

# 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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**BOCCHI AMERICAS ASSOCIATES, INC. v. COMMERCE  
FRESH MARKETING, INC.**

**No. 06-20939.**

**Filed January 23, 2008.**

**(Cite as: 515 F.3d 383).**

**PACA – Trust assets – Notice of intent to assert PACA trust provisions – Post-transaction agreement – Oral agreements to modify, ineffective – Informal writing will suffice – Loss of PACA protections.**

PACA Seller (Bocchi) was owed \$123,000 by PACA Buyer (Commerce). Payments were late and buyer tendered periodic \$2,000 payments to buyer along with an post-transaction informal contract to accept those payments lasting well beyond 30 days. Court ruled that Seller was due the money from the PACA Buyer, but did not award Buyer proceeds under PACA trust, nor permit Seller to proceed against the principals (responsible persons) of the Buyer company. The parties may enter into a non-statutory payment arrangement, but Seller does so at a risk that he will lose powerful PACA enforcement rights. The informal contract must satisfy all the elements of contract formation in the controlling jurisdiction. Here, Seller was found to have informally accepted a payment schedule lasting well beyond 30 days and under PACA law loses his right to proceed under the PACA trust and against the principals of the Buyer entity.

**United States Court of Appeals,  
Fifth Circuit.**

Before WIENER, DeMOSS, and PRADO, Circuit Judges.  
PRADO, Circuit Judge:

Plaintiff-Appellant Bocchi Americas Associates, Inc. appeals the district court's entry of judgment in favor of Defendant-Appellee Diran A. Elsaifi. For the reasons stated below, we affirm.

**I. FACTS AND PROCEDURAL HISTORY**

*A. Factual Background*

Bocchi Americas Associates, Inc.  
v. Commerce Fresh Marketing, Inc.  
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Bocchi Americas Associates, Inc. (“Bocchi”), a Delaware corporation, is a wholesale supplier of fresh fruits and vegetables. Between December 10, 2002, and June 27, 2003, Bocchi sold and delivered twenty shipments of perishable agricultural commodities to Commerce Fresh Marketing, Inc. (“CFM”), a Texas corporation. The parties have stipulated that CFM failed to pay for many of these deliveries and that CFM owes Bocchi \$123,000.

On June 27, 2003, Bocchi sent its last invoice to CFM. CFM claims that on the date of the last invoice, Diran A. Elsaifi (“Elsaifi”), CFM's president and sole shareholder, mailed to Bocchi a check for \$2,000 accompanied by a letter requesting that Bocchi accept weekly payments of \$2,000 until the full balance was paid. The letter stated, in part,

Enclosed please find a payment in the amount of \$ 2,000.00 to be applied to Commerce Fresh Marketing, Inc.'s account with Bocchi Americas, Inc. [sic] Pursuant to our agreement, Bocchi Americas Inc. [sic] will accept partial payments to be applied towards this account, on a weekly basis until the balance of \$103,132.85 is paid.

Should the above correctly reflect the terms of our payout agreement, please deposit the check, apply the amount against the account balance, and send a new statement reflecting the new balance due on the account.

Bocchi deposited the check but claims it never received the above-quoted letter. Nevertheless, between July 2003 and October 2004, Bocchi accepted approximately seven additional \$2,000 payments and applied them to CFM's unpaid invoices.<sup>1</sup> On December 9, 2003, Bocchi's president, Tom Leonardi, sent a fax to CFM demanding it begin making weekly payments to settle three overdue invoices. The overdue amount was never paid, and on June 23, 2004, Bocchi filed this suit.

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<sup>1</sup>CFM also made \$5,000 payments in November and December of 2004.

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On July 13, 2004, CFM again wrote to Bocchi, proposing to make monthly payments of \$2,000 until the end of 2004 and monthly payments of \$5,000 thereafter. Leonardi responded three days later in a handwritten fax that stated, in part,

Bocchi Americas does not wish to hinder the operations of Commerce Fresh but the complete balance due of \$158,577.00 is to be paid in full immediately.

A set monthly payment has never been agreed nor your proposed \$2000.00 monthly payout cannot be deemed acceptable. All files must be paid as invoiced to you as stated.

Don, you have promised to pay complete invoices in full within a year's time and only limited file payments have been done.

On November 10, 2004, Bocchi and CFM entered into an agreement in which Bocchi agreed to dismiss its July 2005 court date in exchange for CFM's promise to pay the outstanding balance of its debt. CFM agreed to make \$5,000 monthly payments in November and December 2004, and \$20,000 monthly payments thereafter until the remaining balance was paid. CFM made the first two payments but defaulted on the remaining debt. Bocchi then moved forward with this suit.

### *B. Procedural History*

On June 23, 2004, Bocchi filed this suit against CFM and Elsaifi, alleging common law breach of contract and seeking damages under the Perishable Agricultural Commodities Act of 1930 ("PACA"), as amended, 7 U.S.C. § 499a, *et seq.* By consent of the parties, a magistrate judge conducted all proceedings in this case, including a bench trial and entry of final judgment. *See* 28 U.S.C. § 636(c).

On October 6, 2006, the magistrate judge entered final judgment on behalf of Bocchi and against CFM, awarding \$123,000 plus prejudgment interest, postjudgment interest, and attorneys' fees.

However, the magistrate judge ruled that Bocchi waived its rights to special trust protection under PACA and that therefore, there was no basis for judgment against Elsaifi. Bocchi filed this timely appeal, challenging the magistrate judge's conclusion that Bocchi waived its rights under PACA.

*C. Statutory Scheme*

Congress originally enacted PACA “to regulate the sale of perishable commodities and promote fair dealing in the sale of fruits and vegetables.” *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 413 (5th Cir.2003) (internal quotation marks omitted). PACA requires buyers of produce to make “full payment promptly.” 7 U.S.C. § 499b(4). If a buyer fails to do so, the seller may file a complaint with the United States Department of Agriculture or file a civil suit against the buyer.<sup>2</sup> *Id.* § 499e(a), (b).

In 1984, Congress amended PACA to strengthen the rights of sellers of perishable commodities on short-term credit. *See Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A.*, 362 F.3d 33, 37 (2d Cir.2004). PACA now gives these sellers two powerful tools with which to enforce buyers' payment obligations. First, PACA creates, immediately upon delivery of the produce, a nonsegregated “floating” trust in favor of unpaid sellers, which attaches to the products themselves and any proceeds. 7 U.S.C. § 499e(c)(2); 7 C.F.R. § 46.46(b); *see also Reaves*, 336 F.3d at 413. If the seller is not paid promptly, the buyer must preserve trust assets, and the seller has a “superpriority” right that trumps the rights of the buyer's other secured and unsecured creditors. *Reaves*, 336 F.3d at 413.

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<sup>2</sup>More specifically, the buyer may enforce its PACA trust rights either by seeking a reparation order from the Secretary of Agriculture and subsequent judicial enforcement, 7 U.S.C. §§ 499f, 499g, or through a civil suit against the buyer for breach of fiduciary trust, 7 U.S.C. § 499e(c)(5).

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Second, PACA imposes secondary liability on persons who are in a position to control the trust assets and fail to do so. *Golman-Hayden Co. v. Fresh Source Produce Inc.*, 217 F.3d 348, 351 (5th Cir.2000). Thus, if the buyer's assets are insufficient to satisfy the seller's claim, this provision allows a seller to seek payment from the buyer's principals, individually.<sup>3</sup> That power is particularly important in cases such as this where the corporate buyer is no longer in business, and a common-law breach of contract claim only would yield an unenforceable judgment.<sup>4</sup>

In order to take advantage of these powers, however, the PACA statute and regulations set forth specific rules that sellers must follow. Relevant to this appeal, PACA applies only to produce sold on a short-term credit basis, in accordance with the statute's "full payment promptly" provision. *See* 7 U.S.C. § 499b(4). "Full payment promptly" means payment within ten days after the buyer accepts the produce. *See* 7 C.F.R. § 46.2(aa)(5),(11). However, a buyer and seller may agree to extend the time for payment, as long as the aggregate time for payment does not exceed thirty days after the buyer receives and accepts the commodities. *Id.* § 46.46(e)(2). Therefore, if a seller of produce agrees to extend the time for payment more than thirty days following delivery and acceptance of the produce, the seller may no longer assert any right to a PACA trust or seek recovery from a principal of the buyer. *See Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 206 n. 9 (3d Cir.1998). Under this rule, the magistrate judge in this case found that Bocchi and CFM had entered into an such an agreement, and therefore, Bocchi's right to PACA trust protection was lost.

## II. STANDARD OF REVIEW AND JURISDICTION

We review the district court's findings of fact for clear error and

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<sup>3</sup>Although similar in effect, this provision does not derive from a "piercing of the corporate veil" theory. Rather, this individual liability is premised on the breach of the individual's fiduciary duty to protect PACA trust assets. *See Golman-Hayden*, 217 F.3d at 351 n.18. In this case, Bocchi uses this provision to seek recovery directly from Elsaifi.

<sup>4</sup> CFM filed for Chapter 7 bankruptcy liquidation on November 17, 2007.

conclusions of law de novo. *Lewis v. Dretke*, 355 F.3d 364, 366 (5th Cir.2003). We have jurisdiction to hear an appeal of the final judgment of a district court under 28 U.S.C. § 1291.

### III. DISCUSSION

PACA imposes a strict set of requirements on produce sellers seeking to benefit from the law's protections. Relevant to this appeal is the rule that a seller may enter into a pre-transaction payment agreement and still qualify for PACA trust protection only if the agreement does not extend the date for payment beyond thirty days after the buyer's receipt and acceptance of the commodities. 7 C.F.R. § 46.46(e)(1)-(2). Notably, the PACA statute and regulations explicitly refer only to pre-transaction agreements. *See, e.g.*, 7 U.S.C. § 499e(c)(3) (“The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker within thirty calendar days ... (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing *before entering into the transaction....*” (emphasis added)); 7 C.F.R. § 46.46(e)(1) (“Parties who elect to use different times for payment must reduce their agreement to writing before entering into the transaction ....”).

The PACA statute and Fifth Circuit precedent are silent on whether the thirty-day limit also applies to agreements made after the buyer and seller have entered into the transaction. However, five circuits have held that the thirty-day limit does apply to post-transaction agreements. *See Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A.*, 362 F.3d 33, 43-44 (2d Cir.2004); *Overton Distribs., Inc. v. Heritage Bank*, 340 F.3d 361, 366-68 (6th Cir.2003); *Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.*, 307 F.3d 666, 669-71 (7th Cir.2002); *Greg Orchards & Produce, Inc. v. Roncone*, 180 F.3d 888, 892 (7th Cir.1999); *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 208-09 (3d Cir.1998); *In re Lombardo Fruit & Produce Co.*, 12 F.3d 806, 809-10 (8th Cir.1993). Following the overwhelming weight of authority, and in

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conformance with the underlying purpose of PACA, we hold that the thirty-day limit extends to post-transaction agreements.

In enacting the PACA statute, Congress sought to provide trust protections only to sellers extending short-term credit to buyers:

[T]he committee does not intend the trust to apply to any credit transaction that extends beyond a reasonable period. Under the bill, the Secretary is required to establish, through rulemaking, the time by which, the parties to a transaction must agree payment on a transaction must be made, to qualify it for coverage under the trust. An agreement for payment after such time will not be eligible to receive the benefits of the trust.

H.R. REP. NO. 98-543, at 7 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 405, 410.

PACA regulations set that “reasonable period” at thirty days following delivery of the produce and acceptance by the buyer. 7 C.F.R. §§ 46.46(e)(1)-(2), 46.2(aa)(5), (11).

PACA also requires sellers, in the event of default, to promptly pursue judicial and administrative remedies. *Am. Banana*, 362 F.3d at 38. “The sellers' prompt resort to administrative remedies was intended to isolate and to put pressure on financially insecure buyers to meet their obligations or to be forced from the business.” *Id.* The primary objective of this requirement is to protect sellers from volatility in the produce industry, where producers and shippers were, at least at the time PACA was first enacted, predominantly small businesses. *See id.* at 44 (citing H.R. REP. NO. 98-543, at 2-4).

Failing to apply the waiver rule to post-default agreements could actually encourage long-term credit arrangements, because sellers could offer longer-term forbearance to delinquent buyers with the knowledge that the seller would still be protected by the PACA trust. Such a result would undermine PACA's intent—which is to protect small sellers who need prompt payment to survive—and would unfairly benefit PACA sellers with respect to other secured and unsecured creditors of the

defaulting buyer.<sup>5</sup> Based on the clear policy of the PACA statute, we conclude that a PACA seller does not lose PACA benefits by entering into a post-transaction agreement to extend credit terms for up to thirty days following delivery and acceptance, but the seller does forfeit its PACA trust protections if such an agreement extends payment beyond thirty days after delivery and acceptance of the commodities in question.<sup>6</sup>

Now that we have determined that a post-transaction agreement may waive PACA trust rights, we consider whether the parties in this case entered into such an agreement. The magistrate judge found sufficient evidence to prove the existence of an oral agreement and, in the alternative, a written agreement.<sup>7</sup>

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<sup>5</sup>In addition, contrary to PACA's purpose, allowing a PACA trust-protected seller to receive payments beyond thirty days while retaining its trust protections would actually increase uncertainty in the agriculture market. A buyer's other secured and unsecured creditors would face the possibility of a seller asserting its PACA trust superpriority rights far into the future. In the meantime, those creditors would see the PACA-protected seller extracting preferential payments from the already-delinquent buyer.

<sup>6</sup>Bocchi argues that *In re Baiardi Chain Food Corp.*, PACA Docket No. D-01-0023 (U.S.D.A.2005), dictates the opposite result and that this U.S.D.A. decision is entitled to deference as an agency interpretation of a statute. The *Baiardi* case, however, involves a question of whether a buyer complied with the "full payment promptly" provision in PACA and does not involve a question of waiver of trust provisions by agreement. Therefore, *Baiardi* has no bearing on these facts.

<sup>7</sup>The magistrate judge concluded, based on the record, that Bocchi must have made a "business decision" to agree to extend payment beyond thirty days, thereby waiving its trust protections. Indeed, Bocchi's accounts receivable manager testified at trial: "I believe Bocchi was giving Commerce Fresh a chance to pay." As the parties explained at oral argument, Bocchi had reason to believe it stood a better chance of recovering on CFM's debt by allowing the buyer more time to pay. If Bocchi had sought immediate enforcement of the debt-as PACA requires-CFM likely would have been forced into bankruptcy, and Bocchi presumably would have recovered little.

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The question of whether an oral agreement is sufficient to effect a waiver or forfeiture of PACA trust rights is an issue of first impression in our circuit. However, three of the four circuits that have expressly addressed the issue have held that only written agreements can effect such a waiver. *See Patterson*, 307 F.3d at 669-70; *Idahoan Fresh*, 157 F.3d at 205; *Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 781-82 (8th Cir.1991). To date, the Second Circuit is the only one to hold that oral agreements suffice to waive PACA trust protection. *Am. Banana*, 362 F.3d at 46-47. We agree with that majority of circuits and adopt the rule that waiver or forfeiture of PACA trust rights by entering into an extension agreement requires an agreement in writing.<sup>8</sup> We next consider, therefore, whether the parties in this case entered into such a written agreement.

First, we must decide what type of writing would be sufficient to prove a written agreement. The Seventh Circuit has held that a formal written agreement is not required to waive the seller's rights under PACA; rather, all that is required are writings sufficient to satisfy the statute of frauds. *Patterson*, 307 F.3d at 671. In *Patterson*, the court reasoned that because a PACA trust can be created by letters, invoices, and other informal writings, the trust provisions may also be waived by informal writings. *Id.* at 671. Other courts considering this question have followed *Patterson's* approach. *See, e.g., Am. Banana*, 362 F.3d at 47; *In re Dixie Produce & Packaging, L.L.C.*, 368 B.R. 533, 536 (Bankr.E.D.La.2007). We find this reasoning persuasive. Therefore, we conclude all that is needed to evidence an agreement are writings sufficient to satisfy the applicable statute of frauds.

Next, we consider whether the writings in this case satisfy the statute of frauds. To satisfy the Texas statute of frauds, a promise may be evidenced by a "memorandum of" the promise that is (1) in writing and (2) signed by the party to be charged with the promise. TEX. BUS. & COM. CODE ANN. § 26.01(a). Writings between parties must be complete within themselves as to every material detail and contain all

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<sup>8</sup>As we hold that an oral agreement will not suffice, we do not review the magistrate judge's evidentiary ruling on the existence of an oral agreement.

the essential elements of the agreement. *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex.1978). The statute of frauds writing requirement may be satisfied by two or more documents. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex.1995). Further, the “memorandum” need not embody all of the terms agreed upon. *Botello v. Misener-Collins Co.*, 469 S.W.2d 793, 794-95 (Tex.1971).

In the instant case, there are a number of writings, which, taken together, evidence an agreement between Bocchi and CFM to extend payment beyond thirty days. For example, the June 27, 2003 letter from CFM was an explicit offer. The letter specified a means of acceptance of the offer: cashing the enclosed \$2,000 check. Although the magistrate judge made no explicit finding on whether Bocchi actually received this letter, the magistrate judge did make a factual finding that it was standard procedure between the parties to construe a failure to respond to an offer as an acceptance. Nevertheless, this letter alone would not satisfy the statute of frauds as against Bocchi because it lacks a signature from Bocchi's representative.

Taken together with Leonardi's July 16, 2004 fax, however, these writings satisfy the statute of frauds. The July 2004 fax provides evidence of an explicit agreement: “Don, you have promised to pay complete invoices in full within a year's time and only limited filed payments have been done.” The handwritten fax lacks a formal signature, but Leonardi's name is written in the “From” field and the fax is written under Bocchi corporate letterhead. *See* TEX. BUS. & COM. CODE ANN. § 1.201(b)(37) (“‘Signed’ includes using any symbol executed or adopted with present intention to adopt or accept a writing”); *Fulshear v. Randon*, 18 Tex. 275, 277 (1857) (“If he writes his name in any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature.”).

To evidence an agreement, the writings must satisfy all the elements of contract formation under Texas law: offer, acceptance, and a

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“meeting of the minds.” *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex.App.2002). “An offer results in a binding contract upon acceptance by the other party according to its terms.” *Fail v. Lee*, 535 S.W.2d 203, 208 (Tex.App.1976). Performance of the act which the offeree was requested to promise to perform may constitute valid acceptance. *Thomas v. Reliance Ins. Co.*, 617 F.2d 122, 128 (5th Cir.1980).

Bocchi contends that the acceptance and meeting of the minds elements are missing from the record documents. Nevertheless, we find sufficient evidence of these elements in the above-described writings. Bocchi's agreement is evidenced by its acceptance of the initial \$2,000 check and at least seven additional payments, as well as Leonard's statement in his July 2004 fax explicitly referencing the agreement. Accordingly, we find there is sufficient evidence of a written agreement to satisfy the statute of frauds, and therefore Bocchi has waived its PACA trust rights.<sup>9</sup> As a result, Bocchi has no cause of action against Elsaifi under PACA.

**IV. CONCLUSION**

We find that Bocchi waived its right to PACA trust protection by entering into a written post-transaction agreement to allow CFM to make payments beyond thirty days after delivery of the produce. Therefore, we AFFIRM the magistrate judge's judgment in favor of Elsaifi.

**AFFIRMED.**

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<sup>9</sup> Because we find sufficient written evidence of an agreement in these writings, we need not consider whether the November 2004 agreement may be considered as evidence of Bocchi's willingness to agree to a payment period in excess of thirty days.

**KOAM PRODUCE, INC. v. USDA.**  
**No. 06-4838-ag.**  
**Filed March 12, 2008.**

**(Cited as: 269 Fed. Appx. 35).**

**PACA – Bribery – Acts of employees and agents – Scope of employment – Willful, flagrant, and repeated violations – Publication of facts and circumstances.**

The Court held that the Judicial Officer (JO) found “substantial evidence” and had made an allowable judgment in his choice of remedies concluding KOAM Produce, Inc. (Respondent), willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4) as a consequence of its employee, Marvin Friedman, paying bribes to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities and rejected Respondent’s contentions that: (1) Marvin Friedman’s payments to the United States Department of Agriculture produce inspector were not bribes but instead, were gratuities. The Judicial Officer ordered the publication of the facts and circumstances of Respondent’s violations.

**United States Court of Appeals,  
Second Circuit.**

Present: Hon. JOSEPH M. McLAUGHLIN, Hon. RICHARD C. WESLEY, Circuit Judges, Hon. BRIAN M. COGAN, District Judge.<sup>1</sup>

**SUMMARY ORDER**

Petitioner Koam Produce, Inc. appeals from a June 2, 2006 final order of the Judicial Officer (“JO”), acting on behalf of the Secretary of the United States Department of Agriculture (“USDA”),<sup>2</sup> finding that the company violated § 499b(4) of the Perishable Agricultural

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<sup>1</sup>The Honorable Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

<sup>2</sup>The Secretary of Agriculture has delegated authority to the Judicial Officer to act as final deciding officer in USDA’s adjudicatory proceedings subject to 7 U.S.C. §§ 556 and 557. 5 C.F.R. § 2.35.

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Commodities Act of 1930 (“PACA”), as amended, 7 U.S.C. §§ 499a-499s (2000), by making illegal payments to a USDA produce inspector. The JO ordered the facts and circumstances set forth in its decision and order to be published, because Koam's PACA license had already been terminated due to its failure to pay the annual fee. The JO affirmed the April 18, 2005 and January 6, 2006 decisions of the Administrative Law Judge (“ALJ”) (Clifton, J.), which found that Marvin Friedman, acting as Koam's agent, paid unlawful bribes and gratuities to a USDA inspector between April and July of 1999 in connection with 42 federal inspections of perishable agricultural commodities, and that Koam thus committed willful, flagrant and repeated violations of § 499b(4) of PACA. Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues.

We reject Koam's argument that the Secretary does not have the authority to impute Friedman's intentional misconduct to the corporation under § 499p of PACA. Koam does not dispute that Friedman paid bribes to a USDA produce inspector nor that his behavior violated § 499b(4) of PACA. *See also G&T Terminal Packaging Co. v. USDA*, 468 F.3d 86, 97 (2d Cir.2006) (endorsing the Secretary's interpretation of § 499b(4) as prohibiting all illicit payments to inspectors). Rather, Koam contends only that it should not be held responsible for those bribes, even though § 499p of PACA provides that:

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer or other person.

7 U.S.C. § 499p.

This Court has already specifically held that “Friedman's acts-bribing USDA inspectors-are deemed the acts of Koam” under PACA. *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, 130 (2d

Cir.2003); *see also H.C. MacClaren v. USDA*, 342 F.3d 584, 591 (6th Cir.2003) (employee's conduct imputable to corporation under PACA); *Potato Sales Co., Inc. v. Dep't of Agric.*, 92 F.3d 800, 807 (9th Cir.1996) (same); *ABL Produce, Inc. v. USDA*, 25 F.3d 641, 644 (8th Cir.1994) (corporation may be held responsible for its employee's acts under PACA even if it was not aware of them). Moreover, despite Koam's repeated assertions to the contrary, its principals are not being held *criminally* responsible for Friedman's activities in this proceeding.

We also reject Koam's argument that its Fifth Amendment due process rights were violated because the JO and the ALJ are institutionally biased against it. Administrative adjudicators are presumed to be unbiased and this presumption can only be rebutted if the party asserting bias makes a showing of a disqualifying interest, either pecuniary or institutional. *Wolkenstein v. Reville*, 694 F.2d 35, 41-42 (2d Cir.1982). Koam's frivolous allegations regarding congressional pressure entirely fail to meet this burden.

Finally, we reject Koam's argument that the evidence does not show that it willfully, flagrantly and repeatedly violated § 499b(4) of PACA and thus that the JO should not have imposed the sanction of publication. We review the Secretary's factual findings under the "substantial evidence" test. *Consol. Edison v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938). "The court may decide only whether, under the pertinent statute and the relevant facts, the Secretary made 'an allowable judgment in his choice of remedy.'" *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 189, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973) (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612, 66 S.Ct. 758, 90 L.Ed. 888 (1946)). We conclude that there is substantial evidence to support the Secretary's factual findings and his choice of remedy was allowable.

Accordingly, for the reasons set forth above, the decision and order of the Secretary of Agriculture is hereby AFFIRMED.

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**MICHAEL H. HIRSCH v. USDA.**

**No. 07-1023.**

**Filed March 31, 2008.**

**(Cite as: 128 S. Ct. 1748).**

**PACA – Bribery – Motive for payment to inspector – Liability of PACA licensee for officer’s acts – Liability of PACA licensee not irrebuttable – Scope of employment – Knowledge of acts of an officer – Willful, flagrant, and repeated violations – Responsibly connected – Actively involved – Nominal – License revocation appropriate – Right to engage in occupation.**

**Supreme Court of the United States**

Case below, *Kleiman & Hochberg, Inc. v. U.S. Dept. of Agriculture*, 497 F.3d 681.

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

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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**REPARATIONS**

**COURT DECISIONS**

**GRIMMWAY ENTERPRISES, INC., d/b/a GRIMMWAY FARMS  
AND NATURIPE FARMS LLC f/k/a GLOBAL BERRY FARMS,  
LLC v. PIC FRESH GLOBAL, INC., AND JEFFREY D. CASE.  
No. 1:07-CV-00109 OWW-TAG.  
Filed Feb. 26, 2008.**

**(Cite as: 548 F.Supp.2d 840).**

**PACA-R – PACA trust – Fiduciary duty to preserve trust res – Personal liability.**

A principal officer of a Buyer entity may be personally liable when he does not protect the trust assets after Seller gives timely notice of demand to set up PACA trust. Buyer of perishable agricultural products failed to exercise any appreciable oversight of the corporation's management and breached a fiduciary duty owed to PACA sellers.

**United States District Court,  
E.D. California.**

**MEMORANDUM DECISION RE GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY JUDGMENT (DOC. 36)**

OLIVER W. WANGER, District Judge.

**1. INTRODUCTION**

Plaintiffs Grimmway Enterprises, Inc. d/b/a Grimmway Farms (“Grimmway”), a California Corporation and Naturipe Farms LLC f/k/a Global Berry Farms, LLC, a Delaware Limited Liability Company

## 594 PERISHABLE AGRICULTURAL COMMODITIES ACT

(“Naturipe”) move for partial summary judgment on their breach of fiduciary claim, pursuant to Federal Rules of Civil Procedure 56 against Pro Se Defendant Jeffrey D. Case (“Case”). Plaintiffs claim Defendant Case is personally liable for \$16,336.00 (inclusive of attorney's fees and post-judgment interest). Defendant Case did not appear for the hearing nor did Defendant file an opposition to this motion. This matter was heard on January 14, 2008.

### **2. PROCEDURAL BACKGROUND**

Plaintiffs Grimmway and Naturipe filed their complaint on January 19, 2007. (Doc. 1, Initial Complaint) Plaintiffs then filed an amended complaint on January 29, 2007 and an accompanying application for injunctive relief to enforce Plaintiffs' rights under the trust provisions of the Perishable Agricultural Commodities Act of 1930, as amended, 7 U.S.C. § 499e (“PACA”) against Defendants PIC Fresh Global, Inc. (“PIC Fresh”) and Case. (Doc. 7, Amended Complaint (“Complaint”)) On January 29, 2007, the Court issued a temporary restraining order, which among other things, required PIC Fresh to discontinue any further dissipation of PACA trust assets and other assets which may or may not be impressed with the PACA trust, pending a hearing on Plaintiffs' motion for preliminary injunction and decision of the Court. (Doc. 17, Temporary Restraining Order)

A settlement agreement was entered into by the parties in February 2007 (“Settlement Agreement”); thereafter on February 12, 2007 a judgment was entered in favor of Plaintiffs and against Defendant PIC Fresh in the aggregate amount of \$48,179.60, inclusive of interest and attorney's fees, as of the date of the Order and the case was dismissed. (Doc. 22, Judgment Order) After Defendant PIC Fresh breached the Settlement Agreement the case was reopened against Defendant Case and a final judgment entered in favor of Plaintiffs and against PIC Fresh in the amount of \$12,236.37 on August 15, 2007. (Doc. 27, Motion to Reopen Case and Final Judgment and Doc. 27, Final Judgment Order)

On September 10, 2007 Defendant Case filed an answer to Plaintiffs' Complaint, admitting certain allegations in the Complaint but claiming

no assets remained in the PACA trust and denying any personal liability. (Doc. 29, Answer) Plaintiffs filed their motion for partial summary judgment on their breach of fiduciary duty claim against Defendant Case on November 30, 2007. (Doc. 36, Motion for Summary Judgment) Defendant Case has not filed any responsive pleadings to Plaintiffs' Motion for Summary Judgment nor did Defendant Case appear at oral argument on January 14, 2008. After this matter was heard, Plaintiffs' counsel, Lawrence H. Meuers filed a declaration on January 17, 2008 for the calculations of attorney's fees and post-judgment interest. (Doc. 42, Meuers Decl.)

### 3. FACTUAL BACKGROUND

#### A. *Statement of Facts*

1. Plaintiffs Grimmway and Naturipe are engaged in the business of buying and selling wholesale quantities of perishable agricultural commodities ("Produce") in interstate commerce. (Doc. 35, PSUF No. 3) (Doc. 7, Complaint ¶ 2, Doc. 29, Answer ¶ 1)
2. PIC Fresh is a California Corporation with its principal place of business located at 7701 Palodura Ct., Bakersfield, California. (PSUF No. 4) (Doc. 7, Complaint ¶ 3(a), Doc. 29, Answer ¶ 1)
3. At all relevant times, PIC Fresh was a commission merchant dealer or broker operating subject to the provisions of PACA, 7 U.S.C. §§ 499a-499t. (PSUF No. 5) (Doc. 7, Complaint ¶ 72, Doc. 29, Answer ¶ 1)
4. Defendant Case was President and Principal of PIC Fresh. (PSUF No. 18 and Exhibit B, Defendant PIC Fresh's license listing Defendant Case as the "Principal") (Doc. 7, Complaint, ¶¶ 3(b), 39, 40, Doc. 29, Answer, ¶¶ 1-4)
5. Plaintiffs sold Produce to PIC Fresh in interstate commerce, and PIC

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Fresh purchased Produce from Plaintiffs. (PSUF No. 6) (Doc. 7, Complaint ¶ 8, Doc. 29, Answer ¶ 1)

6. PIC Fresh failed to pay for its purchase of Produce from Plaintiffs. (PSUF No. 7) (Doc. 7, Complaint ¶ 12, Doc. 29, Answer ¶ 1)

7. On or about January 29, 2007, a Complaint and accompanying application for injunctive relief were filed by Plaintiffs Grimmway and Naturipe to enforce their rights under the trust provisions of PACA against Defendants PIC Fresh and Case. (PSUF No. 8) (Doc. 7, Complaint)

8. On January 29, 2007, the Court issued a TRO, which among other things, required PIC Fresh to discontinue any further dissipation of PACA trust assets, pending a hearing on Plaintiffs' motion for preliminary injunction and decision of the Court. (PSUF No. 9) (Doc. 17, Temporary Restraining Order)

9. In order to avoid the cost, expense and time involved in litigating the various claims asserted by Plaintiffs against Defendants, Plaintiffs entered into a Settlement Agreement to settle and compromise all claims asserted against PIC Fresh and Case. (PSUF No. 10 and Exhibit A, Settlement Agreement)

10. Pursuant to the Settlement Agreement, a Judgment was entered in favor of Plaintiffs and against PIC Fresh in the aggregate amount of \$48,179.60, inclusive of interest and attorneys' fees as of the date of the \$48,179.60 Judgment Order ("Settlement Amount"). (PSUF No. 11) (Doc. 22, Judgment Order)

11. Plaintiffs' claims against Defendant Case were dismissed without prejudice. (PSUF No. 12) (Doc. 22, Judgment Order)

12. Since execution of the Settlement Agreement, PIC Fresh has only paid \$40,089.80 of the entire Settlement Amount, with a balance of \$8,089.80. (PSUF No. 13) (Doc. 24, Affidavit, Steven M. De Falco, Attorney for Plaintiffs, and Doc. 27, Final Judgment Order)

13. Plaintiffs have received no further payments from PIC Fresh, and therefore according to the Settlement Agreement, PIC Fresh is in default. (PSUF No. 14) (Doc. 24, Affidavit, Steven M. De Falco, Attorney for Plaintiffs and Doc. 27, Final Judgment Order)

14. As a result of PIC Fresh's breach of the Settlement Agreement, the Court on August 15, 2007, entered a Final Judgment in favor of Plaintiffs Grimmway and Naturipe and against Defendant PIC Fresh in the total amount of \$12,236.37, inclusive of attorney's fees and post-judgment interest. (PSUF No. 15) (Doc. 27, Final Judgment Order)

15. This Court reopened the case against Defendant Case on August 15, 2007. (PSUF No. 16) (Doc. 27, Final Judgment Order)

16. On September 10, 2007, Defendant Case filed an Answer to the Complaint. (PSUF No. 17) (Doc. 29, Answer)

17. Defendant Case controlled PIC Fresh's operations and financial dealings in connection with the PACA trust assets of PIC Fresh and admits the outstanding balance of \$12,236.37, but denies any personal liability. (PSUF No. 19) (Doc. 7, Complaint ¶ 42, Doc. 29, Answer, ¶¶ 1, 4)

18. Plaintiffs Accounts Receivable Supervisor for Credit and Collections at Grimmway, Pamela Terry, claims that she spoke on several occasions with Defendant Case to determine when Grimmway would receive payments from PIC Fresh on outstanding invoices. (Doc. 33, Pamela Terry Decl., ¶¶ 1, 9)

19. On one occasion Ms. Terry states that she was informed by another individual at PIC Fresh that Defendant Case was the individual who decided when Grimmway would receive payment on outstanding balances. (PSUF No. 20) (Doc. 33, Pamela Terry Decl., ¶ 10).

#### 4. LEGAL STANDARDS

##### A. Standard of Review

Summary judgment is warranted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” Fed.R.Civ.P. 56(c); *California v. Campbell*, 138 F.3d 772, 780 (9th Cir.1998). Therefore, to defeat a motion for summary judgment, the non-moving party must show (1) that a genuine factual issue exists and (2) that this factual issue is material. *Id.* A genuine issue of fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *See Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.1995); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Facts are “material” if they “might affect the outcome of the suit under the governing law.” *Campbell*, 138 F.3d at 782 (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505).

The nonmoving party cannot simply rest on its allegations without any significant probative evidence tending to support the complaint. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir.2001).

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The more implausible the claim or defense asserted by the nonmoving party, the more persuasive its evidence must be to avoid summary judgment. *See United States ex rel. Anderson v. N. Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir.1995). Nevertheless, the evidence must be viewed in a light most favorable to the nonmoving party. *Id.*;

*Anderson*, 477 U.S. at 255, 106 S.Ct. 2505.

**B. Plaintiffs' Motion for Summary Judgment against Defendant Case for Breach of Fiduciary Duty Claim**

Plaintiffs Grimmway and Naturipe bring this motion for partial summary judgment against Defendant Case, as President of PIC Fresh for breach of fiduciary duty, claiming Defendant Case is personally liable due to his control of the assets as trustee under the PACA trust for the \$12,236.37 unpaid portion of their PACA trust claims, plus post-judgment interest and attorney's fees.

“When, as is the case here, the moving party is a plaintiff, he or she must adduce admissible evidence on all matters as to which he or she bears the burden of proof.” *Zands v. Nelson*, 797 F.Supp. 805, 808 (S.D.Cal.1992); Schwarzer, Tashima, & Wagstaffe, Federal Civil Practice Before Trial 14:140 (2007). As a result, the Court will evaluate individual liability, for a breach of fiduciary claim under a PACA trust as to Defendant Case to determine whether there is genuine issue of material fact as to any element of Plaintiffs' claim for relief.

In addition, it should be noted that Defendant Case filed no opposition to Plaintiffs' Motion. “If the opposing party does not so respond, summary judgment should, *if appropriate*, be entered against that party.” Fed.R.Civ.P. 56(e)(2) (emphasis added). “The language of the rule [56(e)] is permissive, conferring discretion upon the district judge to determine whether non-compliance should be deemed consent to a given motion. That discretion, however, is necessarily abused when exercised to grant a motion for summary judgment where the movant's papers are insufficient to support that motion or on their face reveal a genuine issue of material fact.” *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 950 (9th Cir.1993).

Federal Rules of Civil Procedure Rule 56(c) requires that the moving party to show there is no genuine issue as to any material fact but also

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that the movant is entitled to judgment as a matter of law:

The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c).

### **C. PACA**

PACA, 7 U.S.C. § 499a-499t, was enacted in 1930 with the intent of “preventing unfair business practices and promoting financial responsibility in the fresh fruit and produce industry.” *Farley and Calfee, Inc. v. U.S. Dept. of Agric.*, 941 F.2d 964, 966 (9th Cir.1991). PACA regulates trading in agricultural commodities, *e.g.* fruits and vegetables. PACA requires all brokers and dealers in perishable agricultural commodities to obtain licenses from the Secretary of Agriculture. *Id.*; 7 U.S.C. §§ 499c, 499d. Dealers violate PACA if they do not pay promptly and in full for any perishable commodity in interstate commerce. 7 U.S.C. § 499b(4).

“Such liability may be enforced either (1) by complaint to the Secretary ... or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.” 7 U.S.C. § 499e(b).

In 1984 PACA was amended to address the uncertain financial arrangements created by dealers receiving goods without payment. A statutory trust was provided by Congress under PACA on behalf of suppliers and sellers that were unpaid.

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of

such commodities or products, shall be held by such commission merchant, dealer or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers or agents.

*Id.* at § 499e(c)(2); *see also* 7 C.F.R. § 46.46 (2007).

“This provision imposes a ‘non-segregated floating trust’ on the commodities and their derivatives, and permits the commingling of trust assets without defeating the trust.” *Boulder Fruit Exp. & Heger Organic Farm Sales v. Transportation Factoring, Inc.*, 251 F.3d 1268, 1270 (9th Cir.2001).

The statute further provides that to preserve one's rights as a beneficiary of a PACA trust, notice must be given by the seller to the dealer and the Secretary of Agriculture within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction. The regulations promulgated pursuant to this section provide that the maximum time parties may agree upon for payment is thirty days from the date of receipt and acceptance of the goods. 7 C.F.R. § 46.46(f)(1) & (2).

PACA trust rights may be enforced through the Secretary of Agriculture issuing an order (and subsequent judicial enforcement), 7 U.S.C. § 499f & g, or through judicial enforcement in federal court in a breach of fiduciary trust action, 7 U.S.C. § 499e(c)(5). “The several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust.” 7 U.S.C. § 499e(c)(5).

**D. INDIVIDUAL LIABILITY UNDER PACA**

The Ninth Circuit along with several other circuits recognize that individuals may be liable under a PACA trust theory. “[I]ndividual shareholders, officers, or directors of a corporation who are in a position to control PACA trust assets, and who breach their fiduciary duty to preserve those assets, may be held personally liable under the Act” *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 283 (9th Cir.1997). “Anyone found to be a PACA ‘dealer’ is subject to liability under PACA section 499b, which makes unlawful unfair conduct including the failure to maintain a statutory trust.... If deemed a PACA ‘dealer,’ an individual is liable for his own acts, omissions, or failures while acting for or employed by any other dealer.” *Id.* (citations and quotations omitted); *see also Hiller Cranberry Products, Inc. v. Koplovsky*, 165 F.3d 1, 8-9 (1st Cir.1999) (“An individual who is in the position to control the trust assets and who does not preserve them for the beneficiaries has breached a fiduciary duty, and is personally liable for that tortious act.”); *Golman-Hayden Co., Inc. v. Fresh Source Produce Inc.*, 217 F.3d 348, 351 (5th Cir.2000) (“We join our colleagues in the Ninth Circuit and hold that individual shareholders, officers or directors of a corporation who are in a position to control trust assets, and who breach their fiduciary duty to preserve those assets, may be held personally liable under PACA.”); *Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.*, 307 F.3d 666, 669 (7th Cir.2002); *Bronia, Inc. v. Ho*, 873 F.Supp. 854, 861 (S.D.N.Y.1995) (sole shareholder, director, and president of corporation personally liable for corporation's breach of PACA trust under *Morris Okun* ).

Under California law, a trustee's duties include the duty of loyalty, the duty to avoid conflicts of interest, *the duty to preserve trust property*, *the duty to make the trust property productive*, the duty to dispose of improper investments, and the duty to report and account. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal.App.4th 445, 462, 80 Cal.Rptr.2d 329 (Cal.Ct.App.1998) (emphasis added). A trustee is bound to act in the “highest good faith toward the beneficiaries and must not occupy a position where his or her interests either conflict with those of the beneficiaries or even where the trustee

is exposed to the temptation of acting contrary to the best interest of the beneficiaries.” *In re Brown's Estate*, 22 Cal.App.2d 480, 485, 71 P.2d 345 (Cal.Ct.App.1937) Individual liability under PACA extends only to those “who are in a position to control PACA trust assets, and who breach their fiduciary duty to preserve those assets.” *Sunkist Growers, Inc.*, 104 F.3d at 283.

## **5. DISCUSSION**

### **A. JURISDICTION**

The District Court has jurisdiction over this civil action arising under § 5(c)(5) of PACA, 7 U.S.C. § 499e(c)(5), pursuant to 28 U.S.C. § 1331.

### **B. INDIVIDUAL LIABILITY UNDER PACA**

Plaintiffs bring this Motion for Summary Judgment against Defendant Case on their breach of fiduciary duty action claiming no genuine issue as to any material fact exists that Defendant Case was President and Principal of PIC Fresh and in this position controlled PIC Fresh operations and financial dealings, including distribution of PIC Fresh PACA trust assets and therefore is personally liable. (Doc. 36, Motion for Summary Judgment, p. 2:2-10) Defendant Case has filed no opposition to this Motion for Summary Judgment in defense of Plaintiffs' motion.

Individual liability under PACA extends to those “who are in a position to control PACA trust assets, and who breach their fiduciary duty to preserve those assets.” *Sunkist*, 104 F.3d at 283.

Defendant Case, representing himself pro se, admitted in his Answer to Plaintiffs' Complaint that (a) Plaintiffs Grimmway and Naturipe are engaged in the buying and selling wholesale quantities of Produce in interstate commerce. *See* Doc. 7, Complaint ¶ 2 and Doc. 29, Answer ¶ 1; (b) Defendant PIC Fresh is a California corporation, a commission

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merchant dealer or broker operating subject to PACA. *See* Doc. 7, Complaint ¶ 7 and Doc. 29, Answer ¶ 1; (c) Plaintiffs sold Produce between September 20, 2006 and December 13, 2006 to PIC Fresh and PIC Fresh purchased the Produce from Plaintiffs in interstate commerce Produce in the total amount of \$42,179.60. *See* Doc. 7, Complaint ¶ 8 and Doc. 29, Answer ¶ 1; (d) Pursuant to PACA, 7 U.S.C. § 499e(c), at the time of PIC Fresh's receipt of the Produce, PIC Fresh became trustee of the PACA trust for the benefit of Plaintiffs in the amount of \$42,179.60. The PACA trust consists of all PIC Fresh's inventories of Produce, food or products derived from Produce ("Products"), accounts receivable and other proceeds of the sale of Produce or Products, and assets commingled or purchased or otherwise acquired with proceeds of such Produce or Products (assets subject to the PACA trust are hereinafter referred to as "PACA Trust Assets"). *See* Doc. 7, Complaint ¶ 10 and Doc. 29, Answer ¶ 1; (e) Plaintiffs gave written notice of intent to preserve trust benefits to PIC Fresh in accordance with the PACA Amendments of 1995 by including the statutory trust language, as set forth in 7 U.S.C. § 499e(c)(4), on each of their invoices and by sending those invoices to PIC Fresh. *See* Doc. 7, Complaint ¶ 11 and Doc. 29, Answer ¶ 1; (f) PIC Fresh failed to pay for the Produce despite Plaintiffs' repeated demands. *See* Doc. 7, Complaint ¶ 12 and Doc. 29, Answer ¶ 1; (g) Pursuant to PACA, 7 U.S.C. § 499e(c), Plaintiffs are unpaid suppliers and sellers of Produce, and are entitled to PACA trust protection and payment from PIC Fresh's PACA Trust Assets. *See* Doc. 7, Complaint ¶ 13 and Doc. 29, Answer ¶ 1; (h) PACA requires PIC Fresh, as a PACA trustee, to hold its PACA Trust Assets in trust for the benefit of Plaintiffs and all other unpaid suppliers of Produce until all such suppliers have received full payment; PIC Fresh has failed to maintain sufficient trust assets to fully satisfy all qualified PACA trust claims, including Plaintiffs' asserted herein. *See* Doc. 7, Complaint ¶ 23-24 and Doc. 29, Answer ¶ 1; (i) As a direct result of PIC Fresh's failure to properly maintain and protect the PACA Trust Assets from dissipation, Plaintiffs have suffered damages which are covered under the PACA trust in the amount of \$12,236.37 (inclusive of attorney's fee and post-judgment interest through August 6, 2007), the balance reduced by prior payments. *See* Doc. 7, Complaint ¶¶ 23-24 and Doc. 29, Answer ¶ 1; (j) At all times relevant to this action, Defendant Case was

the principal, president, officer, director, shareholder and employee of PIC Fresh. *See* Doc. 7, Complaint ¶¶ 3(b), 39-40 and Doc. 29, Answer ¶¶ 1, 3; and (k) Defendant Case was the principal of PIC Fresh, and controlled its operations and financial dealings, but denies that his actions give rise to personal liabilities of the corporation and claims no assets in the PACA trust remain. *See* Doc. 29, Answer ¶¶ 1, 4.

However, despite Defendant Case's assertion that no PACA trust assets remain, Case can be held personally liable as a trustee for a PACA trust under a breach of fiduciary claim. *Sunkist Growers, Inc.*, 104 F.3d at 283. Defendant Case admitted in his Answer that he is the President, Principal, officer, director and shareholder of PIC Fresh and in that capacity controlled or was in the position to control the assets of PIC Fresh, however he denied allegations in Plaintiffs' Complaint that he had a duty to ensure PIC Fresh fulfilled its duties as a PACA trustee and maintain PACA Trust Assets in such a manner as to ensure there were, at all times, sufficient trust assets available to satisfy all outstanding PACA trust obligations. *See* Doc. 7, Complaint, ¶¶ 40-42 and Doc. 29, Answer, ¶ 4. Defendant Case also denied in his Answer that he breached his fiduciary duty and denies personally being liable to direct PIC Fresh to fulfill its duties as PACA trustee (to preserve and maintain sufficient PACA trust assets) which as a result of the breach, Plaintiffs incurred damages. *See* Doc. 7, Complaint, ¶¶ 44, 46 and Doc. 29, Answer, ¶ 4. Defendant Case has not submitted evidence to support the denials in his Answer.

Plaintiffs submits in support of their breach of fiduciary claim, a declaration by Plaintiff Grimmway's Accounts Receivable Supervisor for Credit and Collections, Pamela Terry, who personally attempted to collect Grimmway's unpaid invoices from PIC Fresh. (Doc. 33, Pamela Terry Decl., ¶ 3) She claims that throughout Grimmway's relationship with PIC Fresh she spoke with Defendant Case and Justin Case regarding PIC Fresh's business operations. (Doc. 33, Pamela Terry Decl., ¶ 8) In particular, she spoke on several occasions with Defendant Case to determine when Grimmway would receive payments from PIC

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Fresh on outstanding invoices. (Doc. 33, Pamela Terry Decl., ¶¶ 1, 9) On one occasion Ms. Terry states that she was informed by PIC Fresh, through Justin Case, that Defendant Case was the individual who decided when Grimmway would receive payment on outstanding balances. (PSUF No. 20) (Doc. 33, Pamela Terry Decl., ¶ 10)

Whether Defendant Case is secondarily liable is dependent on (1) whether his involvement with the corporation was sufficient to establish legal responsibility, and (2) whether Defendant Case, by failing to exercise any appreciable oversight of the corporation's management, breached a fiduciary duty owed to PACA creditors, Plaintiffs Grimmway and Naturipe. *Golman-Hayden Co., Inc. v. Fresh Source Produce Inc.*, 217 F.3d 348, 350 (5th Cir.2000). In *Golman-Hayden Co.*, the court held "It is undisputed that Tomaneng is the sole owner of Fresh Source. As the sole shareholder, he manifestly had absolute control of the corporation. Although Tomaneng maintains that he was a passive shareholder, he may not escape liability based on a real or claimed failure to exercise his right and obligation to control the company. We conclude that his refusal or failure to exercise any appreciable oversight of the corporation's management was a breach of his fiduciary duty to preserve the trust assets." 217 F.3d at 351.

Although Defendant Case cannot be held secondarily liable merely because he served as a corporate officer or shareholder, it has been established that Defendant Case's involvement with PIC Fresh was more than passive and he is legally responsible under PACA. The PACA license lists Defendant Case as the reported principal of PIC Fresh. (Doc. 35, PSUF, Exhibit B, PACA license) Defendant Case admits he is the Principal, President, director and shareholder of PIC Fresh. Defendant Case admitted in his Answer that he controlled PIC Fresh's operations and financial dealings. Ms. Terry of Grimmway stated in her declaration that she frequently spoke with Defendant Case regarding PIC Fresh's business operations and on several occasions to determine when payment would be made by PIC Fresh on outstanding invoices. Ms. Terry was informed by PIC Fresh, through Justin Case, that Defendant Case was the person who decided if and when Grimmway would receive payment.

In *Shepard v. K.B. Fruit & Vegetable, Inc.*, 868 F.Supp. 703 (E.D.Pa.1994), a Pennsylvania District Court case, individuals were held liable after the court found they demonstrated an “active involvement” in the operation of the business, including evidence that they established the corporation, exercised legal control as officers and directors, they were signatories on a banking agreement, applied for the businesses tax identification number, paid rent after the business ceased and stored some of its own produce at the business. “The record demonstrates that the Kalecks were not merely uninvolved ‘silent’ corporate officers or shareholders, but rather established the business, albeit for Blumberg’s sake, used the premises and took action to continue the business after Blumberg abandoned it.” *Id.* at 706. In *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F.Supp. 346 (S.D.N.Y.1993), the court determined that a sole shareholder of the corporation licensed to sell produce under PACA was secondarily liable to PACA trust creditors as a corporate fiduciary: “An individual who is in the position to control the trust assets and who does not preserve them for the beneficiaries has breached a fiduciary duty and is personally liable for that tortious act.” *Id.* at 348.

Plaintiffs bear the burden of proof to prove a breach of fiduciary duty claim and have submitted pleadings and affidavits to demonstrate there is no genuine issue as to any material fact as to Defendant Case’s breach of fiduciary under the PACA trust. Fed.R.Civ.P. 56(c); *California v. Campbell*, 138 F.3d 772, 780 (9th Cir.1998). Defendant Case is personally liable for the outstanding amount due under the Settlement Agreement. While Defendant Case filed no opposition to Plaintiffs’ Motion for Summary Judgment and it is in the discretion of the District Judge to determine if summary judgment should entered in favor of Plaintiff due to the non-response of opposing party, Fed.R.Civ.P. 56(e), summary judgment is justified because Plaintiffs’ evidence proves an implied PACA obligation and Defendant Case actively participated in PIC Fresh’s operations. He is personally liable. *See Henry v. Gill Industries, Inc.*, 983 F.2d 943, 950 (9th Cir.1993).

Defendants' motion for partial summary judgment against Defendant Case for breach of fiduciary duty is **GRANTED**.

### **C. ATTORNEY'S FEES AND POST-JUDGMENT INTEREST**

#### **I. ATTORNEY'S FEES**

Plaintiffs are also seeking attorney's fees from Defendant Case. *See* Doc. 34, Declaration of Plaintiffs' Attorney Steven M. De Falco. Plaintiffs do not provide any briefing on this issue. The Ninth Circuit in *Middle Mountain Land and Produce Inc. v. Sound Commodities Inc.*, 307 F.3d 1220 (9th Cir.2002) describes the awarding of attorney's fees in a PACA trust suit:

First, turning to attorneys' fees, the district court has limited authority to grant attorneys' fees to PACA claimants. Unlike the British legal system rule, in which the winner automatically gets attorneys' fees, the rule in American courts, commonly known as the American Rule, looks with disdain upon awarding attorneys' fees unless an independent basis exists for the award. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (noting that exceptions to the "American Rule" that prevailing party is not entitled to attorneys' fees include (1) statutory basis, (2) enforceable contract, (3) willful violation of court order, (4) bad faith action, and (5) litigation creating common fund for the benefit of others). Under PACA, we have held that a court should award attorneys' fees to a PACA claimant whose litigation efforts "are directly responsible for the availability of the funds from the statutorily created trust." *In re Milton Poulos*, 947 F.2d at 1353 (parties deserved fee award because litigation efforts caused bankruptcy court to "declare[ ] the trust valid and enforceable."). In such cases, the "common fund" exception of *Alyeska* entitles the litigant to an attorneys' fees award out of the trust assets. Nonetheless, if the litigant is not responsible for the availability of the trust funds, the district court cannot award attorneys' fees to PACA claimants, unless the PACA claimant has another independent legal basis for attorneys' fees under an *Alyeska* exception. *Alyeska*, 421 U.S. at 259, 95 S.Ct. 1612, 44 L.Ed.2d 141; *see*,

e.g., *Golman-Hayden Co. v. Fresh Source Produce Inc.*, 217 F.3d 348, 352-353 (5th Cir.2000). 307 F.3d at 1225.

Here, the Settlement Agreement entered into by Plaintiffs and Defendants provides an independent contractual right to attorney's fees. See Doc. 35, Statement of Undisputed Facts, Exhibit A, Settlement Agreement, ¶ 19, *Rights of Prevailing Party*. In the provision of the Settlement Agreement entitled *Rights of Prevailing Party* it states:

If any lawsuit or other legal action is brought as between or among any of the Parties hereto relating to, arising out of, or to enforce, any of the provisions of this Agreement, the prevailing Party shall be entitled to collect its reasonable attorneys' fees and costs incurred in connection therewith *Id.*

While Plaintiffs may also be afforded attorney's fees based on establishing a "common fund," see *In re Milton Poulos, Inc.*, 947 F.2d 1351, 1353 (9th Cir.1991), this is unnecessary as an explicit contractual basis exists.

Plaintiffs' counsel, Mr. Meuers, has personal knowledge of the attorneys fees accrued and declares under penalty of perjury that \$5,192.00 has been billed on this matter. (Doc. 42, Meuers Decl. ¶ 8) The amount billed from August 15, 2007, the date of entry of the Final Judgment, to the present is \$2,904.00.<sup>1</sup> This amount is reasonable and necessary for Plaintiffs to obtain a default judgment against the elusive Defendant in this matter. Therefore, Plaintiffs shall recover \$2,904.00 in attorney's fees and costs.

## II. POST-JUDGMENT INTEREST

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<sup>1</sup>The Final Judgment Order was inclusive of attorney's fees charged prior to entry of the Final Judgment, entered on August 15, 2007. \$2,904.00 is the amount earned after August 15, 2007.

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Finally, Plaintiffs also seek post-judgment interest, (Doc. 42, Meuers Decl. ¶ 9), on the outstanding amount due under the Settlement Agreement pursuant to paragraph 8 of the Settlement Agreement which states:

8. *Remedies for Default.* In the event of a Default, Plaintiffs may request the Court to ... execute upon the Judgment against PIC Fresh in the amount of \$48,179.60, plus interest accruing at the post-judgment rate from the date of entry of the Judgment, plus attorneys' fees incurred in enforcing the terms of this Agreement, less any payments made.

(Doc. 35, Statement of Undisputed Facts, Exhibit A, Settlement Agreement, ¶ 8)

Plaintiffs are entitled pursuant to statute to post-judgment interest which accrues on an unpaid federal judgment and is governed by federal law. "Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." 28 U.S.C. § 1961.

A judgment was entered on February 12, 2007 for the amount of \$48,179.60. (Doc. 22, Judgment) And a final judgment was entered on August 15, 2007 for \$12,236.37, after Defendants paid \$40,089.80, leaving an unpaid balance due under the Settlement Agreement.<sup>2</sup> The final judgment consists of that remaining balance along with attorney's fees and post-judgment interest through August 6, 2007. (Doc. 27, Final Judgment and Doc. 24, DeFalco Affid.)

The most recent calculations provided by Plaintiffs, after oral argument, in Exhibit A, to Meuers Decl., (See Doc. 42, Meuers Decl.), calculate post-judgment interest from February 2, 2007 not August 15, 2007, the date the final judgment was entered. Post-judgment interest is

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<sup>2</sup>Defendants paid Plaintiffs \$32,000.00 on February 2, 2007 and \$8,089.80 on February 28, 2007. See Doc. 42-3, Meuers Decl., Exhibit B, Trust Chart.

calculated from August 15, 2007 at the rate of 4.78% on \$12,236.37.<sup>3</sup>

Plaintiffs shall recover \$310.88 in post-judgment interest.

**CONCLUSION**

For the reasons set forth above, Plaintiffs motion for summary judgment against Defendant Jeffrey D. Case is **GRANTED**. Defendants shall recover \$12,236.37, plus \$2,904.00 in attorney's fees and \$310.88 in post-judgment interest.

**IT IS SO ORDERED.**

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**ARGI EXOTIC TRADING, INC. v. NEW MAN DESIGNED  
SYSTEMS, LTD., d/b/a FRED'S ORGANIC FOODS, FRED  
NEWMAN, MYRNA NEWMAN.  
No. 07-CV-0049 (NG)(MDG).  
Filed June 12, 2008.**

**(Cite as: 2008 WL 2397565 (E.D.N.Y.)).**

**PACA-R – Default judgment – Proof of damages – IRS underpayment rate.**

Agri Exotic (PACA seller) obtained a default judgment in a “failure to make prompt payment” case. In pursuing a PACA claim, if the liability issue is settled, proof of damages may be proven by affidavit, if otherwise uncontested - including costs of collection, attorney fees and interest due. Court may adjust attorney fees, if in its

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<sup>3</sup> The Final Judgment Order of August 15, 2007 includes the amount outstanding under the Settlement Agreement plus attorney's fees and post-judgment interest through August 6, 2007. The statutes states: “Such interest shall be calculated from the date of the entry of the judgment ...” 28 U.S.C. § 1961. On August 9, 2007 the post-judgment rate was 4.78%. The post-judgment interest amount is calculated from August 15, 2007 through February 25, 2008. “Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.” 28 U.S.C. § 1961(b).

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discretion, the fees are excessive. *Luciano v. Olsten Corp*, 109 F. 3d 111. Interest due, if not otherwise prescribed, may be calculated using the IRS underpayment rate. See <http://www.dol.gov/ebsa/calculator/a2underpaymentrates.html>.

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

***ORDER***

GERSHON, District Judge.

No objections having been filed, the unopposed Report and Recommendation of Judge Marilyn D. Go is hereby adopted in its entirety. The Clerk of Court is directed to enter judgment for plaintiff against defendants, jointly and severally, in the amount of \$10,705.22, comprised of \$4,637.50 in damages, \$5,513.92 in attorneys' fees and costs, and \$553.80 in interest through June 11, 2008. The Clerk of Court is also directed to close this case.

**SO ORDERED.**

*REPORT AND RECOMMENDATION*

GO, United States Magistrate Judge.

Plaintiff Agri Exotic Trading, Inc. ("plaintiff") brings this action under the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. § 499a *et seq.*, seeking enforcement of a default reparation order entered by the United States Department of Agriculture ("USDA") against defendant New Man Designed Systems, Ltd. d/b/a Fred's Organic Foods ("Fred's") and for claims against defendants Fred Newman, Myrna Newman and Fred's pursuant to PACA's trust provisions, *see id.* §§ 499e, 499g.

The Honorable Nina Gershon granted plaintiff's motion for default judgment following defendants' failure to appear or otherwise defend in this action and referred to me for report and recommendation the relief to be awarded.

*PERTINENT FACTS*

The facts pertinent to determination of this motion are undisputed and are set forth in the Complaint (ct.doc. 1) (“Comp.”); the June 18, 2007 affidavit of Stuart Kaminsky, President of plaintiff (“Kaminsky Aff.”) (ct.doc. 10); and the July 2, 2007 affirmation of James J. Miuccio, Esq., counsel for plaintiff (“Miuccio Aff.”) (ct.doc. 11). Defendants did not file any opposing papers.

Plaintiff, a licensed dealer under PACA, is a wholesale distributor of produce. Kaminsky Aff. at ¶¶ 2-3. Fred's, also a licensed dealer under PACA, makes soups which are sold and distributed to retail food stores. Comp. at ¶¶ 6-7, 9. Fred and Myrna Newman are officers, directors and shareholders of Fred's. *Id.* at ¶¶ 11-16.

On or about October 6, 2005, plaintiff sold and delivered 3,250 pounds of organic vegetables to Fred's, including yellow potatoes, green cabbage, white onions, yellow onions, red beets and spinach, for \$2,405.00. Kaminsky Aff. at ¶ 4, Exh. A. On or about November 11, 2005, plaintiff again sold and delivered 105 units of organic vegetables to Fred's, including Spanish onions, butternut squash, rutabaga and red onions, for \$2,132.50. *Id.* at ¶ 5, Exh. B. Fred's has paid only \$200.00 for both shipments. *Id.* at ¶¶ 4-5.

On or about March 20, 2006, plaintiff lodged an informal complaint with the USDA seeking the balance of the invoiced amount. *Id.* at ¶ 6. Since Fred's did not answer the informal complaint, plaintiff filed a formal complaint with the USDA on or about June 27, 2006. *Id.* at ¶ 7. Following Fred's failure to answer the formal complaint, a default order was issued by the USDA adopting as findings of fact the facts alleged in the formal complaint. *Id.* The reparation order directed Fred's to pay \$4,337.50 with interest at a rate of 5.07%, plus the \$300.00 handling fee for filing the complaint.

On January 5, 2007, plaintiff filed this action seeking enforcement

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of the USDA order and asserting claims under PACA's trust provisions. Following defendants' failure to answer the Complaint, plaintiff filed a motion for judgment by default. Ct. doc. 9.

### *DISCUSSION*

#### *I. Legal Standards Governing Default*

A default constitutes an admission of all well-pleaded factual allegations in the complaint, except for those relating to damages. *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir.1992); *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir.1981). A default also effectively constitutes an admission that damages were proximately caused by the defaulting party's conduct; that is, the acts pleaded in a complaint violated the laws upon which a claim is based and caused injuries as alleged. *Greyhound*, 973 F.2d at 159. The movant need prove “only that the compensation sought relate to the damages that naturally flow from the injuries pleaded.” *Id.*

The court must ensure that there is a reasonable basis for the damages specified in a default judgment. Actual damages or statutory damages may be assessed. In determining damages not susceptible to simple mathematical calculation, Fed.R.Civ.P. 55(b)(2) gives a court the discretion to determine whether an evidentiary hearing is necessary or whether to rely on detailed affidavits or documentary evidence. *Action S.A. v. Marc Rich & Co., Inc.*, 951 F.2d 504, 508 (2d Cir.1991) (quoting *Fustok v. ContiCommodity Servs., Inc.*, 873 F.2d 38, 40 (2d Cir.1989)). The moving party is entitled to all reasonable inferences from the evidence it offers. *Au Bon Pain*, 653 F.2d at 65 (citing *Trans World Airlines, Inc. v. Hughes*, 308 F.Supp. 679, 683 (S.D.N.Y.1969)).

