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 PREFACE

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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

DEPARTMENTAL DECISIONS

REPARATIONS

MISCELLANEOUS ORDERS

DEFAULT DECISIONS

PERISHABLE AGRICULTURE COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: PETS CALVERT COMPANY.
PACA Docket No. D-09-0045.
Decision and Order.
Filed July 9, 2010.

PACA.

Charles E. Spicknall, for the Administrator, AMS.
Michael Steigmann, Chicago, IL, for Respondent.
Initial decision issued by Jill S. Clifton, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

Robert C. Keeney, Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Deputy Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 23, 2008. The Deputy Administrator instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

The Deputy Administrator alleges, during the period August 13, 2004, through June 17, 2008, Pets Calvert Company failed to make full payment promptly to 10 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of $363,815.50 for 63 lots of perishable agricultural commodities which Pets Calvert Company purchased, received, and accepted in interstate and foreign commerce.[1] On March 2, 2009, Pets Calvert Company filed a response to the Complaint [hereinafter Answer] in which Pets Calvert Company admitted the material

[1]Compl. ¶ III.

allegations of the Complaint.

On October 27, 2009, in accordance with 7 C.F.R. § 1.139, the Deputy Administrator filed a Motion for Decision Based on Admissions and a Proposed Decision and Order. Pets Calvert Company failed to respond to the Deputy Administrator's Motion for Decision Based on Admissions and Proposed Decision and Order.

On December 22, 2009, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order by Reason of Admissions: (1) finding, during the period August 13, 2004, through June 17, 2008, Pets Calvert Company failed to make full payment promptly to 10 produce sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of $363,815.50 for 63 lots of perishable agricultural commodities which Pets Calvert Company purchased, received, and accepted in interstate commerce; (2) concluding Pets Calvert Company willfully, flagrantly, and repeatedly violated 7 U.S.C. § 499b(4); and (3) revoking Pets Calvert Company's PACA license (ALJ's Decision and Order by Reason of Admissions at 7-8).

On March 1, 2010, Pets Calvert Company filed "Appeal Petition to the Judicial Officer" [hereinafter Appeal Petition]. On March 22, 2010, the Deputy Administrator filed "Response to Respondent's Appeal to the Judicial Officer." On June 30, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Decision and Order by Reason of Admissions.

DECISION

Discussion

The PACA requires produce dealers to make full payment promptly for perishable agricultural commodity purchases, usually within 10 days after the day on which the produce is accepted, unless the parties agree to different terms prior to the purchase. (7 U.S.C. § 499b(4); 7 C.F.R. § 46.2(aa)(5), (11).) The Deputy Administrator alleges, during the period August 13, 2004, through June 17, 2008, Pets Calvert Company violated the payment provisions of the PACA by failing to make full payment promptly

to 10 sellers of the agreed purchase prices, or balances of the agreed purchase prices, in the total amount of $363,815.50 for 63 lots of perishable agricultural commodities which Pets Calvert Company purchased, received, and accepted in interstate and foreign commerce.[2] Pets Calvert Company admitted the material allegations of the Complaint. Pets Calvert Company's owner, Michael O'Neill, states: "I also take full responsibility for the 10 vendors and amount owed in your report" (Answer). The Deputy Administrator also alleges that Pets Calvert Company is an Illinois corporation that was operating under PACA license number 1975-0925 when Pets Calvert Company failed to make full payment promptly to produce sellers in violation of 7 U.S.C. § 499b(4). Pets Calvert Company admits it was operating subject to a valid PACA license. Pets Calvert Company's failure to deny or otherwise respond to the specific allegations concerning Pets Calvert Company's incorporation and PACA license number constitutes an admission of those allegations.[3]

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.[4] Based upon Pets Calvert Company's admissions and failure to deny or otherwise respond to allegations of the Complaint, I conclude there is no material issue of fact on which a meaningful hearing can be held in the instant proceeding.

The United States Department of Agriculture's sanction policy in cases in which PACA licensees have failed to make full payment promptly for produce is, as follows:

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[2]See note 1.

[3]*See* 7 C.F.R. § 1.136(c) ("failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation").

[4]*Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (stating the due process clause does not require an agency hearing where there is no disputed issue of material fact); *Pennsylvania v. Riley*, 84 F.3d 125, 130 (3d Cir.) (stating an administrative agency need not provide an evidentiary hearing when there are no disputed material issues of fact), *cert. dismissed*, 519 U.S. 913 (1996); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607-08 (D.C. Cir. 1987) (stating an agency may ordinarily dispense with a hearing when no genuine dispute exists).

> 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 Company states it received the Complaint on February 9, 2009.[5] The 120-day period for compliance with the PACA expired on June 9, 2009. Pets Calvert Company makes no assertion that the produce sellers identified in the Complaint were paid in accordance with the PACA or that Pets Calvert Company achieved full compliance with the PACA within 120 days after having been served with the Complaint. Instead, Pets Calvert Company only asserts it is "in the process of getting the necessary financing and paying the old debts over time" (Answer).

Pets Calvert Company's failure to assert it achieved full compliance with the PACA within 120 days after having been served with the Complaint makes this case a "no-pay" case. The appropriate sanction in a "no-pay" case, if the violations are flagrant or repeated, is license revocation.[6] 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 requiring a PACA violator to pay a civil penalty to the United States Treasury while produce sellers are left unpaid would thwart one of the primary purposes of the PACA which is to ensure that commission merchants, dealers, and brokers make full payment

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[5]Letter from Pets Calvert Company to the Hearing Clerk dated February 28, 2009.

[6]*In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998).

for produce promptly.[7]

Pets Calvert Company's violations of the PACA are repeated because there was more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the time period over which the violations occurred.[8] Pets Calvert Company'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.[9] Willfulness under the PACA does not require evil intent. Willfulness only requires intentional actions by the respondent or actions undertaken with careless disregard of the statutory requirements.[10] Despite knowing that it did not have sufficient working capital to make full or prompt payment to produce sellers, Pets Calvert Company continued to purchase more than $350,000 worth of produce over a time period that spanned almost 4 years. Pets Calvert Company intentionally, or with careless disregard for the payment requirements in 7 U.S.C. § 499b(4), shifted the risk of nonpayment to sellers of the perishable agricultural commodities.

Findings of Fact

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[7] *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (1998).

[8] *See, e.g.*, *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.) (holding 86 transactions occurring over nearly 3 years involving over $300,000 to be repeated and flagrant violations of the payment provisions of the PACA), *cert. denied*, 528 U.S. 1021 (1999); *Farley & Calfee v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of "repeated"); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA).

[9] *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (1998).

[10] *See, e.g.*, *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *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); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

1. Pets Calvert Company is a corporation incorporated and existing under the laws of the State of Illinois.

2. Pets Calvert Company's business and mailing address is 2455 S. Damen Avenue, Chicago, Illinois 60608-5231.

3. Pets Calvert Company was issued PACA license number 1975-0925 on January 10, 1974.

4. At all times material to the instant proceeding, Pets Calvert Company was a PACA licensee.

5. Pets Calvert Company failed to make full payment promptly to the 10 produce sellers identified in the Complaint in the amount of $363,815.50 for 63 lots of perishable agricultural commodities that Pets Calvert Company purchased, received, and accepted in interstate commerce during the period August 13, 2004, through June 17, 2008.

6. Pets Calvert Company makes no assertion that the produce sellers identified in the Complaint have been paid in full or that Pets Calvert Company achieved full compliance with the PACA within 120 days after having been served with the Complaint.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over Pets Calvert Company and the subject matter involved in the instant proceeding.

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

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Pets Calvert Company's Request for Oral Argument

Pets Calvert Company's request for oral argument (Appeal Pet. at 7), which the Judicial Officer may grant, refuse, or limit,[11] is refused because the issues have been fully briefed by the parties and oral argument would serve no useful purpose.

Pets Calvert Company's Appeal Petition

Pets Calvert Company raises one issue in its Appeal Petition. Pets Calvert Company contends the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), applied by the ALJ, is improper and inappropriate, especially under current economic conditions. Pets Calvert Company asserts, if its PACA license is revoked, it will be unable to pay its creditors who are also suffering from the effects of economic recession. Pets Calvert Company urges that, instead of applying the sanction policy in *In re Scamcorp, Inc.,* 57 Agric. Dec. 527 (1998), I remand the instant proceeding to the ALJ for hearing to determine if Pets Calvert Company has paid its produce sellers by the date of the hearing and allow Pets Calvert Company to avoid PACA license revocation if it has paid all of its produce sellers by the date of the hearing.

PACA was designed primarily for the protection of producers of perishable agricultural commodities, most of whom must entrust their products to a buyer who may be thousands of miles away and depend for their payment upon the buyers' business acumen and fair dealing.[12] One of the goals of the PACA is to remove financially unstable and undercapitalized produce merchants, dealers, and brokers from the chain of

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[11]7 C.F.R. § 1.145(d).

[12]S. Rep. No. 84-2507, at 3 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701; *Tom Lang Co. v. A. Gagliano Co.*, 61 F.3d 1305, 1308 (7th Cir. 1995).

produce distribution.[13] The United States Department of Agriculture's sanction policy, set forth in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), is to revoke the PACA license of any PACA licensee that repeatedly or flagrantly fails to make full payment promptly if the licensee cannot achieve full compliance with the PACA within 120 days after having been served with a complaint or by the date of the administrative hearing, whichever occurs first. I conclude the sanction policy articulated in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), is consistent with the goal of the PACA to remove financially unstable and undercapitalized produce merchants, dealers, and brokers from the chain of produce distribution. To allow a financially troubled PACA licensee, such as Pets Calvert Company, that cannot make full payment promptly to its produce sellers, to continue to purchase produce for an extended period of time, would shift the risk of nonpayment to these produce sellers and would not be consistent with the goal of the PACA to remove financially unstable and undercapitalized produce merchants, dealers, and brokers from the chain of produce distribution.

I reject Pets Calvert Company's argument that economic conditions should be considered when determining whether to apply the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer has long held that business recessions are not relevant to the sanction to be imposed for failure to make full payment promptly in accordance with the PACA.[14] A PACA licensee should be adequately

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[13] *Hunts Point Tomato Co. v. U.S. Dep't of Agric.*, 204 F. App'x 981, 983 (2d Cir. 2006); *Harry Klein Produce Corp. v. U.S. Dep't of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987); *Tri-County Wholesale Produce Co. v. U.S. Dep't of Agric.*, 822 F.2d 162, 163 (D.C. 1987) (per curiam); *Finer Foods Sales Co. v. Block,* 708 F.2d 774, 781-82 (D.C. Cir. 1983); *Marvin Tragash Co. v. U.S. Dep't of Agric.*, 524 F.2d 1255, 1257 (5th Cir. 1975); *Chidsey v. Guerin*, 443 F.2d 584, 588-89 (6th Cir. 1971); *Zwick v. Freeman*, 373 F.2d 110, 117 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967). *See Anthony Marano Co. v. Glass*, 2007 WL 257630 (N.D. Ill. 2007) (stating the purposes of the PACA include ensuring financial stability of the entire produce industry).

[14] *In re Moore Mktg. Int'l, Inc.*, 47 Agric. Dec. 1472, 1483 (1988); *In re B.G. Sale's Co.*, 44 Agric. Dec. 2021, 2029-30 (1985); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 130-31 (1984); *In re Produce Brokers, Inc.* (Ruling on Certified Questions), 41 Agric.
(continued...)

capitalized to meet its obligations in economically depressed times as well as in good financial times.[15] The economic conditions in which Pets Calvert Company finds itself provide no basis for remanding the instant proceeding to the ALJ, as Pets Calvert Company urges.

Moreover, the record indicates that Pets Calvert Company's failures to pay its produce sellers in accordance with the PACA were not caused by current economic conditions. Pets Calvert Company asserts in its Answer that its financial problems resulted from a "'bad' business deal with [a] past landlord[.]"

I also reject Pets Calvert Company's argument that the detrimental effect on its creditors of a discontinuation of Pets Calvert Company's business should be considered when determining whether to apply the sanction policy in *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998). The Judicial Officer has long held that the effect on creditors of a forced discontinuation of a PACA licensee's business is not relevant to the sanction to be imposed for failure to make full payment promptly in accordance with the PACA:

> Even where a respondent argues correctly that it would be detrimental to its creditors if it were forced to discontinue business, as a result of a license-revocation order, such arguments (frequently made) are routinely rejected. Even where creditors of a respondent personally appear to urge the Department to permit the violator to continue in business, so that the violator will be able to make additional payments to the creditors, the Secretary routinely rejects such pleas for leniency made by the creditors since the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country. If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of a particular respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.

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[14](...continued)
Dec. 2247, 2250-51 (1982).

[15]*In re R.H. Produce, Inc.*, 43 Agric. Dec. 511, 523 (1984).

In re The Caito Produce Co., 48 Agric. Dec. 602, 628 (1989) (footnote omitted).[16] The detrimental effect that PACA license revocation may have on Pets Calvert Company's creditors provides no basis for remanding the instant proceeding to the ALJ, as Pets Calvert Company urges.

For the foregoing reasons, the following Order is issued.

ORDER

Pets Calvert Company's PACA license is revoked. This Order shall become effective 60 days after service of this Order on Pets Calvert Company.

RIGHT TO JUDICIAL REVIEW

Pets Calvert Company 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. Pets Calvert Company must seek judicial review within 60 days after entry of the Order in this Decision and Order.[17] The date of entry of the Order in this Decision and Order is July 9, 2010.

In re: TANIKKA WATFORD; TANIKKA WATFORD and LATISHA WATFORD d/b/a SOUTHERN SOLUTIONS PRODUCE, LLC.
PACA Docket No. D-09-0017.

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[16] *See also In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118, 142 (1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1160 (1983); *In re Bananas* (Order Denying Intervention), 42 Agric. Dec. 426, 426-27 (1983), *final decision*, 42 Agric. Dec. 588 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347, 351 (6th Cir. 1984); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, 556 F.2d 586 (9th Cir. 1977) (unpublished), *printed in* 36 Agric. Dec. 467 (1977).

[17] 28 U.S.C. § 2344.

Decision and Order.
Filed July 21, 2010.

PACA.

Ciarra A. Toomey, for the Deputy Administrator, AMS.
Respondents, Pro se.
Decision issued by Peter M. Davenport, Chief Administrative Law Judge.

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq; hereinafter "PACA"), instituted by a Complaint filed on October 29, 2008, by the Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture ("Complainant") alleging that Tanikka Watford (hereinafter "Respondent T. Watford") and LaTisha Watford (hereinafter "Respondent L. Watford") d/b/a Southern Solutions Produce, LLC (hereinafter "Respondents") have willfully violated the PACA.

The Complaint alleged that Respondents willfully, flagrantly and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during the period of December 18, 2005 through February 18, 2006, by failing to make full payment promptly to eight sellers of the agreed purchase prices in the total amount of $365,637.74 for 30 lots of perishable agricultural commodities, which they purchased, received, and accepted in the course of interstate and foreign commerce. Complainant has now filed a motion for a decision based on admissions pursuant to section 1.139 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes ("Rules of Practice"). *See* 7 C.F.R. § 1.139.

The Complaint was served on Respondent T. Watford on November 8, 2008. Respondents filed, an "Answer" on December 1, 2008. The Answer generally denied the allegations of paragraph III of the Complaint pertaining to their failure to make full payment promptly. Respondents' Answer contained an explanation for non-performance of their contractual duties, but at no time did the Answer specifically deny any of the allegations listed in paragraph III of the Complaint. (Answer ¶ III.) The Answer also generally denied the allegations listed in paragraph IV of the Complaint regarding the bankruptcy filing and stated that "the amounts on

the Schedule F [were] prepared by our counsel based off invoices obtained from the sellers." (Answer ¶ IV.)[1]

On February 24, 2006, Respondents filed a Voluntary Petition under Chapter 7, in the U.S. Bankruptcy Court for the Middle District of North Carolina, designated as Case No. 06-10185. Complainant has now filed a "Motion for a Decision without Hearing Based on Admissions." In their bankruptcy proceeding, Respondents admitted that they owed $381,700.60 to the eight sellers of produce listed in the Complaint. Bankruptcy documents are judicially noticed in proceedings before the Secretary. *See, e.g., In re: Five Star Food Distributors*, 56 Agric. Dec. 880, 893 (1997). Appendix A, attached and incorporated herein by reference, compares the amounts alleged to be due in the Complaint to the amounts admitted by Respondents in their Bankruptcy Schedule F.

The Department's policy with respect to admissions in PACA disciplinary cases in which a respondent is alleged to have failed to make full payment promptly for produce purchases is as follows:

> 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 Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386 (2003) (citing *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (1998)).

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[1]As the Respondent's *pro se* Answer failed to allege that it would make full payment within 120 days of December 1, 2008, it must be considered a "no pay" case. Moreover, there is no indication that any payment has been made which might have converted the case to a "slow pay" as opposed to a "no pay" case.

In this instance, Respondents have made an admission in a bankruptcy proceeding that they have failed to pay $381,700.60 to the same produce creditors named in the Complaint. Respondents have failed to pay more than a *de minimis* amount for produce in violation of section 2(4) of the PACA, and they have not asserted that they will achieve full compliance with the PACA by making full payment within 120 days of the service of the complaint. This is a "no-pay" case.

The appropriate sanction in a "no-pay" case is license revocation, or where there is no longer any license to revoke, as is the case here, where Respondents' license has terminated, the appropriate sanction is publication of the facts and circumstances of the violations. *See In re Furr's Supermarkets Inc.*, 62 Agric. Dec. at 386-87. Because there can be no debate over the appropriate sanction, a decision can be entered in this case without hearing or further procedure based on the admitted facts. *See* 7 C.F.R. § 1.139.[2] Complainant's motion will be granted and the following decision is issued in the disciplinary case against Respondents without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. §1.139).

Findings of Fact

1. Respondents are a limited liability company organized and existing under the laws of the State of North Carolina. Respondents' business address was 1007 Timbers Drive, Hillsborough, North Carolina 27278. Both Respondents T. Watford and L. Watford's mailing addresses are home addresses and are on file with the Hearing Clerk's Office, United States Department of Agriculture.
2. Respondent T. Watford was licensed or operating subject to license under the provisions of the PACA. License number 20050448 was issued to Respondent T. Watford on February 22, 2005.
3. At all times material herein, Respondents were operating under Respondent T. Watford's license. This license terminated on March 24, 2006, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d (a)), when Respondents failed to pay the required annual renewal fee.

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[2]A hearing is only required where an issue of material fact is joined by the pleadings. *See* 7 C.F.R. § 1.141(b); *Veg. Mix, Inc. v. U. S. Dep't of Agriculture*, 832 F.2d 601, 607 (D.C. Cir. 1987).

4. During the period of December 18, 2005, through February 18, 2006, Respondents failed to make full payment promptly to eight (8) sellers of the agreed purchase prices in the total amount of $365,637.74 for 30 lots of perishable agricultural commodities, which Respondents purchased, received, and accepted in the course of interstate and foreign commerce.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondents' failure to make full payment promptly with respect to the 30 transactions set forth in Finding of Fact 3 above, constitutes willful, flagrant and repeated violations of section 2(4) of the Act (7 U.S.C. § 499b(4)).

Order

1. The facts and circumstances of the above violations shall be published.
2. Pursuant to the Rules of Practice, this Decision will become final without further proceedings 35 days after it is served unless a party to the proceeding appeals the Decision to the Secretary within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

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

Appendix A

COMPARISON OF COMPLAINT AND BANKRUPTCY SCHEDULE F

Produce Seller Listed in Complaint	Amount Alleged in Complaint to be Past Due and Unpaid	Amount Admitted in Respondents' Bankruptcy Schedule F as Undisputed
Taylor Farms Maryland, Inc.	$7,107.40	$5,555.50
G. Cefalu & Bro., Inc	$54,362.00	$55,866.50
ExaWorld Biz	$10,109.05	$17,675.00

Channel Imports	$7,872.00	$10,000.00
KGB International, Inc.	$33,345.86	$38,980.85
South Mill Dist. LP	$74,945.90	$76,000.00
Armstrong Marketing	$104,746.35	$104,746.35
Cornucopia Produce Co.	$73,149.18	$72,876.40
Totals	**$365,637.74**	**$381,700.60**

In re: KDLO ENTERPRISES, INC.
PACA Docket No. D-09-0038.
Decision and Order by Reason of Admissions.
Filed December 30, 2010.

PACA.

Jonathan D. Gordy, for AMS.
Kevin M. Pederson, for Respondent.
Decision issued by Jill S. Clifton, Administrative Law Judge.

