Inc. is a corporation organized and existing under the laws of the State of California. Chato has ceased business operations subject to the PACA. Chato's business address was 2701 Harbor Boulevard, Building E-2, Suite 136, Costa Mesa, California 92626-5153. Chato's mailing address was 1630 Naomi, Los Angeles, California 90021. Chato's registered agent for service of process is Presidential Services, Inc., with a former address of 23404 Lyons Avenue #223, Santa Clarita, CA 91321, and a current address of 465 NE 181st Avenue #505, Portland, Oregon 97230-6660.

2. At all times material to this decision, Chato was licensed under the provisions of the PACA. License number 20051310 was issued to Chato on September 23, 2005. This license terminated on September 23, 2006, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Chato failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph III of the complaint, Chato, during November 20, 2005, through April 16, 2006, failed to make full payment promptly to 13 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$279,364.06 for 36 lots of perishable agricultural commodities which Chato purchased, received, and accepted in the course of interstate and/or foreign commerce.

Conclusions

1. The Secretary of Agriculture has jurisdiction.

2. Chato willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to 13 sellers of the agreed purchase prices in the total amount of \$279,364.06 for 36 lots of fruits and vegetables, all being perishable agricultural commodities, which it purchased, received, and accepted in interstate and/or foreign commerce.

Order

1. Chato Distributors, Inc. committed wilful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and 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.

Finality

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145

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of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties. Done at Washington, D.C.

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

**SUBTITLE A—-OFFICE OF THE SECRETARY OF
AGRICULTURE**

PART 1—-ADMINISTRATIVE REGULATIONS

....

**SUBPART H—-RULES OF PRACTICE GOVERNING
FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE
SECRETARY UNDER**

VARIOUS STATUTES

...

§ 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.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

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(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

In re: ABBA PRODUCE, INC.
PACA Docket No. D-05-0011.
Default Decision.
Filed October 1, 2007.

PACA – Default.

Leah Battaglioli for AMS.

Respondent Pro se.

Default Decision by Chief Administrative Law Judge Marc R. Hillson.

**Decision Without Hearing
by Reason of Default**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499 et seq.; hereinafter “PACA”), instituted by a Complaint filed on May 13, 2005, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service (hereinafter “Complainant”). Complainant filed the First Amended Complaint on March 2, 2007. The First Amended Complaint alleges that during the period June 20, 2003, through February 29, 2004, Respondent Abba Produce, Inc. (hereinafter “Respondent”) failed to make full payment promptly to nine (9) sellers of the agreed purchase prices in the total amount of \$628,607.74 for 124 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

Pursuant to sections 304 and 306 of the New York Business Corporation Law (N.Y. Bus. Corp. Law §§ 304, 306), Complainant served the First Amended Complaint on the New York Secretary of State as agent for Respondent. A U.S. Marshall personally served the First Amended Complaint on the New York Secretary of State on March 20, 2007, in accordance with section 1.147(b) of the Rules of Practice Governing Formal Adjudicatory Proceedings Under Various Statutes (7 C.F.R. § 1.147(b); hereinafter “Rules of Practice”). The New York Secretary of State formally accepted service of the First Amended Complaint on March 21, 2007. Pursuant to section 1.147(e)(4), Complainant filed a certificate of service on March 30, 2007. Under section 306(b)(1) of the New York Business Corporation Law (N.Y. Bus. Corp. Law § 306(b)(1)), service of process on Respondent was completed when the New York Secretary of State accepted service of the First Amended Complaint on March 21, 2007. Respondent has not answered the First Amended Complaint. The time for filing an answer having run, and upon motion of Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following decision

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and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Abba Produce, Inc. (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of New York. Its business address was 1290 Oakpoint Boulevard, Bronx, New York 10474-6903. Its mailing address was 68-03 242nd Street, Apt. 30D, Douglaston, New York 11362-2600. In accordance with section 304(a) of the New York Business Corporation Law (N.Y. BUS. CORP. LAW § 304(a)), Respondent's agent for service of process is the New York Secretary of State, State of New York Department of State, 41 State Street, Albany, New York 12231.