#### *II. Determination of Damages*

Since Judge Gershon granted plaintiff's motion for default judgment, the liability of the individual and corporate defendants is established and is not an issue before me. Nonetheless, plaintiff must establish the damages owed with “reasonable certainty.” *See Transatlantic Marine*

*Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir.1997).

The PACA statute provides that a buyer must “promptly” make “full payment” for any produce received from a seller and that failure to do so gives rise to a seller's right to seek damages. *R. Best Produce v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 241 (2d Cir.2006); 7 U.S.C. §§ 499b, 499e. Those damages consist of the “sums owing in connection with” perishable commodities transactions. *Cooseman Specialties, Inc. v. Gargiulo*, 485 F.3d 701, 709 (2d Cir.2007); 7 U.S.C. § 499e(c)(2).

The affidavit of Stuart Kaminsky and the attached documentation are sufficient to support the damages claimed by plaintiff. Specifically, plaintiff has submitted the two invoices totaling \$4,537.50 and provided the sworn statement of Mr. Kaminsky that defendant has not paid any amount of the invoices except for \$200.00. *See Kaminsky Aff.* at ¶¶ 4-5, Exhs. A, B. Accordingly, I recommend awarding damages of \$4,337.50 for the amount remaining unpaid under the invoices.

Section 499e(a) provides that a party found to have violated section 499b is liable for any handling fee it paid under section 499f(a)(2). Thus, I recommend awarding plaintiff the \$300.00 handling fee it paid to file the reparation complaint. *See Kaminsky Aff.*, Exh. C.<sup>1</sup>

Plaintiff seeks interest on the unpaid balance due under the invoices as provided in the reparation order. Although PACA does not specifically provide for an award of pre-judgment interest, where the parties' contract includes an interest provision, it may be awarded as subject to the PACA trust. *See Country Best v. Christopher Ranch LLC*,

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<sup>1</sup>Although plaintiff does not specifically allege that it paid the \$300 filing fee, the USDA found that it paid the fee and those “findings constitute *prima facie* evidence of the facts recited.” *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 859 n. 3 (9th Cir.1976); *RHA Trading Inc. v. LNM Tropical Imports, LLC*, No. 06 Civ. 7126, 2007 U.S. Dist. LEXIS 92616, at \*7-\*8, 2007 WL 4440929 (S.D.N.Y. Dec. 18, 2007); 7 U.S.C. § 499g(b).

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361 F.3d 629, 632-33 (11th Cir.2004); *Middle Mountain Land & Produce Inc. v. Sound Commodities Inc.*, 307 F.3d 1220, 1222-26 (9th Cir.2002); *Palmareal Produce Corp. v. Direct Produce # 1, Inc.*, No. 07-CV-1364, 2008 WL 905041, at \*2 (E.D.N.Y. March 31, 2008); *Dayoub Marketing, Inc. v. S.K. Produce Corp.*, No. 04 Civ. 3125, 2005 U.S. Dist. LEXIS 26974, at \*13, 2005 WL 3006032 (S.D.N.Y. Nov. 9, 2005). “The 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 Cir.1995) (internal citations and quotation marks omitted).

Each invoice that defendants have failed to pay in full provides that: “[i]nterest and attorney’s fees necessary to collect any balance due here under shall be considered sums owing in connection with this transaction.” Kaminsky Aff., Exhs. A, B. Courts have construed similar provisions as additional terms to an agreement between the parties governed by N.Y. U.C.C. § 2-207(2). *See, e.g., Cooseman Specialties*, 485 F.3d at 708; *Palmareal Produce*, 2008 WL 905041, at \*3; *Dayoub Marketing*, 2005 U.S. Dist. LEXIS 26974, at \*14-\*16, 2005 WL 3006032. When the parties are two merchants, additional terms become part of a contract unless: “(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.” N.Y. U.C.C. § 2-207(2). The party opposing the additional terms bears the burden of establishing it qualifies under one of the exceptions. *See Coosemans Specialties*, 485 F.3d at 707. Since defendants have defaulted, they have not made any showing that one of the exceptions applies. *See Brigiotta’s Farmland Produce and Garden Ctr., Inc. v. Przykuta, Inc.*, No. 05-CV-273S, 2006 U.S. Dist. LEXIS, at \*17-\*18, 2006 WL 3240729 (W.D.N.Y. July 13, 2006).

In addition, the New York U.C.C. specifically recognizes that a contract is not materially altered by “a clause ... providing for interest on overdue invoices.” N.Y. U.C.C. § 2-207(2), cmt. 5. Moreover, courts in this Circuit have generally awarded interest under similar facts. *See, e.g.,*

*Palmareal Produce*, 2008 WL 905041, at \*2-\*3; *Brigiotta's Farmland*, 2006 U.S. Dist. LEXIS, at \*16-\*18, 2006 WL 3240729; *Dayoub Marketing*, 2005 U.S. Dist. LEXIS 26974, at \*14-\*16, 2005 WL 3006032; *see also Coosemans Specialties*, 485 F.3d at 708 (applying N.Y. U.C.C. § 2-207(2) to attorneys' fee provision). Accordingly, I recommend awarding plaintiff pre-judgment interest.

As to the rate of interest to apply, plaintiff seeks pre-judgment interest at the rate of 5.07%. There is no federal statute that sets the rate for pre-judgment interest. *See Jones v. First UNUM Life Ins. Co. of America*, 223 F.3d 130, 139 (2d Cir.2000). Plaintiff seeks interest at the post-judgment interest rate set forth in 28 U.S.C. § 1961(a) that the USDA utilized in its reparation order. Since this rate of interest is not higher than the IRS underpayment rate<sup>2</sup> or the 9% pre-judgment interest rate under New York law, I recommend that the Court award pre-judgment interest at the rate of 5.07% per annum. *See <http://www1.nysd.uscourts.gov/fees.php?fees=judgment>*.

Although the USDA reparation order provides for interest from December 1, 2005, plaintiff requests interest from December 5, 2005 without explanation as to how it arrived at that date. *See* Miuccio Aff. at ¶ 10; Pl.'s Mem. of Law at 6-7. Presumably, the USDA awarded interest from December 1, 2005 because that date is twenty days after Fred's accepted the second shipment of produce. *See* 7 C.F.R. §46.2(aa)(10) ("payment is due the supplier-seller within 20 days from the date of acceptance of the shipment"). Accordingly, I agree that

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<sup>2</sup>The IRS underpayment rate reflects the considered judgment of Congress regarding the appropriate compensation for loss of the use of money. *Cf. S.E.C. v. U.S. Environmental, Inc.*, 114 Fed. Appx. 426 (2d Cir.2004); *S.E.C. v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1476-77 (2d Cir.1996) (upholding prejudgment interest award at the IRS underpayment rate rather than treasury bill rate, recognizing that the more "advantageous rate would seem highly inappropriate in the circumstances here, where defendants have had the use of the money"). Unlike the post-judgment interest rate, the underpayment rate is adjusted quarterly, and ranged from 6%-8% during the relevant time period. *See* <http://www.dol.gov/ebsa/calculator/a2underpaymentrates.html>.

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December 1, 2005 is the appropriate date from which to calculate interest and recommend that interest be calculated as follows on the unpaid balance of \$4,337.50 through May 31, 2008:

<u>Dates</u>	<u>Interest Rate</u>	<u>Per Diem</u>	<u>Number of Days</u>	<u>Interest</u>
12/1/05-5/31/08	5.07%	.60	912	\$ 547.20

Plaintiff seeks to recover \$5,390.00 in attorneys' fees. *Miuccio Aff.* at ¶ 7, Exh. F. Section 499g(b) provides that a party who files suit in district court to enforce a reparation award is entitled to a reasonable attorneys' fee and costs. *See* 7 U.S.C. § 499g(b); *see also Koam Produce, Inc. v. DiMare Homestead, Inc.*, 222 F.Supp.2d 399, 401 (S.D.N.Y.2002) (construing identical language in section 499g(c)), *aff'd*, 329 F.3d 123 (2d Cir.2003); *Frankie Boy Produce Corp v. Sun Pacific Enters.*, 99 Civ. 10158, 2000 WL 1532914, at \*1 (S.D.N.Y. Oct.17, 2000). Like the award of interest discussed above, attorneys' fees may be awarded as “sums owing in connection with’ perishable commodities transactions” where the seller's invoice includes a clause providing for attorneys' fees. *See Coosemans Specialties*, 485 F.3d at 709.

The standard method for determining the amount of reasonable attorneys' fees is “the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate,” or a “presumptively reasonable fee.” *Hensley v. Eckerhart*, 461 U.S. 424, 433, 1940, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); *Arbor Hill Concerned Citizens Neighborhood Ass'n*, 522 F.3d 182, 188-90 (2d Cir.2008); *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053, 1058-59 (2d Cir.1989). In reviewing a fee application, the district court must examine the particular hours expended by counsel with a view to the value of the work product of the specific expenditures to the client's case. *See Lunday v. City of Albany*, 42 F.3d 131, 133 (2d Cir.1994); *DiFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir.1985). If any expenditure of time was unreasonable, the court should exclude these hours from the calculation. *See Hensley*, 461 U.S. at 434; *Lunday*, 42 F.3d at 133. The court should thus exclude “excessive, redundant or otherwise unnecessary hours, as well as hours dedicated to severable unsuccessful claims.” *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 425 (2d Cir.1999).

A party seeking attorneys' fees bears the burden of supporting its claim of hours expended by accurate, detailed and contemporaneous time records. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147-48 (2d Cir.1983).

The reasonable hourly rates should be based on "rates prevailing in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation." *Cruz v. Local Union No. 3 of IBEW*, 34 F.3d 1148, 1159 (2d Cir.1994) (citing *Blum v. Stenson*, 465 U.S. 886, 894, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)). Determination of the prevailing market rates may be based on evidence presented or a judge's own knowledge of hourly rates charged in the community. *Chambless*, 885 F.2d at 1059. The "community" is generally considered the district where the district court sits. *See Arbor Hill*, 522 F.3d at 190.

In support of its request for fees, plaintiff has submitted an affidavit from James Miuccio detailing the work done, hours expended, and the total amount due. Mr. Miuccio, who was admitted to practice in 2003, affirms that he expended a total of 30.8 hours at a rate of \$175.00 per hour, including 16.1 hours for research in connection with the complaint and drafting the complaint and 14.7 hours for research in connection with the motion for default and drafting the default motion. *Id.* at ¶¶ 7-9, Exh. F. The rate sought by plaintiff is reasonable based on my knowledge of prevailing rates for matters in this district. *See, e.g., J & J Sports Prods., Inc. v. Spar*, No. 06-CV-6101, 2008 WL 305038, at \*4 (E.D.N.Y. Feb.1, 2008) (awarding \$200.00 per hour); *LaBarbera v. J.E.T. Res., Inc.*, 396 F.Supp.2d 346, 352-53 (E.D.N.Y.2005) (awarding associate \$150 per hour); *see also Brigiotta's Farmland*, 2006 U.S. Dist. LEXIS 48004, at \*22-\*23, 2006 WL 3240729 (in PACA case, awarding \$250 per hour for attorneys with more than 30 years of experience and \$125 per hour for newly admitted attorney).

However, I find that the hours expended are somewhat excessive for the work conducted in this relatively straightforward and uncontested case. I recommend that plaintiff's request for fees be reduced by 10%.

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*See Luciano v. Olsten Corp.*, 109 F.3d 111, 117 (2d Cir.1997) (permitting courts to make an across-the-board reduction for excessive hours claimed). Accordingly, I recommend that plaintiff be awarded fees for 27.72 hours at a rate of \$175.00 per hour, for a total award of \$4,851.00.

Plaintiff also seeks \$662.92 in costs. The billing records submitted reflect charges of \$350.00 for filing fees, \$272.01 for service of process fees and \$40.91 for postage and photocopying. *Miuccio Aff.*, Exh. F. Awardable costs are “those reasonable out-of-pocket expenses incurred by attorneys and ordinarily charged to their clients.” *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 763 (2d Cir.1998) (quoting *United States Football League v. Nat'l Football League*, 887 F.2d 408, 416 (2d Cir.1989)). Compensable costs include copies and postage. *Id.*; *Aston v. Secretary of Health & Human Servs.*, 808 F.2d 9, 12 (2d Cir.1986). I find that the costs sought are recoverable and reasonable. Accordingly, I recommend that the Court award costs of \$662.92.

*CONCLUSION*

For the foregoing reasons, I respectfully recommend that this Court award plaintiff judgment of \$10,698.62 against defendants, jointly and severally, consisting of \$4,637.50 in damages, \$5,513.92 in attorneys' fees and costs, and \$547.20 in interest through May 31, 2008 and at a rate of \$.60 per day until the entry of judgment.

This report and recommendation will be filed electronically and a copy sent by overnight delivery to the defendants on this date. Any objections must be filed with the Clerk of the Court, with a copy to the Honorable Nina Gershon, on or before June 10, 2008. Failure to file timely objections may waive the right to appeal the District Court's Order. *See* 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72.

**SO ORDERED.**

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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**REPARATIONS**

**DEPARTMENTAL DECISIONS**

**MIRABELLA FARMS, INC. v. FRUIT PATCH SALES, L.L.C.**

**PACA Docket No. R-06-0104.**

**Decision and Order.**

**Filed February 7, 2008.**

**PACA-R – Contract destination.**

In an f.o.b. transaction, when the parties do not agree as to the contract destination, the significant factors in determining the intended contract destination are: 1) indication in writing, such as a broker's memorandum or other memorandum, of the agreed contract destination; 2) indication of knowledge on the part of the seller as to the ultimate destination; and 3) the absence of an intermediate point of acceptance by the buyer.

Toni Keusseyan, Presiding Officer.

Complainant, *Pro se.*

Respondent, *Pro se.*

*Decision and Order issued 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 in which Complainant seeks an award of reparation in the amount of \$36,642.40 in connection with four transactions involving grapes, a perishable agricultural commodity, in 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 Respondent which filed an Answer thereto denying liability to Complainant.

Since the amount claimed as damages exceeds \$30,000.00 and Respondent requested an oral hearing, an oral hearing was held in

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accordance with section 47.15 of the Rules of Practice under the PACA (7 C.F.R. § 47.15) hereinafter referred to as “the Rules of Practice.” The oral hearing was held on March 8, 2007, in Fresno, California, before Tonya Keusseyan, Presiding Officer. Complainant was represented by Darryl J. Horowitz of Coleman & Horowitz, LLP, located in Fresno, California and Respondent appeared *pro se* in the person of its manager Anthony Balakian.

Phillipe Markarian, owner of Mirabella, testified on behalf of Complainant; Complainant presented no additional witnesses.<sup>1</sup> Complainant offered 16 exhibits into the record, designated CX-1- CX-16. Respondent presented four witnesses, all senior employees of Fruit Patch, LLC, and offered 12 additional exhibits, designated RX-1 – RX-12. Pursuant to section 47.7 of the Rules of Practice (7 C.F.R. § 47.7), the Report of Investigation was entered into the record.

After the hearing, the parties were afforded the opportunity to file proposed findings of fact and conclusions of law as well as briefs in support thereof and claims for fees and expenses. A deadline of April 23, 2007 was imposed for both parties.<sup>2</sup> Both parties submitted their findings of fact and supporting briefs as well as claims for fees and expenses by the imposed deadline. The documents were served on the respective parties by the Department in accordance with the Rules of Practice and neither party elected to file objections to the opposing party's claim for fees and expenses within the time period set forth in section 47.19(d)(5) of the Rules of Practice (7 C.F.R. § 47.19(d)(5).)

### **Findings of Fact**

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<sup>1</sup> The only other witness listed by Complainant was discharged by Complainant immediately prior to the hearing without notice to the Presiding Officer or to the opposing party. As the parties in the proceeding had no prior course of business, it was anticipated that this witness could elucidate the nature of the agreement between the parties because he had made the initial introduction and was familiar with the businesses of both parties as well as the trade practices of the area. Respondent anticipated that he would confirm its allegations.

<sup>2</sup> 7 C.F.R. 47.19(d.) The filing time was extended at the close of the hearing to permit the simultaneous submission of applications for fees and expenses with the filing of briefs.

Complainant, Mirabella Farms, Inc. (“Mirabella”), is a California corporation whose address is 5551 South Orange Avenue, Fresno, California. At the time of the transactions involved herein, Complainant was licensed under the Act. (Compl. 1.) Respondent, Fruit Patch, LLC, (“Fruit Patch”) is a corporation whose address is 8773 Road 48, Dinuba, California. At the time of the transactions involved herein, Respondent was licensed under the Act (Compl. 2, Answer 2.)

On or about December 13, 2005 and December 14, 2005, Complainant, by oral contract, sold to Respondent four lots of Crimson seedless grapes consisting of:

2,080 cartons of Crimson seedless grapes, 19# carton at \$6.00 per container plus a \$1.85 pre-cooling and palletization charge; shipped on 12/13/2005 from Mountain View Cold Storage by Ananian, trailer lic. CA-1WX5914. After shipment, Complainant sent Respondent invoice MS3115 for this lot of grapes.

2,080 cartons of Crimson seedless grapes, 19# carton at \$6.00 per container plus a \$1.85 pre-cooling and palletization charge; shipped on 12/14/2005 from Mountain View Cold Storage by Ananian, trailer lic. CA 4GM2083. After shipment, Complainant sent Respondent invoice MS3130 for this lot of grapes.

2,080 cartons of Crimson seedless grapes, 19# carton at \$6.00 per container plus a \$1.85 pre-cooling and palletization charge; shipped on 12/14/2005 from Mountain View Cold Storage by Arnold Trucking, trailer lic. CA 1WC5132. After shipment, Complainant sent Respondent invoice MS3131 for this lot of grapes.

2,080 cartons of Crimson seedless grapes, 19# carton at \$6.00 per container plus a \$1.85 pre-cooling and palletization charge; shipped on 12/16/2005 from Mountain View Cold Storage by Ananian, trailer lic. CA 4GY4654. After shipment, Complainant sent Respondent invoice MS3139 for this lot of grapes.

The Crimson seedless grapes sold were a mixture of grapes produced by Mirabella and grapes produced by other growers being represented by Mirabella.

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The Crimson seedless grapes in each of the lots above had been stored by Mirabella at its cold storage facility, Mountain View Cold Storage ("Mountain View"), 4275 Avenue 416, Reedley, CA, 39654. (Tr. 27.) In each transaction listed above, the grapes in question were initially shipped to Respondent's warehouse at 38773 Road 48, Dinuba, CA 93618. The two locations are approximately five miles apart.

Respondent arranged for shipping of the four lots of grapes from Mountain View Cold Storage to its warehouse in Dinuba, CA.

Prior to the first shipment and on several other occasions, Fruit Patch sent an employee to view and evaluate some of the fruit. (Tr. 65, 167, 217.) Upon evaluation, the employee would point out which lots he wanted to be sent to Fruit Patch. (Tr. 65.) After the arrival of the grapes, or shortly thereafter, an employee of Fruit Patch would inspect the grapes and to see if they were of an acceptable quality for its purposes. (Tr. 220.)

On December 13, 2005, the grapes on Complainant's invoice MS3115 were shipped from Complainant's storage in Reedley, California to Respondent's warehouse in Dinuba, CA. At the time of shipping, a bill of lading was created: one copy remained at Mountain View; one copy was sent to the Mirabella office; two copies were sent with the carrier, one for the trucking company and one for the destination warehouse. (Tr. 29.) The bill of lading listed the terms of the sale as "f.o.b." (CX-2.) A copy of the bill of lading was faxed that afternoon from someone at Mountain View, but the recipient of the fax is unknown, as the heading generated by the fax machine only indicated the time, date and the location of the sender and not the recipient of the fax. (RX-1A.)

Later that day, Respondent shipped 1,920 of the 2,080 boxes of the grapes on invoice MS3115 to its customer, "HOLD in" Ssonet, Massachusetts. A new bill of lading was created by Respondent listing Fruit Patch, Inc. as the shipper and listed the terms of the sale as f.o.b. (RX-8.) "HOLD[""] rejected the lot to Respondent. Upon rejection, Respondent phoned Complainant to ask where to send the grapes. Complainant had no clients in Massachusetts and agreed to move the lot to 4-M Fruit, another client of Respondent. (RX-4E.)

On December 20, 2005, the lot was inspected by USDA in Massachusetts at the request of 4-M Fruit at its location. The grapes

failed to grade U.S. 1 table on account of condition. (RX-10E.) Due to unfavorable conditions in the Boston market, the grapes were moved to a third Fruit Patch customer in Toronto, Canada, after a phone call with Complainant. (RX-4E.)

On January 9, 2006, Respondent faxed to Complainant an account of sale of the 1,920 grapes shipped to Canada which stated:

Return on Crimsons - \$1.00

Freight to North Haven, Connecticut<sup>3</sup> - \$3.34

Redelivery to Toronto, Canada - \$.20

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Total Return:  $1,920^4 \times (\$2.54) = (\$4,876.80)$  (RX 10F.)

The original MS3115 invoice from Mirabella to Fruit Patch listed 2,080 boxes at \$7.85<sup>5</sup> totaling \$16,328. (CX-1.) After resale by Respondent's customer in Canada, Fruit Patch issued an account of sale and a revised version of Mirabella's invoice MS3115, which listed 1,920 x (\$2.54) + 160<sup>6</sup> x \$7.85 totaling \$3,620.80 owed by Mirabella to Fruit Patch. (RX-10A.)

On December 14, 2005, the lot of grapes identified on Complainant's invoice MS3130 was shipped from Complainant's storage in Reedley, CA to Respondent's warehouse in Dinuba, CA at 10:30AM. A bill of lading was created stating that the weight was 44,096 lbs. and there were 21 CHEP pallets. (CX-6.) Two copies were sent with the carrier, one for the trucking company and one for the destination warehouse. The bill of lading listed the terms of the sale as "f.o.b." A copy of the bill of lading was faxed at 11:59 AM from Mountain View, but the recipient of the fax was unknown, as the heading generated by the fax machine only

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<sup>3</sup> It is not clear why the freight was charged to CT when the destination point was actually Massachusetts.

<sup>4</sup> A fax from the customer in Toronto, Canada shows the accounting was based on 1915 cases and not 1,920 cases. (CX-15.)

<sup>5</sup> \$6.00 per container plus a \$1.85 pre-cooling and palletization charge.

<sup>6</sup> This is the number of boxes for which Respondent paid full contract price.

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indicated the time, date and the location of the sender and not the recipient of the fax. (CX-6.)

Upon arrival and inspection at the Fruit Patch warehouse, the lot was rejected by Respondent. Upon request by Respondent, Complainant replaced the grapes at or near 2:00 PM that same day. (Tr. 220; RX-6B.) Either a second bill of lading was generated or the original bill of lading was revised to state that the weight was 44,096 and there were 26 CHEP pallets. (CXB4.) Two copies were sent with the carrier, one for the trucking company and one for the destination warehouse. The bill of lading listed the terms of the sale as "f.o.b." A copy of the bill of lading was faxed at 15:32 PM from Mountain View, but the recipient of the fax is unknown, as the heading generated by the fax machine only indicated the time, date and the location of the sender and not the recipient of the fax. (CXB4; RX-1B.)

On December 15, 2005 Respondent shipped 1,840 of the 2,080 boxes of the lot of grapes on Complainant's invoice MS3130 to its customer, "HOLD[?]", in North Haven, Connecticut. A new bill of lading was created by Respondent listing Fruit Patch, Inc., as the shipper and listing the terms of the sale as f.o.b. (RX-7.)

On December 23, 2005, the lot was inspected by USDA in Brooklyn, New York<sup>7</sup> at the warehouse of I.B.I. Distributors and failed to grade U.S. 1 table account condition. (RX-11F.) Due to unfavorable market conditions in Connecticut, the grapes were moved to a Fruit Patch customer in Boston, Massachusetts after a phone call with Complainant.<sup>8</sup>

On January 10, 2006, Respondent faxed to Complainant an account of sale of the 1,840 grapes shipped to Boston from the MS3130 invoice which stated:

Return on Crimsons - \$3.00  
Freight to North Haven, Connecticut - \$3.48  
Redelivery to Boston, Massachusetts - \$.06

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<sup>7</sup> It is not clear why the grapes were inspected in NY, however, during the hearing both parties confirmed that these were the grapes listed on invoice MS3130. See RX-4D stating that Fruit Patch advised Mirabella that MS 3130 was in North Haven CT, where the market was flooded.

<sup>8</sup> Three days prior, MS3115 had been shipped from Boston, Massachusetts to Toronto, Canada because the Boston market was flooded. (RX-4E.)

Total Return: 1,840 x (\$.54) = (\$993.60) (RX-11E)

The original MS3130 invoice from Mirabella to Fruit Patch listed 2,080 boxes at \$7.85<sup>9</sup> totaling \$16,328.00. (CX-3.) After resale, Fruit Patch issued to Complainant an edited and revised version of Complainant's invoice MS3130, listing (1840 x (\$.54)) + (240 x \$7.85) totaling \$890.40 owed by Mirabella to Fruit Patch. (RX-11B.)

On December 14, 2005, grapes on Complainant's invoice MS3131 were shipped from Complainant's cold storage in Reedley, CA to Respondent's warehouse in Dinuba, CA. Both parties have agreed that at the time of the oral hearing on March 8, 2007, the \$16,328.00 owed on invoice MS3131 had been paid in full. (Tr. 91-93.)

On December 19, 2005, grapes on Complainant's invoice MS3139 were shipped from Complainant's cold storage in Reedley, CA to Respondent's warehouse in Dinuba, CA. On December 22, 2005, four days after the load arrived at its warehouse, Fruit Patch rejected the majority of the grapes because they did not meet its quality standards. (RX-4B.) However, Fruit Patch did retain 160 boxes of the shipment of 2,080 boxes. At the request of Fruit Patch, Mirabella replaced the 1,920 boxes that were returned. (Tr. 87-88.) The revised invoice MS3139a, issued by Mirabella on December 20, 2005 reflected the new quantity and the total amount due for this replacement shipment. (RX-12C.)

Fruit Patch mistakenly paid the invoice MS3139a, without accounting for the 160 boxes that were retained from the initial invoice. (Tr. 87-88.) Fruit Patch issued check no. 32345 dated March 21, 2006, in the amount of \$1,256.00, to the order of Mirabella Farms, who subsequently cashed the check. (CX-15 pg.18.) Both parties have agreed on the record that invoice MS3139a has been paid in full. (Tr. 143, 292.)

The informal Complaint was filed on March 13, 2006, which was within nine months after the causes of action herein accrued.

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<sup>9</sup> \$6.00 per container plus a \$1.85 pre-cooling and palletization charge.

### Conclusions

In its formal Complaint, Complainant lists four unpaid invoices covering grapes sold to Respondent (MS3115, MS3130, MS3131, MS3139) but the parties have since presented evidence at the hearing and have stipulated that two of the four invoices, MS3131 and MS 3139/3139a, have been paid in full. Therefore, Complainant's claims as to those invoices are dismissed. Two invoices remain in dispute. Complainant asserts that the shipments made good delivery, and it is due full contract price on two loads of grapes: MS3115 and MS3130. In order to decide this case, we must answer the following questions: 1) Was there a contract in this case? 2) What were the terms of the contract? 3) Did either party breach the contract? 4) What damages, if any, are due to either party?

Based on documentary and testimonial evidence, we find the parties had an oral agreement for the sale of Complainant's grapes. This agreement, however, was not memorialized in the form of a written contract prior to the shipment of the grapes, and is thus vulnerable to differing interpretations. Perhaps the most basic principle in contract law is that there must be a concurrence of wills between the two parties. It is essential that there be a mutual manifestation of assent, sometimes referred to as a meeting of the minds, as to the material terms of the contract. *Griffin-Holder Co. v. Joseph Mercurio Produce Corp.*, 40 Agric. Dec. 1002 (1981); *Independent Grayse Distributors v. Barbera Packing Corp.*, 25 Agric. Dec. 1144 (1966). Given the fact that the parties differ in their understandings of their arrangement and there is no written contract to reference, we must determine the terms of the oral agreement.

#### Contract Terms:

While the parties in this case agree on most of the material terms of the contract, such as the quantity of the grapes, the dates of shipment, and the price, there is a sharp disagreement regarding the shipping terms. As a rule, it is essential that all the parties to a transaction are using the same shipping terms, and that all the parties have a clear understanding of what those terms mean because the shipping terms establish the

contractual rights and responsibilities between a buyer and seller for delivery, risk of loss, title and payment of freight charges. It is apparent from the testimony in this case that the parties are in disagreement as to the contract destination and whether there was a "protection" agreement as part of their contracts.

Section 46.43(i) of the PACA Regulations, in relevant part, defines "f.o.b." as meaning that "the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in 'suitable shipping condition' . . . and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." 7 C.F.R. § 46.43(i). The buyer shall have the right of inspection at the destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at the time of shipment, subject to the provisions of the suitable shipping condition warranty. *Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968 (1991). The f.o.b. term often is used with an identified physical location (*e.g.*, f.o.b. Miami) to identify the contract destination.

The term "protection" is not defined under the PACA; however the term is used throughout the industry.

A protection agreement is a modification of the original sale contract that leaves the original sale price as the base line price for determining whether the buyer makes a profit, or is entitled to protection. The potential for profit remains after the conclusion of the protection agreement, and this potential can only be realized in the same manner as it is realized in any sale contract, namely by the buyer reselling at prices above the purchase price plus expenses. Since a protection agreement is intended to protect a buyer against any loss, a buyer who has paid freight must be credited with the freight paid. If gross proceeds of the buyer's resale exceed the f.o.b. contract price plus freight, then the buyer gets to keep the excess as profit. On the other hand, if gross proceeds of the re-sale are less than the buyer's costs (f.o.b. price plus freight), then the buyer deducts the freight expense from the gross proceeds and remits the balance, thus suffering no loss. If gross proceeds are not enough to cover freight, then the seller who grants full protection must contribute

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and pay the remainder of the freight costs. (*See* <http://www.ams.usda.gov/fvpaca/training/unit1.htm>.)

As we evaluate whether the terms of this sale were “f.o.b. Dinuba, CA” or “f.o.b. final destination” plus a “protection” agreement, we take notice of the fact that each party’s claims have the common element of f.o.b. There is basic agreement that f.o.b. means: 1) that the produce was to be placed free on board the truck at a shipping point in suitable shipping condition; 2) that the buyer or its agents assume all risk of damage and delay in transit not caused by the seller; 3) that the buyer shall have the right of inspection at the destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at the time of shipment, subject to the provisions of the suitable shipping condition warranty.

The dispute centers around Respondent’s (the purchasing party) claim that it had an additional agreement wherein it was financially protected by Complainant (the seller), in any circumstance where the product did not make good delivery and the gross proceeds were not enough to cover freight. The existence of this protection agreement is logically connected to the parties’ disagreement as to the contract destination. This is true because a under a protection agreement, Respondent’s potential for profit could only be realized by its reselling the grapes at a price that is greater than the sum of the purchase price plus expenses. In this case, the largest expense was the freight from the west coast to the east coast. Since Respondent could not determine the total expenses or the price at resale until the produce reached its final destination in good condition, it would only be logical from a contractual standpoint for Respondent to require a shipping term of f.o.b. final destination.

Respondent insists that there was a protection agreement between the parties whereas the Complainant denies it. In order to properly evaluate each party’s claims regarding the protection agreement, we must establish who has the burden of proof. 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). Thus, Complainant must prove by a preponderance of the evidence that the shipping term was f.o.b. and that the contract destination was Dinuba, CA. Respondent's ability to prove, by a preponderance of the evidence, that the terms of the contract included a protection agreement is critical to this case as we have stated that the existence of a protection agreement would logically dictate the shipping terms, specifically the contract destination (Dinuba, CA versus final destination).

Complainant denies the existence of a protection agreement and asserts that all of the transactions between Mirabella and Fruit Patch were f.o.b. sales, with the contract destination of Dinuba, California, the location of Respondent's warehouse. Complainant supports its contention by testifying that it promptly sent out bills of lading, "passings"<sup>10</sup> and invoices for the sales, all of which stated that the shipping terms were "f.o.b." Specifically, Complainant testified that the carrier would present a bill of lading to the Fruit Patch warehouse when it delivered the grapes. Complainant then would add the price to his copy of the bill of lading and fax it to the Fruit Patch Sales office as a passing, then mail an invoice to Fruit Patch the next day. Complainant further asserts that Respondent received these documents and did not object to them prior to their acceptance of the grapes. (Tr. 139.) As documentary evidence, Complainant presented copies of both of the invoices it generated, as well as the bills of lading/passings faxed from Mountain View. (CX-1B CX-4.)

Complainant notes that Respondent inspected the grapes, both at its cold storage facility when choosing the desired lots and at its own warehouse, noting that on more than one occasion, Respondent rejected the grapes and Complainant replaced them. Complainant is adamant that it did not guarantee that the grapes would be acceptable to any of Respondent's customers, as it did not know to whom or to where the grapes were being shipped and it had no control over the handling and care of the grapes once they left cold storage at Mountain View. (Tr. 12,

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<sup>10</sup> A passing is a copy of the bill of lading that includes the contract price. The two parties have stated that sending a passing for the product after it has been shipped is standard practice in their area.

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61-62.) Complainant asserts that it has fulfilled all of its contractual obligations under “f.o.b. Dinuba, CA” sales and believes that its liability for the grapes ended when Respondent picked them up at the cold storage facility and accepted them at its warehouse. (Tr. 277-279.)

Respondent asserts that the shipping term was “f.o.b. final destination” and further asserts that the parties had a protection contract, wherein Complainant would be paid full contract price if, and only if the grapes were to make good delivery to Respondent’s customers on the east coast. (Tr. 191-194, 325-335.) If the grapes did not make good delivery, Respondent’s customers would not pay for the freight to the east coast and this freight as well as any other costs associated with the grapes after rejection would be charged back to Complainant. (Tr. 330.)

In each of the disputed transactions, when Respondent’s customer on the east coast rejected the load, Respondent contacted Complainant and asked if Complainant wanted to have a USDA inspection immediately or move the load to another site in hopes of reselling them and get the inspection there. (Tr. 56.) Respondent asserts that the load was moved with the approval of Complainant; the load was then inspected and was found to be out of grade. (Tr. 45, RX-10E, RX-11F.) Respondent claims that when its customer rejected the load, the title for the lot would have reverted back to Complainant, but that Respondent tried to help Complainant place the rejected grapes to help mitigate Complainant’s losses. (Tr. 45, 238.) Respondent notes that it then provided an accounting to Complainant on the returns of the subsequent sales, minus freight charges. (Tr. 178, RX-10C, RX-11E.)

Respondent contends that even at the height of the market, it would have never agreed to a simple f.o.b. sale where the contract destination was its warehouse, located approximately 5 miles from Complainant’s storage facility. (Tr. 190.) Respondent stated that the Complainant said that he needed help selling the remainder of his grapes. (RX-4B.) Respondent also noted that at the time of its transactions with Complainant, Complainant’s grapes were already 40 days old, having been picked in early November, and were deteriorating. (Tr. 322-323.) The market was already saturated with the end of the domestic Crimson grape crop and the Chilean Crimsons were just about to hit the U.S. market. (Tr. 231.) Respondent supported this assertion by presenting a USDA market report for the period in question which quantified the

state of the San Joaquin Valley grapes Crimson grape market at the time of the sales. (Tr. 118, RX-9A-J.)

At the hearing, Respondent's witness, Anthony Balakian asserted that it was Respondent's standard business practice to buy product under an "f.o.b. final destination" contract with protection agreement, in which it would do a limited and cursory inspection of the fruit before it was loaded onto the customers' trucks, but had no liability if the fruit did not arrive in acceptable condition. (Tr. 273.) Respondent's witness testified that Fruit Patch has bought and sold millions and millions of dollars worth of fruit under the same contract terms from hundreds of growers. (Tr. 324-325.) Respondent's witness further asserted at hearing that this type of agreement was a common practice in the fruit industry. (Tr. 309.) The witnesses for Respondent further testified that not only were protection agreements standard in the California fruit trade, as well as the standard business practice with its suppliers, but that Gene Bruce, who introduced the two parties, would have testified that he explained the Respondent's buying practices to Complainant<sup>11</sup>. (Tr. 358.)

Respondent's claims had the potential to be very persuasive in this dispute because evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the organization on a particular occasion was in conformity with their routine practice. (Fed. R. Evid. 406.) We find that the testimony given at oral hearing by Respondent's witnesses about its routine business practices was both credible and compelling. However, it is well established that custom must be proven by numerous instances of actual practice, not just by the opinion of a witness. *California Fruit Exchange v. Spracale Fruit Co.*, 89 F. Supp. 580 (W.D. Pa. 1950); *Lookout Mountain Tomato & Banana Co. v. Case Produce, Inc.*, 51 Agric. Dec. 1471 (1992); *The Woods Co., Inc. v. P S L Food Market, a/t/a W. B. Produce, a/t/a Western Beef*, 50 Agric. Dec. 976 (1991); *Coast Marketing Co. v. World Wide Marketing Co.*, 30 Agric. Dec. 1742 (1971); *Michael Santelli & Sons v. Samuel H. Rubenstein*, 21 Agric. Dec. 1053 (1962); *M.R. Davis & Bros. v. William J. Flynn*, 20 Agric. Dec. 1069 (1961). Thus, while swayed by the

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<sup>11</sup> See footnote 2 explaining Mr. Bruce's absence.

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testimony at hearing, we must look for proof of actual practice to be able to find in Respondent's favor with regard to the existence of a protection agreement.

In terms of documentary evidence, Respondent produced the credit memorandum and accounting of the returns given to Complainant after it helped to place the lots of grapes identified in invoices MS3115 and MS3130, after they were rejected by its customers. (Tr. 178.) From a business standpoint, if the Respondent was operating without a protection agreement, it likely would have simply rejected the goods back to Complainant after rejection by its customers at the final destination and sought recovery from the Complainant. Under a protection agreement however, it is incumbent upon a buyer who has such an agreement to keep records which substantiate its costs at resale and its losses because the failure to keep such records would void the protection agreement. *Dave Walsh Co. v. Liberty Fruit Co.*, 38 Agric. Dec. 533 (1979)); *DeMarco Produce Co., Inc. v. J.R. Cortes & Co.*, 39 Agric. Dec. 1256 (1980). Thus by documenting and communicating the amount of resale, freight costs and losses, we find that Respondent acted in a manner which indicated that it believed that it was operating under a protection agreement.

In deciding whether the oral agreement between the parties included a protection agreement, we acknowledge that Respondent's accounting of sales supports its assertion that it was acting under a protection agreement. Also, we take full notice of Respondent's testimony regarding its use of a protection contract as a standard business practice and its testimony regarding the agreement with its customers, wherein the customer would arrange and pay for freight contingent upon good delivery. Unfortunately, Respondent did not provide any credible evidence, such as other similar contracts, concrete examples of similar transactions, or testimony of suppliers, clients, or area industry experts to corroborate its claims. Thus, we find that Respondent failed to meet its burden to prove by a preponderance of the evidence that it was operating under a protection agreement with Complainant. Thus, we must conclude that a protection agreement was not part of Respondent's contracts with Complainant, and given the fact that the parties agree that their contracts were f.o.b., we conclude that the shipping term for the disputed transactions was f.o.b.

Having established that the shipping terms for the contracts were f.o.b., the crucial and ultimate question becomes what did the parties consider to be the contract destination? Specifically, did they intend that the seller was to warrantee that the grapes would arrive without abnormal deterioration to the ultimate destination (*i.e.*, the east coast), or to the intermediate shipping point (Dinuba, CA)?

Acceptance by a buyer at shipping point, or at an intermediate point, does not necessarily relieve a seller of responsibility to the ultimate destination. *Clark Produce v. Primary Export International, Inc.*, 52 Agric. Dec. 1715 (1993). Nor is the destination specified in a freight contract a conclusive consideration. *Id.* Thus we must weigh the following factors in determining the intended contract destination:

- Indication in writing, such as a broker's memorandum or other contract memorandum, of the agreed contract destination.
- Indication of knowledge on the part of the seller as to the ultimate destination. This might be shown by a freight contract, other documents, or it might be admitted.
- The absence of an intermediate point of acceptance. (*Id.*, at page 1721.)

**Indication in writing:**

The writings in the case at hand were limited. Specifically, the existence of and/or the successful transmittal of passings was contested by Respondent at the oral hearing. As a general rule, anything in writing made at the time of the transaction should be given more weight than subsequent statements by interested parties. *Chalona Brothers v. Associated Fruit Distributors, Inc.*, 10 Agric. Dec. 1430 (1951). Complainant rightfully argues that the invoices, passings and bills of lading are necessary writings under the Uniform Commercial Code ("U.C.C.") (Br. 7.) However, Complainant does not actually prove that the passings were ever sent or received. When asked about its business practices, Phillipe Markarian, the General Manager for Complainant, testified that of the four copies of the bill of lading, his copy would be

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faxed to him from Mountain View, wherein he would take his copy, add the price and fax it to Respondent's sales office as a passing. (Tr. 155.) Complainant presented as exhibits two bills of lading; however the fax headers indicated that the faxes were sent by someone at Mountain View. (CX-2, CX-4.) Logic dictates that Mr. Markarian, was somewhere other than the fax room at Mountain View if the documents were being faxed to him. Given the fact that the fax headings merely stated the source of the passings, and that this source was not Complainant, but rather the cold storage facility which also faxed the bill of lading to Complainant, we find the evidence presented about the faxed passings to be inconclusive.

Respondent claims that the paperwork was not done in a prompt and proper manner, (RX-4D.) arguing specifically, that it did not receive the invoices in a timely manner and did not receive passings at all. (Tr. 14.) Additionally, Respondent claimed that it contacted the Complainant when it saw that the shipping term was f.o.b. Dinuba, CA (RX-4D), but this is disputed by the Complainant. In the end, Respondent did not provide any credible evidence that could disprove the Complainant's contention that invoices were mailed the day after shipping. The fact that bills of lading were delivered by the carrier to the Respondent's warehouse was undisputed. (Tr. 210-212.) When documents such as mailgrams and invoices which contain terms of sale are not objected to in a timely manner, such documents are evidence of a contract containing the terms set forth therein. *C. H. Robinson Co. v. Olympia Produce Co., Inc.*, 49 Agric. Dec. 1204 (1990); *Pacific Fruit, Inc. v. Peter J. Bonafede*, 45 Agric. Dec. 371 (1986); *Pacific Valley Produce Co. v. The Garin Co.*, 44 Agric. Dec. 414 (1985); *Casey Woodwyk v. Albanese Farms*, 31 Agric. Dec. 311 (1972); *Frank's Packing Co. v. Ladow-Gordon Grape Co.*, 19 Agric. Dec. 859 (1960). The bills of lading show that the grapes were shipped from Mountain View cold storage to Respondent's warehouse in Dinuba, California. The invoices show the shipping term as "f.o.b." and the destination as Dinuba, California.

**Indication of knowledge on the part of the seller as to the ultimate destination:**

Complainant disputes that it knew that the grapes were being shipped to the east coast. The bills of lading listed Dinuba, CA, not a location on the east coast. (CX-2, 4; RX-1A-B.) While Complainant's witness, Phillippe Markarian, testified that he had no knowledge of the final destination of the grapes (Tr. 67), the note on Respondent's exhibit 11C in what Mr. Markarian admitted is his handwriting stating, "originally told me he was sending it to someone in N.Y." seems to belie that assertion. We must consider, however, the fact that a seller has knowledge of the ultimate destination of a load may, under certain circumstances, be incidental, and not form a part of the contract so as to make the warranty applicable to the known destination. *James Burns & Son v. Chicago Potato Exchange*, 19 Agric. Dec. 1062 (1960). For example, in *Clark Produce v. Primary Export International, Inc.*, 52 Agric. Dec. at 1715, where the seller shipped broccoli to an intermediate cold storage facility where it was accepted by the buyer and then shipped to buyer's customers in the Orient, and there was no documentation as to an agreed contract destination, but seller admitted knowing that the broccoli was destined for the Orient, it was found that the acceptance at the cold storage facility (by unloading the broccoli into a common storage with other previous or subsequent shipments from other transactions between the parties) indicated that the seller did not intend the contract destination to be the Orient. The facts of this case are very similar to those of *Clark Produce*. Even if we assume that Complainant knew that the ultimate destination of the load of grapes referenced in Respondent's exhibit 11C was New York, thus viewing that fact in a light most favorable to the Respondent, we cannot conclude that this knowledge made the contract destination other than Dinuba, CA.

**Intermediate point of acceptance**

The acceptance of the grapes at Respondent's warehouse, the intermediate destination, is the final factor in determining the intended contract destination. While it is undisputed that Respondent received the grapes at its cold storage facility, we must determine whether this receipt constituted acceptance. Based on Respondent's actions after

receipt, we must conclude that it did. It is undisputed that Respondent unloaded the grapes when they arrived at its warehouse. (Tr. 168.) Respondent testified that it would either store the grapes in its cold storage facility or reload them onto another truck for shipment to the east coast. (Tr. 168.) It is also undisputed that Respondent sent the produce to its customers in Massachusetts and Connecticut in order to fulfill a contract. (Tr. 241-243.) The PACA regulations and reparation case precedent tells us the following: 1) the unloading or partial unloading of the transport is an act of acceptance;<sup>12</sup> 2) the transfer of produce from one trailer to another for storage is an act of acceptance;<sup>13</sup> and 3) when a buyer consigns or resells produce, absent other considerations, such action is an act of dominion constituting acceptance.<sup>14</sup> Because Respondent unloaded the grapes, transferred them to another truck or into its warehouse and resold them, we find that Respondent accepted the grapes at its warehouse in Dinuba, CA.

Thus, even if the Complainant was aware that the grapes were being shipped to the east coast, because the shipping term on the invoices states “f.o.b.” with the destination of Dinuba, CA, and because the Respondent’s actions after the receipt of the grapes constituted acceptance, we must conclude that Complainant’s warrantee extended to the contract destination of Dinuba, CA.

***Breach:***

Having established that the shipping terms for the contracts were f.o.b. Dinuba, CA, we must turn our attention to the question of breach. We have determined that Respondent accepted delivery of the shipments from Complainant. Therefore, Respondent is liable to Complainant for the full purchase price of invoices MS3115 and MS3130, less any

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<sup>12</sup> 7 C.F.R. §46.2 (dd)(1); *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons Co. and C. H. Robinson Co.*, 49 Agric. Dec. 620 (1990); *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

<sup>13</sup> *Howard Dunlap v. Israel Klein Co.*, 17 Agric. Dec. 992 (1958), *Julius Peller v. Bonnie Bee Super Foodmark, Inc.*, 16 Agric. Dec. 1018 (1957).

<sup>14</sup> *Dave Walsh Co. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 2085 (1983).

proven damages resulting from Complainant's breach. *Norden Fruit Co., Inc. v. E D P, Inc.*, 50 Agric. Dec. 1865 (1991).

Respondent has the burden of establishing both breach and damages by a preponderance of the evidence. U.C.C. § 2-607(4); *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc.*, 60 Agric. Dec. 840 (2001); *C.H. Robinson Co. v. Trademark Produce, Inc.*, 53 Agric. Dec. 1861 (1994); *Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969). Respondent, then, must prove that the grapes failed to meet suitable shipping condition standards when inspected, and that the inspections were timely.

The suitable shipping condition provision of section 46.43 (j) of the Regulations requires delivery to contract destination "without *abnormal* deterioration," (7 C.F.R. § 46.43(j)) or what is elsewhere called "good delivery." (7 C.F.R. § 46.44). Under the PACA, the only acceptable evidence of a breach of contract resulting from condition defects is an inspection report by a neutral party. *Delco Produce, Inc. v. Sun Valley Potatoes, Inc.*, 59 Agric. Dec. 433 (2000); *Tantum v. Weller*, 41 Agric. Dec. 2456 (1982); *O.D. Huff, Jr., Inc. v. Pagano & Sons*, 21 Agric. Dec. 385 (1962). The only such evidence of condition defects in this case is the two USDA reports of inspections taken on these shipments. (RX 10E, 11F.)

We have determined that the contract destination was Dinuba, CA. According to PACA precedent, inspections a few days after arrival may show the condition of the goods on the day of arrival. *Bruce Newlon Co., Inc. v. Richardson Produce Co.*, 34 Agric. Dec. 897 (1975); *D.L. Piazza Co. v. Stacy Distr. Co.*, 18 Agric. Dec. 307 (1959). However, inspections are deemed too late when they are too remote in time from the time of arrival to reflect condition of the produce on delivery. *Robert Villalobos v. American Banana Co.*, 56 Agric. Dec. 1969 (1997) [five days after arrival of tomatoes in a delivered sale]; *Borton & Sons, Inc. v. Firman Pinkerton Co., Inc.*, 51 Agric. Dec. 905 (1992) [four days after arrival of pears]; *Dan R. Dodds v. Produce Products, Inc.*, 48 Agric. Dec. 682 (1989) [eight days after arrival of potatoes, citing case where seven days held too long]; *U.S.A. Fruit, Inc. v. Roxy Produce*

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*Wholesalers, Inc.*, 48 Agric. Dec. 705 (1989) [four days after arrival of plums].

The grapes on invoice MS3115 were shipped from Mountain View in Reedley, California and received in Dinuba, California, on December 13, 2005, and inspected in Massachusetts on December 20, 2005, seven days after acceptance by Respondent. The grapes on invoice MS3130 were shipped from Mountain View in Reedley, California and received in Dinuba, California, on December 14, 2005, and inspected on December 23, 2005, in New York, nine days after acceptance by Respondent. We hold that the inspections were too remote in time from the time of arrival at the contract destination of Dinuba, California, to establish a breach of contract by Complainant.

While Respondent may argue that the inspections were timely, since it believed that the contract destination was on the east coast, PACA precedent indicates that the warranty of suitable shipping condition may be void when the produce is inspected at a secondary destination. For example, in *Rancho Vergeles, Inc. v. Richard Shelton d/b/a Midvalley Brokerage Company*, 46 Agric. Dec. 1031 (1987), the warranty of suitable shipping condition was held not to be applicable where Respondent took delivery under an f.o.b. contract at shipping point (bill of lading said ship to Respondent at shipping point city), and the commodity was shipped to a distant destination. Prompt inspection at the distant destination showed substantial condition defects in tomatoes, but Respondent was held liable for the full price.

Since timely neutral inspection reports are the only acceptable evidence to prove a breach of contract resulting from condition defects, we find that Respondent has failed to show by a preponderance of the evidence that Complainant breached the warranty of suitable shipping condition at the contract destination of Dinuba, CA. Consequently, we must find that Complainant did not breach the contract and therefore, Respondent is not entitled to damages from Complainant. Respondent is liable to Complainant for the full invoice price of the grapes listed on the invoices in question minus any payments Respondent has already made.

***Liability:***

In its formal Complaint, Complainant asked for judgment in the amount of \$35,386.40, but failed to elucidate how it reached this amount in relation to the invoices in dispute. It is not the purview of this decision to make Complainant whole in terms of the totality of its business transactions with Respondent, but rather to address the invoices specifically listed in the Complaint. Thus, we have looked to the informal Complaint for clarity in terms of the amounts and transactions in dispute. (Report of Investigation, Ex. 1)

The original claim was for \$36,642.40 owed on four invoices (MS3115, MS3130, MS3131, and MS3139):

Invoice No.	Shipping date	Invoice amount	Amount Paid	Balance Due
MS3139	12/19/05	\$16,328.00	\$15,072.00	\$1,256.00
MS3130	12/14/05	\$16,328.00	\$1,884.00	\$14,444.00
MS3115	12/13/05	\$16,328.00	\$1,256.00	\$15,072.00
MS3131	12/14/05	\$16,328.00	\$10,957.60	\$5,870.40
Total				<b>\$36,642.40</b>

During the interval between the informal Complaint and the formal Complaint, invoice MS3139 was paid and the amount requested was reduced to \$35,386.40 ( $\$36,642.40 - \$1,256.00 = \$35,386.40$ ). With regard to this new sum on the formal Complaint, the Court has assumed that this amount is based on a claim for the balances owed on the following three invoices:  $\$15,072.00$  (MS3115) +  $\$14,444.00$  (MS3130) +  $\$5,870.40$  (MS3131) =  $\$35,386.40$ . There were no precise calculations or any other data included in Complainant's post-hearing brief that support the amount claimed. The post-hearing brief makes reference to six different loads sold by Mirabella to Fruit Patch from December 13-15, 2005, which were paid in full by Fruit Patch with check no. 31084. While not mentioned, the perhaps more relevant documentation of payment was check no. 32124 which lists eight additional invoices for the period of December 13-19, 2005. (CX-10.) Six of the eight invoices are paid in full by that check, including MS3131. As Complainant and Respondent have agreed that invoice MS3131 has been paid in full, that amount has been excluded from this

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decision.<sup>15</sup> The post hearing brief correctly focuses its argument on the two loads of grapes listed on check no. 31084, MS3115 and MS3130, which were not paid in full.

We have found that these were f.o.b. sales and that Complainant did not breach the warranty of suitable shipping condition for the two transactions in question. Therefore, Respondent is liable to Complainant for the full purchase price of the two loads, or \$32,656.00. Respondent has paid Complainant \$3,140.00 for these shipments.<sup>16</sup> Therefore, Respondent owes Complainant the \$29,516.00<sup>17</sup> balance of the purchase price.

Respondent's failure to pay Complainant \$29,516.00 is a violation of section 2 of the Act. 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 Steel & Iron Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Because the Secretary is charged with the duty of awarding damages, he

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<sup>15</sup> Complainant has asserted that it included invoice MS3131 to recover freight owed on other invoices on the specific advice of the PACA office in Tucson, Arizona. We have made inquiries and have concluded that this argument lacks credibility and was likely a misunderstanding on the part of Complainant. Various factors may be considered when assessing the credibility of a party's allegations. For instance, in R. L. Burden Produce Services v. Taylor Produce, 50 Agric. Dec. 1009 (1991), Complainant alleged failure to pay for a series of four produce transactions. However, the evidence showed that Complainant, during the informal stages of the proceeding, admitted to the Department that Respondent had paid two of the items, but nevertheless included the two items in its formal Complaint. On that basis, we decided that although we would not normally have been disposed to credit Respondent's assertion of payment due to the failure of Respondent to correlate payments with transactions, we would give credit to Respondent's representation of payment as to all four transactions due to Complainant's lapse of memory as to two of the items.

<sup>16</sup> As noted above, the original invoice amount for each was \$16,328.00. In the Informal Complaint in the Report of Investigation, Complainant has claimed that there were partial payments on the two loads in question of \$3,140.00 (*i.e.*, \$1, 884.00 + \$1,256.00.) We conclude that Complainant did not submit a proper accounting into evidence to justify any payment for any sums above \$29,516.00. This adjusted amount will be considered the amount owed by Respondent for the two outstanding invoices in this matter.

<sup>17</sup> See note above.

also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. *Thomas Produce Co. v. Lange Trading Co.*, 62 Agric. Dec. 331, 341-42 (2003); *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Ass'n, 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.<sup>18</sup>

Under section 7 of the Act, “[t]he 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.” 7 U.S.C. § 499g(a). Because this fee shifting provision only covers fees incurred in connection with an oral hearing, any determination with respect to a prevailing party should be made by looking specifically at the outcome of claims and issues raised at hearing. *Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric. Dec. 343 (2003).

Upon a legal analysis of all of the evidence provided, we find that Complainant is the prevailing party in this dispute. In summary, we reach this conclusion for the following reasons: 1) Respondent failed to prove the existence of a protection agreement, we found that the contract was simply f.o.b.; 2) Complainant proved by a preponderance of the evidence that destination of the f.o.b. contract was Dinuba, CA; and 3) inspection reports taken at the ultimate destination of the lots of grapes were too remote in time to prove a breach of contract by Complainant.

In accordance with the applicable provisions of the Rules of Practice, Complainant has submitted claims for fees and expenses.<sup>19</sup> Respondent

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<sup>18</sup> *PGB International, LLC v. Bayche Companies*, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

<sup>19</sup> 7 C.F.R. 47.19(d.) The filing time was extended at the close of the hearing to permit the simultaneous submission of applications for fees and expenses with the filing of briefs.

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did not file an objection to Complainant's filing. Complainant as prevailing party is entitled to "reasonable fees and expenses incurred in connection with [the] hearing." We have followed the standard Court practice of multiplying the prevailing market rate by the number of hours expended, unless the hours claimed are deemed excessive. In this case Complainant's representative has claimed a total of \$3,068.00 in fees and expenses for hearing preparation, attendance at the hearing, and writing the post-hearing brief.

Expenses which would have been incurred in connection with the case if that case had been heard by documentary procedure may not be awarded under section 7(a). *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). Therefore, we have awarded fees claimed as those incurred in preparation for the hearing only to the extent to which they would not have been incurred under the documentary procedure. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989). The fees for representation break down to: (1) \$858.00 for preparing for the oral hearing; (2) \$1,560.00 for appearance at the oral hearing; and (3) \$650.00 for drafting a hearing brief. We may not award the \$650.00 sought in costs for the brief. There is no explanation of the purpose of or the need for this brief which was prepared the day before the oral hearing. This expense is not recoverable. *Pinto Bros., Inc. v. Frank J. Balestrieri Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977); *Vic Mahns v. A. M. Fruit Purveyors*, 34 Agric. Dec. 1950 (1975). The balance of the fees and expenses claimed are found to be reasonable, resulting in an allowable award of \$2,418.00.

**Order**

Within thirty days from the date of this order, Respondent shall pay to Complainant, as reparation, \$29,516.00 with interest thereon at the rate of 2.23 percent per annum from January 1, 2006, until paid. Respondent shall pay Complainant \$300.00 as additional reparation for the handling fee paid by Complainant.

Within thirty days from the date of this Order, Respondent shall pay to Complainant, as reparation for fees and expenses, \$2,418.00 with

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interest thereon at the rate of 2.23 percent per annum from the date of this Order, until paid.

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

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**SAN JOAQUIN TOMATO GROWERS, INC. v. RAFAT  
ABDALLAH, d/b/a SUPERB FRUIT SALES COMPANY.  
PACA Docket No. R-07-106.  
Decision and Order.  
Filed February 20, 2008.**

**PACA-R – Jurisdiction - Interstate Commerce.**

Where there is no indication that the commodities involved in the Complaint ever physically crossed state lines, the transaction is nevertheless considered as entering the current of interstate commerce where the commodities commonly move in interstate commerce and where the parties reasonably could be expected to regularly engage in interstate purchases and sales of produce based on the nature of their businesses.

Patrice Harps, Presiding Officer.  
Andrew Furbee, Examiner.  
Complainant, Tom R. Oliveri.  
Respondent, *Pro se*.  
*Decision and Order issued 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 \$31,084.00 in connection with two truckloads of tomatoes shipped in the course of interstate commerce.

Respondent did not submit a reply during the informal handling of the Complaint. Therefore, a Report of Investigation was not served upon the parties. A copy of the formal Complaint was served upon the

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

Although the amount claimed in the formal Complaint exceeds \$30,000.00, the parties waived oral hearing and elected to follow the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20). Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant submitted an Opening Statement and a Brief. Respondent did not elect to file any additional evidence or a Brief.

**Findings of Fact**

1. Complainant, San Joaquin Tomato Growers, Inc., is a corporation whose post office address is 18719 Crows Landing Road, Crows Landing, California, 95313. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, Rafat Abdallah, is an individual doing business as Superb Fruit Sales Company, whose post office address is 4627 S. Huntington Drive, Los Angeles, California, 90032. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about August 22, 2006, Complainant, by oral and written contract, sold and shipped from a loading point in Crows Landing, California, to Respondent, in Los Angeles, California, 1,600 cartons of extra large 25# "Mission Bell" tomatoes at \$9.00 per carton, plus \$1.45 per carton for "extra services," for a total f.o.b. contract price of \$16,720.00. (Complainant's Invoice No. 9163).
4. Also on or about August 22, 2006, Art Villarreal, of VIA Brokerage, Nogales, Arizona, issued a Brokerage Sales Memorandum regarding the tomatoes reflected in Finding of Fact 3. The Brokerage Sales Memorandum reflects the following information, in relevant part:

DATE: August 22, 2006 V-26224

CONSIGNEE: Superb Fruit Sales Co. P.O. No. "Danny"  
P.O. Box 86304

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761 Terminal Street  
Los Angeles, California 90086-0304

SHIPPER: San Joaquin Tomato S.O. No. 9-36  
P.O. Box 578  
Crows Landing, California 95313 F.O.B.: Crows Landing, CA

CONSIGNEE PROTECTING BROKERAGE - @ \$.25/CTN

1600 – Ctns 25# M/G Toms (XL) - #2's @ \$10.45  
20 – Total Pallets – “Mission Bell”

TEMP: 52 – Degrees RECORDER: NO

FREIGHT: \$850.00 – Paid by Consignee – Traffic Freight Svcs,  
Inc. (Emily)

NOTE: This load of tomatoes is ready for pickup (TUES)  
08/22/06. Driver is to call the consignee enroute for unloading  
instructions. SUPERB Fruit – agrees to pay for this load of toms within  
2 weeks.

Thank you for your order.

(signed)  
Art Villarreal  
VIA Brokerage

5. On August 23, 2006, at 7:14 a.m., 1,120 cartons of the tomatoes  
referenced in Finding of Fact 3 were inspected at Respondent's place of  
business in Los Angeles, California. The inspection, the results of  
which are set forth on certificate T-034-0280-00870, disclosed the  
following, in relevant part:

**TEMP PRODUCT BRAND/MARKINGS ORIGIN**  
**NO. OF LOADING CONTAINERS STATUS**

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56-58°F Tomatoes, Fresh "Mission Bell" CA 1,120  
cartons Lot Inspection (Red Tomatoes) Tomatoes, Size Stamped  
XL, Produce of USA,  
Net Wt. 25 Lbs.

**DAMAGE SER DAMV.S. DAM OFFSIZE/DEFECTS**

NA	1%	0%	Quality Defects – External (0 to 4%)(Scars, Insect Injury, Cloudy Spots)
NA	3%	3%	Decay (0 to 12%)
NA	4%	3%	Checksum

**GRADE:** Fails to grade U.S. No. 2 account condition in few samples.  
Offsize within tolerance.  
Meets size as marked.

