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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The published decisions and orders may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket number, e.g., AWA Docket No. 99-0022, and the use of such references generally indicates that the decision has not been published in *Agriculture Decisions*. Decisions and Orders found on the OALJ Website may be cited as primary sources.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

COURT CASE

PERISHABLE AGRICULTURAL COMMODITIES ACT

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COURT DECISION

ANTHONY SPINALE, CHAIN TRUCKING, INC., MR. SPROUT, INC., COUNTRYWIDE PRODUCE v. USDA.
No. 09-1454-cv.
Court Decision.
Filed December 11, 2009.

(Cite as 356 Fed. Appx. 465).

United States Court of Appeals,
Second Circuit.

SUMMARY ORDER

UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be **AFFIRMED.**

Plaintiff-Appellants appeal from the district court's April 2, 2009 order dismissing their claims of defamation; deprivation of inspection rights under the Agricultural Marketing Act of 1946, 7 U.S.C. § 1621 *et seq.,* in violation of *42 U.S.C. § 1983*; and retaliation based on Anthony Spinale's exercise of his First Amendment Rights. The district court dismissed the complaint for a lack of subject matter jurisdiction based on sovereign immunity and a failure to state a claim. We assume the parties' familiarity with the facts, procedural history, and specification of issues on appeal.

After reviewing the issues on appeal and the record of proceedings below, we affirm for substantially the same reasons articulated by the district court in its thoughtful and well-reasoned order and opinion.

Accordingly, the judgment of the district court is **AFFIRMED.**

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISION

In re: CHERYL A. TAYLOR.
PACA-APP Docket No. 06-0008.
In re: STEVEN C. FINBERG.
PACA-APP Docket No. 06-0009.
Decision and Order.
Filed September 24, 2009.

PACA-APP – Failure to make full payment promptly – Responsibly connected – Licensing restrictions – Employment restrictions – Nominal officer – Alter ego – Willful, repeated, and flagrant violations.

Charles E. Spicknall, for the Administrator, AMS.
Stephen P. McCarron, Washington, DC, for Petitioners.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

On January 19, 2007, Administrative Law Judge Peter M. Davenport [hereinafter ALJ Davenport] issued a Default Decision and Order in *In re Fresh America Corp.*, 66 Agric. Dec. 953 (2007). ALJ Davenport held Fresh America Corp. violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA], by failing to make full payment promptly for more than $1.2 million in produce purchases during the period February 2002 through February 2003.

On June 23, 2006, the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter AMS], issued a determination that Cheryl A. Taylor was responsibly connected with Fresh America Corp. during the period of time Fresh America Corp. is alleged to have violated the PACA, February 2002 through February 2003. Ms. Taylor filed a Petition for Review challenging that determination on July 27, 2006.

On August 11, 2006, AMS issued a determination that Steven C. Finberg was responsibly connected with Fresh America Corp. during the

period of time Fresh America Corp. is alleged to have violated the PACA, February 2002 through February 2003. Mr. Finberg filed a Petition for Review challenging that determination on September 13, 2006.

By Order of ALJ Davenport, dated March 27, 2007, the two cases, *In re Cheryl A. Taylor*, PACA-APP Docket No. 06-0008, and *In re Steven C. Finberg*, PACA-APP Docket No. 06-0009, were joined for hearing. The hearing was held on January 29-30, 2008, in Dallas, Texas, before Administrative Law Judge Jill S. Clifton [hereinafter the ALJ]. Stephen P. McCarron, McCarron & Diess, Washington, DC, represents Ms. Taylor and Mr. Finberg. Charles E. Spicknall, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represents AMS.

The ALJ held that Ms. Taylor was actively involved in the activities resulting in Fresh America Corp.'s PACA violations during the period February 2002 through February 2003, when Fresh America Corp. failed to pay for more than $1.2 million in produce purchases. According to the ALJ, Ms. Taylor's active involvement in such activities stems from her failure as Fresh America Corp.'s chief financial officer to ensure that full payment promptly was made to Fresh America Corp.'s produce sellers. Because Ms. Taylor was actively involved in the activities resulting in Fresh America Corp.'s violations of the PACA, the ALJ found Ms. Taylor was responsibly connected, as that term is defined in the PACA (7 U.S.C. § 499a(b)(9)), with Fresh America Corp. and subject to the licensing restrictions and employment restrictions in the PACA (7 U.S.C. §§ 499d(b), 499h(b)). The ALJ further decided that Ms. Taylor was an officer of Fresh America Corp. (executive vice president, chief financial officer, and secretary) during the time when Fresh America Corp. violated the PACA by failing to pay for more than $1.2 million in produce purchases. The ALJ found Ms. Taylor was not a nominal officer as that term is used in the PACA. Consequently, whether Ms. Taylor was actively involved or not, the ALJ found Ms. Taylor was responsibly connected with Fresh America Corp., as defined by the PACA (7 U.S.C. § 499a(b)(9)).

The ALJ held Mr. Finberg was not actively involved in the activities resulting in PACA; however, the ALJ held Mr. Finberg was an officer

of Fresh America Corp. (at various times Mr. Finberg was vice president of sales and marketing, while at other times, he was executive vice president) during the time when Fresh America Corp. violated the PACA by failing to pay for more than $1.2 million in produce purchases. The ALJ found Mr. Finberg was not a nominal officer as that term is used in the PACA. Consequently, whether Mr. Finberg was actively involved or not, the ALJ found he was responsibly connected with Fresh America Corp., as defined by the PACA (7 U.S.C. § 499a(b)(9)).

On April 22, 2009, Ms. Taylor and Mr. Finberg filed an appeal of the ALJ's decision. For the reasons discussed below, I affirm the ALJ's decision and dismiss the appeal petition.

DECISION

Statutory and Regulatory Background

In 1930, Congress enacted the PACA (7 U.S.C. §§ 499a-499s) in an attempt to prevent unfair and fraudulent practices in an industry peculiarly susceptible to such practices.[1] *See* H.R. Rep. No. 71-1041, at 1-2 (1930); *see also Tri-County Wholesale Produce Co. v. U.S. Dep't of Agric.*, 822 F.2d 162 (D.C. Cir. 1987) (per curiam), *reprinted in* 46 Agric. Dec. 1105 (1987). Congress noted, in connection with amendments to the PACA in 1956, that:

> The [PACA] . . . is admittedly and intentionally a "tough" law. It was enacted in 1930 for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous. The law was designed primarily for the protection of the

[1] A brief description of the abuses which led to the enactment of the PACA can be found in *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974

> producers of perishable agricultural products–most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing–and for the protection of consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for.
>
> The law has fostered an admirable degree of dependability and fairness in this industry chiefly through the method of requiring the registration [licensing] of all those who carry on an interstate business in perishable agricultural commodities and denying this registration [license] to those whose business tactics disqualify them.

S. Rep. No. 84-2507, at 3 (1956).

The PACA "is designed to protect the producers of perishable agricultural products" and "was enacted to provide a measure of control over a branch of industry which . . . is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct." *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir. 1967); *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 745 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999). The Second Circuit held "the 'goal of the [PACA is] that only financially responsible persons should be engaged in the businesses subject to the Act.'" *Zwick*, 373 F.2d at 117; *see also Marvin Tragash Co. v. U.S. Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975). The Fifth Circuit also found the PACA was enacted "to protect producers of perishables, as well as consumers thereof" from "irresponsible business conduct and [the] delivery of deficient produce[.]" *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1028 (5th Cir. 1982). The District of Columbia Circuit stated the PACA's purpose is "[t]o help instill confidence in parties dealing with each other on short notice, across state lines and at long distances, it provides special sanctions against dishonest or unreliable dealing." *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 604 (D.C. Cir. 1987).

"Essentially, the Act provides a system of licensing and penalties for violations." *George Steinberg*, 491 F.2d at 990. Under the PACA, every commission merchant, dealer, or broker, as defined in the PACA (*see* 7 U.S.C. §§ 499a(b)(5)-(7)), is required to be licensed by the Secretary of Agriculture (7 U.S.C. § 499c(a)).

As originally enacted, the power of the Secretary of Agriculture to refuse to issue a PACA license was limited to situations in which the applicant or one closely connected with the applicant was responsible for any violation that had led to the prior revocation of a PACA license. (46 Stat. 531, 533 (1930).) However, over time, Congress found necessary the amendment of the PACA to prevent evasion of the PACA's penalties. (*See* 48 Stat. 585, 586-87 (1934); 49 Stat. at 1533-34 (1936); 50 Stat. 725, 726-28 (1950); 70 Stat. at 726-27 (1956).) These amendments increased the Secretary of Agriculture's authority to prevent a licensee who has violated the PACA from operating in the perishable agricultural commodities industry.

In 1962, Congress amended section 1 of the PACA (7 U.S.C. § 499a) to define "responsibly connected" persons as those who are "affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association." (76 Stat. 673 (1962).) In addition, Congress provided that a person who is or has been "responsibly connected" with a licensee that has had its PACA license revoked may not be employed by any perishable agricultural commodity licensee for at least 1 year (7 U.S.C. § 499h(b)(1)). Nor may any person responsibly connected with a person who has been found to have committed any flagrant or repeated violations of section 2 of the PACA be so employed.[2] (7 U.S.C. § 499h(b)(2).) A PACA licensee is subject to license suspension or revocation for employing a person under an employment ban. (7 U.S.C. § 499h(b).) After 1 year, if the prospective employer furnishes and maintains a surety bond in an amount set by the Secretary of

[2]"Employment" is defined as "any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment." (7 U.S.C. § 499a(b)(10).)

Agriculture, the responsibly connected person may be employed by a PACA licensee. (7 U.S.C. § 499h(b).) The Secretary of Agriculture may approve employment of the responsibly connected person without a bond after 2 years. *Id.*

In the 1995 amendments to the PACA, Congress gave to the person who met the statutory definition of "responsibly connected" the opportunity to challenge the initial finding and, if successful, avoid licensing and employment restrictions.

§ 499a Short title and definitions

. . . .

(b) Definitions

For purposes of this chapter:

. . . .

(9) . . . A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and the person either was only nominally a partner, officer, director, or shareholder of a violating licensee . . . or was not an owner of a violating licensee . . . which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9). This definition governs the issues before me in this appeal.

Discussion

Ms. Taylor and Mr. Finberg raise six issues on appeal. First, Ms. Taylor challenges the ALJ's finding that being chief financial officer of Fresh America Corp. actively involved Ms. Taylor in the activities that resulted in the "failure to pay" violations. Next, Ms. Taylor and Mr. Finberg each dispute the findings that each failed to demonstrate that he/she was a nominal officer of Fresh America Corp.

Together, Ms. Taylor and Mr. Finberg appealed the ALJ's holding that Fresh America Corp. was not the alter ego of Arthur Hollingsworth.

Finally, Mr. Finberg challenges the ALJ's determination that he was a shareholder of Fresh America Corp., and then questions whether the ALJ erred when she found that shareholder status bars the raising of the alter-ego defense.

I will first discuss the concept of "nominal officer." Fresh America Corp. was a publicly traded corporation subject to the filing and other requirements of the Securities and Exchange Commission [hereinafter the SEC]. Primarily, I rely on two documents filed with the SEC, and entered into the record, to determine if Ms. Taylor and Mr. Finberg are officers of Fresh America Corp. These documents are Fresh America Corp.'s Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 28, 2001 (FRX 21)[3] and the Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 for Fresh America Corp., dated June 26, 2002 (FRX 22).

"In order to prove that one was only a nominal officer or director, one must establish that one lacked any 'actual, significant nexus with the violating company'" and "therefore, neither 'knew [n]or should have known of the [c]ompany's misdeeds.'" *Hart v. Department of Agric.*, 112 F.3d 1228, 1231 (D.C. Cir. 1997), quoting *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983). Participants in responsibly connected proceedings frequently fail to comprehend a critical component of being nominal–that the individual becomes the officer, director, or shareholder for the convenience and benefit of the company or the owners of the company, not because of his or her own career ambition or entrepreneurial desires. Other factors I consider in determining if an individual is nominal include the disparate levels of power and authority between the nominal officer and the individual who appoints the officer, and the experience and educational levels of the person claiming to be nominal. If the information is in the record, I also

[3]AMS offered numerous documents into evidence. By agreement of the parties, documents entered in the case against Mr. Finberg would be designated "FRX" even though it might be duplicated in the evidence against Ms. Taylor. (Tr. 10-13.)

look at the compensation paid to the individual to determine if the person is being compensated as an officer.

Previous "nominal officers" include: Lilly Minotto was a secretary who was made director of a PACA licensee to ensure that a quorum existed for board meetings (*Minotto*, 711 F.2d 406, 408 (D.C. Cir. 1983)); Jean-Pierre Bell was a former chef and produce salesman who was made president of a PACA licensee to mediate disputes between the two owners *(Bell v. Department of Agric.*, 39 F.3d 1199 (D.C. Cir. 1994)); Carl Quinn was a truck driver who was made vice president of a PACA licensee to satisfy the statutory requirement for specific numbers of officers *(Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975)); and Michael Norinsberg was the son of the president of a PACA licensee who was made secretary and treasurer of the corporation so somebody was always available to sign checks (*Norinsberg v. U.S. Dep't of Agric.*, 162 F.3d 1194, 1198 (D.C. Cir. 1998)). In each of these cases, the individual was an officer in name only to solve a corporate need. None of these individuals had the education, training, or experience to preform as the corporate officer or director.

Ms. Taylor's background does not fit into the concept of a nominal officer. She earned a degree in accounting from Texas A&M University. She worked at Coopers & Lybrand, LLP, a national accounting firm, and qualified as a certified public accountant. Ms. Taylor then became controller at The Great Train Store where she helped take the company public. After The Great Train Store went public, she served as its chief financial officer and vice president of finance and administration. The partner at the KPMG, another national accounting firm, who handled The Great Train Store account, recommended Ms. Taylor for a position with the Intellisys Group at a time that company was having financial difficulties (Tr. 329-34). At Intellisys Group, Ms. Taylor "worked with the CEO, got them refinanced, and got a buyer to come in, MCSI, to purchase the company, and it saved all the employees and kept it going." (Tr. 334.) At MCSI's request, Ms. Taylor stayed to help the company through the transition (Tr. 334). The KPMG partner who helped Ms. Taylor with the Intellisys Group position then introduced her to Fresh America Corp. She started with Fresh America Corp. as a consultant, then became an employee and

officer of the company. Ms. Taylor's compensation package included a base salary of $175,000, a bonus potential, stock options, and "other fringe benefits." (FRX 22 at 30.) Ms. Taylor is identified in both the annual report for the fiscal year ending December 28, 2001, and the proxy statement dated June 26, 2002, each filed with the SEC, as executive vice president, chief financial officer, and secretary (FRX 21 at 23, FRX 22 at 21). Based on this evidence, I hold Ms. Taylor was not a nominal officer of Fresh America Corp.

Mr. Finberg's work history belies his claim that he was only a nominal officer of Fresh America Corp. Mr. Finberg started with Gourmet Packing (Fresh America Corp.'s predecessor) over a summer break while attending Southwest Texas State University (Tr. 752). He eventually worked for Gourmet Packing full time becoming the "general manager of the two locations in Austin, Texas, while going to school." (Tr. 754). Mr. Finberg was then given additional responsibility for the location in San Antonio, Texas (Tr. 754-55). After finishing school, he was selected "out of about 400-plus employees" to become "the corporate liaison and to learn supply chain" at the headquarters of Sam's Club, Gourmet Packing's main customer (Tr. 756). While at Sam's Club, he was promoted to director of customer service. By the time Mr. Finberg returned to Fresh America Corp.'s home office, he received another promotion to director of national programs. During this time, Gourmet Packing issued stock to the public through an initial public offering changing its name to Fresh America Corp. (Tr. 757-58). Mr. Finberg was given a 2-year assignment as general manager of the Arlington, Texas, distribution center after which he returned to the home office continuing as director of national programs (Tr. 759-60). In 1999, Mr. Finberg received a promotion to vice president of sales and marketing eventually being elevated to executive vice president of business development (Tr. 764-65). Mr. Finberg's compensation package included a base salary of $145,000, a bonus potential, stock options, and "other fringe benefits." (FRX 22 at 29.) Mr. Finberg is identified in both the annual report for the fiscal year ending December 28, 2001, and the proxy statement dated June 26, 2002, each filed with the SEC, as executive vice president-business development (FRX 21 at 23, FRX 22 at 21). Based on this evidence, I hold Mr. Finberg was not

a nominal officer of Fresh America Corp.

Ms. Taylor and Mr. Finberg each had the experience, training, and education to serve in their positions as officers at Fresh America Corp. The record shows they were not nominal officers. Therefore, I find Ms. Taylor was executive vice president, chief financial officer, and secretary of Fresh America Corp. at a time Fresh America Corp. committed violations of the PACA by failing to make full payment to suppliers of produce. I also find Mr. Finberg was executive vice president-business development of Fresh America Corp. at a time Fresh America Corp. committed violations of the PACA by failing to make full payment to suppliers of produce. I hold Ms. Taylor and Mr. Finberg were responsibly connected with Fresh America Corp. when the company violated the PACA. Therefore, Ms. Taylor and Mr. Finberg are 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)).

Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, even though they may not have been actively involved in the activities resulting in a violation of the PACA, because their status with the corporation requires that they knew, or should have known, about the violation being committed and failed to counteract or obviate the fault of others. In this case, Ms. Taylor and Mr. Finberg knew of Fresh America Corp.'s financial difficulties. Although they told the board of directors of the prompt payment provisions of the PACA, they failed to convince the board of directors to comply with the provisions of the PACA. When the board of directors failed to heed their advice, Ms. Taylor's and Mr. Finberg's only option to avoid a responsibly connected determination was to resign as officers of Fresh America Corp. prior to Fresh America Corp.'s PACA violations.

While the evidence in the record regarding Ms. Taylor's position and Mr. Finberg's position is sufficient for me to conclude that each was not a nominal officer, the fact that each was identified in the SEC filings as an officer makes it difficult for me to conclude that they were only nominal officers. Therefore, I hold, absent very extraordinary circumstances, an individual who is an officer of a publicly traded

company, and identified as an officer in the company's filings with the SEC, cannot be found to be a nominal officer as that term is used in the PACA.

Ms. Taylor challenges the ALJ's determination that she was actively involved in the activities resulting in Fresh America Corp.'s violations of the PACA. My finding that Ms. Taylor was not a nominal officer of Fresh America Corp. makes Ms. Taylor's challenge to the finding on active involvement futile. A person is not deemed to be "responsibly connected" if he or she demonstrates that he or she was not actively involved in the activities resulting in a violation of the PACA and that he or she was only a nominal officer, director, or shareholder of the violating PACA licensee. The two prongs of the test are joined by the conjunctive "and." If Ms. Taylor fails to show that her position as a corporate officer is nominal, even if she could prove that she was not actively involved, she would fail the statutory test and be deemed responsibly connected. Because I find Ms. Taylor's corporate officer position was not nominal, even if she is not actively involved, she cannot meet her burden and will be found responsibly connected. Therefore, addressing the question of her active involvement would be no more than an advisory opinion on the issue. I need not address the issue and I decline to do so.

Ms. Taylor and Mr. Finberg challenge the ALJ's conclusion that Fresh America Corp. was not the alter ego of Arthur Hollingsworth, Fresh America Corp.'s chairman of the board of directors. Having reviewed the arguments presented by the parties, I affirm the ALJ's conclusion. The record makes clear that, while Mr. Hollingsworth was a dominant chairman, the decisions attributed to Mr. Hollingsworth were made by the board of directors. The concept of alter ego goes well beyond the evidence presented in the instant proceeding. Fresh America Corp. had regular board meetings at which non-board members were present and reported to the board. (*See, e.g.*, FRX 24 at 2, "The fifth order of business was a review by Ms. Taylor of the Company's 1st quarter 2002 performance as compared to the same period of 2001.".) The board of directors, with Mr. Hollingsworth as chairman, ran Fresh America Corp. While Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at a lower level of

authority, it is understandable, considering Fresh America Corp.'s financial position and the recent investment made by the North Texas Opportunity Fund, which was managed by Mr. Hollingsworth, that such decisions came before the board of directors.

The standard for alter ego under the PACA has origins in *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994), in which the court indicated that a corporation was the alter ego of an individual when the corporation, although formally a corporation, was so dominated by that individual as to negate the corporation's separate personality. While Mr. Hollingsworth ran Fresh America Corp., the record contains no evidence that Mr. Hollingsworth and Fresh America Corp. were viewed as one and the same, nor do I find evidence that Fresh America Corp.'s corporate personality no longer existed because of Mr. Hollingsworth. As such, I find Fresh America Corp. was not the alter ego of Arthur Hollingsworth.

Because I find Fresh America Corp. was not the alter ego of Arthur Hollingsworth, I need not, and do not, address the questions relating to Mr. Finberg's ownership interest in Fresh America Corp. and whether that ownership interest deprives him of the use of the alter ego defense.

Findings of Fact

1. Fresh America Corp., a Texas corporation, was a PACA licensee and ceased operations January 22, 2003.

2. During the period February 2002 through February 2003, Fresh America Corp. failed to make full payment promptly in the amount of $1,223,284.48, to 82 sellers in 1,149 transactions, for the purchase of perishable agricultural commodities that Fresh America Corp. received and accepted in interstate and foreign commerce.