2. At all times material to this decision, Respondent was licensed under the provisions of the PACA. License number 20031196 was issued to Respondent on June 26, 2003. This license terminated on June 26, 2004, 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. Respondent, during the period June 20, 2003, through February 29, 2004, failed to make full payment promptly to nine (9) sellers of the agreed purchase prices in the total amount of \$628,607.74 for 124 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce.

Conclusions

Respondent's failure to make full payment promptly to nine (9) sellers in the total amount of \$628,607.74 for 124 lots of perishable agricultural commodities above constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

Respondent is found to have committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

Primo's Tropical Produce Corp.
66 Agric. Dec. 1545

1545

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

Pursuant to the Rules of Practice governing procedures under the PACA, 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, 1.145).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.

In re: PRIMO'S TROPICAL PRODUCE CORP.
PACA Docket No. D-06-0011.
Default Decision.
Filed October 1, 2007.

PACA – Default.

Charles L. Kendall for AMS.

Respondent Pro se.

Default Decision by Chief Administrative Law Judge Marc R. Hillson.

Decision Without Hearing

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.) hereinafter referred to as the "Act", instituted by a Complaint filed on April 25, 2006, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleged that during the period during the period April 2003 through January 2004 Respondent purchased, received, and accepted, in interstate and foreign commerce, from 12 sellers, 166 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices in the total amount of \$579,290.15.

A copy of the Complaint was served upon Respondent; Respondent

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submitted a Request for Hearing which was treated as an Answer to the Complaint pertaining to its failure to make payment promptly. During the period of February 1, 2007 through April 9, 2007, a follow up investigation was conducted by the PACA Branch of the Agricultural Marketing Service which revealed that as of April 9, 2007, ten (10) of the sellers listed in the Complaint were still owed \$496,740.42. Based on the results of the investigation, Complainant filed a Motion for an Order Requiring Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued. Respondent indicated via electronic mail on July 12, 2007 that it did not object to issuance of a Show Cause Order. I issued the Show Cause Order on July 10, 2007. The Order was based upon Complainant's allegation in its Motion, substantiated by affidavit, that Respondent failed to pay the produce debt alleged in the Complaint within 120 days of the service of the Complaint. The Order afforded Respondent 30 days from the date of service of the Order to demonstrate that it made full payment, by November 17, 2006, of the \$579,290.15, owed to 12 sellers, alleged in the Complaint. The Order was served on Respondent on July 12, 2007, and no response was filed by Respondent. Accordingly, I grant Complainant's motion for the issuance of a Decision Without Hearing finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and publishing Respondent's violations.

Under the sanction policy enunciated by the Judicial Officer in *In re Scamcorp, Inc., d/b/a Goodness Greeness*, 57 Agric. Dec. 527, 547 (1998), "PACA requires *full payment promptly*, and commission merchants, dealers and brokers are required to be in compliance with the payment provisions of the PACA at all times....In any PACA disciplinary proceeding in which it is shown that a [R]espondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the [C]omplaint is served on that [R]espondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case In any "no-pay" case in which the violations flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked." *Id.* at 548-549.

According to the Judicial Officer's policy set forth in *Scamcorp*, Respondent had 120 days from the date the Complaint was served upon

it, or on or about November 17, 2006, to come into full compliance with the PACA. Therefore, as Respondent was not in full compliance by that date, this case should be treated as a "no pay" case for purposes of sanction, which warrants the issuance of a Decision Without Hearing finding that Respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA and ordering that Respondent's violations be published.

Since Respondent has failed to Show Cause Why a Decision Without Hearing Should Not Be Issued, the following Findings and Order are issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Primo's Tropical Produce Corp., (hereinafter "Respondent") is a corporation organized and existing under the laws of the State of New York. Its business mailing address was 1312 Randall Avenue, Bronx, New York 10474.
2. At all times material herein, Respondent was licensed under the PACA or conducting business subject to the PACA. License number 2002-0265 was issued to Respondent on October 30, 2001. This license terminated on October 30, 2003, 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. As more fully set forth in paragraph III of the Complaint, Respondent, during the period April 2003 through January 2004, failed to make full payment promptly of the agreed purchase price for 166 lots of perishable agricultural commodities, which it purchased, received, and accepted in interstate and foreign commerce from 12 sellers, in the total amount of \$579,290.15.
4. Respondent failed to pay the produce debt to 12 sellers and failed to come into full compliance with the PACA within 120 days of the filing of the Complaint against it.