**LOT DESC:** Stages of decay: Mostly early, many advanced, few moderate. Color: Average approximately 5% turning/pink, 90% light red/red.

6. On or about August 29, 2006, Complainant, by oral and written contract, sold and shipped from a loading point in Crows Landing, California, to Respondent, in Los Angeles, California, 1,520 cartons of extra large 25# "Mission Bell" tomatoes at \$8.00 per carton, plus \$1.45 per carton for "extra services," for a total f.o.b. contract price of \$14,364.00. (Complainant's Invoice No. 9196).

7. Also on or about August 29, 2006, Art Villarreal, of VIA Brokerage, Nogales, Arizona, issued a Brokerage Sales Memorandum regarding the tomatoes reflected in Finding of Fact 6. The Brokerage Sales Memorandum reflects the following information, in relevant part:

DATE: August 29, 2006 V-26230

CONSIGNEE: Superb Fruit Sales Co. P.O. No. "Danny"  
P.O. Box 86304  
761 Terminal Street  
Los Angeles, California 90086-0304

SHIPPER: San Joaquin Tomato S.O. No. 934



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**DAMAGE SER DAMV.S. DAM OFFSIZE/DEFECTS**

NA	6%	0%	Quality Defects – External (2 to 13%)(Insect Injury, Cloudy Spots, Catfaces)
NA	5%	0%	Bruises (0 to 21%)
NA	1%	0%	Sunken Discolored Areas (0 to 4%)
NA	5%	5%	Decay (0 to 10%)
NA	17%	5%	Checksum

**GRADE:** Fails to grade U.S. No. 2 account condition. Undersize within tolerance.

**LOT DESC:** Stages of decay: Mostly advanced, many early, few moderate. Color: Average approximately 5% turning/pink, 90% light red/red. Pack: Well filled (70%), Fairly well filled (30%).

9. Respondent tendered two checks to Complainant as payment for the commodities reflected in Findings of Fact 3 and 6. Respondent's check number 1306, dated September 19, 2006, was payable to Complainant in the amount of \$5,260.00 and references invoice number 9163. Respondent's check number 1315, dated September 15, 2006, was payable to Complainant in the amount of \$2,876.50 and references invoice number 9196. Since both checks contained the notation "Paid in Full," Complainant did not negotiate them and returned them to Respondent.

10. The informal complaint was filed on October 27, 2006, which is within nine months from the date the cause of action accrued.

**Conclusions**

Complainant brings this action to recover the agreed purchase price of two truckloads of tomatoes sold and shipped to Respondent. Complainant states that Respondent accepted the tomatoes in compliance with the contracts of sale, but that it has since failed to pay the agreed purchase prices of the two shipments, amounting to \$31,084.00. Respondent, in its sworn Answer, denies accepting the tomatoes in compliance with the contracts of sale, and asserts, to the contrary, that the tomatoes failed to meet the quality, condition and

grade requirements of the contracts. Moreover, Respondent maintains that it purchased the tomatoes from VIA Brokerage, Nogales, Arizona, a party whom Respondent alleges purchased the commodities from Complainant.

Before we consider Respondent's liability for the subject truckloads of tomatoes, we should note that there is no indication in the file that the tomatoes actually moved in interstate commerce, as they were shipped from Crows Landing, California, to Los Angeles. Goods must be sold in or in contemplation of interstate commerce for this forum to have jurisdiction. *Miller Farms & Orchards v. C.B. Overby*, 26 Agric. Dec. 299 (1967). Jurisdictional issues are raised by the Secretary *sua sponte*. *DeBacker Potato Farms, Inc. v. Pellerito Foods, Inc.*, 57 Agric. Dec. 770 (1998).

Complainant alleges in its formal Complaint that both truckloads of tomatoes were shipped in the course of interstate commerce. In its Answer, Respondent does not controvert this allegation. In addition, Respondent is a wholesale dealer of fruits and vegetables who purchased tomatoes, a commodity that regularly moves in interstate commerce, from Complainant. Therefore, it would not be unreasonable for Complainant to anticipate that the tomatoes would end their transit, after purchase, in another State. On this basis, we conclude that the sales of the tomatoes that are the subject of this proceeding were transacted in the current of interstate commerce.<sup>1</sup>

Returning to the determination of Respondent's liability for the tomatoes, in its sworn Answer, Respondent denies that it purchased the two shipments of tomatoes from Complainant. Instead, Respondent maintains that it purchased both loads of tomatoes from VIA Brokerage of Nogales, Arizona. As proponent of its claim, Complainant has the burden of proving its allegations by a preponderance of the evidence.

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<sup>1</sup> Section 1(b) of the Act states, in pertinent part, "[a] transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another..." (7 U.S.C. § 499a(8)).

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*Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914 (1975); *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973). In that regard, Complainant submitted copies of invoices that were issued to Respondent on or about the date that each load was shipped.<sup>2</sup> Complainant also submitted copies of bills of lading that correspond to both shipments that reference Respondent's name and address as the consignee.<sup>3</sup> In addition, the record reflects that Respondent issued two checks payable to Complainant for the tomatoes.<sup>4</sup> Specifically, Respondent's check number 1306 was made payable to "San Joaquin Tomato Growers, Inc." in the amount of \$5,260.00. On the face of this check is the notation "INV #9163 PAID IN FULL." Respondent's check number 1315 was made payable to "San Joaquin Tomato Growers" in the amount of \$2,876.50. On the face of this check is the notation "INV #9196 PAID IN FULL." While Respondent maintains that it purchased both loads of tomatoes from VIA Brokerage, sales memoranda issued by that firm for each shipment, relevant details of which are summarized in Findings of Fact 4 and 7, reference the same contract prices as those shown on Complainant's invoices, and clearly state that Respondent, as consignee, is "PROTECTING BROKERAGE - @ \$.25/CTN."<sup>5</sup> Based upon the information contained in the record, the preponderance of the evidence indicates that Complainant sold both loads of tomatoes to Respondent, and that the sale of the two shipments was negotiated by VIA Brokerage, who brokered the transactions on behalf of Respondent.

The record shows that both shipments of tomatoes were unloaded at Respondent's place of business at the time USDA inspections of the commodities were performed.<sup>6</sup> The unloading or partial unloading of the transport is considered an act of acceptance. See 7 C.F.R. § 46.2(dd)(1). We therefore find that Respondent accepted the tomatoes.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of

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<sup>2</sup> See Formal Complaint, Exhibits 1 and 2.

<sup>3</sup> See Formal Complaint, Exhibits 1a and 2a.

<sup>4</sup> See Answer, Exhibit 5.

<sup>5</sup> See Answer, Exhibits 1 and 2.

<sup>6</sup> See Formal Complaint, Exhibits 1b and 2b.

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contract by the seller. *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 to prove a breach of contract rests with the buyer of accepted goods. See U.C.C. 2-607(4). See also *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

While Complainant's invoices do not indicate that either truckload of tomatoes was sold with reference to an established U.S. grade, the sales confirmations issued by VIA Brokerage indicate that both shipments of tomatoes were sold as #2s. Complainant's salesman for the transactions, Mark Perez, submitted a sworn Opening Statement in which he confirms that his firm's invoice number 9163 was sold as a "No.2."<sup>7</sup> While Complainant did not clarify whether invoice number 9196 was also sold on the same basis, the record does not indicate that Complainant objected to VIA Brokerage's use of such terminology on the sales confirmation it issued for the transaction. Accordingly, the preponderance of the evidence indicates that Complainant's invoice number 9196 was also sold as a #2. We have held that the use of the term #2 without qualification means U.S. No. 2. *South Jersey Produce v. Rotella Produce*, 13 Agric. Dec. 566 (1954). The tomatoes were also sold under f.o.b. terms, which means that the warranty of suitable shipping condition is applicable. The Regulations (7 C.F.R. § 46.43(j)) define "suitable shipping condition" as meaning:

. . . that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.<sup>8</sup>

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<sup>7</sup> See Opening Statement, Page 2, ¶ 1.

<sup>8</sup> The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be

(continued...)

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The United States Standards for Grades of Tomatoes<sup>9</sup> provide a tolerance, at shipping point, of 10% for tomatoes that fail to meet the requirements of the U.S. No. 2 grade, including therein not more than 5% for defects causing very serious damage and 1% for tomatoes that are soft or affected by decay. For defects present en route or at destination, the standards provide a tolerance of 15% for tomatoes in any lot that fail to meet the requirements of the grade, including therein not more than 5% for tomatoes that are soft or affected by decay. For tomatoes sold f.o.b., we normally apply an additional allowance to the tolerances set forth in the standards to allow for normal deterioration in transit. In the instant case, however, the first truckload of tomatoes was shipped from Crows Landing, California, on August 22, 2006, and a portion of the load, 1,120 cartons, was inspected at 7:14 a.m. the following day. The second truckload of tomatoes, which was shipped

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<sup>8</sup>(...continued)

U. S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

<sup>9</sup> The United States Standards for Grades of Tomatoes, § 51.1855 through 51.1877, published by the United States Department of Agriculture, Agricultural Marketing Service, Fruit and Vegetable Division, Fresh Products Branch, and available in printed form from that source, or on the Internet at <http://www.ams.usda.gov/standards/stanfrfv.htm>.

from Crows Landing, California, on August 29, 2006, was inspected in its entirety at 10:01 a.m. the following day. Given the short transit period, there is no additional allowance for normal deterioration in transit, so the destination tolerances set forth in the standards will be used to determine whether both truckloads of tomatoes were in suitable shipping condition.

The USDA inspection of the first shipment of tomatoes, which corresponds to Complainant's invoice number 9163, disclosed 4% total defects, including 1% quality defects and 3% decay. As we mentioned, the standards provide that 15% of the tomatoes in any lot may fail to meet the requirements of the grade at destination, including therein not more than 5% for tomatoes that are soft or affected by decay. We therefore determine that Respondent has failed to prove that Complainant breached the contract by shipping tomatoes that were not in suitable shipping condition. Absent a breach, Respondent is liable to Complainant for the tomatoes which correspond to invoice number 9163 at the agreed purchase price of \$16,720.00.

The USDA inspection of the second shipment of tomatoes, which corresponds to Complainant's invoice number 9196, disclosed 17% total defects, including 6% quality defects, 5% bruises, 1% sunken discolored areas, and 5% decay. Given that the inspection was performed the morning after the tomatoes were shipped, the defects disclosed by the inspection exceed the tolerance set forth in the standards by 2%. Complainant, in its Brief, contends that no inspection was ever secured or produced by Respondent. However, as this argument was first put forth by Complainant in its Brief, it was not available to Complainant under the documentary procedure set forth in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20). Consequently, we cannot grant it consideration. Even in the event that we were able to grant Complainant's argument consideration, the record indicates that Respondent did, in fact, secure an inspection of the commodities, as evidenced by exhibit 2b of Complainant's formal Complaint, which is a USDA inspection of 1,520 cartons of 25 pound "Mission Bell" tomatoes identified as "Lot 9196." Complainant did not make any arguments regarding Respondent's failure to provide this inspection in

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a timely manner in either its formal Complaint or in its verified statements, and thus shall not now be heard to complain about any irregularities in Respondent's failure to secure or otherwise produce it.

We have determined that the inspection indicates that the tomatoes that correspond to invoice number 9196 were not in suitable shipping condition. Complainant's failure to ship tomatoes in suitable shipping condition 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. U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. Respondent tendered a payment of \$2,876.50 for the commodities; however, it did not submit a detailed account of sales to show how it arrived at this amount. Without a properly prepared account of sales, we cannot accept the reported returns as the value of the tomatoes as accepted.

Absent an accounting, the value of goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection. *Fresh Western Marketing, Inc. v. McDonnell & Blankford, Inc.*, 53 Agric. Dec. 1869 (1994); *South Florida Growers Association, Inc. v. Country Fresh Growers And Distributors, Inc.*, 52 Agric. Dec. 684 (1993). Under this method, the value the tomatoes would have had if they had been as warranted is reduced by the percentage of defects disclosed by a prompt inspection to arrive at the value of the tomatoes as accepted.

The first and best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price as shown by USDA Market News Service Reports. *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990). The August 30, 2006, USDA Market News terminal price report for Los Angeles, California shows that on that date, 25 pound cartons of extra large tomatoes originating in California were selling for \$14.00 per

carton. Using this price, we find that the 1,520 cartons of tomatoes in the shipment had a value if they had been as warranted of \$21,280.00.

When we reduce the \$21,280.00 value the tomatoes would have had if they had been as warranted by 17%, or \$3,617.60, to account for the defects disclosed by the USDA inspection, we arrive at a value for the tomatoes as accepted of \$17,662.40. Respondent's damages are measured as the difference between the value the tomatoes would have had if they had been as warranted (\$21,280.00), and their value as accepted (\$17,662.40), or \$3,617.60. Respondent may also recover the \$128.00 USDA inspection fee as incidental damages. With this, Respondent's total damages amount to \$3,745.60. Subtracting this amount from the \$14,364.00 contract price of the tomatoes leaves an amount due Complainant of \$10,618.40.

The total amount that we have determined is due Complainant from Respondent for the two truckloads of tomatoes is \$27,338.40.

Respondent's failure to pay Complainant \$27,338.40 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*

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*Docket* No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

Complainant in this action paid a \$300.00 handling fee 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 \$27,338.40, with interest thereon at the rate of 2.04 % per annum from October 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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**PERCO USA, INC. v. EAGLE FRUIT TRADERS, LLC.**  
**PACA Docket No. R-07-052.**  
**Decision and Order.**  
**Filed February 29, 2008.**

**PACA-R – Award, amount of.**

A reparation award is usually limited to the amount claimed by a party in its pleading, regardless of the fact that the amount found due as reparation by the Secretary is greater than the amount claimed in the party's pleading. In this case, although Respondent's Answering Statement contained a calculation of damages in a precise dollar amount, the prayer for relief in its counterclaim specified that it desired to recover that amount determined to be due by the Secretary. In view of the language in Respondent's prayer for relief, the Secretary's findings were utilized as the amount of the reparation award even though Respondent had calculated a lesser damage amount.

Patrice Harps, Presiding Officer.  
Andrew Furbee, Examiner.  
Complainant, Pro se.  
Respondent, Louis W. Diess III.  
*Decision and Order issued by William G. Jenson, Judicial Officer*

**Decision and Order**

### **Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of \$10,296.00 in connection with two trucklots of papaya 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. Respondent's Answer also included a counterclaim for unspecified damages which it alleges arise out of the same transactions as those in the complaint.

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 in which it clarified the dollar amount of its counterclaim as being \$1,728.00. Complainant filed a Statement in Reply. Both parties submitted Briefs.

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**Findings of Fact**

1. Complainant, Perco USA, Inc., is a corporation whose post office address is 1300 High Lowe Road, Hidalgo, Texas, 78557. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, Eagle Fruit Traders, LLC, is a limited liability company whose post office address is 314 Main Street, Suite 108, Wilmington, Massachusetts, 01887-2747. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about October 25, 2005, Complainant, by oral contract, sold and shipped to Respondent, in the State of New Jersey, one trucklot of papaya, comprised of 384 - 35 pound cartons of "Maradol" papaya, at \$16.50 per carton, for a total contract price of \$6,336.00. (Complainant's Invoice No. 1084).
4. On November 1, 2005, Respondent's salesman, Michael Giglio, issued a confirmation to Complainant regarding the papayas referenced in Finding of Fact 3. The confirmation reads, in relevant part:  
Confirm of Order! 8 pallets (12) Size Papayas 50% Color / Price \$14.00 - 16.00. P/U 10/25-26.
5. Also on November 1, 2005, at 12:35 p.m., 336 cartons of papaya referenced in Finding of Fact 3 were subjected to a USDA inspection at Respondent's customer, New Generation Produce, Brooklyn, New York. Inspection certificate T-072-0137-00712 segregated the papaya into two lots and disclosed the following, in relevant part:

**LOT A**

**TEMP PRODUCT BRAND/MARKINGS ORIGIN**

**No. of CONTAINERS**

55-56°F Papaya "Chula," Papaya Maradol Chula MX 140 cartons  
Brand 35 Lbs. Counts as noted,  
Fruit has Chula brand PLU  
stickers.

**INJURY DAMAGE SER DAM OFFSIZE/DEFECTS**

**OTHER ID**

N/A 05% N/A Decay (0 to 10%) 11 ct, 10 ct, 9 ct  
N/A 05% N/A Checksum

**LOT DESC:** Inspection: restricted to condition only at applicant's request. Firmness: Mostly firm, many hard. Stages of decay: Early. Color: Many green, mostly with yellow color breaking over 10% to 20% of surface, few up to 50% of surface.

**LOT B**

**TEMP PRODUCT BRAND/MARKINGS ORIGIN No. of CONTAINERS**  
56-58°F Papaya No Brand, Papaya Maradol MX 1 9 6  
cartons  
Hecho En Mexico, Fruit has  
Chula brand PLU Stickers.  
Counts as noted.

**INJURY DAMAGE SER DAM OFFSIZE/DEFECTS OTHER ID**  
N/A 21% N/A Decay (10 to 40%) 9 count, 10 count  
N/A 21% N/A Checksum

**LOT DESC:** Inspection: restricted to condition only at applicant's request. Firmness: Mostly firm. Stages of decay: Early. Color: Most fruit has yellow color breaking over 25 to 75% of surface, some over less than 25% of surface.

6. On November 8, 2005, at 10:48 a.m., a second federal inspection was conducted on 272 cartons of papaya referenced in Finding of Fact 3. Inspection certificate T-072-0137-00728 segregated the papaya into two lots and disclosed the following, in relevant part:

**LOT A**

**TEMP PRODUCT BRAND/MARKINGS ORIGIN No. of CONTAINERS**  
54-58°F Papaya "Chula," Papaya Maradol Chula MX 97 cartons  
Brand 35 Lbs. Counts as noted,

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Fruit has Chula brand PLU stickers.

**INJURY DAMAGE SER DAM OFFSIZE/DEFECTS OTHER ID**

N/A 82% N/A Decay (64 to 100%) 11 ct, 10 ct, 9 ct

N/A 82% N/A Checksum

**LOT DESC:** Inspection: restricted to condition only at applicant's request. Firmness: Remainder ripe, turning yellow color. Stages of decay: Many early, many moderate, some advanced.

**LOT B**

**TEMP PRODUCT BRAND/MARKINGS ORIGIN No. of CONTAINERS**

54-56°F Papaya No Brand, Papaya Maradol MX 175 cartons

Hecho En Mexico, counts as noted.

Fruit has Chula brand

PLU Stickers.

**INJURY DAMAGE SER DAM OFFSIZE/DEFECTS OTHER ID**

N/A 74% N/A Decay (56 to 100%) 9 count, 10 count

N/A 74% N/A Checksum

**LOT DESC:** Inspection: restricted to condition only at applicant's request. Firmness: Remainder ripe, turning yellow. Stages of decay: Many early, many moderate, some advanced.

7. On or about October 27, 2005, Complainant, by oral contract, sold and shipped to Respondent, in the State of New Jersey, one trucklot of papaya, comprised of 240 - 35 pound cartons of "Maradol" papaya, at \$16.50 per carton, for a total contract price of \$3,960.00. (Complainant's Invoice No. 1085).

8. On November 1, 2005, Respondent's Mr. Giglio issued a confirmation to Complainant regarding the papayas referenced in Finding of Fact 6. The confirmation reads, in relevant part:

Confirm of Order! 5 Pallets 10 Size Papaya 50% Color / Price \$14.00 - 16.00. P/U 10/27/-28.

9. Also on November 1, 2005, at 12:39 p.m., the 240 cartons of papaya referenced in Finding of Fact 6 were subjected to a USDA inspection at Respondent's customer, Peter Condakes Co., Inc., Chelsea, Massachusetts. Inspection certificate T-004-0102-01514 disclosed the following, in relevant part:

**TEMP PRODUCT BRAND/MARKINGS ORIGIN No. of CONTAINERS**  
64-65°F Papaya "Chula Brand," Maradol, Grown MX 240 cartons  
And packed by Grupo Agricola  
Martinez S.P.R. de R.L. Monterrey,  
NL, CP Distributed by  
Comercializadora Agrico S.A. de  
C.V. San Nicholas E Los Garza, NL,  
CP Distributed by Sunrise Produce,  
LLC, McAllen, TX.

**INJURY DAMAGE SER DAM OFFSIZE/DEFECTS**

N/A	15%	N/A	Decay (9 to 33%)
N/A	15%	N/A	Checksum

**LOT DESC:** Inspection: restricted to condition only at applicant's request. Firmness: Mostly firm. Stages of decay: Mostly early, some advanced, few moderate. Container count: 9 to 11 avg 10 papaya. Papayas mostly green, some turning.

10. Respondent has not made any payment to Complainant regarding either shipment of papaya.

11 The informal complaint was filed on January 31, 2006, which is within nine months from the accrual of the cause of action.

**Conclusions**

Complainant brings this action to recover the unpaid agreed purchase price of two trucklot shipments of papaya sold to Respondent. Complainant states that Respondent accepted both lots of papaya as agreed in the contract of sale, but that it has since failed to pay anything towards the agreed total purchase price of \$10,296.00.

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In response to the Formal Complaint, Respondent acknowledges having purchased and accepted the two shipments of papaya, but states that Complainant failed to ship commodities that complied with contract specifications. As a result, Respondent asserts that it incurred damages which exceeded the dollar amount of Complainant's Invoice No. 1084 by \$1,728.00, for which it filed a counterclaim.

Having accepted the two lots of papaya, Respondent became liable to Complainant for the full purchase price thereof, less any damages resulting from any breach of warranty by Complainant. *Norden Fruit Co., Inc. v. EDP 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 proof to show both a breach and damages rests upon Respondent.

Respondent's Answering Statement includes the sworn Affidavit of Michael Giglio, its salesman for the transactions. Mr. Giglio states that his contract with Francisco, Complainant's salesman, called for the 384 cartons of papaya referenced on Complainant's Invoice No. 1084 to have contained 12 papayas per carton, with 50% color, and the 240 cartons of papaya pertaining to Complainant's Invoice No. 1085 to have contained 10 papayas per carton, with 50% color. Mr. Giglio submitted into evidence copies of his purchase confirmations upon which Francisco signified his assent to the terms and condition of the contract described by Mr. Giglio, including count and color, by signing and returning the documents to Respondent.<sup>1</sup> Accordingly, the preponderance of the evidence indicates that Complainant's Invoice No. 1084 contemplated the shipment of 384 cartons of 12 count papayas with 50% color, while Complainant's Invoice No. 1085 contemplated the shipment of 240 cartons of 10 count papayas with 50% color.

In support of his position that Complainant breached the respective contracts, Mr. Giglio references two USDA inspections obtained upon arrival of the commodities, and states that the inspections verify that both lots of papaya contained percentages of decay that exceeded the amounts permitted under the terms of the parties' agreements. Mr. Giglio states that the inspections also confirm that Complainant failed to ship papayas that were the size and color that he ordered.

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<sup>1</sup> See Answering Statement, Exhibit Numbers 1 and 7.

In determining whether the percentages of decay set forth on the USDA inspections support Respondent's contentions regarding a breach of contract, it is necessary that we determine whether any additional contract terms, aside from those pertaining to count and color, applied to the transactions.

Complainant's invoices both contain the typewritten notation "delivered."<sup>2</sup> However, Complainant's bills of lading contain the notation "pickup,"<sup>3</sup> and Complainant confirms that both lots were picked up on Respondent's trucks.<sup>4</sup> Respondent provided copies of invoices for the cost of freight incurred to haul both lots of papayas to its customers.<sup>5</sup> We therefore conclude that the contracts between the parties contemplated a delivered sale at an f.o.b. price. Under these terms, Respondent was responsible for providing transportation, while Complainant's duty was to deliver product with condition defects within tolerances established in the U.S. Grade Standards. Under the terms of the parties' agreement, Complainant assumed all risks of loss and damage in transit.

Although there currently are no established U.S. grade standards for papaya, analysis of the percentages of condition defects permitted for similar produce of U.S. No. 1 quality for which standards have been promulgated, such as the avocado,<sup>6</sup> shows that 10 percent grade and condition defects, with not more than five percent involving serious damage, including not more than one percent decay, is a reasonable standard for papaya.

Complainant's Invoice No. 1084, comprised of 384 cartons of papaya, was shipped on October 25, 2005. Respondent's customer, New Generation Produce, received the papaya on October 31, 2005, and obtained a USDA inspection on 336 cartons of the lot on November 1, 2005.

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<sup>2</sup> See Formal Complaint, Exhibit Numbers 1 and 3.

<sup>3</sup> See Formal Complaint, Exhibit Numbers 2 and 4.

<sup>4</sup> See Report of Investigation, Exhibit No. 1-2.

<sup>5</sup> See Answering Statement, Exhibit Numbers 6 and 9.

<sup>6</sup> 7 C.F.R. §§ 51.3050 – 51.3069. Grade standards may also be accessed via the Internet at [www.ams.usda.gov/standards/stanfrfv.htm](http://www.ams.usda.gov/standards/stanfrfv.htm).

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The inspection, which was subdivided into two lots, reveals that 140 cartons, or 37% of the lot, contained 5% decay, while 196 cartons, or 51% of the lot, contained 21% decay. The remaining 48 cartons, or 12% of the lot, were not inspected. To determine the percentage of decay contained in the lot as a whole, the portion of the lot which was not inspected is assumed to have had no condition defects. *Lookout Mountain Tomato & Banana Co., Inc. v. Case Produce, Inc.*, 51 Agric. Dec. 1471 (1992). Applied to this transaction, the lot as a whole contained 13% decay. Such a percentage of decay indicates that Complainant did not ship papayas that complied with contract terms.

The inspection also indicates that the lots contained 9, 10, and 11 count papayas, in various stages of maturity as noted by the color of the fruit, which ranged from solid green to breaking yellow over 25 to 75% of the surface. Both the count and color noted on the inspection are contrary to contract specifications, which called for 12 count papayas with 50% color.

Complainant's failure to ship papayas that were the correct count and color constitutes a material breach of contract. A material breach, as the term is used in the Regulations (7 C.F.R. § 46.43(l)(m) and (t)), refers to all substantial breaches of contract other than a breach of the warranty of suitable shipping condition. *Martori Bros. Distributors v. Houston Fruitland, Inc.*, 55 Agric. Dec. 1331 (1996).

To claim damages stemming from Complainant's breach of contract, Respondent must first establish that it provided Complainant with timely notice of the alleged breach. In that regard, Mr. Giglio states that he immediately sent a copy of the inspection to Francisco, Complainant's salesman,<sup>7</sup> along with a letter dated November 1, 2005 advising him of the breaches of contract regarding count and color.<sup>8</sup> On this basis, we determine that Respondent gave Complainant timely notice regarding the breach of contract.

Having established that Complainant did not ship papayas that complied with contract requirements, and that Respondent provided Complainant with timely notice regarding the breach, Respondent is

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<sup>7</sup> See Answering Statement, Affidavit of Michael Giglio, ¶ 4.

<sup>8</sup> See Answering Statement, Exhibit No. 3.

entitled to recover provable damages. The general measure of damages for a breach of warranty as to accepted goods 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 preferred method of ascertaining the value the goods would have had if they had been as warranted is to use the average price as shown by USDA Market News service reports at or near the time and place of acceptance. *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990). On October 31, 2005, the date the commodities were received by Respondent's customer, the New York, New York USDA Fruit and Vegetable Market News office quoted 35 pound cartons of 12 count Mexican Maradol variety papayas as selling for \$28.00 to \$30.00 per carton. Multiplying the average price of \$29.00 per carton by the 384 cartons of papayas that were shipped results in a value for the commodities if they had been as warranted of \$11,136.00. The value of the goods accepted is best shown by the gross proceeds of a prompt and proper resale. *R. F. Taplett Fruit & Cold Storage Co. v. Chinook Marketing Co., et. al.*, 39 Agric. Dec. 1537 (1980). In that regard, Respondent submitted an accounting prepared by its customer<sup>9</sup> upon which sales of 112 cartons of papaya between November 1, and November 18, 2005, for total gross proceeds of \$1,141.50, are detailed. Respondent's customer also obtained a follow up inspection on 272 cartons of the papayas on November 8, 2005.<sup>10</sup> The inspection, which was subdivided into two lots, showed temperatures of 54 to 58 degrees Fahrenheit, and reveals that 97 cartons of papaya contained 82% decay, while 175 cartons of papaya contained 74% decay. At some point following the inspection, 272 cartons of papaya were reportedly dumped, a percentage of dumping deemed reasonable in view of the amount of decay set forth on the follow up inspection. We find that the accounting submitted by Respondent's customer contains sufficient detail to represent the value of the papayas as accepted, especially when

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<sup>9</sup> See Answering Statement, Exhibit No. 5.

<sup>10</sup> See Report of Investigation, Exhibit Numbers 4-2 and 4-3.

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considered in conjunction with the two USDA inspections performed on the commodity, which document its rapid deterioration.

Respondent's damages, therefore, are the difference between the value of the goods as accepted (\$1,141.50), and the value of the goods as warranted (\$11,136.00), or \$9,994.50. In addition, UCC § 2-714(3) and § 2-715(1) provide buyers with a means of recovering incidental damages resulting from the seller's breach with respect to accepted goods. In that regard, Respondent may also recover \$132.00 for the initial USDA inspection and \$132.00 for the follow up inspection, with which its customer documented the commodities' rapid deterioration, as well as \$375.00 in waste removal charges incurred to dump a portion of the papaya. Respondent's total damages therefore amount to \$10,633.50. When we deduct Respondent's damages of \$10,633.50 from the original contract price of the papayas of \$6,336.00, we find an amount due Respondent from Complainant of \$4,297.50 for Invoice No. 1084.

We now turn to Complainant's Invoice No. 1085, comprised of 240 cartons of papaya shipped on October 27, 2005. Respondent states that its customer, Peter Condakes Company, Inc., Everett, Massachusetts, received the papayas on Tuesday, November 1, 2005, whereupon the entire lot was inspected.

The inspection indicates that the papayas did not comply with contract terms in two respects. First, the percentage of decay present in the fruit, which ranged from 9 to 33%, averaging 15%, exceeds by a wide margin the percentage allowed under the contract. Second, the inspection indicates that the commodities were "mostly green, some turning," thus evidencing a material breach of the "50% color" specification agreed to between the parties. Mr. Giglio states that he immediately relayed the results of the inspection to Complainant<sup>11</sup> along with a letter dated November 1, 2005, in which he outlined his customer's complaints regarding count and color, as well as problems with decay in the papayas.<sup>12</sup> Based upon the results of the inspection and Respondent's timely notice to Complainant, Respondent is entitled to provable damages concerning the transaction.

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<sup>11</sup> See Answering Statement, Affidavit of Michael Giglio, ¶ 10.

<sup>12</sup> See Answering Statement, Exhibit No. 8.

The USDA Market News Service Reports for Boston, Massachusetts do not contain price quotations for 35 pound cartons of Mexican Maradol variety mangoes on the date they were received by Respondent's customer. Therefore, we will use the delivered price of the papayas as the value of the commodities if they had been as warranted. *Rogelio C. Sardina v. Caamano Bros., Inc.*, 42 Agric. Dec. 1275 at 1278-79 (1983). The delivered price is calculated by adding the original invoice price of \$3,960.00 to the freight cost of \$1,140.00.<sup>13</sup> This results in a value of the papayas if they had been as warranted of \$5,100.00.

Respondent's customer prepared an account of sales<sup>14</sup> reflecting sales of 147 cartons of papayas between November 2 and November 15, 2005 for gross proceeds of \$2,934.00, or \$19.96 per carton. The accounting reflects that the bulk of sales (121 cartons) occurred in the week following arrival, and that the balance of the lot, 93 cartons, was dumped on November 17. While it appears that the sales reflected on the accounting were reasonably prompt, Respondent's customer neither obtained a follow up inspection to document the nature and extent of defects present in the 93 cartons dumped, nor did it provide evidence of its efforts to sell the 93 cartons prior to disposing of them. Based on these deficiencies, Respondent has failed to establish that its efforts to sell the 93 cartons were commercially reasonable. However, there is no question, based on the inspection results, that 15% of the papayas could not be resold. Under the circumstances, it is appropriate to assume that 15% of the lot, or 36 cartons, had no commercial value. Since Respondent's customer's sales were reasonably prompt, they represent the best available evidence of the prices at which the papayas were selling. Accordingly, we shall assign to the remaining 57 cartons that were not sold the \$19.96 average selling price of the portion of the lot that was sold, for a total of \$1,137.72. Consequently, the total accepted value of the papayas was \$4,071.72.

Respondent's damages are again measured as the difference between the value the papayas had as warranted, \$5,100.00, and the value they had as accepted, \$4,071.72. Respondent's damages, therefore, are

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<sup>13</sup> See Answering Statement, Exhibit No. 9.

<sup>14</sup> See Answering Statement, Exhibit No. 10.

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\$1,028.28. Respondent may also recover incidental damages of \$76.00 for the USDA inspection. The accounting that Respondent's customer provided included a \$318.00 handling fee and a \$500.00 charge for cartage, both of which are disallowed, since the expenses were not shown to be attributable to Complainant's breach of contract. *Mesa Produce, Inc. v. Romney & Associates, Inc.*, 57 Agric. Dec. 1651 (1998). Respondent's total damages therefore amount to \$1,104.28. Deducting Respondent's damages of \$1,104.28 from the original contract price of \$3,960.00 results in an amount due Complainant from Respondent of \$2,855.72.

There remains for consideration Respondent's counterclaim, wherein it asserts that as a result of Complainant's breaches of contract regarding the two transactions in this proceeding, it suffered damages. While Respondent did not specify the dollar amount of its counterclaim in its Answer, in its Answering Statement, Respondent asserts that it is owed \$1,728.00 from Complainant regarding Invoice No. 1084.<sup>15</sup> In its Answering Statement, Respondent also acknowledges liability to Complainant in the amount of \$900.00 for Invoice No. 1085.<sup>16</sup> Based on the facts presented by both parties, we have determined that Complainant did not ship either trucklot of papaya in compliance with contract terms, thus entitling Respondent to provable damages. After deducting Respondent's damages from the original contract price of each shipment, we have determined that Respondent is entitled to the amount of \$4,297.50 from Complainant regarding Invoice No. 1084, and that Respondent owes Complainant \$2,855.72 for Invoice No. 1085. The amount which we have found due to Respondent from Complainant for Invoice No. 1084, \$4,297.50, is greater than the amount specified in its counterclaim, \$1,728.00. We have held that a party's limitation of its claim in its pleading to a lesser amount than is eventually found due will be given effect in awarding reparation. *Mendelson-Zeller Co., Inc. v. M. K. Hall Produce*, 28 Agric. Dec. 1169 (1969); *Guy C. Lockerman v. Walter Jones*, 16 Agric. Dec. 1002 (1957); and *Parkhill Produce Company v. Zeidenstein Bros.*, 16 Agric. Dec. 997 (1957). However,

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<sup>15</sup> See Answering Statement, ¶ 7.

<sup>16</sup> See Answering Statement, ¶ 12.

in this proceeding, Respondent, with its Answer, included the following statement,<sup>17</sup> which reads, in relevant part:

...that, upon the record made, either with or without formal hearing, as provided in the Act or in the Regulations, and by appropriate order, the Respondent be awarded such amount of damages as it may be entitled to receive according to the facts established...

Where, as here, a party to a reparation proceeding specifies a desire to recover the amount the Secretary finds due, the Secretary's findings will determine the amount of the award, even where the party may have specified a differing amount in its pleadings.

Accordingly, we have determined that Respondent is due \$4,297.50 from Complainant for Invoice No. 1084. Complainant's failure to pay Respondent \$4,297.50 is a violation of Section 2 of the Act. We have further determined that Complainant is due \$2,855.72 from Respondent for Invoice No. 1085. Respondent's failure to pay Complainant \$2,855.72 is a violation of Section 2 of the Act.

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. Complainant submitted a \$300.00 handling fee to file its formal Complaint, as did Respondent to file its counterclaim. Both parties prevailed on their respective claims, so each is entitled to recover the \$300.00 handling fee paid by the other; however, since the handling fees paid by the parties offset one another, neither party shall be required to pay the other party's \$300.00 handling fee.

When the \$4,297.50 owed by Complainant to Respondent is offset against the \$2,855.72 owed by Respondent to Complainant, there remains an amount due Respondent of \$1,441.78. Respondent is entitled to recover this amount, plus interest, from Complainant. 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

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<sup>17</sup> See Answer, Page 2.

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Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc., Order on Reconsideration*, 65 Agric. Dec. 669 (2006).

**Order**

Within 30 days from the date of this Order, Complainant shall pay Respondent, as reparation \$1,441.78, with interest thereon at the rate of 2.10 % per annum from December 1, 2005, until paid.

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

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**BEDLAND PRODUCE ASSOCIATES, LLC v. PLATINUM PRODUCE, INC.**

**PACA Docket No. R-07-089.**

**Decision and Order.**

**Filed March 11, 2008.**

**PACA-R – Real Party in Interest – Invoices Assigned to Factoring Company.**

Where evidence in the file indicated that some of the invoices at issue in the complaint were sold to a factoring company, it was determined that for those transactions that were factored, Complainant had forfeited its right to recover the invoice amount from Respondent. The factoring company is the real party in interest on the factored invoices.

Patrice Harps, Presiding Officer.

Leslie Wowk, Examiner.

Complainant, *Pro se*.

Respondent, *Pro se*.

*Decision and Order issued 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 \$15,628.33 in connection with eight trucklots of mixed peppers and papayas 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, who was afforded twenty days from receipt of the formal Complaint to file its Answer. Respondent failed to submit its Answer within the requisite period of time, so a Default Order was issued on September 22, 2006, awarding Complainant the full amount of its claim. The Department subsequently received from Respondent a Petition to Reopen the Complaint. Upon review of the Petition, it was determined that Respondent failed to provide good reason to reopen the proceeding, so the Petition to Reopen was denied by Order dated November 17, 2006. Following the denial of the Petition to Reopen, Respondent submitted a Petition for Reconsideration. Included with the Petition for Reconsideration was Respondent's Answer, wherein Respondent raises a valid defense to the Complaint. It was therefore necessary to reopen the Complaint in order to consider the facts on the merits. Accordingly, on April 20, 2007, an Order granting Respondent's Petition for Reconsideration was issued.

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, Bedland Produce Associates, LLC, doing business as National Produce Associates, is a limited liability company whose post office address is 3773 E. Broadway, Tucson, Arizona 85716-5409. At

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the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, Platinum Produce, Inc., is a corporation whose post office address is P.O. Box 4285, Rio Rico, Arizona 85648-4285. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about May 26, 2005, Complainant shipped from loading point in the state of California, to Respondent in Los Angeles, California, 250 cartons of papayas. On May 31, 2005, Complainant issued invoice number 2066 billing Respondent for the papayas at \$13.00 per carton, for a total invoice price of \$3,250.00. Respondent paid \$2,000.00 for the papayas in this shipment with check number 2753, dated July 14, 2005, and made payable to "National Produce & Assoc. c/o Millennium Funding."

4. On or about June 4, 2005, Complainant shipped from loading point in the state of California, to Respondent in Los Angeles, California, 144 cartons of Serrano peppers. On the same date, Complainant issued invoice number 2086 billing Respondent for the Serrano peppers at \$18.00 per carton, for a total invoice price of \$2,592.00. Respondent paid \$1,591.50 for the Serrano peppers in this shipment with check number 2885, dated August 4, 2005, and made payable to "National Produce & Assoc. c/o Millennium Funding."

5. On or about June 13, 2005, Complainant shipped from loading point in the state of California, to Respondent in Los Angeles, California, 670 cartons of jalapeno peppers. On the same date, Complainant issued invoice number 2097 billing Respondent for the jalapeno peppers at \$10.00 per carton, for a total invoice price of \$6,700.00. Respondent paid \$2,752.80 for the jalapeno peppers in this shipment with check number 2841, dated July 28, 2005, and made payable to "National Produce & Assoc. c/o Millennium Funding."

6. On or about June 13, 2005, Complainant shipped from loading point in the state of California, to Respondent in Los Angeles, California, 84 cartons of Serrano peppers and 49 cartons of Caribe peppers. On the same date, Complainant issued invoice number 3014 billing Respondent for the Serrano peppers at \$16.00 per carton, or \$1,344.00, and for the Caribe peppers at \$0.00 per carton, for a total invoice price of \$1,344.00. Respondent paid \$295.89 for the peppers in this shipment with check

number 3304, dated November 3, 2005, and made payable to “National Produce & Assoc. c/o Millennium Funding.”

7. On or about June 14, 2005, Complainant shipped from loading point in the state of California, to Respondent in Los Angeles, California, 224 cartons of Pasilla peppers and 22 cartons of Caribe peppers. On the same date, Complainant issued invoice number 3004 billing Respondent for the Pasilla peppers at \$12.48 per carton, or \$2,795.52, and for the Caribe peppers at \$0.00 per carton, for a total invoice price of \$2,795.52. Respondent paid \$362.50 for the peppers in this shipment with check number 3304, dated November 3, 2005, and made payable to “National Produce & Assoc. c/o Millennium Funding.”

8. On or about June 21, 2005, Complainant shipped from loading point in the state of California, to Respondent in Los Angeles, California, 200 cartons of papayas. On the same date, Complainant issued invoice number 3017 billing Respondent for the papayas at \$13.00 per carton, for a total invoice price of \$2,600.00. Respondent has not paid Complainant for the papayas in this shipment.

9. On or about June 23, 2005, Complainant shipped from loading point in the state of California, to Respondent in Los Angeles, California, 199 cartons of papayas. On the same date, Complainant issued invoice number 3022 billing Respondent for the papayas at \$11.50 per carton, for a total invoice price of \$2,288.50. Respondent paid \$600.00 for the papayas in this shipment with check number 3304, dated November 3, 2005, and made payable to “National Produce & Assoc. c/o Millennium Funding.”

10. On or about June 24, 2005, Complainant shipped from loading point in the state of California, to Respondent in Los Angeles, California, 264 cartons of jalapeno peppers. On the same date, Complainant issued invoice number 3024 billing Respondent for the jalapeno peppers at \$9.00 per carton, for a total invoice price of \$2,376.00. Respondent paid \$1,315.00 for the jalapeno peppers in this shipment with check number 2952, dated August 18, 2005, and made payable to “National Produce & Assoc. c/o Millennium Funding.”

11. The informal complaint was filed on February 1, 2006, which is within nine months from the accrual of the cause of action.

### Conclusions

Complainant brings this action to recover the unpaid balance of the invoice price for eight trucklots of papayas and mixed peppers sold and shipped to Respondent. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since paid Complainant only \$7,957.60, thereby leaving unpaid invoice balances due totaling \$15,628.33. In response to Complainant's allegations, Respondent asserts in its Answer that there was no contract at the time the commodities in question were shipped to Respondent, and that Respondent merely agreed to take delivery of produce that had been rejected by the original purchaser in order to "help" Complainant.

Complainant, as the party asserting that Respondent contracted to purchase the eight trucklots of produce in question, has the burden to prove this allegation by a preponderance of the evidence. As evidence in support of its contentions, Complainant submitted copies of its invoices billing Respondent for the produce, the majority of which were apparently prepared on the date of shipment.<sup>1</sup> Complainant also asserts that passings were timely faxed to Respondent on the date of shipment.<sup>2</sup> Respondent asserts, to the contrary, that it did not receive the invoices or passings in a timely manner.<sup>3</sup> We will review the documents submitted with respect to each transaction individually by invoice number below.

#### Invoice No. 2086

We are addressing this transaction first because there is a document submitted with respect to this transaction that bears some influence on our conclusions concerning all but one of the other transactions at issue in this dispute. Specifically, we note that the record includes a letter from Millennium Funding to Respondent, dated August 4, 2005, wherein Millennium Funding refers to the subject invoice and states that it is the factor and assignee for Complainant and instructs Respondent to mail to Millennium Funding all checks issued as payment to

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<sup>1</sup> See Formal Complaint, Exhibit #'s 1, 4, 7, 10, 13, 16, 19, and 22.

<sup>2</sup> See Report of Investigation, Exhibit No. M1.

<sup>3</sup> See Answering Statement, paragraph 12.

Complainant or their related companies.<sup>4</sup> In addition, the invoice issued by Complainant for this shipment of Serrano peppers bears a stamp that reads, “Assigned and Payble [sic] to: Millennium Funding P.O. Box Amherst, NY 14231.”<sup>5</sup> Since Complainant has apparently sold its right to collect on this invoice to Millennium Funding, Complainant has forfeited its right to recover this receivable. Accordingly, we cannot consider Complainant’s claim with respect to invoice number 2086.

Invoice No. 2066

Although the invoice prepared by Complainant for this shipment of papayas does not bear a stamp instructing Respondent to pay Millennium Funding, the record nevertheless shows that Respondent paid \$2,000.00 for this invoice with a check made payable to “National Produce & Assoc. c/o Millennium Funding.”<sup>6</sup> It therefore appears that Complainant also assigned its right to collect on this invoice to Millennium Funding. Consequently, we cannot consider Complainant’s claim with respect to invoice number 2086.

Invoice No. 2097

The invoice prepared by Complainant for this shipment of jalapeno peppers does not bear a stamp instructing Respondent to pay Millennium Funding. The record shows, however, that Respondent paid \$2,752.80 for this invoice with a check made payable to “National Produce & Assoc. c/o Millennium Funding.”<sup>7</sup> It therefore appears that Complainant assigned its right to collect on this invoice to Millennium Funding. Consequently, we cannot consider Complainant’s claim with respect to invoice number 2097.

Invoice No. 3014

In this instance, the invoice prepared by Complainant for the Serrano and Caribe peppers in this shipment bears a stamp that reads, “Assigned

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<sup>4</sup> See Formal Complaint, Exhibit #33.

<sup>5</sup> See Formal Complaint, Exhibit #26.

<sup>6</sup> See Formal Complaint, Exhibit #'s 1 and 26.

<sup>7</sup> See Formal Complaint, Exhibit #'s 7 and 28.

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and Payble [sic] to: Millennium Funding P.O. Box Amherst, NY 14231.”<sup>8</sup> In addition, Respondent paid \$295.89 for this invoice with a check made payable to “National Produce & Assoc. c/o Millennium Funding.”<sup>9</sup> It therefore appears that Complainant assigned its right to collect on this invoice to Millennium Funding. Consequently, we cannot consider Complainant’s claim with respect to invoice number 3014.

Invoice No. 3004

The invoice prepared by Complainant for the Pasilla and Caribe peppers in this shipment bears a stamp that reads, “Assigned and Payble [sic] to: Millennium Funding P.O. Box Amherst, NY 14231.”<sup>10</sup> The record also shows that Respondent paid \$362.50 for this invoice with a check made payable to “National Produce & Assoc. c/o Millennium Funding.”<sup>11</sup> It therefore appears that Complainant assigned its right to collect on this invoice to Millennium Funding. Consequently, we cannot consider Complainant’s claim with respect to invoice number 3004.

Invoice No. 3017

Unlike the transactions discussed up to this point, there is no indication in the documents submitted with respect to this transaction that the invoice was assigned to Millennium Funding. On the contrary, the invoice Complainant prepared for the papayas in this shipment instructs Respondent to remit payment to Complainant’s address in Tucson, Arizona.<sup>12</sup> Respondent has not paid Complainant for the papayas in this shipment, so there is no check in the record pertaining to this transaction. Therefore, absent any evidence that this invoice was assigned, we will consider Complainant’s allegations with respect to invoice number 3017.

Complainant billed Respondent for the 200 cartons of papayas in this shipment at \$13.00 per carton, for a total invoice price of \$2,600.00.

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<sup>8</sup> See Formal Complaint, Exhibit #13.

<sup>9</sup> See Formal Complaint, Exhibit #29.

<sup>10</sup> See Formal Complaint, Exhibit #10.

<sup>11</sup> See Formal Complaint, Exhibit #29.

<sup>12</sup> See Formal Complaint, Exhibit #16.

Complainant asserts, however, that the price terms of the contract were later changed to open.<sup>13</sup> Similarly, Respondent states in its Answering Statement that “after we spoke with Mr. Bland it was agreed to leave the file open due to quality and condition of the fruit.”<sup>14</sup> We therefore find that the papayas in this shipment were sold under open price terms.

The term “open” is a generic term used to describe a sale where the price is not agreed upon when the contract is first made. When goods are sold open, it is assumed that the parties will, at some point, either before or after the goods are resold, reach an agreement as to the price.

If they do not, the reasonable value of the goods should be imputed. *A.P.S. Marketing, Inc. v. R.S. Hanline & Co., Inc.*, 59 Agric. Dec. 407 (2000); *J. Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 565 (1979). Respondent maintains that the parties agreed upon a price of \$3.00 per carton for the papayas in this shipment.<sup>15</sup> Complainant asserts, to the contrary, that it was informed on the day after arrival that only 35 cartons of the papayas had been lost, and that the remaining 165 cartons had been sold at approximately \$16.00 per carton, so the return would be very close to the original contract price of \$13.00 per carton.<sup>16</sup>

Given the conflicting statements made by the parties concerning the price of the papayas, we conclude that the parties failed to settle upon a price. Therefore, a reasonable price for the papayas must be determined. Since Respondent did not submit an account of sales for the papayas, we will refer exclusively to the relevant U.S.D.A. Market News reports to determine a reasonable price. The Los Angeles Terminal Price Report for June 22, 2005, the reported date of arrival, shows that 30-35 pound cartons of Mexican Maradol papayas were mostly selling for \$12.00 to \$15.00 per carton. While Respondent asserts that there were quality and condition issues with the papayas, Respondent did not secure a U.S.D.A. inspection to substantiate this contention. Therefore, in the absence of any evidence showing that the papayas were in less than average marketable condition, we will use the average reported market price of

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<sup>13</sup> See Formal Complaint, paragraph 4.

<sup>14</sup> See Answering Statement, paragraph 6.

<sup>15</sup> See Answering Statement, paragraph 6.

<sup>16</sup> See Report of Investigation, Exhibit No. M3.

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\$13.50 per carton to determine their reasonable value. At \$13.50 per carton, the 200 cartons of papayas in question had a reasonable value of \$2,700.00. From this amount, Respondent is entitled to deduct 20%, or \$540.00, for profit and handling. This leaves a net amount due Complainant from Respondent of \$2,160.00 for the 200 cartons of papayas billed on invoice number 3017.

Invoice No. 3022

While the invoice prepared by Complainant for this shipment of papayas does not bear a stamp instructing Respondent to pay Millennium Funding, the record nevertheless shows that Respondent paid \$600.00 for this invoice with a check made payable to “National Produce & Assoc. c/o Millennium Funding.”<sup>17</sup> It therefore appears that Complainant assigned its right to collect on this invoice to Millennium Funding. As a result, we cannot consider Complainant’s claim with respect to invoice number 3022.

Invoice No. 3024

Once again, the invoice prepared by Complainant for this shipment of jalapeno peppers does not bear a stamp instructing Respondent to pay Millennium Funding. The record shows, however, that Respondent paid \$1,315.00 for this invoice with a check made payable to “National Produce & Assoc. c/o Millennium Funding.”<sup>18</sup> It therefore appears that Complainant also assigned its right to collect on this invoice to Millennium Funding. Consequently, we cannot consider Complainant’s claim with respect to invoice number 3024.

In conclusion, we find that the total amount Complainant is entitled to recover from Respondent is the reasonable value of \$2,160.00 owed for the papayas billed on invoice 3017, as this is the only invoice included in Complainant’s claim for which there is no indication that Complainant assigned its right of recovery to a third party. As for the remaining invoices, Millennium Funding is the real party in interest. Complainant’s claims as to invoice numbers 2066, 2086, 2097, 3004, 3014, 3017, 3022 and 3024 are dismissed.

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<sup>17</sup> See Formal Complaint, Exhibit #'s 19 and 29.

<sup>18</sup> See Formal Complaint, Exhibit #'s 22 and 30.

Respondent's failure to pay Complainant \$2,160.00 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.

### **Order**

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$2,160.00, with interest thereon at the rate of 1.66 % per annum from August 1, 2005, 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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**FLOYD C. GRIFFIN AND GRIFFIN PRODUCE COMPANY,  
INC., D/B/A MISIONERO VEGETABLE SALES v. NEWSTAR  
FRESH FOODS, LLC.**

**PACA Docket No. R-07-098.**

**Decision and Order.**

**Filed March 14, 2008.**

**PACA-R – Election of Remedies** – Where a reparation respondent, who is a party to a joint venture, files both a counterclaim before the Secretary and a complaint in state court dealing with transactions that arise from the joint venture, it has made an election of remedies pursuant to section 5(b) of the PACA (7 U.S.C. § 499e(b)). The Secretary is without jurisdiction to hear a counterclaim involving the same transactions as a complaint filed in state court.

**Multiple Litigation** – Where both the reparation complainant and respondent are parties to a complex joint venture and a complaint and cross-complaint have been filed in state court seeking dissolution and an accounting of said joint venture, the reparation complaint before the Secretary should be dismissed. When the transactions in the reparation complaint are too connected to the joint venture dispute before the state court and cannot be litigated separately without duplicating the litigation and risking inconsistent results, the state court is the proper forum to hear all disputes raised by the parties before the Secretary.

Leah Battaglioli, Presiding Officer.

Complainant, Kurt F. Vote & Devon R. Darrow.

Respondent, Daron T. Judd.

*Decision and Order issued 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 on April 23, 2007, in which Complainant seeks an award of reparation in the amount of \$641,294.90 in connection with 157 transactions involving perishable agricultural commodities that were sold in interstate commerce.

Respondent was granted an extension of time in which to file an answer and subsequently filed a timely Answer and Counterclaim on June 5, 2007. In its Answer, Respondent claims that the parties formed a joint venture, MissionStar Processing, LLC (hereinafter

“MissionStar”), and that the perishable agricultural commodities at issue in the Complaint were sold to Respondent as bulk produce under a transfer pricing agreement as part of the joint venture. Respondent further claims that the prices in Complainant’s invoices do not reflect the prices the parties agreed upon. Respondent asserts multiple affirmative defenses in its Answer. In its Counterclaim, Respondent makes three sets of allegations referred to as Counterclaim Parts A, B, and C. In Counterclaim Part A, Respondent alleges that Complainant submitted a fraudulent Complaint to the Secretary and that Complainant submitted false invoices to Respondent and to the Secretary. In Counterclaim Part B, Respondent alleges that Complainant failed to pay Respondent for purchases of perishable agricultural commodities entitling Respondent to an affirmative recovery and/or setoff and that any amounts Respondent owes on Complainant’s invoices were setoff against the amounts that Complainant owes to the MissionStar joint venture. In Counterclaim Part C, Respondent alleges that Complainant has refused and failed to meet its financial obligations to the MissionStar joint venture and to MissionStar’s creditors owing a net total of approximately \$1,010,000.00. Complainant filed a timely Answer to Counterclaim on June 26, 2007, denying the allegations in the Counterclaim and asserting multiple affirmative defenses.

On or about June 7, 2007, Respondent filed a complaint against Complainant in the Superior Court of the State of California, County of Monterey, Case No. M84964. Respondent later filed an amended complaint on or about September 17, 2007. In the amended complaint (hereinafter “First Amended Complaint”), Respondent seeks dissolution of MissionStar and an accounting of MissionStar and each party’s contribution to MissionStar, alleges breach of contract, breach of fiduciary duty, and trade defamation, and seeks declaratory and injunctive relief. Respondent also claims that it has been damaged by Complainant’s actions in excess of \$1,000,000.00. Complainant filed a cross-complaint against Respondent at some time in the interim and later filed an amended cross-complaint (hereinafter “First Amended Cross-Complaint”) on or about October 25, 2007, seeking dissolution of MissionStar, alleging breach of fiduciary duties, breach of contract, libel

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per se, slander per se, misappropriation of trade secrets, unfair competition, and seeks an accounting of MissionStar and Respondent as well as injunctive relief.

On July 23, 2007, Complainant filed a Notice of Motion and Motion to Disqualify Respondent's Counsel and Memorandum of Points and Authorities in Support of Motion to Disqualify Counsel along with declarations and supporting exhibits. In the memorandum, Complainant alleges that Respondent's attorney, and by association his law firm, represented both Complainant and Respondent in the creation of the MissionStar joint venture. Complainant claims that both the attorney and the firm should be disqualified from representing Respondent because of a conflict of interest and because Respondent's attorney obtained confidential information about Complainant through the joint representation that is relevant to the present case. Respondent was given an extension of time in which to file a response and subsequently filed a timely Memorandum of Points and Authorities in Opposition to Complainants' Motion to Disqualify with declarations and supporting exhibits on October 24, 2007, denying the allegations and alleging that Complainant filed the motion to harass Respondent.

On August 29, 2007, Complainant filed a Notice of Motion and Motion to Dismiss Counterclaim and Memorandum of Points and Authorities in Support of Motion to Dismiss Counterclaim (hereinafter "Memorandum Supporting Motion to Dismiss Counterclaim") along with declarations and supporting exhibits. In its memorandum, Complainant claims that the Counterclaim should be dismissed because Respondent has a pending, identical complaint against Complainant in the Superior Court of the State of California, County of Monterey, and because an action before the Secretary is not the proper forum to hear the allegations in the Counterclaim. Respondent was given an extension of time in which to file a response and subsequently filed a timely Memorandum of Points and Authorities in Opposition to Complainants' Motion to Dismiss Counterclaim (hereinafter "Memorandum Opposing Motion to Dismiss Counterclaim") along with a declaration and supporting exhibits on November 13, 2007. In its response, Respondent concedes that Counterclaim Part C is not properly before the Secretary and withdraws that part of the Counterclaim. Respondent further argues that the full litigation between the parties is more properly before the

Superior Court of the State of California, but that if the Complaint is properly before the Secretary, Counterclaim Parts A and B are properly before the Secretary because there are no corresponding claims before the California state court except for the general accounting claim.

On October 24, 2007, Respondent filed a Motion and Memorandum of Points and Authorities in Support of Motion to Strike Complaint and Reply and/or Require Proper Filing (hereinafter "Motion to Strike"). In the motion, Respondent alleges that the Complaint and Answer to Counterclaim are inconsistent and therefore, the Complaint should be dismissed, the Answer to Counterclaim stricken, and judgment entered on the Counterclaim. In the alternative, Respondent requests that the Answer to Counterclaim be stricken and Complainant be directed to file a new answer that conforms to the Rules of Practice. Complainant has yet to file a response to this motion.

An oral hearing was requested by either one or both parties for the Complaint, Counterclaim, Motion to Disqualify Respondent's Counsel, and Motion to Dismiss Counterclaim.

### **Discussion and Conclusions**

Multiple motions have been filed in this proceeding and each will be dealt with in turn. As a preliminary matter, the oral hearings that were requested in the Motion to Disqualify Respondent's Counsel and Motion to Dismiss Counterclaim are denied. Pursuant to section 47.11(c)(1), (13) of the Rules of Practice Under the Perishable Agricultural Commodities Act (7 C.F.R. § 47.11(c)(1), (13); hereinafter "Rules of Practice"), the examiner is given the power to rule upon motions and requests and to do whatever is necessary to maintain order and efficiently conduct the proceeding. As the parties have thoroughly addressed the issues in their respective filings and because the issues are not complex, an oral hearing is unnecessary and would serve no useful purpose. Therefore, oral hearing is denied.

#### **A. Motion to Dismiss Counterclaim**

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Complainant alleges in its Memorandum Supporting Motion to Dismiss Counterclaim that the Counterclaim should be dismissed because the claims alleged in the Counterclaim are identical to the claims Respondent has alleged in its action before the Superior Court of the State of California, County of Monterey, Case No. M84964, and that the Secretary is not the proper forum to hear the causes of action alleged in the Counterclaim. (Mem. Supporting Mot. to Dismiss Countercl. 1-2.)

*1. Counterclaim Part C*

Respondent has voluntarily withdrawn Counterclaim Part C. (Mem. Opposing Mot. to Dismiss Countercl. 2.) As such, Counterclaim Part C is dismissed.

*2. Counterclaim Parts A and B*

In Counterclaim Part A, Respondent alleges that Complainant filed a fraudulent Complaint with the Secretary in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)) and that Complainant created incorrect, false, and fraudulent invoices in violation of sections 2(1) and 2(4) of the PACA (7 U.S.C. § 499b(1), (4)). (Countercl. 12, ¶¶ 28-29.) Respondent further alleges that Complainant's demand for payment on the alleged false invoices violates section 2(2) of the PACA (7 U.S.C. § 499b(2)). (Countercl. 12, ¶ 30.) Respondent claims that as part of the MisisonStar joint venture, the parties sold each other bulk produce on the basis of a transfer pricing agreement. (Countercl. 9-10, ¶ 23.) Respondent claims the parties agreed on the price that Respondent would pay Complainant for spring mix and spinach, but that the invoices Complainant submitted to Respondent and to the Secretary in its PACA Complaint do not reflect the agreed upon prices. (Countercl. 10-12, ¶¶ 24-29.)

In Counterclaim Part B, Respondent alleges that it sold produce to Complainant during the same time period that Complainant sold produce to Respondent for which Complainant has failed to pay. (Countercl. 13, ¶ 32.) Respondent claims that if Complainant's invoices are under the jurisdiction of the PACA, then so are its invoices. (Countercl. 13, ¶ 32.) Respondent further claims that based on its calculations, it owed Complainant \$367,000.00 for Complainant's invoices and that Respondent attached and setoff this amount against the amounts

Floyd C. Griffin and Griffin Produce Company, Inc. 687  
v. Newstar Fresh Foods, LLC  
67 Agric. Dec. 682

Complainant owed to the MissionStar joint venture. (Countercl. 13-14, ¶ 34.) Therefore, Respondent claims that it is entitled to an affirmative recovery or setoff on the invoices that Complainant failed to pay and that any amounts Respondent owed to Complainant on Complainant's invoices have been fully paid.

Under section 5(b) of the PACA, a claimant seeking damages from a licensee who has violated section 2 of the PACA (7 U.S.C. § 499b) may either file a complaint with the Secretary or file a complaint "in any court of competent jurisdiction." 7 U.S.C. § 499e(b). This section has been interpreted to require a claimant to choose whether to pursue its claim with the Secretary in this administrative forum or in a state or federal court. *E.g., Han Yang Trade Co. v. A.F. & Sons Produce, Inc.*, 52 Agric Dec. 765, 768 (1993); *Navajo Agric. Products Indus. v. Bob's Texas Style Potato Chips, Inc.*, 52 Agric. Dec. 674, 675 (1992). There is only one exception to this election of remedies requirement. A claimant can maintain actions in both an administrative and civil forum if the claimant in the PACA action is forced to file a compulsory counterclaim in the civil action. *E.g., Lake Erie Greenhouse Mgmt. & Leasing Corp. v. Agristar Produce LLC*, 59 Agric. Dec. 878, 879 n.1 (2000); *Kurt Van Engel Comm'n Co. v. Schultz Sav-O Stores, Inc.*, 48 Agric. Dec. 731, 732 (1989). To determine if there has been an election of remedies, the following factors are analyzed: (1) whether the state or federal court is a court of competent jurisdiction; (2) whether the same parties are involved in the PACA action and the civil action; (3) whether any of the same transactions are involved in the PACA action and the civil action; and (4) whether the PACA claimant is before the state or civil court because of filing a compulsory counterclaim. *E.g., George L. Powell v. Georgia Sweets Brand, Inc.*, 58 Agric. Dec. 1136, 1139-40 (1999); *Han Yang Trade Co.*, 52 Agric. Dec. at 769.