1. The Complaint, filed on December 2, 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 Jonathan D. Gordy, Esq. with the Office of the General Counsel (Trade Practices Division), United States Department of Agriculture, South Building Room 2309, Stop 1413, 1400 Independence Ave. SW, Washington, D.C. 20250-1413.
3. The Complaint alleges that the Respondent, KDLO Enterprises, Inc. (herein frequently "KDLO" or "Respondent"), violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), by failing to pay, during October 2006 through June 2007, 8 produce sellers for more than $450,000 in produce purchases. The Complaint alleges that KDLO willfully, flagrantly, and repeatedly violated Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
4. The Respondent is KDLO Enterprises, Inc., a Washington corporation.

KDLO is represented by Kevin M. Pederson, KDLO owner and officer (President).

5. KDLO Enterprises, Inc. on February 27, 2009, filed an Answer to the Complaint.

Procedural History

6. The hearing was scheduled for September 2010, in Tacoma, Washington. AMS then filed, on August 3, 2010, its "Motion for Official Notice of Bankruptcy Pleadings and Motion for Decision without Hearing by Reason of Admissions." *See* 7 C.F.R. § 1.139. The hearing was rescheduled for November. KDLO filed its Response to the Motion on September 22, 2010. The hearing was then canceled, to be rescheduled if needed after my ruling on the Motion. KDLO filed its Supplement to its Response on October 13, 2010. AMS filed its Reply on November 5, 2010. I now know that no hearing will be necessary.

" . . . 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).[1]

7. After careful consideration, and I commend both AMS and KDLO for excellent work, I find that AMS's Motion must be and hereby is GRANTED. The admissions come not only from KDLO's filings in this case, but also from the filings in the bankruptcy case of Kevin M. Pederson and his wife Donna M. Pederson. *See* paragraphs 9 and 10. I issue this Decision and Order by Reason of Admissions, pursuant to section 1.139 of the Rules of Practice. 7 C.F.R. § 1.139.

Discussion

8. Section 2(4) of the PACA requires licensed produce dealers to make "full payment promptly" for fruit and vegetable purchases, usually within

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

ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 U.S.C. § 499b(4).[2]

9. I take official notice of the bankruptcy pleadings of Kevin M. Pederson and his wife Donna M. Pederson. *See,* for example, the Discharge of Debtor, granted November 18, 2009. AMS Motion Exhibit B p.1. KDLO is included as an "fdba" (formerly doing business as) of Debtor Kevin M. Pederson. Kevin Pederson identified himself as formerly operating under the trade name "KDLO Enterprises, Inc." In schedule F, "CREDITORS HOLDING UNSECURED NONPRIORITY CLAIMS," Kevin and Donna Pederson admitted that they owed $422,518.18 to the eight sellers listed in the Complaint, and they listed **$348,026.18** of that amount as **undisputed**. Schedule F, *In re Kevin Pederson*, Case No. 09-45837-PHB in the Western District of Washington (August 11, 2009) (ECF Docket No. 1). KDLO is a corporation, and Kevin M. Pederson and his wife are individuals; nevertheless, in these circumstances, their admissions in the Chapter 7 bankruptcy suffice to admit, for the corporation KDLO, the material allegations in the Complaint. I agree with AMS, in its Reply filed November 5, 2010, that KDLO's argument "has elevated the form of the corporation, while ignoring the substance of the bankruptcy." AMS Reply pp. 2-3.

" . . . KDLO's owners admitted in their Chapter 7 bankruptcy pleadings that they *were* the corporation;" AMS Reply p. 3. KDLO's business debts are clearly included in the Pedersons' bankruptcy. AMS Reply p. 3.

10. A comparison of the Complaint with the bankruptcy filing shows the following:

Produce Seller	Amount Alleged in the Complaint	Amount Admitted in Bankruptcy Schedule F
California Oregon Seed, Inc.	$4,216.00	$4,216.00
Sunkist Growers	$74,492.50	$74,492.00
Gold Digger Apples	22,848.50	$21,808.00
Evans Fruit	$251,425.30	$250,000.00
Salyer American Foods	$8,063.50	$7,447.50
Manson Growers Cooperative	$43,692.47	$18,000.00

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

C.M. Holzinger Fruit Co. (Holtzinger Fruit Co.)	$37,098.50	$38,141.50
Sterling Export	$8,785.00	$8,413.18
TOTALS:	$450,621.77	$422,518.18

Schedule F indicates that the amounts are undisputed with seven of the eight produce sellers; the amount of $74,492.00 owed to Sunkist Growers was the only one listed as disputed on Schedule F. (AMS Motion, Exhibit A p. 31.) Respondent KDLO's owners received a full discharge of this debt, as indicated in the Discharge of Debtor, *In re Kevin Pederson*, Case No. 09-45837-PHB.

11.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).

12.KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. [The Complaint was served on December 11, 2008.] KDLO's inability to show 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. KDLO's violations are "repeated" because repeated means more than one. The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy time period during which the violations occurred. *See, In re Five Star Food Distributors*, 56 Agric. Dec. 880, 894-95 (1997). KDLO'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.[3] KDLO 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.

14. KDLO indicates that Evans Fruit Co. is largely responsible for KDLO's failures under the PACA. For purposes of this disciplinary case, I need not determine whether that is true. Where the licensee, such as KDLO, has failed to make full payment promptly to its produce suppliers, mitigating circumstances do not negate findings of "willful, flagrant and repeated violations." *See* AMS Reply pp. 8-13.

Findings of Fact

15. KDLO Enterprises, Inc., which is no longer in business, is a corporation incorporated and existing under the laws of the State of Washington. KDLO's business and mailing address are in Gig Harbor, Washington.

16. Pursuant to the licensing provisions of the PACA, KDLO Enterprises, Inc. was issued license number 1998-1922 on September 8, 1998. The license terminated on September 8, 2008, when KDLO failed to pay the annual renewal fee. Section 4(a) of the PACA (7 U.S.C. § 499a(a).

17. KDLO Enterprises, Inc., during October 2006 through June 2007, failed to make full payment promptly to 7 of the 8 produce sellers listed in

[3] 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).

paragraph III of the Complaint of the agreed purchases prices, or the balance of those prices, in the amount of $348,026.18 for 28 lots of fruits and vegetables, all being perishable agricultural commodities, which KDLO purchased, received, and accepted in the course of interstate commerce.

18.KDLO cannot show full compliance with the PACA within 120 days after having been served with the Complaint. [The Complaint was served on December 11, 2008.] KDLO's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case.

Conclusions

19.The Secretary of Agriculture has jurisdiction over KDLO Enterprises, Inc. and the subject matter involved herein.

20.KDLO Enterprises, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), during October 2006 through June 2007, by failing to make full payment promptly of the agreed purchases prices, or the balance of those prices, in the amount of $348,026.18 for 28 lots of fruits and vegetables, all being perishable agricultural commodities, which KDLO purchased, received, and accepted in the course of interstate commerce.

Order

21.KDLO Enterprises, Inc. committed willful, flagrant and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act (the PACA) (7 U.S.C. § 499b(4)), and the facts and circumstances of the PACA violations shall be published.

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

Finality

23.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

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REPARATION DECISIONS

GRASSO FOODS, INC. v. AMERICE, INC.
PACA Docket No. R-08-101.
Decision and Order.
Filed July 1, 2010.

PACA-R.

Damages, estimate of
Estimating damages is permissible as long as we do not move into speculation. Where determination of damages would be speculative (no objective benchmark can be found) they should not be awarded. Also, in arriving at an estimate, the uncertainty as to value must not be allowed to benefit the party who caused the uncertainty, or who had the burden of proving damages but failed to submit adequate evidence.

Damages, incidental and consequential
Storage fees can be awarded if agreed upon by the parties in a contract involving the sale of perishable agricultural commodities.

Damages, mitigation of
When assessing damages for resold product, it is necessary that Complainant show that its resale was made in a ""commercially reasonable manner". What is a "reasonable manner" depends upon the nature of the goods, the condition of the market and the other circumstances of the case. Where Complainant proved that the product to be resold was a "specialty item" with limited buyers, and that the product, once frozen, was not highly perishable, holding product in cold storage for several months until it could be resold was commercially reasonable.

Fees, award of
Fees and expenses will only be awarded to the extent that they are incurred in connection with an oral hearing. That an oral hearing might have been "contemplated" from the time of commencement of a reparation case does not necessarily make *all* work performed on that reparation case, from its early informal stages to the oral hearing, work that is "in connection" with the oral hearing. The prevailing party must clearly identify any fees and expenses incurred in connection with an oral hearing.

Interest
When parties contract for the payment of interest at a rate which is different than that normally awarded in reparation proceedings, the percent of interest for which the parties contracted will be awarded. Where invoices provided to Respondent, and undisputed by Respondent, stated that the terms of payment were net 30 days, and further stated that any balances unpaid after 30 days were subject to a 1.5% (18% per annum) finance charge or

interest on the invoice amount, interest of 18% on those invoices was awarded.

Trust, beneficiary of the
Where Complainant claimed that it was entitled to an order declaring that it is a PACA trust beneficiary of Respondent with valid PACA trust claims, such an order was not issued. Only the district courts have jurisdiction over actions by private parties seeking to enforce payment from trust, including actions seeking injunctive relief. It is the purview of the district courts to issue an order declaring that a Complainant is a PACA trust beneficiary of a Respondent with valid PACA trust claims.

Christopher Young-Morales, Presiding Officer.
Mattioni Ltd., Counsel for Complainant.
Gentile & Dickler, Counsel for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.) (hereinafter, "PACA"). A timely Complaint was filed with the Department on February 28, 2008, in which Complainant sought a reparation award against Respondent in the amount of $1,215,428.65 which was alleged to be past due and owing in connection with transactions involving peppers. Complainant claims that for peppers purchased by order contract for f.o.b. delivery during the August 2006-August 2007 contract year and shipped to Respondent between July 30, 2007 and November 13, 2007, Respondent owes the amount of $281,758.65[1] and for peppers purchased by order contract for f.o.b. delivery during the August 2007-August 2008 contract year and never delivered to Respondent, Respondent owes the amount of $933,670.00.[2]

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

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[1]The amount claimed in the Complaint for this produce was $281,758.65. Complainant subsequently modified this amount to $272,371.31.

[2] The amount claimed in the Complaint for this produce was $933,670.00. Complainant subsequently modified this amount to $352,774.96.

An oral hearing in this case was scheduled to be held on March 10-12, 2009, at the Martin Luther King Federal Bldg. and Courthouse in Newark, NJ. On March 3, 2009, a conference call was held, wherein the parties agreed to cancel the oral hearing and proceed by documentary procedure, in accordance with 7 C.F.R. § 47.20 of the Rules Of Practice Governing Reparation Proceedings Under The Perishable Agricultural Commodities Act. The parties further agreed that the testimony of witnesses would be presented by affidavit, and that Complainant would have the opportunity to request to depose any witness who testified by affidavit on behalf of Respondent, if Complainant deemed such request necessary, in accordance with 7 C.F.R. § 47.20 (a)(2). Thereafter, Complainant submitted an opening statement and affidavits, evidence, and a brief in support of its case; Respondent has, to date, made no documentary submissions, and has elected not to submit any additional evidence or file a brief.

Complainant submitted two (2) affidavits and twenty-seven (27) exhibits into evidence (various of the twenty-seven exhibits contained lettered subparts, for example, exhibits 5A-C, exhibits 6A-B, etc. These exhibits will be referred to in this decision as CX 1-27). Complainant submitted affidavits from Anthony Verchio, the Chief Operations Officer of Complainant, and from Janet Schumann[3], the Vice President of Complainant. The affidavits appear to be identical. Complainant also submitted a brief, which contained a claim for fees and expenses, with attached exhibits A-G.

Findings of Fact

1. Complainant, Grasso Foods, Inc., is a corporation whose business address is 2111 Kings Highway, Woolwich Twp., NJ 08085. At the time of the transactions alleged in the Complaint, Complainant was licensed under the PACA.

2. Respondent, Americe, Inc., is a corporation whose business address is 1405 Old Alabama Road, Suite 200, Rosewell, GA 30076. At the time of the transactions alleged in the Complaint, Respondent was licensed under

[3]Also known as Janet Tresch.

the PACA.[4]

3. Complainant is in the business of processing and selling peppers. These peppers are generally harvested, processed, frozen, and stored by Complainant and delivered to customers between the months of July through November. (Opening Statement, Verchio and Schumann affidavit, paragraph 6).

4. Complainant's customers establish their pepper requirements in advance for the upcoming year (because of the limited months that peppers are harvested, processed, and delivered). Complainant and its customers enter into agreements in about July or August to establish the quantity of peppers that Complainant will purchase and process on the customer's behalf for the next year. The contract year for Complainant and its customers generally runs from July or August of one year to July or August of the next. (Opening Statement, Verchio and Schumann affidavit, paragraph 7).

5. Complainant and Respondent have a longstanding relationship. Respondent has purchased peppers from Complainant since at least February 2004. Traditionally, in July or August the parties would discuss Respondent's pepper requirements for the upcoming year and would contract for and order a certain amount of peppers for delivery for the upcoming year at an agreed upon price. (Opening Statement, Verchio and Schumann affidavit, paragraph 9).

6. Based upon the quantity of produce ordered by Respondent in the contract between Complainant and Respondent, Complainant would purchase fresh peppers and process them to Respondent's specifications. They would then be frozen and sent to cold storage. The peppers would be handled at an agreed upon handling rate and placed into storage at an agreed upon storage rate. (Opening Statement, Verchio and Schumann affidavit, paragraph 10).

7. The terms of the sale of peppers were f.o.b., and when Respondent sent a truck to the cold storage facility, an amount of peppers would be loaded and Complainant would issue an invoice for the peppers loaded. This process was repeated throughout the life of each contract, so that

[4]Respondent's PACA license terminated in March 2008.

several pickups by Respondent would occur and several loads would be invoiced to Respondent by Complainant during each contract year, until the amount agreed upon in the original contract had been fulfilled. (Opening Statement, Verchio and Schumann affidavit, paragraph 16, CX 2).

8. In July 2006, the parties began discussions about Respondent's pepper requirements for the 2006-2007 contract year. Respondent stated in a July 13, 2006 email that it had "just been awarded business at a major account", and that it may need as much as 360,000 lbs. of yellow peppers and 1,800,000 lbs. of mixed red and green peppers during the 2006-2007 contract year. (Opening Statement, Verchio and Schumann affidavit, paragraph 13-15, CX 2).

9. In confirmation of the parties' agreement, on October 5, 2006 Respondent issued a purchase order to Complainant for the purchase of 485,000 lbs. of mixed red and green pepper strips at a price of $0.42 per pound, 72,000 lbs. of 3/8" red pepper strips at a price of $0.485 per pound, and 40,000 lbs. of yellow pepper strips at a price of $0.57 per pound. The purchase order stated that there was a storage and handling fee for the red strip peppers of $0.015 per pound for September[5] and a fee of $0.0075 per pound for each month thereafter, and a storage and handling fee for the yellow strip peppers of $0.15 per pound for November[6] and a fee of $0.0075 per pound for each month thereafter. (Opening Statement, Verchio and Schumann affidavit, paragraph 14, CX 3).

10. On January 29, 2007, Respondent issued an additional purchase order to Complainant for the purchase of 1,000,000 lbs. of mixed red and green pepper strips at a price of $0.40 per pound (CX 4). Complainant asserts that the price on the purchase order was a mistake, and that the actual price was $0.42 per pound. (Opening Statement, Verchio and Schumann affidavit, paragraph 15).

11. The terms of sale between Complainant and Respondent were f.o.b. (*see* note 8, *infra,* p. 8), and the agreement was that Respondent would

[5] The evidence submitted by Complainant does not indicate whether this storage fee began in September 2006 or September 2007.

[6] The evidence submitted by Complainant does not indicate whether this storage fee began in November 2006 or November 2007.

supply a truck upon which the peppers would be loaded, and shipped to Respondent. At this time Complainant would issue an invoice to Respondent for the shipped peppers. (Opening Statement, Verchio and Schumann affidavit, paragraph 16).

12. Between July 30, 2007 and November 13, 2007, pursuant to the agreement regarding the 2006-2007 contract year and the purchase orders issued by Respondent on October 5, 2006 and January 29, 2007, Complainant sold and delivered f.o.b. to Respondent various peppers in the amount of $272,371.31. (Opening Statement, Verchio and Schumann affidavit, paragraph 18, CX 5A-19C).

13. The peppers under the 2006-2007 contract were sold in 15 separate shipments, and for each shipment, an invoice was issued. Each invoice stated that the terms of payment were net 30 days, and further stated that any balances unpaid after 30 days were subject to a 1.5% (18% per annum) finance charge. (Opening Statement, Verchio and Schumann affidavit, paragraph 18, CX 5A-19C).

14. There were no inspections requested for any of the shipments made between July 30, 2007 and November 13, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraph 17, CX 5A-19C).

15. Respondent accepted the shipments made between July 30, 2007 and November 13, 2007, and to date, has paid Complainant only $1,000.00, for the shipment made on July 30, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraph 18-19). This payment was made on December 13, 2007. (CX 5C).

16. In July 2007, the parties began discussions via email about Respondent's pepper requirements for the 2007-2008 contract year. (CX 23).

17. In confirmation of the parties' agreement, Respondent issued a purchase order to Complainant, dated August 2, 2007[7], for the purchase of 1,100,000 lbs. of mixed red and green pepper strips at a price of $0.43 per pound, 175,000 lbs of 3/8" red pepper strips at a price of $0.525 per pound, and 110,000 lbs. of yellow pepper strips at a price of $0.64 per pound. The purchase order stated that there was a storage and handling fee for all

[7] This purchase order, submitted by Complainant as CX 24, contains notations for orders made on October 30, 2007, which suggests that August 2, 2007 was not the actual date of CX 24. It appears that the purchase order was issued on August 2 and later amended.

products at a rate of $0.015 per pound, "effective October 1", and an additional fee of $0.0075 per pound for each month of storage. (CX 24).

18. On October 30, 2007, the parties agreed to add an additional 350,000 lbs. of mixed red and green pepper strips at a price of $0.43 per pound, and an additional 53,000 lbs. of red pepper strips at a price of $0.525 per pound. (Opening Statement, Verchio and Schumann affidavit, paragraph 32, CX 24).

19. On November 7, 2007, the parties agreed to add 312,000 lbs. of mixed red and green pepper strips at a price of $0.43 per pound. This addition was a carry over from the 2006-2007 contract year. (CX 25).

20. Respondent never took delivery of any of the produce agreed upon and ordered by Respondent in the contract for the 2007-2008 contract year. (Opening Statement, Verchio and Schumann affidavit, paragraph 34).

21. Prior to the parties entering into the contract for the 2007-2008 year, Respondent had failed to pay for several invoices issued by Complainant to Respondent for peppers from the 2006-2007 contract year. (CX 22).

22. Respondent sent numerous emails to Complainant between September 6, 2007 and November 29, 2007, wherein Respondent acknowledged that it owed money to Complainant for shipments of peppers, and stated that Respondent was having various financial and credit problems. (CX 22).

23. As of July 27, 2009, Respondent had failed to pay for the peppers identified in both the 2006-2007 contract and the 2007-2008 contract, with the exception of a single $1000.00 check tendered by Respondent on December 13, 2007, for payment of invoice 9596 for peppers delivered f.o.b. to Respondent on July 30, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraphs 18-20, 34, CX 5C, See Complainant's Brief, p. 2).

24. The informal complaint was filed on February 11, 2008, and the formal complaint was filed with the Department on February 28, 2008, which is within nine months from the date the cause of action accrued. (Report of Investigation).

Conclusions

Complainant claims that Respondent owes it for peppers purchased by

order contract for f.o.b.[8] delivery during the August 2006-August 2007 contract year and shipped to Respondent between July 30, 2007 and November 13, 2007, and for peppers purchased by order contract for f.o.b. delivery during the August 2007-August 2008 contract year and never delivered to Respondent.

Complainant alleges that Respondent is liable, as to the 2006-2007 contract, for the principal sum of unpaid invoices for peppers sold totaling $272,371.31[9], for finance charges on the unpaid invoices as of May 14, 2009 totaling $78,267.51, and for continuing finance charges of $4,085.56 per month beyond May 2009. Complainant alleges that Respondent is liable, as to the 2007-2008 contract, for the cost of produce sold to Respondent and never claimed by or delivered f.o.b. to Respondent in the amount of $352,774.960, and for storage charges in the amount of $231,983.95 for produce sold to Respondent and never claimed by or delivered f.o.b. to Respondent. As to the 2007-2008 contract, Complainant further alleges that Respondent is liable for "future" losses that will be incurred by Complainant: continuing storage charges for produce sold to Respondent and never claimed by or delivered f.o.b. to Respondent in the amount of $6,354.30 per month, and "estimated" disposal expenses[11] in the

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[8] F.o.b. means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the [buyer] through land transportation at shipping point, in suitable condition...and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed. 7 C.F.R. § 46.43 (i); *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 975-976 (1997). The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at the time of shipment... . 7 C.F.R. § 46.43 (i).

[9] This includes an invoice for storage fees for certain of the peppers from the 2006-2007 contract, issued to Respondent on October 16, 2007. (CX 20).