3. During the period of time in which Fresh America Corp. failed to pay produce sellers, Cheryl A. Taylor was an officer of Fresh America Corp. Cheryl A. Taylor was Fresh America Corp.'s executive vice president, chief financial officer, and secretary.

4. During the period of time in which Fresh America Corp. failed to pay produce sellers, Steven C. Finberg was an officer of Fresh America Corp. Steven C. Finberg was Fresh America Corp.'s vice president of

sales and marketing and then he was promoted to executive vice president of business development.

5. Steven C. Finberg owned Fresh America Corp. stock, but less than 10 percent of the outstanding stock.

Conclusions of Law

1. Fresh America Corp.'s failures to make full payment promptly in the amount of $1,223,284.48, to 82 sellers in 1,149 transactions, for the purchase of perishable agricultural commodities that it received and accepted in interstate and foreign commerce during the period February 2002 through February 2003 are willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Fresh America Corp. was not the alter ego of Arthur Hollingsworth.

3. Cheryl A. Taylor was responsibly connected with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9), during the period February 2002 through February 2003, when Fresh America Corp. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. Steven C. Finberg was responsibly connected with Fresh America Corp., as defined by 7 U.S.C. § 499a(b)(9)), during the period February 2002 through February 2003, when Fresh America Corp. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

1. I affirm the determination by AMS, contained in its letter dated June 23, 2006, that Cheryl A. Taylor was responsibly connected with Fresh America Corp., Arlington, Texas, during the period of time Fresh America Corp. violated the PACA. Accordingly, Cheryl A. Taylor 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 Cheryl A. Taylor.

2. I affirm the determination by AMS, contained in its letter dated August 11, 2006, that Steven C. Finberg was responsibly connected with Fresh America Corp., Arlington, Texas, during the period of time Fresh America Corp. violated the PACA. Accordingly, Steven C. Finberg 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 Steven C. Finberg.

RIGHT TO JUDICIAL REVIEW

Cheryl A. Taylor and Steven C. Finberg each has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Judicial Review must be sought within 60 days after entry of the Order in this Decision and Order.[4] The date of entry of the Order in this Decision and Order is September 24, 2009.

_____

[4]28 U.S.C. § 2344.

PERISHABLE AGRICULTURAL COMMODITIES ACT REPARATIONS

DEPARTMENT DECISION

EUROFRESH, INC. v. TRICAR SALES, INC.
PACA Docket No. R-07-110.
Decision and Order.
Filed May 30, 2008.

[Editor's Note: This case was included here following a Reconsideration ruling by the Judicial Officer - See below.]

PACA-R – Agency – Growers' Agents – Estoppel – Necessary Elements – Commission – Payment of Commission Required.

Where Complainant, who sold tomatoes on Respondent's behalf while acting in the capacity of a growers' agent, paid Respondent the net proceeds from its sales of the tomatoes but neglected to deduct the eight percent commission that it was entitled to withhold as commission according to the contract, Respondent argued that Complainant should be estopped from recovering its commissions because it represented to Respondent that the settlement amounts already remitted to Respondent were final, which representation Respondent reasonably relied upon and paid its growers accordingly, so Respondent would suffer a loss if it were ordered to pay the commissions owed to Complainant. Held that in order for Respondent to defend the claim on the basis of estoppel, Respondent must establish both that its reliance upon the information provided to it by Complainant was reasonable, *and* that it relied upon the error made by Complainant to its detriment. The contract did not specify whether the commission would be deducted on the product liquidation or billed separately, so in the absence of any mention of the commission on the liquidation, Respondent should not have assumed that the commission had already been deducted. Moreover, Respondent failed to show that Complainant otherwise represented that the settlement amounts paid to Respondent were final, i.e., net after commission. Therefore, Respondent failed to establish that its reliance upon the information provided to it by Complainant was reasonable. Respondent also failed to establish that it relied upon the error made by Complainant to its detriment because it failed to show that it attempted to contact its grower to recoup the overpayment that it made as a result of its presumption that the funds received from Complainant were net after commission. Thus, Respondent failed to show that any losses incurred as a result of having to pay commission to Complainant were unavoidable. Because Respondent failed to establish the necessary elements of estoppel, Respondent was ordered to pay the commission owed to Complainant according to the terms of the contract.

Patrice Harps, Presiding Officer
Leslie Wowk, Examiner
Complainant, Rynn & Janowsky, LLP
Respondent, Meuers Law Firm, P.L.
Decision and Order issued by William G. Jenson

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department within nine months of the accrual of the cause of action, in which Complainant seeks a reparation award against Respondent in the amount of $126,465.49 in connection with multiple truckloads of tomatoes 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. Complainant also submitted a Brief.

Findings of Fact

1. Complainant, Eurofresh, Inc., is a corporation whose post office address is 26050 South Eurofresh Avenue, Willcox, Arizona, 85643. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, Tricar Sales, Inc., is a corporation whose post office

address is P.O. Box 607, Nogales, Arizona, 85628. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On September 5, 2005, Complainant sent to Respondent a Distributor Agreement as set forth below:

Distributor Agreement

Tricar Sales wishes to appoint Eurofresh, Inc., on an exclusive basis, to act as distributor of its Beefsteak tomatoes and select other products.

Eurofresh wishes to act as distributor to promote, market, distribute and sell the products and to generally act on Tricar's behalf in the United States. Eurofresh accepts appointment and agrees to use its best commercial endeavors to achieve the highest possible net grower return for Tricar.

The products will be delivered by Tricar to Eurofresh FOB its Nogales facility.

Eurofresh shall cause Tricar to supply products that qualify as US Grade No. 1. The size of the products will be coordinated between Tricar and Eurofresh.

Eurofresh will sell under the prevailing rules of PACA, with regards to established trading practices. Eurofresh reserves the right to grant adjustments to products for changes in market conditions, and may grant adjustments for cause. If adjustments are made for condition defects, Eurofresh will attempt to support them by requesting a USDA inspection and occasionally, warehouse inspections at remote locations.

Eurofresh may, in its sole judgment, settle claims for price adjustments at the buyer's place of business, or may opt to return products to its CSC locations, if in its judgment either option may obtain better prices. Eurofresh makes no guarantee that the

products will be sold or that it will be sold for a specific price.

Eurofresh will have the authority to enter into promotional contracts with customers, to pay promotional allowances, rebates or incentives to customers with respect to the products, and to deduct such expenses from the crop returns collected for Tricar's account.

Terms of agreement: One year commencing on the effective date of this agreement and ending September 30, 2006.

Termination: Tricar or Eurofresh may terminate this agreement by sixty (60) days written notice to the other:

If either party makes default in any of its obligations under this agreement.
If the business of the other party ceases, is sold or is suspended.
In the event of liquidation or insolvency of the other party.

Volume estimates: Tricar's total shipments of products to Eurofresh are estimated to be _____ cases, but may be modified as mutually agreed by Tri-Car and Eurofresh.

Tricar will arrange to pack the products according to Eurofresh specifications and in packaging that is consistent with the needs of the marketplace.

CHEP Pallets: All products must be shipped on CHEP pallets. The CHEP pallet must be 40" x 48" and must fit into all standard racking systems.

Forecasts: Eurofresh requires from Tricar a series of forecasts throughout the season:

Initial forecast: A schedule of the estimated volumes of product to be shipped by week, by size, for the season.

3-week forecast: Once harvest begins, Tricar is to provide every Monday a revised shipping estimate for products to be shipped the next three weeks.

Commissions: The sales commission payable to Eurofresh under this agreement will be equal to eight (8) percent of the net FOB Nogales facility sales (defined as gross invoice price, less price credits and freight costs).

Quality adjustments: Eurofresh will notify Tricar in a timely manner of any customer quality complaints. Credits issued for quality adjustments will be itemized on Eurofresh's account sales settlement.

Food safety: Eurofresh shall cause Tricar to maintain a record of pesticides used on product shipped and use only pesticides and chemicals that are registered for use in the US or Mexico, or that have an import tolerance for the established countries. Tricar shall ensure and monitor that products prohibited by the US Food and Drug Administration shall not be used on crops, and that residue of acceptable products shall not exceed those levels permitted by the FDA or USDA.

Other charges: Eurofresh will deduct from Tricar's account settlements all freight charges incurred by Eurofresh to transport the products from its Nogales facility to Eurofresh's distribution centers and/or direct customers. Eurofresh will deduct from account settlements costs for other charges, if any, that may be mutually agreed between Eurofresh and Tricar from time to time, provided such deductions will not affect the calculation of commissions.

Settlements: Eurofresh will supply Tricar with a weekly settlement setting out the quantity of the products sold in the previous week and the average price for which the products were sold. Eurofresh will supply timely sales, inventory, and quality

control reports as agreed between Eurofresh and Tricar. Eurofresh will provide full and complete account sales and liquidations to Tricar for each defined lot of products shipped by Tricar not later than 40 days after receipt of such products. All payments remitted by Eurofresh to Tricar will be made by electronic transfer of funds to Tricar's account.

Resolution of disputes: In the event that any disputes arise between the parties with respect to the interpretation of this agreement or the performance of obligations by either entity, either party may notify the other party of such and each of the parties will then refer the dispute to its respective chief executive officer, and the chief executive officers will negotiate in good faith to resolve the dispute promptly.

Confidentiality: During the term of this agreement and for a period of three (3) years after its termination, both parties agree not to exploit or disclose any confidential information pertaining to the details of the agreement.

Force majeure: Neither party shall be liable for any failure to perform or for any act of delay in performing any of its respective obligations under this agreement where such failure or delay is caused by any event that is beyond reasonable control.

Governing law: The agreement shall be governed by and construed in accordance with the laws of Arizona and the United States.

Both parties have executed and delivered this agreement as of the date written above.

The Distribution Agreement set forth above was sent as an attachment to an e-mail message from Complainant's Dwight Ferguson to Respondent's Juan Cardenas stating: "Per our conversations, I have attached a draft distributor agreement to govern our planned cooperation

this season. Please let me know if you would like to make any changes, or if I have overlooked any considerations." (See ROI Exhibit No. 1g).
4. Between November 16, 2005, and June 8, 2006, Complainant sold on behalf of Respondent 145,852 cartons of Beefsteak tomatoes. Complainant reported net sales, exclusive of handling and transportation costs, of $1,584,746.48. From this amount, Complainant deducted repacking fees totaling $52,487.08 and paid Respondent the balance of $1,532,259.40. Complainant subsequently added an additional $341.55 to the net sales amount, which resulted in a revised total of $1,585,088.03.
5. On October 27, 2006, Complainant issued invoice number 192141, billing Respondent for commission in accordance with the Distribution Agreement set forth above at eight percent of the revised net sales amount, or $126,807.04, less $341.55 for the additional proceeds that were not remitted to Respondent, for a net invoice amount of $126,465.49. Respondent has not paid this invoice.
6. The informal complaint was filed on November 3, 2006, which is within nine months from the accrual of the cause of action.

Conclusions

This dispute concerns Respondent's liability for commissions allegedly earned by Complainant in connection with its sales of Beefsteak tomatoes supplied by Respondent. Complainant maintains that from November 7, 2005, through June 21, 2006,[1] it sold tomatoes on behalf of Respondent in accordance with the Distributor Agreement set forth in Finding of Fact 3, but that Respondent has since failed and refused to pay the commissions earned, which total $126,465.49. Complainant seeks to recover this amount from Respondent through this proceeding.

In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it asserts first that the draft Distributor

[1]The earliest ship date indicated on the pre-liquidation reports supplied by Complainant is November 16, 2005, which is why we used this date in Finding of Fact 4, rather the November 7, 2005 date stated here.

Agreement received from Complainant was never formalized nor signed. Respondent nevertheless acknowledges that the parties agreed to use the Distributor Agreement as a guideline, provided it "did not contradict nor violate the letter nor the intent of USDA/PACA laws and regulations."[2] Moreover, Respondent admittedly received the Distribution Agreement and, without taking exception to its contents, Respondent proceeded to ship the product identified in the Distribution Agreement to Complainant. We therefore find that Respondent acquiesced to the terms set forth in the Distributor Agreement.

There is no dispute that under the Distributor Agreement, Complainant was entitled to a commission equal to eight percent of the net f.o.b. sales (gross invoice price less price credits and freight costs). According to Complainant, the commission it earned on this basis totaled $126,465.49. In defense of its failure to pay Complainant this amount, Respondent states it was led to believe by Complainant, presumably in error, that all liquidations were full and final as presented to Respondent several times monthly during the period in question. Respondent states it inquired as to the finality of the liquidations due to the fact that the computer printouts provided by Complainant were invariably titled "PRE-LIQUIDATION," in response to which Respondent states Complainant assured it that the title Pre-Liquidation is standard fare for the computer program they utilize, and as Respondent's computerized liquidations are also titled Pre-Liquidation, Respondent states it felt reassured that the liquidations provided by Complainant were full and final as per the Distributor Agreement. Respondent adds that on occasion, it further inquired as to the low rate of return on some of Complainant's liquidations, to which Complainant invariably replied that the returns were final as well as ample. On or about September 25, 2006, Respondent states a representative of Complainant visited with Respondent's Juan C. Cardenas, at which time Mr. Cardenas was advised that Complainant had overlooked billing

[2]See Answer, paragraph 4.

Respondent their 8% commission.[3] Respondent states Complainant had not, at any time prior to September 25, 2006, presented Respondent with an invoice for any or all of these commissions, and that Respondent, having already liquidated to its growers, was in no position to assume the burden of Complainant's oversight.

Complainant thereafter submitted additional evidence in the form of a sworn Opening Statement signed by its President, Dwight Ferguson. In this statement, Mr. Ferguson reiterates the essential elements of Complainant's claim and adds that attempts were made to amicably resolve the unpaid commission on October 5, and 10, 2006, during telephone conferences with Respondent's Juan C. Cardenas. Mr. Ferguson states specifically that Complainant offered to recoup the commissions by adding a $0.50 per case "in-and-out" fee to future shipments, which would have resulted in the commission being paid within one season, with a slight increase in volume. Alternatively, Mr. Ferguson states Complainant offered to increase its commission rate to 12% on future shipments until the amount of the unpaid commission was recouped. In response, Mr. Ferguson states Mr. Cardenas offered to add a $0.10 per case "in-and-out" fee to future shipments until the unpaid commission was recouped in full by Complainant. Mr. Ferguson states Mr. Cardenas' proposal was rejected due to the extreme length of time necessary to recoup the commission at $0.10 per case, but that Complainant was nevertheless encouraged that Mr. Cardenas acknowledged responsibility for the commission.

In response to the Opening Statement of Mr. Ferguson, Respondent submitted a sworn Answering Statement signed by its Vice President, Juan C. Cardenas. In this statement, Mr. Cardenas acknowledges meeting with Mr. Ferguson on several occasions to discuss the prospects for the coming season and to discuss ways to grow related trade for both companies. Mr. Cardenas states that on each occasion, Mr. Ferguson asked if there was any way that he could bill back his growers

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[3] We state here that Respondent met with "a representative of Complainant" because Mr. Cardenas, in his sworn Answer, states that on September 25, 2006, he met with Kathleen Williams, whereas in his sworn Answering Statement, Mr. Cardenas states his meeting on this date was with Christine Hales.

retroactively so as to compensate Complainant for its commissions. Mr. Cardenas states he told Mr. Ferguson that if there was any way to appease him he would, but that there was not. Mr. Cardenas also states that during these conversations, several options were discussed in an effort to avoid a recurrence of the present dispute, including selling to Complainant on an f.o.b. basis, as per the spot market, or establishing a true contract with a set price in order to continue to assist his company in fulfilling their contractual obligations. Mr. Cardenas asserts that he did not, however, assume responsibility for Complainant's error or offer to pay for it.

There is, as we already mentioned, no dispute that Complainant was entitled to deduct commission at a rate of eight percent from the net f.o.b. sales price collected for Respondent's tomatoes. The issue in dispute is whether Complainant, having failed to deduct the commissions from the settlements already remitted to Respondent, is nevertheless entitled to recover its earned commissions. Respondent is essentially arguing that Complainant should be estopped from recovering its commissions because it represented to Respondent that the settlement amounts already remitted to Respondent were final, which representation Respondent reasonably relied upon and paid its growers accordingly, so Respondent would suffer a loss if it were now ordered to pay the commissions owed to Complainant.

In order to defend this claim on the basis of estoppel, Respondent must establish both that its reliance upon the information provided to it by Complainant was reasonable, *and* that it relied upon the error made by Complainant to its detriment. With respect to the issue of whether Respondent's reliance was reasonable, Respondent asserts that it was led to believe that the settlements received from Complainant were final based on assurances made by Complainant, as well as by the Distributor Agreement, which specified that Complainant would "provide full and complete account sales and liquidations to [Respondent] for each defined lot of products shipped by [Respondent] not later than 40 days after receipt of such products."[4] In regard to the assurances allegedly made by Complainant, Respondent fails to specify in what manner or by

[4]See ROI Exhibit No. 1e.

whom such assurances were made. As such, we find that this claim lacks sufficient specificity to be afforded any credence. With respect to the accounting requirements set forth in the Distributor Agreement, what constitutes a "full and complete account of sales" cannot be ascertained with reasonable certainty based on the wording of the agreement. Specifically, we note that while the agreement specifies that Complainant will deduct from the account settlements all freight charges and any other charges mutually agreed between the parties, it also states that such deductions will not affect the calculation of commissions.[5] The issue of how the commissions would be accounted for, *i.e.*, whether they would be deducted from the account settlements or invoiced separately, is not addressed. We therefore find that the factors cited by Respondent as indicating that the settlements were final do not provide reasonable cause for Respondent to reach that conclusion.

We should also note that Respondent has failed to point to any information in the liquidation reports prepared by Complainant which would support its contention that it was reasonable to conclude that commissions had already been deducted in arriving at the return shown on the liquidation. Our own review of the liquidation reports discloses, to the contrary, that no deduction for commission was made. Rather, each pre-liquidation report lists a description of the product, the invoice number, ship date, quantity, price, and total amount, from which Complainant deducted handling and transportation costs only, and remitted the balance to Respondent.[6]

Although Respondent has not established that its reliance upon the representations allegedly made by Complainant was reasonable, and has thus failed to establish an essential element of estoppel, we will nevertheless address the issue of whether this reliance was detrimental to Respondent. Respondent's assertion that it is not in a position to pay the commissions admittedly earned by Complainant is based upon its contention that it paid its growers based on the settlements already received from Complainant. As a result, if Respondent were compelled

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[5]See ROI Exhibit No. 1d.

[6]See, e.g., ROI Exhibit No. 6e.

to pay the commissions now, its payment would be "out-of-pocket." We note, however, that the parties are in agreement that Complainant contacted Respondent on or about September 25, 2006, or approximately 96 days after the last settlement payment was made by Complainant, to inform Respondent that Complainant's commissions had not been deducted from the amount it had already paid Respondent for the tomatoes. At that time, Respondent had the opportunity to contact its growers and advise that its liquidations were in error because said commissions had not been deducted, and to attempt to recoup the resulting overpayment. There is no indication that Respondent ever attempted to do so and, in fact, the record shows that Respondent flatly refused to make such an attempt.[7] Respondent has therefore failed to establish that the loss it claims it will suffer if it is now compelled to pay Complainant's commissions was unavoidable. Hence, the necessary elements of estoppel have not been met and we find nothing unconscionable in ordering Respondent to pay Complainant the commissions that it was contractually obligated to pay according to the Distributor Agreement, which total $126,465.49, and it is so ordered.

Respondent's failure to pay Complainant $126,465.49 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

[7]See Answer, paragraph 13.

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 $126,465.49, with interest thereon at the rate of 2.09 % per annum from July 1, 2006, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

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CORONA COLLEGE HEIGHTS ORANGE & LEMON ASSOCIATION v. CAL ZONA DISTRIBUTING, INC.
PACA Docket No. R-08-035.
Decision and Order.
Filed December 11, 2008.

PACA- R – Contracts – Terms - Interpretation.

Where the terms used by the parties to describe a commodity are the same or similar to terms found in the U.S. Grade Standards for the commodity, it is assumed, unless specifically stated otherwise at the time of contracting, that the term has the same meaning as the meaning given to it in the applicable Standard. In the instant case, where Complainant sold navel oranges which it described as "fancy," without qualification, we found that the term referenced the "U.S. Fancy" grade set forth in the U.S. Standards for Grades of Oranges (California and Arizona).

Patrice H. 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 $2,906.00 in connection with one trucklot of oranges 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 filed an Answering Statement. Neither party submitted a Brief.

Findings of Fact

1. Complainant, Corona College Heights Orange & Lemon Association, is a corporation whose post office address is P.O. Box 7428, Riverside, California, 92513-7428. At the time of the transaction involved herein, Complainant was licensed under the Act.
2. Respondent, Cal Zona Distributing, Inc., is a corporation whose post office address is 3024 South Byrd Court, Visalia, California, 93292-1744. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. On or about February 22, 2007, Respondent ordered from Cal Citrus Packing Company ("Cal Citrus"), Lindsey, California, 270 6-5 lb. bags

of fancy navel orange 88's and 810 cartons of fancy navel orange 72's. On February 23, 2007, Cal Citrus advised Respondent that it was running short on navel orange 72's and that it would only be able to load 270 cartons. On the same date, Cal Citrus loaded the truck hired by Respondent with 270 cartons of Portokali label navel orange 72's and 270 6-5 lb. bags of Portokali label navel orange 88's.