Applying the four factors, we find that an election of remedies has been made. Regarding the first factor, "[a] court is of competent jurisdiction if it can issue an enforceable award in money damages based upon breach of contractual duty which runs against a party to the suit." *E.g., George L. Powell*, 58 Agric. Dec. at 1141-42; *Han Yang Trade Co.*, 52 Agric. Dec. at 769. Based on this definition, the Superior Court

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of the State of California, County of Monterey, is a court of competent jurisdiction. Regarding the second factor, the Complainant in the PACA action is the defendant in the state action and the Respondent in the PACA action is the plaintiff in the state action; therefore, the same parties are involved. Regarding the fourth factor, Respondent is the claimant on the Counterclaim and it voluntarily chose to file a complaint in state court; therefore, Respondent is not in state court because of being required to file a compulsory counterclaim.

Application of the third factor requires a more extensive analysis. Comparing Counterclaim Parts A and B to the First Amended Complaint, both filings share the same background facts. As Complainant points out in its Memorandum Supporting Motion to Dismiss Counterclaim, both the Counterclaim and the First Amended Complaint contain fact passages which are identical or have only slight word variations. (Mem. Supporting Mot. to Dismiss Countercl. 5-7.) Specifically, both the Counterclaim and the First Amended Complaint discuss the creation of the MissionStar joint venture and the purpose of its creation. (Countercl. 9, ¶ 22; First Amended Compl. 3-4, ¶¶ 11, 15.) Both filings claim that as part of the joint venture, the parties exchanged bulk produce with each other on the basis of a transfer pricing agreement. (Countercl. 9, ¶ 23.; First Amended Compl. 5-6, ¶ 19.) Both filings discuss the alleged prices for spring mix and spinach that the parties agreed Respondent would pay to Complainant. (Countercl. 10-11, ¶¶ 24, 26; First Amended Compl. 6, ¶ 20.) In addition, both filings claim that Complainant submitted false invoices regarding the bulk transfer of spring mix and spinach from Complainant to Respondent to both Respondent and the Secretary and that Complainant filed a false PACA Complaint. (Countercl. 12, ¶¶ 28-29; First Amended Compl. 6, ¶ 21.) Respondent claims that the similar background facts are the result of Complainant's attempt to "peel off" a single part of the parties' overall complex dispute" involving the MissionStar joint venture. (Countercl. 3.) However, not only do both filings share the same background facts, they both seek redress for the same actions of Complainant and thus arise from the same transactions.

In Counterclaim Part A, Respondent seeks redress for Complainant's alleged submission of false invoices to Respondent and to the Secretary and for Complainant's alleged filing of a false PACA Complaint.

(Countercl. 12, ¶¶ 28-30.) In the First Amended Complaint, filed in state court, Respondent claims that Complainant's alleged submission of false invoices and alleged filing of a false PACA Complaint are reasons for the court to grant its request for dissolution of MissionStar: "This discord and distrust has arisen . . . because of Misionero's false invoices and false PACA claim. Dissolution is reasonably necessary for the protection of the rights of NewStar and MissionStar." (First Amended Compl. 6-7, ¶ 23.) Respondent also claims that Complainant's alleged false invoices demonstrate breach of contract by Complainant: "In addition, Misionero breached the Transfer Pricing Agreement by submitting false and misleading invoices to NewStar and the USDA inconsistent with the pricing arrangement between Misionero and NewStar." (First Amended Compl. 8, ¶ 33.) Furthermore, Respondent claims that the false invoices support its breach of fiduciary duty claim against Complainant:

[B]y demanding payment on and presenting false invoices to NewStar and the USDA, Misionero has materially damaged NewStar in its reputation and relationship with creditors and has engaged in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law, thereby breaching its fiduciary obligations to plaintiff and to MissionStar.

(First Amended Compl. 9, ¶ 39.)

Respondent also cites to the false invoices as support for its request for declaratory and injunctive relief: "Beginning in or about July, 2006 and continuing to the present, Misionero wrongfully and unlawfully has failed to fulfill its obligations under the Agreements in that it . . . has demanded payment on false invoices and has filed a false PACA claim." (Countercl. 10, ¶ 47.) This analysis demonstrates that whether or not the invoices were false and whether or not Complainant filed a false PACA complaint would necessarily be litigated in the both the PACA action and before the state court. Therefore, Counterclaim Part A and the First Amended Complaint involve the same transactions and the exception to the election of remedies requirement does not apply because Respondent is not a claimant in state court because of filing a compulsory counterclaim.

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The remedies available under section 5 of the PACA (7 U.S.C. § 499e) are different than the remedies available in state court; however, “[t]he remedies made available by Section 5 of the Act are not cumulative but are concurrent remedies from which the complaining party must elect its mode of procedure.” *Hang Yang Trade Co.*, 52 Agric. Dec. at 769. Because Respondent’s Counterclaim Part A involves the same transactions as its First Amended Complaint, Respondent made an election of remedies by filing a complaint in state court and the Secretary is without jurisdiction as to Respondent’s Counterclaim covering the same transactions. Respondent’s reparation Counterclaim Part A should, therefore, be dismissed.

Counterclaim Part A should also be dismissed on grounds independent of an election of remedies. Under section 47.2(n) of the Rules of Practice, a reparation proceeding is defined as “a proceeding in which money damages are claimed and in which the Department is not a party.” 7 C.F.R. § 47.2(n) (emphasis added). As the definition specifically states, reparation proceedings contemplate an award of money damages to the complaining party. Neither the Counterclaim, nor the Memorandum Opposing Motion to Dismiss Counterclaim discuss why Respondent would be entitled to money damages on Counterclaim Part A nor how these money damages would be quantified. Respondent characterizes the allegations in Counterclaim Part A as “aris[ing] out of Complainant Misionero’s abuse of the PACA, and the PACA remedy process.” (Mem. Opposing Mot. to Dismiss Countercl. 3.) This characterization does not involve a specific injury to Respondent. Therefore, the allegations in Counterclaim Part A are not allegations to which Respondent would be entitled to an award of money damages. The allegations in Counterclaim Part A would be more appropriate as the subject of a disciplinary proceeding instituted by the Secretary. Therefore, Counterclaim Part A should also be dismissed because it is not the proper subject of a reparation proceeding.

In Counterclaim Part B, Respondent seeks redress for Complainant’s alleged failure to pay for produce that it purchased from Respondent and seeks a determination that any amounts it owes on Complainant’s invoices have been fully paid. (Countercl. 13-14, ¶¶ 32, 34.) In the First Amended Complaint, Respondent’s claim for accounting of MissionStar is very broad and specifically “seeks the Court’s assistance in settling

accounts between plaintiff and defendants and seeks to have judgment entered against defendant Misionero for such sums as to be found due and owing to NewStar and/or MissionStar.” (First Amended Compl. 7, ¶ 29.) Respondent has consistently maintained that all produce transfers between the parties were part of the MissionStar joint venture. (Countercl. 2-3, ¶ 4(b), 9, ¶ 23; First Amended Compl. 5, ¶ 19; Mem. Opposing Mot. to Dismiss Countercl. 5-6.) Therefore, an accounting of MissionStar would determine what amounts, if any, Complainant owed to Respondent on Respondent’s invoices and whether Respondent owed any amounts on Complainant’s invoices. However, the First Amended Complaint is even more specific and requests a judicial determination of the amounts that the parties owe each other on their respective invoices: “WHEREFORE, plaintiff prays for judgment as follows . . . For an order determining the amounts owed, if any, under the Transfer Pricing Agreement and related invoices and that amounts owing from NewStar to Misionero, if any, have been paid by setoff.” (First Amended Compl. 12, ¶ 2.)<sup>1</sup> This analysis demonstrates that both Respondent’s Counterclaim Part B and its First Amended Complaint arise from the same transactions, specifically, disputes over produce invoices each party claims the other party has not paid. Also, as previously discussed, the exception to the election of remedies requirement does not apply because Respondent is not a claimant in state court because of filing a compulsory counterclaim. Therefore, because Respondent’s Counterclaim Part B involves the same transactions as its First Amended Complaint, Respondent made an election of remedies by

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<sup>1</sup> Respondent’s request for declaratory judgment and injunctive relief also requests a judicial determination of the amounts owed on Complainant’s invoices:

In addition, an actual controversy exists as NewStar asserts and Misionero disputes that NewStar owes no monies to Misionero pursuant to Misionero’s invoices and that any amount NewStar may have owed has been fully paid.

NewStar desires a judicial determination of the parties’ respective rights and duties and a declaration that . . . (2) NewStar owes nothing to Misionero pursuant to the false invoices submitted by Misionero.

(First Amended Compl. 10-11, ¶¶ 48-49.)

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filing a complaint in state court and the Secretary is without jurisdiction to hear Respondent's Counterclaim covering the same transactions. Respondent's reparation Counterclaim Part B should, therefore, be dismissed.

Consequently, because Counterclaim Parts A and B should be dismissed because Respondent has made an election of remedies, and because Respondent has withdrawn Counterclaim Part C, Respondent's Counterclaim should be dismissed in its entirety.

B. Motion to Strike Complaint and Reply and/or Require Proper Filing

In its Motion to Strike, Respondent claims that Complainant's Complaint and Answer to Counterclaim are inconsistent with each other. (Mot. to Strike 11.) Respondent claims that Complainant made general denials of the allegations in the Counterclaim, but that some statements in the allegations were facts taken from the Complaint that should have been admitted. (Mot. to Strike 11.) Respondent further claims that because of the inconsistencies in the pleadings by Complainant, neither the Complaint nor the Answer to Counterclaim can stand and therefore, the Complaint should be dismissed, the Answer to Counterclaim stricken, and judgment entered on the Counterclaim or in the alternative, the Answer to Counterclaim should be stricken and Complainant should be directed to file a new answer that conforms to the Rules of Practice. (Mot. to Strike 14.)

Respondent's motion is granted in part, but for reasons different than those posited in its motion. The filings in the PACA action and in the state court action demonstrate that the parties have had extensive business dealings with each other over an extended period of time. Both parties agree that they are involved in "a complex business litigation dispute" and that the Superior Court of the State of California, County of Monterey, is the proper forum to litigate the dissolution and partnership dispute involving the MissionStar joint venture. (Mem. Supporting Mot. to Dismiss Countercl. 8-9; Mem. Opposing Mot. to Dismiss Countercl. 6-7.) The real issue that needs to be decided here is whether the disputes involving Complainant's invoices can be separated from the MissionStar joint venture dispute and litigated separately before the Secretary. We find that the disputes involving Complainant's

invoices are inextricably intertwined with the MissionStar joint venture dispute and cannot be litigated separately before the Secretary without duplicating the litigation in the state court and risking inconsistent results.

Both Complainant and Respondent have admitted that they formed the MissionStar joint venture and have equal interests in the joint venture. (Answer 1-2, ¶ 4(a); Countercl. 9, ¶ 22; Mem. Supporting Mot. to Dismiss Countercl. 2.) As previously discussed, Respondent has consistently maintained that all produce transfers between the parties were part of the MissionStar joint venture. (Countercl. 2-3, ¶ 4(b), 9, ¶ 23; First Amended Compl. 5, ¶ 19; Mem. Opposing Mot. to Dismiss Countercl. 5-6.) Respondent is even willing to stipulate that should this view prevail, then the disputes involving both Complainant's invoices and Respondent's invoices should be heard in the state court. (Mem. Opposing Mot. to Dismiss Countercl. 5-6.) Complainant has admitted that MissionStar was in operation during the time period in which Complainant sold Respondent the produce at issue in its invoices. (Compl. ¶ 4; Mem. Supporting Mot. to Dismiss Countercl. 2.) Complainant has also admitted that the produce at issue in its invoices was sold and delivered to Respondent at the MissionStar facility and processed by MissionStar. (Compl. ¶ 4.) The MissionStar joint venture is therefore implicated in any dispute involving Complainant's invoices.

Again, as previously discussed, Respondent has filed a First Amended Complaint in state court which seeks an accounting of MissionStar and the parties' contributions to MissionStar as well as a judicial determination of the amounts that the parties owe each other on their respective invoices and that any amounts Respondent owed were paid by setoff. (First Amended Compl. 7, ¶ 29, 12, ¶ 2.) Respondent's First Amended Complaint will necessarily require the state court to litigate the dispute over the amounts Respondent owes, if any, on Complainant's invoices because of Respondent's claim that it paid all amounts due on Complainant's invoices by setoff. Complainant also filed a First Amended Cross-Complaint against Respondent. The First Amended Cross-Complaint contains a wide array of allegations against Respondent involving all aspects of their business relationship but

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notably does not mention the invoices at issue in Complainant's PACA Complaint. As with Respondent's First Amended Complaint, Complainant's First Amended Cross-Complaint seeks an accounting of MissionStar, but it also seeks an accounting of Respondent. (First Amended Cross-Compl. 14, ¶ 73.) Any accounting of Respondent will require the state court to determine the amounts that Respondent owes to Complainant on Complainant's invoices, especially since Respondent claims that those invoices were paid by setoff against the amounts that Complainant owes to the MissionStar joint venture.

The disputes involving Complainant's invoices are too connected to the MissionStar joint venture dispute to be litigated separately. "The fact of the matter is that multiple litigation of the same facts and inconsistent decisions is a potential result" if litigation is allowed to proceed both before the Secretary and before the state court. *George L. Powell v. Georgia Sweets Brand, Inc.*, 58 Agric. Dec. 1136, 1143 (1999). The Superior Court of the State of California, Country of Monterey, is the proper forum to hear all disputes raised by the parties before the Secretary. Therefore, the Complainant's reparation Complaint against Respondent should be dismissed and because we have determined that Respondent's Counterclaim should be dismissed, Respondent's request to strike Complainant's Answer to Counterclaim is moot and should be denied.

C. Motion to Disqualify Respondent's Counsel

Because both the Complaint and Counterclaim should be dismissed, Complainant's Motion to Disqualify Respondent's Counsel is moot. Therefore, Complainant's Motion to Disqualify Respondent's Counsel should be denied.

**Order**

1. The parties having thoroughly addressed the issues in their respective filings, an oral hearing on the Motion to Dismiss Counterclaim and Motion to Disqualify Respondent's Counsel is unnecessary. Therefore, the requests for oral hearings on the motions are DENIED.

2. Respondent has made an election of remedies by filing its First Amended Complaint before the Superior Court of the State of California, County of Monterey. Therefore, Complainant's Motion to Dismiss Counterclaim is GRANTED. The Counterclaim filed in PACA Docket No. R-07-098 is hereby dismissed.

3. The disputes concerning Complainant's invoices are inextricably intertwined with the MissionStar joint venture dispute being litigated before the Superior Court of the State of California, County of Monterey. Therefore, Respondent's Motion to Strike is GRANTED IN PART. The Complaint filed as PACA Docket No. R-07-098 is hereby dismissed. Respondent's Counterclaim filed in PACA Docket No. R-07-098 has been dismissed. Complainant's Answer to Counterclaim is therefore moot. Respondent's Motion to Strike the Answer to Counterclaim is therefore DENIED.

4. The Complaint and Counterclaim in PACA Docket No. R-07-098 have been dismissed, leaving nothing pending before the Secretary. Complainant's Motion to Disqualify Respondent's Counsel is moot. Therefore, Complainant's Motion to Disqualify Respondent's Counsel is DENIED.

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

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**MULLER TRADING COMPANY, INC. v. THE FRESH GROUP LTD., D/B/A MARKET SOURCE.**

**PACA Docket No. R-07-117.**

**Decision and Order.**

**Filed March 14, 2008.**

**PACA-R – Transportation – Abnormality – When Shipper Responsible.**

Where a load of onions sold f.o.b. arrived at the contract destination showing elevated temperatures following shipment in an unrefrigerated truck, and the shipper claimed abnormal transit, it was found that warranty of suitable shipping condition remained applicable, as the seller had a duty of reasonable care to inform the buyer that the use of a dry van to ship the onions was unacceptable, the seller did not do so.

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Patrice Harps, Presiding Officer.

Leslie Wowk, Examiner.

Complainant, *pro se*.

Respondent, *pro se*.

*Decision and Order issued 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 \$3,085.50 in connection with one truckload of onions shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the 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. Respondent also submitted a Brief.

### **Findings of Fact**

1. Complainant, 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, Complainant was licensed under the Act.

2. Respondent, The Fresh Group Ltd., doing business as Market Source, is a corporation whose post office address is 4287 N. Port Washington Road, Glendale, Wisconsin 53212. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about September 7, 2006, Complainant agreed to sell to Respondent 850-50 pound bags of jumbo yellow onions at \$8.25 per bag, or \$7,012.50, plus \$110.50 for pallets, for a total contract price of \$7,123.00. On the same date, the onions were shipped via dry van from loading point in the state of Washington, to Premier Produce, in Franklin Park, Illinois, where they arrived on September 11, 2006.
4. On September 12, 2006, a U.S.D.A. inspection was performed on the onions mentioned in Finding of Fact 3 at the warehouse of Premier Produce, in Franklin Park, Illinois, the report of which disclosed 9% average defects, including 4% dry sunken areas and 5% decay. The decay is described as being in mostly moderate, many early stages. Pulp temperatures at the time of the inspection ranged from 70 to 72 degrees Fahrenheit.
5. On September 13, 2006, Respondent sent Complainant a fax message stating: "Per breach of contract by shipper receiver Premier Produce will handle this load for the account of the shipper. Sales of onions will be done in a timely manner meeting PACA guidelines."
6. Respondent paid Complainant \$4,037.50 for the onions with check number 011629, dated October 12, 2006.
7. The informal complaint was filed on March 6, 2007, which is within nine months from the accrual of the cause of action.

### **Conclusions**

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one truckload of onions sold to Respondent. Complainant states Respondent accepted the onions in compliance with the contract of sale, but that it has since paid only \$4,037.50, leaving a balance due Complainant of \$3,085.50. Respondent asserts, to the contrary, that the original contract was void due to the breach of the contract disclosed by the U.S.D.A. inspection, and that it has paid

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Complainant in full for the onions based on the proceeds collected from its customer.

Turning first to the issue of whether Respondent accepted the onions, the U.S.D.A. inspection shows that the onions were unloaded at the time of the inspection.<sup>1</sup> The unloading or partial unloading of the transport is an act of acceptance. 7 C.F.R. § 46.2 (dd)(1). We therefore find that Respondent accepted the onions. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc.*, 60 Agric. Dec. 840 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353 (1988).

Respondent asserts that the results of the U.S.D.A. inspection establish a breach of contract by Complainant. Both Complainant's invoice and its passing list the terms of sale as f.o.b.<sup>2</sup> In addition, Respondent acknowledges the applicability of the f.o.b. term to this transaction in its Brief.<sup>3</sup> Hence, we conclude that the onions were sold under f.o.b. terms. Where goods are sold f.o.b., the warranty of suitable shipping condition is applicable.<sup>4</sup> The Regulations (7 C.F.R. § 46.43(j)) define "suitable shipping condition" as meaning "...that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."<sup>5</sup>

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<sup>1</sup> See ROI Exhibit 1D.

<sup>2</sup> See ROI Exhibit 4F, and Statement in Reply Exhibit #1.

<sup>3</sup> See Brief of Respondent, paragraph 5.

<sup>4</sup> The Regulations (7 C.F.R. § 46.43 (i)), in relevant part, define f.o.b. as meaning "...that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." *Oshita Marketing, Inc. v. Tampa Bay Produce, Inc.*, 50 Agric. Dec. 968 (1991).

<sup>5</sup> The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be US.

(continued...)

By definition, the warranty of suitable shipping condition is only applicable when the transportation conditions are normal. Complainant maintains that the damage to the onions disclosed by the U.S.D.A. inspection resulted from the conditions in transit. Specifically, the onions were shipped in a dry van at a time when Complainant states the supplier of the onions, Jensen Farms Produce, Inc. ("Jensen Farms"), was not loading anything other than reefers unless the driver assumed responsibility. According to Complainant, when the truck arrived in Warden, Washington, the shed refused to load the truck and only did so after the driver signed a bill of lading stating "SHIPPER ASSUMES NO RISK [sic] IN TRANSIT RISK." A copy of the signed bill of lading bearing this statement is included in the record.<sup>6</sup>

In an f.o.b. transaction, the seller gives an implied warranty that it will use reasonable care and judgment in selecting the transportation

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<sup>5</sup>(...continued)

No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

<sup>6</sup> See ROI Exhibit 1C.

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service and providing shipping instructions to the carrier. *Progressive Groves v. Bittle*, 31 Agric. Dec. 436 (1972); *A.J. Levy & J. Zentner Co. v. Leaf Brandt Co.*, 21 Agric. Dec. 179 (1962). If Complainant was of the opinion at the time of shipment that the use of a dry van to transport the onions was unacceptable, it had an affirmative duty to inform Respondent and/or to refuse to allow the produce to be shipped in that manner. See *Firman Pinkerton Co., Inc. v. Bobinell J. Casey*, 55 Agric. Dec. 1287 (1996). While Complainant has shown that the shipper, Jensen Farms, informed the trucker that it considered the dry van an inappropriate mode of transport for the onions in question, there is no evidence showing that Complainant similarly informed Respondent of its concerns. In fact, Respondent states in its Brief that it did not receive a copy of the bill of lading bearing the disclaimer mentioned above until after the onions were received and inspected.<sup>7</sup> In accordance with its duty of reasonable care, Complainant should have notified Respondent that the unrefrigerated truck was inadequate, and its failure to do so was a breach of duty on its part, not Respondent's. See *Teddy Bertucca Company v. The Kunkel Co., Inc.*, 38 Agric. Dec. 580 (1979). Complainant cannot now complain about Respondent's choice of transport vehicle in an attempt to prove abnormal transportation.

Based on the foregoing, we find that Complainant has not carried its burden of proving abnormal transportation thereby voiding the suitable shipping condition warranty. As we mentioned, the warranty of suitable shipping condition states that the product will arrive at the contract destination without abnormal deterioration. The U.S.D.A. inspection of the onions, which was performed five days after shipment and one day following arrival, disclosed 9% average defects, including 4% dry sunken areas and 5% decay. The United States Standards for Grades of Onions (Other Than Bermuda-Granex-Grano and Creole Type) provide a tolerance at shipping point for U.S. No. 1 grade onions of 5% for onions that fail to meet the requirements of the grade, including therein not more than 2% for decay or wet sunscald. 7 C.F.R. § 51.2837. Where, as here, the U.S.D.A. inspection is performed for condition defects only, these tolerances are applied to the condition defects disclosed by the inspection. Since the onions in question were sold f.o.b., and the tolerances set forth in the grade standards refer to the

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<sup>7</sup> See Respondent's Brief, paragraph 6.

quality and condition of the onions at shipping point, an additional allowance should be applied to account for normal deterioration in transit. The amount of the allowance depends on the time in transit. In the case of the onions in question, which were in transit for four days, the allowance is 8% for average defects, including 3% for decay or wet sunscald. The defects disclosed by the U.S.D.A. inspection of the onions exceed these allowances by 1% for average defects, and 2% for decay. We therefore find that Respondent has sustained its burden to prove that Complainant breached the contract by shipping onions that were not in suitable shipping condition.

Before we consider what, if any, damages Respondent suffered as a result of Complainant's breach, we should consider Respondent's allegation that the original contract was void following the inspection. This allegation is apparently based on a fax sent to Complainant on September 13, 2006, stating that the receiver would be handling the onions for the shipper's account, *i.e.*, on consignment. There is, however, no indication that Complainant and Respondent ever reached an agreement to rescind the original purchase and sale agreement and replace it with a consignment. We therefore find that Respondent has failed to meet its burden to prove that the original terms of contract were modified or voided.

The general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The 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 remitted a return to Complainant of \$4.62 per bag, plus \$110.50 for pallets, or a total of \$4,037.50, for the 850 bags of onions in question. Respondent did not, however, supply an account of sales to show how it arrived at this return. Without a detailed account of sales to establish that the onions were promptly and properly resold, we cannot accept the return remitted by Respondent as the best available evidence of the value of the onions as accepted.

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Absent an accounting, the value of goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection. *Fresh Western Marketing, Inc. v. McDonnell & Blankford, Inc.*, 53 Agric. Dec. 1869 (1994). Under this method, the value the onions would have had if they had been as warranted is reduced by the percentage of condition defects disclosed by the inspection to arrive at the value of the onions as accepted. The first and best method of ascertaining the value the goods would have had if they had been as warranted is to use the average price as shown by USDA Market News Service Reports. *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (1990). The U.S.D.A. Market News Terminal Price Reports for Chicago, Illinois, show that on September 11 and 12, 2006, 50-pound sacks of jumbo yellow onions originating from the state of Washington were selling for \$14.00 to \$15.00 per sack. Using the average Market News price of \$14.50 per sack, we find that the 850 50-pound bags of jumbo yellow onions in question had a value if they had been as warranted of \$12,325.00. When we reduce this amount by 9% to account for the condition defects disclosed by the inspection, we arrive at a value for the onions as accepted of \$11,215.75.

As we mentioned, Respondent's damages are measured as the difference between the value the onions would have had if they had been as warranted, \$12,325.00, and their value as accepted, \$11,215.75, or \$1,109.25. In addition, Respondent may recover the \$125.00 U.S.D.A. inspection fee as incidental damages. With this, Respondent's total damages amount to \$1,234.25. When Respondent's damages are deducted from the \$7,123.00 contract price of the onions, there remains an amount due Complainant of \$5,888.75. Respondent paid Complainant \$4,037.50 for the onions. Therefore, there remains a balance due Complainant from Respondent of \$1,851.25. Respondent's failure to pay Complainant \$1,851.25 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.

#### Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$1,851.25, with interest thereon at the rate of 1.66 % per annum from November 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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**WILDWOOD PRODUCE SALES, INC. v. CITRUSOURCE, INC.**  
**PACA Docket No. R-07-108.**  
**Decision and Order.**  
**Filed March 28, 2008.**

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### **PACA-R – Contract – Terms – Interpretation.**

Where the parties, in various pleadings submitted during the course of the proceeding, described the transactions in question as sales, but the parties also stated that it was their intent, at the formation of the contract, that Respondent would sell the lemons on Complainant's behalf and remit the sales proceeds less commission to Complainant, it was found that Respondent was acting as Complainant's agent in selling the lemons.

### **Consignment – Negligence of Agent.**

Where Complainant sought payment based on its "house average" sales price, and Respondent countered that its liability should be limited to the net sales proceeds collected from its customer, it was noted that Complainant chose Respondent to sell the lemons on its behalf and that, in so doing, Complainant assumed the risk of poor performance on Respondent's part. Accordingly, absent a showing of fraud or other hard evidence of relevant violations of the Regulations, held that Respondent's liability to Complainant should be based on the sales proceeds it collected from its customer, less commission, in accordance with the parties' agreement. This is true even in the case where the sales prices reported by Respondent fell substantially below the relevant prices reported by U.S.D.A. Market News because, again, Complainant bore the risk of Respondent's poor performance. However, in the case where a damage claim was asserted by Respondent's customer, Respondent had a positive duty, as Complainant's agent, to secure evidence that any resulting adjustments granted to the customer were warranted. In the absence of such evidence, Respondent was held liable to Complainant for the original price negotiated with its customer, less commission. Similarly, where Respondent failed to negotiate a sales price with its customer at the time of contracting and later agreed to a substantially reduced price, and there was no evidence that Complainant authorized Respondent to sell the lemons in this manner, it was found that Respondent was liable to Complainant for the fair market value of the lemons as determined based on relevant U.S.D.A. Market News reports.

Patrice Harps, Presiding Officer.

Leslie Wowk, Examiner.

Complainant, Pro se.

Respondent, David A. Adelman.

*Decision and Order issued 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 \$139,829.92 in connection with multiple trucklots of lemons 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.

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 ("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. Respondent also submitted a Brief.

#### **Findings of Fact**

1. Complainant, Wildwood Produce Sales, Inc., is a corporation whose post office address is P.O. Box 250, Kingsburg, California 93631-0250. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, Citrusource, Inc., is a corporation whose post office address is 567 W. Channel Islands Boulevard #353, Port Hueneme California, 93041-2133. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On January 28, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

Respondent paid Complainant \$1,559.40 for invoice number 14147. (AX 453-456, SRX 18).

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106. The informal complaint was filed on August 30, 2006, which is within nine months from the accrual of the cause of action.

Respondent for the lemons as follows:

<b>Invoice #: 13702</b>				
Lemon CTN 115 Choice YELLOW TAIL	437	ctn.		.00
Lemon CTN 140 Choice YELLOW TAIL	594	ctn.		.00
Marathon recorder	1		23.50	23.50
Wildwood Pallets	20		8.75	175.00
Packing Charges	1031		4.25	4,381.75
INVOICE TOTAL:	1031			4,580.25

3a. On the same date, Respondent issued invoice number 13702 billing its customer for a trucklot of lemons as follows:

437	CAL. LEMONS 115s CHOICE	6.00	2,622.00
687	CAL. LEMONS 140s CHOICE	6.00	4,122.00
21	PALLETS	8.75	183.75
			\$6,927.75

3b. Complainant subsequently prepared a revised invoice number 13702, whereon it revised the pallet charge to \$154.65 (1,031 at \$0.15 each), thereby changing the invoice price to \$4,559.90. Respondent paid Complainant \$4,556.75 for invoice number 13702. (Answer Exhibits "AX" 10-14, Statement in Reply Exhibit "SRX" 18).

4. On February 3, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13828</b>				
Lemon CTN 140 Fancy WILDWOOD	108	ctn.		.00
Lemon 18/2N 235 Choice Master-Wildside	42	bag		.00
Wildwood Pallets	3			.00
Packing Charges	108		4.25	459.00
Packing Charges	42		6.70	281.40
INVOICE TOTAL:	150			740.40

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4a. On the same date, Respondent issued invoice number 13828 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 140s FANCY	10.00	1,080.00
42	CAL. LEMONS 18/2# VEXAR CHOICE	11.50	483.00
3	PALLETS	8.75	26.25
			\$1,589.25

4b. Complainant subsequently prepared a revised invoice number 13828, billing Respondent for the lemons as follows:

<b>Invoice #: 13828</b>				
Lemon CTN 140 Fancy WILDWOOD	107	ctn.	10.25	1,096.75
Lemon CTN 140 Fancy WILDWOOD	1	ctn.		.00
Lemon 18/2N Choice Master – Wildside	42	bag		.00
Wildwood Pallets	3			.00
Brokerage/commission	107		-.50	-53.50
Packing Charges/bagging for non growers	42		6.70	281.40
Packing Charges for non growers	1		4.25	4.25
INVOICE TOTAL:	150			1,328.90

Respondent paid Complainant \$740.40 for invoice number 13828. (AX 15-19, SRX 18).

5. On February 3, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13829</b>				
Lemon CTN 140 Choice YELLOW TAIL	108	ctn.		.00
Lemon CTN 165 Choice YELLOW TAIL	228	ctn.		.00
Lemon CTN 200 Choice YELLOW TAIL	85	ctn.		.00
Wildwood Pallets	8		8.75	70.00
INVOICE TOTAL:	421			70.00

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5a. On the same date, Respondent issued invoice number 13829 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 140s CHOICE	11.00	1,188.00
228	CAL. LEMONS 165s CHOICE	11.00	2,508.00
85	CAL. LEMONS 200s CHOICE	11.00	935.00
8	PALLETS	8.75	70.00
			\$4,701.00

5b. Complainant subsequently prepared a revised invoice number 13829, billing Respondent for the lemons as follows:

<b>Invoice #: 13829</b>				
Lemon CTN 140 Choice YELLOW TAIL	62	ctn.	9.10	564.20
Lemon CTN 165 Choice YELLOW TAIL	96	ctn.	9.95	955.20
Lemon CTN 200 Choice YELLOW TAIL	37	ctn.	9.90	366.30
Lemon CTN 140 Choice YELLOW TAIL	46	ctn.		.00
Lemon CTN 165 Choice YELLOW TAIL	132	ctn.		.00
Lemon CTN 200 Choice YELLOW TAIL	48	ctn.		.00
Wildwood Pallets	8		8.75	70.00
Brokerage/commission on grower's fruit	195		-.50	-97.50
Packing Charges for non growers	226		4.25	960.50
INVOICE TOTAL:	421			2,818.70

Respondent paid Complainant \$70.00 for invoice number 13829. (AX 20-24, SRX 18).

6. On February 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13707</b>				
Lemon CTN 115 Fancy WILDWOOD	216	ctn.		.00
Lemon CTN 95 Fancy WILDWOOD	162	ctn.		.00
Lemon CTN 115 Fancy WILDWOOD	378	ctn.		.00
Lemon CTN 140 Fancy WILDWOOD	108	ctn.		.00

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Lemon CTN 165 Fancy WILDWOOD	162	ctn.		.00
Wildwood Pallets	19		8.75	166.25
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,526.75

6a. On the same date, Respondent issued invoice number 13707 billing this customer for a trucklot of lemons as follows:

162	CAL. LEMONS 95s FANCY	5.4415	881.52
594	CAL. LEMONS 115s FANCY	6.6915	3,974.75
108	CAL. LEMONS 140s FANCY	8.9415	965.68
162	CAL. LEMONS 165s FANCY	8.9415	1,448.52
1,026	FREIGHT CHARGE	0.5848	600.00
	***ORIGINALLY INVOICED FOR 8894.94. FILE WAS SHORTPAID BY 1024.44. WILL BE DISTRIBUTED OVER 1026 CTNS (.9985)		
			\$7,870.47

6b. Complainant subsequently prepared a revised invoice number 13707, billing Respondent for the lemons as follows:

<b>Invoice #: 13707</b>				
Lemon CTN 140 Fancy WILDWOOD	108	ctn.	10.25	1,107.00
Lemon CTN 165 Fancy WILDWOOD	63	ctn.	13.30	837.90
Lemon CTN 115 Fancy WILDWOOD	152	ctn.	10.90	1,656.80
Wildwood Pallets	19		8.75	166.25
Brokerage/commission for grower's fruit	323		-.50	-161.50
Packing Charges for Non growers	658		4.25	2,796.50
INVOICE TOTAL:	981			6,402.95

Respondent has not paid Complainant for invoice number 13707. (AX 25-30).

7. On February 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

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<b>Invoice #: 13709</b>				
Lemon CTN 140 Choice YELLOW TAIL	81	ctn.		.00
Packing Charges	81		4.25	344.25
INVOICE TOTAL:	81			344.25

7a. On the same date, Respondent issued invoice number 13709 billing its customer for a trucklot of lemons as follows:

81	CAL. LEMONS 140s CHOICE	8.00	648.00
			\$648.00

7b. Complainant subsequently prepared a revised invoice number 13709, billing Respondent for the lemons as follows:

<b>Invoice #: 13709</b>				
Lemon CTN 140 Choice YELLOW TAIL	81	ctn.	8.00	648.00
Brokerage/commission	81		-.50	-40.50
INVOICE TOTAL:	81			607.50

Respondent paid Complainant \$530.55 for invoice number 13709. (AX 31-34, SRX 18).

8. On February 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13710</b>				
Lemon CTN 200 Choice YELLOW TAIL	42	ctn.	8.75	367.50
Packing Charges	42		4.25	178.50
INVOICE TOTAL:	42			546.00

8a. On the same date, Respondent issued invoice number 13710 billing its customer for a trucklot of lemons as follows:

42	CAL. LEMONS 200s CHOICE	8.75	367.50
			\$367.50

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8b. Complainant subsequently prepared a revised invoice number 13710, billing Respondent for the lemons as follows:

<b>Invoice #: 13710</b>				
Lemon CTN 200 Choice YELLOW TAIL	42	ctn.	8.75	367.50
Brokerage/commission	42		-.50	-21.00
INVOICE TOTAL:	42			346.50

Respondent paid Complainant \$306.60 for invoice number 13710. (AX 35-39, SRX 18).

9. On February 7, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13713</b>				
Lemon CTN 140 Choice YELLOW TAIL	162	ctn.		.00
Packing Charges	162		4.25	688.50
INVOICE TOTAL:	162			688.50

9a. On the same date, Respondent issued invoice number 13713 billing its customer for a trucklot of lemons as follows:

162	CAL. LEMONS 140s CHOICE	8.50	1,377.00
			\$1,377.00

9b. Complainant subsequently prepared a revised invoice number 13713, billing Respondent for the lemons as follows:

<b>Invoice #: 13713</b>				
Lemon CTN 140 Choice YELLOW TAIL	162	ctn.	8.50	1,377.00
Brokerage/commission	162		-.50	-81.00
INVOICE TOTAL:	162			1,296.00

Respondent paid Complainant \$1,142.10 for invoice number 13713. (AX 40-43, SRX 18).

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10. On February 9, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13716</b>				
Lemon CTN 75 Fancy WILDWOOD	108	ctn.		.00
Lemon CTN 75 Choice YELLOW TAIL	54	ctn.		.00
Lemon CTN 95 Choice YELLOW TAIL	270	ctn.		.00
Lemon CTN 115 Choice YELLOW TAIL	324	ctn.		.00
Lemon CTN 140 Choice YELLOW TAIL	108	ctn.		.00
Lemon CTN 165 Fancy WILDWOOD	108	ctn.		.00
Lemon CTN 200 Fancy WILDWOOD	47	ctn.		.00
Cornerboards & straps	19		2.00	38.00
Packing Charges	1019		4.25	4,330.75
INVOICE TOTAL:	162			4,368.75

10a. On the same date, Respondent issued invoice number 13716 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 75s FANCY	17.00	1,836.00
54	CAL. LEMONS 75s CHOICE	8.00	432.00
270	CAL. LEMONS 95s CHOICE	8.00	2,160.00
324	CAL. LEMONS 115s CHOICE	9.00	2,916.00
108	CAL. LEMONS 140s CHOICE	11.25	1,215.00
108	CAL. LEMONS 165s FANCY	14.00	1,512.00
47	CAL. LEMONS 200s FANCY	13.00	611.00
1,019	STRAPS AND CORNERS	0.25	254.75
			\$10,936.75

10b. Complainant subsequently prepared a revised invoice number 13716, billing Respondent for the lemons as follows:

<b>Invoice #: 13716</b>				
Lemon CTN 75 Fancy WILDWOOD	108	ctn.		.00
Lemon CTN 75 Choice YELLOW TAIL	54	ctn.	9.09	490.86
Lemon CTN 95 Choice YELLOW TAIL	235	ctn.	9.09	2,136.15
Lemon CTN 115 Choice YELLOW TAIL	295	ctn.	10.09	2,976.55
Lemon CTN 140 Choice YELLOW TAIL	108	ctn.	12.33	1,331.64
Lemon CTN 165 Fancy WILDWOOD	108	ctn.	15.09	1,629.72

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Lemon CTN 200 Fancy WILDWOOD	47	ctn.	14.09	662.23
Lemon CTN 95 Choice YELLOW TAIL	35	ctn.		.00
Lemon CTN 115 Choice YELLOW TAIL	29	ctn.		.00
Cornerboards & straps	19		2.00	38.00
Brokerage/commission for grower's fruit	847		-.50	-423.50
Packing Charges for non growers	172		4.25	731.00
INVOICE TOTAL:	1019			9,572.65

Respondent paid Complainant \$7,999.30 for invoice number 13716.  
(AX 44-50, SRX 18).

11. On February 9, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

**Invoice #: 13717**

Lemon CTN 75 Fancy WILDWOOD	154	ctn.		.00
Lemon CTN 95 Fancy WILDWOOD	500	ctn.		.00
Lemon CTN 115 Fancy WILDWOOD	353	ctn.		.00
Lemon CTN 140 Fancy WILDWOOD	19	ctn.		.00
Wildwood Pallets	19		8.75	166.25
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,526.75

11a. On the same date, Respondent issued invoice number 13717 billing its customer for a trucklot of lemons as follows:

154	CAL. LEMONS 75s FANCY	7.25	1,116.50
500	CAL. LEMONS 95s FANCY	7.25	3,625.00
353	CAL. LEMONS 115s FANCY	7.25	2,559.25
19	CAL. LEMONS 140s FANCY	7.25	137.75
19	PALLETs	0.00	0.00
	***BUYER'S TRUCK DID NOT EXCHANGE PALLETs***		
	FILE SHORT PAID FOR PALLETs. (19*8.75)		
			\$7,438.50

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11b. Complainant subsequently prepared a revised invoice number 13717, billing Respondent for the lemons as follows:

<b>Invoice #: 13717</b>				
Lemon CTN 75 Fancy WILDWOOD	105	ctn.	10.30	1,081.50
Lemon CTN 95 Fancy WILDWOOD	384	ctn.	8.70	3,340.80
Lemon CTN 115 Fancy WILDWOOD	353	ctn.	10.90	3,847.70
Lemon CTN 140 Fancy WILDWOOD	19	ctn.	10.25	194.75
Lemon CTN 75 Fancy WILDWOOD	49	ctn.		.00
Lemon CTN 95 Fancy WILDWOOD	116	ctn.		.00
Wildwood Pallets	1026		.15	153.90
Brokerage/commission	861		-.50	-430.50
Packing Charges for non grower fruit	165		4.25	701.25
INVOICE TOTAL:	1026			8,889.40

Respondent paid Complainant \$5,861.30 for invoice number 13717. (AX 51-57, SRX 18).

12. On February 9, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13718</b>				
Lemon CTN 75 Choice YELLOW TAIL	54	ctn.		.00
Lemon CTN 95 Choice YELLOW TAIL	108	ctn.		.00
Lemon CTN 115 Choice YELLOW TAIL	324	ctn.		.00
Lemon CTN 140 Fancy WILDWOOD	216	ctn.		.00
Lemon CTN 140 Choice YELLOW TAIL	324	ctn.		.00
Wildwood Pallets	19		8.75	166.25
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,526.75

12a. On the same date, Respondent issued invoice number 13718 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 75s CHOICE	4.5163	243.88
108	CAL. LEMONS 95s CHOICE	6.5163	703.76
324	CAL. LEMONS 115s CHOICE	6.5163	2,111.28
216	CAL. LEMONS 140s FANCY	6.5163	1,407.52
324	CAL. LEMONS 140s CHOICE	6.5163	2,111.28
1,026	FREIGHT CHARGE	0.5848	600.00

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19	PALLETS	8.75	166.25
	***PALLETS WERE NOT EXCHANGED***		
	ORIGINAL INVOICE AMOUNT IS 8271.17. FILE SHORT PAID 927.17...DISTRIBUTED OVER 1026 CTNS (.9037 P/CTN)		
			\$7,343.97

12b. Complainant subsequently prepared a revised invoice number 13718, billing Respondent for the lemons as follows:

<b>Invoice #: 13718</b>				
Lemon CTN 75 Choice YELLOW TAIL	54	ctn.		.00
Lemon CTN 95 Choice YELLOW TAIL	108	ctn.	7.50	810.00
Lemon CTN 115 Choice YELLOW TAIL	324	ctn.	8.20	2,656.80
Lemon CTN 140 Fancy WILDWOOD	216	ctn.	10.25	2,214.00
Lemon CTN 140 Choice YELLOW TAIL	324	ctn.	9.10	2,948.40
Wildwood Pallets	1026		.15	153.90
Brokerage/commission for grower fruit	972		-.50	-486.00
Packing Charges for non grower fruit	54		4.25	229.50
INVOICE TOTAL:	1026			8,526.60

Respondent paid Complainant \$6,198.59 for invoice number 13718. (AX 58-61, SRX 18).

13. On February 9, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13719</b>				
Lemon CTN 165 Choice YELLOW TAIL	270	ctn.		.00
Packing Charges	270		4.25	1,147.50
INVOICE TOTAL:	270			1,147.50

13a. On the same date, Respondent issued invoice number 13719 billing its customer for a trucklot of lemons as follows:

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270	CAL. LEMONS 165s CHOICE	9.00	2,430.00
			\$2,430.00

13b. Complainant subsequently prepared a revised invoice number 13719, billing Respondent for the lemons as follows:

<b>Invoice #: 13719</b>				
Lemon CTN 165 Choice YELLOW TAIL	270	ctn.	9.00	2,430.00
Brokerage/commission	270		-.50	-135.00
INVOICE TOTAL:	270			2,295.00

Respondent paid Complainant \$2,038.50 for invoice number 13719. (AX 62-65, SRX 18).

14. On February 9, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13960</b>				
Lemon CTN 165 Choice YELLOW TAIL	108	ctn.		.00
Lemon CTN 200 Choice YELLOW TAIL	108	ctn.		.00
Packing Charges	216		4.25	918.00
INVOICE TOTAL:	216			918.00

14a. On the same date, Respondent issued invoice number 13960 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 165s CHOICE	12.00	1,296.00
108	CAL. LEMONS 200s CHOICE	12.00	1,296.00
			\$2,592.00

14b. Complainant subsequently prepared a revised invoice number 13960, billing Respondent for the lemons as follows:

<b>Invoice #: 13960</b>				
Lemon CTN 115 Choice YELLOW TAIL	108	ctn.	9.90	1,069.20
Lemon CTN 140 Choice YELLOW TAIL	108	ctn.	9.90	1,069.20

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Brokerage/commission	216		-.50	-108.00
Pallet Exchange				.00
INVOICE TOTAL:	216			2,030.40

Respondent paid Complainant \$2,278.80 for invoice number 13960.  
(AX 66-69, SRX 18).

15. On February 10, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13840</b>				
Lemon CTN 115 Choice YELLOW TAIL	261	ctn.		.00
Lemon CTN 140 Choice YELLOW TAIL	608	ctn.		.00
Lemon CTN 165 Choice YELLOW TAIL	157	ctn.		.00
Wildwood Pallets	19		8.75	166.25
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,526.75

15a. On the same date, Respondent issued invoice number 13840 billing its customer for a trucklot of lemons as follows:

261	CAL. LEMONS 115s CHOICE	6.00	1,296.00
608	CAL. LEMONS 140s CHOICE	6.00	1,296.00
157	CAL. LEMONS 165s CHOICE	6.00	1,296.00
			\$6,156.00

15b. Complainant subsequently prepared a revised invoice number 13840, billing Respondent for the lemons as follows:

<b>Invoice #: 13840</b>				
Lemon CTN 115 Choice YELLOW TAIL	261	ctn.	8.20	2,140.20
Lemon CTN 140 Choice YELLOW TAIL	608	ctn.	9.10	5,532.80
Lemon CTN 165 Choice YELLOW TAIL	157	ctn.	9.90	1,554.30
Wildwood Pallets	1026		.15	153.90
Brokerage/commission	1026		-.50	-513.00

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INVOICE TOTAL: | 1026 | | 8,868.20

Respondent paid Complainant \$5,296.25 for invoice number 13840. (AX 70-73, SRX 18).

16. On February 13, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13842</b>				
Lemon CTN 95 Fancy WILDWOOD	108	ctn.		.00
Lemon CTN 115 Fancy WILDWOOD	432	ctn.		.00
Lemon CTN 140 Fancy WILDWOOD	432	ctn.		.00
Lemon CTN 165 Fancy WILDWOOD	54	ctn.		.00
Wildwood Pallets	19		8.75	166.25
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,526.75

16a. On the same date, Respondent issued invoice number 13842 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 95s FANCY	7.2047	778.11
432	CAL. LEMONS 115s FANCY	7.2047	3,112.43
432	CAL. LEMONS 140s FANCY	7.2047	3,112.43
54	CAL. LEMONS 165s FANCY	7.2047	389.05
1,026	FREIGHT CHARGE	0.5848	600.00
1	FREIGHT CHARGE	-0.02	-0.02
	ORIGINAL INVOICE AMOUNT		8212.92.
	SHORTPAID 220.92 OVER 1026 CTNS (.2153)		
			\$7,992.00

16b. Complainant subsequently prepared a revised invoice number 13842, billing Respondent for the lemons as follows:

<b>Invoice #: 13842</b>				
Lemon CTN 95 Fancy WILDWOOD	108	ctn.	8.70	939.60
Lemon CTN 115 Fancy WILDWOOD	432	ctn.	10.90	4,708.80
Lemon CTN 140 Fancy WILDWOOD	432	ctn.	10.25	4,428.00
Lemon CTN 165 Fancy WILDWOOD	54	ctn.	13.30	718.20

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Wildwood Pallets	1026		.15	153.90
Brokerage/commission	1026		-.50	-513.00
INVOICE TOTAL:	1026			10,435.50

Respondent paid Complainant \$6,291.47 for invoice number 13842.  
(AX 74-77, SRX 18).

17. On February 13, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13965</b>				
Lemon CTN 115 Choice YELLOW TAIL	108	ctn.		.00
Wildwood Pallets	2		8.75	17.50
Packing Charges	108		4.25	459.00
INVOICE TOTAL:	108			476.50

17a. On the same date, Respondent issued invoice number 13965 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 115s CHOICE	7.00	756.00
2	PALLETS	8.75	17.50
			\$773.50

17b. Complainant subsequently prepared a revised invoice number 13965, billing Respondent for the lemons as follows:

<b>Invoice #: 13965</b>				
Lemon CTN 115 Choice YELLOW TAIL	108	ctn.	8.20	885.60
Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			847.80

Respondent paid Complainant \$616.90 for invoice number 13965. (AX 78-81, SRX 18).

18. On February 13, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at

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which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13966</b>				
Lemon CTN 165 Choice YELLOW TAIL	270	ctn.		.00
Wildwood Pallets	5		8.75	43.75
Packing Charges	270		4.25	1,147.50
INVOICE TOTAL:	270			1,191.25

18a. On the same date, Respondent issued invoice number 13966 billing its customer for a trucklot of lemons as follows:

270	CAL. LEMONS 165s CHOICE	11.50	3,105.00
5	PALLETS	8.75	43.75
			\$3,148.75

18b. Complainant subsequently prepared a revised invoice number 13966, billing Respondent for the lemons as follows:

<b>Invoice #: 13966</b>				
Lemon CTN 165 Choice YELLOW TAIL	270	ctn.	11.66	3,148.20
Wildwood Pallets	270		.15	40.50
Brokerage/commission	270		-.50	-135.00
INVOICE TOTAL:	270			3,053.70

Respondent paid Complainant \$2,757.25 for invoice number 13966. (AX 82-85, SRX 18).

19. On February 14, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13844</b>				
Lemon CTN 115 Choice YELLOW TAIL	1026	ctn.		.00
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,360.50

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19a. On the same date, Respondent issued invoice number 13844 billing its customer for a trucklot of lemons as follows:

1,026	CAL. LEMONS 115s CHOICE	2.75	2,821.50
			\$2,821.50

19b. Complainant subsequently prepared a revised invoice number 13844, billing Respondent for the lemons as follows:

<b>Invoice #: 13844</b>				
Lemon CTN 115 Choice YELLOW TAIL	1026	ctn.	8.20	8,413.20
Brokerage/commission	1026		-.50	-513.00
Pallet Exchange				.00
INVOICE TOTAL:	1026			7900.20

Respondent paid Complainant \$1,333.80 for invoice number 13844. (AX 86-90, SRX 18).

20. On February 14, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13845</b>				
Lemon CTN 75 Choice YELLOW TAIL	108	ctn.		.00
Lemon CTN 95 Choice YELLOW TAIL	162	ctn.		.00
Lemon CTN 140 Choice YELLOW TAIL	540	ctn.		.00
Lemon CTN 165 Choice YELLOW TAIL	216	ctn.		.00
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,360.50

20a. On the same date, Respondent issued invoice number 13845 billing its customer for a trucklot of lemons as follows:

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108	CAL. LEMONS 75s CHOICE	4.5163	243.88
162	CAL. LEMONS 95s CHOICE	6.5163	703.76
540	CAL. LEMONS 140s CHOICE	6.5163	2,111.28
216	CAL. LEMONS 165s CHOICE	6.5163	2,111.28
	***FRUIT ARRIVED WITH PROBLEMS... WILL WORK OPEN		
			\$2,971.08

20b. Complainant subsequently prepared a revised invoice number 13845, billing Respondent for the lemons as follows:

<b>Invoice #: 13845</b>				
Lemon CTN 75 Choice YELLOW TAIL	108	ctn.	8.20	885.60
Lemon CTN 95 Choice YELLOW TAIL	162	ctn.	7.50	1,215.00
Lemon CTN 140 Choice YELLOW TAIL	540	ctn.	9.10	4,914.00
Lemon CTN 165 Choice YELLOW TAIL	216	ctn.	9.90	2,138.40
Brokerage/commission	1026		-.50	-513.00
Pallet Exchange				.00
INVOICE TOTAL:	1026			8,640.00

Respondent paid Complainant \$1,468.80 for invoice number 13845. (AX 91-95, SRX 18).

21. On February 14, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13847</b>				
Lemon CTN 235 Fancy WILDWOOD	3	ctn.		.00
Packing Charges	3		4.25	12.75
INVOICE TOTAL:	3			12.75

21a. On the same date, Respondent issued invoice number 13847 billing its customer for a trucklot of lemons as follows:

3	CAL. LEMONS 235s FANCY	10.25	30.75
			\$30.75

21b. Complainant subsequently prepared a revised invoice number 13847, billing Respondent for the lemons as follows:

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<b>Invoice #: 13847</b>				
Lemon CTN 235 Fancy WILDWOOD	3	ctn.	10.25	30.75
Brokerage/commission	3		-.50	-1.50
INVOICE TOTAL:	3			29.25

Respondent paid Complainant \$26.40 for invoice number 13847. (AX 96-99, SRX 18).

22. On February 14, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13970</b>				
Lemon CTN 200 Choice YELLOW TAIL	248	ctn.		.00
Wildwood Pallets	5		8.75	43.75
Packing Charges	248		4.25	1,054.00
INVOICE TOTAL:	248			1,097.75

22a. On the same date, Respondent issued invoice number 13970 billing its customer for a trucklot of lemons as follows:

248	CAL. LEMONS 200s CHOICE	11.00	2,728.00
5	PALLETS	8.75	43.75
	***FRUIT ARRIVED WITH PROBLEMS... WORKING OPEN		
			\$2,771.75

22b. Complainant subsequently prepared a revised invoice number 13970, billing Respondent for the lemons as follows:

<b>Invoice #: 13970</b>				
Lemon CTN 200 Choice YELLOW TAIL	248	ctn.	9.90	2,455.20
Wildwood Pallets	248		.15	37.20
Brokerage/commission	248		-.50	-124.00
INVOICE TOTAL:	248			2,368.40

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Respondent paid Complainant \$1,246.55 for invoice number 13970. (AX 100-107, SRX 18).

23. On February 15, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13848</b>				
Lemon CTN 75 Fancy WILDWOOD	29	ctn.		.00
Lemon CTN 95 Fancy WILDWOOD	405	ctn.		.00
Lemon CTN 115 Fancy WILDWOOD	254	ctn.		.00
Lemon CTN 140 Fancy WILDWOOD	284	ctn.		.00
Lemon CTN 165 Fancy WILDWOOD	54	ctn.		.00
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,360.50

23a. On the same date, Respondent issued invoice number 13848 billing its customer for a trucklot of lemons as follows:

29	CAL. LEMONS 75s FANCY	5.9013	171.14
405	CAL. LEMONS 95s FANCY	6.1513	2,491.28
254	CAL. LEMONS 115s FANCY	6.9013	1,752.93
284	CAL. LEMONS 140s FANCY	7.4013	2,101.97
54	CAL. LEMONS 165s FANCY	10.4013	561.67
	ORIGINAL INVOICE AMOUNT		
	7180.25.		
	SHORT 101.25 OVER 1026 (.0987)		
			\$7,078.99

23b. Complainant subsequently prepared a revised invoice number 13848, billing Respondent for the lemons as follows:

<b>Invoice #: 13848</b>				
Lemon CTN 75 Fancy WILDWOOD	29	ctn.	10.30	298.70
Lemon CTN 95 Fancy WILDWOOD	405	ctn.	8.70	3,523.50
Lemon CTN 115 Fancy WILDWOOD	254	ctn.	10.90	2,768.60
Lemon CTN 140 Fancy WILDWOOD	279	ctn.	10.25	2,859.75
Lemon CTN 165 Fancy WILDWOOD	54	ctn.	13.30	718.20
Lemon CTN 140 Fancy WILDWOOD	5	ctn.		.00
Brokerage/commission	1021		-.50	-510.50
Packing Charges for non grower fruit	5		4.25	21.25

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Pallet Exchange				.00
INVOICE TOTAL:	1026			9,679.50

Respondent paid Complainant \$5,692.55 for invoice number 13848.  
(AX 108-111, SRX 18).

24. On February 16, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13967</b>				
Lemon CTN 165 Choice YELLOW TAIL	108	ctn.		.00
Wildwood Pallets	2		8.75	17.50
Packing Charges	108		4.25	459.00
INVOICE TOTAL:	108			476.50

24a. On the same date, Respondent issued invoice number 13967 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 165s CHOICE	11.50		1,242.00
2	PALLETs	8.75		17.50
				\$1,259.50

24b. Complainant subsequently prepared a revised invoice number 13967, billing Respondent for the lemons as follows:

<b>Invoice #: 13967</b>				
Lemon CTN 165 Choice YELLOW TAIL	108	ctn.	9.90	1,069.20
Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			1,031.40

Respondent paid Complainant \$1,205.50 for invoice number 13967.  
(AX 112-115, SRX 18).

25. On February 16, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at

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which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13968</b>				
Lemon CTN 165 Choice YELLOW TAIL	118	ctn.		.00
Wildwood Pallets	2		8.75	17.50
Packing Charges	118		4.25	501.50
INVOICE TOTAL:	118			519.00

25a. On the same date, Respondent issued invoice number 13968 billing its customer for a trucklot of lemons as follows:

118	CAL. LEMONS 165s CHOICE	11.50	1,357.00
2	PALLETS	8.75	17.50
			\$1,374.50

25b. Complainant subsequently prepared a revised invoice number 13968, billing Respondent for the lemons as follows:

<b>Invoice #: 13968</b>				
Lemon CTN 165 Choice YELLOW TAIL	118	ctn.	9.90	1,168.20
Wildwood Pallets	118		.15	17.70
Brokerage/commission	118		-.50	-59.00
INVOICE TOTAL:	118			1,126.90

Respondent paid Complainant \$1,315.50 for invoice number 13968. (AX 116-119, SRX 18).

26. On February 16, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13977</b>				
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.		.00
Lemon CTN 140 Choice YELLOW TAIL	162	ctn.		.00
Wildwood Pallets	6		8.75	52.50
Packing Charges	324		4.25	1,377.00
INVOICE TOTAL:	324			1,429.50

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26a. On the same date, Respondent issued invoice number 13977 billing its customer for a trucklot of lemons as follows:

162	CAL. LEMONS 115s CHOICE	7.00	1,134.00
162	CAL. LEMONS 140s CHOICE	8.00	1,296.00
6	PALLETS	8.75	52.50
			\$2,482.50

26b. Complainant subsequently prepared a revised invoice number 13977, billing Respondent for the lemons as follows:

<b>Invoice #: 13977</b>				
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.	8.20	1,328.40
Lemon CTN 140 Choice YELLOW TAIL	162	ctn.	9.10	1,474.20
Wildwood Pallets	324		.15	48.60
Brokerage/commission	324		-.50	-162.00
INVOICE TOTAL:	324			2,689.20

Respondent paid Complainant \$2,012.70 for invoice number 13977. (AX 120-123, SRX 18).

27. On February 17, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13849</b>				
Lemon CTN 165 Fancy WILDWOOD	108	ctn.		.00
Lemon CTN 165 Choice YELLOW TAIL	216	ctn.		.00
Packing Charges	324		4.25	1,377.00
INVOICE TOTAL:	324			1,377.00

27a. On the same date, Respondent issued invoice number 13849 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 165s FANCY	12.00	1,296.00
216	CAL. LEMONS 165s CHOICE	9.25	1,998.00

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	\$3,294.00
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27b. Complainant subsequently prepared a revised invoice number 13849, billing Respondent for the lemons as follows:

<b>Invoice #: 13849</b>				
Lemon CTN 165 Fancy WILDWOOD	108	ctn.	12.00	1,296.00
Lemon CTN 165 Choice YELLOW TAIL	216	ctn.	9.25	1,998.00
Brokerage/commission	324		-.50	-162.00
INVOICE TOTAL:	324			3,132.00

Respondent paid Complainant \$2,824.20 for invoice number 13849. (AX 124-127, SRX 18).

28. On February 17, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13850</b>				
Lemon CTN 140 Choice YELLOW TAIL	594	ctn.		.00
Wildwood Pallets	11		8.75	96.25
Packing Charges	594		4.25	2,524.50
INVOICE TOTAL:	594			2,620.75

28a. On the same date, Respondent issued invoice number 13850 billing its customer for a trucklot of lemons as follows:

594	CAL. LEMONS 140s CHOICE	6.00	3,564.00
11	PALLETS	8.75	96.25
			\$3,660.25

28b. Complainant subsequently prepared a revised invoice number 13850, billing Respondent for the lemons as follows:

<b>Invoice #: 13850</b>				
Lemon CTN 140 Choice YELLOW TAIL	594	ctn.	9.10	5,405.40
Wildwood Pallets	594		.15	89.10
Brokerage/commission	594		-.50	-297.00
INVOICE TOTAL:	594			5,197.50

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Respondent paid Complainant \$2,798.95 for invoice number 13850. (AX 128-130, Formal Complaint Exhibit "FX" 1, SRX 18).

29. On February 17, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13855</b>				
Lemon CTN 115 Fancy WILDWOOD	108	ctn.		.00
Packing Charges	108		4.25	459.00
INVOICE TOTAL:	108			459.00

29a. On the same date, Respondent issued invoice number 13855 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 115s FANCY	10.00	1,080.00
			\$1,080.00

29b. Complainant subsequently prepared a revised invoice number 13855, billing Respondent for the lemons as follows:

<b>Invoice #: 13855</b>				
Lemon CTN 115 Fancy WILDWOOD	108	ctn.	10.00	1,080.00
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			1,026.00

Respondent paid Complainant \$923.40 for invoice number 13855. (AX 131-134, SRX 18).

