

# AGRICULTURE DECISIONS

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

## AGRICULTURE DECISIONS

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**PERISHABLE AGRICULTURAL COMMODITIES ACT**

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**COURT DECISION**

**WESPAK DISTRIBUTORS, INC. v. RED HAWK FARMING & COOLING LLC, JACK LEWIS DIXON, LEWIS DIXON, JR. AND JESSIE DIXON.**

**Civil No. 09-743-KI.**

**Filed January 5, 2010.**

**[Cite as: 2010 WL 56104 (D.Or.)]**

**PACA-R – Responsibly connected – PACA trust – Personal liability, when not.**

Although controlling owner may be determined to be responsibly connected person - that does not automatically result in personal liability.

**United States District Court,  
D. Oregon.**

Cited CasesA distributor was entitled to default judgment against a controlling owner of a purchaser for its failure to pay for watermelons under their contract. The controlling owner was the signatory for the purchaser's company checks and was responsible for deciding whether to pay the distributor. Further, the owner repeatedly told the distributor that the purchaser did not have the funds available to pay the distributor and his choice not to appear to defend this suit was not indicative of a valid explanation for the dissipation of the purchaser's trust assets. Perishable Agricultural Commodities Act, 1930, § 1, 7 U.S.C.A. § 499a.Renee R.

**OPINION AND ORDER**

KING, District Judge:

Plaintiff Wespak Distributors, Inc. (“Wespak”) filed this lawsuit

under the Perishable Agricultural Commodities Act of 1930 (“PACA”), 7 U.S.C. § 499a *et seq.* The suit seeks to recover payment for agricultural commodities that Wespak delivered to defendant Red Hawk Farming and Cooling, LLC (“Red Hawk”) and its member/manager, defendant Jack Dixon, neither of whom have appeared to defend this action. On December 3, 2009, I ruled from the bench that Wespak is entitled to a default judgment against Red Hawk, but deferred ruling on whether Wespak is entitled to a default judgment against Dixon. I now hold that under PACA, Wespak is entitled to a default judgment against Dixon as well.

#### **ALLEGED FACTS**

Wespak is an Oregon corporation. Red Hawk is an Arizona limited liability company. Defendant Jack Dixon is a member and co-manager of Red Hawk. Wespak entered into a number of contracts to sell Red Hawk perishable agricultural commodities, namely, watermelons. Between August 22, 2007 and September 12, 2008, Red Hawk ordered and received agricultural commodities from Wespak. Wespak invoiced Red Hawk for the commodities but, despite repeated demand for payment, Red Hawk did not pay. The unpaid amounts due and owing Wespak total \$612,187.78, plus interest and fees. The amount owed is lessened by \$469,034.63, the total that Wespak garnished from Red Hawk's accounts receivable. Nevertheless, a sizeable deficiency of at least \$143,153.15 remains. According to Wespak, Dixon is responsible for the day-to-day operations of Red Hawk. Dixon is the official registered agent of Red Hawk and is its co-manager. He is also a member of Red Hawk and owns at least ten percent of the limited liability company; the other two owners are two members of Dixon's family. Dixon has signature authority for checks issued on behalf of Red Hawk. When Wespak's accountant called Red Hawk to demand payment on several occasions, the accountant was always referred to Dixon. The accountant believes Dixon is Red Hawk's decision-maker about whether to pay Wespak. According to the accountant, “[d]uring multiple

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telephone conversations between Dixon and [him]self, Dixon repeatedly admitted that Red Hawk did not have the funds available to pay [Wespak].” Decl. Gary Wood at ¶ 6.

### STANDARD

After entering an order of default, a district court has discretion to issue a default judgment. *See* Fed.R.Civ.P. 55; *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 852 (9th Cir.2007), *cert. denied*, 555 U.S.937, 129 S.Ct. 40, 172 L.Ed.2d 240 (2008). In exercising its discretion, the court may consider:(1) the possibility of prejudice to the plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.*Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir.1986) (citation omitted).

The court has “considerable leeway as to what it may require as a prerequisite to the entry of a default judgment.” *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir.1987) (per curiam) (footnote omitted). The court may take the complaint's well-pleaded factual allegations as true, other than the amount of damages. *Id.* at 917–18 (citation omitted); *DIRECTV*, 503 F.3d at 854 (citations omitted). On the other hand, a “ ‘defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law.’ ” *Id.* (quoting *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir.1975)).