4. Also on February 23, 2007, Cal Citrus notified Respondent that Complainant had an inventory of fancy navel orange 72's. Shortly thereafter, Respondent contacted Complainant and agreed to purchase the fancy navel orange 72's that Complainant had available for $17.00 per carton. At 9:25 p.m. on the same date, the truck hired by Respondent departed Complainant's warehouse in Riverside, California, with 540 cartons of Pinnacle label navel orange 72's.

5. On February 26, 2007, Complainant issued invoice number 07D34851 billing Respondent for 540 cartons of Pinnacle label orange 72's at $17.00 per carton, or $9,180.00, plus $23.50 for a temperature recorder and $40.80 for a Federal-State inspection, for a total f.o.b. invoice price of $9,244.30. On the same date, Complainant supplied Respondent with a copy of Federal-State Inspection Certificate No. P-451869, showing that between 9:30 a.m. and 10:00 a.m. on February 23, 2007, approximately 648-40 pound cartons of "Pinnacle, Royal" label navel oranges, size 72, were inspected at the place of business of Complainant, in Riverside, California, and certified as being approximately 80 percent U.S. No. 1 quality, U.S. standard pack.

6. Following arrival of the truckload of navel oranges supplied by Cal Citrus and Complainant at the place of business of Respondent's customer, The Country Stop, Inc. ("Country Stop"), in Spicer, Minnesota, Country Stop advised Respondent that the Portokali label navel oranges from Cal Citrus were fancy fruit and were received in good condition, but that the Pinnacle label navel oranges from Complainant were not fancy. Country Stop thereafter agreed to handle the Pinnacle label navel oranges for Respondent's account. After completing its resales, Country Stop paid Respondent the contract price of the oranges, less $3.40 per carton for freight and $2.00 per carton for storage and special handling. Respondent, in turn, paid Complainant $6,338.30 for the oranges, after deducting $3.40 per carton, or

$1,826.00, for freight, and $2.00 per carton, or $1,080.00, for handling, storage and delivery, from the invoice price of $9,244.30.
7. The informal complaint was filed on May 21, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for one trucklot of navel oranges purchased and accepted from Complainant. Complainant states Respondent accepted the oranges in compliance with the contract of sale, but that it has since paid only $6,338.30 of the agreed purchase price thereof, leaving a balance due Complainant of $2,906.00. Respondent asserts, to the contrary, that the navel oranges shipped by Complainant failed to comply with the contract requirements because they were not fancy grade, as specified in the contract.[1] Respondent, as the party asserting that the contract called for fancy grade navel oranges, 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).

The Report of Investigation prepared by the Department contains a letter from Respondent's President, Len Kern, wherein Mr. Kern explains that Respondent's purchase of the subject trucklot of navel oranges from Complainant came about because Respondent's original supplier, Cal Citrus, was unable to provide the 810 cartons of 72 size fancy navel oranges that Respondent needed.[2] Mr. Kern states he was informed by Cal Citrus's Fred VanZandt that Complainant had an inventory of 72 size fancy navel oranges, after which he contacted Complainant directly and received confirmation that Complainant had approximately 648 cartons of fancy navel orange 72's available. Mr. Kern states he ordered all 648 cartons because he was not sure how

[1]See Answer ¶4.

[2]See ROI Exhibits C and C1.

many cartons Cal Citrus would be able to provide. The following day, Mr. Kern states Complainant confirmed that the truck hired by Respondent had left Complainant's warehouse with "540 – 72 pinnacle his Fancy Fruit at $17.00."

Review of the record discloses that Complainant's Treasurer, Susan Jaspan, was contacted by a representative of the Western Regional P.A.C.A. Branch Office during the informal handling of this claim, at which time Ms. Jaspan reportedly stated that the contract did not specify fancy grade oranges.[3] We note, however, that Ms. Jaspan subsequently submitted an Opening Statement on behalf of Complainant wherein she acknowledges that "the customer ordered fancy grade." Ms. Jaspan also states that at the time the order was placed, "a reduction was given… of $2 per carton."[4] Attached to Respondent's sworn Answer is a copy of Complainant's price sheet for the time period in question, whereon Complainant lists a price for fancy grade navel oranges, size 72, of $19.33 per carton.[5] A $2.00 per carton reduction in this price would approximately equal the $17.00 per carton sales price that Complainant billed Respondent for the navel oranges in question. On the basis of this evidence, we conclude that the preponderance of the evidence supports Respondent's contention that the contract called for fancy grade navel oranges, size 72.

While Respondent asserts that the navel oranges shipped by Complainant were not fancy, Respondent did not secure an independent inspection at the contract destination to substantiate this allegation. Instead, Respondent cites the shipping point inspection of the oranges, which disclosed that the oranges were only approximately 80 percent U.S. No. 1 quality, as evidence that the oranges were not fancy grade. In making this argument, Respondent is apparently contending that Complainant's use of the term "fancy" should be interpreted as meaning that the oranges would meet the requirements of the U.S. Fancy grade

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[3]See ROI Exhibit F.

[4]See Complainant's Opening Statement.

[5]See Answer Exhibit #6, page 1.

set forth in the United States Standards for Grades of Oranges (California and Arizona).[6] We have held that where the designations No. 1 or No. 2 are used by the parties without qualifying words, it will be deemed to mean U.S. No. 1 or U.S. No. 2, as the case may be. *See DiMare Bros. of CA v. Philadelphia Produce Co.*, 38 Agric. Dec. 752 (1979).[7] Similarly, where a party to a contract uses the term "fancy," without qualification, and there exists a grade designation "U.S. Fancy" in the grade standards for the commodity, we will assume that the party is referring to the U.S. Fancy grade.

As we mentioned, Respondent asserts that the shipping point inspection showing that only 80 percent of the oranges were U.S. No. 1 quality establishes a breach of contract by Complainant. While we note that this is a lot inspection which does not specifically reference the oranges in question, the certificate number for this inspection, P-451869, appears on both the invoice and the shipping order prepared by Complainant.[8] Complainant has, therefore, represented this inspection as pertinent to the subject lot of oranges. Consequently, given that the inspection shows that the oranges shipped by Complainant were only 80 percent U.S. No. 1 quality, and the requirements to meet the U.S. Fancy grade are more stringent than those for the U.S. No. 1 grade, we conclude that Complainant breached the contract by failing to ship U.S. Fancy navel oranges, as oranges that fail to meet the requirements of the U.S. No. 1 grade would also fail to meet the requirements of the U.S. Fancy grade. See 7 C.F.R. §§ 51.1085, 51.1086 and 51.1091.

Respondent is entitled to recover provable damages resulting from Complainant's breach. The general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show

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[6]See 7 C.F.R. §§ 51.1085 through 51.1109.

[7]See, also, *South Jersey Produce v. Rotella Produce,* 13 Agric. Dec. 566 (1954).

[8]See ROI Exhibits A2, C4 and C5.

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's customer did not provide an account of sales for the oranges. Rather, Respondent's customer simply deducted the cost of freight, and $2.00 per carton for handling, storage, and delivery, from the contract price owed to Respondent for the oranges.[9] Respondent, in turn, deducted the same amount from Complainant's invoice.[10] We cannot, however, accept this unsubstantiated deduction as an appropriate measure of Respondent's damages in the absence of a detailed account of sales showing the actual losses sustained as a result of the breach.

The evidence presented by the parties does, however, present an alternative means of determining the damages resulting from Complainant's breach. Specifically, we note that Respondent, in its sworn Answer, asserts that the navel oranges shipped by Complainant were "choice" quality.[11] Complainant does not deny this allegation. While the United States Standards for Grades of Oranges (California and Arizona)[12] do not include a "choice" grade, the U.S.D.A. Market News reports for California navel oranges describe the oranges as either "shipper's first grade" or "shipper's choice." We presume that "shipper's first grade" would apply to those oranges that are at least U.S. No. 1 quality, and perhaps U.S. Fancy. Oranges of a lesser quality, but that are otherwise in good marketable condition, would be described as "shipper's choice." As we have already determined that the navel oranges shipped by Complainant were not U.S. Fancy or U.S. No. 1, we find that the preponderance of the evidence supports Respondent's contention that the subject oranges were of the quality that would

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[9]See first unnumbered attachment to Respondent's Answer, correspondence from Respondent's customer, The Country Stop, Inc., to Respondent.

[10]See ROI Exhibit C6.

[11]See Answer ¶6.

[12]See 7 C.F.R. §§ 51.1085 through 51.1109.

normally be marketed as "choice." Having established this, we will consult relevant U.S.D.A. Market News reports to determine the difference between the market value of the fancy ("first grade") navel oranges that Respondent ordered, and the market value of the choice navel oranges that it actually received.

The navel oranges were shipped from California on February 23, 2007, which means that they should have arrived at the contract destination in Minnesota on or about February 26, 2007. On that date, the report for Chicago, Illinois, the nearest reporting location to Spicer, Minnesota, does not list prices for choice navel orange 72's in cartons originating from California. Therefore, a comparison between the market price for first grade and choice navel oranges cannot be made using this report. There is, however, a reporting location slightly further from Spicer, Minnesota, in St. Louis, Missouri, where prices for both first grade and choice navel orange 72's in cartons originating from California are listed. The St. Louis Terminal Market Report for February 26, 2007, shows that 7/10 bushel cartons of first grade California navel orange 72's were mostly selling for $23.90 to $24.75 per carton, or an average of $24.33 per carton; and that choice oranges of the same size and origin were selling for $19.90 to $22.50 per carton, or an average of $21.20.

We will measure Respondent's damages as the difference between the market prices reported for first grade and choice navel oranges. Using the average market prices just mentioned this difference equals $3.13 per carton. For the 540 cartons of navel oranges in question, this amounts to a total of $1,690.20. When Respondent's damages of $1,690.20 are deducted from the contract price of the navel oranges of $9,244.30,[13] there remains an amount due Complainant from

[13]This price includes $23.50 for a temperature recorder and $40.80 for a Federal-State inspection, charges which Respondent stated during the informal handling of this claim that it "complained about" to Complainant. See ROI Exhibit No. C. Respondent did not deduct these charges from its remittance to Complainant, nor did it dispute the charges in its sworn Answer. Consequently, we presume that Respondent ultimately agreed that the temperature recorder and inspection fees were a part of the contract price
(continued...)

Respondent for the subject load of navel oranges of $7,554.10. Respondent paid Complainant $6,338.30. Therefore, there remains a balance due Complainant from Respondent of $1,215.80.

Respondent's failure to pay Complainant $1,215.80 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 $1,215.80, with interest thereon at the rate of % per annum from April 1, 2007, until paid, plus the amount of $300.00. Copies of this Order shall be served upon the parties.

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[13](...continued)
of the oranges.

CORONA FRUITS & VEGGIES, INC. v. CLASS PRODUCE GROUP, LLC.
PACA Docket No. R-08-080.
Decision and Order.
Filed March 17, 2009.

[Editor's Note: This case was appealed to U.S. District Court on June 3, 2009. The U.S. District Court upheld the Department's decision on Nov. 19, 2010. The court also awarded respondent attorney fees which have been paid.]

PACA-R – Transportation – Temperatures - Strawberries.

For the subject shipment of strawberries, which travelled from California to Maryland, we found that the temperatures in transit, which predominantly ranged from 31 to 37 degrees Fahrenheit as indicated by the ambient air temperatures recorded by instruments placed in the nose and tail end of the truck, were normal. Although the bill of lading specified a transit temperature of 32 degrees Fahrenheit, stated that the mechanics of refrigeration are such that a trailer with a reefer unit set to run at 32 degrees Fahrenheit will necessarily show fluctuations in temperature due to factors such as outside temperatures, loading patterns, and the respiration of the product itself. We held that these fluctuations are permissible as long as temperatures do not remain at or exceed 37 degrees Fahrenheit for an extended period of time.

Transportation – Normal – Strawberry Pulp Temperatures.

Strawberries shipped in a Tectrol atmosphere will warm somewhat in transit as a result of their own respiration. In light of this, we found that a USDA inspection performed while the strawberries were still on the truck, which listed pulp temperatures of 40 to 42 degrees Fahrenheit, was not evidence of abnormal transportation where there was no evidence that the strawberries were exposed to such elevated ambient air temperatures for more than a brief period in transit.

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 $24,076.00 in connection with one truckload of strawberries 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 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties also submitted a Brief.

Findings of Fact

1. Complainant, Corona Fruits & Veggies, Inc., is a corporation whose post office address is P.O. Box 1106, Santa Maria, California, 93456-1106. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent, Class Produce Group, LLC, is a limited liability company whose post office address is P.O. Box 2003, Jessup, Maryland, 20794-2003. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about June 1, 2007, Complainant, by oral contract, sold to Respondent 3,360 flats of 8-1 pound clamshell strawberries at $5.00 per flat, plus $840.00 for tectrol, $52.00 for two temperature recorders, and

$6,384.00 for cooling and palletization, for a total f.o.b. contract price of $24,076.00. The sale of the strawberries was negotiated by a broker, JJ & Son Marketing, Inc., who acted in negotiating the sale as agent for Respondent.

4. On June 2, 2007, the strawberries mentioned in Finding of Fact 3 were shipped from loading point in the state of California, to The Kroger Co. (hereafter "Kroger"), in Roanoke, Virginia (1,440 flats), and to Respondent, in Jessup, Maryland (1,920 flats).

5. Upon arrival of the 1,440 flats of strawberries destined for Kroger at its Roanoke Division on June 4, 2007, Kroger rejected the strawberries to Respondent. The entire shipment was then sent to Respondent in Jessup, Maryland, where it arrived on June 5, 2007. On the same date, at 10:37 a.m., a USDA inspection was performed on the strawberries, the report of which disclosed, in pertinent part, as follows:

LOT A (CON) – STRAWBERRIES				
Temperatures: 40 to 42ºF		**NUMBER OF CONTAINERS:** 3360 FLATS		**ORIGIN:** CA
Markings: BRAND: MJA FARMING MARKINGS: NET WT 18 OZ 1 LB DIST BY CORONA MARKETING SANTA MARIA, CA PREMIUM CALIFORNIA STRAWBERRIES PRODUCE OF USA				
PLI: NONE				**OTHER ID:** XXXXXXXXXXXXX XXXXXXXXXXXXX XXXX
INJURY	**DAM**	**SER. DAM**	**V.S.DAM**	**OFFSIZE/DEFECTS**
NA	15	1	NA	BRUISING (8 to 25%)
NA	8	8	NA	OVERRIPE (0 to 17%)
NA	1	1	NA	DECAY (0 to 5%)
NA	24	10	NA	CHECKSUM
GRADE:		XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX		
LOT DESC:		INSPECTION: RESTRICTED TO CONDITION ONLY AT APPLICANT'S REQUEST BRIGHTNESS: GENERALLY FAIRLY BRIGHT, FEW DULL COLOR OF CALYX: GENERALLY GREEN, FEW TURNING FIRMNESS: GENERALLY FIRM STAGES OF DECAY: EARLY		

6. After the USDA inspection was completed at 11:42 a.m. (EST) on June 5, 2007, a representative of Respondent wrote the word "Reject" on the certificate and faxed a copy to Complainant at 12:14 p.m. (EST) on the same date. At 9:43 a.m. (PST) on the same date, Complainant faxed the certificate back to Respondent after adding a handwritten notation that reads "TOO-HOT YOU HAVE TRUCK CLAIM." (ROI Ex 1 p. 11) Without instructions from Complainant, the trucker, L&M Transportation, placed the strawberries at B.R.S. Produce, in Philadelphia, Pennsylvania, to be handled for "Responsible Party." (ROI Ex 5 p. 2) B.R.S. Produce reported selling the strawberries for gross proceeds of $15,594.00. (ROI Ex 6 p. 2)
7. Respondent has not paid Complainant for the subject load of strawberries.
8. The informal complaint was filed on August 13, 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 one truckload of strawberries sold to Respondent. Complainant states Respondent accepted the strawberries in compliance with the contract of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase price of $24,076.00. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it asserts that it rejected the subject load of strawberries to Complainant because they were "out of grade due to poor condition."[1]

Complainant, as the moving party in this action, has the burden to prove that Respondent accepted the strawberries as alleged. While Complainant acknowledges receiving notice that Respondent was rejecting the strawberries, Complainant also asserts that an effective rejection for produce sold f.o.b. good delivery is only valid, and will only have the effect of automatically transferring title to the seller, if the product was handled under normal transportation service and

[1]See Answer ¶7.

conditions.[2] Complainant contends that the transportation temperatures for the shipment in question were not normal.

Initially, we note that Complainant is entirely incorrect in its assertion that an effective rejection will not revest title in the seller in an f.o.b. sale if the transportation conditions were not normal. On the contrary, a seller must take possession of rejected goods [assuming the rejection was procedurally effective] even if the rejection is wrongful. *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535 (1982); *Produce Brokers & Distributors, Inc.* v. Monsour's, Inc., 36 Agric. Dec. 2022 (1977). Hence, we must examine the circumstances of Respondent's rejection to determine whether it was procedurally effective.

A rejection is not effective unless the buyer seasonably notifies the seller and the burden of proving seasonable notice rests upon the buyer. *San Tan Tillage Co., Inc. v. Kaps Foods, Inc.*, 38 Agric. Dec. 867 (1979); *Sun World Marketing v. Bayshore Perishable Distributors*, 38 Agric. Dec. 480 (1979). For a rejection involving a truck shipment, the Regulations provide that notice must be provided within eight hours after the receiver or a responsible representative is given notice of arrival and the produce is made accessible for inspection. See 7 CFR § 46.2(cc)(2).

The record shows that Respondent purchased the strawberries for delivery to two locations, Kroger-Roanoke Division and Respondent's warehouse in Jessup, Maryland.[3] Upon delivery of the load at Kroger on June 4, 2007, Respondent states the broker, John Jackson of JJ & Son Marketing, Inc., notified Complainant's representative, Jose Corona, that Kroger rejected its portion of the strawberries due to poor condition.[4] This contention is affirmed in a sworn statement from John D. Jackson of JJ & Son Marketing, Inc., which was submitted as part of

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[2]See Statement in Reply, Reply to Paragraph 3.

[3]See ROI Ex 5 p. 1.

[4]See Answer ¶7.

Respondent's Answering Statement.[5] Respondent states further that following the rejection by Kroger, the entire load was moved to its warehouse in Jessup, Maryland, where a USDA inspection was promptly performed while the strawberries remained on the truck. Following the inspection, Respondent states it notified Complainant that it was rejecting the strawberries by faxing in a timely manner a copy of the inspection marked "Reject." Respondent states Mr. Jackson also verbally notified Complainant of the rejection at approximately the same time.[6] Once again, this is affirmed in the Jackson statement submitted with Respondent's Answering Statement.[7] Notice of rejection through a broker is permissible as long as it is established that the broker clearly communicated notice of the rejection to the seller. In the instant case, Complainant does not dispute that it was timely notified of Respondent's rejection by the broker, Mr. Jackson. We therefore find that the preponderance of the evidence supports Respondent's allegation that it accomplished a procedurally effective rejection by timely notifying Complainant of its intent to reject the strawberries.

Next we will consider whether the rejection of the strawberries was rightful, *i.e* , whether the rejected strawberries failed to meet the contract requirements in any respect. As we mentioned, Complainant has asserted that the carrier is responsible for the poor condition of the strawberries at destination because the strawberries were not transported at proper temperatures. When effectively rejected produce is sold f.o.b., the shipper has the burden to show that the transportation service and conditions were abnormal. *Bud Antle, Inc. v. J.M. Fields, Inc.*, 38 Agric. Dec. 844 (1979); *Sunset Strawberry Growers v. Luna Co., Inc.*, 46 Agric. Dec. 1701 (1987). In addition, when produce has been rejected by a receiver as not meeting contract specifications, the shipper has the burden to show that it was in suitable shipping condition when it was loaded at shipping point. *Heggeblade-Marguleas- Tenneco, Inc. v.*

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[5]See Answering Statement Exhibit 1, p. 2.

[6]See Answer ¶7.

[7]See Answering Statement Exhibit 1, p. 2.

Fisher Foods, Inc., 33 Agric. Dec. 1443 (1974).

The warranty of suitable shipping condition just mentioned is applicable in an f.o.b. sale such as the one involved herein. See 7 CFR § 46.43(i). Under the warranty, the commodity is warranted, at the time of billing, to be "in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."[8] The rationale for this rule is the following:

> Whether the commodity, at time of billing, was in good enough condition to travel to destination without abnormal deterioration can be determined only from the condition in which it did arrive at destination, and where the carrier provides such faulty service as may have damaged the commodity in transit, it becomes impossible to attribute the abnormal deterioration found at destination to the condition at time of billing." *Anonymous*, 12 Agric. Dec. 694 (1953).