30. On February 17, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13979</b>				
Lemon CTN 140 Choice YELLOW TAIL	216	ctn.		.00
Wildwood Pallets	4		8.75	35.00
Packing Charges	216		4.25	918.00

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INVOICE TOTAL: | 216 | | 953.00

30a. On the same date, Respondent issued invoice number 13979 billing its customer for a trucklot of lemons as follows:

216	CAL. LEMONS 140s CHOICE	9.00	1,944.00
4	PALLETS	8.75	35.00
			\$1,979.00

30b. Complainant subsequently prepared a revised invoice number 13979, billing Respondent for the lemons as follows:

<b>Invoice #: 13979</b>				
Lemon CTN 140 Choice YELLOW TAIL	216	ctn.	9.10	1,965.60
Wildwood Pallets	216		.15	32.40
Brokerage/commission	216		-.50	-108.00
INVOICE TOTAL:	216			1,890.00

Respondent paid Complainant \$1,665.80 for invoice number 13979. (AX 135-138, SRX 18).

31. On February 18, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13854</b>				
Lemon CTN 95 Fancy WILDWOOD	108	ctn.		.00
Lemon CTN 115 Fancy WILDWOOD	255	ctn.		.00
Lemon CTN 140 Fancy WILDWOOD	127	ctn.		.00
Lemon CTN 165 Fancy WILDWOOD	54	ctn.		.00
Wildwood Pallets	10		8.75	87.50
Packing Charges	544		4.25	2,312.00
INVOICE TOTAL:	544			2,399.50

31a. On the same date, Respondent issued invoice number 13854 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 95s FANCY	6.25	675.00
255	CAL. LEMONS 115s FANCY	7.00	1,785.00
127	CAL. LEMONS 140s FANCY	7.50	952.50
54	CAL. LEMONS 165s FANCY	10.50	567.00

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10	PALLETS	8.75	87.50
	***PALLETS WERE NOT EXCHANGED***		
			\$4,067.00

31b. Complainant subsequently prepared a revised invoice number 13854, billing Respondent for the lemons as follows:

<b>Invoice #: 13854</b>				
Lemon CTN 95 Fancy WILDWOOD	108	ctn.	8.70	939.60
Lemon CTN 115 Fancy WILDWOOD	255	ctn.	10.90	2,779.50
Lemon CTN 140 Fancy WILDWOOD	127	ctn.	10.25	1,301.75
Lemon CTN 165 Fancy WILDWOOD	54	ctn.	13.30	718.20
Wildwood Pallets	544		.15	81.60
Brokerage/commission	544		-.50	-272.00
INVOICE TOTAL:	544			5,548.65

Respondent paid Complainant \$3,278.20 for invoice number 13854. (AX 139-142, SRX 18).

32. On February 18, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13980</b>				
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.		.00
Lemon CTN 140 Choice YELLOW TAIL	162	ctn.		.00
Wildwood Pallets	6		8.75	52.50
Packing Charges	324		4.25	1,377.00
INVOICE TOTAL:	324			1,429.50

32a. On the same date, Respondent issued invoice number 13980 billing its customer for a trucklot of lemons as follows:

162	CAL. LEMONS 115s CHOICE	7.00	1,134.00
162	CAL. LEMONS 140s CHOICE	8.00	1,296.00

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6	PALLETS	8.75	52.50
			\$2,482.50

32b. Complainant subsequently prepared a revised invoice number 13980, billing Respondent for the lemons as follows:

<b>Invoice #: 13980</b>				
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.	8.20	1,328.40
Lemon CTN 140 Choice YELLOW TAIL	162	ctn.	9.10	1,474.20
Wildwood Pallets	324		.15	48.60
Brokerage/commission	324		-.50	-162.00
INVOICE TOTAL:	324			2,689.20

Respondent paid Complainant \$2,012.70 for invoice number 13980. (AX 143-146, SRX 18).

33. On February 20, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13857</b>				
Lemon CTN 235 Choice YELLOW TAIL	57	ctn.		.00
Packing Charges	57		4.25	242.25
INVOICE TOTAL:	57			242.25

33a. On the same date, Respondent issued invoice number 13857 billing its customer for a trucklot of lemons as follows:

57	CAL. LEMONS 235s CHOICE	9.00	513.00
			\$513.00

33b. Complainant subsequently prepared a revised invoice number 13857, billing Respondent for the lemons as follows:

<b>Invoice #: 13857</b>				
Lemon CTN 140 Choice YELLOW TAIL	25	ctn.	9.00	225.00
Lemon CTN 140 Choice YELLOW TAIL	32	ctn.		.00
Brokerage/commission on grower fruit	25		-.50	-12.50
Packing Charges for non grower fruit	32		4.25	136.00

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INVOICE TOTAL: | 57 | | 348.50

Respondent paid Complainant \$430.35 for invoice number 13857. (AX 147-150, SRX 18).

34. On February 20, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13983</b>				
Lemon CTN 95 Choice YELLOW TAIL	108	ctn.		.00
Lemon CTN 115 Choice YELLOW TAIL	216	ctn.		.00
Wildwood Pallets	6		8.75	52.50
Packing Charges	324		4.25	1,263.60
INVOICE TOTAL:	324			1,316.10

34a. On the same date, Respondent issued invoice number 13983 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 95s CHOICE	6.00	648.00
216	CAL. LEMONS 115s CHOICE	6.00	1,296.00
6	PALLETS	8.75	52.50
			\$1,996.50

34b. Complainant subsequently prepared a revised invoice number 13983, billing Respondent for the lemons as follows:

<b>Invoice #: 13983</b>				
Lemon CTN 95 Choice YELLOW TAIL	108	ctn.	7.50	810.00
Lemon CTN 115 Choice YELLOW TAIL	216	ctn.	8.20	1,771.20
Wildwood Pallets	324		.15	48.60
Brokerage/commission	324		-.50	-162.00
INVOICE TOTAL:	324			2,467.80

Respondent paid Complainant \$1,413.30 for invoice number 13983. (AX 151-154, SRX 18).

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35. On February 20, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13984</b>				
Lemon CTN 165 Choice YELLOW TAIL	216	ctn.		.00
Wildwood Pallets	4		8.75	35.00
Packing Charges	216		4.25	918.00
INVOICE TOTAL:	216			953.00

35a. On the same date, Respondent issued invoice number 13984 billing its customer for a trucklot of lemons as follows:

216	CAL. LEMONS 165s CHOICE	11.00	2,376.00
4	PALLETS	8.75	35.00
			\$2,411.00

35b. Complainant subsequently prepared a revised invoice number 13984, billing Respondent for the lemons as follows:

<b>Invoice #: 13984</b>				
Lemon CTN 165 Choice YELLOW TAIL	216	ctn.	9.90	2,138.40
Wildwood Pallets	216		.15	32.40
Brokerage/commission	216		-.50	-108.00
INVOICE TOTAL:	216			2,062.80

Respondent paid Complainant \$2,097.80 for invoice number 13984. (AX 155-158, SRX 18).

36. On February 20, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13985</b>				
Lemon CTN 235 Choice YELLOW TAIL	54	ctn.		.00
Wildwood Pallets	1		8.75	8.75
Packing Charges	54		4.25	229.50
INVOICE TOTAL:	54			238.25

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36a. On the same date, Respondent issued invoice number 13985 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 235s CHOICE	10.00	540.00
1	PALLETS	8.75	8.75
			\$548.75

36b. Complainant subsequently prepared a revised invoice number 13985, billing Respondent for the lemons as follows:

<b>Invoice #: 13985</b>				
Lemon CTN 235 Choice YELLOW TAIL	54	ctn.	9.10	491.40
Wildwood Pallets	54		.15	8.10
Brokerage/commission	54		-.50	-27.00
INVOICE TOTAL:	54			472.50

Respondent paid Complainant \$470.45 for invoice number 13985. (AX 159-162, SRX 18).

37. On February 21, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13982</b>				
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.		.00
Wildwood Pallets	3		8.75	26.25
Packing Charges	162		4.25	688.50
INVOICE TOTAL:	162			714.75

37a. On the same date, Respondent issued invoice number 13982 billing its customer for a trucklot of lemons as follows:

162	CAL. LEMONS 115s CHOICE	6.00	972.00
3	PALLETS	8.75	26.25
			\$998.25

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37b. Complainant subsequently prepared a revised invoice number 13982, billing Respondent for the lemons as follows:

<b>Invoice #: 13982</b>				
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.	8.20	1,328.40
Wildwood Pallets	162		.15	24.30
Brokerage/commission	162		-.50	-81.00
INVOICE TOTAL:	162			1,271.70

Respondent paid Complainant \$763.35 for invoice number 13982. (AX 163-166, SRX 18).

38. On February 23, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13859</b>				
Lemon CTN 95 Fancy WILDWOOD	108	ctn.		.00
Lemon CTN 115 Fancy WILDWOOD	421	ctn.		.00
Lemon CTN 140 Fancy WILDWOOD	232	ctn.		.00
Lemon CTN 165 Fancy WILDWOOD	84	ctn.		.00
Wildwood Pallets	16		8.75	140.00
Packing Charges	845		4.25	3,591.25
INVOICE TOTAL:	845			3,731.25

38a. On the same date, Respondent issued invoice number 13859 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 95s FANCY	5.9754	645.34
421	CAL. LEMONS 115s FANCY	6.2254	2,620.89
232	CAL. LEMONS 140s FANCY	9.2254	2,140.29
84	CAL. LEMONS 165s FANCY	10.7254	900.93
16	PALLETS	8.75	140.00
	**TRUCK DID NOT EXCHANGE PALLETS**		
	ORIGINALLY INVOICE 6679.5. SHORT OVER 845 CTNS (.2746 P/CTN)		
			\$6,447.45

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38b. Complainant subsequently prepared a revised invoice number 13859, billing Respondent for the lemons as follows:

<b>Invoice #: 13859</b>				
Lemon CTN 95 Fancy WILDWOOD	108	ctn.	8.70	939.60
Lemon CTN 115 Fancy WILDWOOD	421	ctn.	10.90	4,588.90
Lemon CTN 140 Fancy WILDWOOD	232	ctn.	10.25	2,378.00
Lemon CTN 165 Fancy WILDWOOD	84	ctn.	13.30	1,117.20
Wildwood Pallets	845		.15	126.75
Brokerage/commission	845		-.50	-422.50
<b>INVOICE TOTAL:</b>	<b>845</b>			<b>8,727.95</b>

Respondent paid Complainant \$5,454.25 for invoice number 13859. (AX 167-170, SRX 18).

39. On February 24, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13860</b>				
Lemon CTN 140 Choice YELLOW TAIL	409	ctn.		.00
Lemon CTN 165 Choice YELLOW TAIL	73	ctn.		.00
Wildwood Pallets	9		8.75	78.75
Packing Charges	482		4.25	2,048.50
<b>INVOICE TOTAL:</b>	<b>482</b>			<b>2,127.25</b>

39a. On the same date, Respondent issued invoice number 13860 billing its customer for a trucklot of lemons as follows:

409	CAL. LEMONS 140s CHOICE	6.00	2,454.00
73	CAL. LEMONS 165s CHOICE	6.00	438.00
			\$2,892.00

39b. Complainant subsequently prepared a revised invoice number 13860, billing Respondent for the lemons as follows:

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<b>Invoice #: 13860</b>				
Lemon CTN 140 Choice YELLOW TAIL	409	ctn.	9.10	3,721.90
Lemon CTN 165 Choice YELLOW TAIL	73	ctn.	9.90	722.70
Wildwood Pallets	482		.15	72.30
Brokerage/commission	482		-.50	-241.00
INVOICE TOTAL:	482			4,275.90

Respondent paid Complainant \$2,271.85 for invoice number 13860. (AX 171-174, SRX 18).

40. On February 25, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13856</b>				
Lemon CTN 115 Choice YELLOW TAIL	972	ctn.		.00
Wildwood Pallets	18		8.75	157.50
Packing Charges	972		4.25	4,131.00
INVOICE TOTAL:	972			4,288.50

40a. On the same date, Respondent issued invoice number 13856 billing its customer for a trucklot of lemons as follows:

972	CAL. LEMONS 115s CHOICE	6.00	5,382.00
18	PALLETS	8.75	157.52
-972	CREDIT FOR DAMAGED CARTONS	0.50	-486.00
	***CUT ONE PALLET FOR WEIGHT***		
			\$5,503.50

40b. Complainant subsequently prepared a revised invoice number 13856, billing Respondent for the lemons as follows:

<b>Invoice #: 13856</b>				
Lemon CTN 115 Choice YELLOW TAIL	972	ctn.	8.20	7,970.40
Wildwood Pallets	972		.15	145.80
Brokerage/commission	972		-.50	-486.00
INVOICE TOTAL:	972			7,630.20

Respondent paid Complainant \$4,580.10 for invoice number 13856. (AX 175-178, SRX 18).

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41. On February 27, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13991</b>				
Lemon CTN 95 Choice YELLOW TAIL	270	ctn.		.00
Wildwood Pallets	5		8.75	43.75
Packing Charges	270		4.25	1,147.50
INVOICE TOTAL:	270			1,191.25

41a. On the same date, Respondent issued invoice number 13991 billing its customer for a trucklot of lemons as follows:

270	CAL. LEMONS 95s CHOICE	5.00	1,350.00
5	PALLETS	8.75	43.75
			\$1,393.75

41b. Complainant subsequently prepared a revised invoice number 13991, billing Respondent for the lemons as follows:

<b>Invoice #: 13991</b>				
Lemon CTN 95 Choice YELLOW TAIL	270	ctn.	7.50	2,025.00
Wildwood Pallets	270		.15	40.50
Brokerage/commission	270		-.50	-135.00
INVOICE TOTAL:	270			1,930.50

Respondent paid Complainant \$1,326.25 for invoice number 13991. (AX 179-182, SRX 18).

42. On February 27, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13992</b>				
Lemon CTN 95 Choice YELLOW TAIL	162	ctn.		.00
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.		.00

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Wildwood Pallets	6		8.75	52.50
Packing Charges	324		4.25	1,377.00
INVOICE TOTAL:	324			1,429.50

42a. On the same date, Respondent issued invoice number 13992 billing its customer for a trucklot of lemons as follows:

162	CAL. LEMONS 95s CHOICE	3.2065	2,454.00
162	CAL. LEMONS 115s CHOICE	3.2065	438.00
			\$1,038.90

42b. Complainant subsequently prepared a revised invoice number 13992, billing Respondent for the lemons as follows:

<b>Invoice #: 13992</b>				
Lemon CTN 95 Choice YELLOW TAIL	108	ctn.	7.50	810.00
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.	8.20	1,328.40
Lemon CTN 95 Choice YELLOW TAIL	54	ctn.		.00
Wildwood Pallets	324		.15	48.60
Brokerage/commission	270		-.50	-135.00
Packing Charges for non grower fruit	54		4.25	229.50
INVOICE TOTAL:	324			2,281.50

Respondent paid Complainant \$530.95 for invoice number 13992. (AX 183-189, SRX 18).

43. On February 28, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13866</b>				
Lemon CTN 95 Fancy WILDWOOD	108	ctn.		.00
Lemon CTN 115 Fancy WILDWOOD	185	ctn.		.00
Lemon CTN 140 Fancy WILDWOOD	72	ctn.		.00
Lemon CTN 115 Choice YELLOW TAIL	108	ctn.		.00
Wildwood Pallets	12		8.75	105.00
Packing Charges	473		4.25	2,010.25
INVOICE TOTAL:	473			2,115.25

43a. On the same date, Respondent issued invoice number 13866 billing its customer for a trucklot of lemons as follows:

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108	CAL. LEMONS 95s FANCY	6.50	702.00
324	CAL. LEMONS 115s FANCY	7.75	2,511.00
108	CAL. LEMONS 140s FANCY	10.00	1,080.00
108	CAL. LEMONS 115s CHOICE	7.75	837.00
12	PALLETS	8.75	105.00
	**TRUCK DID NOT EXCHANGE PALLETS**		
			\$5,235.00

43b. Complainant subsequently prepared a revised invoice number 13866, billing Respondent for the lemons as follows:

<b>Invoice #: 13866</b>				
Lemon CTN 95 Fancy WILDWOOD	108	ctn.	8.70	939.60
Lemon CTN 115 Fancy WILDWOOD	185	ctn.	10.90	2,016.50
Lemon CTN 140 Fancy WILDWOOD	72	ctn.	10.25	738.00
Lemon CTN 115 Choice YELLOW TAIL	108	ctn.	8.20	885.60
Wildwood Pallets	12		.15	70.95
Brokerage/commission	473		.50	236.50
INVOICE TOTAL:	473			4,887.15

Respondent paid Complainant \$3,111.90 for invoice number 13866. (AX 190-192, FX 1, SRX 18).

44. On February 28, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13867</b>				
Lemon CTN 140 Choice YELLOW TAIL	118	ctn.		.00
Lemon CTN 165 Choice YELLOW TAIL	63	ctn.		.00
Lemon CTN 200 Choice YELLOW TAIL	34	ctn.		.00
Lemon CTN 235 Choice YELLOW TAIL	3	ctn.		.00
Packing Charges	218		4.25	926.50
INVOICE TOTAL:	218			926.50

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44a. On the same date, Respondent issued invoice number 13867 billing its customer for a trucklot of lemons as follows:

118	CAL. LEMONS 140s CHOICE	9.00	1,062.00
63	CAL. LEMONS 165s CHOICE	10.00	630.00
34	CAL. LEMONS 200s CHOICE	10.00	340.00
3	CAL. LEMONS 235s CHOICE	9.00	27.00
			\$2,059.00

44b. Complainant subsequently prepared a revised invoice number 13867, billing Respondent for the lemons as follows:

<b>Invoice #: 13867</b>				
Lemon CTN 140 Choice YELLOW TAIL	118	ctn.	9.00	1,062.00
Lemon CTN 165 Choice YELLOW TAIL	63	ctn.	10.00	630.00
Lemon CTN 200 Choice YELLOW TAIL	34	ctn.	10.00	340.00
Lemon CTN 235 Choice YELLOW TAIL	3	ctn.	9.00	27.00
Brokerage/commission	218		-.50	-109.00
INVOICE TOTAL:	218			1,950.00

Respondent paid Complainant \$1,742.90 for invoice number 13867. (AX 193-196, SRX 18).

45. On February 28, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13993</b>				
Lemon CTN 95 Choice YELLOW TAIL	972	ctn.		.00
Wildwood Pallets	972		4.25	4,131.00
INVOICE TOTAL:	972			4,131.00

45a. On the same date, Respondent issued invoice number 13993 billing its customer for a trucklot of lemons as follows:

972	CAL. LEMONS 95s CHOICE	5.00	4,860.00
			\$4,860.00

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45b. Complainant subsequently prepared a revised invoice number 13993, billing Respondent for the lemons as follows:

<b>Invoice #: 13993</b>				
Lemon CTN 95 Choice YELLOW TAIL	918	ctn.	7.50	6,885.00
Lemon CTN 95 Choice YELLOW TAIL	54	ctn.		.00
Brokerage/commission	918		-.50	-459.00
Wildwood Pallets	54		4.25	229.50
Pallet Exchange				.00
<b>INVOICE TOTAL:</b>	972			6,655.50

Respondent paid Complainant \$4,374.00 for invoice number 13993. (AX 197-200, SRX 18).

46. On March 1, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13869</b>				
Lemon CTN 115 Choice YELLOW TAIL	810	ctn.		.00
Lemon CTN 140 Choice YELLOW TAIL	216	ctn.		.00
Wildwood Pallets	19		8.75	166.25
Packing Charges	1026		4.25	4,360.50
<b>INVOICE TOTAL:</b>	1026			4,526.75

46a. On the same date, Respondent issued invoice number 13869 billing its customer for a trucklot of lemons as follows:

810	CAL. LEMONS 115s CHOICE	6.00	4,860.00
270	CAL. LEMONS 140s CHOICE	6.00	1,620.00
20	PALLETS	8.75	175.00
-1,080	CREDIT FOR DAMAGED CARTONS	1.00	-1,080.00
			\$5,575.00

46b. Complainant subsequently prepared a revised invoice number 13869, billing Respondent for the lemons as follows:

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<b>Invoice #: 13869</b>				
Lemon CTN 115 Choice YELLOW TAIL	810	ctn.	8.20	6,642.00
Lemon CTN 140 Choice YELLOW TAIL	216	ctn.	9.10	1,965.60
Wildwood Pallets	1026		.15	153.90
Brokerage/commission	1026		-.50	-513.00
INVOICE TOTAL:	1026			8,248.50

Respondent paid Complainant \$4,834.55 for invoice number 13869.  
(AX 201-204, SRX 18).

47. On March 1, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13995</b>				
Lemon CTN 75 Choice YELLOW TAIL	270	ctn.		.00
Wildwood Pallets	5		8.75	43.75
Packing Charges	270		4.25	1,147.50
INVOICE TOTAL:	270			1,191.25

47a. On the same date, Respondent issued invoice number 13995 billing its customer for a trucklot of lemons as follows:

270	CAL. LEMONS 75s CHOICE	1.75	472.50
			\$472.50

47b. Complainant subsequently prepared a revised invoice number 13995, billing Respondent for the lemons as follows:

<b>Invoice #: 13995</b>				
Lemon CTN 75 Choice YELLOW TAIL	270	ctn.	8.20	2,214.00
Wildwood Pallets	270		.15	40.50
Brokerage/commission	270		-.50	-135.00
INVOICE TOTAL:	270			2,119.50

Respondent paid Complainant \$1,272.25 for invoice number 13995.  
(AX 205-214, SRX 18).

48. On March 1, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

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<b>Invoice #: 13996</b>				
Lemon CTN 95 Choice YELLOW TAIL	540	ctn.		.00
Wildwood Pallets	10		8.75	87.50
Packing Charges	540		4.25	2,295.00
INVOICE TOTAL:	540			2,382.50

48a. On the same date, Respondent issued invoice number 13996 billing its customer for a trucklot of lemons as follows:

540	CAL. LEMONS 95s CHOICE	5.00	2,700.00
10	PALLETS	8.75	87.50
			\$2,787.50

48b. Complainant subsequently prepared a revised invoice number 13996, billing Respondent for the lemons as follows:

<b>Invoice #: 13996</b>				
Lemon CTN 95 Choice YELLOW TAIL	540	ctn.	7.50	4,050.00
Wildwood Pallets	540		.15	81.00
Brokerage/commission	540		-.50	-270.00
INVOICE TOTAL:	540			3,861.00

Respondent paid Complainant \$2,652.50 for invoice number 13996. (AX 215-218, SRX 18).

49. On March 2, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13868</b>				
Lemon CTN 95 Choice YELLOW TAIL	972	ctn.		.00
Wildwood Pallets	18		8.75	157.50
Packing Charges	972		4.25	4,131.00
INVOICE TOTAL:	972			4,288.50

49a. On the same date, Respondent issued invoice number 13868 billing its customer for a trucklot of lemons as follows:

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972	CAL. LEMONS 95s CHOICE	2.78	2,702.16
18	PALLETS	8.75	157.50
	***FRUIT IS PAS***		
			\$2,859.66

49b. Complainant subsequently prepared a revised invoice number 13868, billing Respondent for the lemons as follows:

<b>Invoice #: 13868</b>				
Lemon CTN 95 Choice YELLOW TAIL	972	ctn.	7.50	7,290.00
Wildwood Pallets	972		.15	145.80
Brokerage/commission	972		-.50	-486.00
INVOICE TOTAL:	972			6,949.80

Respondent paid Complainant \$1,936.26 for invoice number 13868. (AX 219-222, SRX 18).

50. On March 2, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13998</b>				
Lemon CTN 140 Choice YELLOW TAIL	216	ctn.		.00
Lemon CTN 95 Choice YELLOW TAIL	54	ctn.		.00
Wildwood Pallets	5		8.75	43.75
Packing Charges	270		4.25	1,147.50
INVOICE TOTAL:	270			1,191.25

50a. Complainant subsequently prepared a revised invoice number 13998, billing Respondent for the lemons as follows:

<b>Invoice #: 13998</b>				
Lemon CTN 140 Choice YELLOW TAIL	216	ctn.	9.10	1,965.60
Lemon CTN 95 Choice YELLOW TAIL	54	ctn.	7.50	405.00
Wildwood Pallets	270		.15	40.50
Brokerage/commission	270		-.50	-135.00
INVOICE TOTAL:	270			2,276.10

Respondent paid Complainant \$2,136.25 for invoice number 13998. (AX 223-225, SRX 18).

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51. On March 3, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13870</b>				
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.	7.00	1,134.00
Lemon CTN 140 Choice YELLOW TAIL	108	ctn.	9.00	972.00
Packing Charges	270		4.25	1,147.50
INVOICE TOTAL:	270			3,253.50

51a. On the same date, Respondent issued invoice number 13870 billing its customer for a trucklot of lemons as follows:

162	CAL. LEMONS 115s CHOICE	7.00	1,134.00
108	CAL. LEMONS 140s CHOICE	9.00	972.00
			\$2,106.00

51b. Complainant subsequently prepared a revised invoice number 13870, billing Respondent for the lemons as follows:

<b>Invoice #: 13870</b>				
Lemon CTN 115 Choice YELLOW TAIL	162	ctn.	7.00	1,134.00
Lemon CTN 140 Choice YELLOW TAIL	108	ctn.	9.00	972.00
Brokerage/commission	270		-.50	-135.00
INVOICE TOTAL:	270			1,971.00

Respondent paid Complainant \$1,714.50 for invoice number 13870. (AX 226-229, SRX 18).

52. On March 4, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14040</b>				
Lemon CTN 95 Fancy WILDWOOD	702	ctn.		.00

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Lemon CTN 75 Fancy WILDWOOD	324	ctn.		.00
Wildwood Pallets	19		8.75	166.25
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,526.75

52a. On the same date, Respondent issued invoice number 14040 billing its customer for a trucklot of lemons as follows:

702	CAL. LEMONS 95s FANCY	6.50	4,563.00
324	CAL. LEMONS 75s FANCY	6.50	2,106.00
			\$6,669.00

52b. Complainant subsequently prepared a revised invoice number 14040, billing Respondent for the lemons as follows:

<b>Invoice #: 14040</b>				
Lemon CTN 95 Fancy WILDWOOD	702	ctn.	8.70	6,107.40
Lemon CTN 75 Fancy WILDWOOD	316	ctn.	10.30	3,254.80
Lemon CTN 75 Fancy WILDWOOD	8	ctn.		.00
Wildwood Pallets	1026		.15	153.90
Brokerage/commission	1018		-.50	-509.00
Packing Charges	8		4.25	34.00
INVOICE TOTAL:	1026			9,041.10

Respondent paid Complainant \$5,347.55 for invoice number 14040. (AX 230-233, SRX 18).

53. On March 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13874</b>				
Lemon CTN 115 Choice YELLOW TAIL	54	ctn.		.00
Lemon CTN 140 Choice YELLOW TAIL	32	ctn.		.00
Packing Charges	86		4.25	365.50
INVOICE TOTAL:	86			365.50

53a. On the same date, Respondent issued invoice number 13874 billing its customer for a trucklot of lemons as follows:

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54	CAL. LEMONS 115s CHOICE	4.72093	254.93
32	CAL. LEMONS 140s CHOICE	5.47093	175.07
ORIGINAL PRICE WAS 7.25 ON 115s AND 8 ON 140's WILDWOOD SHORTPAID INVOICE BY 217.50 CREDIT TAKEN AGAINST WILDWOOD INVOICE 100250			
			\$430.00

53b. Complainant subsequently prepared a revised invoice number 13874, billing Respondent for the lemons as follows:

<b>Invoice #: 13874</b>				
Lemon CTN 115 Choice YELLOW TAIL	54	ctn.	7.25	391.50
Lemon CTN 140 Choice YELLOW TAIL	32	ctn.	8.00	256.00
Brokerage/commission	86		-.50	-43.00
INVOICE TOTAL:	86			604.50

Respondent paid Complainant \$522.80 for invoice number 13874. (AX 234-237, SRX 18).

54. On March 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14041</b>				
Lemon CTN 165 Choice YELLOW TAIL	153	ctn.		.00
Lemon CTN 200 Choice YELLOW TAIL	25	ctn.		.00
Lemon CTN 95 Fancy WILDWOOD	108	ctn.		.00
Wildwood Pallets	6		8.75	52.50
Packing Charges	286		4.25	1,215.50
INVOICE TOTAL:	286			1,268.00

54a. On the same date, Respondent issued invoice number 14041 billing its customer for a trucklot of lemons as follows:

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153	CAL. LEMONS 165s CHOICE	13.00	1,989.00
25	CAL. LEMONS 200s CHOICE	13.00	325.00
108	CAL. LEMONS 95s FANCY	7.00	756.00
6	PALLETS	8.75	52.50
	***TRUCK DID NOT EXCHANGE PALLETS***		
			\$3,122.50

54b. Complainant subsequently prepared a revised invoice number 14041, billing Respondent for the lemons as follows:

<b>Invoice #: 14041</b>				
Lemon CTN 165 Choice YELLOW TAIL	153	ctn.	9.90	1,514.70
Lemon CTN 200 Choice YELLOW TAIL	25	ctn.	9.90	247.50
Lemon CTN 95 Fancy WILDWOOD	108	ctn.	8.70	939.60
Wildwood Pallets	286		.15	42.90
Brokerage/commission	286		-.50	-143.00
INVOICE TOTAL:	286			2,601.70

Respondent paid Complainant \$2,707.80 for invoice number 14041. (AX 238-241, SRX 18).

55. On March 7, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 10450</b>				
Lemon CTN 95 Choice YELLOW TAIL	1026	ctn.		.00
Wildwood Pallets	19		8.75	166.25
Packing Charges	1026		4.25	4,360.50
INVOICE TOTAL:	1026			4,526.75

55a. On the same date, Respondent issued invoice number 14050 billing its customer for a trucklot of lemons as follows:

1,026	CAL. LEMONS 95s CHOICE	5.50	5,643.00
19	PALLETS	8.75	166.25
	***YOUR TRUCK DID NOT EXCHANGE PALLETS***		
			\$5,809.25

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55b. Complainant subsequently prepared a revised invoice number 10450, billing Respondent for the lemons as follows:

<b>Invoice #: 10450</b>				
Lemon CTN 95 Choice YELLOW TAIL	976	ctn.	7.50	7,320.00
Lemon CTN 95 Choice YELLOW TAIL	50	ctn.		.00
Wildwood Pallets	1026		.15	153.90
Brokerage/commission	976		-.50	-488.00
Packing Charges for non growers	50		4.25	212.50
INVOICE TOTAL:	1026			7,198.40

Respondent paid Complainant \$5,296.25 for invoice number 10450. (AX 242-245, SRX 18).

56. On March 7, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14044</b>				
Lemon CTN 115 Choice YELLOW TAIL	223	ctn.		.00
Lemon CTN 95 Choice YELLOW TAIL	216	ctn.		.00
Lemon CTN 140 Fancy WILDWOOD	29	ctn.		.00
Wildwood Pallets	9		8.75	78.75
Packing Charges	468		4.25	1,989.00
INVOICE TOTAL:	468			2,067.75

56a. On the same date, Respondent issued invoice number 14044 billing its customer for a trucklot of lemons as follows:

223	CAL. LEMONS 115s CHOICE	5.00	1,115.00
216	CAL. LEMONS 95s CHOICE	3.50	756.00
29	CAL. LEMONS 140s FANCY	9.00	261.00
			\$2,132.00

56b. Complainant subsequently prepared a revised invoice number 14044, billing Respondent for the lemons as follows:

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<b>Invoice #: 14044</b>				
Lemon CTN 115 Choice YELLOW TAIL	223	ctn.	8.20	1,828.60
Lemon CTN 95 Choice YELLOW TAIL	215	ctn.	7.50	1,612.50
Lemon CTN 140 Fancy WILDWOOD	29	ctn.	10.25	297.25
Lemon CTN 95 Choice YELLOW TAIL	1	ctn.		.00
Wildwood Pallets	468		.15	70.20
Brokerage/commission	467		-.50	-233.50
Packing Charges for non grower fruit	1		4.25	4.25
INVOICE TOTAL:	468			3,579.30

Respondent paid Complainant \$1,008.80 for invoice number 14044.  
(AX 246-261, SRX 18).

57. On March 8, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14048</b>				
Lemon CTN 95 Choice YELLOW TAIL	216	ctn.		.00
Wildwood Pallets	4		8.75	35.00
Packing Charges	216		4.25	918.00
INVOICE TOTAL:	216			953.00

57a. On the same date, Respondent issued invoice number 14048 billing its customer for a trucklot of lemons and oranges as follows:

216	CAL. LEMONS 95s CHOICE	5.00	1,080.00
108	CAL. NAVEL ORANGES 88s CHOICE	6.00	648.00
324	PALLETS	0.15	48.60
			\$1,776.60

57b. Complainant subsequently prepared a revised invoice number 14048, billing Respondent for the lemons as follows:

<b>Invoice #: 14048</b>				
Lemon CTN 95 Choice YELLOW TAIL	216	ctn.	7.50	1,620.00
Wildwood Pallets	216		.15	32.40
Brokerage/commission	216		-.50	-108.00
INVOICE TOTAL:	216			1,544.40

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Respondent paid Complainant \$1,007.00 for invoice number 14048.  
(AX 262-265, SRX 18).

58. On March 8, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14051</b>				
Lemon CTN 95 Fancy WILDWOOD	216	ctn.		.00
Lemon CTN 115 Fancy WILDWOOD	80	ctn.		.00
Wildwood Pallets	6		8.75	52.50
Packing Charges	296		4.25	1,258.00
INVOICE TOTAL:	296			1,310.50

58a. On the same date, Respondent issued invoice number 14051 billing its customer for a trucklot of lemons as follows:

216	CAL. LEMONS 95s FANCY	6.50	1,404.00
80	CAL. LEMONS 115s FANCY	7.00	560.00
296	PALLETS	0.15	44.40
			\$2,008.40

58b. Complainant subsequently prepared a revised invoice number 14051, billing Respondent for the lemons as follows:

<b>Invoice #: 14051</b>				
Lemon CTN 95 Fancy WILDWOOD	216	ctn.	8.70	1,879.20
Lemon CTN 115 Fancy WILDWOOD	80	ctn.	10.90	872.00
Wildwood Pallets	296		.15	44.40
Brokerage/commission	296		-.50	-148.00
INVOICE TOTAL:	296			2,647.60

Respondent paid Complainant \$1,587.30 for invoice number 14051.  
(AX 266-269, SRX 18).

59. On March 10, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

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<b>Invoice #: 13876</b>				
Lemon CTN 75 Choice YELLOW TAIL	1188	ctn.		.00
Wildwood Pallets	22		8.75	192.50
Packing Charges	1188		4.25	5,049.00
INVOICE TOTAL:	1188			5,241.50

59a. On the same date, Respondent issued invoice number 13876 billing its customer for a trucklot of lemons as follows:

1,188	CAL. LEMONS 75s CHOICE	3.50	4,158.00
22	PALLETS	8.10	178.20
			4,336.20

59b. Complainant subsequently prepared a revised invoice number 13876, billing Respondent for the lemons as follows:

<b>Invoice #: 13876</b>				
Lemon CTN 75 Choice YELLOW TAIL	1145	ctn.	8.20	9,389.00
Lemon CTN 75 Choice YELLOW TAIL	1145	ctn.		.00
Wildwood Pallets	1188		.15	178.20
Brokerage/commission	1145		-.50	-572.50
Packing Charges for non grower	43		4.25	182.75
INVOICE TOTAL:	1188			9,177.45

Respondent paid Complainant \$1,663.20 for invoice number 13876. (AX 270-273, SRX 18).

60. On March 10, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 13878</b>				
Lemon CTN 75 Fancy WILDWOOD	853	ctn.		.00
Lemon CTN 75 Choice YELLOW TAIL	335	ctn.		.00
Wildwood Pallets	22		8.75	192.50
Packing Charges	1188		4.25	5,049.00
INVOICE TOTAL:	1188			5,241.50

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60a. On the same date, Respondent issued invoice number 13878 billing its customer for a trucklot of lemons as follows:

853	CAL. LEMONS 75s FANCY	2.4352	2,077.23
335	CAL. LEMONS 75s CHOICE	2.4352	815.79
22	PALLETS	8.10	178.20
			\$3,071.22

60b. Complainant subsequently prepared a revised invoice number 13878, billing Respondent for the lemons as follows:

<b>Invoice #: 13878</b>				
Lemon CTN 75 Fancy WILDWOOD	853	ctn.	10.30	8,785.90
Lemon CTN 75 Choice YELLOW TAIL	335	ctn.	8.20	2,747.00
Wildwood Pallets	1188		.15	178.20
Brokerage/commission	1188		-.50	-594.00
INVOICE TOTAL:	1188			11,117.10

Respondent paid Complainant \$3,148.20 for invoice number 13878. (AX 274-277, SRX 18).

61. On March 31, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14024</b>				
Lemon CTN 75 Choice ORGloCitrusource	148	ctn.		.00
Lemon CTN 95 Choice ORGloCitrusource	341	ctn.		.00
Lemon CTN 115 Choice ORGloCitrusource	557	ctn.		.00
Lemon CTN 140 Choice ORGloCitrusource	142	ctn.		.00
Wildwood Pallets	1188		.15	178.20
Packing Charges	1188		4.25	5,049.00
INVOICE TOTAL:	1188			5,227.20

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61a. On the same date, Respondent issued invoice number 14024 billing its customer for a trucklot of lemons as follows:

148	CAL. LEMONS 75s CHOICE	6.00	888.00
341	CAL. LEMONS 95s CHOICE	7.00	2,387.00
557	CAL. LEMONS 115s CHOICE	9.00	5,013.00
142	CAL. LEMONS 140s CHOICE	11.00	1,562.00
22	PALLETS	8.75	192.50
			\$10,042.50

61b. Complainant subsequently prepared a revised invoice number 14024, billing Respondent for the lemons as follows:

<b>Invoice #: 14024</b>				
Lemon CTN 75 Choice ORGloCitrusource	148	ctn.	5.96	882.08
Lemon CTN 95 Choice ORGloCitrusource	341	ctn.	6.96	2,373.36
Lemon CTN 115 Choice ORGloCitrusource	557	ctn.	8.96	4,990.72
Lemon CTN 140 Choice ORGloCitrusource	142	ctn.	10.96	1,556.32
Box Credits	1188		-.75	-891.00
Wildwood Pallets	1188		.15	178.20
Brokerage/commission	1188		-.50	-594.00
INVOICE TOTAL:	1188			8,495.68

Respondent paid Complainant \$6,831.00 for invoice number 14024. (AX 278-281, SRX 18).

62. On April 3, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14030</b>				
Lemon CTN 140 Choice ORGloCitrusource	108	ctn.		.00
Lemon CTN 165 Choice ORGloCitrusource	54	ctn.		.00
Lemon CTN 200 Choice ORGloCitrusource	54	ctn.		.00
Lemon CTN 235 Choice	54	ctn.		.00

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ORGloCitrusource				
Wildwood Pallets	270		.15	40.50
Packing Charges	270		4.25	1,147.50
INVOICE TOTAL:	270			1,188.00

62a. On the same date, Respondent issued invoice number 14030 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 140s CHOICE	13.00	1,404.00
54	CAL. LEMONS 165s CHOICE	15.00	810.00
54	CAL. LEMONS 200s CHOICE	16.00	864.00
54	CAL. LEMONS 235s CHOICE	7.00	378.00
5	PALLETS	8.75	43.75
			\$3,499.75

62b. Complainant subsequently prepared a revised invoice number 14030, billing Respondent for the lemons as follows:

<b>Invoice #: 14030</b>				
Lemon CTN 140 Choice ORGloCitrusource	108	ctn.	13.15	1,420.20
Lemon CTN 165 Choice ORGloCitrusource	54	ctn.	15.15	818.10
Lemon CTN 200 Choice ORGloCitrusource	54	ctn.	16.15	872.10
Lemon CTN 235 Choice ORGloCitrusource	54	ctn.	7.15	386.10
Box Credits	270		-.75	-202.50
Wildwood Pallets	270		.15	40.50
Brokerage/commission	270		-.50	-135.00
INVOICE TOTAL:	270			3,199.50

Respondent paid Complainant \$2,821.50 for invoice number 14030. (AX 282-285, SRX 18).

63. On April 3, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

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<b>Invoice #: 14124</b>				
Lemon CTN 165 Choice ORGloCitrusource	108	ctn.		.00
Lemon CTN 200 Choice ORGloCitrusource	216	ctn.		.00
Wildwood Pallets	324		.15	48.60
Packing Charges	324		4.25	1,377.00
INVOICE TOTAL:	324			1,425.60

63a. On the same date, Respondent issued invoice number 14124 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 165s CHOICE	15.00	1,620.00
216	CAL. LEMONS 200s CHOICE	16.00	3,456.00
324	PALLETS	0.15	48.60
			\$5,124.60

63b. Complainant subsequently prepared a revised invoice number 14124, billing Respondent for the lemons as follows:

<b>Invoice #: 14124</b>				
Lemon CTN 165 Choice ORGloCitrusource	108	ctn.	15.13	1,634.04
Lemon CTN 200 Choice ORGloCitrusource	216	ctn.	16.13	3,484.08
Box Credits	324		-.75	-243.00
Wildwood Pallets	324		.15	48.60
Brokerage/commission	324		-.50	-162.00
INVOICE TOTAL:	324			4,761.72

Respondent paid Complainant \$4,309.20 for invoice number 14124. (AX 286-289, SRX 18).

64. On April 3, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14126</b>				
Lemon CTN 165 Choice ORGloCitrusource	54	ctn.		.00
Wildwood Pallets	54		.15	8.10

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Packing Charges	54		4.25	229.50
INVOICE TOTAL:	54			237.60

64a. On the same date, Respondent issued invoice number 14126 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 165s CHOICE	15.00		810.00
1	PALLETS	8.75		8.75
				\$818.75

64b. Complainant subsequently prepared a revised invoice number 14126, billing Respondent for the lemons as follows:

<b>Invoice #: 14126</b>				
Lemon CTN 165 Choice ORGloCitrusource	54	ctn.	15.15	818.10
Box Credits	54		-.75	-40.50
Wildwood Pallets	54		.15	8.10
Brokerage/commission	54		-.50	- 27.00
INVOICE TOTAL:	54			758.70

Respondent paid Complainant \$683.10 for invoice number 14126. (AX 290-293, SRX 18).

65. On April 4, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14029</b>				
Lemon CTN 115 Fancy YEGloCitrusource	162	ctn.		.00
Lemon CTN 200 Fancy YEGloCitrusource	108	ctn.		.00
Packing Charges	270		4.25	1,147.50
INVOICE TOTAL:	270			1,147.50

65a. On the same date, Respondent issued invoice number 14029 billing its customer for a trucklot of lemons as follows:

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162	CAL. LEMONS 115s FANCY	15.00	2,430.00
108	CAL. LEMONS 200s FANCY	17.50	1,890.00
			\$4,320.00

65b. Complainant subsequently prepared a revised invoice number 14029, billing Respondent for the lemons as follows:

<b>Invoice #: 14029</b>				
Lemon CTN 115 Fancy YEGloCitrusource	162	ctn.	15.00	2,430.00
Lemon CTN 200 Fancy YEGloCitrusource	108	ctn.	17.50	1,890.00
Box Credits	270		-.75	-202.50
Brokerage/commission	270		-.50	-135.00
INVOICE TOTAL:	270			3,982.50

Respondent paid Complainant \$3,645.00 for invoice number 14029. (AX 294-297, SRX 18).

66. On April 4, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14031</b>				
Lemon CTN 95 Choice ORGloCitrusource	108	ctn.		.00
Wildwood Pallets	108		.15	16.20
Packing Charges	108		4.25	459.00
INVOICE TOTAL:	108			475.20

66a. On the same date, Respondent issued invoice number 14031 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 95s CHOICE	9.00	972.00
108	PALLETS	0.15	16.20
			\$988.20

66b. Complainant subsequently prepared a revised invoice number 14031, billing Respondent for the lemons as follows:

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<b>Invoice #: 14031</b>				
Lemon CTN 95 Choice ORGloCitrusource	108	ctn.	9.15	988.20
Box Credits	108		-.75	-81.00
Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			869.40

Respondent paid Complainant \$718.20 for invoice number 14031. (AX 298-301, SRX 18).

67. On April 4, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14033</b>				
Lemon CTN 115 Choice ORGloCitrusource	108	ctn.	11.25	1,215.00
Packing Charges	108		4.25	459.00
INVOICE TOTAL:	108			1,674.00

67a. On the same date, Respondent issued invoice number 14033 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 115s CHOICE	11.25	1,215.00
			\$1,215.00

67b. Complainant subsequently prepared a revised invoice number 14033, billing Respondent for the lemons as follows:

<b>Invoice #: 14033</b>				
Lemon CTN 115 Choice ORGloCitrusource	108	ctn.	11.25	1,215.00
Box Credits	108		-.75	-81.00
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			1,080.00

Respondent paid Complainant \$945.00 for invoice number 14033. (AX 302-305, SRX 18).

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68. On April 4, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14131</b>				
Lemon CTN 75 Fancy YEGloCitrusource	54	ctn.		.00
Wildwood Pallets	54		.15	8.10
Packing Charges	54		4.25	229.50
INVOICE TOTAL:	54			237.60

68a. On the same date, Respondent issued invoice number 14131 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 75s FANCY	9.50	513.00
54	PALLETS	0.17	9.18
			\$522.18

68b. Complainant subsequently prepared a revised invoice number 14131, billing Respondent for the lemons as follows:

<b>Invoice #: 14131</b>				
Lemon CTN 75 Fancy YEGloCitrusource	54	ctn.	9.65	521.10
Box Credits	54		-.75	-40.50
Wildwood Pallets	54		.15	8.10
Brokerage/commission	54		-.50	-27.00
INVOICE TOTAL:	54			461.70

Respondent paid Complainant \$386.10 for invoice number 14131. (AX 306-309, SRX 18).

69. On April 5, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14026</b>				
Lemon CTN 140 Choice ORGloCitrusource	90	ctn.		.00
Lemon CTN 165 Choice ORGloCitrusource	18	ctn.		.00
Lemon CTN 75 Choice ORGloCitrusource	36	ctn.		.00

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Lemon CTN 75 Fancy YEGloCitrusource	27	ctn.		.00
Wildwood Pallets	171		.15	25.65
Packing Charges	171		4.25	726.75
INVOICE TOTAL:	171			752.40

69a. On the same date, Respondent issued invoice number 14026 billing its customer for a trucklot of lemons as follows:

27	CAL. LEMONS 75s FANCY	9.50	256.50
36	CAL. LEMONS 75s CHOICE	8.50	306.00
90	CAL. LEMONS 140s CHOICE	13.00	1,170.00
18	CAL. LEMONS 165s CHOICE	15.00	270.00
171	PALLETS	0.15	25.65
			\$2,028.15

69b. Complainant subsequently prepared a revised invoice number 14026, billing Respondent for the lemons as follows:

<b>Invoice #: 14026</b>				
Lemon CTN 140 Choice ORGloCitrusource	90	ctn.	13.14	1,182.60
Lemon CTN 165 Choice ORGloCitrusource	18	ctn.	15.14	272.52
Lemon CTN 75 Choice ORGloCitrusource	36	ctn.	8.64	311.04
Lemon CTN 75 Fancy YEGloCitrusource	27	ctn.	9.64	260.28
Box Credits	171		-.75	-128.25
Wildwood Pallets	171		.15	25.65
Brokerage/commission	171		-.50	-85.50
INVOICE TOTAL:	171			1,838.34

Respondent paid Complainant \$1,598.85 for invoice number 14026. (AX 310-312, FX 1, SRX 18).

70. On April 5, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

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<b>Invoice #: 14028</b>				
Lemon CTN 140 Choice ORGloCitrusource	432	ctn.		.00
Wildwood Pallets	432		.15	64.80
Packing Charges	432		4.25	1,836.00
INVOICE TOTAL:	432			1,900.80

70a. On the same date, Respondent issued invoice number 14028 billing its customer for a trucklot of lemons as follows:

432	CAL. LEMONS 140s CHOICE	13.00	5,616.00
432	PALLETS	0.15	64.80
			\$5,680.80

70b. Complainant subsequently prepared a revised invoice number 14028, billing Respondent for the lemons as follows:

<b>Invoice #: 14028</b>				
Lemon CTN 140 Choice ORGloCitrusource	432	ctn.	13.15	5,680.80
Box Credits	432		-.75	-324.00
Wildwood Pallets	432		.15	64.80
Brokerage/commission	432		-.50	-216.00
INVOICE TOTAL:	432			5,205.60

Respondent paid Complainant \$4,600.80 for invoice number 14028. (AX 313-316, SRX 18).

71. On April 5, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14038</b>				
Lemon CTN 200 Choice ORGloCitrusource	54	ctn.	15.35	828.90
Packing Charges	54		4.25	229.50
INVOICE TOTAL:	54			1,058.40

71a. On the same date, Respondent issued invoice number 14038 billing its customer for a trucklot of lemons as follows:

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54	CAL. LEMONS 200s CHOICE	15.50	837.00
			\$837.00

71b. Complainant subsequently prepared a revised invoice number 14038, billing Respondent for the lemons as follows:

<b>Invoice #: 14038</b>				
Lemon CTN 200 Choice ORGloCitrusource	54	ctn.	15.50	837.00
Box Credits	54		-.50	-27.00
Brokerage/commission	54		-.75	-40.50
INVOICE TOTAL:	54			769.50

Respondent paid Complainant \$702.00 for invoice number 14038. (AX 317-320, SRX 18).

72. On April 5, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14130</b>				
Lemon CTN 95 Fancy YEGloCitrusource	54	ctn.		.00
Lemon CTN 140 Choice ORGloCitrusource	54	ctn.		.00
Wildwood Pallets	108		.15	16.20
Packing Charges	108		4.25	459.00
INVOICE TOTAL:	108			475.20

72a. On the same date, Respondent issued invoice number 14130 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 95s FANCY	11.00	594.00
54	CAL. LEMONS 140s CHOICE	13.00	702.00
108	PALLETs	0.17	18.36
			\$1,314.36

72b. Complainant subsequently prepared a revised invoice number 14130, billing Respondent for the lemons as follows:

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<b>Invoice #: 14130</b>				
Lemon CTN 95 Fancy YEGloCitrusource	54	ctn.	11.17	603.18
Lemon CTN 140 Choice ORGloCitrusource	54	ctn.	13.17	711.18
Box Credits	108		-.75	-81.00
Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			1,195.56

Respondent paid Complainant \$1,044.36 for invoice number 14130.  
(AX 321-324, SRX 18).

73. On April 5, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14201</b>				
Lemon CTN 95 Choice ORGloCitrusource	54	ctn.		.00
Lemon CTN 115 Choice ORGloCitrusource	54	ctn.		.00
Wildwood Pallets	108		.15	16.20
Packing Charges	108		4.25	459.00
INVOICE TOTAL:	108			475.20

73a. On the same date, Respondent issued invoice number 14201 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 95s CHOICE	9.00	486.00
54	CAL. LEMONS 115s CHOICE	12.00	648.00
108	PALLETS	0.15	16.20
			\$1,150.20

73b. Complainant subsequently prepared a revised invoice number 14201, billing Respondent for the lemons as follows:

<b>Invoice #: 14201</b>				
Lemon CTN 95 Choice ORGloCitrusource	54	ctn.	9.15	494.10
Lemon CTN 115 Choice ORGloCitrusource	54	ctn.	12.15	656.10
Box Credits	108		-.75	-81.00

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Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			1,031.40

Respondent paid Complainant \$880.20 for invoice number 14201. (AX 325-328, SRX 18).

74. On April 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14128</b>				
Lemon CTN 115 Choice ORGloCitrusource	54	ctn.		.00
Lemon CTN 140 Choice ORGloCitrusource	108	ctn.		.00
Wildwood Pallets	162		.15	24.30
Packing Charges	162		4.25	688.50
INVOICE TOTAL:	162			712.80

74a. On the same date, Respondent issued invoice number 14128 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 115s CHOICE	12.00	648.00
108	CAL. LEMONS 140s CHOICE	13.00	1,404.00
162	PALLETS	0.15	24.30
			\$2,076.30

74b. Complainant subsequently prepared a revised invoice number 14128, billing Respondent for the lemons as follows:

<b>Invoice #: 14128</b>				
Lemon CTN 115 Choice ORGloCitrusource	54	ctn.	12.14	655.56
Lemon CTN 140 Choice ORGloCitrusource	108	ctn.	13.14	1,419.12
Box Credits	162		-.75	-121.50
Wildwood Pallets	162		.15	24.30
Brokerage/commission	162		-.50	-81.00

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INVOICE TOTAL: | 162 | | 1,896.48

Respondent paid Complainant \$1,668.60 for invoice number 14128. (AX 329-332, SRX 18).

75. On April 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14132</b>				
Lemon CTN 115 Choice	108	ctn.		.00
ORGloCitrusource				
Wildwood Pallets	108		.15	16.20
Packing Charges	108		4.25	459.00
INVOICE TOTAL:	108			475.20

75a. On the same date, Respondent issued invoice number 14132 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 115s CHOICE	12.00	1,296.00
108	PALLETS	0.17	18.36
			\$1,314.36

75b. Complainant subsequently prepared a revised invoice number 14132, billing Respondent for the lemons as follows:

<b>Invoice #: 14132</b>				
Lemon CTN 115 Choice	108	ctn.	12.15	1,312.20
ORGloCitrusource				
Box Credits	108		-.75	-81.00
Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			1,193.40

Respondent paid Complainant \$1,042.20 for invoice number 14132. (AX 333-336, SRX 18).

76. On April 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

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<b>Invoice #: 14133</b>				
Lemon CTN 165 Choice ORGloCitrusource	536	ctn.		.00
Lemon CTN 200 Choice ORGloCitrusource	378	ctn.		.00
Lemon CTN 235 Choice ORGloCitrusource	108	ctn.		.00
Wildwood Pallets	1022		8.75	8,942.50
Packing Charges	1022		4.25	4,343.50
<b>INVOICE TOTAL:</b>	<b>1022</b>			<b>13,286.00</b>

76a. On the same date, Respondent issued invoice number 14133 billing its customer for a trucklot of lemons as follows:

536	CAL. LEMONS 165s CHOICE	15.00	8,040.00
378	CAL. LEMONS 200s CHOICE	16.00	6,048.00
108	CAL. LEMONS 235s CHOICE	7.00	756.00
1,022	PALLETS	0.17	173.74
4	PALLETS	0.17	0.68
4	CAL. LEMONS 165s CHOICE	15.00	60.00
			\$15,078.42

76b. Complainant subsequently prepared a revised invoice number 14133, billing Respondent for the lemons as follows:

<b>Invoice #: 14133</b>				
Lemon CTN 165 Choice ORGloCitrusource	536	ctn.	15.03	8,056.08
Lemon CTN 200 Choice ORGloCitrusource	378	ctn.	16.03	6,059.34
Lemon CTN 235 Choice ORGloCitrusource	108	ctn.	7.03	759.24
Box Credits	1022		-.75	-766.50
Wildwood Pallets	1022		.15	153.30
Brokerage/commission	1022		-.50	-511.00
<b>INVOICE TOTAL:</b>	<b>1022</b>			<b>13,750.46</b>

Respondent paid Complainant \$1,872.80 for invoice number 14133. (AX 337-341, SRX 18).

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77. On April 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14134</b>				
Lemon CTN 140 Choice ORGloCitrusource	324	ctn.		.00
Wildwood Pallets	324		.15	48.60
Packing Charges	324		4.25	1,377.00
<b>INVOICE TOTAL:</b>	<b>324</b>			<b>1,425.60</b>

77a. On the same date, Respondent issued invoice number 14134 billing its customer for a trucklot of lemons as follows:

324	CAL. LEMONS 140s CHOICE	13.00	4,212.00
324	PALLETS	0.15	48.60
			\$4,260.60

77b. Complainant subsequently prepared a revised invoice number 14134, billing Respondent for the lemons as follows:

<b>Invoice #: 14134</b>				
Lemon CTN 140 Choice ORGloCitrusource	324	ctn.	13.15	4,260.60
Box Credits	324		-.75	-243.00
Wildwood Pallets	324		.15	48.60
Brokerage/commission	324		-.50	-162.00
<b>INVOICE TOTAL:</b>	<b>324</b>			<b>3,904.20</b>

Respondent paid Complainant \$3,450.60 for invoice number 14134. (AX 342-345, SRX 18).

78. On April 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14135</b>				
Lemon CTN 165 Choice ORGloCitrusource	540	ctn.		.00

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Wildwood Pallets	540		.15	81.00
Packing Charges	540		4.25	2,295.00
INVOICE TOTAL:	540			2,376.00

78a. On the same date, Respondent issued invoice number 14135 billing its customer for a trucklot of lemons as follows:

540	CAL. LEMONS 165s CHOICE	15.00	8,100.00
540	PALLETS	0.17	91.80
			\$8,191.80

78b. Complainant subsequently prepared a revised invoice number 14135, billing Respondent for the lemons as follows:

<b>Invoice #: 14135</b>				
Lemon CTN 165 Choice ORGloCitrusource	540	ctn.	15.15	8,181.00
Box Credits	540		-.75	-405.00
Wildwood Pallets	540		.15	81.00
Brokerage/commission	540		-.50	-270.00
INVOICE TOTAL:	540			7,587.00

Respondent paid Complainant \$6,831.00 for invoice number 14135. (AX 346-349, SRX 18).

79. On April 6, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14205</b>				
Lemon CTN 140 Choice ORGloCitrusource	28	ctn.		.00
Lemon CTN 200 Fancy YEGloCitrusource	108	ctn.		.00
Packing Charges	136		4.25	578.00
INVOICE TOTAL:	136			578.00

79a. On the same date, Respondent issued invoice number 14205 billing its customer for a trucklot of lemons as follows:

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108	CAL. LEMONS 200s FANCY	17.00	1,836.00
28	CAL. LEMONS 140s CHOICE	13.00	364.00
			\$2,200.00

79b. Complainant subsequently prepared a revised invoice number 14205, billing Respondent for the lemons as follows:

**Invoice #: 14205**

Lemon CTN 140 Choice ORGloCitrusource	28	ctn.	13.00	364.00
Lemon CTN 200 Fancy YEGloCitrusource	108	ctn.	17.00	1,836.00
Box Credits	136		-.75	-102.00
Brokerage/commission	136		-.50	-68.00
INVOICE TOTAL:	136			2,030.00

Respondent paid Complainant \$1,856.40 for invoice number 14205. (AX 350-353, SRX 18).

80. On April 7, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

**Invoice #: 14137**

Lemon CTN 95 Fancy YEGloCitrusource	540	ctn.		.00
Wildwood Pallets	540		.15	81.00
Packing Charges	540		3.50	1,890.00
INVOICE TOTAL:	540			1,971.00

80a. On the same date, Respondent issued invoice number 14137 billing its customer for a trucklot of lemons as follows: \

540	CAL. LEMONS 95s FANCY	7.90	4,266.00
			\$4,266.00

80b. Complainant subsequently prepared a revised invoice number 14137, billing Respondent for the lemons as follows:

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<b>Invoice #: 14137</b>				
Lemon CTN 95 Fancy YEGloCitrusource	540	ctn.	7.90	4,266.00
Box Credits	540		-.75	-405.00
Wildwood Pallets	540		.15	81.00
Brokerage/commission	540		-.50	-270.00
<b>INVOICE TOTAL:</b>	<b>540</b>			<b>3,672.00</b>

Respondent paid Complainant \$2,916.00 for invoice number 14137.  
(AX 354-357, SRX 18).

81. On April 7, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14202</b>				
Lemon CTN 75 Choice ORGloCitrusource	27	ctn.		.00
Lemon CTN 95 Choice ORGloCitrusource	27	ctn.		.00
Lemon CTN 115 Choice ORGloCitrusource	9	ctn.		.00
Lemon CTN 140 Choice ORGloCitrusource	135	ctn.		.00
Lemon CTN 200 Choice ORGloCitrusource	54	ctn.		.00
Packing Charges	252		4.25	1,071.00
<b>INVOICE TOTAL:</b>	<b>252</b>			<b>1,071.00</b>

81a. On the same date, Respondent issued invoice number 14202 billing its customer for a trucklot of lemons as follows:

27	CAL. LEMONS 75s CHOICE	8.50	229.50
27	CAL. LEMONS 95s CHOICE	9.00	243.00
9	CAL. LEMONS 115s CHOICE	12.00	108.00
135	CAL. LEMONS 140s CHOICE	13.00	1,755.00
54	CAL. LEMONS 200s CHOICE	16.00	864.00
252	PALLETS	0.15	37.80
			<b>\$3,237.30</b>

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81b. Complainant subsequently prepared a revised invoice number 14202, billing Respondent for the lemons as follows:

<b>Invoice #: 14202</b>				
Lemon CTN 75 Choice ORGloCitrusource	27	ctn.	8.60	232.20
Lemon CTN 115 Choice ORGloCitrusource	9	ctn.	12.10	108.90
Lemon CTN 95 Choice ORGloCitrusource	27	ctn.	9.10	245.70
Lemon CTN 140 Choice ORGloCitrusource	135	ctn.	13.10	1,768.50
Lemon CTN 200 Choice ORGloCitrusource	54	ctn.	16.10	869.40
Box Credits	252		-.75	-189.00
Brokerage/commission	252		-.50	-126.00
INVOICE TOTAL:	252			2,909.70

Respondent paid Complainant \$2,595.60 for invoice number 14202. (AX 358-361, SRX 18).

82. On April 7, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14203</b>				
Lemon CTN 165 Choice ORGloCitrusource	243	ctn.		.00
Wildwood Pallets	243		4.25	1,032.75
Packing Exchange				.00
INVOICE TOTAL:	243			1,032.75

82a. On the same date, Respondent issued invoice number 14203 billing its customer for a trucklot of lemons as follows:

243	CAL. LEMONS 165s CHOICE	15.00	3,645.00
			\$3,645.00

82b. Complainant subsequently prepared a revised invoice number 14203, billing Respondent for the lemons as follows:

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<b>Invoice #: 14203</b>				
Lemon CTN 165 Choice	243	ctn.	15.00	3,645.00
ORGloCitrusource				
Box Credits	243		-.75	-182.25
Brokerage/commission	243		-.50	-121.50
Pallet Exchange				.00
INVOICE TOTAL:	243			3,341.25

Respondent paid Complainant \$3,037.50 for invoice number 14203. (AX 362-365, SRX 18).

83. On April 7, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14204</b>				
Lemon CTN 140 Fancy YEGloCitrusource	54	ctn.		.00
Packing Charges	54		3.50	189.00
INVOICE TOTAL:	54			189.00

83a. On the same date, Respondent issued invoice number 14204 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 140s FANCY	16,5139	891.75
			\$891.75

83b. Complainant subsequently prepared a revised invoice number 14204, billing Respondent for the lemons as follows:

<b>Invoice #: 14204</b>				
Lemon CTN 140 Fancy YEGloCitrusource	54	ctn.	17.00	918.00
Box Credits	54		-.75	-40.50
Brokerage/commission	54		-.50	-27.00
Pallet Exchange				.00
INVOICE TOTAL:	54			850.50

Respondent paid Complainant \$783.00 for invoice number 14204. (AX 366-369, SRX 18).