Conclusions

Respondent's failure to make full payment promptly with respect

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to 166 lots of perishable agricultural commodities it purchased, received, and accepted in interstate and foreign commerce, in the total amount of \$579,290.15, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. §499b), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances of the violations of Respondent shall be published.

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

Pursuant to the Rules of Practice governing procedures under the Act, 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 shall be served upon the parties.

Done at Washington, D.C.

In re: P. J. PRODUCE, INC.
PACA Docket No. D-05-0023.
Default Decision.
Filed October 12, 2007.

PACA – Default.

Andrew Y Stanton for AMS.

Respondent Pro se.

Default Decision by Administrative Law Judge Jill S. Clifton.

Decision and Order by Reason of Default

This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (herein frequently “the PACA” or “the Act”), by a complaint filed

on September 23, 2005.

The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS" or "Complainant"), is represented by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

The complaint alleged, among other things, that during October 25, 2002 through October 3, 2003, the Respondent, P. J. Produce, Inc. (herein frequently "P. J. Produce" or "Respondent"), failed to make full payment promptly to 30 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$1,146,938.48 for 283 lots of perishable agricultural commodities, which the Respondent purchased, received, and accepted in interstate and foreign commerce, in willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The complaint requested that the Administrative Law Judge find that the Respondent P. J. Produce wilfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order that the facts and circumstances be published.

The Hearing Clerk was unsuccessful in attempting to serve the complaint upon the Respondent P. J. Produce, because certified mail to the Respondent's last known address was returned, indicating that the Respondent was no longer located there. The Complainant then attempted to serve the complaint upon the registered agent for the Respondent P. J. Produce who was noted in the records of the New York Department of State, but that individual refused to accept service, claiming that he was no longer the registered agent.

In order to obtain service of the complaint pursuant to section 306(b)(1) of the New York State Corporation Law, the Complainant filed, on April 11, 2007, his First Amended Complaint to include the necessary procedural elements for service through the New York Department of State. In all other respects, the First Amended Complaint was identical to the original complaint. The United States Marshal Service served the First Amended Complaint on the New York Department of State on April 24, 2007. The Complainant filed a Notice of Service of First Amended Complaint on Respondent on May 16,

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2007.

According to section 1.136(a) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (hereinafter "Rules of Practice"), (7 C.F.R. § 1.136(a)), an answer is due within 20 days after service of the complaint. No answer to the First Amended Complaint has been received from the Respondent P. J. Produce, Inc.

The Complainant's Motion for Decision Without Hearing by Reason of Default as to Respondent P. J. Produce, Inc., is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the complaint, which are admitted by P. J. Produce's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

Findings of Fact

1. Respondent P. J. Produce, Inc. is a corporation organized and existing under the laws of the State of New York. Respondent ceased operating in September 2003. The last known business mailing address of Respondent is Unit 337 Row C, Hunts Point Produce Market, Bronx, New York 10474.

2. At all times material to this decision, Respondent P. J. Produce, Inc. was licensed under the provisions of the PACA. License number 19991220 was issued to the Respondent on June 22, 1999. This license terminated on June 22, 2004, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when the Respondent failed to pay the required renewal fee.

3. As more fully set forth in paragraph III of the First Amended Complaint, Respondent P. J. Produce, Inc., during October 25, 2002 through October 3, 2003, failed to make full payment promptly to 30 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$1,146,938.48 for 283 lots of perishable agricultural commodities which the Respondent purchased, received and accepted in interstate and foreign commerce.

Conclusions

1. The Secretary of Agriculture has jurisdiction.
2. Respondent P. J. Produce, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by willfully failing to make full payment promptly to 30 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$1,146,938.48 for 283 lots of fruits and vegetables, all being perishable agricultural commodities, which the Respondent purchased, received and accepted in interstate and/or foreign commerce.