The record shows that there were two temperature recorders placed with the load, one toward the nose area of the truck, and another toward the tail end of the truck.[9] The recorder placed toward the nose area of the truck (serial number 3409522290-0) recorded the temperature in five minute intervals from June 2, 2007, at 3:13 a.m., to June 5, 2007, at 8:43 a.m., for a total of 931 temperature readings.[10] The temperatures recorded by this instrument primarily ranged from 31 to 34 degrees Fahrenheit, with the following exceptions:

Date	Time	Temperature Range
6/02/2007	7:48 - 8:08 AM (20 minutes)	30.8 - 30.7 F
	8:18 – 8:28 AM (10 minutes)	30.9 – 30.9°F

[8]See 7 CFR § 46.43(j).

[9]See ROI Ex 1 pp. 5-10.

[10]See ROI Ex 3 pp. 25-40.

	8:33 – 8:53 AM (20 minutes)	30.8 – 30.8°F

	9:23 – 10:48 AM (85 minutes)	30.2 – 30.8°F
	10:53 – 10:58 AM (5 minutes)	30.8°F
	12:23 – 12:48 PM (25 minutes)	30.5 – 30.9°F
6/03/2007	8:18 – 8:33 AM (15 minutes)	38.0 – 39.9°F
	8:33 – 9:03 AM (30 minutes)	40.5 – 42.4°F
	3:18 – 3:23 PM (5 minutes)	40.0°F
6/05/2007	3:13 – 4:33 AM (80 minutes)	30.0 – 30.9°F
	4:43 – 5:03 AM (20 minutes)	30.7 – 30.9°F
	5:43 – 6:08 AM (25 minutes)	30.3 – 30.8°F
	8:08 – 8:23 AM (15 minutes)	38.8 – 39.8°F
	8:23 – 8:38 AM (15 minutes)	41.0 – 43.6°F

The recorder placed toward the tail end of the truck (serial number 3420506858-0) recorded the temperature in five minute intervals from June 2, 2007, at 3:14 a.m., to June 5, 2007, at 8:44 a.m., for a total of 931 temperature readings.[11] The temperatures recorded by this instrument primarily ranged from 34 to 37 degrees Fahrenheit, with the following exceptions:

Date	**Time**	**Temperature Range**
6/03/2007	8:04 - 8:19 AM (15 minutes)	38.3 – 39.8°F
	8:19 – 9:14 AM (55 minutes)	40.5 – 44.4°F
	9:14 – 9:24 AM (10 minutes)	38.2 – 39.2°F

[11]See ROI Ex 3 pp. 9-24.

6/03/2007 (cont.)	3:19 – 3:24 PM (5 minutes)	40.6°F
	3:24 – 3:34 PM (10 minutes)	38.8 – 39.6°F
6/04/2007	10:19 – 10:49 AM (30 minutes)	38.0 – 39.7°F
6/05/2007	7:54 – 8:09 AM (15 minutes)	38.8 – 39.9°F
	8:09 – 8:49 AM (40 minutes)	40.0 – 40.5°F

Respondent also submitted copies of Sensitech Post Validation Certificates showing that the recorders were thoroughly tested and met performance accuracy specifications within the designated range (± 0.05° Celsius over a range of -200° to +200° Celsius).[12]

Strawberries are an extremely perishable commodity that should be transported at or as near as possible to 32 degrees Fahrenheit.[13] The bill of lading for the shipment instructs the carrier to maintain a temperature of 32 degrees Fahrenheit, and the truck driver, Leopoldo Quezada of Quezada Trucking, signed this document indicating that the strawberries were pulping at 32 degrees Fahrenheit at the time of loading.[14] Mr. Quezada also signed a loading manifest indicating that both the product temperature and the trailer temperature were 32 degrees Fahrenheit.[15] Review of the temperature reports generated from the two recorders placed with the load discloses an initial reading of 32.7 degrees Fahrenheit for the instrument placed at the nose end of the truck, and 37.0 degrees Fahrenheit for the instrument placed at the tail end of the truck. The temperature at the tail end of the truck rapidly declined to 34

[12]See ROI Ex 3 pp. 41-42.

[13]See "Protecting Perishable Foods During Transport by Truck," Agricultural Handbook No. 669, July, 2006, p. 53.

[14]See ROI Ex 1 p. 5.

[15]See ROI Ex 1 p. 6.

degrees Fahrenheit within the first hour of transit. Therefore, the transit period began at proper temperatures.

The temperature recorders placed with the load recorded the ambient air temperatures for the approximately seventy-seven and a half hour period that elapsed from the time the load was shipped from Santa Maria, California, to the time the strawberries were inspected at the place of business of Respondent in Jessup, Maryland.

Within that time, the recorder placed toward the tail end of the truck disclosed an instance during the morning of the second day in transit where temperatures approached and exceeded 40 degrees Fahrenheit, peaking at 44.4 degrees Fahrenheit before descending back to a more desirable range. Altogether the ascent beyond 38 degrees Fahrenheit to above 40 degrees Fahrenheit and back down to below 38 degrees Fahrenheit lasted for slightly less than an hour and a half. A similar instance occurred later that afternoon, but lasted only fifteen minutes. The following morning, there was a brief thirty-minute period where temperatures hovered near, but did not exceed 40 degrees Fahrenheit. Temperatures rose above 40 degrees Fahrenheit once again on June 5, 2007; however, this rise in temperature coincided with the arrival of the load at the place of business of Respondent, so it can reasonably be attributed to the opening of the trailer doors to make the strawberries available for inspection.

The recorder placed toward the nose area of the truck disclosed similar temperature rises to those disclosed by the recorder on the tail end, both on the second day of transit and at the time of arrival, although the duration is somewhat shorter. In addition, the recorder in the nose area of the trailer disclosed temperatures that hovered around and sometimes drifted below the highest freezing point for strawberries, 30.6 degrees Fahrenheit. There were six such instances that occurred on the second day of transit, during the five-hour period between 7:48 a.m. and 12:48 p.m. Three other instances occurred just prior to arrival at Respondent's place of business, during the nearly three-hour period between 3:13 a.m. and 6:08 a.m., on June 5, 2007.

In *G. Tanaka Farms v. Garden State Farms, Inc.*, 48 Agric. Dec. 729 (1989), we held that any substantial period of transit above 40 degrees Fahrenheit is clearly abnormal for the proper carriage of strawberries.

In that case, temperatures stayed at or above 40 degrees Fahrenheit for hours at a time during the majority of the transit period. In the instant case, during the entire seventy-seven and a half hour period that the strawberries were in transit, there were only four separate instances where elevated temperatures were recorded, the duration of which ranged from as little as fifteen minutes to a maximum of an hour and twenty minutes, and in each case temperatures swiftly returned to a more desirable range. For the majority of the transit period, temperatures generally stayed within a rather narrow range of 31 to 34 degrees Fahrenheit in the nose end of the truck, and 34 to 37 degrees Fahrenheit in the tail end of the truck. The discrepancy between the temperatures at either end of the truck is probably attributable to the location of the reefer unit, *i.e.*, the recorder at the nose end of the truck records the air coming directly from the refrigeration unit, whereas the recorder at the tail end of the truck records the temperature of the air after it has been slightly warmed by the surrounding environment.

When we look at the all of the temperature readings, totaling 931 per instrument, we find that there were only 36 instances where one or both instruments were recording temperatures above the predominant temperature range of 31 to 37 degrees Fahrenheit.[16] In other words, only approximately five percent of the readings were outside this range. Moreover, the deviations occurred on four separate, relatively short, instances. Consequently, there were no substantial periods where temperatures rose above 37 degrees Fahrenheit. While we nevertheless expect temperatures to be maintained at or as near as possible to 32 degrees Fahrenheit, as that is the temperature specified on the bill of lading, we are cognizant of the fact that the mechanics of refrigeration are not perfect, and that fluctuations will occur as the reefer unit attempts to adjust for changes in the trailer environment caused by such factors as outside air temperatures, loading patterns, and the respiration

[16] Because the temperature recorders recorded temperatures to the tenth of a degree, we are including temperatures up to 37.4 degrees Fahrenheit in this range.

of the product itself.[17] Given this, we can reasonably take the position that fluctuations in temperature, up to a maximum of 37 degrees Fahrenheit, would be permissible where a carriage temperature of 32 degrees Fahrenheit is specified. In taking this position, we hasten to point out that the emphasis here is on the *fluctuation*. We are not saying that a sustained carriage temperature of 37 degrees Fahrenheit is permissible. We are merely acknowledging that a trailer with a refrigeration unit set to run at 32 degrees Fahrenheit will necessarily show fluctuations in ambient air temperature due to environmental factors such as those mentioned above. As long as those temperatures do not reach or exceed 37 degrees Fahrenheit for any substantial period of time, the condition of the product should not be adversely affected.[18] We have already determined that the transit temperatures in the instant case did not exceed this threshold for any substantial period of time. Accordingly, we are unable to find that there was abnormal transportation on the basis of elevated temperatures.

There remains for our consideration the colder temperatures disclosed by the recorder at the nose end of the truck. As we mentioned, there were nine instances where the temperatures recorded by this instrument hovered around or drifted below the highest freezing point for strawberries of 30.6 degrees Fahrenheit. It is important to point out that these temperatures were recorded by the instrument placed at the nose end of the truck, where the refrigerated "supply air" originates. During the same time period, the instrument at the tail end of the truck was recording temperatures in the 34 degree Fahrenheit range. Hence, it appears that the cooler air supplied by the refrigeration unit was quickly warmed by the surrounding environment. In addition, as

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[17]Bernstein, Corinne S. and Nelson, Doug. The Mechanics of Temperature Control. Blueprints 2008.

[18]Strawberries stored in a semi-constant temperature environment exhibit a lesser incidence of bruising and decay than those stored in fluctuating temperatures. Nunes, M.C.N. and Brecht, J.K. 2003. International Conference on Quality in Chains. ISHS Acta. Hort. 604. We believe the evidence in this case firmly establishes that the strawberries in question were transported in a semi-constant temperature environment.

Respondent points out in its Brief, the strawberries in question were wrapped in Tectrol bags with cardboard on the top and bottom of each pallet, so the product was protected from any direct exposure to chilling temperatures.[19] We therefore find that the colder temperatures disclosed by the recorder at the nose end of the truck do not provide sufficient basis to conclude that the temperature conditions in transit were abnormal.

For the reasons set forth above, we find that Complainant has failed to sustain its burden to prove that the warranty of suitable shipping condition is void due to abnormal transit conditions. Accordingly, we may now consider whether the USDA inspection results establish a breach by Complainant of the warranty of suitable shipping condition. The inspection disclosed 24 percent average defects, including 15 percent bruising, 8 percent overripe, and 1 percent decay.[20] The maximum allowance for defects at destination for strawberries sold f.o.b. is 15 percent for total defects, including therein not more than 8 percent for defects causing serious damage and 3 percent for decay. *Supreme Berries, Inc. v. R.C. McIntire, Jr.*, 49 Agric. Dec. 1210 (1990). We therefore find that the defects disclosed by the inspection are sufficient to establish that the strawberries in question were not in suitable shipping condition.

While we note that the pulp temperatures of the strawberries at the time of the inspection were 40 to 42 degrees Fahrenheit, it is well-established that strawberries on pallets that have been placed in a Tectrol atmosphere, *i.e* , bagged and treated with carbon dioxide, "will warm somewhat during transport as a result of their own respiration. The bags do not allow cold air to flow through the boxes within the pallets to remove this respiratory heat. It is therefore necessary to remove the bags after arrival and to cool down the fruit thoroughly if it is intended

[19]See Respondent's Brief, p.2.

[20]See ROI Ex 1 p. 7.

for immediate use".[21] The strawberries in question were inspected on the truck. We therefore find that the elevated pulp temperatures disclosed by the inspection can reasonably be attributed to the Tectrol atmosphere in which the strawberries were shipped, and that they did not result from the instances where temperatures in transit rose above acceptable levels.

Complainant also asserts in its Opening Statement that fluctuating temperatures such as those disclosed by the temperature recorders placed on the load of strawberries in question will cause moisture condensation on the inside of the bag that will result in decay and bruising. Complainant did not, however, submit any evidence to substantiate this contention.[22]

Complainant's failure to ship strawberries in suitable shipping condition constitutes a breach of contract that is cause for Respondent to reject the strawberries. We therefore find that Respondent's rejection of the strawberries was justified. After rejecting produce, a receiver has a duty to dispose of the goods in commercial channels upon request of the shipper or in lieu of instructions from the shipper. *Yokoyama Brothers v. Cal-Veg Sales, Inc*., 41 Agric. Dec. 535 (1982). The evidence indicates that following Respondent's rejection of the strawberries, Complainant did not give Respondent instructions as to the disposition of the load, nor did Complainant make any effort to arrange to have the strawberries transported elsewhere. In fact, Complainant asserts in its sworn Opening Statement that it was unaware of the disposition of the strawberries until it received a copy of the Report of Investigation prepared by the Department showing that the strawberries were sent to Frank Leone (B.R.S. Produce) in Philadelphia, Pennsylvania.[23]

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[21] Margriet Franke, "Post Harvest Technology for fresh Strawberries," p. 4, accessed on the Internet on July 10, 2008, at http://www.transfresh.com/images_up/Post_Harvest_Strawberries.pdf.

[22] See Opening Statement ¶7.

[23] See Opening Statement ¶12.

In his sworn statement submitted as part of Respondent's Answering Statement, the broker, John D. Jackson, asserts, in pertinent part, as follows:

> Because [Complainant] insisted that this was not a Shipper problem but a temperature problem in-transit, L&M Transportation placed the berries at Frank Leone—Philadelphia, PA to handle for "Responsible Party" and has sued [Complainant] in the California State Courts for damages. Prior to sending these berries to Leone L&M tried to arbitrate this load and [Complainant] refused to cooperate.[24]

While Complainant earlier contended that it was unaware of the disposition of the strawberries until it received the ROI prepared by the Department, Complainant has failed entirely to address the broker's sworn contention that negotiations regarding the disposition of the strawberries took place between Complainant and the trucker, L&M Transportation, after Respondent rejected the strawberries. Statements made by brokers are entitled to great weight. *Homestead Tomato Packing Co. v. Mim's Produce, Inc.*, 43 Agric. Dec. 173 (1984). We are therefore unconvinced by Complainant's assertion that it was unaware of the disposition of the strawberries until it received documents related to this Complaint.

As Respondent has established that its rejection of the strawberries was both effective and rightful, thereby revesting title to the strawberries in Complainant, and the broker has testified that subsequent negotiations concerning the disposition of the strawberries were conducted between the trucker and Complainant, after which the strawberries were moved and resold by a third party unrelated to Respondent, we conclude that Respondent has no liability for the strawberries it rejected to Complainant. See U.C.C. § 2-602(2)(c). The Complaint should, therefore, be dismissed.

Order

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[24]See Answering Statement Exhibit 1, p. 2.

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

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SUNRIDGE FARMS, INC. v. THE ALPHAS COMPANY, INC.
PACA Docket No. R-08-097.
Decision and Order.
Filed June 26, 2009.

PACA-R – Damages – Cover.

A buyer who has accepted non-conforming goods may still be entitled to damages for cover. In such a case, the buyer's damages will be measured as the difference between the cost of cover and the proceeds collected from the prompt resale of the accepted goods.

Patrice Harps, Presiding Officer
Leslie Wowk, Examiner
Complainant, Western Growers Assn.
Respondent, Pro Se
Decision and Order Issued by William G. Jenson

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $24,136.36 in connection with three truckloads of mixed vegetables shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant and asserting a Counterclaim in the amount of $7,752.20 for damages allegedly incurred in connection with one of the transactions at issue in the Complaint. Complainant filed a Reply to the

Counterclaim denying liability to Respondent.

Neither the amount claimed in the Complaint nor the Counterclaim exceeds $30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties also submitted a Brief.

Findings of Fact

1. Complainant, Sunridge Farms, Inc., is a corporation whose post office address is P.O. Box 4273, Salinas, California, 93912-4273. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, The Alphas Company, Inc., is a corporation whose post office address is 87-89 New England Produce Center, Chelsea, Massachusetts, 02150-1703. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about June 25, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of California, to Respondent in Chelsea, Massachusetts, 960 cartons of Coastline wrapped lettuce 24's at $8.72 per carton, or $8,371.20, plus $25.00 for a temperature recorder, for a total f.o.b. contract price of $8,396.20. (Complainant's Invoice No. 274512).
4. On or about June 26, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of California, to Respondent in Chelsea, Massachusetts, 960 cartons of Coastline wrapped lettuce 24's at $7.72 per carton, or $7,411.20, plus $25.00 for a temperature recorder, for a total f.o.b. contract price of $7,436.20. (Complainant's Invoice No. 274513).
5. On or about July 12, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of

California, to Respondent in Chelsea, Massachusetts, 320 cartons of Coastline liner lettuce 24's at $8.72 per carton, or $2,790.40, 320 cartons of Coastline wrapped lettuce 24's at $9.72 per carton, or $3,110.40, 224 cartons of Coastline wrapped cauliflower 12's at $5.72 per carton, or $1,281.28, 140 cartons of Coastline liner romaine 24's at $5.22 per carton, or $730.80, and 64 cartons of Coastline naked celery 24's at $5.72 per carton, or $366.08, plus $25.00 for a temperature recorder, for a total f.o.b. contract price of $8,303.96. (Complainant's Invoice No. 275333).

6. The shipment of mixed vegetables mentioned in Finding of Fact 5 arrived at Respondent's place of business, in Chelsea, Massachusetts, at 9:30 a.m. on Monday, July 16, 2007. On July 17, 2007, at 7:50 a.m., a USDA inspection was requested. The inspection took place later that morning, at 11:26 a.m., after the shipment had been unloaded from the truck, and covered the 320 cartons of Coastline wrapped lettuce 24's and the 320 cartons of Coastline liner lettuce 24's in the shipment.[1] The inspection disclosed 25 percent average defects, including 6 percent russet spotting, 6 percent tipburn, 3 percent discoloration following bruising, and 10 percent decay affecting the compact portion of the heads and/or butts in the 320 cartons of wrapped lettuce 24's; and 61 percent average defects, including 4 percent quality (mechanical damage), 3 percent russet spotting, and 54 percent decay affecting the compact portion of the heads and/or butts in the 320 cartons of liner lettuce 24's. Pulp temperatures at the time of the inspection ranged from 34 to 36 degrees Fahrenheit for the wrapped lettuce 24's and 34 to 40 degrees Fahrenheit for the liner lettuce 24's.

7. On August 20, 2007, at 8:06 a.m., a second USDA inspection was performed on the 320 cartons of Coastline wrapped lettuce 24's and the 320 cartons of Coastline naked lettuce 24's that were previously inspected on July 17, 2007. This inspection disclosed 99 percent average defects, including 29 percent russet spotting, 12 percent pink

[1]Since no issue has been raised as to the applicability of this inspection, we assume that the 320 cartons of naked lettuce 24's referenced on the inspection certificate are the same product that is referred to as liner lettuce 24's on Complainant's invoice and bill of lading.

rib, and 58 percent decay affecting the compact portion of the heads and/or butts in the 320 cartons of wrapped lettuce 24's; and 100 percent average decay affecting the compact portion of the heads and/or butts in the 320 cartons of liner lettuce 24's. The pulp temperature at the time of the inspection was 38 degrees Fahrenheit for both the wrapped lettuce 24's and the liner lettuce 24's. In the remarks section of the certificate, the inspector noted: "APPLICANT STATES ABOVE LOT TO BE DUMPED. APPLICANT STATES THE ABOVE LOT WAS PREVIOUSLY INSPECTED ON 7-17-07 AND REPORTED ON CERTIFICATE T-004-0098-02629."

8. On August 22, 2007, Respondent sent correspondence to Complainant, addressed to the attention of Grant Oswalt, the details of which are set forth below:

RE: Invoice #275333
Alphas Lot # 8396

Invoice# 275333	$ 8,303.96
320 cases Liner Lettuce Disposed	- 2,790.40
320 cases Cello Lettuce Disposed	- 3,110.40
Freight Charges *16 pallets (26 pallets / $6200.00 Frt)	- 3,815.38
7/17 USDA Federal Inspection	- 166.00
8/20 USDA Dump Certificate	- 147.00
Loss of Sales *640 cases @ $2.00	- 1,280.00
Disposal Charges	- 1,000.00

Balance due Alphas Company $ - 4,005.22

**** Monies will be deducted and applied to Inv# 274512

9. Respondent has not paid Complainant for the three loads of mixed vegetables mentioned above.
10. The informal complaint was filed on August 31, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for three truckloads of mixed vegetables purchased and accepted from Complainant. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling $24,136.36. Respondent admits that the two loads of lettuce shipped on June 25, 2007, were received without complaint; however, Respondent asserts that the lettuce contained in the mixed vegetable load shipped on July 12, 2007, was not saleable. As a result of the poor condition of the lettuce in this shipment, Respondent states it incurred damages in the amount of $7,572.20,[2] which amount Respondent seeks to recover through its Counterclaim.