[10] The total amount of produce ordered by Respondent in the 2007-2008 contract totaled $757,660 (1,762,000 lbs. X $0.43/lb.); Complainant granted a "credit" to Respondent for produce sold by Complainant to other buyers in the amount of $404,885.04. (Opening Statement, Verchio and Schumann affidavit, paragraph 39).

[11] While Complainant had not disposed of any of the peppers which were the subject of the 2007-2008 contract as of May 14, 2009, they nevertheless make the claim for disposal (continued...)

amount of $58,608.00. Finally, Complainant makes a claim for attorney's fees and expenses, and asserts that Complainant is entitled to an order declaring that it is a PACA trust beneficiary of Respondent with valid PACA trust claims.

Complainant has the burden of proving by a preponderance of the evidence all of the material allegations of its complaint, including the existence of a contract, the terms thereof, a breach by Respondent, and damages resulting from that breach. *Haywood County Co-operative Fruit, et al. v. Orlando Tomato, Inc.*, 47 Agric. Dec. 581 (1988); *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987).

As to whether the contracts in question existed, Complainant has met its burden and proven by a preponderance that a contract existed as to both the 2006-2007 and the 2007-2008 contract years. (*See* Opening Statement, Verchio and Schumann affidavit, paragraphs 12-16, 18; CX 2, CX 3, CX 5A-19C, CX 23, CX 24, CX 25). The evidence of record indicates that a mutual manifestation of assent, a "meeting of the minds", occurred as to the material terms of both of the contracts at issue in this case. *See Griffin-Holder Co. v. Joseph Mercurio Produce Corp.*, 40 Agric. Dec. 1002 (1981).

Complainant has further proven by a preponderance of the evidence that respondent breached both contracts. *See Martori Bros. Distributors v. Houston Fruitland, Inc.*, 55 Agric. Dec. 1331, 1335-1336 (1996). Respondent breached the 2006-2007 contract when Respondent took delivery of and accepted[12] the peppers identified in the contract and invoiced to Respondent between July and November 2007, and failed to pay

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[11](...continued)
expenses, stating that "[Complainant] is hopeful that it will be able to sell additional product [from the 2007-2008 contract] but the shelf life of the product is expiring and if the product cannot be sold in the near future then [Complainant] will incur disposal charges which are estimated to be [$58,608.00]."

[12] The evidence of record suggests that Respondent accepted all of the peppers which were sent to Respondent between July and November 2007 without complaint, and Respondent did not require inspections for any of the shipments made between July 30, 2007 and November 13, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraph 19, CX 5A-19C).

for all but $1,000.00 of those peppers. *See Growers Marketing Service, Inc. v. Dino Produce, Inc.*, 38 Agric. Dec. 1599 (1979)(where seller shipped watermelons of kind and quality called for by buyer, buyer's failure to make full and prompt payment results in buyer being indebted to seller for amount owed); *see also In re Diamond Tomato Co.*, 49 Agric. Dec. 1153 (1990)(purchaser's failure to make full payment promptly to 6 sellers with respect to 23 lots of tomatoes constitutes willful, repeated, and flagrant violations of § 499b).

Respondent breached the 2007-2008 contract when Respondent failed to take delivery of any of the peppers ordered by Respondent. *See Brookside Farms v. Mama Rizzo's, Inc.*, 873 F.Supp. 1029 (S.D. Tex. 1995). In *Brookside*, the seller (Brookside) and the buyer (MRI) entered into a contract for the sale of fresh basil leaves. Under the contract, MRI agreed to purchase a minimum of 91,000 lbs. of fresh basil leaves for a one year term. MRI failed to pay for a portion of the 91,000 lbs. already delivered by Brookside, and failed to accept the minimum amount of basil leaves it agreed to purchase. Brookside brought suit for both the delivered produce for which MRI failed to pay, and for the unordered remainder of the 91,000 lbs. The court granted Brookside's motion for summary judgment, holding that MRI's refusal to pay for the basil delivered and MRI's failure to accept and pay for the minimum amount of basil it agreed to purchase were breaches of contract and violations of section 499b(4) of the PACA (7 U.S.C. § 499b(4)). *Id.* at 1036. Similarly, in this case, both Respondent's failure to pay for the peppers delivered and accepted in the 2006-2007 contract, and its failure to order and take delivery of the peppers in the 2007-2008 contract, were breaches of the contracts and a violation of section 499b(4) of the PACA, for which damages may be awarded.

Damages

Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequences of such violations." *Ta-De Distributing Company, Inc., v. R.S. Hanline & Co., Inc.*, 58 Agric. Dec. 658 (1999). The long standing administrative practice favors the assessing of damages where possible. *James Macchiaroli Fruit Co. v. Ben Gatz Co.*, 38 Agric. Dec. 1477, 1484 (1979).

1) 2006-2007 contract year

As to the peppers that were delivered f.o.b. to Respondent, and for which Respondent failed to pay, Respondent is liable to Complainant for the full contract price of the peppers. The first and most basic rule, where goods have been accepted, is that the buyer who accepts goods is liable for the contract price. *See Growers Marketing Service, Inc. v. Dino Produce, Inc.*, 38 Agric. Dec. at 1599; *See also* UCC § 2 - 607(1). Between July 2007 and November 2007, Respondent accepted loads of peppers in 15 separate shipments from Complainant. In each case, an invoice was issued, and each invoice stated that the terms of payment were net 30 days. The invoice prices were in accord with the contract reached between the parties in July-August 2006.
(Opening Statement, Verchio and Schumann affidavit, paragraph 18, CX 5A-19C).

As of July 27, 2009, Respondent had failed to pay for the peppers identified in the 2006-2007 contract, with the exception of a single $1000.00 check tendered by Respondent on December 13, 2007 for payment of invoice 9596 for peppers delivered f.o.b. to Respondent on July 30, 2007. (Opening Statement, Verchio and Schumann affidavit, paragraph 18, CX 5C, Complainant's Brief, p. 2). Moreover, Respondent acknowledged that it had failed to pay for several invoices: Respondent sent numerous emails to Complainant between September 6, 2007 and November 29, 2007, wherein it admitted that it owed money to Complainant for shipments of peppers, and stated that Respondent was having various financial and credit problems. (CX 22). Respondent has offered no defense for its failure to pay for the produce accepted pursuant to the 2006-2007 contract. Therefore, Respondent is liable to Complainant for the full amount of the contract price, in this case evidenced by the invoices sent to Respondent between July 2007 and November 2007, less the $1,000.00 paid by Respondent on December 13, 2007. This amount totals $271,659.52.

Respondent is also liable for storage fees for peppers stored as part of the 2006-2007 contract, which were agreed upon by the parties at the time of the making of the contract in July-August 2006, and memorialized in the purchase order sent by Respondent to Complainant. (CX 3, CX 20). *Peak*

Vegetable Sales v. Northwest Choice, Inc., 58 Agric. Dec. 646, 654-655 (1999)(awarding storage fees); *Eustis Fruit Company, Inc., v. The Austen Company, Inc.*, 51 Agric. Dec. 861 (1992)(suggesting that storage fees are allowable if agreed upon in contract).[13] Complainant presented as evidence a breakdown of the charges in the amount of $711.79, set forth on an invoice dated October 16, 2007[14] and presented to Respondent. (CX 20). Respondent is liable to Complainant in the amount of $711.79 for storage fees for storage of peppers from the 2006-2007 contract year.

Complainant asserts that Respondent is liable for finance charges on the unpaid invoices, relating to the 16 separate transactions (one of these transactions includes an invoice for storage fees on produce, CX 20) that occurred under the 2006-2007 year contract, totaling $78,267.51 as of May 14, 2009. Complainant further asserts that Respondent is liable for continuing finance charges of $4,085.56 per month beyond May 2009. Complainant has provided a calculation of interest for each unpaid invoice through May 2009, and for each month thereafter. (CX 21).

The requirement of section 5(a) of the Act (7 U.S.C. § 499e(a)), that we award damages to the person or persons injured by a violation of section 2 of the Act, includes awards of interest. *L & N Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award. *See W. D. Crokett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

If parties contract for the payment of interest at a rate which is different

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[13] Certain earlier PACA reparation cases have suggested that storage fees should not be awarded, and that a storage contract [or portion of a contract thereof, when there is a claim for storage fees in a PACA reparation involving a contract for the sale of produce] does not fall within the category of "transaction" under section 2(4) (7 U.S.C. § 499b(4)) of the Act. *See De Bruyn Produce Co. v. Ruben E. Lopez d/b/a R.L. Distributors*, 56 Agric. Dec. 992, 996, note 5 (1997); *Roger L. Burden dba Burden Produce Services v. Sonny Taylor and Richard Taylor dba Taylor Produce*, 50 Agric Dec. 1005, 1008 (1991); *see also Joanne M. Eady v. Eady Associates*, 37 Agric. Dec. 1589 (1978). However, the later cases cited in this decision suggest that storage fees can be awarded if agreed upon by the parties in a contract involving the sale of perishable agricultural commodities.

[14] This invoice also contained a statement advising Respondent that any unpaid balance after 30 days would be subject to a 1.5% (18 % per annum) finance charge. (CX 20).

than that normally awarded in reparation proceedings, this forum will award the percent of interest for which the parties contracted. *Dale Seaquist d/b/a Orchard hill Farm v. Gro-Pro, Inc. and/or Fruit Hill, Inc.*, 43 Agric. Dec. 161 (1984); *Swanee Bee Acres, Inc. v. Gro-Pro, Inc. and/or Fruit Hill, Inc.,* 42 Agric. Dec. 637 (1983); *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.,* 29 Agric. Dec. 978, 979 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970). Here, each invoice provided to Respondent stated that the terms of payment were net 30 days, and further stated that any balances unpaid after 30 days were subject to a 1.5% (18% per annum) finance charge[15] or interest on the invoice amount. (Opening Statement, Verchio and Schumann affidavit, paragraphs 18-24, CX 5A-19C).

Terms contained in the seller's invoice become part of the parties' contract unless (1) the buyer expressly limited the seller's acceptance to the terms of the offer; or (2) the buyer objects to the new terms within a reasonable time; and (3) the additional terms materially alter the contract. *Bayway Ref. Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 223 (2d Cir. 2000). Here, Respondent has made no claim that it limited its offer or timely objected to the interest provision in the invoices, or that the interest provision materially altered[16] the contract. The parties contracted, via the invoices issued by Complainant to Respondent between July and November 2007, for the payment of interest at a rate of 1.5 % interest on all balances unpaid after 30 days. Therefore, we award this rate on the past due invoices from the 2006-2007 contract, in the amount of $78,267.51 for charges up until May 2009, and $4,085.56 per month after May 2009, until

[15] Including CX 20, the invoice containing storage fees.

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

the date of issuance of this order.[17] *See Pearl Grange Fruit Exchange, Inc.*, 29 Agric. Dec. at 978, 979.

2) 2007-2008 contract year

Complainant alleges that Respondent is liable, as to the 2007-2008 contract, for the cost of peppers sold to Respondent and never claimed by or delivered f.o.b. to Respondent in the amount of $352,774.96[18], and for storage charges in the amount of $231,983.95 for produce sold to Respondent and never claimed by or delivered f.o.b. to Respondent. Complainant's claim is limited to the quantity of red and green pepper strips sold under the 2007-2008 contract; Complainant states that these are a specialty item and for that reason, they were more difficult to resell to other buyers[19]. (Opening Statement, Verchio and Schumann affidavit, paragraph 36).

As noted *supra* at 10-11, Respondent breached the 2007-2008 contract when it failed to take delivery of any of the peppers ordered by Respondent. Complainant points to the case of *S.N.A. Nut Company v. The Haagen-Dazs Company*, 247 B.R. 7 (N.D. Ill. 2000), as support for damages from this breach as to the mixed red and green pepper portion of the contract. In *S.N.A. Nut*, S.N.A. manufactured nuts for Haagen-Dazs under a sales contract, and Haagen-Dazs failed to perform under the contract and take possession of and pay for the nuts. The court found that S.N.A could recover damages because, *inter alia*, 1) the evidence was undisputed that the nuts in question were unique goods manufactured to Haagen Dazs' confidential specifications with no market value to any except Haagen

[17] Subsequent to the date of issuance of this order, interest on the past due invoices shall be determined in accordance with the rate set by 28 U.S.C. § 1961, *see infra* at 25. *See PGB International, LLC. Co. v. Bayche Companies, Inc.*, 65 Agric. Dec. 669, 672 (2006).

[18] The total amount of produce ordered by Respondent in the 2007-2008 contract totaled $757,660 (1,762,000 lbs X $0.43/lb.); Complainant granted a "credit" to Respondent for produce sold by Complainant to other buyers in the amount of $404,885.04. (Opening Statement, Verchio and Schumann affidavit, paragraph 39).

[19] Complainant presumably resold the other pepper items under the 2007-2008 contract with no damages perceived by Complainant.

Dazs; 2) S.N.A. provided undisputed evidence that it employed extensive marketing efforts to sell the nuts, that it expended considerable effort and resources in attempted resale, and that it made every reasonable effort to resell the nuts in a timely manner; and 3) the subject nuts being held by S.N.A in storage "no longer had any value whatsoever." *Id.* at 11-13.

In our case, while Complainant provided affidavits from Complainant's employees which stated that mixed red and green pepper strips were a "specialty item" with limited demand
(Opening Statement, Verchio and Schumann affidavit, paragraph 36), Complainant has provided no evidence that the mixed red and green pepper strips had no value to any other customer, as was the case in *S.N.A Nut*. Further, while Complainant has provided evidence of resale of the red and green strip peppers, it has not provided evidence that it expended "considerable effort and resources" in attempted resale, as was the case in *S.N.A Nut*. *See id.* at 10-13.

Nevertheless, in this case, since Respondent has provided no evidence to the contrary, and based on the affidavits submitted by Complainant, we find that the mixed red and green strip peppers were a specialty item. The evidence indicates that Complainant kept all 1,762,000 lbs. (the entire amount under the 2007-2008 contract) of the mixed red and green peppers in storage from October 2007 through July 2008, and then began selling portions of the mixed strip peppers to other buyers. As of May 2009, Complainant had resold 914,670 lbs. to other buyers. (Opening Statement, Verchio and Schumann affidavit, paragraph 39).

In assessing Complainant's damages as to the mixed strip peppers, we must determine whether the product's resale was made in a "commercially reasonable manner", and whether Complainant properly mitigated its damages. *See S.N.A. Nut Company*, 247 B.R. 7 at 10-13; *Valley Pride Sales, Inc. v. Dairy Rich Ice Cream Co., Inc., and/or Continental Food Sales, Inc.*, 53 Agric Dec. 879 (1994); U.C.C. § 2-703. Section 2-703 of the UCC provides that when a buyer refuses to perform under a sales contract, the seller may recover damages using a number of different methods to calculate loss as set forth in UCC §§ 2-704 through 2-709. The underlying purpose of each of these remedies is to ensure that the seller is made whole and the "[c]ourt must administer each of these remedies so that [the seller] may be put in as good a position as if [the buyer] had fully performed."

S.N.A. Nut Company, 247 B.R. at 8-9. For these sections of the UCC to apply, it is also necessary that Complainant show that its resale was made in a "commercially reasonable manner". "What is such a reasonable [manner] depends upon the nature of the goods, the condition of the market and the other circumstances of the case; its length cannot be measured by any legal yardstick or divided into degrees." *Valley Pride Sales, Inc.*, 53 Agric Dec. at 885.

Here, as stated above, Complainant provided evidence that the mixed red and green strip peppers were a specialty item, and difficult to sell to buyers other than Respondent. (Opening Statement, Verchio and Schumann affidavit paragraph 36). Further, it appears from the evidence provided by Complainant that the peppers, once frozen, were not highly perishable, and that the sale of peppers to Respondent under the 2007-2008 contract would have begun in July 2008 (the contract was traditionally reached in July of the preceding year). (Opening Statement, Verchio and Schumann affidavit, paragraph 7, 12-18). Therefore, we find that the resale of mixed red and green strip peppers between July 2008 and April 2009 was "commercially reasonable", and a reasonable attempt to mitigate any damages caused by Respondent's breach. *See Valley Pride Sales, Inc.*, 53 Agric Dec. at 885.

The affidavits provided by Complainant show damages for the cost of mixed red and green strip peppers sold to Respondent under the 2007-2008 contract as follows:

Total amount ordered and unpaid-	1,762,000 lbs. X $0.43 =	$757,660.00
Credit for product sold -	914,760 lbs. X $0.44 =	$404,885.04
Net loss for unsold product-		$352,774.96

(Opening Statement, Verchio and Schumann affidavit, paragraph 39). According to Complainant's calculations, the portion of the red and green pepper mix that it resold fetched an average price of $0.442 per pound, which is greater than the original price agreed upon by the parties in the 2007-2008 contract (had Complainant sold the 914,760 lbs. at the original contract price of $0.43 per pound, it would have netted $393,346.80, which is less than the actual $404,885.04 amount it netted after resale to buyers other than Respondent).

Complainant calculates its net loss for unsold product by presumably

assuming that the remaining unsold 847,240 lbs. is worth nothing. Had Complainant produced evidence of such, then perhaps its calculation of damages could be adopted; however, Complainant produced no evidence to suggest that the remaining unsold peppers had no value whatsoever, as was done in the *S.N.A Nut* case. *See S.N.A. Nut Company*, 247 B.R. at 11. Instead, the affidavits submitted by Complainant somewhat equivocally state: "Grasso is hopeful that it will be able to sell additional product but the product is expiring and if the product cannot be sold in the near future then Grasso will incur disposal charges." (Opening Statement, Verchio and Schumann affidavit, paragraph 41). Estimating damages is permissible as long as we do not move into speculation. Where determination of damages would be speculative [no objective benchmark can be found] they should not be awarded. *See Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979). Also, in arriving at an estimate, the uncertainty as to value must not be allowed to benefit the party who caused the uncertainty, or who had the burden of proving damages but failed to submit adequate evidence. *See Meyer Tomatoes v. Hardcastle Produce Co., Inc.*, 40 Agric. Dec. 1172 (1981).

Accordingly, since Complainant made more than it would have under the original 2007-2008 contract for the 914,760 lbs. of peppers resold, and since Complainant still had 847,240 lbs. of unsold peppers as of May 2009 that presumably had some unknown value, and since Complainant has provided us with no evidentiary benchmark for determining that value, we do not award Complainant damages as to its claimed net loss for unsold mixed red and green strip peppers under the 2007-2008 contract.

However, we will award damages as to expenses incurred in relation to Respondent's breach of the 2007-2008 contract. *See Summit Produce, Inc., v. James Polly d/b/a Star Produce*, 35 Agric. Dec. 41 (1976); *Pandol Bros., Inc., v. Prevor Marketing International, Inc.,* 49 Agric. Dec. 1193 (1990)(incidental and consequential damages resulting from breach will be allowed if the party who breached had reason to know the damages would be incurred); UCC § 2-714 and 715. Complainant claims storage charges

in the amount of $231,983.95[20] for the red and green pepper mix, for storage of the peppers between October 2007 through May 2009. The sum of the charges is based on a $0.015 charge per pound for the month of October 2007, and a $0.075 charge per pound for each month thereafter, to which Respondent agreed (in writing) at the time of the making of the contract. CX 24. Since Respondent agreed to the charges, and since the time period for storage of the peppers was reasonable (*see supra* at 16-18 regarding resale), we find that Respondent is liable to Complainant for storage fees in the amount of $231,983.95 for storage of the mixed red and green strip peppers through May 2009. *See Peak Vegetable Sales*, 58 Agric. Dec. at 654-655 (awarding storage fees); *see also Eustis Fruit Company, Inc.,* 51 Agric. Dec. at 861 (suggesting that storage fees are allowable if agreed upon in contract).

As to the 2007-2008 contract, Complainant further alleges that Respondent is liable for "future" losses relating to the mixed red and green strip peppers under the 2007-2008 contract that will be incurred by Complainant: continuing storage charges in the amount of $6,354.30 per month, and "estimated" future disposal expenses in the amount of $58,608.00. As stated *supra* at 19-20, damages that are speculative, with no objective benchmark for their determination, will not be awarded. *See Anthony Brokerage, Inc. v. The Auster Company, Inc.*, 38 Agric. Dec. 1643 (1979).

Here, Complainant requests future continuing monthly storage fees (after May 2009) in a specified amount based on the unsold 847,240 lbs. of mixed peppers as of May 2009. However, Complainant provides no evidence to suggest that it will sell *no* more peppers after May 2009, and that the poundage in storage will remain the same from month to month (thus justifying a fixed award of $6,354.30 per month, *i.e.*, 847,240 lbs. X $.075). Moreover, if it was indeed the case that Complainant *knew* it would sell no more peppers after May 2009, that the 847,240 lbs. would remain a static amount from month to month and was unsaleable, then Complainant would be obligated to immediately dump the produce to mitigate its incidental and consequential damages resulting from storage. Complainant

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[20] The total sum for storage costs was $242,275.20; Complainant provided a "credit" of $10,291.25, for storage charges paid by other buyers to whom the peppers were resold. (Opening Statement, Verchio and Schumann affidavit, paragraph 39)

provides no evidence that the remaining 847,240 lbs. is worthless and must be dumped.