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84. On April 7, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14206</b>				
Lemon CTN 95 Fancy YEGloCitrusource	54	ctn.		.00
Lemon CTN 140 Fancy YEGloCitrusource	108	ctn.		.00
Lemon CTN 95 Choice ORGloCitrusource	399	ctn.		.00
Lemon CTN 115 Choice ORGloCitrusource	465	ctn.		.00
Packing Charges	1026		3.50	3,591.00
INVOICE TOTAL:	1026			3,591.00

84a. On the same date, Respondent issued invoice number 14206 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 95s FANCY	11.50	621.00
108	CAL. LEMONS 140s FANCY	13.00	1,404.00
399	CAL. LEMONS 95s CHOICE	10.00	3,990.00
465	CAL. LEMONS 115s CHOICE	11.00	5,115.00
1,026	PALLETS	0.15	153.90
	**1 PALLET CUT DUE TO WEIGHT		
	***TRUCK DID EXCHANGE PALLETS		
			\$11,283.90

84b. Complainant subsequently prepared a revised invoice number 14206, billing Respondent for the lemons as follows:

<b>Invoice #: 14206</b>				
Lemon CTN 95 Fancy YEGloCitrusource	54	ctn.	11.45	618.30
Lemon CTN 140 Fancy YEGloCitrusource	108	ctn.	12.95	1,398.60
Lemon CTN 95 Choice ORGloCitrusource	399	ctn.	9.95	3,970.05
Lemon CTN 115 Choice ORGloCitrusource	465	ctn.	10.95	5,091.75
Box Credits	1026		-.75	-769.50
Brokerage/commission	1026		-.50	-513.00
Pallet Exchange				.00

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INVOICE TOTAL: | 1026 | | 9,796.20

Respondent paid Complainant \$8,515.80 for invoice number 14206. (AX 370-374, SRX 18).

85. On April 8, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14129</b>				
Lemon CTN 165 Choice ORGloCitrusource	216	ctn.		.00
Lemon CTN 200 Choice ORGloCitrusource	54	ctn.		.00
Lemon CTN 140 Choice ORGloCitrusource	18	ctn.		.00
Wildwood Pallets	288		.15	43.20
Packing Charges	288		3.50	1,008.00
INVOICE TOTAL:	288			1,051.20

85a. On the same date, Respondent issued invoice number 14129 billing its customer for a trucklot of lemons as follows:

18	CAL. LEMONS 140s CHOICE	13.00	234.00
216	CAL. LEMONS 165s CHOICE	15.00	3,240.00
54	CAL. LEMONS 200s CHOICE	16.00	864.00
288	PALLETS	0.15	43.20
			\$4,381.20

85b. Complainant subsequently prepared a revised invoice number 14129, billing Respondent for the lemons as follows:

<b>Invoice #: 14129</b>				
Lemon CTN 165 Choice ORGloCitrusource	216	ctn.	15.04	3,248.64
Lemon CTN 200 Choice ORGloCitrusource	54	ctn.	16.04	866.16
Lemon CTN 140 Choice ORGloCitrusource	18	ctn.	13.00	234.00

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Box Credits	288		-75	-216.00
Wildwood Pallets	288		.15	43.20
Brokerage/commission	288		-50	-144.00
INVOICE TOTAL:	288			4,032.00

Respondent paid Complainant \$3,628.80 for invoice number 14129.  
(AX 375-378, SRX 18).

86. On April 8, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

**Invoice #: 14136**

Lemon CTN 140 Fancy YEGloCitrusource	42	ctn.		.00
Lemon CTN 140 Choice ORGloCitrusource	66	ctn.		.00
Wildwood Pallets	108		.15	16.20
Packing Charges	108		3.50	378.00
INVOICE TOTAL:	108			394.20

86a. On the same date, Respondent issued invoice number 14136 billing its customer for a trucklot of lemons as follows:

42	CAL. LEMONS 140s FANCY	13.00	546.00
66	CAL. LEMONS 140s CHOICE	13.00	858.00
108	PALLETS	0.17	18.36
			\$1,422.36

86b. Complainant subsequently prepared a revised invoice number 14136, billing Respondent for the lemons as follows:

**Invoice #: 14136**

Lemon CTN 140 Fancy YEGloCitrusource	42	ctn.	13.15	552.30
Lemon CTN 140 Choice ORGloCitrusource	66	ctn.	13.15	867.90
Box Credits	108		-75	-81.00
Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-50	-54.00
INVOICE TOTAL:	108			1,301.40

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Respondent paid Complainant \$1,150.20 for invoice number 14136. (AX 379-382, SRX 18).

87. On April 10, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14138</b>				
Lemon CTN 95 Choice ORGloCitrusource	108	ctn.		.00
Wildwood Pallets	108		.15	16.20
Packing Charges	108		3.50	378.00
INVOICE TOTAL:	108			394.20

87a. On the same date, Respondent issued invoice number 14138 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 95s CHOICE	10.00	1,080.00
108	PALLETS	0.17	18.36
			\$1,098.36

87b. Complainant subsequently prepared a revised invoice number 14138, billing Respondent for the lemons as follows:

<b>Invoice #: 14138</b>				
Lemon CTN 95 Choice ORGloCitrusource	108	ctn.	10.15	1,096.20
Box Credits	108		-.75	-81.00
Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			977.40

Respondent paid Complainant \$826.20 for invoice number 14138. (AX 383-386, SRX 18).

88. On April 10, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

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<b>Invoice #: 14210</b>				
Lemon CTN 140 Choice ORGloCitrusource	18	ctn.		.00
Lemon CTN 165 Fancy YEGloCitrusource	54	ctn.		.00
Wildwood Pallets	72		.15	10.80
Packing Charges	72		3.50	252.00
INVOICE TOTAL:	72			262.80

88a. On the same date, Respondent issued invoice number 14210 billing its customer for a trucklot of lemons as follows:

18	CAL. LEMONS 140s CHOICE	15.00	270.00
54	CAL. LEMONS 165s FANCY	16.00	864.00
72	PALLETS	0.15	10.80
			\$1,144.80

88b. Complainant subsequently prepared a revised invoice number 14210, billing Respondent for the lemons as follows:

<b>Invoice #: 14210</b>				
Lemon CTN 140 Choice ORGloCitrusource	18	ctn.	15.15	272.70
Lemon CTN 165 Fancy YEGloCitrusource	54	ctn.	16.15	872.10
Box Credits	72		-.75	-54.00
Wildwood Pallets	72		.15	10.80
Brokerage/commission	72		-.50	-36.00
INVOICE TOTAL:	72			1,065.60

Respondent paid Complainant \$964.80 for invoice number 14210. (AX 387-390, SRX 18).

89. On April 10, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14211</b>				
Lemon CTN 165 Fancy YEGloCitrusource	27	ctn.		.00
Lemon CTN 165 Choice ORGloCitrusource	108	ctn.		.00
Packing Charges	135		3.50	472.50

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INVOICE TOTAL: | 135 | | 472.50

89a. On the same date, Respondent issued invoice number 14211 billing its customer for a trucklot of lemons as follows:

27	CAL. LEMONS 140s CHOICE	18.50	499.50
108	CAL. LEMONS 165s FANCY	16.00	1,728.00
	**PALLET EXCHANGE**		
			\$2,227.50

89b. Complainant subsequently prepared a revised invoice number 14211, billing Respondent for the lemons as follows:

<b>Invoice #: 14211</b>				
Lemon CTN 165 Fancy YEGloCitrusource	27	ctn.	18.45	498.15
Lemon CTN 165 Choice ORGloCitrusource	108	ctn.	15.95	1,722.60
Box Credits	135		-.75	-101.25
Brokerage/commission	135		-.50	-67.50
Pallet Exchange				.00
INVOICE TOTAL:	135			2,052.00

Respondent paid Complainant \$1,883.25 for invoice number 14211. (AX 391-394, SRX 18).

90. On April 10, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14212</b>				
Lemon CTN 115 Choice ORGloCitrusource	108	ctn.		.00
Packing Charges	108		3.50	378.00
INVOICE TOTAL:	108			378.00

90a. On the same date, Respondent issued invoice number 14212 billing its customer for a trucklot of lemons as follows:

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108	CAL. LEMONS 115s CHOICE	13.00	1,404.00
	**PALLET EXCHANGE**		
			\$1,404.00

90b. Complainant subsequently prepared a revised invoice number 14212, billing Respondent for the lemons as follows:

<b>Invoice #: 14212</b>				
Lemon CTN 115 Choice	108	ctn.	13.00	1,404.00
ORGloCitrusource				
Box Credits	108		-.75	-81.00
Brokerage/commission	108		-.50	-54.00
Pallet Exchange				.00
INVOICE TOTAL:	108			1,269.00

Respondent paid Complainant \$1,134.00 for invoice number 14212. (AX 395-398, SRX 18).

91. On April 10, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14215</b>				
Lemon CTN 165 Fancy YEGloCitrusource	54	ctn.		.00
Lemon CTN 200 Choice	41	ctn.		.00
ORGloCitrusource				
Wildwood Pallets	95		.15	14.25
Packing Charges	95		3.50	332.50
INVOICE TOTAL:	95			346.75

91a. On the same date, Respondent issued invoice number 14215 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 165s CHOICE	16.00	864.00
41	CAL. LEMONS 200s CHOICE	16.00	656.00
95	PALLETS	0.15	14.25
			\$1,534.25

91b. Complainant subsequently prepared a revised invoice number 14215, billing Respondent for the lemons as follows:

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<b>Invoice #: 14215</b>				
Lemon CTN 165 Fancy YEGloCitrusource	54	ctn.	16.10	869.40
Lemon CTN 200 Choice ORGloCitrusource	41	ctn.	16.10	660.10
Box Credits	95		-.75	-71.25
Wildwood Pallets	95		.15	14.25
Brokerage/commission	95		-.50	-47.50
INVOICE TOTAL:	95			1,425.00

Respondent paid Complainant \$1,292.00 for invoice number 14215.  
(AX 399-402, SRX 18).

92. On April 10, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14216</b>				
Lemon CTN 140 Choice ORGloCitrusource	54	ctn.		.00
Wildwood Pallets	54		.15	8.10
Packing Charges	54		3.50	189.00
INVOICE TOTAL:	54			197.10

92a. On the same date, Respondent issued invoice number 14216 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 140s CHOICE	15.00	810.00
1	PALLETS	0.15	0.15
			\$810.15

92b. Complainant subsequently prepared a revised invoice number 14216, billing Respondent for the lemons as follows:

<b>Invoice #: 14216</b>				
Lemon CTN 140 Choice ORGloCitrusource	54	ctn.	15.00	810.00
Box Credits	54		-.75	-40.50
Wildwood Pallets	54		.15	8.10
Brokerage/commission	54		-.50	-27.00

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INVOICE TOTAL: | 54 | | 750.60

Respondent paid Complainant \$675.00 for invoice number 14216. (AX 403-406, SRX 18).

93. On April 11, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14140</b>				
Lemon CTN 75 Fancy YEGloCitrusource	54	ctn.	10.50	567.00
Lemon CTN 140 Fancy YEGloCitrusource	54	ctn.	18.00	972.00
Wildwood Pallets	108		.15	16.20
Packing Charges	108		3.50	378.00
INVOICE TOTAL:	108			1,933.20

93a. On the same date, Respondent issued invoice number 14140 billing its customer for a trucklot of lemons as follows:

54	CAL. LEMONS 75s CHOICE	10.50	567.00
41	CAL. LEMONS 140s CHOICE	18.00	972.00
108	PALLETS	0.15	16.20
			\$1,555.20

93b. Complainant subsequently prepared a revised invoice number 14140, billing Respondent for the lemons as follows:

<b>Invoice #: 14140</b>				
Lemon CTN 75 Fancy YEGloCitrusource	54	ctn.	10.65	575.10
Lemon CTN 140 Fancy YEGloCitrusource	54	ctn.	18.15	980.10
Box Credits	108		-.75	-81.00
Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			1,436.40

Respondent paid Complainant \$1,285.20 for invoice number 14140. (AX 407-410, SRX 18).

94. On April 11, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at

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which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14142</b>				
Lemon CTN 75 Fancy YEGloCitrusource	205	ctn.		.00
Lemon CTN 75 Choice ORGloCitrusource	767	ctn.		.00
Packing Charges	972		3.50	3,402.00
<b>INVOICE TOTAL:</b>	<b>972</b>			<b>3,402.00</b>

94a. On the same date, Respondent issued invoice number 14142 billing its customer for a trucklot of lemons as follows:

205	CAL. LEMONS 75s FANCY	8.50	1,742.50
767	CAL. LEMONS 75s CHOICE	8.50	6,519.50
			\$8,262.00

94b. Complainant subsequently prepared a revised invoice number 14142, billing Respondent for the lemons as follows:

<b>Invoice #: 14142</b>				
Lemon CTN 75 Fancy YEGloCitrusource	205	ctn.	8.50	1,742.50
Lemon CTN 75 Choice ORGloCitrusource	767	ctn.	8.50	6,519.50
Box Credits	972		-.75	-729.00
Brokerage/commission	972		-.50	-486.00
Pallet Exchange				.00
<b>INVOICE TOTAL:</b>	<b>972</b>			<b>7,047.00</b>

Respondent paid Complainant \$5,832.00 for invoice number 14142. (AX 411-414, SRX 18).

95. On April 11, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14209</b>				
Lemon CTN 154 Fancy YEGloCitrusource	81	ctn.		.00
Wildwood Pallets	81		.15	12.15

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Packing Charges	81		3.50	283.50
INVOICE TOTAL:	81			295.65

95a. On the same date, Respondent issued invoice number 14209 billing its customer for a trucklot of lemons as follows:

81	CAL. LEMONS 165s FANCY	16.00	1,296.00
81	PALLETS	0.15	12.15
			\$1,308.15

95b. Complainant subsequently prepared a revised invoice number 14209, billing Respondent for the lemons as follows:

<b>Invoice #: 14209</b>				
Lemon CTN 165 Fancy YEGloCitrusource	81	ctn.	16.10	1,304.10
Box Credits	81		-.75	-60.75
Wildwood Pallets	81		.15	12.15
Brokerage/commission	81		-.50	-40.50
INVOICE TOTAL:	81			1,215.00

Respondent paid Complainant \$1,101.60 for invoice number 14209. (AX 415-418, SRX 18).

96. On April 11, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14213</b>				
Lemon CTN 140 Fancy YEGloCitrusource	84	ctn.		.00
Lemon CTN 140 Choice ORGloCitrusource	486	ctn.		.00
Lemon CTN 235 Choice ORGloCitrusource	24	ctn.		.00
Wildwood Pallets	594		.15	89.10
Packing Charges	594		3.50	2,079.00
INVOICE TOTAL:	594			2,168.10

96a. On the same date, Respondent issued invoice number 14213 billing its customer for a trucklot of lemons as follows:

486	CAL. LEMONS 140s CHOICE	15.00	7,290.00
24	CAL. LEMONS 235s CHOICE	8.00	192.00
84	CAL. LEMONS 140s FANCY	15.00	1,260.00

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594	PALLETS	0.15	89.10
			\$8,831.10

96b. Complainant subsequently prepared a revised invoice number 14213, billing Respondent for the lemons as follows:

<b>Invoice #: 14213</b>				
Lemon CTN 140 Fancy YEGloCitrusource	84	ctn.	15.13	1,270.00
Lemon CTN 140 Choice ORGloCitrusource	486	ctn.	15.13	7,353.18
Lemon CTN 235 Choice ORGloCitrusource	24	ctn.	15.13	195.12
Box Credits	594		-.75	-445.50
Wildwood Pallets	594		.15	89.10
Brokerage/commission	594		-.50	-297.00
<b>INVOICE TOTAL:</b>	<b>594</b>			<b>8,165.82</b>

Respondent paid Complainant \$7,335.90 for invoice number 14213. (AX 419-422, SRX 18).

97. On April 11, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14214</b>				
Lemon CTN 115 Choice ORGloCitrusource	216	ctn.		.00
Wildwood Pallets	216		.15	32.40
Packing Charges	216		3.50	756.00
<b>INVOICE TOTAL:</b>	<b>216</b>			<b>788.40</b>

97a. On the same date, Respondent issued invoice number 14214 billing its customer for a trucklot of lemons as follows:

216	CAL. LEMONS 115s CHOICE	13.00	2,808.00
216	PALLETS	0.15	32.40
			\$2,840.40

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97b. Complainant subsequently prepared a revised invoice number 14214, billing Respondent for the lemons as follows:

<b>Invoice #: 14214</b>				
Lemon CTN 115 Choice ORGloCitrusource	216	ctn.	13.15	2,840.40
Box Credits	216		-.75	-162.00
Wildwood Pallets	216		.15	32.40
Brokerage/commission	216		-.50	-108.00
INVOICE TOTAL:	216			2,602.80

Respondent paid Complainant \$2,300.40 for invoice number 14214. (AX 423-426, SRX 18).

98. On April 11, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14217</b>				
Lemon CTN 115 Fancy YEGloCitrusource	318	ctn.		.00
Lemon CTN 95 Choice ORGloCitrusource	445	ctn.		.00
Lemon CTN 115 Choice ORGloCitrusource	263	ctn.		.00
Wildwood Pallets	1026		.15	153.90
Packing Charges	1026		3.50	3,591.00
INVOICE TOTAL:	1026			3,744.90

98a. On the same date, Respondent issued invoice number 14217 billing its customer for a trucklot of lemons as follows:

318	CAL. LEMONS 115s FANCY	13.00	4,134.00
445	CAL. LEMONS 95s CHOICE	10.00	4,450.00
263	CAL. LEMONS 115s CHOICE	13.00	3,419.00
1,026	PALLETS	0.15	153.90
			\$12,156.90

98b. Complainant subsequently prepared a revised invoice number 14217, billing Respondent for the lemons as follows:

<b>Invoice #: 14217</b>			

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Lemon CTN 115 Fancy YEGloCitrusource	318	ctn.	13.10	4,165.80
Lemon CTN 95 Choice ORGloCitrusource	445	ctn.	10.10	4,494.50
Lemon CTN 115 Choice ORGloCitrusource	263	ctn.	13.10	3,445.30
Box Credits	1026		-.75	-769.50
Wildwood Pallets	1026		.15	153.90
Brokerage/commission	1026		-.50	-513.00
INVOICE TOTAL:	1026			10,977.00

Respondent paid Complainant \$9,541.80 for invoice number 14217.  
(AX 427-430, SRX 18).

99. On April 14, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14222</b>				
Lemon CTN 115 Choice ORGloCitrusource	108	ctn.		.00
Wildwood Pallets	108		.15	16.20
Packing Charges	108		3.50	378.00
INVOICE TOTAL:	108			394.20

99a. On the same date, Respondent issued invoice number 14222 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 115s CHOICE	11.00	1,188.00
108	PALLETs	0.15	16.20
			\$1,204.20

99b. Complainant subsequently prepared a revised invoice number 14222, billing Respondent for the lemons as follows:

<b>Invoice #: 14222</b>				
Lemon CTN 115 Choice ORGloCitrusource	108	ctn.	11.30	1,220.40
Box Credits	108		-.75	-81.00
Wildwood Pallets	108		.15	16.20

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Brokerage/commission	108		-50	-54.00
INVOICE TOTAL:	108			1,101.60

Respondent paid Complainant \$950.40 for invoice number 14222. (AX 431-434, SRX 18).

100. On April 15, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14220</b>				
Lemon CTN 140 Choice ORGloCitrusource	18	ctn.		.00
Lemon CTN 165 Choice ORGloCitrusource	89	ctn.		.00
Wildwood Pallets	107		.15	16.05
Packing Charges	107		3.50	374.50
INVOICE TOTAL:	107			390.55

100a. On the same date, Respondent issued invoice number 14220 billing its customer for a trucklot of lemons as follows:

18	CAL. LEMONS 140s CHOICE	15.00	270.00
89	CAL. LEMONS 165s CHOICE	16.00	1,424.00
107	PALLETS	0.15	16.05
			\$1,710.05

100b. Complainant subsequently prepared a revised invoice number 14220, billing Respondent for the lemons as follows:

<b>Invoice #: 14220</b>				
Lemon CTN 140 Choice ORGloCitrusource	18	ctn.	15.12	272.16
Lemon CTN 165 Choice ORGloCitrusource	89	ctn.	16.12	1,434.68
Box Credits	107		-.75	-80.25
Wildwood Pallets	107		.15	16.05
Brokerage/commission	107		-.50	-53.50
INVOICE TOTAL:	107			1,589.14

Respondent paid Complainant \$1,439.15 for invoice number 14220. (AX 435-438, SRX 18).

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101. On April 15, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14221</b>				
Lemon CTN 140 Choice ORGloCitrusource	108	ctn.		.00
Wildwood Pallets	108		.15	16.20
Packing Charges	108		3.50	378.00
INVOICE TOTAL:	108			394.20

101a. On the same date, Respondent issued invoice number 14221 billing its customer for a trucklot of lemons as follows:

108	CAL. LEMONS 140s CHOICE	16.00	1,728.00
108	PALLETS	0.15	16.20
			\$1,744.20

101b. Complainant subsequently prepared a revised invoice number 14221, billing Respondent for the lemons as follows:

<b>Invoice #: 14221</b>				
Lemon CTN 140 Choice ORGloCitrusource	108	ctn.	16.15	1,744.20
Box Credits	108		-.75	-81.00
Wildwood Pallets	108		.15	16.20
Brokerage/commission	108		-.50	-54.00
INVOICE TOTAL:	108			1,625.40

Respondent paid Complainant \$1,474.20 for invoice number 14221. (AX 439-442, SRX 18).

102. On April 15, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

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<b>Invoice #: 7712</b>				
Lemon CTN 165 Choice YELLOW TAIL	27	ctn.	16.00	432.00
INVOICE TOTAL:	27			432.00

Complainant subsequently prepared a second invoice number 7712 which is labeled as "revised," but which is otherwise identical to the original invoice. Respondent has not paid Complainant for invoice number 7712. (AX 443-444).

103. On April 17, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14144</b>				
Lemon CTN 115 Fancy YEGloCitrusource	270	ctn.		.00
Wildwood Pallets	270		.15	40.50
Packing Charges	270		3.50	945.00
INVOICE TOTAL:	270			985.50

103a. On the same date, Respondent issued invoice number 14144 billing its customer for a trucklot of lemons as follows:

270	CAL. LEMONS 115s FANCY	15.75	4,252.50
270	PALLETS	0.17	45.90
			\$4,298.40

103b. Complainant subsequently prepared a revised invoice number 14144, billing Respondent for the lemons as follows:

<b>Invoice #: 14144</b>				
Lemon CTN 115 Fancy YEGloCitrusource	270	ctn.	15.90	4,293.00
Box Credits	270		-.75	-202.50
Wildwood Pallets	270		.15	40.50
Brokerage/commission	270		-.50	-135.00
INVOICE TOTAL:	270			3,996.00

Respondent paid Complainant \$3,618.00 for invoice number 14144. (AX 445-448, SRX 18).

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104. On April 21, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14224</b>				
Lemon CTN 63 Fancy YEGloCitrusource	81	ctn.		.00
Lemon CTN 63 Fancy WILDWOOD	1	ctn.		.00
Lemon CTN 63 Choice ORGloCitrusource	320	ctn.		.00
Lemon CTN 75 Fancy YEGloCitrusource	102	ctn.		.00
Lemon CTN 75 Choice ORGloCitrusource	168	ctn.		.00
Lemon CTN 95 Fancy YEGloCitrusource	53	ctn.		.00
Lemon CTN 95 Choice ORGloCitrusource	316	ctn.		.00
Lemon CTN 115 Choice ORGloCitrusource	147	ctn.		.00
Wildwood Pallets	1188		.15	178.20
Packing Charges	1		4.25	4.25
Packing Charges	1187		3.50	4,154.50
<b>INVOICE TOTAL:</b>	<b>1188</b>			<b>4,336.95</b>

104a. On the same date, Respondent issued invoice number 14224 billing its customer for a trucklot of lemons as follows:

82	CAL. LEMONS 63s FANCY	5.4343	445.61
320	CAL. LEMONS 63s CHOICE	5.4343	1,738.98
102	CAL. LEMONS 75s FANCY	5.4343	554.30
168	CAL. LEMONS 75s CHOICE	5.4343	912.96
53	CAL. LEMONS 95s CHOICE	7.4343	394.02
316	CAL. LEMONS 95s CHOICE	7.4343	2,349.24
147	CAL. LEMONS 115s CHOICE	9.4343	1,386.84
	SALES COMMISSION	-0.05	-0.05
1	PALLETs	-0.10	-0.10
			<b>\$7,781.80</b>

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104b. Complainant subsequently prepared a revised invoice number 14224, billing Respondent for the lemons as follows:

<b>Invoice #: 14224</b>				
Lemon CTN 63 Fancy YEGloCitrusource	81	ctn.	5.38	435.78
Lemon CTN 63 Fancy WILDWOOD	1	ctn.		.00
Lemon CTN 63 Choice ORGloCitrusource	320	ctn.	5.38	1,721.60
Lemon CTN 75 Fancy YEGloCitrusource	102	ctn.	5.38	548.76
Lemon CTN 75 Choice ORGloCitrusource	168	ctn.	5.38	903.84
Lemon CTN 95 Fancy YEGloCitrusource	53	ctn.	7.38	391.14
Lemon CTN 95 Choice ORGloCitrusource	316	ctn.	7.38	2,332.08
Lemon CTN 115 Choice ORGloCitrusource	147	ctn.	9.62	1,414.14
Box Credits	1188		-.75	-891.00
Wildwood Pallets	1188		.15	178.20
Brokerage/commission	1187		-.50	-593.50
Packing Charges for non grower fruit	1		4.25	4.25
INVOICE TOTAL:	1188			6,445.29

Respondent paid Complainant \$4,787.64 for invoice number 14224. (AX 449-452, SRX 18).

105. On April 21, 2006, Complainant supplied Respondent with one trucklot of lemons for Respondent to sell on Complainant's behalf, at which time Complainant also invoiced Respondent for the lemons as follows:

<b>Invoice #: 14147</b>				
Lemon CTN 95 Fancy YEGloCitrusource	226	ctn.		.00
Lemon CTN 115 Fancy YEGloCitrusource	17	ctn.		.00
Lemon CTN 140 Fancy YEGloCitrusource	22	ctn.		.00
Lemon CTN 200 Fancy YEGloCitrusource	1	ctn.		.00
Lemon CTN 200 Choice ORGloCitrusource	9	ctn.		.00
Lemon CTN 235 Choice ORGloCitrusource	1	ctn.		.00

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Wildwood Pallets	276		.15	41.40
Packing Charges	275		3.50	962.50
Packing Charges	1		4.25	4.25
INVOICE TOTAL:	276			1,008.15

105a. On the same date, Respondent issued invoice number 14147 billing its customer for a trucklot of lemons as follows:

226	CAL. LEMONS 95s FANCY	8.00	1,808.00
17	CAL. LEMONS 115s FANCY	8.00	136.00
22	CAL. LEMONS 140s FANCY	8.00	176.00
1	CAL. LEMONS 200s FANCY	8.00	8.00
9	CAL. LEMONS 200s CHOICE	8.00	72.00
1	CAL. LEMONS 235s CHOICE	8.00	8.00
276	PALLETS	0.15	41.40
			\$2,249.40

105b. Complainant subsequently prepared a revised invoice number 14147, billing Respondent for the lemons as follows:

<b>Invoice #: 14147</b>				
Lemon CTN 95 Fancy YEGloCitrusource	226	ctn.	5.65	1,276.00
Lemon CTN 115 Fancy YEGloCitrusource	17	ctn.	5.65	96.05
Lemon CTN 140 Fancy YEGloCitrusource	22	ctn.	5.65	124.30
Lemon CTN 200 Fancy YEGloCitrusource	1	ctn.	5.65	5.65
Lemon CTN 200 Choice ORGloCitrusource	9	ctn.	5.65	50.85
Lemon CTN 235 Choice ORGloCitrusource	1	ctn.	5.65	5.65
Box Credits	275		-.75	-206.25
Wildwood Pallets	276		.15	41.40
Brokerage/commission	276		-.50	-138.00
INVOICE TOTAL:	276			1,256.55

Respondent paid Complainant \$1,559.40 for invoice number 14147. (AX 453-456, SRX 18).

## the Secretary Conclusions

Complainant asserts that it had a verbal agreement with Respondent that provided that Respondent would sell the February and March 2006 lemon crop for Complainant's growers, Highline and Denise Marooney, and that Complainant would be responsible for packing the fruit. Complainant states the initial agreement provided that Complainant would bill Respondent for packing charges and any other incidentals (e.g. pallets, strappings, and inspections, if required), and that Respondent would pay Complainant whatever they billed their customer less their commission of \$0.50 per carton sold.<sup>1</sup>

According to Complainant, the parties' verbal agreement stipulated that Respondent would only continue to sell the lemons as long as the sales price for each carton exceeded its cost, including picking, packing, and other expenses, as well as Respondent's commission. Complainant states it is for this reason that it initially issued invoices to Respondent listing only the packing and pallet charges, so that Respondent would be aware of the costs that needed to be recovered through the sale of the lemons.<sup>2</sup> Following the sale of the lemons, Complainant states the parties were unable to agree on the appropriate return, so Complainant prepared revised invoices billing Respondent for the lemons at the house average price for lemons sold during the same period.<sup>3</sup> The total revised invoice amount billed by Complainant is \$388,071.14, of which Respondent paid \$248,241.22, leaving an unpaid invoice balance of \$139,829.92, which amount Complainant seeks to recover through this proceeding.

In response to Complainant's allegations, Respondent asserts that the parties entered into contracts for Respondent to purchase the lemons at an open price. More specifically, Respondent asserts that the contract terms were "price after sale." Respondent states this is evidenced by the invoices initially issued by Complainant, which did not list any prices for the lemons.<sup>4</sup> We note, however, that both the "open" and "price after sale" terms asserted by Respondent typically entail the parties agreeing

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<sup>1</sup> See ROI, Exhibit No. 1.

<sup>2</sup> See Opening Statement, paragraphs 9A and 9B.

<sup>3</sup> See Opening Statement, paragraph 4.

<sup>4</sup> See Answer, Affirmative Defenses, paragraphs A and B.

upon a price after the goods are sold.<sup>5</sup> In the instant case, there is no indication that the parties, at the time of contracting, intended that there would be any price negotiation after Respondent sold the lemons. Rather, both parties are in agreement that Respondent was to return to Complainant the sales price collected from its customers less Respondent's commission. Moreover, Respondent, in its initial response submitted during the informal handling of this claim, states that it "agreed to help sell product on account for them [Complainant] and return the net revenues back to [Complainant]."<sup>6</sup>

In all contract interpretation the intent of the parties, where it can be reasonably discerned, should be paramount, except in those rare instances where public policy is thereby contravened. *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, at 980 n. 18 (1997). Although the parties have, in various pleadings submitted during the course of this proceeding, described the transactions in question as sales, both have also stated that it was their intent, at the formation of the contract, that Respondent would sell the lemons on Complainant's behalf and remit the net sales proceeds to Complainant. On this basis, it appears Respondent was acting as Complainant's agent in selling the lemons, as it was obligated to pay Complainant the net proceeds collected from its customers and it was not, therefore, in a position to negotiate a profit in the manner that a buyer would in the case of goods that were purchased and resold. On the contrary, Respondent was only authorized to withhold \$0.50 per carton for commission. Respondent was, therefore, acting primarily for the benefit of Complainant when it sold the subject loads of lemons. On this basis, we conclude that an agency relationship was created when Respondent agreed to sell the lemons on Complainant's behalf.

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<sup>5</sup> Section 2-305(1) of the Uniform Commercial Code, "Open Price Term," states "the parties if they so intend can conclude a contract for sale even though the price is not settled." The term "price after sale" is not defined in either the U.C.C. or the Act and Regulations. It is considered a subcategory of the open price term, and is generally understood as meaning that the parties will agree upon a price after the buyer effects its resales.

<sup>6</sup> See ROI, Exhibit No. 4.

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In order to determine the appropriate amount due Complainant for each of the 103 loads of lemons that Respondent sold on Complainant's behalf, we will consider each shipment individually, using Complainant's invoice number for reference purposes only. Before we do, however, we must first consider Complainant's allegation that the parties agreed that Respondent would only continue to sell the lemons as long as they were selling at either profitable or break-even prices.<sup>7</sup> Respondent asserts in response that its obligation was to sell the produce and provide an accounting, and that it was not obligated to guarantee that Complainant's growers made a profit.<sup>8</sup> Since we have conflicting statements from the parties on this issue, and since the parties' agreement was never reduced to writing, we find that Complainant has failed to sustain its burden to prove that Respondent guaranteed that its sales prices would exceed the cost of the lemons.

We will now consider each shipment individually by invoice number below:

Invoice No. 13702

According to Respondent, this order belongs to one of Respondent's growers, and does not apply to the group of transactions in question. Respondent states it short paid Complainant's original invoice by \$23.50 because it was charged for a temperature recorder that it did not order. Complainant states Respondent did not dispute the temperature recorder charge when the invoice was presented. Respondent states in response that Complainant put a temperature recorder on the order at their own discretion, and that since the recorder was not ordered, Respondent does not feel that it should have to pay for it. Complainant responds that if Respondent felt it was wrongly charged, it should have resolved the issue when the invoice was presented rather than a year later.

Complainant, as the moving party, has the burden to prove that Respondent ordered and agreed to pay for a temperature recorder on this shipment. Complainant did not supply any evidence to refute Respondent's contention that it did not order the temperature recorder. In the absence of such evidence, we find that Complainant's claim concerning this shipment of lemons should be dismissed.

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<sup>7</sup> See Opening Statement, paragraph 9A.

<sup>8</sup> See Answering Statement, paragraph 1.

Invoice No. 13828

Respondent submitted a copy of its invoice showing that it billed its customer \$10.00 per carton for the 107 cartons of 140-count fancy lemons in this shipment. Complainant apparently did not agree with this return and invoiced Respondent for the lemons at its house average price of \$10.25 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, February 3, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$12.00 to \$14.00 per carton for the 140-count size. The report also notes, however, that demand was moderate with a wide range of prices. Moreover, as we already mentioned, Respondent was acting as Complainant's agent when it negotiated the sale of the lemons. In *La Vern Co-operative Citrus Ass'n v. Mendelson-Zeller Co., Inc.*, 46 Agric. Dec. 1673 (1987), we stated:

Market circumstances vary widely from time to time and place to place. In addition, perishable commodities can be merchantable and still vary over a wide range as to quality and as to desirability on a given market dependent on many varying characteristics of such produce. [The consignee] was a company chosen by complainant to act as complainant's agent. . . . We are very reluctant to subject the performance of complainant's agent to the scrutiny of our hindsight.

Similarly here, Respondent was a firm chosen by Complainant to act as its agent in selling the subject lemons. Absent a showing of fraud or other hard evidence of relevant violations of the Regulations, Complainant must bear the risk of its agent, Respondent, not having done a good job in regard to sales. Respondent promptly sold the lemons, and a copy of Respondent's invoice evidencing such is contained in the record.<sup>9</sup> Under the circumstances, we see no reason to allow Complainant to recover more than the sales price Respondent

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<sup>9</sup> See AX 16.

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collected from its customer, less commission, in accordance with the parties' verbal agreement.

At \$10.00 per carton, the total sales price for the 107 cartons of lemons in question is \$1,070.00. From this amount, the parties agree that Respondent is entitled to deduct \$0.50 per carton, or \$53.50, for commission. We note that this shipment included an additional 42-18/2 pound bags of lemons that Complainant packed on behalf of Respondent. Complainant billed Respondent \$6.70 per bag, or a total of \$281.40, to pack these bags. In addition, the shipment included one carton of 140-count fancy lemons that Complainant packed for one of Respondent's growers. Complainant billed Respondent \$4.25 to pack this carton. As these lemons were not supplied by Complainant's growers, but Complainant nevertheless packed the lemons on Respondent's behalf, we find that Complainant is entitled to recover the packing charges claimed.

Finally, the record shows Respondent deducted freight in the amount of \$101.65, or \$0.95 per carton for 107 cartons, from its remittance to Complainant.<sup>10</sup> In its Opening Statement, Complainant disputes the deduction of freight from Respondent's remittance and asserts, in pertinent part, as follows:

...Freight was never agreed as a deductible item but rather reimbursable upon presentation of invoice with documentation and upon verification that it is a cost incurred for the hauling of the lemons from the field to the packing house then this would be reimbursed to the respondent.<sup>11</sup>

In making this argument, Complainant fails to acknowledge Section 3 of Respondent's Answer, which includes copies of delivery tickets and freight bills for full bins of lemons shipped from the fields to Complainant's packing facility between February 1, 2006, and April 8, 2006. Although Respondent lists a total of nine invoices paid to Moya Trucking in amounts totaling \$49,175.00, for freight associated with the lemons in question, Respondent neglected to submit a copy of invoice number 562568, in the amount of \$10,500.00, nor did Respondent

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<sup>10</sup> See AX 15.

<sup>11</sup> See Opening Statement, p.3.

submit any of the delivery tickets to establish that this invoice is for freight charges incurred in connection with the shipment of lemons from the fields to Complainant's packing facility. Respondent also failed to submit delivery tickets for invoice numbers 562075 and 562165, to establish that the \$600.00 freight expense claimed for each of these invoices was incurred in connection with the shipment of lemons to Complainant's packing facility. After removing the charges associated with these three invoices from the total freight billed by Moya Trucking, the total documented freight expense that Respondent incurred to ship the lemons in question to Complainant's packing facility is \$37,475.00. As this is an expense Respondent reasonably incurred in connection with the lemons it sold on Complainant's behalf, Respondent is entitled to deduct this expense from sales proceeds owed to Complainant for the lemons. However, since the freight was incurred while the lemons were in bulk bins, there is no way to reasonably apportion the freight charges over the 103 trucklot shipments of lemons in cartons at issue here. Therefore, as we discuss each shipment, we will not include a deduction for freight for each individual load. Rather, we will determine the amount due Complainant for each shipment without the freight deduction, and at the conclusion of our discussion we will total the amount due for all 103 loads of lemons in question and reduce this amount by \$37,475.00 to account for Respondent's freight expense.

Returning to our discussion of the lemons in the load identified by invoice number 13828, after deducting Respondent's commission of \$53.50 from the gross sales price of \$1,070.00, the net amount due Complainant for the lemons in this shipment is \$1,016.50. To this amount, we will add Complainant's packing charges totaling \$285.65, which results in a total amount due Complainant from Respondent of \$1,302.15. Respondent paid Complainant \$740.40 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$561.75.

Invoice No. 13829

Respondent sold the 195 cartons of 140-count, 165-count, and 200-count choice lemons in this shipment for \$11.00 per carton, or a total of

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\$2,145.00. Complainant apparently did not agree with this return and proceeded to invoice Respondent at its house average prices of \$9.10, \$9.95, and \$9.90 per carton, respectively, all of which are lower than the sales price reported by Respondent. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, February 6, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$10.00 to \$12.00 per carton for 140-count, \$10.00 to \$12.50 per carton for 165-count, and \$10.00 to \$12.00 per carton for 200-count. Since Respondent's sales price of \$11.00 per carton is in line with prevailing market prices, Complainant has not established any basis for its failure to accept this return. We conclude that Respondent's liability to Complainant for the subject load of lemons should be based on the \$11.00 per carton sales price collected from its customer, less commission, in accordance with the parties' agreement.

From the gross sales price of \$2,145.00, Respondent may deduct \$97.50 for commission at the agreed upon rate of \$0.50 per carton. The record shows that this shipment also included 226 cartons of lemons that Complainant packed on Respondent's behalf. For these cartons, Complainant is entitled to recover a packing fee of \$4.25 per carton, or a total of \$960.00. After making these adjustments, the net amount due Complainant for the lemons in this shipment is \$3,008.00. Respondent paid Complainant \$70.00 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$2,938.00.

### Invoice No. 13707

Respondent's invoice reflects that it originally sold the 115-count fancy lemons in this shipment for \$7.69 per carton, the 140-count fancy lemons for \$9.94 per carton, and the 165-count fancy lemons for \$9.94 per carton.<sup>12</sup> Respondent apparently received less than this amount from its customer due to damaged boxes and decay. Respondent did not, however, submit a U.S.D.A. inspection to establish that the lemons or the cartons were in poor condition as alleged. Absent such evidence,

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<sup>12</sup> Respondent's invoice shows sales prices of \$6.6915, \$8.9415, and \$8.9415, respectively, for the 115-count, 140-count, and 165-count lemons in this shipment. A note at the bottom of this invoice states that these prices reflect a per carton price adjustment of \$0.9985. The adjustment amount was added to the invoice price to determine the original sales price of the lemons.

any price reductions granted by Respondent to its customer cannot be considered.

Complainant apparently did not agree with the return reported by Respondent, so it invoiced Respondent for the lemons at its house average price of \$10.90 per carton for the 115-count fancy lemons, \$10.25 per carton for the 140-count fancy lemons, and \$13.30 per carton for 165-count fancy lemons. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, February 6, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$14.00 to \$17.00 per carton for 115-count, \$12.00 to \$14.00 per carton for 140-count, and \$13.00 to \$14.00 per carton for 165-count. The report also notes that demand was moderate, with a wide range in prices. Although the original sales prices reported by Respondent fall below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence, Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price reflects poor performance on Respondent's part. We will, however, base Respondent's liability on its original sales price, rather than the amount it actually collected, because Respondent failed to supply evidence that the adjustment granted to its customer was warranted.

Based on Respondent's original sales prices, the total anticipated sales proceeds amount to \$2,868.62. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$161.50, for its commission. The record shows that Respondent sold a total of 1,026 cartons of lemons to its customer, or 703 cartons more than the 323 cartons of lemons that Respondent received from Complainant. Complainant's invoice to Respondent includes a packing charge of \$4.25 per carton for 658 cartons of lemons packed on Respondent's behalf. There is no explanation for the 45 carton difference between the 658 cartons for which Complainant charged a packing fee and the 703 cartons of lemons in the shipment that Respondent did not receive from Complainant. Nevertheless, since Complainant chose to bill Respondent for packing only 658 cartons, we will limit Complainant's recovery to the \$2,796.50 (658 cartons at \$4.25 per carton) claimed.

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Complainant also billed Respondent \$166.25 for 19 pallets at \$8.75 each. Respondent asserts in its Answering Statement that it does not commonly bill separately for pallet charges because the pallet charges are included in the price of the fruit.<sup>13</sup> On this basis, Respondent states it has never disputed the pallet charges; however, Respondent does dispute that the pallet charges should be billed separately and added on top of the revenues. Respondent asserts, to the contrary, that the pallet charges should be subtracted from its sales prices, which already include the pallet charges. In response to this contention, Complainant contends that Respondent was aware of the pallet charges as indicated in Bill Allen's e-mail message to Rosalind Child of April 4, 2006. That e-mail message reads:

I just noticed that you are currently charging \$8.75 for a pallet which works out to just over \$0.16 per carton. Citrusource is currently taking a loss on every pallet that we ship from your facility. All other shippers are charging \$0.15 per carton for pallets or \$8.10 per pallet. This is customary at this time and our customers only pay \$0.15 per carton. Can you please adjust your pallet charge to the \$0.15 per carton?<sup>14</sup>

While this e-mail message addresses the amount of the pallet charges, it does not address Respondent's contention that the pallet charges were included in Respondent's sales prices. Under the circumstances, we believe that the most equitable way to proceed is to assume that for those invoices issued by Respondent that do not include a separate charge for pallets, the cost of palletization is included in the sales price. Since Complainant is billing Respondent for pallets, we must presume that the pallets were paid for by Complainant. On this basis, we see no reason to deduct the pallet charge from the revenues collected by Respondent, as Respondent suggests we do in its Answering Statement. For those invoices issued by Respondent that do include a separate charge for pallets, Respondent shall remit to Complainant the pallet charges it collected from its customer.

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<sup>13</sup> See Answering Statement, p.8.

<sup>14</sup> See OSX 3.

We now return to the question of the appropriate pallet charge for the shipment of lemons in question. In this instance, Respondent's invoice to its customer does not include a separate charge for pallets, so we assume that the pallet expense was built into the sales price of the lemons. Therefore, it would not be appropriate to add a pallet charge to the sales proceeds due Complainant for the lemons. Consequently, in determining the net proceeds due Complainant for the lemons in this shipment, we will simply add Complainant's packing charge of \$2,796.50, and deduct Respondent's commission of \$161.50, from the total sales price of \$2,868.62, which leaves a net amount due Complainant from Respondent for the lemons in this shipment of \$5,503.62.

Invoice No. 13709

Respondent sold the 81 cartons of 140-count choice lemons in this shipment for \$8.00 per carton, or a total of \$648.00, and Complainant agreed to this return. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$40.50, for commission. Respondent deducted this amount, plus \$76.95 for freight, and paid Complainant the balance of \$530.55. We determined earlier in our discussion that the most straightforward way to account for the freight paid by Respondent is to deduct the total freight expense incurred by Respondent to ship the lemons to Complainant's packing facility from the total amount Respondent owes Complainant for the 103 shipments of lemons that Respondent sold on Complainant's behalf. In accordance with this method, we must disallow the individual freight deductions taken by Respondent on a shipment by shipment basis. We therefore find that there remains a balance due Complainant from Respondent of \$76.95 for the lemons in this shipment.

Invoice No. 13710

Respondent sold the 42 cartons of 200-count choice lemons in this shipment for \$8.75 per carton, or a total of \$367.50, and Complainant agreed to this return. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$21.00, for commission. Respondent deducted this

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amount, plus \$39.90 for freight, and paid Complainant the balance of \$306.60. For the reasons just stated, we must disallow Respondent's freight deduction. We therefore find that there remains a balance due Complainant from Respondent of \$39.90 for this shipment of lemons.

Invoice No. 13713

Respondent sold the 162 cartons of 140-count choice lemons in this shipment for \$8.50 per carton, or a total of \$1,377.00, and Complainant agreed to this return. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$81.00, for commission. Respondent deducted this amount, plus \$153.90 for freight, and paid Complainant the balance of \$1,142.10. For the reasons already cited, we must disallow Respondent's freight deduction. We therefore find that there remains a balance due Complainant from Respondent of \$153.90 for this shipment of lemons.

Invoice No. 13716

Respondent sold the 75-count choice lemons in this shipment for \$8.00 per carton, the 95-count choice lemons for \$8.00 per carton, the 115-count choice lemons for \$9.00 per carton, the 140-count choice lemons for \$11.25 per carton, the 165-count fancy lemons for \$14.00 per carton, and the 200-count fancy lemons for \$13.00 per carton. Complainant apparently did not agree to the reported return and invoiced Respondent for the 75-count choice lemons at \$9.09 per carton, the 95-count choice lemons at \$9.09 per carton, the 115-count choice lemons at \$10.09 per carton, the 140-count choice lemons at \$12.33 per carton, the 165-count fancy lemons at \$15.09 per carton, and the 200-count fancy lemons at \$14.09 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, February 9, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$9.00 per carton for 75-count, \$7.50 to \$9.00 per carton for 95-count, \$9.00 to \$10.00 per carton for 115-count, and \$10.00 to \$12.00 per carton for 140-count. Shipper's 1<sup>st</sup> grade lemons were mostly selling for \$14.00 to \$15.00 per carton for 165-count, and \$13.00 to \$15.00 per carton for 200-count. Since Respondent's sales prices are in line with prevailing market prices, there is no basis for Complainant's refusal to accept the reported return.

Therefore, in accordance with the parties' agreement, we find that Respondent is liable to Complainant for the sales proceeds it collected from its customer, less commission.

The sales prices collected by Respondent total \$8,305.00. From this amount Respondent is entitled to deduct \$0.50 per carton, or \$423.50, for commission. Complainant's revised invoice includes a charge of \$38.00 (19 at \$2.00 each) for straps and cornerboards. Since Respondent's invoice to its customer also includes a separate charge for straps and cornerboards, we presume that the parties agreed to this charge. In addition, the shipment included an additional 172 cartons of lemons that Complainant packed on Respondent's behalf. Complainant is entitled to recover a packing charge of \$4.25 per carton, or a total of \$731.00, for these cartons. After making the appropriate adjustments for commission, straps and cornerboards, and packing charges, the net amount due Complainant from Respondent for this shipment of lemons is \$8,650.50. Respondent paid Complainant \$7,999.30 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$651.20.

Invoice No. 13717

Respondent sold the 75-count, 95-count, 115-count, and 140-count fancy lemons in this shipment for \$7.25 per carton. Complainant apparently did not agree to this return and invoiced Respondent at \$10.30 per carton for the 75-count fancy lemons, \$8.70 per carton for the 95-count fancy lemons, \$10.90 per carton for the 115-count fancy lemons, and \$10.25 per carton for the 140-count fancy lemons. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, February 9, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$13.00 to \$16.00 per carton for 75-count, \$14.00 to \$17.00 per carton for 95-count, \$14.00 to \$16.00 per carton for 115-count, and \$13.00 to \$14.00 per carton for 140-count. Although Respondent's sales price of \$7.25 per carton falls below the prevailing market prices mentioned in the report, there is no indication that Respondent's failure to sell the lemons at prevailing market prices resulted from any negligence on Respondent's

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part. Moreover, the U.S.D.A. Market News report just mentioned states that demand was only moderate and that lemons were selling for a wide range of prices. With a wide range of prices reported, it cannot be stated that Respondent's sales price was not within the market range. We therefore find that Complainant has failed to establish any basis for its refusal to accept the return reported by Respondent. We conclude that Respondent's liability to Complainant for the subject load of lemons should be based on the gross sales proceeds, less commission, in accordance with the parties' agreement.

Respondent's invoice to its customer lists gross sales of \$7,438.50, from which Respondent may deduct \$0.50 per carton, or \$430.50, for commission, leaving a net amount due Complainant of \$7,008.00. We note that Complainant's invoice to Respondent for the lemons includes a charge of \$153.90 for pallets (1,026 cartons at \$0.15 per carton), and Respondent's invoice to its customer bears a notation that reads "FILE SHORT PAID FOR PALLETS. (19\*8.75)." Hence, it appears that Respondent should have been paid \$166.25 by its customer for pallets. Respondent provides no explanation for its failure to collect this amount. We therefore find that Respondent is liable to Complainant for the pallet charge of \$166.25 that it should have collected from its customer.

This shipment also included 165 cartons of lemons that Complainant packed on behalf of Respondent. Complainant is entitled to recover a packing charge of \$4.25 per carton, or a total of \$701.25, for these cartons. When the appropriate charges for pallets and packing are added to the net sales proceeds of \$7,008.00, the total amount due Complainant from Respondent for the lemons in this shipment is \$7,875.50. Respondent paid Complainant \$5,861.30 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$2,014.20.

Invoice No. 13718

Respondent sold the 95-count, 115-count, and 140-count choice lemons and the 140-count fancy lemons in this shipment for \$7.42 per carton.<sup>15</sup> Respondent thereafter reduced this price by \$0.9037 per carton

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<sup>15</sup> Respondent's invoice shows a sales price of \$6.5163 for the 95-count choice, 115-count choice, 140-count fancy, and 140-count choice lemons in this shipment. A note  
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as a result of a damage claim asserted by its customer. Respondent did not, however, submit any independent evidence to substantiate the damage claim. In the absence of such evidence, we conclude that the price adjustment Respondent granted to its customer was not warranted.

Complainant apparently did not agree to the return reported by Respondent, so it invoiced Respondent for the lemons at \$7.50 per carton for the 95-count choice, \$8.20 per carton for the 115-count choice, \$9.10 per carton for the 140-count choice, and \$10.25 per carton for the 140-count fancy. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, February 9, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.50 to \$9.00 per carton for 95-count, \$9.00 to \$10.00 per carton for 115-count, and \$10.00 to \$12.00 per carton for 140-count. Shipper's 1<sup>st</sup> grade lemons were mostly selling for \$13.00 to \$14.00 per carton for 140-count. The report also notes that demand was moderate, with a wide range in prices. Although the original sales price reported by Respondent is below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence, Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price reflects poor performance on Respondent's part. We will, however, base Respondent's liability on its original sales price, rather than the amount it actually collected, because Respondent failed to supply evidence that the adjustment granted to its customer was warranted.

From the gross sales proceeds of \$7,212.24, Respondent may deduct \$0.50 per carton, or \$486.00, for commission. Respondent's invoice to its customer reflects a separate charge for pallets in the amount of \$166.25 (19 pallets at \$8.75 each), which amount should be added to the sales proceeds due Complainant for the lemons.<sup>16</sup> The shipment also

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<sup>15</sup>(...continued)

at the bottom of this invoice states that these prices reflect a per carton price adjustment of \$0.9037. The adjustment amount was added to the invoice price to determine the original sales price of the lemons.

<sup>16</sup> While Complainant's invoice reflects that Complainant billed Respondent for pallets at the agreed upon rate of \$0.15 per carton, the \$8.75 per pallet that Respondent  
(continued...)

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included an additional 54 cartons of lemons that Complainant packed on Respondent's behalf. Complainant is entitled to recover \$4.25 per carton, or \$229.50, for packing these cartons. When the appropriate adjustments for commission, packing charges and pallets are applied to the gross sales of \$7,212.24, the net amount due Complainant from Respondent for the lemons in this shipment is \$7,121.99. Respondent paid Complainant \$6,198.59 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$923.40.

### Invoice No. 13719

Respondent sold the 270 cartons of 165-count choice lemons in this shipment for \$9.00 per carton, or a total of \$2,430.00, and Complainant agreed to this return. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$135.00, for commission. Respondent deducted this amount, plus \$256.50 for freight, and paid Complainant the balance of \$2,038.50. For the reasons cited earlier in our discussion, we are disallowing the freight deduction taken by Respondent. We therefore find that there remains a balance due Complainant from Respondent of \$256.50 for this shipment of lemons.

### Invoice No. 13960

Respondent sold the 165-count and 200-count choice lemons in this shipment for \$12.00 per carton. Complainant apparently refused to accept this return and proceeded to invoice Respondent for the lemons at its house average price of \$9.90 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, February 9, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$11.00 to \$12.00 per carton for both the 165-count and 200-count sizes. Since Respondent's sales price of \$12.00 per carton is in line with prevailing market prices, there is no basis for Complainant's refusal to accept the reported return. We conclude that Respondent's liability to Complainant for the subject load of lemons should be based on the \$12.00 per carton sales price collected

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<sup>16</sup>(...continued)

billed its customer results in a slightly greater amount, and Respondent should not be allowed to profit from the pallets supplied by Complainant.

from its customer, less commission, in accordance with the parties' agreement.

From the gross sales price of \$2,592.00, Respondent is entitled to deduct \$0.50 per carton, or \$108.00, for commission. This leaves a net amount due Complainant of \$2,484.00. Respondent paid Complainant \$2,278.80 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$205.20 for the lemons in this shipment.

Invoice No. 13840

Respondent sold the 115-count, 140-count, and 165-count choice lemons in this shipment for \$6.00 per carton. Complainant billed Respondent for the lemons at \$8.20 per carton for the 115-count choice, \$9.10 per carton for the 140-count choice, and \$9.90 per carton for the 165-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, February 10, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$9.00 to \$10.00 per carton for 115-count, \$10.00 to \$12.00 per carton for 140-count, and \$11.00 to \$12.50 per carton for 165-count. The report also notes that demand was moderate, with a wide range in prices. Although the sales price reported by Respondent is below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence, Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price reflects poor performance on Respondent's part. We therefore find that Respondent's liability to Complainant should be based on the \$6.00 per carton sales price collected from its customer, less commission, in accordance with the parties' agreement.

From the gross sales of \$6,156.00, Respondent may deduct \$0.50 per carton, or \$513.00, for commission. Complainant also billed Respondent \$153.90 for pallets (1,026 cartons at \$0.15 per carton); however, Respondent's invoice to its customer does not include a separate charge for pallets, so we assume that the pallet expense was built in to the sales price of the lemons. Therefore, pallet charges should not be added to the sales proceeds due Complainant for the lemons.

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When Respondent's commission of \$513.00 is deducted from the gross sales of \$6,156.00, the net amount due Complainant for the lemons in this shipment is \$5,643.00. Respondent paid Complainant \$5,296.25 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$346.75.

### Invoice No. 13842

Respondent sold the 95-count, 115-count, 140-count, and 165-count fancy lemons in this shipment for \$7.42 per carton.<sup>17</sup> Respondent thereafter reduced this price by \$2.153 per carton as a result of a damage claim asserted by its customer. Respondent did not, however, submit a U.S.D.A. inspection or any other independent evidence to substantiate the damages claimed. Without such evidence, any price reductions granted by Respondent to its customer cannot be considered.

Complainant apparently did not agree to the return reported by Respondent, so it billed Respondent for the lemons at \$8.70 per carton for the 95-count fancy, \$10.90 per carton for the 115-count fancy, \$10.25 per carton for the 140-count fancy, and \$13.30 per carton for the 165-count fancy. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, February 13, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$14.00 to \$16.00 per carton for 95-count, \$13.00 to \$15.00 per carton for 115-count, \$13.00 to \$14.00 per carton for 140-count, and \$14.00 to \$15.00 per carton for 165-count. The report also notes that demand was moderate, with a wide range in prices. Although the original sales price reported by Respondent is below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence, Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price reflects poor performance on Respondent's part. We will, however, base Respondent's liability on its original sales price, rather than the amount it actually collected, because Respondent

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<sup>17</sup> Respondent's invoice shows a sales price of \$7.2047 for the 95-count, 115-count, 140-count, and 165-count fancy lemons in this shipment. A note at the bottom of this invoice states that the invoice was short paid by \$220.92, which amount was distributed among the 1,026 cartons that Respondent sold to its customer by deducting \$0.2153 from the price of each carton. This adjustment was added back to the invoice price to determine the original sales price of the lemons.

failed to supply evidence that the adjustment granted to its customer was warranted.

From the gross sales of \$7,612.92, Respondent may deduct \$0.50 per carton, or \$513.00, for commission. Complainant also billed Respondent \$153.90 for pallets (1,026 cartons at \$0.15 per carton); however, Respondent did not bill its customer separately for pallets, so we assume that this expense was built in to the sales price of the lemons. Therefore, a charge for pallets should not be added to the sales proceeds due Complainant for the lemons. When Respondent's commission of \$513.00 is deducted from the gross sales of \$7,612.92, the net amount due Complainant for the lemons in this shipment is \$7,099.92. Respondent paid Complainant \$6,291.47 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$808.45.

Invoice No. 13965

Respondent sold the 108 cartons of 115-count choice lemons in this shipment for \$7.00 per carton. Complainant invoiced Respondent for the lemons at \$8.20 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, February 13, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$8.00 to \$10.50 per carton, mostly \$9.00 to \$10.00 per carton, for the 115-count size. The report also notes that demand was moderate, and that a wide range of prices was reported. Although Respondent's sales price is below the prevailing market prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We therefore find that Respondent's liability to Complainant should be based on the \$7.00 per carton sales price collected from its customer, less commission, in accordance with the parties' agreement.

At \$7.00 per carton, the gross sales for the 108 cartons of lemons in question total \$756.00. From this amount, Respondent may deduct \$0.50 per carton, or \$54.00, for commission. Respondent billed its customer \$17.50 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate

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adjustments for commission and pallets, the net amount due Complainant from Respondent for the lemons in this shipment is \$719.50. Respondent paid Complainant \$616.90 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$102.60.

##### Invoice No. 13966

Respondent sold the 165-count choice lemons in this shipment for \$11.50 per carton. Complainant invoiced Respondent for the lemons at \$0.16 per carton more, or \$11.66 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, February 13, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$11.00 to \$12.50 per carton for the 165-count size. Since Respondent's sale price is in line with prevailing market prices, there is no basis for Complainant's failure to accept this return. Moreover, Complainant billed Respondent for the lemons at nearly the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented a reasonable return for the lemons. We conclude that Respondent's liability to Complainant should be based on the sales price of \$11.50 per carton, less commission, in accordance with the parties' agreement.

At \$11.50 per carton, the gross sales of the 270 cartons of 165-count choice lemons in question amount to \$3,105.00. From this amount Respondent may deduct \$0.50 per carton, or \$135.00, for commission. Respondent billed its customer \$43.75 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant from Respondent for the lemons in this shipment is \$3,013.75. Respondent paid Complainant \$2,757.25 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$256.50.

##### Invoice No. 13844

Respondent maintains that this shipment of lemons arrived with problems, after which Respondent and its customer settled upon a price of \$2.75 per carton. Respondent did not, however, secure any independent evidence, such as a U.S.D.A. inspection, to show that the

lemons arrived in poor condition as alleged. Absent such evidence, Respondent is liable to Complainant for the fair market value of the lemons. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, February 14, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$9.00 to \$10.00 per carton for the 115-count size. Complainant invoiced Respondent for the lemons at \$8.20 per carton. Although the market prices are higher, we see no reason to assign a higher price to the lemons than that used by Complainant. Therefore, using Complainant's invoice price of \$8.20 per carton, we find that the 1,026 carton of lemons in this shipment had a fair market value of \$8,413.20. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$513.00, for commission. This leaves a net amount due Complainant from Respondent for the lemons in this shipment of \$7,900.20. Respondent paid Complainant \$1,333.80 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$6,566.40.

Invoice No. 13845

Once again, Respondent's invoice reflects that the lemons arrived with problems, after which Respondent and its customer settled upon a price of \$2.70 per carton for the 75-count choice lemons in this shipment, \$3.10 per carton for the 95-count choice lemons, \$2.90 per carton for the 140-count choice lemons, and \$2.83 per carton for the 165-count choice lemons. Respondent did not, however, secure any independent evidence, such as a U.S.D.A. inspection, to show that the lemons arrived in poor condition as alleged. Absent such evidence, Respondent is liable to Complainant for the fair market value of the lemons. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, February 14, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$9.00 per carton for 75-count size, \$7.50 to \$9.00 per carton for 95-count size, \$10.00 to \$12.00 per carton for the 140-count size, and \$11.00 to \$12.50 per carton for 165-count size. Complainant invoiced Respondent for the 75-count choice lemons at \$8.20 per carton, the 95-count choice lemons at \$7.50 per carton, the 140-count choice lemons

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at \$9.10 per carton, and the 165-count choice lemons at \$9.90 per carton. For the reasons already cited, we will use the lesser prices billed by Complainant as the fair market value of the lemons. On this basis, we find that the 1,026 cartons of lemons in this shipment had a fair market value of \$9,153.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$513.00, for commission. This leaves a net amount due Complainant from Respondent for the lemons in this shipment of \$8,640.00. Respondent paid Complainant \$1,468.80 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$7,171.20.