The only transaction that is in dispute, therefore, is the shipment of mixed vegetables that took place on July 12, 2007. Moreover, the dispute concerns only the 320 cartons of wrapped lettuce and the 320 cartons of liner lettuce in this shipment. The other commodities were

[2]This amount includes the cost of replacement product (320 cartons of liner lettuce 24's at $9.28 per carton, or $2,969.60, and 320 cartons of cello lettuce 24's at $10.28 per carton, or $3,289.60), USDA inspection fees totaling $313.00, and $1,000.00 for disposal charges.

received without complaint. As we mentioned, Respondent asserts that the lettuce was not salable. Since Respondent nevertheless accepted the lettuce,[3] Respondent has the burden to prove that the lettuce it accepted did not comply with the contract requirements.[4]

The shipment of mixed vegetables in question was sold under f.o.b. terms,[5] which means that the warranty of suitable shipping condition is applicable. Suitable shipping condition is defined in the Regulations (7 CFR § 46.43(j)) as meaning:

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

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[3]The lettuce was inspected following arrival and unloading at the contract destination (see ROI Exhibit Nos. 5-7 and 5-8). Unloading is considered an act of acceptance. See 7 CFR § 46.2(dd)(1). Moreover, the truckload of mixed vegetables in question comprises a commercial unit that must be accepted or rejected in its entirety (see U.C.C. § 2-601). Therefore, Respondent could not accept the other commodities in the shipment and reject the lettuce. We conclude, on this basis, that Respondent accepted the lettuce.

[4]See U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co. v. Southwestern Produce Co*., 28 Agric. Dec. 511 (1969).

[5]See Complaint Exhibit No. 3.

[6]The suitable shipping condition provisions of the Regulations (7 CFR § 46.43(j)), which require delivery to the contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 CFR § 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 U.S. No. 1 at the 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.
(continued...)

Section 46.43(j) provides further that if a good delivery standard for the commodity is set forth in section 46.44 of the Regulations, and the commodity at the contract destination contains deterioration in excess of any tolerance provided therein, it will be considered abnormally deteriorated. Section 46.44 of the Regulations states that lettuce sold without a U.S. Grade designation, such as the lettuce at issue here, may contain a maximum of 15 percent, by count, of the heads in any lot which are damaged by condition defects, including therein not more than 9 percent serious damage, of which not more than 5 percent may be decay affecting any portion of the head exclusive of the wrapper leaves.[7]

Respondent secured a prompt USDA inspection of the lettuce at 11:26 a.m., on July 17, 2007. The inspection disclosed 25 percent average defects, including 6 percent russet spotting, 6 percent tipburn, 3 percent discoloration following bruising, and 10 percent decay affecting the compact portion of the heads and/or butts in the 320 cartons of wrapped lettuce 24's; and 61 percent average defects, including 4 percent quality (mechanical damage), 3 percent russet spotting, and 54 percent decay affecting the compact portion of the

[6](...continued)
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.

[7]See 7 CFR § 46.44(a)(2).

heads and/or butts in the 320 cartons of liner lettuce 24's.[8] Based on the good delivery allowances just mentioned, these results establish that the lettuce was abnormally deteriorated. Accordingly, we find that Respondent has sustained its burden to prove that Complainant breached the contract by shipping lettuce that was not in suitable shipping condition.

Before we consider the damages allegedly incurred by Respondent as a result of Complainant's breach, we note that Complainant has asserted that it was not timely notified of the breach. This issue was first raised in the informal letter of complaint submitted on Complainant's behalf by Mr. Thomas R. Oliveri of Western Growers. Mr. Oliveri asserts in this correspondence that he was told by Complainant that it was never advised of any condition problems with the lettuce at the time of arrival, and that the only time Complainant became aware of any potential condition problems was when Respondent attempted to remit on the contracts that are the subject of this claim.[9]

Section 2-607(3)(a) of the Uniform Commercial Code provides that a buyer must, within a reasonable time after he discovers or should have discovered a breach with respect to the goods accepted, notify the seller of the breach or be barred from any remedy. The purpose of the requirement, as stated in the comment to the section, is to defeat commercial bad faith; *i.e.*, if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the breach by taking advantage of U.C.C. Section 2-515, which gives either party upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence.[10] The burden to prove that prompt notice of a breach was

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[8]See ROI Exhibit Nos. 5-7 and 5-8.

[9]See ROI Exhibit No. 1-1.

[10]See *A. C. Carpenter, Inc. v. Boyer Potato Chips*, 28 Agric. Dec. 1557, 7 UCC Rep. Serv. 493 (1969).

given rests on the buyer who claims a breach by the seller.[11]

Complainant's Sales Office Manager, Mr. Mark McBride, asserts in an affidavit submitted as Complainant's Opening Statement, that "Mr. Grant Oswalt advised me that upon arrival of this product at Respondent's place of business, at no time was he ever verbally given any type of indication of off condition with any of the products in question."[12] According to Mr. McBride, Mr. Oswalt told him this prior to his death in January of 2008. In response to this allegation, Respondent's President, John S. Alphas, asserts in Respondent's sworn Answering Statement that he and Grant Oswalt had several conversations regarding the file in question, during which he insisted that Mr. Oswalt call the cooler to find out how old the lettuce was. Mr. Alphas states Mr. Oswalt thereafter admitted that the lettuce was very old and that the cooler had made a mistake shipping it to Respondent.

We are not inclined to consider the hearsay testimony just mentioned concerning the statements allegedly made by Complainant's former salesman, Grant Oswalt, as Mr. Oswalt is now deceased and is therefore unable to rebut the allegations contained in Respondent's Answering Statement. Instead, we note that during the informal handling of this claim, the Manassas, Virginia PACA Branch Office received correspondence from Respondent on October 5, 2007, wherein Respondent asserts, in pertinent part:

> A completed inspection took place on July 17, 2007. The inspection certificate was forwarded to Grant Oswalt @ Sunridge Farms upon completion. (Attached are our fax transmission reports).[13]

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[11] *Hunts Point Tomato Co., Inc. v. Maryland Fresh Tomato Co., Inc.*, 47 Agric. Dec. 773 (1988).

[12] See Complainant's Opening Statement, Affidavit of Mark McBride, Complainant's Sales Office Manager.

[13] See ROI Exhibit No. 7-1.

Attached to this correspondence is a copy of the inspection certificate (two pages) pertaining to the July 17, 2007, inspection of the lettuce in question, along with a copy of a fax transmission verification report showing that a three-page fax was successfully transmitted to Complainant's fax number on July 17, 2007.[14] We note that the report shows that the fax was sent at "03:11," or 3:11 a.m.[15] The inspection was completed later that morning, at 11:57 a.m. Moreover, we also note that the confirmed fax consisted of three pages, whereas the inspection consisted of only two. In light of these discrepancies, we find that the fax transmission report submitted by Respondent fails to establish that the inspection certificate was promptly sent to Complainant.

Respondent also asserts that all federal inspections are faxed by the USDA to the shipper of record, which in this case is Complainant. However, Complainant's receipt of the inspection results from the USDA's Fresh Products Branch does not constitute notice of a breach of contract from Respondent.[16] Therefore, in the absence of any additional evidence to substantiate Respondent's allegation that prompt notice of a breach was provided, we find that Respondent has failed to sustain its burden to prove by a preponderance of the evidence that Complainant was promptly notified of the breach. Consequently, Respondent is barred from recovering any damages resulting therefrom.

Respondent purchased and accepted three truckloads of mixed vegetables from Complainant at contract prices totaling $24,436.36, and while Respondent has established a breach with respect to the lettuce in one of the shipments, Respondent is barred from recovering any damages resulting from the breach due to its failure to provide prompt notice. Respondent is, therefore, liable to Complainant for the full

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[14]See ROI Exhibit No. 7-5.

[15]The record shows Respondent's fax number (831)755-8716 was set to record events based on military time (see fax legend on ROI Exhibit Nos. 4-1 through 4-13), *i.e* , 3:11 a.m. is reported as 03:11 and 3:11 p.m. is reported as 15:11.

[16]See *Columbia Basin Sales and Marketing, Inc. v. Mark Haness, d/b/a C J's Produce Co*., PACA Docket No. R-08-034, May 9, 2008.

purchase price of the three truckloads of mixed vegetables it accepted, which total $24,436.37. Respondent's Counterclaim, which seeks to recover damages resulting from Complainant's breach, should be dismissed.

Respondent's failure to pay Complainant $24,436.37 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 $24,436.37, with interest thereon at the rate of ____% per annum from August 1, 2007, until paid, plus the amount of $300.00.

The Counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

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EUROFRESH, INC. v. TRICAR SALES, INC.
PACA Docket No. R-07-110.
Order on Reconsideration.
Filed July 7, 2009.

PACA-R – Agency – Growers' Agents – Estoppel – Necessary Elements – Commission – Payment of Commission Required.

Where Complainant, who sold tomatoes on Respondent's behalf while acting in the capacity of a growers' agent, paid Respondent the net proceeds from its sales of the tomatoes but neglected to deduct the eight percent commission that it was entitled to withhold as commission according to the contract, Respondent argued that Complainant should be estopped from recovering its commissions because it represented to Respondent that the settlement amounts already remitted to Respondent were final, which representation Respondent reasonably relied upon and paid its growers accordingly, so Respondent would suffer a loss if it were ordered to pay the commissions owed to Complainant. Held that in order for Respondent to defend the claim on the basis of estoppel, Respondent must establish both that its reliance upon the information provided to it by Complainant was reasonable, *and* that it relied upon the error made by Complainant to its detriment. The contract did not specify whether the commission would be deducted on the product liquidation or billed separately, so in the absence of any mention of the commission on the liquidation, Respondent should not have assumed that the commission had already been deducted. Moreover, Respondent failed to show that Complainant otherwise represented that the settlement amounts paid to Respondent were final, *i.e* , net after commission. Therefore, Respondent failed to establish that its reliance upon the information provided to it by Complainant was reasonable. Respondent also failed to establish that it relied upon the error made by Complainant to its detriment because it failed to show that it attempted to contact its grower to recoup the overpayment that it made as a result of its presumption that the funds received from Complainant were net after commission. Thus, Respondent failed to show that any losses incurred as a result of having to pay commission to Complainant were unavoidable. Because Respondent failed to establish the necessary elements of estoppel, Respondent was ordered to pay the commission owed to Complainant according to the terms of the contract.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
Complainant, Rynn & Janowsky, LLP
Respondent, Meuers Law Firm, P.L.
Order on Petition for Reconsideration issued by William G. Jenson, Judicial Officer.

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), a Decision and Order was issued on May 30, 2008, in which Respondent was ordered to pay Complainant, as reparation, $126,465.49, with interest thereon at the rate of 2.09% per annum from July 1, 2006, until paid, plus the amount of $300.00. On July 11, 2008, the Department received from Respondent a Petition for Reconsideration of the Order. Complainant was served with a copy of the Petition and afforded the opportunity to submit a reply. On September 2, 2008, the Department received from Complainant a response to the Petition.

Before we consider the issues raised by Respondent in its Petition, we should briefly review of the details of this case. Complainant brought this action seeking to recover commissions totaling $126,465.49, which it earned in connection with its sales of Beefsteak tomatoes supplied by Respondent. In defense of its failure to pay the commissions admittedly earned by Complainant, Respondent claimed it was led to believe by Complainant that all liquidations were full and final as presented to Respondent, and that it already remitted to its growers on that basis. In other words, Respondent argued that Complainant should be estopped from recovering its commissions because it represented to Respondent that the settlement amounts paid to Respondent were final, which representation Respondent reasonably relied upon and paid its growers accordingly, so Respondent would suffer a loss if it were ordered to pay the commissions owed to Complainant. In the decision, we considered the estoppel defense raised by Respondent and determined that the necessary elements of estoppel, *i.e.*, a showing that one party made a representation upon which the other party reasonably relied *and* that the other party relied upon the representation to its detriment, were not present. (See D&O, pp.9-11). In the Petition, Respondent asserts first that it reasonably relied upon the information provided to it by Complainant. In connection with this assertion, Respondent makes the erroneous assertion that "the JO *did* recognize that [Respondent] repeatedly asked [Complainant] if the liquidations were full and final and that [Complainant] *did* confirm that the accounts were full and final." (See Petition, p.2, emphasis in the original). On the contrary, in reference to Respondent's claim that it

was led to believe the settlements received from Complainant were final based on assurances received from Complainant, we stated "Respondent fails to specify in what manner or by whom such assurances were made. As such, we find that this claim lacks sufficient specificity to be afforded any credence." (See D&O, p.9).

Respondent next refers to our finding that the meaning of the phrase "full and complete account of sales" could not be ascertained with reasonable certainty based on the wording of the Distributor Agreement negotiated between the parties. (See D&O, p.9). Respondent suggests that when there are vague, ambiguous or contradictory terms in a contract, the meaning of the agreement should be determined by: (1) course of dealings (previous transactions establishing a common basis for interpreting conduct); (2) course of performance (the parties' conduct after the agreement has been made); and (3) usage of trade (practice or method followed by the industry). (See Petition, p.2). Respondent cites these three factors as relevant to the determination of the meaning of the terms of an agreement. Respondent includes two subheadings, "The Parties' Course of Performance" and "Usage of Trade," in its discussion. We infer from this that there was no course of dealing, or previous transactions between the parties, for use in determining the meaning of the terms in the present agreement.

Under the subheading entitled "The Parties' Course of Performance," Respondent references Complainant's September 25, 2006, meeting with Respondent concerning the unpaid commissions and asserts this establishes that Complainant was aware that Respondent had detrimentally relied on Complainant's assurances that the full and final accountings included a deduction for Complainant's commissions. Respondent maintains that if Complainant was not aware of the detrimental reliance, Complainant would not have deemed the matter sufficiently serious to warrant a personal meeting. (See Petition, p.3).

The September 25, 2006, meeting does not constitute a course of performance as that term is defined in U.C.C. § 1-303(a). If Respondent is referring to the alleged repeated assurances from Complainant that its accountings included a deduction for commissions as a course of performance, then as we stated in the decision, the claim that the assurances were made is too vague and non-specific to be given any

credence. We concluded that Respondent's reliance on the alleged assurances that the accountings were final, *i.e* , included a deduction for commissions, was unreasonable. (See D&O, p.9). Respondent has shown no course of performance that would lead to the conclusion that the "full and complete account of sales and liquidation" referenced in the contract was understood by the parties to include a deduction for commissions.

Under the subheading entitled "Usage of Trade," Respondent refers to the definition of truly and correctly account, as set forth in section 46.2(y)(1) of the Regulations, which states:

> …to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce, and the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by Sec. 46.29;

Respondent states 7 CFR § 46.29(b) specifies that the commission charges are also to be included in the accounting, and argues on this basis that there can be no serious question that the industry practice is to deduct commissions from the account of sale. (See Petition, p.4). We note, however, that 7 CFR § 46.29(b) says nothing about the inclusion of commission charges in an account of sale. That section reads, in its entirety, as follows:

> *Commission charges*. Before accepting produce on consignment, the parties should reach a definite agreement on the amount of the commission and other charges which will be assessed by the commission merchant. In the absence of such an agreement, only the usual and customary commission and other charges shall be permitted. The receiver may not reconsign produce to another person or firm, including auction companies, and incur additional commissions, charges or expenses without the specific prior authority of the consignor. Unless otherwise agreed upon by the parties, joint account partners shall not charge a commission fee

> or other selling charges against the joint account for disposing of the produce. When a portion of a consigned shipment is purchased by the commission merchant he shall not charge or receive a commission fee for such sales.

While we acknowledge that commissions are typically deducted from the gross sales reflected on an account of sales to determine the net amount due the consignor, the Regulations do not require that procedure. Furthermore, although commissions are typically deducted from gross sales prior to payment of net proceeds, this does not outweigh the fact that Complainant prepared a liquidation for each lot that plainly did not include a deduction for commission. (See ROI Exhibit Nos. 6c through 6h). As we noted in the decision, the liquidation reports prepared by Complainant listed a description of the product, the invoice number, ship date, quantity, price, and total amount, from which Complainant deducted handling and transportation costs only, and remitted the balance to Respondent. Since the liquidation did not show a deduction for commission, we found that Respondent's assumption that a commission had been deducted was not reasonable. (See D&O, p.10).

The arguments raised in Respondent's Petition do not alter this conclusion.

Respondent also asserts in its Petition that we erroneously concluded that Respondent's reliance on the information provided by Complainant was not detrimental. In reference to our statement on page 10 of the decision that "…Respondent had the opportunity to contact its growers and advise that its liquidations were in error because said commissions had not been deducted, and to attempt to recoup the resulting overpayment," Respondent asserts that both its Answer and Answering Statement clearly state that Respondent had already accounted back and remitted to its growers. (See Petition, p.4). While the fact that Respondent had already paid its growers undoubtedly put Respondent in a more difficult position than if the account had not yet been liquidated, Respondent nevertheless had the opportunity, just as Complainant did with Respondent prior to the commencement of this action, to take reasonable steps to recover its overpayment from its growers. As we stated in the decision, Respondent flatly refused to

make such an attempt. (See D&O, p.11). As a result, Respondent is unable to establish that the loss it claims it will suffer if it is compelled to pay Complainant its earned commissions was unavoidable.

Finally, Respondent asserts that Complainant should be barred from recovery under the doctrine of laches. Citing Williston on Contracts 31 § 79:11 (4th ed.), Respondent states a party is barred from relief when: (1) an unreasonable delay by one party in asserting its right or remedy, causes (2) prejudice to the other party as a result of the delay. (See Petition, p.5). This defense must also fail because an essential element of laches is the requirement that the party invoking the doctrine has changed its position as a result of the delay, and while Respondent has asserted that it paid its growers before it was notified by Complainant that commission had not been deducted from the sales proceeds, Respondent has, as we just mentioned, failed to establish that the resulting overpayment to its growers could not be recovered.

Upon reconsideration of the evidence and for the reasons cited, we are denying Respondent's Petition. There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in Section 7 of the Act.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $126,465.49, with interest thereon at the rate of 2.09% per annum from July 1, 2006, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

_____

WM. CONSALO & SONS FARMS, INC. v. RAFAT ABDALLAH, D/B/A SUPERB FRUIT SALES COMPANY.
PACA Docket No. R-08-086.
Decision and Order.
Filed August 6, 2009.

PACA-R – Damages – Limitation under the Suspension Agreement.

Where the sale of Mexican grown tomatoes falls under the terms of the U.S. Department of Commerce Mexican Tomato Suspension Agreement, 73 FR 4831 (2008), Appendix D of the Suspension Agreement provides specific procedures for adjusting the sale price following a breach of contract by the seller. Only tomatoes with specific condition defects, documented by a timely unrestricted U.S.D.A. inspection, are considered defective tomatoes. The seller may reimburse the buyer for defective tomatoes and specific reasonable expenses. Uninspected portions of a lot of tomatoes are not eligible for an adjustment.

Patrice H. Harps, Presiding Officer.
Earl E. Elliott, 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 $17,762.00 in connection with one truckload of tomatoes shipped in the course of interstate commerce.
A copy of the Complaint was served upon the Respondent, who was afforded twenty days from receipt of the Complaint to file its Answer. Respondent failed to submit its Answer within the requisite period of time, so a Default Order was issued on June 8, 2007, awarding Complainant the full amount of its claim.

The Department subsequently received a Motion to Reopen the Complaint from Respondent on June 26, 2007, wherein Respondent raised what appeared to be a valid defense to mitigate the award requested by Complainant. In order to determine the validity of the allegations made by the parties, and to weigh all of the evidence, it was necessary to reopen the proceeding. An Order granting Respondent's Motion to Reopen the Complaint was issued by the Department on January 4, 2008.

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 CFR § 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). However, no ROI was prepared in this case.[1] In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Neither party filed any additional evidence or Briefs.

Findings of Fact

1. Complainant, Wm. Consalo & Sons Farms, Inc., is a corporation whose post office address is 1269 N. Main Road, Vineland, New Jersey, 08360-2538. At the time of the transaction involved herein, Complainant was licensed under the Act.
2. Respondent is an individual, Rafat Abdallah, doing business as Superb Fruit Sales Company, whose post office address is P.O. Box 86304, Los Angeles, California, 90086-0304. At the time of the transaction involved herein, Respondent was licensed under the Act.
3. Complainant, on or about November 27, 2006, by oral contract, sold to Respondent one truckload, consisting of 1560 cartons of tomatoes, from a loading point in Nogales, Arizona, to Respondent, in Los Angeles, California. Complainant's invoice number 100622 indicates the truckload contained two separate lots, 1120 cartons of roma tomatoes at $11.95 per carton, or $13,384.00, and 440 cartons of 5x5 tomatoes at $9.95 per carton, or $4,378.00, for the total agreed purchase price of $17,762.00, delivered, net 21 days.
4. A copy of bill of lading number R0011752, to the carrier K & B

[1]Where the informal handling of the claim by a PACA Branch office generates correspondence and other documents pertinent to the dispute, a Report of Investigation is prepared by the Department so these documents become a part of the record considered by the Presiding Officer in deciding the case. In the instant case, Respondent did not respond to the informal complaint submitted by Complainant, so no Report of Investigation was prepared.

Sanchez, submitted by Complainant, has "pending inspection," handwritten on it. The bill of lading was prepared at shipping point by Complainant's supplier of the tomatoes, Bionova Produce, Inc., Nogales, Arizona, and reflects the tomatoes were shipped f.o.b. to an undesignated receiver in Los Angeles, California. The bill of lading is signed by the driver, "Willy Lopez, 11-25-06."