Complainant submitted an equivocal statement wherein it stated that "[Complainant] is hopeful that it will be able to sell additional product [from the 2007-2008 contract] but the shelf life of the product is expiring and if the product cannot be sold in the near future then [Complainant] will incur disposal charges which are estimated to be [$58,608.00]." (Opening Statement, Verchio and Schumann affidavit, paragraph 41). Complainant would have us award both speculative continuing storage fees (speculative since Complainant may very well sell more of the 847,240 lbs. of peppers after May 2009), and speculative disposal charges (speculative since Complainant has no idea whether, or what amount, it might eventually dump). Complainant's somewhat vague and equivocal statement is inadequate to provide a benchmark for damages regarding future storage charges or possible estimated future disposal charges[21]. Therefore, we deny Complainant's claim of future storage charges (for charges after May 2009) in the amount of $6,354.30 per month or estimated future disposal charges in the amount of $58,608.00.

Complainant makes a claim for attorney's fees and expenses in this case, claiming that "[Complainant's] actions in defending this claim make an award for attorney's fees appropriate." (Complainant's brief at 12). Complainant also claims that certain fees were incurred preparing for the oral hearing (prior to the parties decision to convert to a documentary procedure). (Complainant's brief at 12-13). The fees and expenses provision under section 7(a) of the PACA (7 U.S.C. § 499g(a)) has been interpreted to exclude any fees or expenses which would have been incurred in connection with the case if that case had been heard by documentary procedure. *East Produce, Inc., v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (2000); *Mountain Tomatoes, Inc., v. Patapanian & Son*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieir Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son,* 36 Agric. Dec. 24 (1977).

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[21] Dumping fees are allowed as damages where there is evidence of proper dumping due to breach of contract. *Shelby Farms v. Wellsworth Pickle Company,* 21 Agric. Dec. 190 (1962).

Section 47.19(d)(2) of the regulations applicable to the PACA (7 C.F.R. § 47.19(d)(2)) states that the term "fees and expenses" as used in section 7(a) of the Act includes:

(i) reasonable fees of an attorney or authorized representative for appearance at the hearing and for the taking of depositions necessary for introduction at the hearing;

(ii) fees and mileage for necessary witnesses at the rates provided for witnesses in the courts of the United States;

(iii) fees for the notarizing of a deposition and its reduction to writing;

(iv) fees for serving subpoenas; and

(v) other fees and expenses necessarily incurred in connection with the oral hearing. Fees and expenses which are not considered to be reasonable or necessarily incurred in connection with the oral hearing will not be awarded.

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. *East Produce, Inc.*, 59 Agric. Dec. at 864; *Mountain Tomatoes, Inc.*, 48 Agric. Dec. at 715. It is the province of the Secretary to determine the reasonableness of the requested fees and expenses. *Id.*; *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Complainant claims that a portion of its attorney's fees and expenses were incurred in preparation for oral hearing, yet it does not enumerate which expenses were incurred in this fashion. Based on the record, Complainant did not incur any of the fees and expenses enumerated in section 47.19(d)(2) of the regulations (7 C.F.R. § 47.19(d)(2)). Complainant also appears to assert that the entire amount of its claimed fees and expenses should be awarded, because an oral hearing was "contemplated" from the start of the case, and therefore all work performed and expenses incurred were incurred in connection with the oral hearing. We disagree with Complainant's assertion. That an oral hearing might have been "contemplated" from the time of commencement of a reparation case does not necessarily make *all* work performed on that reparation case, from its early informal stages to the oral hearing, work that is "in connection with the oral hearing." We find that Complainant's claims for fees and expenses are for fees and expenses "which would have been incurred in any event under the documentary procedure." *See, e.g., East Produce,* 59 Agric. Dec. at 865-866. Based on the foregoing, we deny Complainant's claim for fees

and expenses.

Finally, Complainant claims that it is entitled to an order declaring that it is a PACA trust beneficiary of Respondent with valid PACA trust claims. The PACA trust was established by Congress to protect sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received. The trust is a statutory trust which operates in favor of all unpaid suppliers, sellers and agents. *C&E Enterprises, Inc. d/b/a Koyama farms, et. al., v. Milton Poulos, Inc.*, 47 Agric. Dec. 1442, 1443 (1988). The trust provisions are found in section 5(c) of the PACA (7 U.S.C. § 499e(c)). Section 5(c)(5) of the Act addresses PACA trust jurisdiction, and states:

[t]he several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust.

(7 U.S.C. § 499e(c)(5); *Tanimura & Antle, Inc. v. Pack Fresh Produce, Inc.*, 222 F3d 132 (2000)([t]he district courts have jurisdiction over actions by private parties seeking to enforce payment from trust, including actions seeking injunctive relief). Therefore, we do not have jurisdiction to issue an order declaring that Complainant is a PACA trust beneficiary of Respondent with valid PACA trust claims.

Respondent's failure to pay Complainant monies owed under the 2006-2007 and 2007-2008 contracts is a violation of section 2 of the Act for which reparation should be awarded to the Complainant, with interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970). As to the 2006-2007 contract, we have determined that Respondent is liable to Complainant in the amount of $271,659.52. Respondent is also liable to Complainant for storage fees in the amount of $711.79, which were invoiced to Respondent on October 13, 2007 for storage of peppers from the 2006-2007 contract. The total damages owed for this contract is $272,371.31. As to the 2006-2007 contract, the parties agreed to the payment of interest at a rate of 1.5 % interest on all balances unpaid after 30 days. Therefore, we award this rate on the past due invoices from the 2006-2007 contract, in the amount of $78,267.51 for charges up until May

2009, and $4,085.56 per month after May 2009, until the date of issuance of this order. *See Pearl Grange Fruit Exchange, Inc.*, 29 Agric. Dec. at 978, 979. Subsequent to the date of issuance of this order, interest on the past due invoices shall be determined in accordance with the rate set by 28 U.S.C. § 1961, *i.e.*, the interest shall be calculated at a rate equal to the weekly average one year constant treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the order. *See PGB International, LLC. Co. v. Bayche Companies, Inc.*, 65 Agric. Dec. 669, 672 (2006); *see also* 71 Fed. Reg. 25133 (April 28, 2006).

As to the 2007-2008 contract, we find that Respondent is liable to Complainant for storage fees in the amount of $231,983.95 for storage of the mixed red and green strip peppers through May 2009. Interest on this portion of the award shall be determined in accordance with 28 U.S.C. § 1961. *Id*. Interest on awards of damages have traditionally been calculated from the first day of the month following the date upon which payment was due; however, in this case, as to the 2007-2008 contract, while the evidence shows that the parties agreed upon monthly charges and their amounts, the evidence does not show when the monthly storage charges were due from Respondent or to be paid to Complainant. Therefore, interest on these cumulative monthly charges up until May 2009 is awarded from the date we adjudicated them as due.

Complainant in this action paid a $300.00 handling fee to file its complaint. Pursuant to 7 U.S.C. § 499(e)(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 $272,371.31, plus interest in the amount of $78,267.51 for charges up until May 2009, and $4,085.56 per month from June 2009 to June 2010. Subsequent to the date of issuance of this Order, interest on the past due invoices shall be at the rate of 0.29 % per annum, until paid.

Respondent shall further pay Complainant as reparation $231,983.95, with interest thereon at the rate of 0.29 % per annum, until paid; plus the amount of $300.00.

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

_____

DENNIS B. JOHNSTON, DON M. JOHNSTON, GERALD A. JOHNSTON, KEVIN C. JOHNSTON, AND TARI L. HENDERSON, d/b/a JOHNSTON FARMS v. AG GROWER SALES LLC.
PACA Docket No. R-08-137.
Decision and Order.
Filed July 7, 2010.

PACA-R.

Damages – Interest rate in confirming forms

Contract Terms – Failure to enforce terms constitutes a waiver

Contract Terms – Waived terms reinstated with reasonable notice

Complainant alleges that it is entitled to recover interest on its invoices which expressly state that "Past Due Accounts will be assessed a late payment service charge at the rate of 1½% per month or 18% per annum from the date of invoice." Respondent, rather than objecting to the "FOB Prompt" payment and service charge terms in Complainant's invoices, simply chose to ignore them. Comment 6 to section 2-207 of the Uniform Commercial Code makes it clear that a merchant's decision to ignore additional terms in confirming forms constitutes acceptance of those terms.

We found that the payment and interest charge provisions in Complainant's invoices were incorporated into the parties' sales contracts. In addition, we found that Respondent's late payments over many years and Complainant's failure to charge interest during those years did not modify the parties' contracts, but that Complainant had waived its right to recover interest charges for late payments that it accepted prior to giving Respondent reasonable notice that the service charge provision in the parties' contracts would be enforced.

We awarded prejudgment interest at the contractually agreed rate of 18% on any unpaid amounts from the effective date of Complainant's reasonable notice to Respondent, until paid, up to the date of the judgment. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978, 979 (1970). In addition, we awarded post-judgment interest on the judgment amount from the date of the judgment until paid at the rate set by 28 U.S.C. § 1961. *See PGB International, LLC. Co. v. Bayche Companies, Inc.*, 65 Agric.

Dec. 669, 672 (2006).

Patrice H. Harps, Presiding Officer.
Earl E. Elliott, Examiner.
Complainant, *pro se.*
Ogden Murphy Wallace, P.L.L.C., Counsel for Respondent.
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 $4,620.00 in connection with thirteen truckloads of potatoes 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 $2,260.00 for damages allegedly incurred in connection with three of the transactions contained in the Complaint. Complainant filed a Reply to the Counterclaim denying liability to Respondent.

Neither the amount claimed in the Complaint nor in the Counterclaim exceeds $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. Respondent filed an Answering Statement. Complainant filed a Statement in Reply. Neither party submitted a brief.

Findings of Fact

1. Complainant is a partnership comprised of Dennis B. Johnston, Don M. Johnston, Gerald A. Johnston, Kevin C. Johnston, and Tari L. Henderson, doing business as Johnston Farms, whose post office address is P.O. Box 65, Edison, California, 93220-0065. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, AG Grower Sales LLC, is a limited liability company whose post office address is 636 Valley Mall Pkwy., Ste. 203, East Wenatchee, Washington, 98802-4875. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about June 15, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in San Louis Obispo, California, 50-50# sacks of #2 Budget red potatoes at $4.05 per sack, or $202.50, and 50-50# cartons of #1A El Diablo Rojo red potatoes at $8.05 per carton, or $402.50, and 40-50# cartons of #1B El Diablo Rojo red potatoes at $10.05 per carton, or $402.00, and 10-50# cartons of Creamer El Diablo Rojo red potatoes at $28.05 per carton, or $280.50, and 50-50# cartons of Premium Bluejay yellow flesh potatoes at $13.05 per carton, or $652.50, plus $30.00 for pallets, for a total agreed price of $1,970.00, f.o.b., billed on invoice number 702082. (Complaint, Ex. 1.) Respondent paid invoice number 702082 in full prior to the Complaint being filed.

4. On or about June 19, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Denver, Colorado, 100-50# cartons of #1B El Diablo Rojo red potatoes at $12.05 per carton, f.o.b., or $1,205.00, plus $15.00 for pallets, for a total agreed price of $1,220.00, billed on invoice number 702149. (Complaint, Ex. 2.) Respondent paid invoice number 702149 in full prior to the Complaint being filed.

5. On or about June 26, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in the state of New York, 50-50# sacks of #1A El Diablo Rojo red potatoes at $10.05 per sack, or $502.50,

and 50-50# cartons of Creamer El Diablo Rojo red potatoes at $23.05 per carton, or $1,152.50, and 100-50# cartons of #1A Bluejay yellow flesh potatoes at $13.05 per carton, or $1,305.00, and 50-50# cartons of Creamer yellow flesh potatoes at $27.05 per carton, or $1,352.50, plus $37.50 for pallets, for a total agreed price of $4,350.00, f.o.b., billed on invoice number 702258. (Complaint, Ex. 3.) Complainant received payment in full for invoice 702258 on or by November 19, 2007, on Respondent's check number 7459. (Complaint, Ex. 8-9.)

6. On or about June 27, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in the state of New Jersey, 150-50# cartons of Creamer Bluejay white potatoes at $20.05 per carton, or $3,007.50, and 200-50# cartons of Creamer Bluejay yellow flesh potatoes at $30.05 per carton, or $6,010.00, plus $23.50 for a temperature recorder, and $52.50 for pallets, for a total agreed price of $9,093.50, f.o.b., billed on invoice number 702309. (Complaint, Ex. 4.) Respondent reported a condition problem to Complainant regarding the 150 cartons of Creamer Bluejay white potatoes, and Complainant granted Respondent an allowance. (Complaint, Ex. 41-2.) On June 28, 2007, Complainant issued a corrected version of invoice number 702309, billing Respondent for 150-50# cartons of Cramer Bluejay white potatoes at the reduced price of $11.00 per carton, or $1,650.00, and 200-50# cartons of yellow flesh potatoes at the original price of $30.05 per carton, or $6010.00, plus $23.50 for a temperature recorder, and $52.50 for pallets, for an adjusted total price of $7,736.00, f.o.b. (Complaint, Ex. 5.) Respondent paid Complainant $7,720.00 for invoice number 702309 on check number 6776, on or about August 10, 2007, leaving an unpaid balance of $16.00. (ROI, Ex. C, p. 1, and Answer, Ex. D-5-2.)

7. On or about June 29, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in the state of Nebraska, 357-50# cartons of #1A El Diablo Rojo red potatoes at $7.75 per carton, or $2,766.75, and 21-50# cartons of #1B red potatoes at $14.05 per carton, or $295.05, and 14-50# cartons of #1B yellow flesh potatoes at $10.05 per carton, or $140.70, plus $60.00 for pallets, for a total agreed price of $3,262.50, f.o.b., billed on invoice number 702316. (Complaint, Ex. 6.) Respondent issued check number 6738 to Complainant on August 1, 2007,

in payment of invoice 702316. (Answer, Ex. G-15.) Complainant refused to accept the check and returned it to Respondent due to alleged unauthorized deductions taken against other invoices paid with the same check, leaving an unpaid balance of $3,262.50. (Complaint, Ex. 31-32.) Respondent issued another check number 7628 to Complainant on December 10, 2007, in payment of invoice 702316. (Complaint, Ex. 43.) Complainant refused to accept the check and returned it to Respondent as an unsatisfactory payment seeing the payment included unauthorized deductions taken against other invoices (Complaint, Ex. 44), leaving an unpaid balance of $3,262.50.

8. On or about June 29, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Fresno, California, 50-50# sacks of #2 Budget red potatoes at $4.05 per sack, or $202.50, and 50-50# cartons of #1A El Diablo Rojo red potatoes at $8.05 per carton, or $402.60, and 50-50# cartons of Premium Bluejay yellow flesh potatoes at $13.05 per carton, or $652.50, for a total agreed price of $1,257.50, f.o.b., billed on invoice number 702336. (Complaint, Ex. 7.) Complainant received payment in full for invoice number 702336 on or by November 19, 2007, on Respondent's check number 7459.
(Complaint Ex. 8-9.)

9. On or about June 30, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in El Paso, Texas, 430-100# sacks of #1A Bluejay Norkotah Russet potatoes at $8.75 per sack, f.o.b., or $3,762.50, plus $23.50 for a temperature recorder, and $127.50 for pallets, and $75.00 for a phytosanitary inspection, for a total agreed price of $3,988.50, billed on invoice number 702339. (Complaint, Ex. 10.)

10. On July 2, 2007, the U.S.D.A. performed an inspection at Respondent's customer in El Paso, Texas, on the 430 sacks of potatoes, mentioned in Finding of Fact number 9. Pulp temperatures at the time of the inspection ranged from 41 to 42 degrees Fahrenheit. The inspection disclosed the potatoes were affected by 2% external quality defects (cuts), 10% brown surface discoloration, and 7% discolored raised/sunken lenticels, for a total of 19% damage by quality and condition defects. The inspector stated the

potatoes failed to grade U.S. No. 1 account condition. (Complaint, Ex. 11.) Respondent rejected the truckload of potatoes to Complainant. Following the rejection of the potatoes Respondent billed Complainant $2,000.00 for freight, and $154.00 for the federal inspection, and $130.00 for a Mexican inspection cancellation fee, and $75.00 for a Mexican inspection, or a total of $2,359.00 on its invoice number 5451. (Complaint, Ex. 19.) Complainant paid Respondent $2,000.00 for freight and $154.00 for the cost of the federal inspection, or $2,154.00 on check number 36276, dated August 17, 2007. (Complaint, Ex. 20.)

11.On or about June 30, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in El Paso, Texas, 430-100# sacks of #1A Bluejay Norkotah Russet potatoes at $8.75 per sack, f.o.b., or $3,762.50, plus $23.50 for a temperature recorder, and $127.50 for pallets, and $75.00 for a phytosanitary inspection, for a total agreed price of $3,988.50, billed on invoice number 702340. (Complaint, Ex. 13.)

12.On July 2, 2007, the U.S.D.A. performed an inspection at Respondent's customer's location in El Paso, Texas, on the 430 sacks of potatoes, mentioned in Finding of Fact number 11. Pulp temperatures at the time of the inspection ranged from 41 to 43 degrees Fahrenheit. The inspection disclosed the potatoes were affected by 2% external quality defects (cuts), 8% brown surface discoloration, and 7% discolored raised/sunken lenticels, for a total of 17% damage by quality and condition defects. The inspector stated the potatoes failed to grade U.S. No. 1 account condition. (Complaint, Ex. 14.) Respondent rejected the truckload of potatoes to Complainant. Following the rejection of the potatoes Respondent billed Complainant $2,200.00 for freight, and $115.00 for the federal inspection, and $130.00 for a Mexican inspection cancellation fee, for a total of $2,445.00 billed on its invoice number 5449. (Complaint, Ex. 18.) Complainant paid Respondent $2,200.00 for freight and $115.00 for the cost of the federal inspection, or $2,315.00 on check number 36276, dated August 17, 2007. (Complaint, Ex. 20.)

13.On or about June 30, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in El Paso, Texas, 430-100# sacks of #1A Bluejay Norkotah Russet potatoes at $8.75 per sack, f.o.b., or $3,762.50, plus $23.50 for a temperature recorder, and $127.50 for pallets,

and $75.00 for a phytosanitary inspection, for a total agreed price of $3,988.50, billed on invoice number 702341. (Complaint, Ex. 16.) The truck carrying the potatoes broke down due to mechanical problems and never arrived at the intended contract destination in El Paso, Texas. The potatoes were returned to Complainant's place of business, where they were accepted and returned to inventory. Respondent sent invoice number 5450, for $2,000.00 to Complainant for freight billed by the carrier to Respondent's customer in El Paso, Texas. (Answer, Ex. G-11.)

14.On or about July 2, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in the state of Nebraska, 441-50# cartons of #1A El Diablo Rojo red potatoes at $7.75 per carton, f.o.b., or $3,417.75, plus $23.50 for a temperature recorder and $67.50 for pallets, for a total agreed price of $3,508.75, billed on invoice number 702354. (Complaint, Ex. 21.) Respondent paid invoice number 702354 in full prior to the Complaint being filed.

15.On or about July 24, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Las Vegas, Nevada, 850-50# sacks of #2 Budget Norkotah Russet potatoes at $4.15 per sack, f.o.b., or $3,527.50, plus $1,062.50 for freight, and $127.50 for pallets, for a total agreed delivered price of $4,717.50, billed on invoice number 702782. (Complaint, Ex. 22.) Respondent paid invoice number 702782 in full, on or by September 19, 2007, prior to the Complaint being filed.

16.On or about July 26, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Las Vegas, Nevada, 400-50# sacks of #2 Baker Budget Norkotah Russet potatoes at $4.15 per sack, f.o.b., or $1,660.00, plus $60.00 for pallets, for a total agreed price of $1,720.00, billed on invoice number 702799. (Complaint, Ex. 23.) Respondent paid invoice number 702799 in full, on or by September 19, 2007, prior to the Complaint being filed.

17.On or about July 27, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of California, to Respondent's customer in Las Vegas, Nevada, 850-50# sacks

of #2 Baker Budget Norkotah Russet potatoes at $4.15 per sack, delivered, or $3,527.50, plus $1,062.50 for freight, for a total agreed price of $4,590.00, billed on invoice number 702815. (Complaint, Ex. 24.) Respondent paid invoice number 702815 in full, on or by September 19, 2007, prior to the Complaint being filed.