Invoice No. 13847

Respondent sold the three cartons of 235-count fancy lemons in this shipment for \$10.25 per carton, or a total of \$30.75, and Complainant agreed to this return. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$1.50, for commission. Respondent deducted this amount, plus \$2.85 for freight, and paid Complainant the balance of \$26.40. For the reasons already cited, we must disallow Respondent's freight deduction. We therefore find that there remains a balance due Complainant from Respondent of \$2.85 for this shipment of lemons.

Invoice No. 13970

Respondent sold the 200-count choice lemons in this shipment for \$11.00 per carton. Complainant apparently refused to accept this return and proceeded to invoice Respondent for the lemons at its house average price of only \$9.90 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, February 14, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$11.00 to \$12.00 per carton for the 200-count size. Since Respondent's sales price is in line with prevailing market prices, there is no basis for Complainant's refusal to accept the reported return. We conclude that Respondent's liability to Complainant should be based on the \$11.00 per carton sales price reported, less commission, in accordance with the parties' agreement.

At \$11.00 per carton, the gross sales for the 248 cartons of 200-count choice lemons in this shipment amount to \$2,728.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$124.00, for

commission. Respondent billed its customer \$43.75 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant from Respondent for the lemons in this shipment is \$2,647.75. Respondent paid Complainant \$1,246.55 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$1,401.20.

Invoice No. 13848

Respondent originally sold the lemons in this shipment at \$6.00 per carton for the 75-count fancy, \$6.25 per carton for the 95-count fancy, \$7.00 per carton for the 115-count fancy, \$7.50 per carton for the 140-count fancy, and \$10.00 per carton for the 165-count fancy.<sup>18</sup> Respondent subsequently reduced these prices by \$0.0987 per carton; however, Respondent did not supply any evidence to establish that this adjustment was warranted. Absent such evidence, any price reductions granted by Respondent to its customer cannot be considered.

Complainant apparently did not agree to the return reported by Respondent, so it invoiced Respondent for the lemons at \$10.30 per carton for the 75-count fancy, \$8.70 per carton for the 95-count fancy, \$10.90 per carton for the 115-count fancy, \$10.25 per carton for the 140-count fancy, and \$13.30 per carton for the 165-count fancy. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, February 15, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$12.00 to \$15.00 per carton for 75-count size, \$14.00 to \$16.00 per carton for 95-count size, \$13.00 to \$15.00 per carton for the 115-count size, \$13.00 to \$14.00 per carton for 140-count size, and \$14.00 to \$15.00 per carton

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<sup>18</sup> Respondent's invoice lists sales prices for the lemons in this shipment of \$5.9013 per carton for the 75-count fancy, \$6.1513 per carton for the 95-count fancy, \$6.9013 per carton for the 115-count fancy, \$7.4013 for the 140-count fancy, and \$10.4013 per carton for the 165-count fancy. A note at the bottom of this invoice states that the invoice was short paid by \$101.25, which amount was distributed among the 1,026 cartons that Respondent sold to its customer by deducting \$0.0987 from the price of each carton. This adjustment was added back to the invoice price to determine the original sales price of the lemons.

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for 165-count size. The report also notes that demand was moderate, with a wide range in prices. Although the original sales prices reported by Respondent fall below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence, Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price reflects poor performance on Respondent's part. We will, however, base Respondent's liability on its original sales prices, rather than the amount it actually collected, because Respondent failed to supply evidence that the adjustments granted to its customer were warranted.

Based on Respondent's original sales prices, the anticipated gross sales amount for the lemons in this shipment is \$7,180.25. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$510.50, for commission. There were also an additional five cartons of 140-count fancy lemons in this shipment that Complainant packed on Respondent's behalf. Complainant is entitled to recover a packing fee of \$4.25 per carton, or \$21.25, for these cartons. After making the appropriate adjustments for commission and packing charges, the net amount due Complainant for the lemons in this shipment is \$6,691.00. Respondent paid Complainant \$5,692.55 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$998.45.

Invoice No. 13967

Respondent sold the 108 cartons of 165-count choice lemons in this shipment for \$11.50 per carton. Complainant apparently refused to accept this return and proceeded to invoice Respondent for the lemons at its house average price of only \$9.90 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, February 16, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$11.00 to \$13.00 per carton for the 165-count size. Since Respondent's sales price is in line with the prevailing market prices mentioned in the report, there is no basis for Complainant's refusal to accept the reported return. We conclude that Respondent's liability to Complainant should be based on its sales price of \$11.50 per carton, less commission, in accordance with the parties' agreement.

At \$11.50 per carton, the gross sales for the 108 cartons of 165-count choice lemons in question amount to \$1,242.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent billed its customer \$17.50 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant from Respondent for the lemons in this shipment is \$1,205.50, which amount Respondent has already paid Complainant. Therefore, there is nothing further owed to Complainant by Respondent for the lemons in this shipment.

Invoice No. 13968

Respondent sold the 165-count choice lemons in this shipment for \$11.50 per carton. Complainant apparently refused to accept this return and proceeded to invoice Respondent for the lemons at its house average price of only \$9.90 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, February 16, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$11.00 to \$13.00 per carton for the 165-count size. Since Respondent's sales price is in line with prevailing market prices, there is no basis for Complainant's refusal to accept the reported return. We conclude that Respondent's liability to Complainant should be based on its sales price of \$11.50 per carton, less commission, in accordance with the parties' agreement.

At \$11.50 per carton, the gross sales for the 118 cartons of 165-count choice lemons in question amount to \$1,357.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$59.00, for commission. In addition, Respondent's invoice reflects that it also billed its customer \$17.50 for two pallets at \$8.75 each, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant from Respondent for the lemons in this shipment is \$1,315.50, which amount Respondent has already paid Complainant. Therefore, there is nothing further owed to Complainant by Respondent for the lemons in this shipment.

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Invoice No. 13977

Respondent sold the lemons in this shipment at \$7.00 per carton for the 115-count choice, and at \$8.00 per carton for the 140-count choice. Complainant invoiced Respondent for the lemons at \$8.20 per carton for the 115-count choice, and at \$9.10 per carton for the 140-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, February 16, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice grade lemons were mostly selling for \$9.00 to \$10.00 per carton for 115-count, and \$10.00 to \$12.00 per carton for 140-count. The report also notes that demand was moderate, with a wide range in prices. Although Respondent's sales prices are below the prevailing market prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

Respondent's gross sales for the lemons in this shipment total \$2,430.00, from which Respondent is entitled to deduct \$0.50 per carton, or \$162.00, for commission. Respondent billed its customer \$52.50 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$2,320.50. Respondent paid Complainant \$2,012.70 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$307.80.

Invoice No. 13849

Respondent sold the 165-count fancy lemons in this shipment for \$12.00 per carton, and the 165-count choice lemons in the shipment for \$9.25 per carton, and Complainant agreed to this return. From the gross sales of \$3,294.00, Respondent is entitled to deduct \$0.50 per carton, or \$162.00, for commission. Respondent deducted this amount, plus \$307.80 for freight, and paid Complainant the balance of \$2,824.20. For the reasons already cited, we must disallow Respondent's freight deduction. We therefore find that there remains a balance due Complainant from Respondent of \$307.80 for this shipment of lemons.

Invoice No. 13850

Respondent sold the 140-count choice lemons in this shipment for \$6.00 per carton. Complainant invoiced Respondent for the lemons at its house average price of \$9.10 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, February 17, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$10.00 to \$12.00 per carton for the 140-count size. The report also notes that demand was moderate, with a wide range in prices. Although the sales price reported by Respondent falls below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence, Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price reflects poor performance on Respondent's part. Accordingly, we find that Respondent is liable to Complainant for the lemons in this shipment at its sales price of \$6.00 per carton, less commission, in accordance with the parties' agreement.

At \$6.00 per carton, the gross sales for the 594 cartons of lemons in this shipment total \$3,564.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$297.00, for commission. Respondent billed its customer \$96.25 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$3,363.25. Respondent paid Complainant \$2,798.95 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$564.30.

Invoice No. 13855

Respondent sold the 108 cartons of 115-count fancy lemons in this shipment for \$10.00 per carton, or a total of \$1,080.00, and Complainant agreed to this return. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent deducted this amount, plus \$102.60 for freight, and paid Complainant the balance of \$923.40. For the reasons already cited, we must disallow Respondent's

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freight deduction. We therefore find that there remains a balance due Complainant from Respondent of \$102.60 for this shipment of lemons.

Invoice No. 13979

Respondent sold the 140-count choice lemons in this shipment for \$9.00 per carton. Complainant invoiced Respondent for the lemons at its house average price of \$9.10 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, February 17, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$10.00 to \$12.00 per carton for the 140-count size. The report also notes that demand was fairly light, with a wide range in prices. Although Respondent's sales price is below the prevailing market prices mentioned in the report, Complainant billed Respondent for the lemons at nearly the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented a reasonable return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's sales price of \$9.00 per carton, less commission, in accordance with the parties' agreement.

At \$9.00 per carton, the gross sales for the 216 cartons of lemons in this shipment total \$1,944.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$108.00, for commission. Respondent billed its customer \$35.00 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$1,871.00. Respondent paid Complainant \$1,665.80 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$205.20.

Invoice No. 13854

Respondent sold the lemons in this shipment at \$6.25 per carton for the 95-count fancy, \$7.00 per carton for the 115-count fancy, \$7.50 per carton for the 140-count fancy, and \$10.50 per carton for the 165-count fancy. Complainant invoiced Respondent for the lemons at \$8.70 per carton for the 95-count fancy, \$10.90 per carton for the 115-count fancy, \$10.25 per carton for the 140-count fancy, and \$13.30 per carton for the 165-count fancy. The U.S.D.A. Market News recap of available f.o.b.

prices for Friday, February 17, 2006, the nearest reporting date to the date of shipment, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$13.00 to \$16.00 per carton for 95-count size, \$12.00 to \$14.00 per carton for the 115-count size, \$13.00 to \$14.00 per carton for 140-count size, and \$14.00 to \$15.00 per carton for 165-count size. The report also notes that demand was fairly light, with a wide range in prices. Although the sales prices reported by Respondent fall below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence, Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price reflects poor performance on Respondent's part. Accordingly, we find that Respondent is liable to Complainant for the gross sales collected from its customer, less commission, in accordance with the parties' agreement.

Respondent sold the lemons for gross sales totaling \$3,979.50. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$272.00, for commission. Respondent billed its customer \$87.50 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$3,795.00. Respondent paid Complainant \$3,278.20 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$516.80.

Invoice No. 13980

Respondent sold the lemons in this shipment at \$7.00 per carton for the 115-count choice, and at \$8.00 per carton for the 140-count choice. Complainant invoiced Respondent for the lemons at \$8.20 per carton for the 115-count choice, and at \$9.10 per carton for the 140-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, February 17, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$9.00 to \$10.00 per carton for 115-count, and \$10.00 to \$12.00 per carton for 140-count. The report also notes that demand was fairly light, with a

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wide range in prices. Although Respondent's sales prices are below the prevailing market prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We therefore find that Respondent's liability to Complainant should be based on its gross sales, less commission, in accordance with the parties' agreement.

Respondent's gross sales for the lemons in this shipment total \$2,430.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$162.00, for commission. Respondent billed its customer \$52.50 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$2,320.50. Respondent paid Complainant \$2,012.70 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$307.80.

### Invoice No. 13857

Respondent sold the 25 cartons of 235-count choice lemons in this shipment for \$9.00 per carton, or a total of \$225.00, and Complainant agreed to this return. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$12.50, for commission. Respondent also deducted \$54.15 for freight; however, for the reasons already cited, we must disallow Respondent's freight deduction. The shipment also included 32 cartons of lemons that Complainant packed on Respondent's behalf. For these cartons, Complainant may recover a repacking fee of \$4.25 per carton, or a total of \$136.00. After making the appropriate adjustments for commission and packing charges, the net amount due Complainant from Respondent for this shipment of lemons is \$348.50. Respondent paid Complainant \$430.35 for the lemons, an overpayment of \$81.85.

### Invoice No. 13983

Respondent sold both the 95-count and the 115-count choice lemons in this shipment for \$6.00 per carton. Complainant invoiced Respondent for the lemons at \$7.50 per carton for the 95-count choice, and at \$8.20 per carton for the 115-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, February 21, 2006, the nearest

reporting date to the date of shipment, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$9.00 per carton for 95-count size, and \$9.00 to \$10.00 per carton for 115-count size. The report also notes that demand was moderate, with a wide range in prices. Although Respondent's sales price is below the prevailing market prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We therefore find that Respondent's liability to Complainant should be based on its gross sales, less commission, in accordance with the parties' agreement.

Respondent's gross sales total \$1,944.00, from which Respondent is entitled to deduct \$0.50 per carton, or \$162.00, for commission. Respondent billed its customer \$52.50 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$1,834.50. Respondent paid Complainant \$1,413.40 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$421.10.

Invoice No. 13984

Respondent sold the 165-count choice lemons in this shipment for \$11.00 per carton. Complainant apparently refused to accept this return and proceeded to invoice Respondent for the lemons at its house average price of only \$9.90 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, February 21, 2006, the nearest reporting date to the date of shipment, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$11.00 to \$13.00 per carton for the 165-count size. Since Respondent's sales price is in line with prevailing market prices, there is no basis for Complainant's refusal to accept the reported return. We conclude that Respondent's liability to Complainant should be based on the \$11.00 per carton sales price reported, less commission, in accordance with the parties' agreement.

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At \$11.00 per carton, the gross sales for the 216 cartons of 165-count choice lemons in this shipment amount to \$2,376.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$108.00, for commission. Respondent billed its customer \$35.00 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant from Respondent for the lemons in this shipment is \$2,303.00. Respondent paid Complainant \$2,097.80 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$205.20 for this shipment of lemons.

Invoice No. 13985

Respondent sold the 235-count choice lemons in this shipment for \$10.00 per carton. Complainant apparently refused to accept this return and proceeded to invoice Respondent for the lemons at its house average price of only \$9.90 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, February 21, 2006, the nearest reporting date to the date of shipment, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$9.00 to \$10.00 per carton for the 235-count size. Since Respondent's sales price is in line with prevailing market prices, there is no basis for Complainant's refusal to accept the reported return. We conclude that Respondent's liability to Complainant should be based on the \$10.00 per carton sales price reported, less commission, in accordance with the parties' agreement.

At \$10.00 per carton, the gross sales for the 54 cartons of 235-count choice lemons in this shipment amount to \$540.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$27.00, for commission. Respondent billed its customer \$8.75 for one pallet, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant from Respondent for the lemons in this shipment is \$521.75. Respondent paid Complainant \$470.45 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$51.30 for this shipment of lemons.

Invoice No. 13982

Respondent sold the 115-count choice lemons in this shipment for \$6.00 per carton. Complainant invoiced Respondent for the lemons at the house average price of \$8.20 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, February 21, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$9.00 to \$10.00 per carton for 115-count size. The report also notes that demand was moderate, with a wide range in prices. Although Respondent's sales price is below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We therefore find that Respondent's liability to Complainant should be based on its sales price of \$6.00 per carton, less commission, in accordance with the parties' agreement.

At \$6.00 per carton, Respondent's gross sales for the 162 cartons of 115-count choice lemons in this shipment amount to \$972.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$81.00, for commission. Respondent billed its customer \$26.25 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$917.25. Respondent paid Complainant \$763.35 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$153.90.

Invoice No. 13859

Respondent originally sold the lemons in this shipment at \$6.25 per carton for the 95-count fancy, \$6.50 per carton for the 115-count fancy, \$9.50 per carton for the 140-count fancy, and \$11.25 per carton for the 165-count fancy.<sup>19</sup> Respondent subsequently reduced these prices by

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<sup>19</sup> Respondent's invoice lists sales prices for the lemons in this shipment of \$5.9754 per carton for the 95-count fancy, \$6.2254 per carton for the 115-count fancy, \$9.2254 per carton for the 140-count fancy, and \$10.7254 per carton for the 165-count fancy.

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\$0.2746 per carton; however, Respondent did not supply any evidence to establish that this adjustment was warranted. Without such evidence, any adjustments granted by Respondent to its customer cannot be considered.

Complainant apparently did not agree to the return reported by Respondent, so it invoiced Respondent for the lemons at \$8.70 per carton for the 95-count fancy, \$10.90 per carton for the 115-count fancy, \$10.25 per carton for the 140-count fancy, and \$13.30 per carton for the 165-count fancy. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, February 23, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$12.00 to \$14.00 per carton for 95-count size, \$12.00 to \$14.00 per carton for the 115-count size, \$13.00 to \$14.00 per carton for 140-count size, and \$14.00 to \$15.00 per carton for 165-count size. The report also notes that demand was moderate, with a wide range in prices. Although Respondent's original sales prices fall below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence, Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price reflects poor performance on Respondent's part. We will, however, base Respondent's liability on its original sales prices, rather than the amount it actually collected, because Respondent failed to supply evidence that the adjustments granted to its customer were warranted.

Based on Respondent's original sales prices, the anticipated gross sales amount for the lemons in this shipment is \$6,539.50. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$422.50, for commission. Respondent billed its customer \$140.00 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$6,257.00. Respondent paid Complainant \$5,454.25

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<sup>19</sup>(...continued)

A note at the bottom of this invoice states that the invoice was short paid by \$232.05, which amount was distributed among the 845 cartons that Respondent sold to its customer by deducting \$0.2746 from the price of each carton. This adjustment was added back to the invoice price to determine the original sales price of the lemons.

for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$802.75.

Invoice No. 13860

Respondent sold both the 140-count and the 165-count choice lemons in this shipment for \$6.00 per carton. Complainant invoiced Respondent for the lemons at \$9.10 per carton for the 140-count choice, and at \$9.90 per carton for the 165-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, February 24, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$10.00 to \$12.00 per carton for 140-count, and \$11.00 to \$13.00 per carton for 165-count. Although Respondent's sales price falls below the prevailing market prices mentioned in the report, we have already determined that in the absence of fraud or negligence, Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price reflects poor performance on Respondent's part. We therefore find that Respondent is liable to Complainant for its gross sales, less commission, in accordance with the parties' agreement.

Respondent's gross sales for the lemons in this shipment amount to \$2,892.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$241.00, for commission. Complainant invoiced Respondent \$72.30 for pallets (482 cartons at \$0.15 per carton); however, Respondent did not include a separate charge for pallets on its invoice to its customer, so we assume that the cost of pallets was built in to the sales price. Therefore, a charge for pallets should not be added to the sales proceeds due Complainant for the lemons in this shipment. After deducting Respondent's commission of \$241.00 from the gross sales of \$2,892.00, the net amount due Complainant for the lemons in this shipment is \$2,651.00. Respondent paid Complainant \$2,271.85 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$379.15.

Invoice No. 13856

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Respondent sold the 115-count choice lemons in this shipment for \$6.00 per carton. Respondent's invoice also indicates that it issued a credit to its customer in the amount of \$486.00 for damaged cartons; however, Respondent did not submit any independent evidence, such as a U.S.D.A. inspection, to establish that any of the cartons in this shipment were damaged as alleged. Absent such evidence, any adjustments granted by Respondent to its customer cannot be considered.

Complainant apparently did not agree to the return reported by Respondent, so it billed Respondent for the lemons in this shipment at its house average price of \$8.20 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, February 24, 2006, the nearest reporting date to the date of shipment, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$9.00 per carton for 115-count size. The report also notes that there were few sales in the \$6.00 to \$6.50 per carton range. Therefore, since Respondent's original invoice price of \$6.00 per carton is in line with the reported market prices, there is no basis for Complainant's refusal to accept the reported return.

Based on Respondent's original sales price of \$6.00 per carton, the anticipated gross sales amount for the lemons in this shipment is \$5,832.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$486.00, for commission. Respondent billed its customer \$157.52 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$5,503.52. Respondent paid Complainant \$4,580.10 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$923.42.

### Invoice No. 13991

Respondent sold the 95-count choice lemons in this shipment for \$5.00 per carton. Complainant invoiced Respondent for the lemons at its house average price of \$7.50 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, February 27, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for 95-count

size. The report also notes that there were few sales in the \$6.00 to \$6.50 per carton range, and that demand was moderate, with a wide range in prices. Although Respondent's sales price is below the range of prices mentioned in the report, we have already determined that in the absence of fraud or negligence Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We conclude that Respondent's liability to Complainant should be based on its sales price of \$5.00 per carton, less commission, in accordance with the parties' agreement.

At \$5.00 per carton, the gross sales amount for the 270 cartons of 95-count choice lemons in this shipment is \$1,350.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$135.00, for commission. Respondent billed its customer \$43.75 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$1,258.75. Respondent paid Complainant \$1,326.25 for the lemons, an overpayment of \$67.50.

Invoice No. 13992

A U.S.D.A. inspection was performed on the 95-count choice and the 115-count choice lemons in this shipment at Panama Banana Co., in Chicago, Illinois, on March 3, 2006, four days after they were shipped on February 27, 2006. The inspection disclosed 22% average defects, including 19% skin breakdown and 3% decay. Based on the inspection results, Respondent and its customer negotiated a price of \$3.2065 per carton for the lemons. Respondent did not, however, supply an account of sales to show how they arrived at this return. Absent an account of sales, Respondent should have received the value the lemons would have had if they had been as warranted, *i.e.*, the prevailing market price, less an adjustment based on the percentage of defects disclosed by the inspection. The U.S.D.A. Market News Terminal Price Report for Chicago, Illinois, shows that on March 3, 2006, 7/10 bushel cartons of California shipper's choice 95-count lemons were mostly selling for

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\$14.50 to \$15.00 per carton, and that 115-count lemons were mostly selling for \$14.00 to \$16.00 per carton. Using the average Market News price of \$14.75 per carton for 95-count choice lemons, the 108 cartons of 95-count choice lemons in this shipment had a value if they had been as warranted of \$1,593.00. Similarly, using the average Market News price of \$15.00 per carton for 115-count choice lemons, the 162 cartons of 115-count choice lemons in this shipment had a value if they had been as warranted of \$2,430.00. The total value the lemons would have had if they had been as warranted is \$4,023.00. When we reduce this amount by 22%, or \$885.06, to account for the condition defects disclosed by the U.S.D.A. inspection, and also by \$87.00 for the cost of the inspection and \$324.00 for freight, we are left with an amount that should have been remitted to Respondent for the lemons of \$2,726.94. We note, however, that Complainant invoiced Respondent for the 95-count and 115-count choice lemons in this shipment at its house average prices of \$7.50 per carton and \$8.20 per carton, respectively, for a total invoice price of \$2,138.40. We see no reason to assign a higher value to the lemons than that used by Complainant. We therefore find that the fair market value of the lemons in this shipment was \$2,138.40. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$135.00, for commission. Complainant invoiced Respondent \$48.60 for pallets (324 cartons at \$0.15 per carton); however, we presume that the house average prices used by Complainant are based on gross sales prices, which should include the cost of pallets. On this basis, we find that an additional charge for pallets is not appropriate. Complainant's invoice also reflects that it packed an additional 54 cartons of 95-count choice lemons on Respondent's behalf, for which it is entitled to recover a packing fee of \$4.25 per carton, or \$229.50. After making the appropriate adjustments for commission and packing fees, the net amount due Complainant from Respondent for the lemons in this shipment is \$2,232.90. Respondent paid Complainant \$530.95 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$1,701.95 for this shipment of lemons.

Invoice No. 13866

Respondent sold the lemons in this shipment at \$6.50 per carton for the 95-count fancy, \$7.75 per carton for the 115-count fancy, \$10.00 per carton for the 140-count fancy, and \$7.75 per carton for the 115-count choice. Complainant invoiced Respondent for the lemons at \$8.70 per carton for the 95-count fancy, \$10.90 per carton for the 115-count fancy, \$10.25 per carton for the 140-count fancy, and \$8.20 per carton for the 115-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, February 28, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$10.00 to \$13.00 per carton for 95-count, \$11.00 to \$14.00 per carton for 115-count, and \$13.00 to \$14.00 per carton for 140-count. The same report shows that shipper's choice lemons were mostly selling for \$7.00 to \$9.00 per carton for the 115-count size. The report also notes that demand was moderate, with a wide range of prices reported. With the exception of the 115-count choice lemons, Respondent's sales prices for the lemons in this shipment are generally below the market prices mentioned in the report. We have already determined, however, that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

Respondent's gross sales for the lemons in this shipment amount to \$5,130.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$236.50, for commission. Respondent billed its customer \$105.00 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$3,692.75. Respondent paid Complainant \$3,111.90 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$580.85.

Invoice No. 13867

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Respondent sold the 140-count and 235-count choice lemons in this shipment for \$9.00 per carton, and the 165-count and 200-count choice lemons for \$10.00 per carton, and Complainant agreed to these prices. From the gross sales of \$2,059.00, Respondent is entitled to deduct \$0.50 per carton, or \$109.00, for commission. Respondent deducted this amount, plus \$207.10 for freight, and paid Complainant the balance of \$1,742.90. For the reasons already cited, we must disallow Respondent's freight deduction. We therefore find that there remains a balance due Complainant from Respondent of \$207.10 for this shipment of lemons.

Invoice No. 13993

Respondent sold the 95-count choice lemons in this shipment for \$5.00 per carton. Complainant invoiced Respondent for the lemons at its house average price of \$7.50 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, February 28, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for 95-count size. The report also notes that there were few sales in the \$6.00 to \$6.50 per carton range, and that demand was moderate, with a wide range in prices. Although Respondent's sales price is below the range of prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We conclude that Respondent's liability to Complainant should be based on its sales price of \$5.00 per carton, less commission, in accordance with the parties' agreement.

At \$5.00 per carton, the gross sales amount for the 972 cartons of 95-count choice lemons in this shipment is \$4,860.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$459.00, for commission. Complainant's invoice also reflects that it packed an additional 54 cartons of 95-count choice lemons on Respondent's behalf, for which it is entitled to recover a packing fee of \$4.25 per carton, or \$229.50. After making the appropriate adjustments for commission and packing, the net amount due Complainant for the lemons in this shipment is \$4,630.50. Respondent paid Complainant \$4,374.00 for the

lemons. Therefore, there remains a balance due Complainant from Respondent of \$256.50.

Invoice No. 13869

Respondent sold the 115-count and 140-count choice lemons in this shipment for \$6.00 per carton. Respondent's invoice also indicates it issued a credit to its customer in the amount of \$1,080.00 for damaged cartons; however, Respondent did not submit any independent evidence, such as a U.S.D.A. inspection, to establish that any of the cartons in this shipment were damaged as alleged. Absent such evidence, any adjustments granted by Respondent to its customer cannot be considered.

Complainant apparently did not agree to the return reported by Respondent, so it invoiced Respondent for the lemons in this shipment at its house average price of \$8.20 per carton for the 115-count choice, and at \$9.10 per carton for the 140-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, March 1, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$9.00 per carton for 115-count, and \$10.00 to \$12.00 per carton for 140-count. The report also notes that there were few sales of 115-count choice lemons in the \$6.00 to \$6.50 per carton range, and that demand was moderate, with a wide range in prices. Respondent's original sales price of \$6.00 per carton is within the market range for 115-count choice lemons, but falls below the reported range for 140-count choice lemons. Nevertheless, the sale was prompt and there is no indication of any negligence on Respondent's part. We therefore find that Respondent's liability to Complainant should be based on the sales price it collected from its customer, less commission, in accordance with the parties' agreement. We will, however, base Respondent's liability on its original sales price, rather than the amount it actually collected, because Respondent failed to supply evidence that the adjustment granted to its customer was warranted.

Based on Respondent's original sales price of \$6.00 per carton, the anticipated gross sales amount for this shipment of lemons is \$6,156.00.

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From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$513.00, for commission. Respondent billed its customer \$175.00 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$5,818.00. Respondent paid Complainant \$4,834.55 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$983.45.

Invoice No. 13995

Respondent's customer reported condition problems with the 270 cartons of 75-count choice lemons in this shipment, after which Respondent and its customer settled upon a return of \$1.75 per carton. Respondent did not, however, secure any independent evidence, such as a U.S.D.A. inspection, to establish that the lemons were in poor condition as alleged. Without such evidence, Respondent is liable to Complainant for the fair market value of the lemons it sold on Complainant's behalf. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, March 1, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for the 75-count size. Using the average Market News price of \$7.50 per carton, we conclude that the 270 cartons of 75-count choice lemons in this shipment had a fair market value of \$2,025.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$135.00, for commission. Although both Respondent's invoice to its customer and Complainant's invoice to Respondent include a charge for pallets, we presume that the cost of palletization is included in the Market News price. Therefore, an additional charge for pallets is not appropriate. When Respondent's commission of \$135.00 is deducted from the \$2,025.00 fair market value of the lemons in this shipment, there remains a net amount due Complainant of \$1,890.00. Respondent paid Complainant \$1,272.25 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$617.75.

Invoice No. 13996

Respondent sold the 95-count choice lemons in this shipment for \$5.00 per carton. Complainant invoiced Respondent for the lemons in this shipment at its house average price of \$7.50 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, March 1, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for the 95-count size. The report also notes that there were few sales of 95-count choice lemons in the \$6.00 to \$6.50 per carton range, and that demand was moderate, with a wide range in prices. Although Respondent's sales price is below the range of prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We conclude that Respondent's liability to Complainant should be based on its sales price of \$5.00 per carton, less commission, in accordance with the parties' agreement.

At \$5.00 per carton, the gross sales amount for the 540 cartons of 95-count choice lemons in this shipment is \$2,700.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$270.00, for commission. Respondent billed its customer \$81.00 for pallets, which amount should be added to the sales proceeds owed to Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$2,511.00. Respondent paid Complainant \$2,652.50 for the lemons, an overpayment of \$141.50.

Invoice No. 13868

Respondent sold the 95-count choice lemons in this shipment on a price after sale basis and settled upon a price of \$2.78 per carton with its customer. There is no evidence that Complainant specifically authorized Respondent to sell the lemons on a price after sale basis. Without such evidence, we conclude that Respondent is liable to Complainant for the fair market value of the lemons in this shipment. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, March 2, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's

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choice lemons were mostly selling for \$7.00 to \$8.00 per carton for the 95-count size. Using the average Market News price of \$7.50 per carton, we find that the 972 cartons of 95-count choice lemons in this shipment had a fair market value of \$7,290.00.

From the fair market value of \$7,290.00, Respondent is entitled to deduct \$0.50 per carton, or \$486.00, for commission. Although both Respondent's invoice to its customer and Complainant's invoice to Respondent include a charge for pallets, we are using a Market News price, which presumably includes the cost of palletization. Therefore, an additional charge for pallets is not appropriate. After deducting Respondent's commission of \$486.00 from the \$7,290.00 fair market value of the lemons, the net amount due Complainant for the lemons in this shipment is \$6,804.00. Respondent paid Complainant \$1,936.26 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$4,867.74.

Invoice No. 13998

Respondent did not submit an invoice evidencing its sale of the lemons in this shipment. Complainant, on the other hand, invoiced Respondent for the 95-count choice lemons at \$7.50 per carton, and for the 140-count choice lemons at \$9.10 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, March 2, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for 95-count, and \$10.00 to \$12.00 per carton for 140-count. Since the house average prices billed by Complainant are below the average U.S.D.A. Market News prices, we will use the prices billed by Complainant, which total \$2,370.60, as the best available evidence of the fair market value of the lemons in question.

From the fair market value of the lemons of \$2,370.60, Respondent is entitled to deduct \$0.50 per carton, or \$135.00, for commission. Although Complainant's invoice to Respondent includes a charge for pallets, we presume that the house average price billed by Complainant is based on gross sales prices, which should include the cost of pallets. Therefore, an additional charge for pallets is not appropriate. After deducting Respondent's commission of \$135.00 from the \$2,370.60 fair market value of the lemons, the net amount due Complainant for the

lemons in this shipment is \$2,235.60. Respondent paid Complainant \$2,136.25 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$99.35.

Invoice No. 13870

Respondent sold the 115-count choice lemons in this shipment for \$7.00 per carton, and the 140-count choice lemons for \$9.00 per carton, and Complainant agreed to this return. From the gross sales of \$2,106.00, Respondent is entitled to deduct \$0.50 per carton, or \$135.00, for commission. Respondent deducted this amount, plus \$256.50 for freight, and paid Complainant the balance of \$1,714.50. For the reasons already cited, we must disallow Respondent's freight deduction. We therefore find that there remains a balance due Complainant from Respondent of \$256.50 for this shipment of lemons.

Invoice No. 14040

Respondent sold both the 75-count and 95-count fancy lemons in this shipment for \$6.50 per carton. Complainant invoiced Respondent for the lemons at its house average price of \$10.30 per carton for 75-count fancy lemons, and \$8.70 per carton for 95-count fancy lemons. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, March 3, 2006, the nearest reporting date to the date of shipment, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$10.00 to \$13.00 per carton for both the 75-count and 95-count size. The report also notes that demand was moderate, with a wide range in prices. Although Respondent's sales price falls below the range of prices mentioned in the report, the sale was nevertheless prompt and there is no indication of any negligence on Respondent's part. We therefore find that Respondent's liability to Complainant should be based on the sales price it collected from its customer, less commission, in accordance with the parties' agreement.

From the gross sales of \$6,669.00, Respondent is entitled to deduct \$0.50 per carton, or \$509.00, for commission. Complainant's invoice includes a charge of \$153.90 for pallets (1,026 cartons at \$0.15 per carton); however, Respondent did not include a charge for pallets on the

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invoice to its customer, so we assume that the cost of pallets was built in to the sales price. Therefore, an additional charge for pallets is not appropriate. The shipment also included an additional eight cartons of lemons that Respondent did not receive from Complainant, but which Complainant packed on Respondent's behalf. For these cartons, Complainant may recover a packing fee of \$4.25 per carton, or a total of \$34.00. After making the appropriate adjustments for commission and packing charges, the net amount due Complainant for the lemons in this shipment is \$6,194.00. Respondent paid Complainant \$5,347.55 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$846.45.

Invoice No. 13874

As with many of the transactions previously discussed, the record indicates that Complainant agreed to the sales price negotiated by Respondent for the lemons in this shipment. Notably, in each case where Complainant agreed to the sales price reported by Respondent, Respondent's invoice for the sale of the lemons is made out to Complainant. Hence, Respondent apparently sold the lemons, after packing, to Complainant. In this case, the parties agreed upon a sales price of \$7.25 per carton for the 115-count choice lemons in the shipment, and \$8.00 per carton for the 140-count choice lemons. The total agreed upon sales price was \$2,106.00. Respondent's invoice indicates, however, that Complainant short paid the invoice by \$217.50, for a credit taken against Complainant's invoice number 100250.<sup>20</sup> Under the circumstances, we find that the fair market value of the lemons should be limited to the amount Complainant actually paid for the lemons, or \$430.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$43.00, for commission. Respondent also took a deduction in the amount of \$81.70 for freight; however, for the reasons already cited, we must disallow Respondent's freight deduction. After deducting Respondent's commission of \$43.00 from the \$430.00 reasonable value of the lemons, the net amount due Complainant for the lemons in this shipment is \$387.00. Respondent paid Complainant \$522.80 for the lemons, an overpayment of \$135.80.

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<sup>20</sup> See AX235.

Invoice No. 14041

Respondent sold the 95-count fancy lemons in this shipment for \$7.00 per carton, and it sold both the 165-count and 200-count choice lemons for \$13.00 per carton. Complainant invoiced Respondent for the lemons at its house average prices of \$8.70 per carton for the 95-count fancy lemons, and \$9.90 per carton for the 165-count and 200-count choice lemons. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, March 6, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$10.00 to \$13.00 per carton for 95-count, and shipper's choice lemons were mostly selling for \$12.00 to \$14.00 per carton for both the 165-count and 200-count sizes. The report also notes that demand was moderate, with a wide range in prices. In this case, Respondent's sales price is in line with prevailing market prices for the choice lemons, but not for the fancy lemons. Nevertheless, the sale was prompt and there is no indication of any negligence on Respondent's part. We therefore find that Respondent's liability to Complainant should be based on the gross sales collected from its customer, less commission, in accordance with the parties' agreement.

From the gross sales of \$3,070.00, Respondent is entitled to deduct \$0.50 per carton, or \$143.00, for commission. Respondent billed its customer \$52.50 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$2,979.50. Respondent paid Complainant \$2,707.80 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$271.70.

Invoice No. 10450 (Respondent's No. 14050)

Respondent sold the 95-count choice lemons in this shipment for \$5.50 per carton. Complainant invoiced Respondent for the lemons at its house average price of \$7.50 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, March 7, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for the 95-count size.

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The report also notes that there were few sales of 95-count choice lemons in the \$6.00 to \$6.50 per carton range, and that demand was moderate, with a wide range in prices. Although Respondent's sales price is below the range of prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We conclude that Respondent's liability to Complainant should be based on its sales price of \$5.50 per carton, less commission, in accordance with the parties' agreement.

At \$5.50 per carton, the gross sales amount for the 1,026 cartons of 95-count choice lemons in this shipment is \$5,643.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$488.00, for commission. Respondent billed its customer \$166.25 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. The shipment also included an additional 50 cartons of lemons that Respondent did not receive from Complainant, but which Complainant packed on Respondent's behalf. For these cartons, Complainant may recover a packing fee of \$4.25 per carton, or a total of \$212.50. After making the appropriate adjustments for commission, pallets and packing charges, the net amount due Complainant for the lemons in this shipment is \$5,533.75. Respondent paid Complainant \$5,296.25 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$237.50.

Invoice No. 14044

Respondent originally sold the 95-count choice lemons in this shipment for \$5.50 per carton, the 115-count choice lemons for \$7.00 per carton, and the 140-count fancy lemons for \$12.00 per carton.<sup>21</sup> Respondent subsequently reduced these prices to \$3.50 per carton, \$5.00 per carton, and \$9.00 per carton, respectively, as a result of a damage claim asserted by its customer.<sup>22</sup> Respondent did not, however, secure a U.S.D.A. inspection or other independent evidence to establish that the adjustments granted to its customer were warranted. In the absence of

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<sup>21</sup> See AX 250.

<sup>22</sup> See AX 249.

such evidence, any adjustments granted by Respondent to its customer cannot be considered.

Complainant apparently did not agree to the return reported by Respondent, so it invoiced Respondent for the lemons at its house average price of \$7.50 per carton for the 95-count choice lemons, \$8.20 per carton for the 115-count choice lemons, and \$9.00 per carton for the 140-count fancy lemons. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, March 7, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for 95-count, and \$8.00 to \$9.00 per carton for 115-count. Shipper's 1<sup>st</sup> grade lemons were mostly selling for \$13.00 to \$14.00 per carton for the 140-count size. The report also notes that there were few sales of 95-count choice lemons in the \$6.00 to \$6.50 per carton range, and that demand was moderate, with a wide range in prices. Although Respondent's original sales prices are below the range of prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We conclude, therefore, that Respondent's liability to Complainant should be based on the original sales prices, less commission, in accordance with the parties' agreement.

Based on the original sales prices, the anticipated gross sales amount for the shipment of lemons in question is \$3,091.50. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$233.50, for commission. Complainant's invoice includes a charge of \$70.20 for pallets (468 cartons at \$0.15 per carton); however, Respondent did not bill its customer separately for pallets, so we assume that the cost of pallets was built into the sales price. Therefore, an additional charge for pallets is not appropriate. The shipment included one additional carton of lemons that Respondent did not receive from Complainant, but which Complainant packed on Respondent's behalf. For this carton, Complainant may recover a packing fee of \$4.25. After making the appropriate adjustments for commission and packing charges, the net amount due Complainant for the lemons in this shipment is \$2,862.25. Respondent paid Complainant \$1,008.80 for the lemons. Therefore,

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there remains a balance due Complainant from Respondent of \$1,853.45.

Invoice No. 14048

Respondent sold the 95-count choice lemons in this shipment for \$5.00 per carton. Complainant invoiced Respondent for the lemons at its house average price of \$7.50 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, March 8, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for the 95-count size. The report also notes that there were few sales of 95-count choice lemons in the \$6.00 to \$6.50 per carton range, and that demand was moderate, with a wide range in prices. Although Respondent's sales price is below the range of prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. We conclude that Respondent's liability to Complainant should be based on its sales price of \$5.00 per carton, less commission, in accordance with the parties' agreement.

At \$5.00 per carton, the gross sales amount for the 216 cartons of 95-count choice lemons in this shipment is \$1,080.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$108.00, for commission. Respondent also billed its customer \$48.60 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$1,020.60. Respondent paid Complainant \$1,007.00 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$13.60.

Invoice No. 14051

Respondent sold the 95-count fancy lemons in this shipment for \$6.50 per carton, and the 115-count fancy lemons for \$7.00 per carton. Complainant invoiced Respondent for the lemons at its house average prices of \$8.70 per carton for the 95-count, and \$10.90 per carton for the 115-count. The U.S.D.A. Market News recap of available f.o.b. prices

for Wednesday, March 8, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$10.00 to \$13.00 per carton for 95-count, and \$11.00 to \$14.00 for 115-count. The report also notes that demand was moderate, with a wide range in prices. Although the sales prices reported by Respondent are below the range of prices mentioned in the report, Respondent's sales were nevertheless prompt, and there is no indication of any negligence on Respondent's part. We therefore find that Respondent's liability to Complainant should be based on the gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,964.00, Respondent is entitled to deduct \$0.50 per carton, or \$148.00, for commission. Respondent billed its customer \$44.40 for pallets, which amount should be added to the sales proceeds owed to Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$1,860.40. Respondent paid Complainant \$1,587.30 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$273.10.

Invoice No. 13876

Respondent sold the 75-count choice lemons in this shipment for \$3.50 per carton. Complainant invoiced Respondent for the lemons at its house average price of \$8.20 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, March 10, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for the 75-count size. The report also notes that there were few sales of 75-count choice lemons in the \$6.00 to \$6.50 per carton range, and that demand was moderate, with a wide range in prices. Although the sales price reported by Respondent still falls below the range of prices mentioned in the report, Respondent's sale was nevertheless prompt, and there is no indication of any negligence on Respondent's part. We therefore find that Respondent's liability to Complainant should be based on the gross sales, less commission, in accordance with the parties' agreement.

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From the gross sales of \$4,007.50, Respondent is entitled to deduct \$0.50 per carton, or \$572.50, for commission. Respondent billed its customer \$178.20 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. In addition, the shipment included 43 cartons of lemons that Respondent did not receive from Complainant, but which Complainant packed on Respondent's behalf. For these cartons, Complainant is entitled to recover a packing fee of \$4.25 per carton, or a total of \$182.75. After making the appropriate adjustments for commission, packing, and pallets, the net amount due Complainant for the lemons in this shipment is \$3,795.95. Respondent paid Complainant \$1,663.20 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$2,132.75.

Invoice No. 13878

Respondent sold both the 75-count fancy and the 75-count choice lemons in this shipment for \$2.4352 per carton. Although it is not stated on Respondent's invoice, it is evident that this is an average sales price that Respondent settled upon with its customer after the customer completed its resale of the lemons. As we already mentioned, there is no evidence that Respondent was given authority to sell the lemons on an open or price after sale basis. Even assuming, in the alternative, that Respondent sold the lemons at a fixed price and later adjusted that price to the \$2.4352 per carton price shown on the invoice, there is no inspection or other evidence in the file indicating that such an adjustment was warranted. Consequently, we cannot accept the sales price reported by Respondent as the best available evidence of the fair market value of the lemons in this shipment.

Complainant invoiced Respondent for the lemons at its house average price of \$10.30 per carton for the 75-count fancy lemons, and \$8.20 per carton for the 75-count choice lemons. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, March 10, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$11.00 to \$13.00 per carton for the 75-count size, and that shipper's choice lemons were mostly selling for \$7.00 to \$8.00 per carton for the 75-count size. The report also notes that there were few sales of 75-count choice lemons in the \$6.00 to \$6.50 per carton range, and that demand was moderate, with a wide range in

prices. For the 75-count fancy lemons, the house average price of \$10.30 per carton billed by Complainant is less than the average Market News price of \$12.00 per carton, so we will use the lesser price billed by Complainant as the best available evidence of the fair market value of these lemons. For the 75-count choice lemons, since there is no evidence that the lemons were in less than average marketable condition, we will use the average Market News price of \$7.50 per carton, which is less than the house average price billed by Complainant, as the best available evidence of their fair market value.

At \$10.30 per carton, the 853 cartons of 75-count fancy lemons in this shipment had a fair market value of \$8,785.90. At \$7.50 per carton, the 335 cartons of 75-count choice lemons in this shipment had a fair market value of \$2,512.50. Hence, the total fair market value of the lemons in this shipment was \$11,298.40. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$594.00, for commission. Respondent billed its customer \$178.20 for pallets, which amount should be added to the sales proceeds due Complainant for the lemons. After making the appropriate adjustments for commission and pallets, the net amount due Complainant for the lemons in this shipment is \$10,882.60. Respondent paid Complainant \$3,148.20 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$7,734.40.

Invoice No. 14024

Respondent sold the lemons in this shipment at \$6.00 per carton for the 75-count choice, \$7.00 per carton for the 95-count choice, \$9.00 per carton for the 115-count choice, and \$11.00 per carton for the 140-count choice. Complainant invoiced Respondent for the lemons at \$0.04 per carton less than Respondent's sales prices, *i.e.*, \$5.96 per carton for the 75-count choice, \$6.96 per carton for the 95-count choice, \$8.96 per carton for the 115-count choice, and \$10.96 per carton for the 140-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, March 31, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$12.00 to \$14.00 per carton for 75-count, \$13.00 to \$15.00 per carton for 95-count, \$15.00 to

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\$16.50 per carton for 115-count, and \$16.50 to \$18.00 per carton for 140-count. Although Respondent's sales prices are below the prevailing market prices, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$9,850.00, Respondent is entitled to deduct \$0.50 per carton, or \$594.00, for commission. Respondent also billed its customer \$192.50 for pallets, which amount should be remitted to Complainant. Complainant's invoice also includes a credit of \$891.00 for 1,188 boxes at \$0.75 per box. This credit signifies a change in the packing of the lemons from the transactions discussed up to this point. Specifically, for the lemon shipments discussed up to this point, Complainant was packing the lemons in its own cartons. Starting with this shipment, however, all of the lemon shipments were packed in cartons supplied by Respondent. Respondent maintains that this change was made for two reasons, the first being that Complainant's cartons were stored in a cooler with high humidity which was causing the cartons to break down, resulting in claims upon arrival. Respondent also asserts it was told that Complainant was getting negative feedback from its customers because Respondent was selling Complainant's label into markets that Complainant was already selling to. To remedy this conflict, Respondent states Complainant requested that the lemons be packed in Respondent's label so that its customers would not know that the product was coming from Complainant, and to protect its label in certain markets. Complainant denies requesting that Respondent use its own cartons.

Regardless of the impetus for changing the source of the cartons, there is no dispute that from this point on, Complainant packed the lemons in Respondent's cartons. Respondent is, therefore, entitled to recover the cost of these cartons. When Complainant was using its own cartons to pack the lemons, it was charging a \$4.25 per carton fee to pack the lemons, including \$3.50 for labor and \$0.75 for the carton. When Complainant switched to using Respondent's cartons, it applied

a “box credit” of \$0.75 per carton to the amount invoiced to Respondent for the lemons. Respondent, on the other hand, deducted a charge of \$2.00 per carton from its remittance to cover the cost of supplying the cartons. Neither party submitted any convincing evidence supporting their respective allegations concerning the amount of the carton charge agreed upon.<sup>23</sup> In the absence of such evidence, we find that Respondent is entitled to deduct the actual cost of the cartons as established by the evidence in the record. In this regard, Respondent submitted invoices showing that between December 22, 2005, and January 16, 2006, it purchased 53,140 carton tops at a total cost of \$74,007.00, or an average of \$1.39268 each, and 50,750 carton bottoms at a total cost of \$37,555.00, or an average of \$0.74 each. In addition, Respondent submitted evidence that it incurred freight charges in the amount of \$3,550.00, or an average of \$0.03417, to have the 103,890 carton tops and bottoms delivered. Respondent therefore incurred a total cost per carton of \$2.16685.<sup>24</sup> On this basis, we find that the \$2.00 per carton charged assessed by Respondent is a reasonable approximation of the actual cost of the cartons supplied by Respondent.

For the shipment of lemons in question, this means that Respondent may deduct \$2.00 per carton, or a total of \$2,376.00, for the 1,188 cartons of lemons contained in the shipment. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$7,072.50. Respondent paid Complainant \$6,831.00 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$241.50.

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<sup>23</sup> As evidence in support of its contention that Respondent agreed to a carton charge of \$0.75 per carton, Complainant cites an e-mail from Respondent’s Tim Shoemaker advising Complainant that it should only be charging its growers a pack charge of \$3.50 per carton, rather than \$4.25 per carton, because it was not using its own cartons (\$4.25 less \$3.50=\$0.75). See SRX 16. We find, however, that this statement merely acknowledges that Complainant should not be charging the growers for cartons that it was no longer supplying. It says nothing in regard to the amount that Respondent would charge to supply the cartons.

<sup>24</sup> See Answer, Section 4.

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Invoice No. 14030

Respondent sold the lemons in this shipment at \$13.00 per carton for the 140-count choice, \$15.00 per carton for the 165-count choice, \$16.00 per carton for the 200-count choice, and \$7.00 per carton for the 235-count choice. Complainant invoiced Respondent for the lemons at \$0.15 per carton more than Respondent's sales prices, *i.e.*, \$13.15 per carton for the 140-count choice, \$15.15 per carton for the 165-count choice, \$16.15 per carton for the 200-count choice, and \$7.15 per carton for the 235-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, April 3, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$13.00 to \$14.50 per carton for 140-count, \$16.00 to \$17.50 per carton for 165-count, \$16.00 to \$17.50 per carton for 200-count, and \$9.00 to \$10.50 per carton for the 235-count. Although Respondent's sales prices are, in some cases, below the range of relevant prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. Moreover, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement. From the gross sales of \$3,456.00, Respondent is entitled to deduct \$0.50 per carton, or \$135.00, for commission. Respondent also billed its customer \$43.75 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$540.00 for 270 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$2,824.75. Respondent paid Complainant \$2,821.50 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$3.25.

Invoice No. 14124

Respondent sold the lemons in this shipment at \$15.00 per carton for the 165-count choice, and \$16.00 per carton for the 200-count choice.

Complainant invoiced Respondent for the lemons at \$0.13 per carton more than Respondent's sales prices, *i.e.*, \$15.13 per carton for the 165-count choice, and \$16.13 per carton for the 200-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, April 3, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$16.00 to \$17.50 per carton for 165-count, and \$16.00 to \$17.50 per carton for 200-count. Although Respondent's sales prices are, in some cases, below the range of relevant prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. Moreover, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$5,076.00, Respondent is entitled to deduct \$0.50 per carton, or \$162.00, for commission. Respondent also billed its customer \$48.60 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$648.00 for 324 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$4,314.60. Respondent paid Complainant \$4,309.20 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$5.40.

Invoice No. 14126

Respondent sold the 165-count choice lemons in this shipment at \$15.00 per carton. Complainant invoiced Respondent for the lemons at \$15.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, April 3, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$16.00 to \$17.50 per carton for the 165-count size. Although Respondent's sales price is

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below the range of prices mentioned in the report, we have already determined that Respondent's liability to Complainant should be limited to the sales price it collected, regardless of whether the sales price falls below the reported market range. Moreover, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$810.00, Respondent is entitled to deduct \$0.50 per carton, or \$27.00, for commission. Respondent also billed its customer \$8.75 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$108.00 for 54 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$683.75. Respondent paid Complainant \$683.10 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$0.65.

### Invoice No. 14029

Respondent sold the 162 cartons of 115-count fancy lemons in this shipment for \$15.00 per carton, and the 108 cartons of 200-count fancy lemons for \$17.50 per carton, for a total of \$4,320.00, and Complainant agreed to this return. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$135.00, for commission. For its carton expenses, Respondent may deduct \$540.00 for 270 cartons at \$2.00 per carton. After making the appropriate adjustments for commission and carton charges, the net amount due Complainant for the lemons in this shipment is \$3,645.00, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

### Invoice No. 14031

Respondent sold the 95-count choice lemons in this shipment at \$9.00 per carton. Complainant invoiced Respondent for the lemons at \$9.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices

for Tuesday, April 4, 2006, shows that California and Arizona 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$8.50 to \$10.50 per carton for the 95-count size. Respondent's sales price is in line with the prevailing market prices. Moreover, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$972.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent also billed its customer \$16.20 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$718.20, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14033

Respondent sold the 108 cartons of 115-count choice lemons in this shipment at \$11.25 per carton, and Complainant agreed to this return. From the gross sales of \$1,215.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission and carton charges, the net amount due Complainant for the lemons in this shipment is \$945.00, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14131

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Respondent sold the 75-count fancy lemons in this shipment at \$9.50 per carton. Complainant invoiced Respondent for the lemons at \$9.65 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, April 4, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$12.00 to \$15.00 per carton for the 75-count size. Although Respondent's sales price is below the prevailing market prices, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$513.00, Respondent is entitled to deduct \$0.50 per carton, or \$27.00, for commission. Respondent also billed its customer \$9.18 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$108.00 for 54 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$387.18. Respondent paid Complainant \$386.10 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$1.08.

#### Invoice No. 14026

Respondent sold the lemons in this shipment at \$9.50 per carton for the 75-count fancy, \$8.50 per carton for the 75-count choice, \$13.00 per carton for the 140-count choice, and \$15.00 per carton for the 165-count choice. In this instance, Complainant invoiced Respondent for the lemons at \$0.14 per carton more than Respondent's sales prices, *i.e.*, \$9.64 per carton for the 75-count fancy, \$8.64 per carton for the 75-count choice, \$13.14 per carton for the 140-count choice, and \$15.14 per carton for the 165-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, April 5, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$12.00 to \$14.00 per carton for the 75-count size. Shipper's choice lemons were mostly selling for \$8.00 to \$10.00 per carton for 75-count, \$13.00 to \$14.50 per carton for 140-count, and \$16.00 to \$17.50

per carton for 165-count. With the exception of the fancy lemons, Respondent's sales prices are in line with the prevailing market prices. Moreover, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$2,002.50, Respondent is entitled to deduct \$0.50 per carton, or \$85.50, for commission. Respondent also billed its customer \$25.65 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$342.00 for 171 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,600.65. Respondent paid Complainant \$1,598.85 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$1.80.

Invoice No. 14028

Respondent sold the 140-count choice lemons in this shipment at \$13.00 per carton. Complainant invoiced Respondent for the lemons at \$13.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, April 5, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$13.00 to \$14.50 per carton for the 140-count size. Respondent's sales price is in line with the prevailing market prices. Moreover, Complainant invoiced Respondent for the lemons at approximately the same price. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$5,616.00, Respondent is entitled to deduct \$0.50 per carton, or \$216.00, for commission. Respondent also billed

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its customer \$64.80 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$864.00 for 432 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$4,600.80, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14038

Respondent sold the 54 cartons of 200-count choice lemons in this shipment for \$15.50 per carton, and Complainant agreed to this return. From the gross sales of \$837.00, Respondent is entitled to deduct \$0.50 per carton, or \$27.00, for commission. For its carton expenses, Respondent may deduct \$108.00 for 54 cartons at \$2.00 per carton. After making the appropriate adjustments for commission and carton charges, the net amount due Complainant for the lemons in this shipment is \$702.00, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14130

Respondent sold the lemons in this shipment at \$11.00 per carton for the 95-count fancy, and \$13.00 per carton for the 140-count choice. Complainant invoiced Respondent for the lemons at \$0.17 per carton more than Respondent's sales prices, *i.e.*, \$11.17 per carton for the 95-count fancy, and \$13.17 per carton for the 140-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, April 5, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$13.00 to \$15.00 per carton for the 95-count size. Shipper's choice lemons were mostly selling for \$13.00 to \$14.50 per carton for the 140-count size. With the exception of the fancy lemons, Respondent's sales prices are in line with the prevailing market prices. Moreover, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We

therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,296.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent also billed its customer \$18.36 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,044.36, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14201

Respondent sold the lemons in this shipment at \$9.00 per carton for the 95-count choice, and \$12.00 per carton for the 115-count choice. Complainant invoiced Respondent for the lemons at \$0.15 per carton more than Respondent's sales prices, *i.e.*, \$9.15 per carton for the 95-count choice, and \$12.15 per carton for the 115-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, April 5, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$13.00 to \$15.00 per carton for the 95-count size. Shipper's choice lemons were mostly selling for \$13.00 to \$14.50 per carton for the 140-count size. With the exception of the fancy lemons, Respondent's sales prices are in line with the prevailing market prices. Moreover, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,296.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent also billed its

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customer \$18.36 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,044.36, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14128

Respondent sold the lemons in this shipment at \$12.00 per carton for the 115-count choice, and \$13.00 per carton for the 140-count choice. Complainant invoiced Respondent for the lemons at \$0.14 per carton more than Respondent's sales prices, *i.e.*, \$12.14 per carton for the 115-count choice, and \$13.14 per carton for the 140-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Wednesday, April 5, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$11.50 to \$12.00 per carton for 115-count, and \$13.00 to \$14.50 per carton for 140-count. Respondent's sales prices are in line with the prevailing market prices. Moreover, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$2,052.00, Respondent is entitled to deduct \$0.50 per carton, or \$81.00, for commission. Respondent also billed its customer \$24.30 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$324.00 for 162 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,671.30. Respondent paid Complainant \$1,668.60 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$2.70.

Invoice No. 14132

Respondent sold the 115-count choice lemons in this shipment at \$12.00 per carton. Complainant invoiced Respondent for the lemons at \$12.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, April 6, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$12.00 per carton for the 115-count size. In this instance, Respondent's sales price equals the prevailing market price. Moreover, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,296.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent also billed its customer \$18.36 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,044.36. Respondent paid Complainant \$1,042.20 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$2.16.

Invoice No. 14133

Respondent sold the lemons in this shipment at \$15.00 per carton for the 165-count choice, \$16.00 per carton for the 200-count choice, and \$7.00 per carton for the 235-count choice. Complainant invoiced Respondent for the lemons at \$0.03 per carton more than Respondent's sales prices, *i.e.*, \$15.03 per carton for the 165-count choice, \$16.03 per carton for the 200-count choice, and \$7.03 per carton for the 235-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, April 6, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$16.50 to \$17.50 per carton for 165-count, \$16.50 to \$17.50 per carton for 200-count, and \$10.00 to

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\$10.50 per carton for 235-count. Although Respondent's sales prices are all below the prevailing market prices, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$14,094.00, Respondent is entitled to deduct \$0.50 per carton, or \$513.00, for commission. Respondent also billed its customer \$174.42 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$2,052.00 for 1,026 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$12,513.42. Respondent paid Complainant \$1,872.80 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$10,640.62.

Invoice No. 14134

Respondent sold the 140-count choice lemons in this shipment at \$13.00 per carton. Complainant invoiced Respondent for the lemons at \$13.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, April 6, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$14.00 to \$14.50 per carton for the 140-count size. Although Respondent's sales price is below the range of prices mentioned in the report, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$4,212.00, Respondent is entitled to deduct \$0.50 per carton, or \$162.00, for commission. Respondent also billed its customer \$48.60 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$648.00

for 324 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$3,450.60, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14135

Respondent sold the 165-count choice lemons in this shipment at \$15.00 per carton. Complainant invoiced Respondent for the lemons at \$15.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Thursday, April 6, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$16.50 to \$17.50 per carton for the 165-count size. Although Respondent's sales price is below the range of prices mentioned in the report, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$8,100.00, Respondent is entitled to deduct \$0.50 per carton, or \$270.00, for commission. Respondent also billed its customer \$91.80 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$1,080.00 for 540 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$6,841.80. Respondent paid Complainant \$6,831.00 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$10.80.

Invoice No. 14205

Respondent sold the 140-count choice lemons in this shipment for \$13.00 per carton, and the 200-count fancy lemons for \$17.00 per

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carton, and Complainant agreed to this return. From the gross sales of \$2,200.00, Respondent is entitled to deduct \$0.50 per carton, or \$68.00, for commission. For its carton expenses, Respondent may deduct \$272.00 for 136 cartons at \$2.00 per carton. After making the appropriate adjustments for commission and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,860.00. Respondent paid Complainant \$1,856.40 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$3.60.

### Invoice No. 14137

Respondent sold the 540 cartons of 95-count fancy lemons in this shipment for \$7.90 per carton, and Complainant agreed to this return. From the gross sales of \$4,266.00, Respondent is entitled to deduct \$0.50 per carton, or \$270.00, for commission. For its carton expenses, Respondent may deduct \$1,080.00 for 540 cartons at \$2.00 per carton. After making the appropriate adjustments for commission and carton charges, the net amount due Complainant for the lemons in this shipment is \$2,916.00, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

### Invoice No. 14202

Respondent sold the lemons in this shipment at \$8.50 per carton for the 75-count choice, \$9.00 per carton for the 95-count choice, \$12.00 per carton for the 115-count choice, \$13.00 per carton for the 140-count choice, and \$16.00 per carton for the 200-count choice. In this instance, Complainant invoiced Respondent for the lemons at \$0.10 per carton more than Respondent's sales prices, *i.e.*, \$8.60 per carton for the 75-count choice, \$9.10 per carton for the 95-count choice, \$12.10 per carton for the 115-count choice, \$13.10 per carton for the 140-count choice, and \$16.10 per carton for the 200-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 7, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$9.00 per carton for 75-count, \$9.50 to \$11.50 per carton for 95-count, \$12.00 per carton for 115-count, \$14.00 to \$14.50 per carton for 140-count, and \$16.50 to \$17.50 per carton for 200-count. Respondent's sales prices are generally in line with the prevailing

market prices. Moreover, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$3,199.50, Respondent is entitled to deduct \$0.50 per carton, or \$126.00, for commission. Respondent also billed its customer \$37.80 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$504.00 for 252 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$2,607.30. Respondent paid Complainant \$2,595.60 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$11.70.

Invoice No. 14203

Respondent sold the 243 cartons of 165-count choice lemons in this shipment for \$15.00 per carton, and Complainant agreed to this return. From the gross sales of \$3,645.00, Respondent is entitled to deduct \$0.50 per carton, or \$121.50 for commission. For its carton expenses, Respondent may deduct \$486.00 for 243 cartons at \$2.00 per carton. After making the appropriate adjustments for commission and carton charges, the net amount due Complainant for the lemons in this shipment is \$3,037.50, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14204

Respondent sold the 54 cartons of 140-count fancy lemons in this shipment for \$17.00 per carton, and Complainant agreed to this return. From the gross sales of \$918.00, Respondent is entitled to deduct \$0.50 per carton, or \$27.00, for commission. For its carton expenses, Respondent may deduct \$108.00 for 54 cartons at \$2.00 per carton.