5. Another version of the same bill of lading number R0011752, submitted by Respondent does not have "pending inspection," handwritten on it. This version of the bill of lading has "12/01/06, 1120 boxes picked up, K & B Sanchez Trucking, Driver Manie, $200.00," handwritten on it.

6. On December 1, 2006, an unrestricted U.S.D.A. appeal inspection for condition, number T-034-0167-01360, was completed at Respondent's warehouse in Los Angeles, California, on a portion of the truckload of tomatoes. The appeal inspection reversed the findings of an earlier U.S.D.A. inspection completed November 28, 2006, not contained in the record. The appeal inspection reflects 1120 cartons of roma tomatoes of Mexican origin were inspected and found to be damaged by 10% sunken discolored areas, 3% skin checks, 1% bruises, 1% abnormal coloring, 1% shoulder bruises, and .5% decay, or 17% total damage. Pulp temperatures were 48 to 49 degrees F. In addition, 255 cartons out of the original 440 cartons of 5x5 tomatoes of Mexican origin were inspected and found to be damaged by 18% sunken discolored areas, 1% bruises, and 8% decay, or 27% total damage. Pulp temperatures were 49 to 51 degrees F. Respondent's total expense for the U.S.D.A. inspections of 1375 cartons of tomatoes was $384.85.

7. Following inspection, Respondent accounted to Complainant for 255 of the original 440 cartons of 5x5 tomatoes shipped as follows:

SUSPENSION AGREEMENT ACCOUNTING OF SALES AND COSTS

Date 12/05/06
Customer & P.O. # 12472-018
Shipper & P.O. # 11752-100622 Invoice # 100622

Produce & Count (255) Tomatoes Vineripe 5 x 5 (Signature)		
Checksum of Condition Defects 27%		
Tomato Sales 255 Boxes	@9.95	$2,537.25
Credited Produce 69 Boxes Dumped / Dented	@9.95	$686.55
TOTAL		$1,850.95
EXPENSES CREDITED		
Reconditioning Charges 255 Boxes @ 1.50		$382.50
Freight Charged on Dumped Product		$0.00
Dumping Charges 69 Boxes @ 1.00		$69.00
Inspection Charges		$384.85
Deduction of Total Cost of Credited Expenses		$836.35
Net Return on Product:		$1,014.60

No monies or other compensation was received for the dumped or donated product.

/ s /
Signature

8. Respondent has not paid Complainant for the truckload of tomatoes.
9. The informal complaint was filed on December 30, 2006, which is within nine months from the accrual of the cause of action.

Conclusions

Before we consider Complainant's sworn allegations in its Complaint and Respondent's sworn allegations in its Answer, we must address the allegation made by Respondent in its unsworn Motion to Reopen the Complaint. Respondent alleged both parties agreed to release each other from any liabilities resulting from the tomatoes in this Complaint.[2] The proponent of a claim has the burden of proof. *Sun World International, Inc. v. J. Nichols Produce Co*., 46 Agric. Dec. 893 (1987). Complainant in return submitted an unsworn Reply to Respondent's Motion to

[2]Motion to Reopen, p. 1, ¶2.

Reopen the Complaint, dated July 10, 2007, wherein it denied making the agreement with Respondent.[3] Since there is no evidence in the record to substantiate Respondent's unsworn allegation of a mutual agreement, we find Respondent has failed to sustain its burden of proof.

In its Complaint, Complainant alleged on or about November 27, 2006, by oral contract, it sold Respondent one truckload of tomatoes from a loading point in the state of Arizona, to Respondent in Los Angeles, California. It alleged Respondent accepted the tomatoes in compliance with the contract and has since failed, neglected, and refused to pay the agreed purchase price of $17,762.00.[4] As the proponent of this claim, Complainant has the burden of proving its allegations 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); *New York Trade Association v. Sidney Sandler,* 32 Agric. Dec. 702 (1973).

As proof of its sale of the truckload of tomatoes and the terms thereof, Complainant submitted copies of its invoice number 100622,[5] and bill of lading number R0011752.[6] Complainant's invoice number 100622, dated November 27, 2006, reflects the truckload consisted of two separate lots of tomatoes sold under delivered terms.[7] One lot

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[3]Reply to Motion to Reopen, p. 1, ¶2.

[4]Complaint, ¶¶ 4-9.

[5]Complaint, Ex. 1.

[6]Reply to Motion to Reopen, bill of lading number R0011752.

[7]7 CFR § 46.43(p), "Delivered or delivered sale means the produce is to be delivered by the seller on board car, or truck or on dock if delivered by boat, at the market in which the buyer is located, or at such other market as is agreed upon, free of any and all charges for transportation or protective service. The seller assumes all risks of loss and (continued...)

consisted of 1120 cartons of roma tomatoes, and the other lot consisted of 440 cartons of 5x5 tomatoes or a total of 1560 cartons. Complainant's bill of lading number R0011752, to the carrier K & B Sanchez, is signed by the driver, "Willy Lopez, 11-25-06," which differs from the November 27, 2006, shipping date reflected on Complainant's invoice. The bill of lading was prepared at shipping point by Complainant's supplier of the tomatoes, Bionova Produce, Inc., Nogales, Arizona, and reflects the truckload of tomatoes was shipped f.o.b.[8] from Nogales, Arizona, to an undesignated receiver in Los Angeles, California. The phrase "pending inspection" is handwritten on this copy of the bill of lading. The shipping dates and terms on the invoice and bill of lading differ. Complainant's invoice reflects a shipping date of November 27, 2006, with delivered terms. Its supplier's bill of lading reflects a shipping date of November 25, 2006, with f.o.b. terms. Since the parties have not questioned the shipping dates or terms, we find Complainant's invoice number 100622 reflects the correct shipping date of November 27, 2006, under delivered terms without reference to any established U.S. grade.

In its sworn Answer, Respondent denied all of Complainant's allegations and alleged problems with the tomatoes, and alleged "part of the tomatoes was [*sic*] picked up by the shipper."[9] Respondent, however, admitted in its Answer it owes Complainant $2,855.35 for the tomatoes per the U.S. Department of Commerce Mexican Tomato

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[7](...continued)
damage in transit not caused by the buyer."

[8]7 CFR § 46.43(i), which defines f.o.b. as meaning ". . . 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 the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed."

[9]Answer, ¶¶4-9, and Answer, Ex. A.

Suspension Agreement (hereinafter Suspension Agreement).[10]

In support of its sworn allegations, Respondent submitted a copy of the findings from an unrestricted U.S.D.A. appeal inspection, number T-034-0167-01360, completed December 1, 2006, at its warehouse in Los Angeles, California, on a portion of the truckload of tomatoes.[11] The appeal inspection reversed the findings of an earlier U.S.D.A. inspection completed on November 28, 2006, not contained in the record. The earlier inspection was completed one day after Complainant's alleged shipping date of November 27, 2006. The U.S.D.A. appeal inspection of December 1, 2006, reflects the tomatoes had already been unloaded at time of inspection. Therefore, we conclude Respondent accepted the full truckload of tomatoes as Complainant alleges, since the unloading or partial unloading of the transport is an act of acceptance.[12]

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). 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). Since neither party has alleged any abnormality in the transportation service and conditions, we conclude transportation was normal. *Dave Walsh v. Rozak's*, 39 Agric. Dec. 281 (1980); *Veg-A-Mix v. Wholesale Produce Supply,* 37 Agric. Dec. 1296 (1978). Likewise, neither party has questioned the timeliness of the inspections.

The unrestricted appeal inspection confirmed the tomatoes were of

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[10]Notice of suspension of antidumping investigation on fresh tomatoes from Mexico, 73 FR 4831 (2008). The Suspension Agreement is also available on the Internet at www.ia.ita.doc.gov/tomato.

[11]Answer, Ex. B, p. 1-2.

[12]7 CFR § 46.2 (dd)(1).

Mexican origin. Since Respondent alleged the tomatoes were purchased under the Suspension Agreement, and Complainant has not disputed Respondent's allegation, we conclude the tomatoes in question were sold under the terms of the Suspension Agreement. The appeal inspection reflects the 1120 cartons of roma tomatoes were damaged by 10% sunken discolored areas, 3% skin checks, 1% bruises, 1% abnormal coloring, 1% shoulder bruises, and .5% decay, or 17% total damage. Pulp temperatures were 48 to 49 degrees F. In addition, the appeal inspection reflects the 255 cartons of 5x5 tomatoes of Mexican origin were inspected and were found to be damaged by 18% sunken discolored areas, 1% bruises, and 8% decay, or 27% total damage. Pulp temperatures were 49 to 51 degrees F. Respondent's total expense for the U.S.D.A. inspections of 1375 cartons of tomatoes was $384.85.

We will now examine the relevant parts of the Suspension Agreement to determine whether Complainant breached the contract for the tomatoes based upon the appeal inspection results as Respondent alleges. Appendix D, of the January 28, 2008, Suspension Agreement provides specific procedures for determining whether a seller breached its sales contract, and the procedures for adjusting the sales price of Mexican grown tomatoes if a breach occurred, as follows:

> Appendix D, Part A(1), states: "A USDA inspection certificate must be provided to support claims for rejection of all or part of a lot. Further, no adjustments will be made for failure to meet suitable shipping conditions unless supported by an unrestricted USDA inspection."
>
> Appendix D, Part A(2), states: "If the USDA inspection indicates that the lot has: (1) Over 8% soft/decay condition defects; (2) over 15% of any one condition defect; or (3) greater than 20% total condition defects, the receiver may reject the lot or may accept a portion of the lot and reject the quantity of tomatoes lost during the salvaging process. In those instances, price adjustments will be calculated as described below. For purposes of this Agreement, a condition defect is any defect listed in the chart in part A.5. below. When a lot of tomatoes has condition defects in excess of those outlined above as documented on a

USDA inspection certificate, the documented percentage of the tomatoes with condition defects are considered DEFECTIVE tomatoes."

Appendix D, Part A(3), states: "No adjustments will be made for failure to meet suitable shipping conditions if the USDA inspection certificate does not indicate one of the condition thresholds outlined above."

Appendix D, Part A(4), states: "The USDA inspection must be called for no more than six hours from the time of arrival at the destination specified by the receiver and be performed in a timely fashion thereafter."

Appendix D, Part A(5), "Under this Agreement, adjustments to the sales price of signatory tomatoes will be permitted only for condition defects. The term ''condition defect'' is intended to have the same definition recognized by the Fresh Produce Branch of the United States Department of Agriculture, with the exception of abnormal coloring, and, therefore, covers the following items:

CONDITION DEFECTS

Sunken & Discolored Areas
Sunburn
Internal Discoloration
Freezing Injury
Chilling Injury
Gray Mold Rot
Bacterial Soft Rot
Soft/Decay
Bruising
Nailhead Spot
Skin Checks

> Decayed and Moldy Stems
> Waxy Blister
> White Core
> Discolored or Dried-out Jelly Around Seeds"
>
> Appendix D, Part B, states: "If the lot contains condition defects greater than those outlined above and the receiver does not reject the entire lot of tomatoes, the Department will factor certain adjustments into the transaction price . . ."
>
> Appendix D, Part D, states: "As explained in part A.1. above, the Department will only allow adjustments to the transaction price for condition defects if the USDA inspection is unrestricted. During the time between the call for inspection and the arrival of the USDA inspector, the
> receiver might sell part of the lot and, therefore, by the time the USDA inspector arrives, that part is not available for inspection. If the USDA inspector is allowed full access to the partial lot, the Department will consider this an unrestricted partial-lot inspection. Alternatively, if the USDA inspector is not allowed full access to the partial lot, the Department will deem it a restricted inspection. No adjustments will be made for failure to meet suitable shipping conditions if the USDA inspection is restricted. For purposes of this Agreement, when calculating an adjustment for failure to meet suitable shipping conditions where an unrestricted partial-lot inspection has taken place, only the portion of the lot inspected is eligible for adjustment. The portion of the lot that the receiver sold prior to the inspection will not be eligible for an adjustment based on the USDA inspection."

Next, we will apply the relevant parts of the Suspension Agreement outlined above to the case before us. The record does not indicate 185 cartons of the original 440 cartons of 5x5 tomatoes were ever U.S.D.A. inspected. These 185 cartons are not eligible for an adjustment under the terms of the Suspension Agreement, Appendix D, Part D. Respondent, having failed to prove any breach by Complainant on these

185 cartons of tomatoes, is liable to Complainant for the full agreed purchase price of $9.95 per carton delivered, or a total of $1,840.75. An unrestricted U.S.D.A. appeal inspection made on the 1120 cartons of roma tomatoes disclosed less than 20% damage by scorable condition defects, less than 8% soft and decay, and less than 15% of any single scorable condition defect. Thus, Respondent has failed to prove any breach of contract by Complainant on these 1120 cartons of tomatoes, and is not eligible for an adjustment on the 1120 cartons under the terms of the Suspension Agreement, Appendix D, Parts A(1) through A(5). However, before we can determine Respondent's liability to Complainant for the 1120 cartons of roma tomatoes, we will address Respondent's allegation "part of the tomatoes was [*sic*] picked up by the shipper." In an effort to support this allegation, Respondent submitted its version of bill of lading number R0011752,[13] which differs from the version submitted by Complainant.[14] Respondent's version of the bill of lading has handwritten on it, "12/01/06, 1120 boxes picked up K & B Sanchez Trucking, Driver Manie, $200.00." After reviewing this document, we are unable to conclude with reasonable certainty whether the 1120 cartons were picked up on behalf of Complainant, or whether Complainant authorized or accepted a return delivery of the tomatoes from anyone. Respondent is liable to Complainant for the full agreed price of $11.95 per carton delivered for the 1120 cartons of roma tomatoes, or a total of $13,384.00.

The 255 cartons of 5x5 tomatoes inspected were found to be damaged by more than 20% of scorable condition defects, and more than 15% of a single scorable condition defect, sunken discolored areas.[15] Under the terms of the Suspension Agreement, Appendix D, Parts A(1) through A(5), Respondent has proven a breach of contract by Complainant on this portion of the original truckload of tomatoes, and

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[13]Answer, ¶4, and Answer, Ex. A.

[14]Reply to Motion to Reopen, bill of lading number R0011752.

[15]Answer, Ex. B, p. 1-2.

Respondent is entitled to recover provable damages resulting from Complainant's breach of contract. 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.[16]

To support its damage claim under the terms of the Suspension Agreement, Appendix D, Parts A and B, Respondent submitted a copy of its accounting with its sworn Answer.[17] The accounting is in line with the terms of the Suspension Agreement, and Complainant has not raised any specific issues regarding Respondent's accounting. Respondent deducted damages and expenses on the 255 cartons of tomatoes from their original agreed price as follows:

SUSPENSION AGREEMENT ACCOUNTING OF SALES AND COSTS		
Date 12/05/06		
Customer & P.O. # 12472-018		
Shipper & P.O. # 11752-100622 Invoice # 100622		
Produce & Count (255) Tomatoes Vineripe 5 x 5 (Signature)		
Checksum of Condition Defects 27%		
Tomato Sales 255 Boxes	@9.95	$2,537.25
Credited Produce 69 Boxes Dumped / Dented	@9.95	$686.55
	TOTAL	$1,850.95
EXPENSES CREDITED		
Reconditioning Charges 255 Boxes @ 1.50		$382.50
Freight Charged on Dumped Product		$0.00
Dumping Charges 69 Boxes @ 1.00		$69.00
Inspection Charges		$384.85
Deduction of Total Cost of Credited Expenses		$836.35
Net Return on Product:		$1,014.60

[16]U.C.C. § 2-714(2).

[17]Answer, Ex. C.

No monies or other compensation was received for the dumped or donated product.

/s/
Signature

As previously mentioned, the U.S.D.A. inspection revealed the 255 cartons of 5x5 tomatoes were damaged by a total of 27% condition defects. Respondent, under the terms of the Suspension Agreement, Appendix D, Part B, is allowed to deduct as its damages the total costs associated directly with salvaging and reconditioning the lot, including U.S.D.A. inspection fees, freight, repacking expenses, and dumping expenses associated with the 27% defective tomatoes. Respondent's accounting reflected the value of the tomatoes as warranted was the agreed purchase price of $9.95 per carton delivered, or $2,537.25, for the 255 cartons of tomatoes inspected. Respondent correctly deducted as its damages 27% of the value of the 255 cartons of tomatoes inspected, or a total allowable deduction of $686.55, for the 69 cartons of damaged tomatoes dumped from the lot. In addition, Respondent correctly deducted its total expenses associated directly with salvaging and reconditioning the lot, which include $1.50 per carton, or $382.50, for reconditioning expenses, and $1.00 per carton, or $69.00, for dumping expenses. Complainant has not alleged these expenses exceed what was usual and customary in Los Angeles, California, at the time. We must prorate Respondent's allowable damages for the U.S.D.A. inspection expense, since Respondent's deduction of the full cost for the U.S.D.A. inspection, $384.85, is not warranted. As previously mentioned, the U.S.D.A. inspection covered a total of 1375 cartons of tomatoes, and we found Complainant had breached the contract on only 255 cartons of 5x5 tomatoes. Therefore, by dividing Respondent's total cost of the inspection, or $384.85, by the 1375 cartons inspected, we conclude each carton of tomatoes cost Respondent roughly $.28 to inspect. Therefore, we will allow Respondent a total deduction of $.28 per carton, or $71.40, for its inspection costs for 255 cartons of

tomatoes. Respondent's total damages are therefore $1,209.45. By subtracting Respondent's total damages of $1,209.45 from the value of the 255 cartons of tomatoes as warranted, which is $2,537.25, we find Respondent liable to Complainant in the amount of $1,327.80 for the 255 cartons of 5x5 tomatoes.

By adding our finding of $1,327.80 to the agreed upon amounts of $1,840.75 and $13,384.00, for which we have already found Respondent liable, we find Respondent liable to Complainant in the total amount of $16,552.55 for the full truckload of 1560 cartons of tomatoes purchased and accepted on Complainant's invoice number 100622. The record does not contain evidence of any payments made by Respondent on Complainant's invoice number 100622.

Respondent has raised a number of additional unsworn defenses, which we will address at this time. Respondent claims Complainant should not be allowed to profit from defective tomatoes Respondent did not promise to pay for, and Complainant was dishonest, not acting in good faith, misrepresenting itself, and acting illegally by seeking compensation from this forum for events, which occurred when Respondent had severe pneumonia, in light of the aforementioned mutual agreement to release each other from any liabilities.[18] Complainant contends it was not advised Respondent had severe pneumonia.[19] These additional contentions of Respondent are moot, since we have already determined Respondent failed to sustain its burden to prove a mutual agreement to release each other from any liabilities.

Respondent's failure to pay Complainant $16,552.55 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires 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

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[18]Motion to Reopen the Complaint, ¶¶2-7.

[19]Reply to Motion to Reopen the Complaint, ¶7.

Valley Tie Co., 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, the Secretary 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 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 $16,552.55, with interest thereon at the rate of .49 % per annum from January 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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A-W PRODUCE CO. v. FERRAL BERRY D/B/A CHIP BERRY PRODUCE.
PACA Docket R-08-036.
Decision and Order.
Filed October 2, 2009.

PACA-R – Interstate Commerce.

Physical movement of a commodity across a state border is not a prerequisite to jurisdiction under the PACA.

Interstate Commerce.

Shipments are considered to have occurred in "interstate commerce" if: (i) the produce regularly moves in interstate commerce; and (ii) the shipper or receiver of the shipments was also routinely engaged in interstate commerce. It is not necessary to demonstrate that each shipment was actually intended to move out of the state in which it was grown. *In re: The Produce Place*, 53 *Agric. Dec.* 1715 (1994), aff'd, *The Produce Place v. USDA*, 91 F.3d 173 (D.C. Cir. 1996); see, also *Steve Almquist d/b/a Steve Almquist Sales & Brokerage v. Mountain High Potatoes & Onion, Inc.* 65 Agric. Dec. 1418 (2006).

Ciarra A. Toomey, Presiding Officer
Complainant's Attorney, Craig A. Stokes
Respondent's Attorney, John Fahle
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.*), in which Complainant originally sought a reparation award from the Respondent in the amount of $33,088.32 in connection with six truckloads of watermelons shipped and sold in interstate commerce in accordance with an oral contract.[20]

A copy of the Report of Investigation prepared by the Department was served upon the parties. A copy of the formal Complaint was served upon the Respondent. Respondent filed an Answer thereto denying liability to Complainant, raising several affirmative defenses, and requesting an oral hearing.

Because the amount sought in the formal complaint was over $30,000.00 and an oral hearing was requested, an oral hearing was held in accordance with section 47.15 of the Rules of Practice (7 C.F.R. §

[20]On the day of the hearing and before the proceeding began, Complainant and Respondent settled one of Complainant's claims, which then decreased the reparation award Complainant sought to $26,093.32, in connection with five truckloads of watermelons.