18. Complainant notified Respondent of its intention to start enforcing the payment term and interest clause in the parties' contracts by letter dated October 31, 2007, as follows:

> …We are also demanding interest be paid as per the terms of sale, see invoice. The interest is due at the rate of 1½% per month commencing ten (10) days after arrival of the product….

(Complaint, Ex. 37.)

19. The informal complaint was filed on September 15, 2007, which is within nine months from the date the cause of action accrued.

Conclusions

This proceeding concerns thirteen truckloads of potatoes that Respondent purchased from Complainant. Complainant alleges Respondent owes the sum of $4,620.00, plus interest, on two of its invoices, numbers 702309 and 702316.[1] In addition, Complainant is seeking interest from Respondent for alleged late payments on eight of its invoices, numbers 702082, 702149, 702258, 702336, 702354, 702782, 702799, and 702815,[2] that were paid in full by Respondent prior to the Complaint being filed. Complainant further alleges that nothing is owed to either party on its remaining three invoices, numbers 702339, 702340, and 702341, that are the subject of Respondent's Counterclaim.[3]

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[1] Complaint, ¶ 10, and Ex. 4 and 6.

[2] Complaint, ¶¶ 7, 8, and 10, and Ex. 1-3, 7, and 21-24.

[3] Complaint, ¶ 7G, and Ex. 10, 13, 16.

Respondent, in its Answer, denies Complainant is entitled to interest,[4] but admits owing $3,262.50 to Complainant for the potatoes. Respondent, however, alleges that Complainant owes it $2,260.00 in damages for freight and other expenses, which Respondent seeks to offset through its Counterclaim. Respondent states the following in its Answer:

> … Johnston is entitled to nothing more than the difference between what AGS owes to Johnston, being $3,262.50 and what Johnston owes to AGS, being $2,260.00, or a total of $1,002.50....[5]

The proponent of a claim has the burden of proof. *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893, 894 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914, 919 (1975).

First we will consider the evidence submitted with respect to Complainant's invoices, numbers 702309 and 702316, for which Complainant alleges a balance of $4,620.00 remains due from Respondent for two truckloads of potatoes. Respondent has not denied receiving and accepting the two truckloads of potatoes. 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, 844 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353, 355 (1988). The burden to prove a breach of contract rests with the buyer of accepted goods. *See* UCC § 2-607(4).[6] We will now consider the evidence submitted concerning these two transactions as follows:

Complainant's invoice number 702309

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[4] Answer, p. 2, ¶ 7.6.

[5] Answer, p. 12 ¶ 8.5.

[6] *See also The Grower-Shipper Potato Co. v. Southwestern Produce Co.,* 28 Agric. Dec. 511, 514 (1969).

Respondent purchased a truckload of potatoes for an agreed price of $9,093.50, f.o.b.[7] Complainant agreed to reduce the price after Respondent reported condition problems upon arrival.[8] Although Complainant alleges Respondent has not furnished proof of its alleged problems,[9] Complainant has not shown its price reduction was hinged upon Respondent providing proof. In fact, Complainant issued a corrected invoice, billing Respondent the reduced price of $7,736.00.[10]

Respondent paid Complainant $7,720.00,[11] leaving an unpaid balance of $16.00.[12] Respondent asserts in its Answer that the underpayment was due to a $.05 per carton billing error on Complainant's corrected invoice and an overcharge of $23.50 on the invoice for a temperature recorder that was not ordered.[13] Based upon Respondent's failure to promptly object to the adjusted invoice received from Complainant,[14] Respondent is liable to Complainant for the unpaid balance of $16.00.

Complainant's invoice number 702316

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[7] Complaint, ¶ 7D, and Ex. 4.

[8] Complaint, ¶ 7D, and Ex. 41-2, ¶ 3.

[9] Complaint, ¶ 7D, and Ex. 41-2, ¶ 3, and Opening Statement (Response to Answer), p. 1, ¶ 7.5.

[10] Complaint, ¶ 7D, and Ex. 5.

[11] ROI, Ex. C, p. 1, ¶ 3, and Answer, Ex. D-5-2.

[12] Complaint ¶ 7D, and ROI, Ex. C, p. 1, ¶ 3, and Answer, Ex. D-5-1and D-5-2, and Opening Statement (Response to Answer), ¶ 7.5.

[13] Answer, p. 10, ¶¶ D.5-D.7.

[14] Failure to promptly complain as to the terms set forth on an invoice is considered strong evidence such terms were correctly stated. *Pemberton Produce, Inc. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 1630, 1636 (1983) *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218, 224-225 (1960).

Respondent purchased a truckload of potatoes, for a total agreed price of $3,262.50, f.o.b.[15] Respondent issued check number 6738 to Complainant as payment.[16] Complainant returned the check to Respondent as an unsatisfactory payment due to alleged unauthorized deductions being taken against this transaction and other disputed transactions.[17] Respondent issued a second check, number 7628,[18] which Complainant also returned to Respondent for the same reasons, leaving an unpaid balance of $3,262.50.[19] Checks combining payments for disputed and undisputed transactions do not meet the good faith tender requirement of UCC § 3-311. *See Lindemann Produce, Inc. v. ABC Fresh Marketing, Inc., et al.,* 57 Agric. Dec. 738, 745 (1998). We find Respondent is liable to Complainant for the unpaid balance of $3,262.50, [20] which Respondent admits owing.[21]

We will now consider the evidence concerning Respondent's Counterclaim, and Respondent's allegation that Complainant owes it $2,260.00 for inbound freight and other costs associated with three truckloads of potatoes billed on Complainant's invoices, numbered 702339, 702340, and 702341,[22] as follows:

Complainant's invoice numbers 702339

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[15] Complaint, ¶ 7E, and Ex. 6.

[16] Answer, p. 7, Ex. G-15.

[17] Complaint, ¶ 7E, and Ex. 31-32.

[18] Complaint, Ex. 43.

[19] Complaint, Ex. 44.

[20] Complaint, ¶ 7E.

[21] Answer, p. 12 ¶ 8.5.

[22] Answer, p. 14, ¶ CC-4.

On or about June 30, 2007, Respondent purchased 430-100# sacks of #1 Russet potatoes for a total agreed price of $3,988.50.[23] On July 2, 2007, the U.S.D.A. inspected the 430 sacks of potatoes El Paso, Texas at Respondent's customer's location. Pulp temperatures at the time of the inspection ranged from 41 to 42 degrees Fahrenheit. The inspection disclosed the potatoes were affected by 2% external quality defects (cuts), 10% brown surface discoloration, and 7% discolored raised/sunken lenticels, for a total of 19% damage by quality and condition defects. The inspector stated the potatoes failed to grade U.S. No. 1 on account of their condition.[24]

Respondent rejected the truckload of potatoes to Complainant and billed Complainant $2,000.00 for freight, $154.00 for the federal inspection, $130.00 for a Mexican inspection cancellation fee, and $75.00 for a Mexican inspection, for a total of $2,359.00 billed on its invoice number 5451.[25] Complainant paid Respondent $2,000.00 for freight and $154.00 for the cost of the federal inspection, or $2,154.00 on check number 36276.[26] Complainant denies owing the remaining balance of the invoice concerning a Mexican inspection and/or Mexican inspection cancellation fees.[27] Since Respondent has not submitted any evidence, such as invoices from the Mexican Inspection Service to support any of these alleged charges, Respondent's claim for these charges is denied.

Complainant's invoice number 702340

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[23] Complaint, ¶ 7G, and Ex. 10.

[24] Complaint, Ex. 11.

[25] Complaint, Ex. 19.

[26] Complaint, Ex. 20.

[27] Opening Statement (Response to Answer), ¶ 8.1.

On or about June 30, 2007, Respondent purchased 430-100# sacks of #1 Russet Potatoes for a total agreed price of $3,988.50.[28] On July 2, 2007, the U.S.D.A. inspected the 430 sacks of potatoes El Paso, Texas at Respondent's customer's location. Pulp temperatures at the time of the inspection ranged from 41 to 43 degrees Fahrenheit. The inspection disclosed the potatoes were affected by 2% external quality defects (cuts), 8% brown surface discoloration, and 7% discolored raised/sunken lenticels, for a total of 17% damage by quality and condition defects. The inspector stated the potatoes failed to grade U.S. No. 1 account condition.[29]

Respondent rejected the truckload of potatoes to Complainant and billed Complainant $2,200.00 for freight, $115.00 for the federal inspection, $130.00 for a Mexican inspection cancellation fee, for a total of $2,445.00 billed on its invoice number 5449.[30] Complainant paid Respondent $2,200.00 for freight and $115.00 for the cost of the federal inspection, or $2,315.00 on check number 36276, dated August 17, 2007.[31] Complainant denies owing the remaining balance of the invoice concerning the cost of a Mexican inspection and/or Mexican inspection cancellation fees.[32] Since Respondent has not submitted any evidence, such as invoices from the Mexican Inspection Service to support any of these charges, Respondent's claim is denied.

Complainant's invoice number 702341

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[28] Complaint, ¶ 7G, and Ex. 13.

[29] Complaint, Ex. 14.

[30] Complaint, Ex. 18.

[31] Complaint, Ex. 20.

[32] Opening Statement (Response to Answer), ¶ 8.1.

On or about June 30, 2007, Respondent purchased 430-100# sacks of #1 Russet potatoes for a total agreed price of $3,988.50.[33] The truck carrying the potatoes broke down due to mechanical problems before reaching the intended contract destination in Texas.[34] The potatoes were returned to Complainant's place of business in California, where they were accepted by Complainant and returned to inventory.[35] Complainant asserts it only accepted the returned potatoes as a courtesy to Respondent,[36] but Respondent alleges Complainant demanded the return of the potatoes.[37] The trucker asserts that even though its truck broke down it could have completed delivery to the contract destination, but Complainant decided to take the potatoes back.[38]

Since the parties have put forth conflicting allegations regarding what transpired after the truck broke down, we cannot conclude the parties agreed to a novation or rescission of the contract, which would require a clear agreement between the parties. *Eastern Potato Dealers of Maine, Inc. v. Commodity Marketing Co.,* 36 Agric. Dec. 2017, 2021-2022 (1977); *Morris Bros. Fruit Co. v. Elmer Stutzman, et al.,* 1 Agric. Dec. 98, 101 (1942). Respondent sent invoice number 5450, for $2,000.00 to Complainant for freight billed by the trucker,[39] which amount Respondent is seeking to recover through its Counterclaim. As evidence of the freight charge, Respondent provided a copy of invoice number 100707, dated

[33] Complaint, ¶ 7G, and Ex. 16.

[34] Answer, p. 6, ¶ G.5.

[35] Complaint, ¶ G, and Opening Statement (Response to Answer), ¶ G.

[36] Complaint, ¶ G.

[37] Answer, p. 6, ¶ G.7.

[38] Answer, Ex. G-5.

[39] Answer, Ex. G-11.

October 7, 2007, for $2,000.00, issued by its customer in El Paso, Texas.[40]

Regarding a seller's stoppage of delivery in transit or otherwise, section 2-705 of the Uniform Commercial Code ("UCC") (3)(b) states as follows:

> After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

In this instance, the trucker was the bailee or custodian of the potatoes. From the evidence in record and for the reasons discussed above, we find Respondent can recover $2,000.00 through its Counterclaim for freight charges due to Complainant's stoppage of delivery of the potatoes while they were in transit.

Lastly, we consider Complainant's claim for interest at a rate of 1½% per month, or 18% per annum, due on the alleged late payments on invoices. Since failing to make prompt payment is a violation of section 2(4) of the PACA, we have awarded interest on late-paid transactions in prior cases. *See* 7 U.S.C. § 499b(4) (requiring PACA licensed merchants to make "full payment promptly").[41] In *Peak Vegetable Sales v. Northwest Choice, Inc.*, 58 Agric. Dec, 646, 657 (1999), we awarded interest on a late-paid produce debt noting that "the award of interest in this situation will provide an additional motive for licensees to avoid slow payment, and it will not remove the motive to admit and pay any amount known by the Respondent to be due, because by so paying a Respondent will avoid interest for the balance of the period before the final order is issued." *See id*., at 657 – 658. Although the Complainant, Peak Vegetable Sales, sought interest at a rate of 24% per annum, we deemed that rate of interest

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[40] Answer, Ex. G-8.

[41] An award of interest "is nothing more than an adjunct to the award of damages, a differential paid to compensate for the loss of the use of a sum of money for a period of time." *See PGB International LLC, Co. v. Bayche Companies, Inc.,* 65 Agric. Dec. 669, 671 - 672 (2006) (quoting *Sherwood v. Madda Trading Co.,* 1979 WL 11487, slip op. at *12 (CFTC)).

unreasonable and awarded interest at a rate of 10% per annum. *See id.,* at 657.

In the case of *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.,* 29 Agric. Dec. 978, 979 (1970), which is often cited for the proposition that the Secretary can award interest as a measure of damages, we also awarded interest for a late-paid produce debt. In that case, the Respondent, Mark Bernstein Co., Inc., ("Bernstein"), purchased 1,375 cartons of frozen cherries from the Complainant, Pearl Grange Fruit Exchange, Inc., ("Pearl Grange"), on July 15, 1969. The total contract price was $7,947.50, which included $110 in freight charges. Pearl Grange's invoices specified that payment was to be net cash on receipt of the invoice with interest at a rate of ¾ of 1% per month (9% per annum) on any part of the invoice not paid within 30 days of the invoice date. Pearl Grange's invoice for the 1,375 cartons of frozen cherries at issue was dated August 13, 1969. In April of 1970, Bernstein paid $1,500 on the invoice leaving an unpaid balance of $6,447.50 that Bernstein was ordered to pay to Pearl Grange, with interest, in the reparation award. The Judicial Officer also awarded interest, at the 9% rate specified in Pearl Grange's invoices, on the full invoice amount of $7,947.50 until the time of Bernstein's late payment of $1,500 in April of 1970.[42]

In the instant case, Complainant's claim for interest is based on its invoices which expressly state that "Past Due Accounts will be assessed a service charge at the rate of 1½% per month or 18% per annum from the date of invoice." *See*, *e.g.*, Complaint Ex. 4 (emphasis omitted). Respondent argues that it never agreed to the 1½% per month charge on overdue invoices and notes that it ignored the "FOB Prompt" payment term and service charge provisions in Complainant's invoices for at least the last eleven years. Respondent's practice was "usually" to make payment to Complainant 25 to 40 days after the shipping date. *See* Answer at pp. 2 - 3, ¶¶ (b), (h). Until this dispute arose over three ill-fated shipments to

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[42] The 9% per annum rate of interest specified in Pearl Grange's invoice was higher than the rate of interest that the Department typically applied to damage awards at the time. *See, e.g., E.B. Costin, Jr. v. E.J. Harrison & Son, Inc.,* 29 Agric. Dec. 981, 986 (1970) (awarding interest at the usual rate of 8% per annum). In another case, *Flanagan and Jones, Inc. v. Tom Rotta d/b/a Sparkling Ranches,* 43 Agric. Dec. 242, 244 (1984), the Judicial Officer declined to award interest at a rate of 1½% per month because there was no interest clause in Complainant's invoices.

Mexico, Complainant never demanded interest on overdue invoices. *See id.*, at ¶ i. Like Respondent, Complainant also ignored the prompt payment terms on Respondent's invoices. *See id*., at p. 3, ¶ m, and Ex. 4.

As Respondent notes in its Answer, we look to the UCC in order to determine if the prompt payment and service charge provisions on Complainant's invoices were incorporated into each sales contract as additional terms. Section 2-207(2) of the UCC states in relevant part:

> The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Here, both parties are licensed under the PACA to do business in the produce trade and both are "merchants" as that term is used in the UCC. *See* UCC § 2-104 (defining a merchant as someone "who deals in goods of the kind" or who "holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction"). Therefore, pursuant to section 2-207(2),[43] the prompt payment term and service charge provision on Complainant's invoices, which were confirmations of the parties' oral contracts, were incorporated into each sales contract unless they fall within one of the exceptions to incorporation in subsections (a) through (c).

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[43] Although Respondent's business is located in Washington and Complainant is located in California, both states have adopted the same version of 2-207. *See* RCW 62A.2-207(2) (Washington Code); Cal. Comm. Code § 2207. *See also*, *e.g.*, *In re Fleming Companies Inc. v. Fleming Companies, Inc*., 316 B.R. 809, 816 (D. Del. 2004) (noting that 2-207 had been adopted verbatim by many states). Section 2-207 does away with the common law "mirror image rule." *See, e.g.*, "UCC § 2-207: The Drafting History," 49 Bus. Law 1029, 1036 (1994).

Subsection (a) of section 2-207(2) is not applicable to the present case because neither of the parties' forms contained any express limitations. Subsection (b) prohibits the incorporation of clauses that materially alter the contract. Comment 4 to section 2-207 gives examples of clauses that would materially alter a contract, while Comment 5 gives example of clauses that should be incorporated if no seasonable objection is made by the merchant receiving the confirmation form. Comment 5 notes that incorporating "a clause providing for interest on overdue invoices" and "fixing the seller's standard credit terms where they are within the range of trade practice" would involve no element of unreasonable surprise. Rather than objecting to the prompt payment and service charge terms in Complainant's invoices, as required by subsection (c) of section 2-207(2), Respondent simply chose to ignore them. Comment 6 makes it clear that a merchant's decision to ignore additional terms in confirming forms constitutes acceptance of those terms.

Based on the foregoing analysis, we find that the payment and interest charge provisions in Complainant's invoices were incorporated into the parties' sales contracts. Our decision is consistent with the application of section 2-207(2) by federal courts that have been confronted with similar provisions on produce invoices. *See, e.g., Coosemans Specialties, Inc. v. Garguilo*, 485 F.3d 701, 708 (2nd Cir. 2007) (invoice clauses providing for attorneys' fees were incorporated into the parties' contracts pursuant to 2-207); *Ruby Robinson Co., Inc. v. Kalil Fresh Marketing, Inc.*, 2009 WL 3378419, slip op. at *1 (S.D. Tex 2009) (attorneys' fees provisions in invoices were incorporated into the parties' contracts pursuant to 2-207); *Senn Bros., Inc. v. Foothills Meat & Produce, Inc.*, 2008 WL 2559418, slip op. at *3 (W.D. N.C. 2008) (terms included on seller's invoices became binding on the parties pursuant to 2-207); *Dayoub Marketing, Inc. v. S.K. Produce Corp.*, 2005 WL 3006032, slip op. at *4 (S.D. N.Y. 2005) (interest and collection costs provisions in seller's invoices were incorporated into the parties' contracts, subject to a limitation of reasonableness, pursuant to 2-207); *Fleming Companies*, 316 B.R. at 815 - 816 (attorneys' fees provisions on invoices enforceable pursuant to 2-207).[44] Service charge

[44] *See also Vulcan Automotive Equipment, Ltd v. Global Marine Engine & Parts, Inc.*, 240 F.Supp.2d 156, 162 - 163 (D. Rhode Island 2003) (invoice service charge provision was (continued...)

and attorneys' fee clauses have become commonplace on produce invoices because many federal courts have determined that these fees are recoverable in PACA trust actions pursuant to 7 U.S.C. § 499e(c)(2). *See*, *e.g.*, *Middle Mountain Land and Produce Inc. v. Sound Commodities Inc.*, 307 F.3d 1220, 1224 - 1225 (9th Cir. 2002); *Consumers Produce, Inc. v. R. Family Market*, 2009 WL 2351642, slip op. at *1 (N.D. Ohio 2009); *JC Produce, Inc. v. Paragon Steakhouse Restaurants*, 70 F. Supp.2d 1119, 1123 (E.D. Ca. 1999).

Respondent argues that the parties' course of performance over many years ultimately modified or waived the express payment term and interest charge provision on Complainant's invoices. *See* Answer at pp. 3 – 4 (citing UCC §§ 2-208 and 209). Pursuant to section 2-208(1) of the UCC, "'course of dealing' or 'course of performance' can be used to flesh out an ambiguous or incomplete agreement." *See Sethness-Greanleaf, Inc. v. Green River Corp.*, 65 F.3d 64, 67 (7th Cir. 1995). In the instant case, there is no need to look to the parties' course of performance to interpret the contract terms at issue. The "FOB Prompt" payment term and service charge clause on Complainant's invoices, which were accepted by Respondent's silence and incorporated into each sales contract, are not ambiguous. Prompt payment under the PACA means that payment is due "within 10 days after the day on which the produce is accepted." *See* 7 C.F.R. § 46.2(aa)(5). Pursuant to the service charge clause, overdue balances incurred interest at a rate of 1½% per month from the date of invoice. Section 2-208(2) makes clear that express contract terms control course of performance and course of dealing. *See, e.g.*, *Central Illinois Public Service Company v. Atlas Minerals, Inc.*, 965 F.Supp. 1162, 1176 (C.D. Ill. 1997) (discussing 2-208(2)). In other words, Respondent's late payments over many years and Complainant's failure to charge interest did not modify the parties' contracts. "[A] vendor who cuts the buyer some slack . . . does not thereby 'agree' to forbear indefinitely." *See Sethness-Greanleaf*, 65 F.3d at 67.