Order

1. The Respondent P. J. Produce, Inc. committed wilful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and 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.

Finality

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

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**SUBTITLE A—OFFICE OF THE SECRETARY OF
AGRICULTURE**

PART 1—ADMINISTRATIVE REGULATIONS

....

**SUBPART H—RULES OF PRACTICE GOVERNING
FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE
SECRETARY UNDER**

VARIOUS STATUTES

...

§ 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.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial

Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

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(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]
7 C.F.R. § 1.145

In re: FRANK J. GATTO, INC.
PACA Docket No. D-07-0171.
Default Decision.
Filed November 6, 2007.

PACA – Default.

Jonathon Gordy for AMS
Respondent pro se.

Default Decision by Administrative Law Judge Jill S. Clifton.

Decision by Reason of Default

The Complaint, filed on August 15, 2007, under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (“the Act” or “the PACA”), alleges that during the period of April 2006 through October 2006, Respondent Frank J. Gatto, Inc. (“Respondent”), failed to make full payment promptly to 22 sellers of the agreed purchase prices in the total amount of \$633,389.94 for 172

Frank J. Gatto, Inc.
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lots of perishable agricultural commodities, which it purchased, received, and accepted in the course of interstate and foreign commerce or in contemplation of interstate or foreign commerce.

Parties and Counsel

Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (“AMS” or “Complainant”), is represented by Jonathan Gordy, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture, Washington D.C. 20250-1413.

Respondent is a corporation organized and existing under the laws of the state of New Jersey.

Respondent’s Failure to Answer

Respondent has not answered the Complaint. The time for filing an answer has expired. Complainant’s Motion for Decision Without Hearing by Reason of Default is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Complaint, which are admitted by Respondent’s default, are adopted and set forth herein as Findings of Fact. This Decision, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Frank J. Gatto, Inc. is a corporation organized and existing under the laws of the state of New Jersey. Respondent’s business address was 837 E Esperanza Suite C, McAllen, TX 78502. Its mailing address was P.O. Box 6078, McAllen, TX 78504-6078. Respondent ceased operations on December 7, 2006.

2. At all times material herein, Respondent Frank J. Gatto, Inc. was

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licensed under the provisions of the PACA. License number 1916-5381 was issued to Respondent on June 22, 1956. This license is due for renewal on June 22, 2008.

3. During April 2006 through October 2006, Respondent Frank J. Gatto, Inc. failed to make full payment promptly to 22 sellers of the agreed purchase prices in the total amount of \$633,389.94 for 172 lots of perishable agricultural commodities, which it purchased, received, and accepted in the course of interstate and foreign commerce or in contemplation of interstate or foreign commerce.

Conclusions

Respondent Frank J. Gatto, Inc.'s failure to make full payment promptly with respect to the 172 transactions set forth in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)), and the license of Respondent is revoked.

Finality

This Decision will become final and effective without further proceedings 35 days after it is served unless a party to the proceeding files with the Hearing Clerk an appeal to the Judicial Officer 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). See attached Appendix A, containing 7 C.F.R. § 1.145).

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

Done at Washington, D.C.

In re: OLD DIXIE PRODUCE & PACKAGING, INC.
PACA Docket No. D-07-0104.
Default Decision.
Filed December 21, 2007.

PACA – Default.

Tonya Keusseyan for AMS.
Respondent Pro se.

Default Decision by Administrative Law Judge Jill S. Clifton

Decision and Order by Reason of Default

1. This disciplinary proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (herein frequently “the PACA” or “the Act”), by the Complaint filed on May 8, 2007.
2. The Complainant, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently “AMS” or “Complainant”), is represented by Tonya Keusseyan, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.
3. On May 8, 2007, the Hearing Clerk sent to Respondent Old Dixie Produce & Packaging, Inc. (herein frequently “Old Dixie Produce” or “Respondent”), by certified mail, return receipt requested, a copy of the Complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent was informed in the service letter, among other things, that it had 20 days from receipt to file its answer.
4. Respondent Old Dixie Produce received the Complaint, Rules of Practice, and service letter on May 14, 2007, and did not answer the Complaint. The Rules of Practice provide that an answer is due to be filed within 20 days after service of the complaint, and the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.
5. The Complaint alleged, among other things, that during October 2004 through March 2005, Respondent Old Dixie Produce & Packaging, Inc. failed to make full payment promptly to 45 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$4,353,004.62 for 605 transactions involving perishable agricultural commodities that Respondent purchased, received, and accepted in the course of interstate and foreign commerce. [Of the \$4,353,004.62 which

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Respondent Old Dixie Produce was alleged to have failed to pay promptly, \$845.40 was for brokerage fees for 7 transactions involving perishable agricultural commodities.]