47.15). The oral hearing was held on July 8, 2008 in San Antonio, Texas before Ciarra A. Toomey, Presiding Officer. The Complainant was represented by Craig A. Stokes, Esq. of Santos Stokes LLP, located in San Antonio, Texas, and the Respondent was represented by John Fahle, Esq. of Fahle Law Firm located in San Antonio, Texas. Complainant presented two witnesses, Mr. Ferral Berry, the Respondent, and Mr. Chad Szutz, Complainant's sale representative. In accordance with section 47.7 of the Rules of Practice (7 C.F.R. § 47.7), the Department's Report of Investigation is considered evidence in this proceeding. Complainant offered 10 exhibits into the record (designated CX 3 through CX-12). Respondent called no additional witnesses and offered no documentary evidence for admittance into the record.

After the hearing, the parties were afforded the opportunity to file briefs and claims for fees and expenses. A deadline of August 25, 2008 was imposed for both parties. Complainant submitted its brief as well as claims for fees and expenses by the imposed deadline. Respondent did not file a brief or objections to the Complainant's claim for fees and expenses within the time period set forth in section 47.19(5) of the Rules of Practice (7 C.F.R. § 47.19(5)).

Findings of Fact

1. Complainant, A-W Produce Co., is a corporation whose mailing address is 2300 Vo-Tech Dr., Weslaco, Texas 78596.
2. Respondent, Ferral Berry, d/b/a Chip Berry Produce, is an individual whose mailing address is 17644 FM 2493, Flint, Texas 75762.[21] At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about June 20, 2006, Complainant, by oral contract, sold and shipped to Respondent, one truckload of watermelons consisting of 60 pallets, having a total weight of 39,690 pounds, for a total f.o.b. contract price of $6,350.40.

[21] This was true at the time when Respondent answered the Complaint. However, Respondent testified at trial that he now operates as a corporation. TR 12.

4. On or about June 21, 2006, Complainant, by oral contract, sold and shipped to Respondent, one truckload of watermelons consisting of 60 pallets, having a total weight of 38,901 pounds, for a total f.o.b. contract price of $6,224.16.
5. On or about June 21, 2006, Complainant, by oral contract, sold and shipped to Respondent, one truckload of watermelons consisting of 60 pallets, having a total weight of 40,714 pounds, for a total f.o.b. contract price of $6,514.24.
6. On or about June 21, 2006, Complainant, by oral contract, sold and shipped to Respondent, one truckload of watermelons consisting of 60 pallets, having a total weight of 39,099 pounds, for a total f.o.b. contract price of $6,255.84.
7. On or about June 23, 2006, Complainant, by oral contract, sold and shipped to Respondent, one truckload of watermelons consisting of 60 pallets, having a total weight of 38,523 pounds, for a total f.o.b. contract price of $6,163.68.
8. Respondent paid Complainant $5,380.00 for the watermelons described in Findings of Fact 3-7 with check number 27835 on August 18, 2006.
9. The informal complaint was filed on July 9, 2007, which was within nine months after the cause of action alleged herein accrued.

Conclusions

Complainant brought this action to recover the unpaid balance of the agreed purchase price for five truckloads of watermelons sold to Respondent. Respondent has accepted the watermelons in compliance with the contract of sale, but has only paid $5,380.00 of the agreed purchase price of $31,508.32. In both its Answer, and at the oral hearing, Respondent admitted he purchased the watermelons for the amount claimed. However, Respondent alleged that, following delivery, the parties orally agreed to modify the terms of the original sales contract. Respondent alleged that the parties' subsequent oral agreement

changed the invoice prices to open prices. (TR, 23)[22]

Before considering the merits of Respondent's claim, we must address an issue raised by Respondent. Respondent, both in its Answer and at the hearing, objected to the Department's jurisdiction over this matter because four of the five truckloads never moved into or out of the State of Texas and thus were not in interstate commerce. (TR, 6) Relevant to establishing the existence of jurisdiction in this case, we must determine whether the subject transactions were in interstate commerce.

The term "interstate commerce" is defined in section 1 of the Act as: "….commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia." (7 U.S.C.§ 499a(b)(3)). Under the same section the Act states:A transaction in respect of any perishable agricultural commodity shall be considered in interstate or foreign commerce if such commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing. Commodities normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. (7 U.S.C. § 499a(b)(8)).

The shipments in this case were made in the course of interstate commerce. Shipments are considered to have occurred in "interstate commerce" if: (i) the produce regularly moves in interstate commerce; and (ii) the shipper or receiver of the shipments was also routinely engaged in interstate commerce. It is not necessary to demonstrate that

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[22]The transcript will be referenced by "TR".

each shipment was actually intended to move out of the state in which it was grown. *In re: The Produce Place*, 53 *Agric. Dec.* 1715 (1994), aff'd, *The Produce Place v. USDA*, 91 F.3d 173 (D.C. Cir. 1996); see, also *Steve Almquist d/b/a Steve Almquist Sales & Brokerage v. Mountain High Potatoes & Onion, Inc.* 65 Agric. Dec. 1418 (2006). Additionally, Congress has found that watermelons move in the channels of interstate commerce, and watermelons that do not move in such channels directly affect interstate commerce. 7 U.S.C 4901 (a)(4).

Respondent testified that he is regularly engaged in the shipment of watermelons in interstate commerce. (TR 12, 13). Moreover, it is undisputed that the shipments giving rise to Complainant's claim were shipped to Whole Foods, Kroger stores, and Dillon Companies of Hutchison, Kansas. (TR 13, 19). Whole Foods and Kroger stores are national grocery store chains routinely engaged in interstate commerce. Dillon Companies is a wholly owned subsidiary of Kroger stores is also engaged in interstate commerce as evidenced by its receipt of watermelon shipments from Complainant.

As noted above, under the D.C. Circuit court's decision in *The Produce Place v. USDA,* 91 F.3d 173, to establish jurisdiction over a transaction, it need only be shown that the commodity shipped was of the type that regularly moves in interstate commerce and was shipped to or from a dealer that does a substantial portion of its business in interstate commerce. The transactions between Complainant and Respondent satisfy both of these jurisdictional elements and, thus, properly fall within the Department's jurisdiction under the Act.

Furthermore, in *The Produce Place*, the U.S. Court of Appeals for the D.C. Circuit stated that actual movement between states is not required for PACA jurisdiction to exist. Likewise, the notion that "limiting the provisions of PACA to commodities that have physically crossed state lines or to situations where the parties specifically envisioned such a crossing" has been soundly rejected. *Fishgold v. Onbank & Trust Co.,* 43 F. Supp. 2d 346 (1999). Without some additional information suggesting that the transaction in question was not entered into the course of interstate commerce, we are not persuaded by Respondent's argument. As the Presiding Officer did at the hearing, Respondent's objection to the Secretary's jurisdiction over this case is

denied.

We now turn to the merits of Respondent's claim that, following delivery and acceptance of the five truckloads of watermelons, the parties orally agreed to modify the terms of the original sales contract. It is well settled that 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); *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 to prove both a breach and damages rests with the buyer of accepted goods. *Perez Ranches, Inc. d/b/a P.R.I. Sales v. Pawel Distributing Co.*, 48 Agric. Dec. 725 (1989); *Santa Clara Produce, Inc., v. Caruso Produce, Inc.*, 41 Agric. Dec. 2279 (1982); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971). See also, 7 C.F.R. §46.2(dd). In absence of any proof of damages resulting from the breach of contract, the buyer is held liable for the full contract price. UCC §2-607(4); *Mowen v. Cooper*, 39Agric. Dec. 1549, 1552 (1980). Evidence of breach after acceptance should be proven by a cognizable federal inspection. See *Mutual Vegetable Sales* v. *Select Distributors, Inc*., 38 Agric. Dec. 1359 (1979).

In the instant case, Respondent claimed that following delivery and acceptance of the five truckloads of watermelons, the parties orally agreed to modify the terms of the original sales contract. The party alleging the modification of original contract terms has the burden of proof in establishing its existence. *F. H. Hogue Produce Company v. M. Singer's Sons Corp*., 33 Agric. Dec. 451 (1974). The essential question in this case is whether the conversations held between Complainant salesman, Mr. Szutz, and the Respondent effectively modified the original contract.

Respondent testified that each and every one of the five truckloads he accepted was subsequently rejected by Whole Foods, Kroger, and Dillon. (TR, 14) Respondent further testified that he contacted Mr. Szutz the same day the rejection occurred for each and every one of the

five loads of watermelons. (TR, 23) Additionally, Respondent testified that during each and every conversation, Mr. Szutz authorized him to "move the product and do as good as I could to get somebody to unload it." (TR, 22) Respondent testified that the understanding with Complainant was that the invoice prices changed to an open price. (TR, 23)

Respondent also testified that he notified Complainant that internal inspections were performed and that he provided Complainant with the in-house inspections from Kroger. (TR, 23) In fact, Respondent testified that he faxed these inspections to Complainant "everyday on the days the load was rejected." (TR, 23) However, Mr. Stutz testified the first time he became aware that anyone had a problem with the loads was at the end of July when he started requesting payment for the watermelons. (TR, 34-5) Additionally, Mr. Szutz stated that if he were to have trouble with the produce, he would either request a federal inspection or move the product himself. (TR, 36) Mr. Szutz did not deny that the Kroger rejected the loads, but testified that he saw Kroger's in-house rejection for the first time at the end of July after he requested payment for the loads from the Respondent. (TR, 43)

Respondent admitted that he could not prove that he faxed inspection reports to Complainant. (TR, 25) Respondent admitted that he receives a long-distance phone bill, but did not produce any phone records at the hearing. In fact, Respondent offered no evidence into the record to support his oral testimony. Thus, we conclude that Respondent has failed to meet its burden of proving that a modification of the contract occurred.

We are therefore faced with the question of whether there was a breach of contract on behalf of the Complainant as to the five truckloads of watermelons. Respondent testified that that he contacted Complainant subsequent to his acceptance of each of the five truckloads and protested the quality and condition of the watermelons received. Respondent further testified that Complainant did not want an inspection of the product. (TR, 27) Mr. Szutz, on the other hand, testified that he never agreed to accept private inspection certificates in lieu of U.S.D.A. certificates because if he were to have trouble with the produce he would either request a federal inspection or if he waived the federal inspection

he would have moved the product himself because he has customers all over the United States that he could move the product. (T 35, 36) Because Respondent did not secure federal inspections of the watermelons and "we have often discounted testimonial evidence concerning the condition of perishable commodities and stated the necessity of obtaining a neutral inspection showing the exact extent of damages," Respondent failed to meet the burden of proof. See *G. J. Albert, Inc. v. Salvo*, 36 Agric. Dec. 240 (1977); *Salt Lake Produce Co., Inc. v. Butte Produce Company, Inc*., 32 Agric. Dec. 1732 (1973); *B.G. Anderson Company, Inc. v. Mountain Produce Co*., 29 Agric. Dec. 513 (1970).

Notwithstanding his failure to meet the aforementioned burden, Respondent also failed to introduce adequate or precise testimony concerning the amount of damages suffered as a result of the Complainant's alleged breach of the agreements. Respondent testified that he did not sell the watermelons, but rather consigned the load. Respondent stated that he "had somebody unload it on an open price to get them to sell it," and when he got the return, he paid Complainant. (TR, 30)

Respondent admitted that there is no record or account of sale showing the dates of sale, the quantities sold, the prices of sale, or the location of sale, by which he ended up with some returns for some of the five truckloads. (TR, 21) Respondent testified that both the U.S.D.A. and Complainant are unable to determine his diligence in reselling the watermelons because he did not provide a liquidation. (TR 21, 35) Therefore, even if the Respondent had met his burden of proof as to the alleged breach he would be without remedy because if his failure to introduce adequate evidence in support of his claim of damages.

We find that the Respondent has failed to show that Complainant breached its contracts of sale. Respondent's failure to pay Complainant $26,093.32 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). Because the Secretary is charged with the duty of awarding damages, he 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).

Section 7(a) of the PACA (7 U.S.C. §499g(a)) states that, after an oral reparation hearing under the PACA, the "Secretary shall order any commission merchant, dealer, or broker, who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any such hearing." Complainant is the prevailing party and has submitted a claim for fees and expenses in the amount of $9,071.69. These fees include the expenses of two attorneys from the law firm of Santos Stokes, LLP: Craig A. Stokes (Partner) and Jesse Lopez (Associate). Respondent has not objected to Complainant's claim.

Fees and expenses will be awarded to the extent that they are reasonable. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). It is the province of the Secretary to determine the reasonableness of the requested fees and expenses. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In reviewing Complainant's claim for fees and expenses, we take into consideration that this case is not overly complex and the hearing should not have required extensive preparation. The activities conducted by Complainant's attorneys in

connection with the hearing consisted of applying for the issuance of a subpoena and preparing for and attending the July 8, 2008, oral hearing. Complainant has submitted this claim in the form of an itemized invoice of charges and expenses, with each item containing a short description of the activity billed.

First, Complainant is claiming a total of $6,788.00 for 31.25 hours of hearing preparation spent by both attorneys in this case.[23] Of this amount, $4,380.00 includes review of the pleadings, witness and exhibit lists, and the application of a subpoena duces tecum. It is well settled that expenses which would have been incurred under the documentary procedure are not recoverable under section 7(a) of the Act which would include findings of fact, conclusions of law and post hearing briefs. *See Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). Accordingly, Complainant will only be allowed $2,408.00 for that portion of its claim.

Second, Complainant is claiming $1,950.00 for 6 hours spent at the oral hearing. However, the hearing only lasted an hour. Accordingly, we will only allow $325.00 for that appearance. Finally, Complainant is claiming reimbursement for additional expenses totaling $363.69. Of this amount, $297.00 is for subpoena services and witness fees. Under the Rules of Practice (7 C.F.R. 47.18), fees and mileage shall be paid only to witnesses "who are subpoenaed and who appear in the proceeding." Complainant subpoenaed one witness, but did not call that witness to testify the day of the oral hearing. Because the subpoenaed witness did not appear in the proceeding, the witness and mileage fees and all fees associated with the subpoena will not be allowed. The remaining portion of Complainant's claim ($66.69) is allowed.

In view of the above, we conclude that Complainant should be awarded further reparation in the amount of $2,799.69.

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[23]This included approximately 10 hours at the rate of $325.00-$350.00 per hour for Mr. Stokes and approximately 22 hours at the rate of $190.00-$200.00 per hour for Mr. Lopez.

Order

Within 30 days from the date of this Order Respondent shall pay Complainant, as reparation, $26,093.32 with interest thereon at the rate of 0.41% per annum from August 1, 2006 until paid, plus $300.00 reimbursement for Complainant's handling fee.

Within 30 days from the date of this Order Respondent shall pay Complainant as additional reparation, Complainant's fees and expenses in the amount of $2,799.69, with interest thereon at the rate of 0.41% 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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[1]SUNRIDGE FARMS, INC. v. THE ALPHAS COMPANY, INC.
PACA Docket No. R-08-097.
Order on Reconsideration.
Filed December 11, 2009.

PACA-R – Damages – Cover.

A buyer who has accepted non-conforming goods may still be entitled to damages for cover. In such a case, the buyer's damages will be measured as the difference between the cost of cover and the proceeds collected from the prompt resale of the accepted goods.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
Complainant, Western Growers Assn.
Respondent, Pro se.
Order on Reconsideration issued by William G. Jenson, Judicial Officer.

In this reparation proceeding under the Perishable Agricultural

[1] As we noted in the decision, the hearsay testimony of Complainant's Mark McBride on this issue cannot be considered. (D&O, p. 9)

Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), a Decision and Order was issued on June 26, 2009, in which Respondent was ordered to pay Complainant, as reparation, $24,436.37, with interest thereon at the rate of 0.51% per annum from August 1, 2007, until paid, plus the amount of $300.00. On July 15, 2009, the Department received from Respondent a petition for reconsideration of the Order. Complainant was served with a copy of the petition and afforded the opportunity to submit a reply. On August 7, 2009, the Department received from Complainant a reply to Respondent's petition, requesting that the original Order be affirmed.

In the petition, Respondent asks that we review the facts and evidence again concerning the issue of whether Complainant was timely notified of a breach of contract with respect to the lettuce billed on Complainant's invoice 275333. In the decision, we were unconvinced by the evidence submitted by Respondent to substantiate its allegation that the USDA inspection results pertaining to the lettuce were promptly shared with Complainant, primarily because the fax confirmations purportedly evidencing such notice reference a fax transmission that took place prior to the inspection. In addition, we concluded that the transmission of the certificates by the USDA, Fresh Products Branch, to Complainant, did not constitute notice from Respondent of a breach of contract by Complainant. (D&O, p. 10) Respondent raises no new issues in its petition that alter these conclusions. We have, however, determined upon further review of the evidence that the issue of notice was not fully considered in the Decision and Order of June 26, 2009, due to the singular emphasis placed on the question of whether the USDA inspection certificate was timely sent to Complainant. Specifically, we note that in addition to the arguments and evidence presented by the parties concerning the transmission of the USDA inspection certificate, the record also contains sworn testimony from Respondent's President, John (Yanni) Alphas, wherein Mr. Alphas states "[a]ll pertinent information regarding this load and its condition was addressed with Grant Oswalt upon receipt of this load." (Ans. Stmt. p. 1) Complainant's salesman, Grant Oswalt, passed away prior to Complainant's receipt of the statement from Mr. Alphas. Since it was therefore impossible for Complainant to submit a rebuttal statement

from Mr. Oswalt, no negative inference will be taken from its failure to do so. We nevertheless have within the record a sworn statement from Respondent on the issue of notice which has not been rebutted by any credible evidence from Complainant.[2] Statements that are sworn and have not been controverted must be taken as true in the absence of other persuasive evidence. *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675 (1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265 (1982). Accordingly, we find the preponderance of the evidence supports Respondent's contention that Complainant's Grant Oswalt was timely notified of the poor condition of the lettuce billed on Complainant's invoice 275333.

With respect to the sufficiency of the notice required to preserve a buyer's right to recover damages for a breach of warranty, Comment 4 to U.C.C. § 2-607(3)(a) states:

> The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer, as under the section covering statements of defects upon rejection (Section 2-605). Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation. (Emphasis supplied)

We therefore find that the verbal notice provided to Complainant's Grant Oswalt at the time the lettuce arrived at the contract destination was sufficient to preserve Respondent's right to assert a claim for damages.

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[2] As we noted in the decision, the hearsay testimony of Complainant's Mark McBride on this issue cannot be considered. (D&O, p. 9)

Respondent, through its Counterclaim, seeks to recover as damages the sum of $6,259.20, which amount represents the additional cost Respondent allegedly incurred to purchase replacement product for the lettuce in question. The issue of whether a buyer who has accepted is entitled to recover damages for cover is addressed in *Pandol Bros., Inc. v. Prevor Marketing International, Inc*., 49 Agric. Dec. 1193 (1990), note 11, wherein we stated:

> The concept of cover following acceptance is not frequently encountered. However, that such an avenue is open to an accepting buyer is explicitly stated in the comment 1 to section 2-601:
>
> > A buyer accepting a non-conforming tender is not penalized by the loss of any remedy otherwise open to him. This policy extends to cover. . . .
>
> In addition the text of section 2-607 on "Effect of Acceptance" states, in part, ". . . acceptance does not of itself impair any other remedy provided by this Article for non-conformity." The reference in section 2-714 on "Buyer's Damages for Breach in Regard to Accepted Goods" to the availability, in a proper case, of consequential damages under section 2-715 makes it clear that such is contemplated by the UCC. Cover in such circumstances might be more comfortably thought of under the heading of a buyer's duty to minimize damages. Consequential damages are available only if the buyer has taken reasonable steps to prevent their occurrence. Of course such a buyer has a duty to promptly and properly resell the goods accepted. If he covers, his damages are the difference between the cost of cover and what was realized from the salvage sale. If he does not cover, but consequential damages are nevertheless recoverable because they "could not reasonably be prevented by cover or otherwise", then consequential damages are in addition to damages for breach as to accepted goods computed in the normal manner. *See Nyquist v. Randall,* 819 F.2d 1014 (11th Cir. 1987). (Emphasis supplied)

In accordance with the foregoing, we conclude Respondent's

damages in the instant case should be measured as the difference between the cost of cover, *i.e* , the cost of Respondent's replacement purchase, and the proceeds realized from the salvage sale of the product.

With respect to the cost of Respondent's replacement purchase, Respondent submitted a copy of an invoice from Fastrac Logistics, Chelsea, Massachusetts, showing that on July 17, 2007, Respondent purchased 320 cartons of naked lettuce[3] at $18.00 per carton, or $5,760.00, and 320 cartons of cello lettuce at $20.00 per carton, or $6,400.00, for a total invoice price of $12,160.00. (Ans. Ex. B) We conclude this amount represents Respondent's cost of cover. There is no account of sales with which to determine the salvage value of the lettuce because Respondent reported that all of the lettuce was dumped. (ROI Ex. 7-9, 7-10) Upon review, we find the USDA inspection of the 320 cartons of liner lettuce in the shipment, which was performed July 17, 2007, five days after shipment, and disclosed 61 percent average defects, including 54 percent average decay, is sufficient to establish that this lettuce had no commercial value. (ROI Ex. 5-8) We therefore find the salvage value for the 320 cartons of liner lettuce was $0.00.