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[44](...continued)
incorporated into engine contract pursuant to 2-207).

Nonetheless, we agree with Respondent's contention that Complainant, after more than a decade of forbearance, waived interest charges for late payments that it accepted prior to giving Respondent reasonable notice that the service charge provision in the parties' contracts would be enforced. *See* UCC § 2-208(3) (course of performance inconsistent with contract terms can show waiver); UCC § 2-209(5) (retraction of a waiver requires reasonable notice).[45] When the instant dispute over the Mexican shipments went sour, Complainant notified Respondent of its intention to start enforcing the payment term and interest clause in the parties' contracts by letter dated October 31, 2007. *See* Complaint Ex. 37 ("[w]e are also demanding interest be paid as per the terms of sale"). Apparently Respondent received Complainant's letter because shortly thereafter it paid two outstanding invoices. *See id*., at Ex. 8. The payments were received by Complainant on or by November 19, 2007. *See id*., at Ex. 41. Thus, we find that Complainant successfully retracted its waiver with the October 31, 2007, letter and that as of November 19, 2007, and interest began to accrue on any remaining overdue amounts. By that date, Respondent plainly had reasonable time to undo its reliance on the waiver and remit any overdue payments to Complainant in order to avoid the service charge.

The only remaining question is whether the rate of prejudgment interest set by the parties' contracts is reasonable. As noted above, we have rejected claims for interest at rates that we have deemed to be unreasonable. *See Peak Vegetable Sales*, 58 Agric. Dec at 657 (rejecting a claim for interest at a rate of 24% per annum). The 1½% per month, 18% per annum, rate is higher than the rate that is typically applied in PACA reparation cases using the formula in 28 U.S.C. § 1961. *See PGB*, 65 Agric. Dec. at 672. However, we cannot say that the 18% rate set by the parties' contracts in this case is unreasonable. Numerous courts have awarded prejudgment interest at 18% based on similar contract provisions. *See*, *e.g.*, *Palmareal*

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[45] Waiver "is the intentional relinquishment of a known right." *See Sethness-Greanleaf*, 65 F.3d at 67. Pursuant to section 2-209(5) of the UCC, "[a] party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver." *See Getty Terminals Corp. v. Coastal Oil New England, Inc.*, 995 F.2d 372, 374 - 375 (2nd Cir. 1993) (applying 2-209(5) to find waiver).

Produce Corp. v. Direct Produce #1, Inc., 2008 WL 905041, slip op. at **3 – 4 (E.D.N.Y. 2008) (awarding interest at 18% set by invoice clause); *John Georgallas Banana Dist. of New York, Inc. v. N&S Tropical Produce, Inc.*, 2008 WL 2788410, slip op. at * 5 (E.D.N.Y. 2008) (same); *AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Services, Inc.*, 2007 WL 4302514, slip op. at **7- 8 (S.D.N.Y. 2007) (same); *Dayoub Marketing*, 2005 WL 3006032, at **4 – 5 (same); *Vulcan Automotive*, 240 F.Supp.2d at 163 - 166 (same). Accordingly, we will award prejudgment interest at the 18% rate set by Complainant's invoices in this case.

In summary, we find that Complainant has proven a breach of contract with regard to invoices 702309 and 702316. Respondent is liable to Complainant for the unpaid balance of $16.00 for the potatoes billed on Complainant's corrected invoice number 702309, plus the full agreed price of $3,262.50 for the potatoes billed on Complainant's invoice number 702316, for a total of $3,278.50. However, that amount will be offset by $2,000.00 for freight that we found owing to Respondent on Complainant's invoice number 702341, leaving a total unpaid amount of $1,278.50. Respondent's failure to pay Complainant $1,278.50 is a violation of section 2 of the Act for which reparation should be awarded.

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." *See* 7 U.S.C. § 499e(a). As discussed above, the secretary has long included interest, at a reasonable rate, as part of each reparation award. *See Pearl Grange,* 29 Agric. Dec. at 979; *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 338 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66, 67 (1963). Respondent shall pay Complainant prejudgment interest at the contractual rate of 18% from November 19, 2007, until the date of the Order. Complainant waived interest on the late-paid invoices listed in the Complaint. Respondent paid these invoices before Complainant effectively retracted its waiver on November 19, 2007. Consistent with past decisions, post-judgment interest will be applied in accordance with 28 U.S.C. § 1961, 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. *See PGB,* 65 Agric. Dec. at 671-672.

Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party. Complainant submitted a $300.00 handling fee to file its formal Complaint, as did Respondent to file its Counterclaim. Each party proved a violation of section 2 of the Act (7 U.S.C. § 499b) by the other. Therefore, each is entitled to recover the $300.00 handling fee paid by the other. However, since the handling fees offset one another, neither party shall be required to pay the other party's $300.00 handling fee.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $1,278.50, with interest thereon at the rate of 18% per annum from November 19, 2007, up to the date of this Order.

Respondent shall pay Complainant interest at the rate of 0.29 % per annum on the sum of $1,278.50 from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, DC

FRESH HARVEST INTERNATIONAL, INC. v. TOMAHAWK PRODUCE, INC.
PACA Docket No. R-09-057.
Order on Reconsideration.
Filed July 28, 2010.

PACA-R.

Standing or Privity of Contract – Factoring.

Where invoices issued by Complainant to Respondent bore a prominent statement advising the account was sold to a factoring company and that the invoice amount should be remitted to the factoring company, found that Complainant had standing to sue in the absence of evidence showing the factoring company, as part of its agreement to purchase the receivables, assumed the risk of non-payment by the account debtor. In other words, the

purchase of the receivables by the factoring company effectively placed a lien on any monies collected by Complainant from Respondent for the subject invoices, but did not prevent Complainant from pursuing such collection.

Patrice Harps, Presiding Officer.
Leslie Wowk, Examiner.
Complainant, *pro se*
Respondent, Thomas Oliveri, Western Growers Association
Decision and Order issued by William G. Jenson, Judicial Officer

Order

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 March 31, 2010, in which Respondent was ordered to pay Complainant, as reparation, $23,474.20, with interest thereon at the rate of 0.42 percent per annum from November 1, 2007, until paid. On April 29, 2010, the Department received from Respondent a Petition for Reconsideration ("Petition") of the Decision and Order. Complainant was served with a copy of the Petition and afforded the opportunity to submit a reply. On June 22, 2010, the Department received from Complainant a Reply to Respondent's Petition for Reconsideration ("Reply").

Complainant brought this action to recover the agreed purchase price for three truckloads of sugar snap peas sold and shipped to Respondent. In response to Complainant's allegation of non-payment, Respondent asserted that it paid Complainant $22,000.00 for the sugar snap peas via wire transfer. In the Decision and Order, we found that the evidence submitted established by a preponderance of the evidence that the $22,000.00 that Respondent wired to Complainant represented an investment in a Peruvian sugar snap pea joint venture, not payment for the three sugar snap pea shipments in question. As Respondent therefore failed to prove its defense of payment, we found that Respondent was liable to Complainant for the agreed purchase price of the sugar snap peas, or a total of $23,474.20.

In the Petition, Respondent states we erred in finding that the purchases were straight f.o.b. sales. In addition, Respondent states we incorrectly found that Complainant had timely invoiced for the product. (Petition, p. 1) Respondent asserts, to the contrary, that the transactions were price after

sale and that it did not receive any invoices from Complainant until after the prices were settled. According to Respondent, the returns were usually settled three to four weeks following arrival. (Petition, p. 2)

In its response to the Petition, Complainant points out that Respondent has neither challenged the amount of the award nor the reasonable value of the produce in its Petition. Complainant states this is shown by Respondent's assertion that it never received any invoices from Complainant until after the prices were settled, thereby admitting that the invoice price represents the price Respondent agreed to pay for the product. (Reply, p. 1) As the dispute therefore did not involve the value to be assigned to the subject peas, Complainant states the issue of whether the sales were for a fixed price or price after sale is irrelevant. Moreover, Complainant states Respondent's contention that it did not receive the invoices until three or four weeks following arrival supports the conclusions of the Decision and Order in that Respondent wired a total of $22,000.00 to Complainant between September 5th and 14th, 2007, whereas the invoices in question are dated from September 5th through September 19th, 2007, so Respondent is, in effect, arguing that it paid the invoices before they were received.

As Complainant correctly points out, the issue of whether the three truckloads of sugar snap peas in question were sold price after sale is irrelevant given that Respondent admitted purchasing the produce in question at the prices invoiced and asserted as its only defense the allegation that it paid Complainant $22,000.00. (Ans. Stmt., p. 2) We also agree that Respondent's allegation concerning the timeliness of the invoices actually supports the conclusion that the $22,000.00 paid by Respondent was an investment in a Peruvian sugar snap pea joint venture rather than payment for the invoices in question, as under the scenario posed by Respondent payment for the invoices would have preceded their receipt.

Respondent next asserts that it never had an agreement with the factoring company Agricap, and that Agricap was to have nothing to do with the invoices in question. Respondent asserts specifically:

Initially, we note that while Respondent asserts that Agricap was not to be involved in the subject transactions, Respondent does not point to any evidence in the record to substantiate this contention. Moreover, as we noted in the Decision and Order, the invoices submitted by Complainant

bear a prominent statement on their face instructing Respondent to remit payment to Agricap. (D&O, p. 4) Hence, the evidence fails to substantiate Respondent's contention that Agricap was not to be involved with the invoices at issue in this dispute.

With respect to the issue raised by Complainant in its Reply, in the Decision and Order we stated:

> Although the first invoice was issued on the same date as the first wire transfer, September 5, 2007, so Respondent cannot be charged with knowledge of its obligation to remit payment to Agricap at the time it made this transfer, Respondent is presumed to be aware of its obligation to remit to Agricap at the time it made the second wire transfer on September 14, 2007. This raises the obvious question as to why Respondent allegedly paid Complainant for the invoices in question via wire transfer to Complainant's bank account when it was instructed to remit such payment to Agricap.

(D&O, p. 4)

The involvement of the factoring company Agricap in the transactions in question was therefore mentioned to show that, presuming Respondent was timely invoiced for the product, Respondent should have been aware prior to the wire transfer of September 14, 2007, that payment for the sugar snap peas in question should have been remitted to Agricap, rather than directly to Complainant. Although Respondent has asserted in its Petition that the invoices were not timely received (Petition, p. 2), this allegation, if proven, would only remove one of several factors that led to our conclusion that Respondent's wire transfer of $22,000.00 was an investment in a sugar snap pea joint venture and not payment for the invoices in question.

Respondent states next that Complainant has been cited by the Department for repeated and flagrant violations of the Act, thereby raising a question as to its credibility and giving cause for the Hearing Officer to reconsider the Decision and Order. Respondent refers specifically to a U.S.D.A. press release dated October 6, 2009, stating that Complainant was cited for willful, repeated and flagrant violations of the Act for its failure to pay $655,285.39 for 318 lots of produce that the company distributed in the

course of interstate commerce during the period of July through September of 2007. (Petition, pp. 2-3) In response, Complainant states this issue is irrelevant to the matters raised in this proceeding and explains that it encountered financial problems and could not pay its bills due to the failure of customers and business associates, such as Respondent, that did not pay their debts to Complainant. (Reply, p. 3) We agree that Complainant's violation of the prompt pay provisions of the Act has no bearing on the credibility of the statements and evidence it presented in this proceeding.

Finally, Respondent argues that we erroneously stated that e-mail messages exchanged between the parties concerning the sugar snap pea joint venture were sent before the dispute concerning the subject invoices arose. Respondent states specifically that the first transaction occurred on September 5, 2007, and the e-mail messages were sent on August 14th and September 21st, the first one prior, not making a commitment, and the second one long after the shipments took place. (Petition, p. 4) Complainant asserts in response that the Judicial Officer concluded that the e-mail exchange between the parties and Andean Produce took place before a *dispute* arose, not before the shipments took place. (Reply, p. 3) Complainant asserts further that if Respondent had no involvement in the Andean Produce transaction then it would have responded to the e-mails and questioned why it was being copied on them and clarifying to Mr. Ellis [Complainant] that the $22,000 payment was to be applied to the invoices and not as an investment. Complainant states Respondent could offer no proof that it challenged the statements in the e-mails. (Reply, p. 4)

The e-mail messages in question, which were exchanged between Complainant and Respondent and a Peruvian firm, Andean Produce, are dated August 14th and September 21st, 2007, and the latter message mentions both Complainant and Respondent losing $22,000.00 on the venture. (ROI Ex., D7, D14) While Respondent is correct that the second message was sent after the last load of onions at issue in the Complaint was shipped on September 19, 2007, there is no indication that Complainant was aware at that time that Respondent intended to claim that the $22,000.00 wired to Complainant was payment for the invoices in question. Hence, the e-mail messages were sent before the *dispute* with respect to the subject transactions arose. Moreover, as we mentioned in the Decision and Order, Respondent failed during the course of the proceeding to address any of the issues raised in these e-mail messages. (D&O, p. 7) For these reasons, we

concluded that the e-mail messages, coupled with the evidence showing that Complainant wired funds to Andean Produce at the same time it received the wire transfers in question from Respondent, were sufficient to establish Complainant's contention that the $22,000.00 that Respondent wired to Complainant was an investment in a Peruvian sugar snap pea joint venture. (D&O, p. 7) None of the issues raised in Respondent's Petition alter this conclusion.

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

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $23,474.20, with interest thereon at the rate of 0.42 percent per annum from November 1, 2007, until paid, plus the amount of $300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

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JOSE MAGALLON, D/B/A JM FARMING, v. PACIFIC SUN DISTRIBUTING, INC. AND/OR VALUE PRODUCE, INC.
PACA Docket No. R-08-078.
Order on Reconsideration.
Filed August 17, 2010

PACA-R.

Interstate Commerce

A transaction is in interstate commerce for the purpose of a reparation case if the shipment involves a type of produce commonly shipped in interstate commerce, and the

produce is shipped for resale by or to a dealer that does a substantial portion of its business in interstate commerce.

Agency – Apparent Authority

It was held that the manager of a cold storage facility of the PACA licensed firm, had the apparent authority to accept and sell consigned produce from the cold storage facility. The firm provided insufficient notice to the consignor that the manager did not have the actual authority to a handle produce on consignment. Therefore, the firm was liable for the manager's actions, even though it was unaware of the consignment and did not authorize the manager to handle produce on consignment.

Jurisdiction - Cold Storage Fees

While the PACA reparation forum does not ordinarily have jurisdiction over cold storage fee claims, there is jurisdiction to adjudicate those claims when the cold storage fees are incident to the consignment of a perishable agricultural commodity.

Jonathan Gordy, Presiding Officer
Thomas Oliveri, for Complainant
Joseph Choate, Jr. for Respondent Pacific Sun Distributing, Inc.
William L. Zeltonoga for Respondent Value Produce, Inc.
Decision and Order issued by William G. Jenson, Judicial Officer

Order on Reconsideration

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), a Decision and Order was issued on March 5, 2010, in which (1) the Complaint against Respondent Pacific Sun Distributing, Inc. (hereafter "Pacific Sun") was dismissed; (2) Respondent Value Produce, Inc. (hereafter "Value Produce") was ordered to pay Complainant, as reparation, $253.60, with interest thereon at the rate of 0.34 percent per annum from February 1, 2007, until paid; (3) Complainant was ordered to pay Value Produce, as reparation, $4,815.75, with interest thereon at the rate of 0.34 percent per annum from February 1, 2007, until paid; (4) Complainant was ordered to pay Value Produce $2,478.50 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 percent per annum from the date of the Order, until paid; and (5) Complainant was ordered to pay Pacific Sun $4,530.00 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 percent per annum from the date of the Order, until paid.

On April 1, 2010, the Department received from Complainant a Petition for Reconsideration of Order (hereafter "Petition"). The Respondents were each served with a copy of the Petition and afforded the opportunity to submit a reply. On April 29, 2010, the Department received from Value Produce a response to Complainant's Petition, requesting that the original Order be affirmed. Pacific Sun waived the opportunity to submit a response.

In the Petition, Complainant asserts that (1) USDA Market News prices should have been used to determine the reasonable value of the consigned tomatoes at issue in the Complaint because Value Produce's employee, Mr. Ray Park, negligently handled the tomatoes consigned to him by Complainant; and (2) the Respondents should not have been awarded attorney's fees because the decision should have been in Complainant's favor. (Petition at 1-2)

Turning first to Complainant's contention that he should have been awarded the reasonable value of the tomatoes based on USDA Market News prices, we have repeatedly held that in the absence of fraud or some other breach of the consignee's fiduciary obligations, the consignee is not liable to the consignor merely because the goods fetched less on resale than the market price or the amount the consignor expected. *Tex-Sun Produce v. International Produce Distributors, Inc.*, 48 Agric. Dec. 1110, 1114 (1989); *Pacific Fruit & Produce Co. v. Wm. C. Denny, Inc.*, 31 Agric. Dec. 1420, 1423 (1972); *Monash Produce v. Pearl*, 15 Agric. Dec. 1250, 1254 (1956); *Haven Citrus Sales v. Dietz & Co.*, 15 Agric. Dec. 1091, 1095 (1956). We explained in *Tex Sun* that "[t]he consignor chooses his agent and derives full benefit from exceptionally good performance and must also bear the consequences of poor performance." *Tex Sun Produce*, 48 Agric. Dec. at 1114-15. Complainant never alleged that Mr. Park acted fraudulently or that he otherwise breached his fiduciary duties as a consignee.[1] Rather, Complainant simply asserted his claim based on USDA

[1] In the Petition, Complainant states "[a]pparently Mr. Park was not skilled in handling the magnitude of tomatoes which it received from Complainant which is evident from the prices Mr. Park sold the tomatoes for." (Petition p. 1) Mr. Park's purported lack of skill is (continued...)

Market News prices without providing any basis for making this claim. Comparable evidence has been repeatedly rejected. *Id*. at 1115.

Moreover, the case that Complainant cites in the Petition as supporting his argument concerning the use of USDA Market News prices, *Dennis Produce Sales, Inc. v. Caruso-Ciresi, Inc.*,[2] concerns the sale of produce where the price was to be set after shipment. *Id*. at 181. In Dennis Produce, the parties failed to agree on a price, and we therefore had to establish the reasonable price at the time of delivery. *Id*. So, the circumstances in that case are not pertinent to the consignment transaction at issue here. In this case, Complainant did not allege that this transaction was a sale. Consequently, Complainant failed to establish any cause for resorting to the use of USDA Market News prices to determine the reasonable value of the tomatoes.

For the reasons just stated, Complainant did not prevail on the allegations of the Complaint. (D&O p. 21) As a result, Complainant was ordered to pay the reasonable fees and expenses incurred by the Respondents in connection with the oral hearing in accordance with section 7(a) of the Act (7 U.S.C. § 499g(a)). (D&O p. 20) The arguments raised by Complainant in the Petition do not alter this conclusion.

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

Order

The Complaint against Respondent Pacific Sun Distributing, Inc. is dismissed.

Within 30 days from the date of this Order, Respondent Value Produce, Inc. shall pay Complainant as reparation $253.60, with interest

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[1](...continued)
not cause for finding that Complainant is due more than the net proceeds derived from Mr. Park's sales.

[2] 42 Agric. Dec. 178 (1983).

thereon at the rate of 0.34 percent per annum from February 1, 2007, until paid.

Within 30 days from the date of this Order, Complainant shall pay to Respondent Value Produce, Inc. as reparation $4,815.75, with interest thereon at the rate of 0.34 percent per annum from February 1, 2007, until paid. Within 30 days from the date of this Order, Complainant shall pay Respondent Value Produce, Inc. $2,478.85 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 percent per annum from March 5, 2010, until paid.

Within 30 days from the date of this Order, Complainant shall pay Respondent Pacific Sun Distributing, Inc. $4,530.00 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 percent per annum from March 5, 2010, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.
August 17, 2010.

ROGERS BROTHERS FARMS, INC. v. SKYLINE POTATO COMPANY.
PACA Docket No. R-08-084.
Decision and order.
Filed August 26, 2010.

PACA-R.

Grower's agent, duties of
A grower's agent may be held liable for extremely low returns remitted to its principal on consignment when it fails to provide justification for unauthorized adjustments, dumping, and sale for "process".

Grower's agent, measure of performance
In the absence of accounts of sale from ultimate receivers or timely, impartial inspections, grower's agent's performance of its duty to the grower is measured against Market News Service price reports.

Condition defects, evidence of

Testimony of buyer/consignee's trucker and reports from buyer/consignee's customers do not prove condition defects; they are parties to the transactions, so their reports are not impartial.