### DISCUSSION

Congress enacted PACA in 1930 to prevent unfair business practices and promote financial responsibility in the fresh fruit and produce industry. *Boulder Fruit Exp. & Heger Organic Farm Sales v. Transp. Factoring, Inc.*, 251 F.3d 1268, 1270 (9th Cir.2001). In 1984, Congress amended PACA to ensure that growers of agricultural commodities have priority over lenders in all financing arrangements. *Id.* PACA creates a trust for this purpose:

Perishable agricultural commodities received by a commission

merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, *shall be held* by such commission merchant, dealer, or broker *in trust* for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

*Id.* (quoting 7 U.S.C. § 499e(c)(2)) (emphasis added).

The PACA trust comes into existence upon delivery of the commodities, and applies to all of the purchaser's produce-related inventory and proceeds. *See In re Southland Keystone*, 132 B.R. 632, 638–39 (B .A.P. 9th Cir.1991). The trust remains in effect until full payment of sums due has been received. *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 281 (9th Cir.1997).

The party holding trust assets must maintain them so they are freely available to satisfy outstanding obligations to the sellers of perishable agricultural commodities. *Id.* Under Ninth Circuit precedent, this party—the PACA trustee—owes a fiduciary duty to the beneficiary fruit and vegetable suppliers. *Id.* at 283. If the PACA trustee fails to create and protect a trust for the beneficiary, the PACA trustee commits a breach of trust and shall be liable to the beneficiary suppliers. *See* 7 U.S.C. § 499e(a). The Ninth Circuit has held that the PACA trust provisions impose these duties, and the resulting liability, on both the purchaser *and* its controlling person who use the assets for a purpose other than payment of suppliers. *Sunkist Growers, Inc.*, 104 F.3d at 283.

There is, however, some confusion amongst courts, and indeed, the litigants in this case, about the proper test to apply when determining if an individual person can be personally liable for the PACA buyer's failure to pay a supplier.

Wespak argues that PACA's definition of a “responsibly connected person” sets out the proper test to determine who can be personally

liable for the purchaser's failure to create and protect a trust for the PACA supplier. PACA defines “responsibly connected person” as, affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

7 U.S.C. § 499a(b)(9).

According to Wespak, since Dixon is a member of the LLC, and owns at least ten percent of Red Hawk, he fits the definition of “responsibly connected person,” and is, therefore, personally liable under PACA.

According to the statute, however, the significance of being “responsibly connected” to a company that has violated PACA has nothing to do with personal liability for corporate debts. Indeed, “[n]owhere in the legislative history is the issue of individual liability of persons under PACA discussed.” *Farm–Wey Produce, Inc. v. Wayne L. Bowman Co., Inc.*, 973 F.Supp. 778, 783 (E.D.Tenn.1997). Rather, a person “responsibly connected” to a PACA violator may not be employed by a PACA licensee except by approval of the Secretary of Agriculture. 7 U.S.C. § 499h(b); *see also Farley and Calfee, Inc. v. U.S. Dept. of Agric.*, 941 F.2d 964, 968 (9th Cir.1991) (discussing the “strict employment bar imposed on individuals responsibly connected with violators of the PACA”). There is no other mention in the statute about being “responsibly connected.” Recovery, therefore, may not be had of Dixon merely because he is “responsibly connected” to Red Hawk.

The Ninth Circuit, however, imposes personal liability on a PACA violator's “controlling person” who uses trust assets for a purpose other than payment of suppliers. *Sunkist Growers, Inc.*, 104 F.3d at 283. A controlling person is a person who is in the position to control the trust assets. *See id.* A controlling person who does not preserve trust assets

for the trust beneficiaries has breached a fiduciary duty, and is personally liable for that tortious act. *Id.* A court considering the liability of an alleged controlling person may look at the closely-held nature of the corporation, the person's active management role, and any evidence of the person acting for the corporation. *Id.* If a court determines that someone qualifies as a controlling person, PACA liability attaches first to the licensed seller of perishable agricultural commodities. *Id.* If the seller's assets are insufficient to satisfy the liability, the controlling person may be found secondarily liable if he had some role in causing the corporate trustee to commit the breach of trust. *Id.*

Dixon qualifies as a controlling person. Red Hawk is owned exclusively by three members of the Dixon family and is, therefore, akin to a closely-held corporation. Dixon was the signatory for company checks, and was responsible for deciding whether to pay Wespak. He co-managed Red Hawk and its daily operations, and was the company's registered agent.