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After making the appropriate adjustments for commission and carton charges, the net amount due Complainant for the lemons in this shipment is \$783.00, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14206

Respondent sold the lemons in this shipment at \$11.50 per carton for the 95-count fancy, \$13.00 per carton for the 140-count fancy, \$10.00 per carton for the 95-count choice, and \$11.00 per carton for the 115-count choice. In this instance, Complainant invoiced Respondent for the lemons at \$0.05 per carton less than Respondent's sales prices, *i.e.*, \$11.45 per carton for the 95-count fancy, \$12.95 per carton for the 140-count fancy, \$9.95 per carton for the 95-count choice, and \$10.95 per carton for the 115-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 7, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$14.00 to \$15.00 per carton for 95-count, and \$18.00 to \$18.50 per carton for 140-count. Shipper's choice lemons were mostly selling for \$9.50 to \$11.50 per carton for 95-count, and \$12.00 per carton for 115-count. Respondent's sales prices are generally in line with the reported market prices for choice lemons, but fall below the reported market prices for fancy lemons. Nevertheless, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$11,130.00, Respondent is entitled to deduct \$0.50 per carton, or \$513.00, for commission. Respondent also billed its customer \$153.90 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$2,052.00 for 1,026 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$8,718.90. Respondent paid Complainant \$8,515.80 for the lemons.

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Therefore, there remains a balance due Complainant from Respondent of \$203.10.

Invoice No. 14129

Respondent sold the lemons in this shipment at \$13.00 per carton for the 140-count choice, \$15.00 per carton for the 165-count choice, and \$16.00 per carton for the 200-count choice. In this instance, Complainant invoiced Respondent at the same price for the 140-count choice lemons, and at \$0.04 per carton more for the 165-count and 200-count choice lemons. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 7, 2006, the nearest reporting date to the date of shipment, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$14.00 to \$14.50 per carton for 140-count, \$16.50 to \$17.50 per carton for 165-count, and \$16.50 to \$17.50 per carton for 200-count. Respondent's sales prices are generally in line with the prevailing market prices. Moreover, as we already noted, Complainant invoiced Respondent at the same price for the 140-count choice lemons, and at only \$0.04 per carton more for the 165-count and 200-count choice lemons. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$4,338.00, Respondent is entitled to deduct \$0.50 per carton, or \$144.00, for commission. Respondent also billed its customer \$43.20 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$576.00 for 288 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$3,661.20. Respondent paid Complainant \$3,628.80 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$32.40.

Invoice No. 14136

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Respondent sold the 140-count choice and 140-count fancy lemons in this shipment at \$13.00 per carton. Complainant invoiced Respondent for the lemons at \$13.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 7, 2006, the nearest reporting date to the date of shipment, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$18.00 to \$18.50 per carton for the 140-count size, and that shipper's choice lemons were mostly selling for \$14.00 to \$14.50 per carton for the 140-count size. Respondent's sales price of \$13.00 per carton is below the prevailing market price for both fancy and choice 140-count lemons. Nevertheless, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,404.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent also billed its customer \$18.36 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,152.36. Respondent paid Complainant \$1,150.20 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$2.16.

Invoice No. 14138

Respondent sold the 95-count choice lemons in this shipment at \$10.00 per carton. Complainant invoiced Respondent for the lemons at \$10.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, April 10, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$10.50 to \$12.75 per carton for the 95-count size. Although Respondent's sales price is below the range of prices mentioned in the report, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the

lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,080.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent also billed its customer \$18.36 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$828.36. Respondent paid Complainant \$826.20 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$2.16.

Invoice No. 14210

Respondent sold the lemons in this shipment at \$15.00 per carton for the 140-count choice, and \$16.00 per carton for the 165-count fancy. In this instance, Complainant invoiced Respondent for the lemons at \$0.15 per carton more than Respondent's sales prices, *i.e.*, \$15.15 per carton for the 140-count choice, and \$16.15 per carton for the 165-count fancy. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 10, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$14.50 to \$16.00 per carton for the 140-count size, and that shipper's 1<sup>st</sup> grade lemons were mostly selling for \$18.50 to \$19.50 per carton for the 165-count size. While Respondent's sales price for the 140-count choice lemons is in line with prevailing market prices, its sales price for the 165-count fancy lemons is below the range of prices mentioned in the report. Nevertheless, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,134.00, Respondent is entitled to deduct \$0.50 per carton, or \$36.00, for commission. Respondent also billed its

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customer \$10.80 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$144.00 for 72 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$964.80, which amount Respondent has already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for this shipment of lemons.

Invoice No. 14211

Respondent sold the lemons in this shipment at \$18.50 per carton for the 165-count fancy, and \$16.00 per carton for the 165-count choice. In this instance, Complainant invoiced Respondent for the lemons at \$0.05 per carton less than Respondent's sales prices, *i.e.*, \$18.45 per carton for the 165-count fancy, and \$15.95 per carton for the 165-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, April 10, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$18.50 to \$19.50 per carton for the 165-count size, and that shipper's choice lemons were mostly selling for \$17.50 to \$18.00 per carton for the 165-count size. Respondent's sales prices are in line with the prevailing market price for fancy lemons, but are below the prevailing market price for choice lemons. Nevertheless, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement. From the gross sales of \$2,227.50, Respondent is entitled to deduct \$0.50 per carton, or \$67.50, for commission. For its carton expenses, Respondent may deduct \$270.00 for 135 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,890.00. Respondent paid Complainant \$1,883.25 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$6.75.

Invoice No. 14212

Respondent sold the 108 cartons of 115-count choice lemons in this shipment at \$13.00 per carton, and Complainant agreed to this return. From the gross sales of \$1,404.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,134.00, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14215

Respondent sold the 165-count choice and the 200-count choice lemons in this shipment at \$16.00 per carton. Complainant invoiced Respondent for the lemons at \$16.50 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, April 10, 2006, the nearest reporting date to the date of shipment, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$17.50 to \$18.00 per carton for 165-count, and \$17.50 to \$17.75 per carton for 200-count. Respondent's sales price is below the prevailing market price for the lemons in question. Nevertheless, Complainant invoiced Respondent at nearly the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,520.00, Respondent is entitled to deduct \$0.50 per carton, or \$47.50, for commission. Respondent also billed its customer \$14.25 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$190.00 for 95 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,296.75.

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Respondent paid Complainant \$1,292.00 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$4.75.

Invoice No. 14216

Respondent sold the 54 cartons of 140-count choice lemons in this shipment at \$15.00 per carton, and Complainant agreed to this return. From the gross sales of \$810.00, Respondent is entitled to deduct \$0.50 per carton, or \$27.00, for commission. For its carton expenses, Respondent may deduct \$108.00 for 54 cartons at \$2.00 per carton. Respondent's invoice also reflects that it charged its customer \$0.15 for pallets, which amount should be remitted to Complainant. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$675.15. Respondent paid Complainant \$675.00 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$0.15.

Invoice No. 14140

Respondent sold the lemons in this shipment at \$10.50 per carton for the 75-count fancy, and \$18.00 per carton for the 140-count fancy. Complainant invoiced Respondent for the lemons at \$0.15 per carton more than Respondent's sales prices, *i.e.*, \$10.65 per carton for the 75-count fancy, and \$18.15 per carton for the 140-count fancy. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, April 11, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$15.00 to \$16.75 per carton for 75-count, and \$18.50 to \$21.25 per carton for 140-count. Respondent's sales prices are in line with the prevailing market price for fancy lemons, but are below the prevailing market price for choice lemons. Nevertheless, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement. From the gross sales of \$1,539.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent also billed its

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customer \$16.20 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,285.20, which amount Respondent paid Complainant for the lemons. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14142

Respondent sold the 972 cartons of 75-count fancy and choice lemons in this shipment for \$8.50 per carton, and Complainant agreed to this amount. From the gross sales of \$8,262.00, Respondent is entitled to deduct \$0.50 per carton, or \$486.00, for commission. For its carton expenses, Respondent may deduct \$1,944.00 for 972 cartons at \$2.00 per carton. After making the appropriate adjustments for commission and carton charges, the net amount due Complainant for the lemons in this shipment is \$5,832.00, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14209

Respondent sold the 165-count fancy lemons in this shipment at \$16.00 per carton. Complainant invoiced Respondent for the lemons at \$16.10 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, April 11, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$18.50 to \$19.50 per carton for the 165-count size. Respondent's sales price is below the range of prices mentioned in the report. Nevertheless, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

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From the gross sales of \$1,296.00, Respondent is entitled to deduct \$0.50 per carton, or \$40.50, for commission. Respondent also billed its customer \$12.15 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$162.00 for 81 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,105.65. Respondent paid Complainant \$1,101.60 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$4.05.

### Invoice No. 14213

Respondent sold the lemons in this shipment at \$15.00 per carton for the 140-count choice, \$8.00 per carton for the 235-count choice, and \$15.00 per carton for the 140-count fancy. Complainant invoiced Respondent for the lemons at \$0.13 per carton more than Respondent's sales price, *i.e.*, \$15.13 per carton for the 140-count choice, \$8.13 per carton for the 235-count choice, and \$15.13 per carton for the 140-count fancy. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, April 11, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$15.00 to \$16.00 per carton for 140-count, and \$10.00 to \$11.00 per carton for 235-count. Shipper's 1<sup>st</sup> grade lemons were mostly selling for \$18.50 to \$21.25 per carton for the 140-count size. Although Respondent's sales prices are below the prevailing market prices for the 235-count choice and the 140-count fancy lemons, Complainant invoiced Respondent for the lemons at nearly the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement. From the gross sales of \$8,742.00, Respondent is entitled to deduct \$0.50 per carton, or \$297.00, for commission. Respondent also billed its customer \$89.10 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$1,188.00 for 594 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is

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\$7,346.10. Respondent paid Complainant \$7,335.90 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$10.20.

Invoice No. 14214

Respondent sold the 115-count choice lemons in this shipment for \$13.00 per carton. Complainant invoiced Respondent for the lemons at \$13.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, April 11, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$14.00 to \$15.50 per carton for the 115-count size. Respondent's sales price is below the range of prices mentioned in the report. Nevertheless, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$2,808.00, Respondent is entitled to deduct \$0.50 per carton, or \$108.00, for commission. Respondent also billed its customer \$32.40 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$432.00 for 216 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$2,300.40, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

Invoice No. 14217

Respondent sold the lemons in this shipment at \$13.00 per carton for the 115-count fancy, \$10.00 per carton for the 95-count choice, and \$13.00 per carton for the 115-count choice. Complainant invoiced Respondent for the lemons at \$0.10 per carton more than Respondent's sales price, *i.e.*, \$13.10 per carton for the 115-count fancy, \$10.10 per carton for the

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95-count choice, and \$13.10 per carton for the 115-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, April 11, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$17.00 to \$19.25 per carton for the 115-count size. Shipper's choice lemons were mostly selling for \$10.50 to \$13.00 per carton for 95-count, and \$14.00 to \$15.50 per carton for 115-count. Although Respondent's sales prices are below the prevailing market prices, Complainant invoiced Respondent for the lemons at nearly the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement. From the gross sales of \$12,003.00, Respondent is entitled to deduct \$0.50 per carton, or \$513.00, for commission. Respondent also billed its customer \$153.90 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$2,052.00 for 1,026 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$9,591.90. Respondent paid Complainant \$9,541.80 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$50.10.

Invoice No. 14222

Respondent sold the 115-count choice lemons in this shipment at \$11.00 per carton. Complainant invoiced Respondent for the lemons at \$11.30 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 14, 2006, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$14.00 to \$15.50 per carton for the 115-count size. Although Respondent's sales price falls below the prevailing market price, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's

gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,188.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent also billed its customer \$16.20 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$934.20. Respondent paid Complainant \$950.40 for the lemons, an overpayment of \$16.20.

Invoice No. 14220

Respondent sold the lemons in this shipment at \$15.00 per carton for the 140- count choice, and \$16.00 per carton for the 165-count choice. Complainant invoiced Respondent for the lemons at \$0.12 per carton more than Respondent's sales price, i.e., \$15.12 per carton for the 140-count choice, and \$16.12 per carton for the 165-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 14, 2006, the nearest reporting date to the date of shipment, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$15.00 to \$16.50 per carton for 140-count, and \$18.00 to \$19.25 per carton for 165-count. Respondent's sales price for the 140-count choice lemons is in line with prevailing market prices, but its sales price for the 165-count choice lemons is below the range of relevant prices mentioned in the report. Nevertheless, Complainant invoiced Respondent for the lemons at approximately the same prices as those reported by Respondent. In so doing, Complainant acknowledged that Respondent's sales prices represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,694.00, Respondent is entitled to deduct \$0.50 per carton, or \$53.50, for commission. Respondent also billed its customer \$16.05 for pallets, which amount should be remitted to

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Complainant. For its carton expenses, Respondent may deduct \$214.00 for 107 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,442.55. Respondent paid Complainant \$1,439.15 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$3.40.

### Invoice No. 14221

Respondent sold the 140-count choice lemons in this shipment at \$16.00 per carton. Complainant invoiced Respondent for the lemons at \$16.15 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 14, 2006, the nearest reporting date to the date of shipment, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$15.00 to \$16.50 per carton for the 140-count size. Respondent's sales price is in line with prevailing market prices. Moreover, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$1,728.00, Respondent is entitled to deduct \$0.50 per carton, or \$54.00, for commission. Respondent also billed its customer \$16.20 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$216.00 for 108 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,474.20, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

### Invoice No. 7712

Respondent submitted a copy of the invoice received from Complainant for the 27 cartons of 165-count choice lemons in this shipment whereon Respondent made a notation that reads, "Do Not Pay 14221 used on order/inv. #14221 – No bill of lading/proof order shipped." Review of

the record discloses that Complainant used order number 14221 for this invoice, but that for invoice number 14221, it used order number 19845.<sup>25</sup> Moreover, Complainant submitted a copy of the bill of lading evidencing shipment of the 27 cartons of 165-count choice lemons in question.<sup>26</sup> We therefore find that Respondent is liable to Complainant for the fair market value of the lemons in this shipment.

Complainant invoiced Respondent for the lemons at \$16.00 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 14, 2006, the nearest reporting date to the date of shipment, shows that California 7/10 bushel cartons of shipper's choice lemons were mostly selling for \$18.00 to \$19.25 per carton for the 165-count size. We will use the lesser price billed by Complainant, \$16.00 per carton, as the fair market value of the lemons in question. At this price, the 27 cartons of lemons in this shipment had a total value of \$432.00. From this amount, Respondent is entitled to deduct \$0.50 per carton, or \$13.50, for commission. It appears these lemons were packed in Complainant's cartons, so no deduction for carton charges is warranted. Therefore, the net amount due Complainant from Respondent for the lemons in this shipment is \$418.50.

Invoice No. 14144

Respondent sold the 115-count fancy lemons in this shipment at \$15.75 per carton. Complainant invoiced Respondent for the lemons at \$15.90 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Monday, April 17, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$17.00 to \$19.25 per carton for the 115-count size. Respondent's sales price is below the range of prices mentioned in the report. Nevertheless, Complainant invoiced Respondent for the lemons at approximately the same price as Respondent reported. In so doing, Complainant acknowledged that Respondent's sales price represented an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant

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<sup>25</sup> See AX 442 and 443.

<sup>26</sup> See OSX 12.

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should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$4,252.50, Respondent is entitled to deduct \$0.50 per carton, or \$135.00, for commission. Respondent also billed its customer \$45.90 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$540.00 for 270 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets, and carton charges, the net amount due Complainant for the lemons in this shipment is \$3,623.40. Respondent paid Complainant \$3,618.00 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$5.40.

Invoice No. 14224

Respondent sold the lemons in this shipment for \$5.4343 per carton for the 63-count fancy, \$5.4343 per carton for the 63-count choice, \$5.4343 per carton for the 75-count fancy, \$5.4343 per carton for the 75-count choice, \$7.4343 per carton for the 95-count fancy, \$7.4343 per carton for the 95-count choice, and \$9.4343 per carton for the 115-count choice. Complainant invoiced Respondent for the lemons at \$5.38 per carton for the 63-count fancy, \$5.38 per carton for the 63-count choice, \$5.38 per carton for the 75-count fancy, \$5.38 per carton for the 75-count choice, \$7.38 per carton for the 95-count fancy, \$7.38 per carton for the 95-count choice, and \$9.62 per carton for the 115-count choice. The U.S.D.A. Market News recap of available f.o.b. prices for Friday, April 21, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$16.00 to \$18.50 per carton for 75-count, and \$17.00 to \$20.50 per carton for 95-count. Shipper's choice lemons were mostly selling for \$10.00 to \$11.00 per carton for 75-count, \$11.00 to \$14.00 per carton for 95-count, and \$15.00 to \$16.00 per carton for 115-count. There were no prices listed for 63-count lemons. Although Respondent's sales prices are below the prevailing market prices, Complainant invoiced Respondent at prices that were slightly less than the sales prices reported by Respondent. Consequently, we presume that Complainant would accept the sales prices reported by Respondent as a reasonable return for the lemons. We therefore find that Respondent's liability to Complainant should be

based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$7,781.95, Respondent is entitled to deduct \$0.50 per carton, or \$594.00, for commission. For its carton expenses, Respondent may deduct \$2,374.00 for 1,187 cartons at \$2.00 per carton. Complainant's invoice also shows the shipment in question included one carton of lemons that Complainant packed on Respondent's behalf in its own carton. Complainant may recover a packing charge of \$4.25 for this carton. After making the appropriate adjustments for commission, and carton and packing charges, the net amount due Complainant for the lemons in this shipment is \$4,818.20. Respondent paid Complainant \$4,787.64 for the lemons. Therefore, there remains a balance due Complainant from Respondent of \$30.56.

Invoice No. 14147

Respondent sold the 95-count fancy, 115-count fancy, 140-count fancy, 200-count fancy, 200-count choice, and 235-count choice lemons in this shipment for \$8.00 per carton. Complainant invoiced Respondent for all of the lemons in this shipment at \$5.65 per carton. The U.S.D.A. Market News recap of available f.o.b. prices for Tuesday, April 25, 2006, shows that California 7/10 bushel cartons of shipper's 1<sup>st</sup> grade lemons were mostly selling for \$17.00 to \$20.50 per carton for 95-count, \$19.00 to \$21.00 per carton for 115-count, \$23.00 to \$25.00 per carton for 140-count, and \$19.00 to \$20.00 per carton for 200-count. Shipper's choice lemons were mostly selling for \$18.00 to \$20.00 per carton for 200-count, and \$10.00 to \$12.00 per carton for 235-count. Although Respondent's sales price is below the prevailing market prices, Complainant invoiced Respondent for the lemons at \$2.45 per carton less than the sales price Respondent reported. Since Complainant was apparently willing to accept \$2.45 per carton less than the sales price reported by Respondent for the lemons, we presume that Complainant would accept Respondent's sales price as an appropriate return for the lemons. We therefore find that Respondent's liability to Complainant

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should be based on Respondent's gross sales, less commission, in accordance with the parties' agreement.

From the gross sales of \$2,208.00, Respondent is entitled to deduct \$0.50 per carton, or \$138.00, for commission. Respondent also billed its customer \$41.40 for pallets, which amount should be remitted to Complainant. For its carton expenses, Respondent may deduct \$552.00 for 276 cartons at \$2.00 per carton. After making the appropriate adjustments for commission, pallets and carton charges, the net amount due Complainant for the lemons in this shipment is \$1,559.40, which amount Respondent already paid Complainant. Therefore, there is nothing further due Complainant from Respondent for the lemons in this shipment.

The total amount due Complainant from Respondent for the 103 transactions discussed above is \$70,418.97. From this amount, Respondent is entitled to deduct \$37,475.00 for the freight expense that it incurred to ship the lemons from the field to Complainant's packing facility. This leaves a net amount due Complainant from Respondent of \$32,943.97.

Respondent's failure to pay Complainant \$32,943.97 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

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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 \$32,943.97, with interest thereon at the rate of 1.35 % 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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**OMER GARRETT, D/B/A GARRETT PRODUCE v. MORARI  
SPECIALTIES, INC.**

**PACA Docket No. R-08-012.**

**Decision and Order.**

**Filed May 30, 2008.**

#### **PACA-R – Jurisdiction – Interstate Commerce.**

Where Complainant, an unlicensed Florida grower, sold and shipped eggplants to Respondent in Miami, Florida, and there was no showing that the eggplants actually moved in interstate commerce, we determined that since Respondent is a licensed dealer who regularly ships produce out of state, and since eggplant is a commodity that is produced in Florida for both local and national distribution, this is sufficient to find that the transaction is considered to be in interstate commerce, so the Secretary has jurisdiction to hear the dispute.

Patrice Harps, Presiding Officer.

Leslie Wowk, Examiner.

Complainant, *pro se*.

Respondent, *pro se*.

*Decision and Order issued 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 in which Complainant seeks a reparation award against Respondent in the amount of \$1,381.50 in connection with two trucklots of eggplants shipped in the course of interstate commerce.

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

The amount claimed in the 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. Respondent did not elect to file any additional evidence. Neither party submitted a Brief.

### **Findings of Fact**

1. Complainant is an individual, Omer Garrett, doing business as Garrett Produce, whose post office address is 3704 S.E. 20<sup>th</sup> Terrace, Okeechobee, Florida 34974. At the time of the transactions involved herein, Complainant was not licensed under the Act.
2. Respondent, Morari Specialties, Inc., is a corporation whose post office address is 13901 S.W. 22<sup>nd</sup> Street, Miami, Florida 33175-7006. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about January 2, 2007, Complainant, by oral contract, sold to Respondent, and agreed to deliver to Respondent at its place of business in Miami, Florida, 145 boxes of eggplants at \$14.50 per box, for a total

contract price of \$2,102.50. Respondent paid Complainant \$1,240.00 for the eggplants, thereby leaving an unpaid balance of \$862.50.

4. On or about February 6, 2007, Complainant, by oral contract, sold to Respondent, and agreed to deliver to Respondent at its place of business in Miami, Florida, 71 boxes of eggplants at \$12.50 per box, for a total contract price of \$887.50. Respondent paid Complainant \$367.50 for the eggplants, thereby leaving an unpaid balance of \$520.00.

5. The informal complaint was filed on March 29, 2007, which is within nine months from the accrual of the cause of action.

### Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for two trucklots of eggplants sold and delivered to Respondent. Complainant states Respondent accepted the eggplants in compliance with the contracts of sale, but that it has since paid only \$1,607.50 of the agreed purchase prices thereof, leaving a balance due Complainant of \$1,381.50. As evidence in support of this contention, Complainant submitted copies of its invoices showing that Respondent was billed a total of \$2,990.00 for the two shipments of eggplants in question. Complainant also submitted evidence of the payments received from Respondent, which total \$1,607.50.<sup>1</sup> These documents reveal that Complainant's claim is understated by \$1.00, as the difference between the amount billed and the amount remitted is \$1,382.50.

Review of the documents submitted by Complainant also indicates that there may be a jurisdictional bar to this Complaint.<sup>2</sup> Specifically, although Complainant states that the eggplants were sold to Respondent in the course of interstate commerce, Complainant also states that the eggplants were shipped from loading point in Okeechobee, Florida, to

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<sup>1</sup> See Complaint, Exhibits 1 and 2.

<sup>2</sup> Jurisdictional issues are raised by the Secretary *sua sponte*. *DeBacker Potato Farms, Inc. v. Pellerito Foods, Inc.*, 57 Agric. Dec. 770 (1998); *Provincial Fruit Company Limited v. Brewster Heights Packing, Inc.*, 39 Agric. Dec. 1514 (1980).

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Respondent in Miami, Florida.<sup>3</sup> Goods which move only within a state are not in interstate commerce. *Bud Antle, Inc. v. Pacific Shore Marketing Corp.*, 50 Agric. Dec. 954 (1991). In order for this forum to have jurisdiction, goods must be sold in or in contemplation of interstate commerce. *Miller Farms & Orchards v. C.B. Overby*, 26 Agric. Dec. 299 (1967).

Complainant is, according to the P.A.C.A. license records maintained by the Department, an unlicensed grower. Moreover, Respondent's President, Mukesh Shah, asserts in Respondent's sworn Answer that when he questioned Complainant's Omer Garrett regarding the poor quality of the eggplants in question, Mr. Garrett stated that "one of his growers had washed it with too much water and he gave him (Omer) one week old batch."<sup>4</sup> Based on this statement, it would appear that the subject eggplants were produced locally, by one of Complainant's field growers. The shipment of Florida-grown eggplants from Okeechobee, Florida, to Respondent, in Miami, Florida, is not in interstate commerce.

Nevertheless, we must still consider whether the eggplants were sold and shipped in contemplation of interstate commerce, *i.e.*, whether Complainant shipped the eggplants with the belief that the commodities would end their transit, after purchase, outside the state of Florida.<sup>5</sup> In this regard, we note that Respondent's Mukesh Shah describes the eggplants in question as "Indian Egg-plants" and states that Respondent accepted the eggplants "with Omer's permission to Market it in the small, limited, specialty Indian market."<sup>6</sup> It also appears, however, that this conversation allegedly took place after Respondent received and reported problems with the eggplants. Hence, there remains the possibility that if the eggplants were received in the condition that Respondent anticipated, Respondent would have shipped them to customers located outside the state of Florida. Respondent is licensed

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<sup>3</sup> See Complaint, ¶4.

<sup>4</sup> See Answer, ¶6.

<sup>5</sup> Section 1 of the Act states, in pertinent part, that "[a] transaction in respect of any perishable agricultural commodity shall be considered in interstate commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit after purchase, in another..." See 7 U.S.C. § 499a(b)(8).

<sup>6</sup> See Answer, ¶6.

under the Act as a dealer, which means that Respondent is engaged in the business of selling wholesale quantities of produce in interstate or foreign commerce. See 7 C.F.R. §§ 46.2(m) 46.3(a). Moreover, Respondent describes itself as a company “involved in growing, importing, packing, processing, marketing and distributing a wide range of specialty vegetables and exotic tropical fruits throughout the United States.”<sup>7</sup> Therefore, given the nature of Respondent’s business, Complainant could reasonably expect that the commodities sold to Respondent would be shipped out of state. We also note that Florida is the one of the nation’s leading eggplant producers, so it is reasonable to presume that a large portion of Florida’s production is probably shipped out of state in the current of commerce in eggplant. We believe that all of these factors combined are sufficient to establish that the transaction in question is considered to be in interstate commerce. See, *In re The Produce Place*, 53 Agric. Dec. 1715, 1757 (1994), aff’d 91 F.3d 173 (D.C. Cir. 1996).

Having established that the Secretary has jurisdiction to hear this dispute, we will now consider Respondent’s response to the allegations raised in the Complaint. Respondent’s Mukesh Shah asserts in Respondent’s sworn Answer that both lots of eggplants were received in poor condition, with the January 2<sup>nd</sup> lot accepted with the understanding that a price change would be needed, and the February 6<sup>th</sup> lot accepted on consignment.<sup>8</sup> Respondent, as the party alleging that the price terms of the contracts were changed following delivery of the eggplants, has the burden to prove this allegation by a preponderance of the evidence. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914 (1975).

Aside from Mr. Shah’s sworn statement to this effect, the only other evidence offered by Respondent to substantiate its contention that the original contracts were modified are copies of the invoices that

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<sup>7</sup> Morari Specialties, Inc. website, retrieved on February 20, 2008 from <http://morarispecialties.com/history.html>.

<sup>8</sup> See Answer, paragraph 6.

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Respondent received from Complainant for the eggplants, whereon Respondent's Mukesh K. Shah wrote "price change maybe" for the January 2<sup>nd</sup> lot of eggplants, and "consignment" for the February 6<sup>th</sup> lot of eggplants.<sup>9</sup>

In response to Respondent's allegations regarding a price change and an agreement to handle the eggplants on consignment, Complainant submitted an Opening Statement which includes a letter signed by Omer Garrett, wherein Mr. Garrett denies all of the statements made by Respondent in its response to the Complaint and asserts specifically that the eggplants delivered on January 2<sup>nd</sup> were not damaged or "bad" as claimed by Respondent. Mr. Garrett also states that "there was never a conversation about the price discrepancy until the payment check was received." Complainant's Opening Statement also includes a letter signed by Ed Cornett, the individual who delivered the eggplants to Respondent on behalf of Complainant. In the letter, Mr. Cornett asserts that at the time of delivery there was no discussion about "bad" eggplant or that the price of the eggplant would be less than previously discussed.

Upon review, we note that the statements made by Mr. Garrett and Mr. Cornett are notarized but not sworn. Consequently, their statements cannot be afforded any evidentiary value. *C. H. Robinson Co. v. ARC Fresh Food System, Inc.*, 50 Agric. Dec. 950 (1991); see, also, *Frank W. Prillwitz, Jr. v. Sheehan Produce*, 19 Agric. Dec. 1213 (1960). As a result, Respondent's sworn contentions regarding the contract modifications are not rebutted. Nevertheless, even if we accept as true Respondent's contention that the eggplants shipped on January 2<sup>nd</sup> were accepted with the understanding that a price change was needed, Respondent has not alleged that a specific new price was agreed upon, nor did it submit any independent evidence, such as a U.S.D.A. inspection, to establish that a price change was warranted. With respect to the eggplants shipped on February 6<sup>th</sup> that were allegedly consigned, Respondent did not submit a detailed account of sales for the eggplants. Therefore, absent any evidence showing that Respondent prepared the type of documentation that it would be required to prepare if it were selling the eggplants for the account of Complainant, *i.e.*, on

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<sup>9</sup> See Answer, Exhibits 1 and 2.

consignment,<sup>10</sup> we are unconvinced by Respondent's assertion that Complainant authorized a consignment handling.

Based on the evidence submitted and for the reasons cited, we find that Respondent is liable to Complainant for the two trucklots of eggplants it purchased and accepted from Complainant at the agreed purchase prices totaling \$2,990.00. Respondent paid Complainant a total of \$1,607.50 for the eggplants. Therefore, there remains a balance due Complainant from Respondent of \$1,382.50.

Respondent's failure to pay Complainant \$1,382.50 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 (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

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<sup>10</sup> The duties of commission merchants who accept produce for sale on consignment are set forth in section 46.29 of the Regulations, which state, in pertinent part, "Complete and detailed records shall be prepared and maintained by all commission merchants and joint account partners covering produce received, sales, quantities lost, dates and cost of repacking or reconditioning, unloading, handling, freight, demurrage or auction charges, and any other expenses which are deducted on the accounting, in accordance with the provisions of Sec. 46.18 through Sec. 46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made."

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Order. *PGB International, LLC v. Bayche Companies, Inc.*, 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 \$1,382.50, with interest thereon at the rate of 2.09 % per annum from March 1, 2007, 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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**NEW MUNDO EXPORT FRUITS, INC. v. SAN DIEGO POINT PRODUCE, INC.**

**PACA Docket No. R-08-046.**

**Decision and Order.**

**Filed June 4, 2008.**

**PACA-R – Contracts – Modification.**

Where Complainant sought payment of the original contract price for mangoes sold to Respondent, but the record included evidence that Complainant agreed in writing to accept the lesser amounts of \$30,000.00 (if payment was received by September 28, 2007), or \$35,232.00 (if payment was received after September 28, 2007), it was found that there was a binding agreement to modify the original contract price of the mangoes to \$35,232.00, with no time limitation on when payment was due. Respondent was ordered to pay Complainant \$35,232.00.

**Practice and Procedure – Time for Payment.**

The Act requires full payment promptly for perishable agricultural commodities purchased in the course of interstate or foreign commerce. The parties' request to allow the reparation award to be satisfied in allotments must therefore be denied.

**Interest**

Where an agreement is reached to change the original contract price for goods purchased, the payment due date for the purpose of calculating interest is the original payment due date specified in the contract, not the modification date, unless otherwise agreed between the parties.

Patrice Harps, Presiding Officer.

Leslie Wowk, Examiner.

Complainant, Pro se.

Respondent, Pro se.

*Decision and Order issued 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, in which Complainant seeks a reparation award against Respondent in the amount of \$44,832.00 in connection with two truckloads of mangoes shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto admitting liability to Complainant in the amount of \$35,232.00 for the two truckloads of mangoes that are at issue in the Complaint.

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

**Findings of Fact**

1. Complainant, New Mundoexport Fruits, Inc., is a corporation whose post office address is P.O. Box 8906, Hidalgo, Texas 78557-8906. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, San Diego Point Produce, Inc., is a corporation whose post office address is P.O. Box 1726, Chula Vista, California 91912-1726. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about May 18, 2007, Complainant, by oral contract, sold to Respondent one truckload of mangoes comprised of 3,264 cartons of Ataulfo 18's at a delivered price of \$6.25 per carton, or \$20,400.00, and 576 cartons of Ataulfo 20's at a delivered price of \$5.75 per carton, or \$3,312.00, for a total contract price of \$23,712.00. (Complainant's Invoice No. 16248). The mangoes were shipped on May 22, 2007, from loading point in the state of Texas, to Respondent in San Diego, California.
4. On or about May 21, 2007, Complainant, by oral contract, sold to Respondent one truckload of mangoes comprised of 3,840 cartons of Ataulfo 20's at a delivered price of \$5.50 per carton, for a total contract price of \$21,120.00. (Complainant's Invoice No. 16263). The mangoes were shipped on May 23, 2007, from loading point in the state of Texas, to Respondent in San Diego, California.
5. Respondent has not paid Complainant for the subject loads of mangoes.
6. The informal complaint was filed on September 10, 2007, which is within nine months from the accrual of the cause of action.

**Conclusions**

Complainant brings this action to recover the agreed purchase price for two truckloads of mangoes sold and shipped to Respondent. Complainant states Respondent accepted the mangoes in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling

\$44,832.00. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it acknowledges accepting the mangoes in compliance with the contracts of sale and failing to pay the invoice prices or any portion thereof. Respondent also states, however, that it believes the invoices need to be adjusted according to a signed agreement reducing the amount due to \$35,232.00, and due to the losses it incurred from the sale of the mangoes.<sup>1</sup>

A copy of the signed agreement to which Respondent refers is attached as Exhibit 1 to Respondent's Answer. The agreement, which is signed by Complainant's President, Cesar Garcia, and Respondent's President, Daniel Calderon, reads, in pertinent part, as follows:

We have an agreement with your company to pay \$30 000.00 (thirty thousand dollars 00/100) to cover the disputed transactions: invoices # 16248 & 16263 before this Friday Sept. 28<sup>th</sup>.

In case, we receive the money later than Friday 28<sup>th</sup> the amount will be for the sum of the claim \$ 35,232.00 dls.

Complainant's Cesar Garcia admits in his sworn Opening Statement that he offered a settlement of \$30,000.00 for both truckloads of mangoes if Respondent paid by the end of the business day on September 28, 2007. Mr. Garcia also acknowledges that if Respondent failed to pay by September 28, 2007, the offer was increased to \$35,232.00. Mr. Garcia also asserts, however, that Respondent failed to pay either amount, and offered only to make monthly payments, which offer was refused by Complainant. On this basis, Mr. Garcia seeks recovery of the original invoice prices totaling \$44,822.00.

Respondent's Vice President, Michelle Calderon, asserts in Respondent's sworn Answering Statement that since 2001, Complainant and Respondent have had a stable business relationship whereby Complainant would contact Respondent when it had a load of mangoes that was rejected by another customer, and Respondent would agree to

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<sup>1</sup> See Answer, ¶7.

pick up the mangoes and attempt to sell them. Ms. Calderon states it was the same situation with the two shipments of mangoes in question. Specifically, Ms. Calderon states Cesar Garcia asked her to help him sell the fruit because it was very ripe, with spots and color. Ms. Calderon states that since they never had a problem and they trusted each other, Respondent decided to take the fruit, but Daniel Calderon explained to Mr. Garcia that the fruit was selling for \$3.00 per carton and he was having many problems with his clients due to the quality of the fruit. Ms. Calderon states months passed without the parties agreeing on a price for the fruit and settling the invoices, but they ultimately came to an agreement to a payoff of \$30,000.00 for both shipments if Respondent paid before September 28, 2007, and if Respondent was not able to pay by the 28<sup>th</sup>, the amount would increase to \$35,232.00. Ms. Calderon states it has always been Respondent's intention to pay Complainant for the fruit at a fair price, but Respondent needed to offer a payment plan because the shipment was never sold in its totality due to credits and adjustments. Finally, Ms. Calderon asks that Respondent be granted a monthly payment plan to pay Complainant the amount due, \$35,232.00, plus interest and fees.

Complainant's Cesar Garcia, in Complainant's sworn Statement in Reply, points out once again that Respondent has not met their agreement to pay \$30,000.00 by September 28, 2007, or to pay his second offer of \$35,232.00. On this basis, Mr. Garcia once again requests payment of the full original invoice amount of \$44,822.00, plus interest and fees. Mr. Garcia also states he would allow this amount to be paid in two equal payments separated by thirty days.

We will first address Complainant's contention that the full original invoice amount is owed by Respondent because it has not paid either the \$30,000.00 that was due by September 28, 2007, or the \$35,232.00 that was due if payment was made after that date, according to the parties' written agreement. Initially, we note that while there was a time limitation placed on Complainant's offer to accept \$30,000.00 for the mangoes, no such limit was placed on its offer to accept \$35,232.00.<sup>2</sup> It therefore appears that there was a binding agreement to modify the original contract price of the mangoes to \$35,232.00. Included in this agreement was an additional provision allowing Respondent to pay only

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<sup>2</sup> See Answer, Exhibit 1.

\$30,000.00 if payment in full of this lesser amount was received by September 28, 2007. Since Respondent failed to pay Complainant \$30,000.00 by the date specified in the agreement, we conclude that the amount due Complainant from Respondent for the two truckloads of mangoes in question is the modified contract price of \$35,232.00.

Both parties have suggested that Respondent be ordered to satisfy this amount by making payments, with Respondent requesting monthly payments and Complainant requesting two payments, thirty days apart. The Act requires full payment promptly for perishable agricultural commodities purchased in the course of interstate or foreign commerce. 7 U.S.C. § 499b(4). Full payment promptly means payment in full of the contract price by the payment due date specified in the contract or, in the absence of a specified payment due date, payment within ten days after the produce is accepted by the buyer. See 7 C.F.R. § 46.2(aa)(5). The issue of failure to pay under the Perishable Agricultural Commodities Act is thoroughly discussed in *In re Samuel Esposito d/b/a Quakertown Town Kennels*, 38 Agric. Dec. 613, 636 (App. B) (1979), wherein we stated:

The Perishable Agricultural Commodities Act was enacted at the request of the regulated industry. It is the only regulatory program administered by the Department paid for by the regulated industry through license fees. Payment violations are the very heart of the regulatory program. The industry desires and supports a toughminded administration of the Act which requires full payment irrespective of the reasons for non-payment.

Given the importance of full and prompt payment as discussed more fully in *Esposito*, an extended payment agreement that allows for payment beyond the terms agreed upon between the parties or, in the absence of an agreement, beyond what is considered prompt payment under the Act (7 C.F.R. § 46.2(aa)), runs counter to the proper administration of the Act and will not be part of a reparation award issued by the Secretary. The time to enter an agreement for a payment plan was before the formal Complaint was filed.

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For the reasons cited herein and based on all the evidence in the record, we find that Respondent is liable to Complainant for the settlement price of \$35,232.00 negotiated and confirmed by signed correspondence exchanged between the parties via fax on or about September 25, 2007.

Respondent's failure to pay Complainant \$35,232.00 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., 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 \$35,232.00, with interest thereon at the rate

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of 2.16 % per annum from July 1, 2007,<sup>3</sup> 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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<sup>3</sup> While the agreement by Complainant to accept \$35,232.00 for the mangoes modified the original contract price of the mangoes, the contract terms originally agreed upon between the parties, including the time for payment, remained unchanged. Therefore, the interest due from Respondent on the modified contract price is calculated based on the date payment was due under the original contract terms.

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**PERISHABLE AGRICULTURE COMMODITIES ACT**

**MISCELLANEOUS ORDERS**

**In re: COOSEMANS SPECIALTIES, INC.**

**PACA Docket No. D-02-0024.**

**In re: EDDY C. CRECES.**

**PACA Docket No. APP-03-0002.**

**In re: DANIEL F. COOSEMANS.**

**PACA Docket No. APP-03-0003.**

**Order Lifting Stay Order.**

**Filed January 18, 2008.**

**PACA – Perishable agricultural commodities – Order Lifting Stay Order.**

Andrew Y. Stanton, for the Agricultural Marketing Service and the Chief of the PACA Branch.

Stephen P. McCarron, Washington, DC, for Coosemans Specialties, Inc., and Eddy C. Creces.

Martin Schulman, Woodside, NY, for Daniel F. Coosemans.

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

On April 20, 2006, I issued a Decision and Order: (1) concluding Coosemans Specialties, Inc. [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) revoking Respondent's PACA license; (3) concluding Eddy C. Creces and Daniel F. Coosemans [hereinafter Petitioners] were responsibly connected with Respondent; and (4) subjecting Petitioners to licensing and employment restrictions under the PACA.<sup>1</sup>

Respondent and Petitioners filed a petition for review of *In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006), with the United States Court of Appeals for the District of Columbia Circuit. The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], and the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural

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<sup>1</sup>*In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006).

Marketing Service, United States Department of Agriculture [hereinafter the Chief], filed a Motion for Stay requesting a stay of the order in *In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006), pending the outcome of proceedings for judicial review. Respondent and Petitioners informed the Office of the Judicial Officer, by telephone, that they had no objection to the Motion for Stay, and on September 20, 2006, I issued a Stay Order.<sup>2</sup>

On April 6, 2007, the United States Court of Appeals for the District of Columbia Circuit denied Respondent's and Petitioners' petitions for review.<sup>3</sup> On November 13, 2007, the Supreme Court of the United States denied Respondent's and Petitioners' petition for writ of certiorari.<sup>4</sup> On December 21, 2007, the Agricultural Marketing Service and the Chief filed a motion to lift the September 20, 2006, Stay Order, and on January 15, 2008, Respondent and Petitioners filed a response stating they had no objection to the Motion to Lift Stay Order.

Proceedings for judicial review are concluded. Therefore, the September 20, 2006, Stay Order is lifted, and the Order issued in *In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006), is effective as follows.

### ORDER

1. Coosemans Specialties, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Coosemans Specialties, Inc.'s PACA license is revoked, effective 60 days after service of this Order on Coosemans Specialties, Inc.

2. I affirm the Chief's January 6, 2003, determination that Eddy C. Creces was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Eddy C. Creces is subject to the licensing restrictions under section 4(b)

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<sup>2</sup>*In re Coosemans Specialties, Inc.* (Stay Order), 66 Agric. Dec. 926 (2006).

<sup>3</sup>*Coosemans Specialties, Inc. v. Department of Agric.*, 482 F.3d 560 (D.C. Cir. 2007).

<sup>4</sup>*Coosemans Specialties, Inc. v. Department of Agric.*, 128 S. Ct. 628 (Nov. 13, 2007).

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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 Eddy C. Creces.

3. I affirm the Chief's January 6, 2003, determination that Daniel F. Coosemans was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Daniel F. Coosemans 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 Daniel F. Coosemans.

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**In re: COOSEMANS SPECIALTIES, INC.**  
**PACA Docket No. D-02-0024.**  
**In re: EDDY C. CRECES.**  
**PACA Docket No. APP-03-0002.**  
**In re: DANIEL F. COOSEMANS.**  
**PACA Docket No. APP-03-0003.**  
**Order Modifying January 18, 2008, Order Lifting Stay Order.**  
**Filed February 12, 2008.**

Christopher Young-Morales, for the Agricultural Marketing Service and the Chief of the PACA Branch.

Stephen P. McCarron, Washington, DC, for Coosemans Specialties, Inc., and Eddy C. Creces.

Martin Schulman, Woodside, NY, for Daniel F. Coosemans.

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

On January 18, 2008, I issued an Order Lifting Stay Order: (1) finding Coosemans Specialties, Inc. [hereinafter Respondent], violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) revoking Respondent's PACA license effective 60 days after service of the Order Lifting Stay Order on Respondent; (3) concluding Eddy C. Creces and Daniel F. Coosemans [hereinafter Petitioners] were responsibly connected with Respondent; and (4) subjecting Petitioners to licensing

and employment restrictions under the PACA effective 60 days after service of the Order Lifting Stay Order on Petitioners.<sup>1</sup>

On January 30, 2008, Respondent and Petitioners filed a motion to advance the effective date of the Respondent's license revocation and Petitioners' licensing and employment restrictions to December 31, 2007, based upon their self-imposed implementation of the revocation of Respondent's PACA license and the restrictions on Petitioners. On February 11, 2008, the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], and the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], filed a response opposing Respondent's and Petitioners' January 30, 2008, motion.

By its terms, the Stay Order issued in the instant proceeding is effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.<sup>2</sup> The Stay Order cannot be lifted by the action of the parties. Therefore, I reject Respondent's and Petitioners' request to modify the January 18, 2008, Order Lifting Stay Order to advance the effective date of the Order issued in *In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006), to December 31, 2007. The Agricultural Marketing Service and the Chief state they have no objection to an advancement of the effective date to the date of the issuance of the instant Order; therefore, I modify the January 18, 2008, Order Lifting Stay Order and make the Order issued in *In re Coosemans Specialties, Inc.*, 65 Agric. Dec. 539 (2006), effective immediately, as follows:

### ORDER

1. Coosemans Specialties, Inc., has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Coosemans Specialties, Inc.'s PACA license is revoked, effective February 12, 2008.

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<sup>1</sup>*In re Coosemans Specialties, Inc.* (Order Lifting Stay Order), 67 Agric. Dec. \_\_\_\_ (Jan. 18, 2008).

<sup>2</sup>*In re Coosemans Specialties, Inc.* (Stay Order), 66 Agric. Dec. 926, 927 (2006).

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2. I affirm the Chief's January 6, 2003, determination that Eddy C. Creces was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Eddy C. Creces 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 February 12, 2008.

3. I affirm the Chief's January 6, 2003, determination that Daniel F. Coosemans was responsibly connected with Coosemans Specialties, Inc., when Coosemans Specialties, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Daniel F. Coosemans 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 February 12, 2008.

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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 Michael H. Hirsch.  
Filed June 11, 2008.**

**PACA – Perishable agricultural commodities – Order lifting stay order.**

Charles L. Kendall and Christopher Young-Morales, for the Chief.  
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 that Michael H. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; and (2) subjecting Mr. Hirsch to

licensing and employment restrictions under the PACA (7 U.S.C. §§ 499d(b), 499h(b)).<sup>1</sup> On April 24, 2006, Mr. Hirsch filed a petition to reconsider *In re Kleiman & Hochberg, Inc.*, 65 Agric. Dec. 482 (2006), which I denied.<sup>2</sup>

Mr. Hirsch 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, Mr. Hirsch 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 Mr. Hirsch's motion for a stay.<sup>3</sup>

On August 14, 2007, the United States Court of Appeals for the District of Columbia Circuit issued a decision denying Mr. Hirsch's petition for review.<sup>4</sup> Mr. Hirsch filed a petition for a writ of certiorari with the Supreme Court of the United States which was denied on March 31, 2008.<sup>5</sup>

On April 16, 2008, the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], filed a Motion to Lift Stay Order as to Petitioner Michael H. Hirsch. On June 2, 2008, Mr. Hirsch filed Petitioner's Opposition to Respondent's Motion to Lift Stay. On June 10, 2008, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on the Chief's request to lift the stay as to Mr. Hirsch.

The September 22, 2006, Stay Order stays 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

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

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

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

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

<sup>5</sup>*Hirsch v. Department of Agriculture*, \_\_ U.S. \_\_\_, 128 S. Ct. 1748 (2008).

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judicial review. Proceedings for judicial review as to Mr. Hirsch are concluded. Mr. Hirsch raises no meritorious basis for my denial of the Chief's Motion to Lift Stay Order as to Petitioner Michael H. Hirsch. Therefore, as to Mr. Hirsch, 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 Mr. Hirsch, are effective as follows.

**ORDER**

I affirm the Chief's February 12, 2003, determination that Michael H. Hirsch was responsibly connected with Kleiman & Hochberg, Inc., when Kleiman & Hochberg, Inc., willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Michael H. Hirsch 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 Michael H. Hirsch.

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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**DEFAULT DECISIONS**

**In re: ROSENTHAL & KLEIN, INC.**  
**PACA Docket No. D-08-0036.**  
**Default Decision.**  
**Filed February 21, 2008.**

**PACA - Default.**

Charles Kendall 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 a Complaint filed on December 19, 2007 (the Complainant’s signature date is corrected to “this 18th day of December 2007” as was requested in the Erratum filed January 2, 2008).
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 Charles L. Kendall, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave, SW, Washington DC 20250-1413.
3. The Complaint alleged, among other things, that during July 19, 2005, through October 26, 2005, the Respondent, Rosenthal & Klein, Inc. (herein frequently “Rosenthal & Klein” or “Respondent”), failed to make full payment promptly to 16 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$927,459.76 for 208 lots of perishable agricultural commodities, which Respondent purchased,

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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)).

4. The Complaint requested that the Administrative Law Judge find that Respondent willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order that the facts and circumstances of the violations be published.

5. 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 Rosenthal & Klein's attorney by certified mail on December 19, 2007, and received and signed for on December 21, 2007. No answer to the Complaint has been received. The time for filing an answer expired on January 10, 2008.

6. AMS's Motion for a 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 Rosenthal & Klein'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**

7. Rosenthal & Klein, Inc. is a corporation organized and existing under the laws of the State of New York. Rosenthal & Klein ceased operating on October 1, 2005. Rosenthal & Klein's business address was 123-125 NYC Term. Mkt., Bronx, New York 10474. Rosenthal & Klein is represented by Leslie S. Barr, Esq., Windels Marx Lane & Mittendorf, LLP, 156 West 56<sup>th</sup> Street, New York, New York 10019.

8. At all times material to this Decision, Rosenthal & Klein was licensed under the PACA. License number 1977-1984 was issued to Rosenthal & Klein on September 28, 1977. This license terminated on

September 28, 2006, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Rosenthal & Klein failed to pay the required annual renewal fee.

9. As more fully set forth in paragraph III of the Complaint, including Attachment A to the Complaint, Rosenthal & Klein, during July 19, 2005, through October 26, 2005, failed to make full payment promptly to 16 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$927,459.76 for 208 lots of perishable agricultural commodities which Rosenthal & Klein purchased, received, and accepted in interstate and/or foreign commerce. 10. On October 12, 2005, Rosenthal & Klein filed for relief pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 *et seq.*) in the United States Bankruptcy Court for the Southern District of New York (Manhattan). This Petition was designated Case No. 05-45649. Rosenthal & Klein admitted in its Bankruptcy schedules, filed November 4, 2005, that all 16 of the sellers listed Attachment A to the Complaint herein, hold unsecured claims that are equal to or greater than the amounts alleged in said Attachment A, for a total of \$942,027.42. By Order dated October 12, 2006, Rosenthal & Klein (the debtor) was authorized to make final distributions to holders of allowed PACA trust claims. Rosenthal & Klein, had, when the Complaint herein was filed, made trust distribution payments totaling \$572,552.59 to seven (7) of the 16 produce creditors listed in said Attachment A, leaving a balance due and unpaid of \$354,907.17.

### **Conclusions**

11. The Secretary of Agriculture has jurisdiction.

12. Rosenthal & Klein, 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 16 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$927,459.76 for 208 lots of fruits and vegetables, all being perishable agricultural commodities, which Rosenthal & Klein purchased, received, and accepted in interstate and/or foreign commerce.

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**Order**

13. Rosenthal & Klein, Inc. committed willful, 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.

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

**Finality**

15. 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.:**

**TITLE 7—AGRICULTURE**

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

**PART 1—ADMINISTRATIVE REGULATIONS**

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

**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE  
SECRETARY UNDER**

**VARIOUS STATUTES**

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**§ 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

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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.

(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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**In re: LEADERS FARMS, INC.**  
**PACA Docket No. D-07-0206.**  
**Default Decision.**  
**Filed February 28, 2008.**

**PACA – Default.**

Andrew Stanton 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 a Complaint filed on September 27, 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”), has been represented by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington D.C. 20250.

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3. The Complaint alleged, among other things, that during May 10, 2005 through April 13, 2006, the Respondent, Leaders Farms, Inc. (herein frequently “Leaders Farms” or “Respondent”), failed to make full payment promptly to two sellers of the agreed purchase prices, or balances thereof, in the total amount of \$341,549.45 for 20 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)).

4. The Complaint requested that the Administrative Law Judge find that the Respondent Leaders Farms, Inc. willfully, flagrantly and repeatedly violated section 2(4) of the PACA, and order that the facts and circumstances be published.

5. The Hearing Clerk attempted to serve by certified mail a copy of the Complaint, 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”), on the registered agent for the Respondent Leaders Farms, Inc., but the envelope was stamped by the United States Postal Service “RETURNED TO SENDER” “Unclaimed” and returned to the Hearing Clerk.

6. The Hearing Clerk re-mailed the copy of the Complaint with the enclosures by regular mail on November 13, 2007, to the same address. When a complaint has been returned “Unclaimed” under circumstances such as these, “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 December 3, 2007.

7. The Complainant’s Motion for Decision Without Hearing by Reason of Default, filed December 7, 2007, 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 Leaders Farms’ 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**

8. Respondent Leaders Farms, Inc. is a corporation organized and existing under the laws of the State of Florida. Respondent's business and mailing address is 121 Harrogate Court, Longwood, Florida 32779. Respondent's registered agent is Deborah S. Bullock, 121 Harrogate Court, Longwood, Florida 32779.

9. At all times material to this Decision, Respondent Leaders Farms, Inc. was licensed under the provisions of the PACA. License number 20041265 was issued to Respondent on September 21, 2004. Respondent's license was automatically suspended on November 18, 2005, for Respondent's failure to pay reparation awards issued pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)). Respondent's license terminated on September 21, 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.

10. As more fully set forth in paragraph III of the Complaint, Respondent Leaders Farms, Inc., during May 10, 2005, through April 13, 2006, failed to make full payment promptly to two sellers of the agreed purchase prices, or balances thereof, in the total amount of \$341,549.45 for 20 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate and foreign commerce.

### **Conclusions**

11. The Secretary of Agriculture has jurisdiction.

12. Respondent Leaders Farms, 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 two sellers in the amount of \$341,549.45 for 20 lots of fruits and vegetables, all being perishable agricultural commodities, which the Respondent purchased, received and accepted in interstate and/or foreign commerce during May 10, 2005, through April 13, 2006.

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**Order**

13. The Respondent Leaders Farms, Inc. committed willful, 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.

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

**Finality**

15. 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.:**

**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

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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.

(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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**In re: TIMOTHY C. YORK d/b/a T & R FRESH PRODUCE.**  
**PACA Docket No. D-08-0044.**  
**Default Decision.**  
**Filed March 25, 2008.**

**PACA – Default.**

Charles Spicknall for AMS.  
Respondent Pro se.  
*Default Decision by Chief Administrative Law Judge Marc R. Hillson.*

### **Default Decision**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), (the “PACA”), instituted by a Complaint filed on January 11, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period of June 12, 2005 through May 17, 2006, Respondent Timothy C. York, d/b/a T & R Fresh Produce, (“Respondent”), violated Section 2(4) of the PACA by failing to make full payment promptly in the total amount of \$536,092.91 for perishable agricultural commodities that Respondent purchased, received and accepted in the course of, or in contemplation of, interstate and foreign

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commerce. The time for filing an answer having expired, and upon Complainant's motion for the issuance of a default decision, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.139).

### **Findings of Fact**

1. Respondent Timothy C. York, doing business as T & R Fresh Produce, is an individual doing business in the State of California.
2. Pursuant to the licensing provision of the PACA, license number 19901814 was issued to Respondent on August 30, 1990. The license terminated on August 30, 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.
3. As more fully set forth in paragraph III of the Complaint, incorporated by reference herein, during the period June 12, 2005, through May 17, 2006, Respondent failed to make full payment promptly to thirty sellers of the agreed purchase prices, or balances thereof, in the total amount of \$536,092.91 for 401 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in the course of, or in contemplation of, interstate and foreign commerce.

### **Conclusions**

Respondent's failure to make full payment promptly with respect to the transactions described in Finding of Fact No. 3 above constitutes willful, repeated, and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)).

### **Order**

A finding is made that the Respondent Timothy C. York, doing business as T & R Fresh Produce, has committed willful, flagrant, and

Mich-Kim, Inc., d/b/a Ellis Fleisher Produce Company 917  
d/b/a Dichter Bros. & Glass, Inc.  
67 Agric. Dec. 917

repeated violations of Section 2 of the PACA (7 U.S.C. § 499b(4)), and the facts and circumstances of the violations shall be published.

This Order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice, this Decision will become final without further proceedings thirty-five days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty 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.

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**In re: MICH-KIM, INC., D/B/A ELLIS FLEISHER PRODUCE  
COMPANY AND d/b/a DICHTER BROS. & GLASS, INC.  
PACA Docket No. D-08-0048.  
Default Decision.  
Filed May 09, 2008.**

**PACA – Default.**

Leah C. Battagoli 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. § 499a *et seq.*; hereinafter “PACA”), instituted by a Complaint filed on January 23, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (hereinafter “Complainant”). The Complaint alleges that during the period May 24, 2006, through March 18, 2007, Respondent Mich-Kim, Inc., d/b/a Ellis Fleisher Produce Company and d/b/a Dichter

## 918 PERISHABLE AGRICULTURAL COMMODITIES ACT

Bros. & Glass, Inc. (hereinafter “Respondent”), failed to make full payment promptly to 38 sellers of the agreed purchase prices in the total amount of \$1,438,415.00 for 507 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

A copy of the Complaint was sent to Respondent’s president and one-hundred percent shareholder, Ellis Fleisher, by certified mail on January 23, 2008, and it was returned to the Hearing Clerk as “unclaimed” on February 19, 2008. Accordingly, pursuant to 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”), the Hearing Clerk re-mailed the Complaint using regular mail on February 20, 2008. That mailing by regular mail is deemed to constitute service on Respondent pursuant to section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)). Respondent has not answered the Complaint.<sup>1</sup> The time for filing an answer having run, and upon the motion of Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following decision 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. Mich-Kim, Inc., d/b/a Ellis Fleisher Produce Company and d/b/a Dichter Bros. & Glass, Inc., is a corporation organized and existing under the laws of the State of Pennsylvania. Its business and mailing address was 3301 S. Galloway Street #93, Philadelphia, Pennsylvania 19148. Respondent ceased business operations on March 9, 2007. Respondent’s current mailing addresses are c/o Ellis Fleisher, 13 Foxcroft Court, Voorhees, New Jersey 08043 and c/o Eugene Malady, Eugene J. Malady, LLC, 200 East State Street, Suite 309, Media, Pennsylvania 19063.

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<sup>1</sup> A copy of the Complaint was also sent to Respondent’s attorney, Eugene J. Malady, on January 23, 2008. The Complaint was served on Respondent’s attorney on January 25, 2008. Respondent’s attorney also has failed to file an answer on behalf of Respondent.

Mich-Kim, Inc., d/b/a Ellis Fleisher Produce Company 919  
d/b/a Dichter Bros. & Glass, Inc.  
67 Agric. Dec. 917

2. At all times material to this decision, Respondent was licensed under the provisions of the PACA. License number 1983-0535 was issued to Respondent on February 4, 1983. This license has been renewed annually and was next subject to renewal on or before February 4, 2008. This license was suspended on May 10, 2007, pursuant to section 7(d) of the PACA (7 U.S.C. § 499g(d)), when Respondent failed to pay a reparation award, and was terminated on February 4, 2008, 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 May 24, 2006, through March 18, 2007, failed to make full payment promptly to 38 sellers of the agreed purchase prices in the total amount of \$1,438,415.00 for 507 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce.

### **Conclusions**

Respondent's failure to make full payment promptly to 38 sellers in the total amount of \$1,438,415.00 for 507 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.

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

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

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

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**In re: CHAMPION PRODUCE, INC.**  
**PACA Docket No. D-08-0065**  
**Default Decision.**  
**Filed May 9, 2008.**

**PACA – Default.**

Jonathan D. Gordy for AMS.  
Respondent Pro se.

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

**Decision Without Hearing by Reason of Default.**

**Preliminary Statement**

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (“PACA”), instituted by a Complaint filed on February 22, 2008, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. The Complaint alleges that during the period of May 2006 through February 2007, Respondent Champion Produce, Inc. (“Respondent”) failed to make full payment promptly to 41 sellers of perishable agricultural commodities of the agreed purchase prices in the total amount of \$566,681.10 for 249 transactions involving perishable agricultural commodities, which Respondent purchased, received, and accepted in, or in contemplation of, interstate commerce.

A copy of the Complaint was served upon Respondent by certified mail on February 27, 2008. Respondent has not answered the Complaint. The time for filing an answer having run, and upon the motion of Complainant for the issuance of a Decision Without Hearing by Reason of Default, the following decision and order is issued without further investigation or hearing pursuant to Section 1.139 (7 C.F.R. §

1.139) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et. seq.*) (“Rules of Practice”).

### **Findings of Fact**

Respondent is a corporation organized and existing under the laws of the State of Texas. Respondent’s business and mailing address was 3122 Produce Road, Houston, TX 77023. Respondent ceased business operations on or about February 20, 2007.

At all times material herein, Respondent was licensed under the provisions of the PACA. License number 20040949 was issued to Respondent on June 23, 2004. The license is still in effect and its anniversary date is June 23, 2008.

Respondent, during the period May 2006 through February 2007 failed to make full payment promptly to 41 sellers of the agreed purchase prices, or balances thereof, in the total amount of \$566,681.10 for 249 transactions involving perishable agricultural commodities, which Respondent purchased, received, and accepted in, or in contemplation of, interstate commerce.

### **Conclusions**

Respondent’s failure to make full payment promptly regarding the 249 transactions involving perishable agricultural commodities, which is described in Finding of Fact No. 3 above, constitutes willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)). Therefore, Respondent has willfully, flagrantly and repeatedly violated Section 2(4) of the PACA (7 U.S.C. §§ 499b(4)), and Respondent’s license shall be revoked.

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Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals the Decision to the Secretary within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145). Copies of this Decision shall be served upon the parties.

Done at Washington, D.C.

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**Consent Decisions**  
[Date Format YY/MM/DD]

**Perishable Agricultural Commodities Act**

Brian Sudano, PACA-D-07-0205, 08/02/29.

Millennia Marketing, Inc., d/b/a MMI Foods and Millennia Foods,  
PACA-D-07-0204, 08/03/21.

Golden Gourmet Mushrooms, Inc., PACA-D-08-0060, 08/04/01.

Daniel S. Dubinsky, PACA-APP-04-0007, 08/04/22.