Charles Kendall, Presiding Officer
Louis W. Diess, III, Counsel for Complainant
William J. Friedman, Counsel for Respondent
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*.)(the Act). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $204,124.00 in connection with Respondent's packing and sale of Complainant's crop of potatoes in interstate commerce.

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

The parties took part in a December 30, 2008 teleconference, in which this case was set down for oral hearing beginning Tuesday, February 24, 2009.

On January 12, 2009, Respondent filed Respondent's First Motion to Dismiss (First Motion). In response, on February 2, 2009, Complainant filed Complainant's Opposition to Respondent's First Motion to Dismiss (Opposition).

On January 27, 2009, the Presiding Officer issued a Notice of Hearing and Summary of Teleconference. The Notice of Hearing said, "NOTE: Since the hearing is imminent and parties must have 20 days to reply to any motion(s), any motions filed later than January 30, 2009 will only be considered contemporaneously with post-hearing briefs."

Nonetheless, on February 6, 2009, Respondent submitted to the Presiding Officer, by e-mail, Respondent's Reply in Support of Its Motion to Dismiss (Reply), along with a request to file said Reply.

On February 9, 2009, the Presiding Officer issued an Order denying Respondent's First Motion. The order further stated that Respondent's February 6, 2009 Reply would not be entertained at that time, for the reasons noted in the Notice of Hearing. The Order provided that

Respondent would be allowed to file the Reply in conjunction with its post-hearing brief.

Since the amount claimed as damages exceeds $30,000.00 and the Respondent requested an oral hearing, an oral hearing was held in accordance with section 47.15 of the Rules of Practice (7 C.F.R. § 47.15). The oral hearing was held on Tuesday, February 24, 2009 in Saguache, Colorado before Charles L. Kendall, Presiding Officer. The Complainant was represented by Louis W. Diess, III, Esq. of McCarron & Diess, located in Washington, DC, and the Respondent was represented by William J. Friedman, Esq. of Covington & Burling, LLP, also located in Washington, DC. Complainant presented three witnesses, and offered four exhibits which were entered into the record (herein designated CX 1 through CX 4). Respondent presented four witnesses, and offered 15 exhibits which were entered into the record (herein designated RX 1 through RX 15). Respondent, in addition, offered a new exhibit at hearing which was used for cross-examination of one of Complainant's witnesses. The document pertained to a previous growing season, and since Complainant's witness did not deny or contradict the contents or nature of the document, it had no function as extrinsic impeachment of the testimony; therefore, it was not admitted.

At oral hearing Respondent renewed its motion to dismiss, and asked for an opportunity to present evidence at the outset of the hearing to support its motion. Respondent was permitted to proceed out of order at the outset of the hearing, to the extent of calling and examining a witness, Complainant's banker, that Respondent felt would support oral renewal of its motion to dismiss (Tr. 18-25). The testimony elicited did not lead to a ruling dismissing the case (Tr. 45, 238-239), and the hearing continued (Tr. 45).

At the conclusion of the hearing, a schedule was set for filing post-hearing briefs and requests for fees and expenses. Since the parties did not agree on the need for reply briefs, none were scheduled; single, simultaneous briefs were due by May 4, 2009. Both parties submitted their findings of fact and supporting briefs as well as claims for fees and expenses by the imposed deadline. The documents were served on the respective parties by the Department and neither party elected to file objections to the opposing party's claim for fees and expenses within the

time period set forth in section 47.19(5) of the Rules of Practice (7 C.F.R. § 47.19(5)). Complainant's and Respondent's briefs are referred to herein as "CB" and "RB", respectively. The transcript of the proceeding is designated "Tr.".

After the deadline for briefs, on May 18, 2009, Respondent filed Respondent's Renewed Motion to Dismiss for Lack of Jurisdiction Following Testimony and Evidence Adduced at February 24, 2009 Hearing and Request for Post-Disposition Mediation (Renewed Motion). On June 18, 2009, Complainant filed Complainant's Opposition, and on June 26, 2009, Respondent filed its Reply to Complainant's Opposition to Respondent's Renewed Motion to Dismiss for Lack of Jurisdiction (Reply to Renewed Opposition), which was considered and treated as a supplement or continuation of the Renewed Motion.

In each of its motions to dismiss, Respondent argued that Complainant filed its informal complaint more than nine months after the cause of action accrued. Respondent's argument in this regard is without merit. It overlooks the fundamental fact that Respondent acted as a grower's agent in relation to Complainant; the relevant requirements and timelines are dictated by that fact. An Order on Respondent's Renewed Motion to Dismiss was issued on February 24, 2010, denying Respondent's motion to dismiss the case for lack of jurisdiction, with full explanation for the denial.

Findings of Fact

1. Complainant Rogers Brothers Farms, Inc. is a corporation whose address is 11495 N. Road 108, Hooper Colorado 81136. At all times material to this proceeding, Complainant was not licensed under the Act. (RX 14).

2. Respondent Skyline Potato Company is a corporation whose mailing address is P.O. Box 416, Center, Colorado 81125. At all times material, Respondent was licensed under the Act. (RX 14: RB, pg. 4).

3. Complainant, at the material time, was a farm, which raised potatoes and wheat
(Tr. 47).

4. Complainant did not pack and sell its own potatoes (Tr. 49).

5. After harvest of the 2005 crop, early in October 2005, Respondent's buyer, Doug Wert, indicated that Respondent wanted to handle

Complainant's 2005 crop of "nugget" potatoes. (Tr. 54). The "nugget" crop was stored in a climate-controlled shed, or "bin", at Complainant's farm. (Tr. 52).

6. In late June or early July 2006, the parties entered into an oral contract wherein Respondent would size and grade Complainant's 2005 crop of "nugget" potatoes and pack them in boxes or bags and sell them. (Tr. 55-56, 200).

7. On July 10, 2006, Respondent's contract hauler, Mark Barela, began to haul the potatoes from Complainant's shed. (Tr. 189). All the potatoes were taken from the bin at Complainant's farm to Respondent's packing facilities between July 10, 2006 and July 14, 2006. (Tr. 58, 178, 201). The total amount of potatoes hauled from Complainant's bin to Respondent's packing shed was 37,489 hundredweight (cwt). (CX 1, CX 2; Tr. 143-144).

8. From mid-July 2006 through on or about August 5, 2006, Respondent had potatoes returned to it by its customers. (RB pg. 8; RX 2 through RX 7; Tr. 184, 203-215).

9. On or about August 24, 2006 Respondent made a partial accounting, or "pack-out", of Complainant's potatoes (RX 10; Tr. 219), pending final estimates on adjustments (Tr. 221). Complainant asserts that it did not receive the August 24, 2006 "packout"with the payment check of that date (Tr. pg. 128).

10. Respondent generated a final accounting, or "pack-out", on November 8, 2006 (RX-12; Tr. 226-227). The final accounting (RX 12) indicated that Respondent had handled 34,489 cwt of Complainant's potatoes, and would remit to Complainant a net return per hundredweight of $4.32, for a total of $149,029.00.

11. Respondent paid Complainant based on these accountings, or "pack-outs", with a check dated August 24, 2006 in the amount of $87,000.00 and a check dated November 10, 2006 in the amount of $62,029.00 (RX-13), for a total of $149,029.00.

12. Complainant filed its informal complaint on May 10, 2007, which was within nine months after the cause of action therein accrued.

Conclusions

The relevant definition of the relationship between Complainant and Respondent in this case is found at 7 C.F.R § 46.2(q):

> (q) *Growers' agent* means any person operating at shipping point who sells or distributes produce in commerce for or on behalf of growers or others and whose operations may include the planting, harvesting, grading, packing, and furnishing containers, supplies, or other services.

Complainant in this case is a grower. Respondent distributed the subject potatoes in commerce for or on behalf of Complainant, and performed all of the above services other than planting and harvesting. (Tr. 55-56, 200). Respondent, then, is a grower's agent, and any rights or responsibilities it has under the PACA are those of a grower's agent.[3]

The parties disagree over the terms of how Complainant would be paid for its potatoes. According to Complainant, Respondent agreed to purchase the front half of Complainant's bin, made up of smaller potatoes, for $9.00 per cwt., and to handle the remaining half on a "pack-out" basis with a minimum return of $10.00 per cwt. (RX 14; Tr. 55, 103-104). Respondent alleges that the initial oral agreement was modified to a "pack-out" basis for all the potatoes that it hauled from Complainant's bin. (Tr. 192, 232-233).

Section 46.32(a) of the regulations (7 C.F.R. § 46.32(a)) makes it the duty of a grower's agent to reduce the terms of agreement between the

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[3] In the Order on Respondent's Renewed Motion to Dismiss issued in this case, we noted that Complainant was a farm (Tr. 47), that Complainant did not pack and sell its own potatoes (Tr. 49), that all the potatoes were taken from the bin at Complainant's farm to Respondent's packing facilities (Tr. 178, 201) where Respondent was to put them in bags or cartons and sell them (Tr. 200), and that Respondent paid Complainant based on Respondent's accountings, or "pack-outs"(RX 13). The Order pointed out that the relationship between a grower and a grower's agent is not dependent on how the parties may characterize the transactions between them in their pleadings or arguments. For example, we have held that the evidence supported a grower's agent relationship, rather than just a sale, even where a complainant claimed a sale of numerous shipments to the respondent, but the complainant issued no invoices and the respondent remitted payment based on "pack-out" sheets. *Art Lozano v. Whizpac, Inc.*, 46 Agric. Dec. 658 (1987). In the present case, as in *Lozano*, Respondent remitted payment to Complainant on the basis of Respondent's "pack-out" sheets.

grower and the agent to writing. An agent who does not make and keep such a writing is in violation of the Act and may be liable for any damages resulting therefrom. *Id*. Here, we do not find any direct damages to have been caused by Respondent's violation of section 46.32(a). Respondent's failure to reduce the agreement to writing, however, leads us to credit Complainant's characterization of the contract terms over Respondent's. The conflicting evidence adduced at hearing leaves the contract terms ambiguous. The norm in contract interpretation is that ambiguous terms are construed against the drafter.[4] Respondent had a duty to be the drafter. Its breach of that duty leaves it at a disadvantage in arguing terms of the agreement that it failed to draft.

The analysis of the first half of the agreement, that Respondent would purchase the front half of Complainant's bin, made up of smaller potatoes, for $9.00 per cwt., is fairly straightforward. Respondent took the potatoes from Complainant's bin to its own packing shed, and then sorted and packed them for subsequent sale. Loading/unloading the potatoes was an act of acceptance under 7 C.F.R. § 46.2(dd). *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons Co. and C. H. Robinson Co.*, 49 Agric. Dec. 620 (1990); *Harvest Fresh Produce, Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980). Respondent's subsequent sale of the potatoes also constitutes an act of acceptance. *Dave Walsh Co. v. Tom Lange Co., Inc.*, 42 Agric. Dec. 2085 (1983).

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. *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987). Having accepted half of Complainant's bin of potatoes for purchase and subsequent packing and resale, Respondent became liable for the purchase price of $9.00 per cwt., less any damages resulting from any breach of contract by Complainant.

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[4] The Supreme Court expressed this principle as "the general maxim that a contract should be construed most strongly against the drafter." *United States v. Seckinger*, 397 U.S. 203, 210; 90 S.Ct. 880, 884 (1970).

Respondent argues on brief, and its buyer testified at hearing (Tr. pg. 191) that it rejected the potatoes at the end of the first day of hauling, July 10, 2006 (RB pp. 6-7). Complainant's witnesses, on the other hand, testified that even after the first day, Respondent's buyer expressed satisfaction with the potatoes (Tr. pp. 60, 107). The parties, then, disagree about whether there were significant condition defects in the potatoes, and whether Respondent made a clear statement of rejection. To be effective, rejection must be timely (7 C.F.R. § 46.2(cc)), and must be clearly stated. We have previously said, "The need for a clear and unmistakable rejection is doubly necessary where there is a subsequent unloading of the produce by the receiver, with a claim that the produce was to be handled for the shipper's account." *Beamon Brothers v. California Sweet Potato Growers*, 38 Agric. Dec. 71, 74 (1979).

Because of Respondent's acts of acceptance, *i.e.*, taking the potatoes from Complainant's bin to its own packing shed and sorting, packing, and selling them, and because Respondent produced no evidence of rejection other than its buyer's testimony,[5] we find that Respondent did not establish that it made an effective rejection of the potatoes that it purchased for $9.00 per cwt. from Complainant. Therefore, our analysis turns to the question of whether Respondent's liability for those potatoes is reduced by a breach on the part of Complainant. After it has received and accepted the produce, the burden to prove breach and/or damages is on Respondent. *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).

Respondent offered testimony from its trucker that toward the end of the first day of hauling, "we started smelling some rot" and that he saw something like mud and flakes of potato underneath the machine (Tr. pp. 173-174), and testimony from its buyer that there was soft rot around the air tubes of Complainant's bin (Tr. pp. 190-191). In contrast, Complainant's witnesses testified that the pile looked good, with a tiny bit of rot at the bottom of the tubes, which is normal (Tr. pg. 59), and that Respondent's buyer said that the potatoes looked good (Tr. pp. 60, 107).

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[5] Respondent's president also testified regarding the purported July 10, 2006 rejection, but he did not claim to have been involved in any such communication; he simply acknowledged that he had heard the testimony of his buyer (Tr. 221-222).

The subjective, inherently self-interested testimony of the parties provides little basis for determining the actual condition of the potatoes at the time of their acceptance. As we have previously stated, "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 damage." *Mutual Vegetable Sales v. Select Distributors, Inc.*, 38 Agric. Dec. 1359 (1979); *see also Tyre Farm, Inc. v. Dandrea Produce, Inc.*, 45 Agric. Dec. 796 (1986). In the absence of a timely, neutral inspection, we find that Respondent has failed to carry its burden of showing breach by Complainant. Respondent, therefore, is liable for the full contract price of $9.00 per cwt. for half of the potatoes that it hauled out of Complainant's bin.[6] Respondent is liable to Complainant for one half of the potatoes, or 18,441.40 cwt. at a rate of $9.00/cwt., for a total of $165,972.60.

In regard to the second half of Complainant's bin of potatoes, the parties are in agreement as to how it would be handled by Respondent. Complainant asserts that the agreement of the parties from the outset was that the second half would be handled on a "pack-out" or consignment basis (CB pg. 2; Tr. pp. 55, 103-104). Respondent asserts that the initial agreement of the parties was supplanted by a new oral agreement of the parties to proceed under a "packout" agreement for [all of] the stored potatoes (RB pg. 7; Tr. pg. 192).[7] Respondent's buyer described a

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[6] The line item "Russet Bulk Culls Dumped" on Respondet's pack-outs RX 10 and on RX 12 were identified by Respondent's president as being culls that were unable to be packed or processed, and were identified as such at Respondent's facility (Tr. pp. 223-224). Since the quantity, 606.20 cwt., is less than five percent of the total, the dumping of those identified culls will be permitted. 7 C.F.R. 46.23. The total quantity of potatoes at issue, then, is the amount of potatoes hauled from Complainant's bin to Respondent's packing shed, 37,489 cwt. (CX 1, CX 2; Tr. 143-144) minus the 606.20 cwt. of culls dumped, or 36,882.80 cwt. One half of that amount is 18,441.40 cwt.

[7] The party claiming a modification of contract terms has the burden of proving that modification. *Regency Packing Co., Inc. v. The Auster Company, Inc*., 42 Agric. Dec. 2042 (1983). Respondent did not reduce the alleged new agreement to writing, and therefore failed to carry its burden of proving the modification. As to the second half of the bin, however, the parties agree that it was to be handled on a "packout" basis, so it will be

(continued...)

"packout" arrangement as being a form of consignment, wherein Respondent would pack the consigned potatoes in bags or boxes and sell them (Tr. pg. 200-201). We review Respondent's handling of the second half of Complainant's bin of potatoes, then, as a grower's agent's handling on consignment. The parties differ on whether the "packout" arrangement included a minimum or "bottom" price to be returned for the consignment. Complainant alleges that the potatoes in the second, or back, half of the bin, which looked better and bigger than the small ones in the front half, were to be handled on a "packout" basis with a minimum return of $10.00/cwt. (Tr. pp. 55, 103-104). Respondent's buyer testified that there was no agreement as to a minimum return (Tr. pp. 192-193). Respondent's president also testified in this regard (Tr. pg. 230), but took no part in the negotiations.

Whether they are grower's agents or not, all licensees who accept produce for sale on consignment or on joint account are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner. 7 C.F.R. § 46.29. Grower's agents have additional, specific duties to the growers whose goods they handle on consignment. The section requiring a grower's agent to reduce agreements to writing (7 C.F.R. § 46.32(a)) provides:

An agent who fails to perform any specification or duty, express or implied, is in violation of the Act and may be held liable for any damages resulting therefrom and for other penalties provided under the Act for such failure.

The dispute in this case is essentially over the question of whether Respondent performed its duty as a grower's agent by exercising reasonable care and diligence in disposing of Complainant's consigned potatoes promptly and in a fair and reasonable manner. Respondent remitted payment to Complainant that it reported as representing a net return of $4.32/cwt. for Complainant's consigned potatoes (RX 12). Complainant offered into evidence, without dispute, the Market News Service Reports for Norkotah/Nugget potatoes from the San Luis Valley of Colorado for the relevant time period, which show an average net return of $15.58/cwt.

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[7](...continued)
analyzed in those terms.

The fact that prices remitted by a consignee are substantially lower than the applicable Market News Service prices, taken by itself, would not necessarily show that the consignee was liable for negligence in the discharge of its duties. For example, in *LaVerne Co-Operative Citrus Assn. v. Mendelson-Zeller Co., Inc*., 46 Agric. Dec. 1673 (1987), we declined to argue with the results of an actual accounting by the broker who received the produce and sold it on behalf of the respondent grower's agent. In that case, however, the grower's agent had been specifically granted the widest possible latitude in the written agreement it had with the grower. As noted above, Respondent in the present case did not reduce the agreement with Complainant to writing. Therefore, Respondent in this case is not relieved of the ordinary standard of care contemplated by 7 C.F.R. § 46.29 for any licensee acting as a consignee.

In *Mayoli, Inc. v. Weis-buy Services, Inc*., 65 Agric. Dec. 648, 663 (2006), even though the grower's agent agreement in that case included terms granting the agent broad discretion to determine the price at which the subject produce would be sold, we said, "It has long been held that '[w]hile an agent does not insure the success of an undertaking or a guarantee against mistakes or errors of judgment, he may be liable to his principal for damages resulting from his failure to exercise ordinary and reasonable care, diligence, and skill in the performance of his duties." *See also Arnold Sousa & Francis Sousa d/b/a Sousa Farms v. San Joaquin Tomato Growers, Inc*., 46 Agric. Dec. 709, 716 (1987); and *Akers Marketing Co., Inc. v. Anthony Lobue Packing Co.*, 39 Agric. Dec. 1184, 1189 (1980).

In addition to the duty to reduce the agency agreement to writing, a grower's agent has a duty under section 46.32(b) of the regulations (7 C.F.R. § 46.32(b) to:

> . . . prepare and maintain complete records on all transactions in sufficient detail as to be readily understood and audited. Agents must be in a position to render to the growers accurate and detailed accountings covering all aspects of their handling of the produce... Agents shall issue receipts to growers and others for all produce received. A lot number or other positive means of identification shall be assigned to each lot in order to segregate the various lots of produce received from different growers from similar produce being handled at the same time. Each lot shall be so identified and

> segregated throughout all operations conducted by the agent, including the sale or other disposition of the produce. The records shall show the result of all packing and grading operations, including the quantity lost through packing and grading and the quantity and quality packed out. If the culls are sold, they shall be included in the accounting. Unless there is a specific agreement with the growers to pool all various growers' produce, the accounting to each of the growers shall itemize the actual expenses incurred for the various operations conducted by the agent and all the details of the disposition of the produce received from each grower including all sales, adjustments, rejections, details of consigned or jointed shipments and sales through brokers, auctions, and status of all claims filed with or collected from the carriers. The agent shall prepare and maintain full and complete records on all details of such distribution to provide supporting evidence for the accounting....The failure of the agent to render prompt, accurate and detailed accountings in accordance with Sec. 46.2 (z) and (aa), is a violation of the Act.

Respondent offered a document into evidence (RX 10), dated August 24, 2006, that Respondent's president described as a "partial accounting" which provided an estimated net return for the potatoes that had been handled up to that point (Tr. pg. 219).[8] The August 24, 2006 "packout" shows three columns: 1) "Description"–the type/size of box or bag, or whether the potatoes in a particular grouping were dumped, sold in bulk, "dumped in the trade, handled "commercial Process", etc.; 2) "Cwt."–the number of hundredweight of potatoes for each classification in the "Description" field; and 3) "NetReturn"–the dollar amount to be remitted for each type of box, bag, or other handling group. The "packout" reported a total net return of $181,562.84 on a total of 34,489 cwt. of potatoes. From that amount, the amount of $40,000.00 was subtracted for "Reserve for product condition discounts and freight on dumped product," leaving an "Estimated net return" of $141,562.84. Respondent, at that time, remitted to Complainant a check in the amount of $87,000.00.