The same inspection also covers the 320 cartons of cello lettuce in the shipment, and discloses 25 percent average defects, including 10 percent decay. (ROI Ex. 5-7) These results do not, in our opinion, establish that the 320 cartons of cello lettuce in the shipment were not merchantable. Moreover, the second USDA inspection Respondent secured to show the lettuce was dumped, which disclosed 99 percent average defects, was performed on August 20, 2007, more than a month after the lettuce was received. (ROI Ex. 5-10) As such, it is too remote from the time of arrival to show anything more than the normal senescence of the product. Consequently, we are unable to conclude the 320 cartons of cello lettuce in the shipment had no salvage value. It is therefore necessary to determine the salvage value of this lettuce.

The Boston Terminal Price Report for July 17, 2007, shows California iceberg lettuce film-wrapped 24's were mostly selling for $17.00 to $18.00 per carton, with those in fair condition selling for

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[3]The lettuce Respondent purchased from Complainant is naked liner lettuce which may be alternately referred to as "naked" or "liner."

$12.00 per carton, and those in ordinary condition selling for $5.00 to $6.00 per carton. Based on the condition defects disclosed by the USDA inspection, we find the average market price of $5.50 per carton for lettuce in ordinary condition represents the best available measure of the salvage value of the lettuce. Accordingly, we find the lettuce had a salvage value of $5.50 per carton, or a total of $1,760.00 for the 320 cartons of cello lettuce in question.

As we mentioned, Respondent's damages are measured as the difference between the cost of cover, $12,160.00, and the salvage value of the lettuce, $1,760.00, or $10,400.00. Respondent may also recover as incidental damages the USDA inspection fees totaling $239.50,[4] and the $500.00 cost it incurred to dump the liner lettuce.[5] (ROI Ex. 5-7, 5-9, 5-11) With this, Respondent's total damages amount to $11,139.50. When Respondent's damages totaling $11,139.50 are deducted from the total contract price of $8,303.96 for the mixed vegetables billed on invoice 275333, there is a net loss of $2,835.54, which Respondent may offset against the amount due for the other invoices included in the Complaint.

Based on the foregoing discussion, we have determined that Respondent incurred a loss of $2,835.54 as a result of Complainant's breach with respect to the lettuce billed on invoice 275333. Respondent's liability for the other two transactions included in the Complaint, identified by invoice numbers 274512 and 274513, is not the subject of the petition in dispute. The total amount owed by Respondent for these invoices is $15,832.40. Respondent may offset its losses totaling $2,835.54 against this amount, which leaves a net amount due

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[4]This amount includes the $166.00 USDA inspection fee for the inspection performed July 17, 2007, and one-half of the fee for the inspection performed August 20, 2007. The second inspection was performed to show the lettuce was dumped; however, since we have determined the evidence establishes only that the 320 cartons of liner lettuce were unsalable, only the portion of the fee attributable to those cartons is recoverable.

[5]The total fee incurred to dump both the liner and cello lettuce was $1,000.00; however, since only the liner lettuce was shown to be unsalable, only half of this fee, or $500.00, is recoverable.

Complainant from Respondent for the three truckloads of mixed vegetables in question of $12,996.86.

Based on our review of the evidence and for the reasons cited, we are granting Respondent's petition and revising the Decision and Order of June 26, 2009, to show the amount due Complainant from Respondent as $12,996.86. As there remains an amount due Complainant from Respondent after consideration of the damages incurred by Respondent as a result of Complainant's breach, the Counterclaim submitted by Respondent should be dismissed.

There will be no further stays of this Order based on further petitions for reconsideration to this forum. The parties' right to appeal to the district court is found in Section 7 of the Act (7 U.S.C. § 499g).

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $12,996.86, with interest thereon at the rate of 0.51% per annum from August 1, 2007, until paid, plus the amount of $300.00.

The Counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

PERISHABLE AGRICULTURAL COMMODITIES ACT

MISCELLANEOUS ORDERS

In re: B.T. PRODUCE CO., INC.
PACA Docket No. D-02-0023.
In re: LOUIS R. BONINO.
PACA Docket No. APP-03-0009.
In re: NAT TAUBENFELD.
PACA Docket No. APP-03-0011.
Order Lifting Stay Order.
Filed September 2, 2009.

PACA – Perishable agricultural commodities – Order lifting stay order.

Christopher Young-Morales and Ann Parnes for the Agricultural Marketing Service and the Chief.
Mark C. H. Mandell, Annandale, NJ, for Respondent/Petitioners.
Order issued by William G. Jenson, Judicial Officer.

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

On July 3, 2007, in response to a request by B.T. Produce, Petitioner Louis R. Bonino, and Petitioner Nat Taubenfeld, I stayed *In re B.T. Produce Co.*, 66 Agric. Dec. 774 (2007), pending the outcome of

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

proceedings for judicial review.[2] On August 4, 2009, the Chief and the Agricultural Marketing Service filed a Motion To Lift Stay Order. No response was filed in opposition to the Motion To Lift Stay Order, and, on September 1, 2009, the Hearing Clerk transmitted the record to me for a ruling on the Motion To Lift Stay Order.

Proceedings for judicial review are concluded. No objection to the Motion To Lift Stay Order has been filed. Therefore, the July 3, 2007, Stay Order is lifted and the order issued in *In re B.T. Produce Co.*, 66 Agric. Dec. 774 (2007), is effective, as follows.

ORDER

1. B.T. Produce has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). B.T. Produce's PACA license is revoked, effective 60 days after service of this Order on B.T. Produce.

2. I affirm the Chief's March 31, 2003, determination that Louis R. Bonino was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Louis R. Bonino 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 Louis R. Bonino.

3. I affirm the Chief's March 31, 2003, determination that Nat Taubenfeld was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Nat Taubenfeld 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 Nat Taubenfeld.

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[2] *In re B.T. Produce Co.* (Stay Order), 66 Agric. Dec. 1527 (2007).

In re: PERFECTLY FRESH FARMS, INC.
PACA Docket No. D-05-0001
In re: PERFECTLY FRESH CONSOLIDATION, INC.
PACA Docket No. D-05-0002 and
In re: PERFECTLY FRESH SPECIALTIES, INC.
PACA Docket No. D-05-0003
In re::JAIME O. ROVELO
In re: JEFFREY LON DUNCAN
In re: THOMAS BENNETT
PACA-APP Docket No. 05-0010
PACA-APP Docket No. 05-0011
PACA-APP Docket No. 05-0012
PACA-APP Docket No. 05-0013
PACA-APP Docket No. 05-0014
PACA-APP Docket No. 05-0015
Stay Order as to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialities, Inc.; and Jeffrey Lon Duncan.
Filed September 2, 2009.

PACA – Stay order.

Christopher Young-Morales, for the Associate Deputy Administrator, AMS.
Christopher F. Bryan, Los Angeles, CA, for Respondents Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Farms, Inc.; Perfectly Fresh Specialties, Inc.; and Petitioner Jeffrey Lon Duncan.
Order issued by William G. Jenson, Judicial Officer.

On June 12, 2009, I issued a decision and order: (1) concluding that Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; and Perfectly Fresh Specialties, Inc., violated the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; (2) ordering the publication of the facts and circumstances of Perfectly Fresh Farms, Inc.'s; Perfectly Fresh Consolidation, Inc.'s; and Perfectly Fresh Specialties, Inc.'s violations of the PACA; (3) concluding Petitioner Thomas Bennet was responsibly

connected with Perfectly Fresh Farms, Inc., when Perfectly Fresh Farms, Inc., violated the PACA; (4) concluding Petitioner Jeffrey Lon Duncan was responsibly connected with Perfectly Fresh Consolidation, Inc., when Perfectly Fresh Consolidation, Inc., violated the PACA; and (5) subjecting Petitioner Thomas Bennett and Petitioner Jeffrey Lon Duncan to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).[1]

On July 16, 2009, Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialities, Inc.; and Jeffrey Lon Duncan filed a request for a stay of the Order in *In re Perfectly Fresh Farms, Inc.* (Decision as to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; Jeffrey Lon Duncan; and Thomas Bennett), 68 Agric. Dec. 507 (2009), pending the outcome of proceedings for judicial review. Neither the Agricultural Marketing Service nor the Chief of the PACA Branch filed a response to the request for a stay.

In accordance with 5 U.S.C. § 705, Perfectly Fresh Farms, Inc.'s; Perfectly Fresh Consolidation, Inc.'s; Perfectly Fresh Specialties, Inc.'s; and Jeffrey Lon Duncan's request for a stay is granted.

For the foregoing reasons, the following order is issued.

ORDER

The Order in *In re Perfectly Fresh Farms, Inc.* (Decision as to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; Jeffrey Lon Duncan; and Thomas Bennett), 68 Agric. Dec. 507 (2009), as it relates to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; and Jeffrey Lon Duncan, is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh

[1]*In re Perfectly Fresh Farms, Inc.* (Decision as to Perfectly Fresh Farms, Inc.; Perfectly Fresh Consolidation, Inc.; Perfectly Fresh Specialties, Inc.; Jeffrey Lon Duncan; and Thomas Bennett), 68 Agric. Dec. 507 (2009).

Specialties, Inc.; and Jeffrey Lon Duncan shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFAULT DECISION

In re: PETS CALVERT COMPANY.
PACA Docket No. D-09-0045.
Default Decision.
Filed December 22, 2009.

PACA – Default.

Charles E. Spicknall, for AMS.
Michael F. O'Neill, for Respondent.
Decision issued by Jill S. Clifton, Administrative Law Judge.

Decision and Order by Reason of Admissions

1. The Complaint, filed on December 23, 2008, initiated a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §499a *et seq*.) (herein frequently the "PACA").

Parties, Counsel, and Allegations

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently "AMS" or "Complainant"). AMS is represented by Charles E. Spicknall, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2318, Stop 1413, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.

3. The Complaint alleges that the Respondent, Pets Calvert Company (herein frequently "Pets Calvert" or "Respondent"), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to pay ten produce sellers for more than $350,000 in produce purchases during the period of August 13, 2004, through June 17, 2008. The Complaint alleges that Pets Calvert willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).

4. The Respondent is Pets Calvert Company, an Illinois corporation. Pets Calvert is represented by Michael F. O'Neill, Pets Calvert owner and officer.
5. Pets Calvert Company on March 2, 2009, filed an Answer to the Complaint.

Discussion

6. On September 23, 2009, this case was scheduled for hearing on December 3 and 4, 2009, in Chicago, Illinois. AMS then filed, on October 27, 2009, a Motion for Decision Based on Admissions. *See* 7 C.F.R. § 1.139. Pets Calvert had through November 30, 2009 to respond to AMS's Motion and failed to respond. (*See* e-mail filed November 16, 2009.) Based upon careful consideration, AMS's Motion is granted, and I issue this Decision and Order without hearing or further procedure.
7. Section 2(4) of the PACA requires licensed produce dealers to make "full payment promptly" for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4).[1] Pets Calvert has admitted the material allegations in the Complaint. Pet Calvert's owner, Michael O'Neill, states: "I . . . take full responsibility for the 10 vendors and the amount owned in your report." "A respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held." *See In re: H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (1998).[2]
8. The Complaint alleges that Pets Calvert is an Illinois corporation that was operating under a PACA license during the period of August 13, 2004, through June 17, 2008, when the company failed to pay produce

[1] *See also* 7 C.F.R. § 46.2(aa)(5) and (11) (defining "full payment promptly").

[2] *See also*, *In re: Five Star Food Distributors*, *Inc.*, 56 Agric. Dec. 880, 894 (1997) (decision without hearing by reason of admissions).

sellers in violation of section 2(4) of the PACA. Pets Calvert admits that the company was operating subject to a valid PACA license. Pet Calvert's failure to deny or otherwise respond to the specific allegations concerning the company's incorporation and PACA license number constitutes an admission of those allegations. *See* 7 C.F.R. § 1.136(c) ("failure to deny or otherwise respond to an allegation of the Complaint shall be deemed . . . an admission of said allegation").

9. The Department's policy in cases where PACA licensees have failed to make full or prompt payment for produce is straightforward:

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

In re: Scamcorp, Inc., 57 Agric. Dec. 527, 549 (1998). Pets Calvert makes no assertion that the produce sellers listed in the Complaint have been paid or that the company will achieve full compliance with the PACA within 120 days after having been served with the Complaint.[3]

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[3]Rather than asserting that the Respondent's admitted debts will be quickly repaid, Pets Calvert only asserts that it is "in the process of getting the necessary financing and paying the old debts over time. . . ." Installment payment plans and debt reductions that are negotiated as a result of a buyer's insolvency cannot be used to avoid sanctions in PACA disciplinary proceedings. *See e.g., Scamcorp*, 57 Agric. Dec. at 566 (after-the-fact promissory notes do not satisfy the requirements of the PACA); *In re: Top Fresh, Inc.*, 53 Agric. Dec. 951, 953 - 954 (1994) (a seller's agreement to accept partial payment because of the buyer's insolvency does not constitute full payment or negate a violation of the PACA); *In re: Caito Produce Co.*, 48 Agric. Dec. 602, 625-28 (1989) (seller's agreement to accept partial payment in full satisfaction of a produce debt is not

(continued...)

10. Pets Calvert notes in its Answer that it received the Complaint on February 9, 2009. The 120-day period for compliance expired on or about June 10, 2009, prior to a hearing being set in this case. At the scheduling conference, held by telephone on September 23, 2009, more than 220 days after Pets Calvert admittedly received the Complaint, Pets Calvert's owner, Michael O'Neill, stated that although "some" of the sellers listed in the Complaint had been paid, Pets Calvert was still attempting to resolve legal actions by other unpaid suppliers listed in the Complaint.

11. One of the legal actions pending against Pets Calvert is in the United States District Court for the Northern District of Illinois, Case No. 08-cv-06684. I take official notice of that proceeding because Respondent's ability to satisfy the debts owed to the plaintiff produce creditors in that case, whose substantial unpaid debts are also at issue here,[4] has a direct relation to Respondent's ability to assert that it has achieved full compliance with the PACA. *See* section 1.141(h)(6) of the Rules of Practice (7 C.F.R. § 1.141(h)(6)), and *see Five Star Food*, 56 Agric. Dec. 880, 893 (1997) (taking official notice of proceedings in a bankruptcy court that had a direct relation to a PACA disciplinary case). The ongoing case by produce creditors in the Northern District of Illinois corroborates the fact that Respondent has been unable to assert that it has achieved full compliance with the PACA within the 120 day period established by the Department in *Scamcorp, supra*.[5]

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[3](...continued)
full payment for purposes of the PACA and does not negate the violation).

[4]In the trust action in the Northern District of Illinois, the produce creditor plaintiffs, Sunrise Orchards and Borzynski Bros. Distributing, are seeking to recover $178,745.53 for past due invoices. *See* Pets Calvert's "Motion for Partial Summary Judgment" and "Memorandum of Law in Support," attached hereto as "Exhibit C." In this case, Respondent admitted owing these two sellers $106,151. *See* Complaint at Appendix A and Exhibit A (Respondent's Answer). Regardless of which figure is correct, it is clear that Respondent still owes more than a *de minimus* amount to these sellers.

[5]Pets Calvert's defense to the plaintiffs' trust claims in the Northern District of Illinois is not that the sellers have been paid in full, but rather that the unpaid suppliers (continued...)

12. Pets Calvert's inability to assert that it has achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. *See Scamcorp*, 57 Agric. Dec. at 549. The appropriate sanction in a "no-pay" case where the violations are flagrant and repeated is license revocation. *See id*. A civil penalty is not appropriate because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA", and it would not be consistent with the Congressional intent to require a PACA violator to pay the Government while produce sellers are left unpaid. *See id*., at 570-71.

13. Pet Calvert's violations of the PACA are repeated because there was more than one. *See id*., at 551. The violations are flagrant "because of the number of violations, the amount of money involved, and the time period over which the violations occurred." *See id*. Pets Calvert failed to make full payment promptly to ten sellers of the agreed purchase prices in the total amount of $363,815.50 for 63 lots of perishable agricultural commodities that Pets Calvert purchased, received, and accepted in the course of interstate commerce.[6] These failures to pay

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[5](...continued)
lost the protection of the PACA trust (*see* 7 U.S.C. § 499e) by agreeing to accept payments over an extended period of time. The fact that Respondent's produce creditors were forced to accept payments over time, or even a fraction of what they were owed because of Respondent's financial problems, is no defense in this disciplinary action. *See Scamcorp*, 57 Agric. Dec. at 566 (after-the-fact promissory notes do not satisfy the requirements of the PACA); *Top Fresh,* 53 Agric. Dec. at 953 ("a seller's agreement to accept partial payment because of the buyer's insolvency does not negate the violation of the PACA"). As the Judicial Officer has stated in past cases under the PACA: "Full compliance requires . . . that a respondent have no credit agreements with produce sellers for more than 30 days." *See Scamcorp*, 57 Agric. Dec. at 549.

[6]*See In re: Coastal Banana & Tomato Co.*, 55 Agric. Dec. 617, 621 (1996) (holding that violations of the PACA were willful, flagrant and repeated where a produce merchant failed to make full payment promptly for $150,723.03 worth of produce purchased in 27 transactions); *In re: Pugach, Inc.*, 55 Agric. Dec. 581, 587- 588 (1995) (holding that violations of the PACA were willful, flagrant and repeated where a produce buyer failed to make full payment promptly for $384,979.33 in produce (continued...)

took place during the period of August 13, 2004, through June 17, 2008.

14. Pets Calvert's violations of the PACA are also willful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)), because of "the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved." *See Scamcorp*, 57 Agric. Dec. at 553.[7] Despite knowing that the company did not have sufficient working capital to make full or prompt payment to suppliers of agricultural commodities, Pets Calvert continued to purchase more than $350,000 worth of produce over a time period that spanned almost four years. Pets Calvert intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, "shifted the risk of nonpayment to sellers of the perishable agricultural commodities." *See id*., at 553.

Findings of Fact

15. Pets Calvert Company is a corporation incorporated and existing under the laws of the State of Illinois. Pets Calvert's business and mailing address is 2455 S. Damen Avenue, Chicago, Illinois 60608-5231.

16. Pursuant to the licensing provisions of the PACA, Pets Calvert Company was issued license number 1975-0925 on January 10, 1974. The license was last renewed on January 10, 2008.

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[6](...continued)
purchased in 166 transactions); *In re: Allsweet Produce Co., Inc.*, 51 Agric. Dec. 1455, 1458 (1992) (holding that violations of the PACA were willful, flagrant and repeated where a produce merchant failed to make full payment promptly for $278,120.85 worth of produce purchased in 58 transactions); *In re: Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632 (1976) (holding that violations of the PACA were willful, flagrant and repeated where a produce dealer failed to make full payment promptly for $29,000 worth of produce purchased in 64 transactions).

[7]Willfulness under the PACA does not require evil intent. Willfulness only requires intentional actions by Respondent or actions undertaken with careless disregard of the statutory requirements. *See*, *e.g*. *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (D.C. Cir. 1983).

17. Pets Calvert Company failed to make full payment promptly to the ten produce sellers listed in paragraph III of the Complaint in the amount of $363,815.50 for 63 lots of perishable agricultural commodities that Pets Calvert purchased, received, and accepted in interstate commerce during the period August 13, 2004, through June 17, 2008.

18. Pets Calvert makes no assertion that the produce sellers listed in the Complaint have been paid in full or that the company has achieved full compliance with the PACA within 120 days after having been served with the Complaint.

19. Official notice is taken of the PACA trust action brought against Pets Calvert by produce sellers in the United States District Court for the Northern District of Illinois, Case No. 08-cv-06684. As of October 14, 2009, that proceeding remained unresolved and the produce creditors, whose unpaid debts, or portions thereof, have been admitted by Respondent here, had not received payment in full from Pets Calvert Company.

Conclusions

20. The Secretary of Agriculture has jurisdiction over Pets Calvert Company and the subject matter involved herein.

21. Pets Calvert Company willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during August 13, 2004 through June 17, 2008, by failing to make full payment promptly of the purchase prices, or balances thereof, in the total amount of $363,815.50 for fruits and vegetables, all being perishable agricultural commodities, which Pets Calvert Company purchased, received, and accepted in interstate commerce.

Order

22. Pets Calvert Company's PACA license is revoked. Section 8(a) of the PACA, 7 U.S.C. § 499h(a).

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

Finality

24. 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.

APPENDIX A

7 C.F.R.:

TITLE 7—-AGRICULTURE

SUBTITLE A—-OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—-ADMINISTRATIVE REGULATIONS

. . . .

SUBPART H—-RULES OF PRACTICE GOVERNING FORMAL ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER VARIOUS STATUTES

. . . .

§ 1.145 Appeal to Judicial Officer.

(a) Filing of petition. Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding

evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

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

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

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

advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

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

(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

Consent Decisions

PERISHABLE AGRICULTURAL COMMODITIES ACT

Fresh Harvest International, PACA-D-09-0039, 09/09/18.
Juniper Tree d/b/a Best Produce, PACA-09-0109, 09/08/19.
Atlantic Coast Products, Inc., PACA-10-0015, 09/11/18.
Carolina Tomato, Inc., PACA-08-0066, 09/12/31.
Gary Goodnight, PACA 08-0187, 09/12/31.
Phillip C. Jones, PACA 08-0188, 09/12/31.