6. AMS requested that Respondent Old Dixie Produce be found to have willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), and that the facts and circumstances be ordered to be published. AMS's Motion for Decision Without Hearing by Reason of Default, filed October 3, 2007, is before me.

7. Respondent Old Dixie Produce is in default. The time for filing an answer expired on June 4, 2007. Respondent Old Dixie Produce's filings on June 20 and 21, 2007, which do not deny the allegations of the Complaint, are not an answer. This proceeding is not stayed by the bankruptcy proceedings.

8. Accordingly, the material allegations of the Complaint, which are admitted by Respondent Old Dixie Produce's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. See 7 C.F.R. §1.130 *et seq.*

Findings of Fact

9. Respondent Old Dixie Produce & Packaging, Inc. is a corporation organized and existing under the laws of the State of Louisiana. Respondent's business and mailing address was 5801 G Street New Orleans, LA 70183. Respondent ceased business operations in March 2005. Respondent's current mailing address is c/o Anthony Peraino, 7516 Bluebonnet Blvd PMB 171, Baton Rouge, LA 70810.

10. At all times material herein, Respondent Old Dixie Produce was licensed under the provisions of the PACA. License number 19197643 was issued to Respondent on July 31, 1962. This license terminated on July 31, 2006, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

11. Respondent Old Dixie Produce, during October 2004 through March 2005, failed to make full payment promptly, as is more fully set forth in Appendix A to the Complaint, to 45 sellers of the agreed purchase prices, or balances thereof, in 605 transactions involving perishable agricultural commodities, which Respondent purchased,

received, and accepted in the course of interstate and foreign commerce. The total amount which Respondent failed to pay promptly in these transactions was \$4,353,004.62, of which \$845.40 was for brokerage fees for 7 transactions involving perishable agricultural commodities.

12. On July 29, 2005, Respondent Old Dixie Produce filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.*) in the U.S. Bankruptcy Court, Eastern District of Louisiana, New Orleans Louisiana. The bankruptcy petition was designated case number 05-16397. Respondent, in bankruptcy pleadings and in bankruptcy schedule F, admitted that all 45 sellers listed in the Complaint hold unsecured claims for unpaid produce debt. Of the \$4,353,004.62 that the Complaint alleges to be due and owing for perishable agricultural commodities to those sellers, Respondent has admitted that it owes \$4,240,907.33.

Conclusions

13. The Secretary of Agriculture has jurisdiction.

14. Respondent Old Dixie Produce willfully, flagrantly and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing, during October 2004 through March 2005, to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of \$4,353,004.62, to 45 sellers in 605 transactions involving perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

Order

15. Respondent Old Dixie Produce committed wilful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

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

Finality

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This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.

APPENDIX A

7 C.F.R.: 1.145

TITLE 7—AGRICULTURE

**SUBTITLE A—OFFICE OF THE SECRETARY OF
AGRICULTURE**

PART 1—ADMINISTRATIVE REGULATIONS

....

**SUBPART H—RULES OF PRACTICE GOVERNING
FORMAL**

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE
SECRETARY UNDER**

VARIOUS STATUTES

...

§ 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.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

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(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003] 7 C.F.R. § 1.145.

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Fresh Marketing Services, Inc., PACA-D-07-0092, 7/17/07.

Bronco Produce Corp, d/b/a J & J Produce, PACA-D-07-0094,
09/12/07.

Robison Farms, LLC, PACA-D-07-0147, 10/01/07.

Dandylion Farms, Inc., PACA-D-07-0165, 10/15/07.