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[8] Complainant asserts that it did not receive the August 24, 2006 "packout"with the payment check of that date (Tr. pg. 128).

Respondent remitted to Complainant a second check dated November 10, 2006, and at that time (Tr. pg. 223) or shortly thereafter (Tr. pg. 156) also provided a final "packout" dated November 8, 2006. This final "packout"(RX 12) was substantially the same as the earlier one (RX 10), with the addition of a column titled "Net/Cwt.", showing the rate of return per hundredweight for each classification of potatoes. The last entry in that added column shows the overall rate of return of $4.32/cwt.

The accountings (RX 10, RX 12) offer no information about when the product was sold, where, or to whom. Neither they nor any supporting evidence provide the essential information required by 7 C.F.R. § 46.2(y)(1), which provides, "'Truly and correctly to account means, in connection with: Consignments, 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. . ."

The absence of detailed information as to the disposition of the potatoes makes it exceedingly difficult to assess whether Respondent exercised reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner. For example, the summary item, "Reserve for product condition discounts and freight on dumped product" (RX 10), for which Respondent subtracted $40,000.00 from the remittance, is accompanied by no detail as to what discounts were granted, where and when any dumping occurred, or what type of freight was employed, when, and the rates therefor. Potatoes listed on the second packout (RX 12) as "Russet #1 Culls Process" are reported as resulting in a net return of $0.78/cwt., without any indication as to where they were processed, when, or by whom. Potatoes listed on the second packout as "Russet Commercial PROCESS PROCESS" (14,214.40 cwt. of them) are reported as resulting in a net return of $0.99/cwt., also without any indication as to where they were processed, when, or by whom. An additional 3,008.00 cwt. are reported as "Dumped in Trade", yielding no return at all, without any documentation as to who dumped them, when, where, or why. *Id*.

Respondent contends that Complainant breached its agreement to provide potatoes that met Skyline's quality and grade specifications (RB pg. 11), and explains the low returns that it realized for Complainant's potatoes

by stating that, "Skyline agreed to make its best efforts to move the Rogers' potatoes despite their substandard quality" (RB pg. 18).[9]

Absent an adequate accounting, the value of the goods accepted may be shown by use of the percentage of condition defects disclosed by a prompt inspection. *G&T Terminal Packaging Co., Inc. v. Joe Phillips, Inc.*, 798 F. 2d 579 (2d Cir. 1986); *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 *Agric. Dec.* 1869 (1994). *See also South Florida Growers Association, Inc. v. Country Fresh Growers and Distributors, Inc.*, 52 Agric. Dec. 684, 706 (1993); *V. Barry Mathis, d/b/a Barry Mathis Farms v. Kenneth Rose Co., Inc.*, 46 Agric. Dec. 1562 (1987).

In the instant case, however, there is no prompt inspection in the record to show the percentage of condition defects, if any, that the potatoes exhibited when Respondent accepted them. In lieu of proof of condition by means of an impartial inspection report, Respondent offered the testimony of its own employee (Tr. pp. 190-191) and its hired trucker (Tr. pp 173-174), and several exhibits (RX 2 through RX 7) that were offered to show subsequent rejections by Respondent's customers.

RX 2 consists of an invoice from Respondent to Wal-Mart in Johnstown, NY, followed by photos of potatoes in Respondent's bags. RX 3, RX 4, and RX 5 are each titled "Wal-Mart Rejection Notification"; they include charts that purport to show levels of condition defects, and RX 3 and RX 4 include photos of potatoes (without any packaging). RX 6, titled "Trouble Notification" is from Potandon Produce, LLC of Idaho Falls, ID, and includes an invoice register referencing Skyline (Respondent). RX 7 is one

[9] Respondent further states that, "Complainant's failure to deliver potatoes in compliance with the contract requirements constitutes a breach of contract for which Respondent is entitled to recover provable damages" (RB pg. 20). In regard to Respondent's purchase of the first half of the potatoes, we have already found that Respondent did not carry its burden of proving breach. In regard to the second half, Respondent handled them on consignment. Therefore, our analysis does not involve damages for breach of a warranty of suitable shipping condition by the consignor; it involves the question of whether Respondent, the consignee, exercised reasonable care and diligence in disposing of the produce.

page of a USDA inspection certificate performed on July 31, 2006 for Seven Stars of Forest Park, GA on a load of "Skyline" Russet potatoes.[10]

Respondent's president testified that the potatoes referenced and depicted in RX 2 through RX 7 were the potatoes that Respondent had hauled in from Complainant (Tr. pp. 204, 206, 207, 210-211). There is nothing, however, in any of the exhibits identifying Complainant as the source of the potatoes. There do not appear, and Respondent's president did not reference, any sort of lot number or any other identification as required under (7 C.F.R. § 46.32(b)), which provides in pertinent part, "A lot number or other positive means of identification shall be assigned to each lot in order to segregate the various lots of produce received from different growers from similar produce being handled at the same time. Each lot shall be so identified and segregated throughout all operations conducted by the agent, including the sale or other disposition of the produce."

A similar attempt by a respondent to use the testimony of the truck driver and its customer to prove condition defects, in the absence of neutral and independent inspection, was rejected in *W. T. Holland & Sons, Inc. v. Clair Sensenig*, 52 Agric. Dec. 1705, 1710:

> Respondent did not secure a federal inspection of the produce nor any other kind of neutral and independent inspection. Although respondent submitted sworn statements from its customer and the truck driver to give credibility to its breach of contract allegation, we cannot accord a great deal of weight to either of those statements for various reasons. First, both parties are biased in that the truck driver is employed by respondent and the customer has a vested interest in the transaction. Second, neither person has been shown to be qualified to conduct inspections and determine the condition of produce. Third, as to the customer's statement, there is no proof that it is complainant's produce which is being referred to in the letter. For these foregoing reasons, we have not accorded either statement a great deal of weight as it relates to the condition of the produce.

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[10] The certificate states that the inspection report is "Continued on Certificate M048943." Certificate M048943 was not offered into evidence by Respondent.

Here, we find Respondent's offered evidence lacking for precisely the same reasons as in *W. T. Holland & Sons*. Respondent's customers may or may not have rejected potatoes that came from Complainant. If they did, there is no evidence that Respondent demanded justification from its customers. Where a grower's agent has allowed rejection by its customer without an inspection, we have held the grower's agent liable, saying, "Without an impartial inspection report, we are merely left with self-serving statements. It was negligent for respondent to allow the rejection of this lot of onions without an impartial inspection to determine whether State Produce was justified in its rejection." *Sousa*, 46 Agric. Dec. 709, 718 (1987).

To the extent that some of the potatoes were not reported as rejected by Respondent's customers, but were sold subject to the "product condition discounts" cited in the first "packout" (RX 10), or were sold at rates of $0.78/cwt. or $0.99/cwt., Respondent, in essence, granted its customers substantial adjustments or allowances on the price. Where a grower's agent failed to enter into a written agreement with the grower, or furnish a written statement of the terms under which it would handle grower's potatoes, allowances granted by the grower's agent have been disallowed. *Big Sky v. S & H, Inc*., 55 Agric. Dec. 1312 (1996). We have also stated that a grower's agent was obligated not only to get the best possible price for the grower's produce, but also not to allow an adjustment unless such adjustment was warranted; absent condition evidence from a timely inspection, granting adjustments without specific authorization by the grower was deemed not warranted. *Anthony Podesta, Inc. v. Foppiano Packing Co., Inc. a/t/a JMB Packing Co.*, 45 Agric. Dec. 1581 (1986).

Respondent cites several cases as support for the proposition that, "Skyline thus carried its burden to prove a material breach under USDA's reparation cases." (RB pp. 11-12).[11] In the first case cited, *Perez Ranches, Inc. d/b/a P.R.I. Sales v. Pawel Distributing Co.*, 48 Agric. Dec. 725 (1989),

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[11] Respondent's overall argument is not actually about material breach, but about a breach of the warranty of suitable shipping condition. Only one of the cases cited deals with material breach; in *Diamond Fruit & Vegetable Distributors, Inc. v. Muller Trading Company, Inc*., 66 Agric Dec. 882, 888 (2007), the seller was found to have committed a material breach when it shipped seeded, not seedless, watermelons. No condition breach was found. The situation here is not at all analogous. Note: Even *Diamond Fruit & Vegetable* involved a Federal inspection.

we held that the respondent failed to establish breach because the Federal inspection was not timely. In the next, *Santa Clara Produce, Inc. v. Caruso Produce, Inc*., 41 Agric Dec. 2279 (1982), the respondent did prove breach by a timely federal inspection. In *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric Dec. 1109 (1971), the respondent obtained a federal inspection, but failed to prove breach because it did not prove a grade agreement. Later, Respondent (RB pg. 18) cites *Fru-veg Marketing, Inc v. J. F. Palmer & Sons Produce, Inc*. 65 Agric. Dec. 1452 (2006), in which the central issue is a failure to secure a USDA inspection to justify below-market sales and dumped product.

In short, an argument as to breach due to condition is most readily made by means of a prompt, neutral inspection. Respondent's failure to produce an inspection or inspections is particularly baffling in light of four facts in this case:

1) Respondent's buyer, Doug Wert, testified that he is a former senior USDA licensed fruit and vegetable inspector with over 30 years experience, including inspecting potatoes. (RB pg. 5; Tr. pp. 181-182). He might be presumed to be very familiar with the purpose and role of neutral, impartial inspections.

2) Complainant's witnesses testified, without being challenged or refuted, that Doug Wert told them that he didn't know why the potatoes were being returned by Respondent's customers, since the inspections looked good (Tr. pp. 62, 108-109).

3) A letter dated August 9, 2006 to Greg Rogers from Respondent's president, Randy Bache (RX 11), states that, "All packing, **inspections**, and dump charges have been absorbed by Skyline." (Emphasis added.)

4) The State of Colorado has in effect a Marketing Order Regulating the Handling of Potatoes Grown in the State of Colorado, which mandates that, with limited exceptions, no handler shall handle potatoes unless such potatoes are inspected by an authorized representative of the Federal or Federal-State Inspection Service and are covered by a valid inspection certificate (CB, Exhibit 1).[12]

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[12] We take official notice that this provision appears at Section V, Paragraph A, of the Colorado Potatoes Market Order, available as of August 13, 2010 at: (continued...)

Respondent failed to provide justification for the adjustments, dumping, and sale for "process" that contributed to the extremely low returns that it remitted to Complainant for the potatoes Respondent handled on consignment, with one minor exception. The line item "Russet Bulk Culls Dumped" on RX 10 and on RX 12 were identified by Respondent's president as being culls that were unable to be packed or processed, and were identified as such at Respondent's facility (Tr. pp. 223-224). Since the quantity, 606.20 cwt., is less than five percent of the total, the dumping of those identified culls will be permitted. 7 C.F.R. 46.23. The total quantity of potatoes at issue, then, is the amount of potatoes hauled from Complainant's bin to Respondent's packing shed, 37,489 cwt. (*see supra* note 4) minus the 606.20 cwt. of culls dumped, or 36,882.80 cwt.

The reasonable value of the potatoes, as discussed above, is the Market News Service average price for the relevant time, or $15.58/cwt. The agreement between the parties, however, was that Respondent would purchase half of the potatoes for $9.00/cwt. and handle the other half on a "packout" basis with a minimum of $10.00/cwt. Complainant's witnesses consistently testified that that was their understanding of the contract (Tr. pp. 55, 103-104), and that was the contract that Complainant sought to enforce in its complaint (RX 14). There is no evidence of record that Respondent actually sold the potatoes at market price, and deceptively remitted a small fraction of what it received; therefore, we do not find Respondent's handling of Complainant's potatoes to be fraudulent. It would appear that Respondent sold the potatoes for less than the $10.00/cwt. minimum simply because it failed to act diligently in its consignor's best interest by accepting unsupported rejections and unjustified dumping. Respondent is thus liable only for the agreed $10.00/cwt. minimum return for the second half of the potatoes.

We find that Respondent is liable to Complainant for its purchase of one half of the potatoes, or 18,441.40 cwt. at a rate of $9.00/cwt., for a total of $165,972.60. Respondent is liable to Complainant for the consigned half of the potatoes, or 18,441.40 cwt. at a rate of $10.00/cwt., for a total of $184,414.00. In sum, Respondent is liable to Complainant for the potatoes in an amount of $350,386.60. Respondent has paid Complainant

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[12](...continued)
http://www.colorado.gov/cs/Satellite/Agriculture-Main/CDAG/1167928164615

$149,029.00 for the produce. Respondent's failure to pay Complainant the $201,357.60 balance of the purchase price and remittance is a violation of section 2 of the Act for which reparation should be awarded to Complainant.

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.

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

In accordance with 7 CFR § 47.19(d), Mr. Louis W. Diess, III, attorney for Complainant, timely filed an Affidavit of Counsel and Claim of Complainant Rogers Bros. Farms, Inc. for Fees and Expenses in Connection with Oral Hearing (Affidavit and Claim). Respondent entered no objection to the Affidavit and Claim. As detailed in Appendix A to the Affidavit and Claim, Mr. Diess claims total attorneys' fees for hearing preparation of $24,626.25 for 92.70 billable hours.

Items which will not be allowed are of three types: 1) work done in response to Respondent's Motion to Dismiss; 2) review or preparation of evidence introduced either by Complainant or Respondent; and 3) travel to and from Colorado for the hearing.

Specifically, disallowed items of the first type, regarding the Motion to Dismiss, are those listed in Appendix A as follows: Page 2, lines 11, 12, 13, 15, 16, 20, 22, 23, 24, 25; Page 3, lines 1, 7, 8. The work and costs of addressing Respondent's Motion to Dismiss are not recoverable, as they would have been would have been incurred if the case had proceeded under the documentary procedure provided in section 47.20 of the Rules of Practice (7 CFR § 47.20). *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc*., 48 Agric. Dec. 707 (1989); *Nathan's Famous v. N. Merberg &*

Son, 36 Agric. Dec. 243 (1977). These items represent 10.05 hours, for a total of $2,847.00, which will not be allowed.

Disallowed items of the second type, regarding the acquisition, preparation, or review of evidence, are those listed in Appendix A as follows: Page 3, lines 2, 5, 14; Page 4, line 3. This evidence, whether Complainant's Colorado Potato Marketing Order or Respondent's Exhibit 8, presumably would have been generated and/or reviewed if the case had proceeded under the documentary procedure, and therefore the costs involved are not recoverable. These items represent 3.25 hours, for a total of $898.00, which will not be allowed.

Finally, attorney fees for time spent traveling to and from the hearing are not recoverable. *East Produce, Inc. v. Seven Seas Trading Co., Inc*., 59 Agric. Dec. 853 (2000); *Golden Harvest Farms, Inc. v. Stanley Produce Co. Inc*., 38 Agric. Dec. 727 (1979). These items, listed in Appendix A at: Page 4, lines 5, 6, and 7, represent 28 hours, for a total of $8,400.00, which will not be allowed.

After making the noted adjustments, the attorney fees Complainant may recover in connection with the oral hearing total $12,481.25.

Mr. Diess also claims expenses totaling $2,163.56, including $359.55 for a copy of the hearing transcript, $100.00 for copies of the hearing exhibits, $924.20 for airfare, and other travel related expenses. All of the claimed expenses appear reasonable and will be permitted. When we add the expenses totaling $2,163.56 to the attorney fees totaling $12,481.25, the total fees and expenses Complainant may recover in connection with the oral hearing amount to $14,644.81.

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 (including any handling fee paid by the injured person or persons under section 6(a)(2)) sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217, 239 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. *See Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, Inc., 29 Agric. Dec. 978, 979 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 339 (1970); and *W.D. Crockett*

v. Producers Marketing Association, Inc., 22 Agric. Dec. 66, 67 (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, 672-73 (2006).

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $201,357.60, with interest thereon at the rate of 0.25 percent per annum from August 24, 2006, until paid, plus the amount of $300.00. Within 30 days from the date of this Order, Respondent shall pay to Complainant, as additional reparation for fees and expenses, $14,644.81, with interest thereon at the rate of 0.25 percent per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

MISCELLANEOUS ORDERS

[Editor's Note: This volume begins the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at:
http://www.dm.usda.gov/oaljdecisions/aljmisdecisions.htm.

In re: CHERYL A. TAYLOR.
PACA-APP Docket No. 06-0008.
In re: STEVEN C. FINBERG.
PACA-APP Docket No. 06-0009.
Stay Order.
Filed September 2, 2010.

PACA-APP.

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.

I issued *In re Cheryl A. Taylor*, __ Agric. Dec. ___ (Sept. 24, 2009). On September 1, 2010, Cheryl A. Taylor and Steven C. Finberg filed a Motion for Entry of Order of Stay seeking a stay of the Order in *In re Cheryl A. Taylor*, __ Agric. Dec. ___ (Sept. 24, 2009), pending the outcome of proceedings for judicial review. On September 1, 2010, the Agricultural Marketing Service, United States Department of Agriculture [hereinafter AMS], filed a response to Ms. Taylor and Mr. Finberg's Motion for Entry of Order of Stay stating AMS has no objection to the requested stay.

In accordance with 5 U.S.C. § 705, Ms. Taylor and Mr. Finberg's Motion for Entry of Order of Stay is granted. For the foregoing reason, the following Order is issued.

ORDER

The Order in *In re Cheryl A. Taylor*, __ Agric. Dec. ___ (Sept. 24, 2009), is stayed pending the outcome of proceedings for judicial review. This Stay Order shall remain effective until lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

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In re: LORETTA BORRELLI.
PACA-APP Docket No. 10-0137.
Order.
Filed November 5, 2010.

PACA-APP.

Leah Battaglioli, Esquire and Charles Kendall, Esquire, for Respondent.
Linda Strumpf, Esquire, for Petitioner.
Order issued by Peter M. Davenport, Chief Administrative Law Judge.

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In re: MARY A. SPINALE.
PACA-APP Docket No. 10-0139.
Order.
Filed November 5, 2010.

PACA-APP.

Leah Battaglioli, Esquire and Charles Kendall, Esquire, for Respondent.
Linda Strumpf, Esquire, for Petitioner.
Order issued by Peter M. Davenport, Chief Administrative Law Judge.

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DEFAULT DECISIONS

[Editor's Note: This volume begins the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. The parties in the case will still be reported in Part IV (List of Decisions Reported - Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: http://www.dm.usda.gov/oaljdecisions/aljdefdecisions.htm.

In re: J & N PRODUCE, INC.
PACA Docket No. D-09-0037.
Default Decision and Order.
Filed July 9, 2010.

PACA.

Mary Hobbie, for Complainant.
Respondent, Pro se.
Default decision issued by Peter M. Davenport, Chief Administrative Law Judge.

In re: O'LIPPI & CO., INC.
PACA Docket No. D-10-0032
Default Decision and Order.
Filed August 24, 2010.

PACA.

Delisle Warden, for AMS.
Respondent, Pro se.
Default decision issued by Peter M. Davenport, Chief Administrative Law Judge.

In re: TCRS, INC d/b/a EAST TENNESSEE PRODUCE.
PACA Docket No. D-09-0075.
Default Decision and Order.
Filed August 26, 2010.

PACA.

Ciarra Toomey, for AMS.
Respondent, Pro se.
Default decision issued by Peter M. Davenport, Chief Administrative Law Judge.

In re: TANIMURA DISTRIBUTING, INC.
PACA Docket No. D-10-0118.
Default Decision and Order.
Filed August 31, 2010.

PACA-D.

Charles E. Spicknall, for the Deputy Administrator, AMS.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

In re: MIAMI BEST TROPICAL ENTERPRISE, INC.
PACA Docket No. D-10-0332.
Default Decision and Order.
Filed October 4, 2010.

PACA-D.

Leah C. Battaglioli, for the Deputy Administrator, AMS.
Respondent, Pro se.
Default decision issued by Jill S. Clifton, Administrative Law Judge.

In re: CONTINENTAL GROWERS, INC.
PACA Docket No. D-10-0221.
Default Decision and Order.
Filed October 13, 2010.

PACA-D.

Brian P. Sylvester, for the Deputy Administrator, AMS.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

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In re: JC PRODUCE LLC.
PACA Docket No. D-10-0309.
Decision and Order By Reason of Default.
Filed December 27, 2010.

PACA-D.

Ciarra A. Toomey, for the Deputy Administrator, AMS.
Respondent, Pro se.
Decision issued by Jill S. Clifton, Administrative Law Judge.

CONSENT DECISIONS

Sirmon Produce, Inc., and Sirmon Farm, PACA-D-10-0004, 10/08/25.
Missiana Produce Inc., PACA D-10-0005, 10/10/12.
SK Foods, L.P, PACA-D-10-0111, 10/12/08.