Although Dixon's absence from this case makes it difficult to know for certain whether he used trust assets for a purpose other than payment of suppliers, the available facts make it sufficiently probable that he did. Dixon repeatedly told Wespak's accountant that "Red Hawk did not have the funds available to pay [Wespak]." Wood Decl. at ¶ 6. Dixon gave no reason why the funds were unavailable. Dixon's lack of explanation and his choice not to appear to defend this suit are not indicative of a valid explanation for the dissipation of trust assets. On the contrary, I am convinced that Dixon used the trust assets for a purpose other than payment of Wespak. The merits of Wespak's substantive claim, therefore, warrant a deficiency judgment against Mr. Dixon. He will be personally, although secondarily, liable to Wespak.

Whether an LLC member is personally liable as a controlling person is not a novel issue in the District of Oregon. In *F.C. Bloxom Co. v. Rojo Produce Imp. and Exp., LLC*, a produce seller delivered an order of fruits and vegetables to Rojo Produce. No. CV 04-1687, 2006 WL 2021697 at \*1 (D.Or. Jul.16, 2006). Rojo Produce failed to pay the seller. *Id.* Following an administrative procedure, Rojo Produce partially

paid its debt to the seller, but a deficiency remained. *Id.* The seller subsequently brought suit against Garcia Rojo, the founder and owner of Rojo Produce. *Id.* Garcia Rojo had authority and control over the company's assets, and check signing authority. *Id.* He was also responsible for the LLC's day-to-day operations. *Id.* at \*3. Judge Aiken found that he had control over the company's assets, "as demonstrated by his ability to authorize wire transfers and to sign checks for the company." *Id.* Judge Aiken held that Garcia Rojo "had a direct fiduciary obligation to preserve and maintain assets subject to the PACA trust and to ensure that those assets were sufficient and freely available for the payment of trust beneficiaries." *Id.* She held Garcia Rojo personally liable for the outstanding debt. *Id.*

Accordingly, I will issue a default judgment against Dixon.

#### CONCLUSION

Wespak's Motion for Default Judgment and Money Award Against Defendant Jack Dixon (# 65) is granted.  
IT IS SO ORDERED.

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**KINGSBURG APPLE PACKERS INC. d/b/a KINGSBURG ORCHARDS, et al., v. BALLANTINE PRODUCE CO., INC., et al.**  
**No. 1:09-CV-901-AWI-JLT.**  
**Filed February 9, 2010.**

[Cite as: 2011 WL 587355].

**PACA-R – Trust claims, failure to preserve – Premature PACA trust notice ineffective.**

A premature notice of a PACA trust claim is ineffective. The notice must be timely and must in sufficient detail to identify the transaction subject to the claim.

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

**ORDER ON WAGON WHEEL'S MOTION TO DETERMINE  
THE VALIDITY OF PACA CLAIMS**

ANTHONY W. ISHII, Chief Judge.

On October 28, 2009, this court issued an order that directed Wagon Wheel Farms, Inc. ("Wagon Wheel") to file a motion with the court to determine the validity of its Perishable and Agricultural and Commodities Act ("PACA") claims. *See* Doc. No. 116. Wagon Wheel complied and filed its motion the same day. Kingsburg Group and Bank of the West oppose the motion and assert that Wagon Wheel's claims are invalid because Wagon Wheel's Notice of Intent to Preserve Trust Benefits ("Notice of Intent") was prematurely served before any trust rights had been created and because the Notice of Intent did not contain certain information that is required by applicable federal regulations. For the reasons described below, the court finds that Wagon Wheel failed to preserve its PACA trust claims.

**FACTUAL BACKGROUND**

Wagon Wheel alleges that it sold and/or delivered to Ballantine Produce Co. ("Ballantine"), a packer and commission merchant, perishable agricultural commodities. *See* Wagon Wheel Proof of Claim dated July 24, 2009. Wagon Wheel alleges that it was not licensed by the United States Department of Agriculture ("USDA") as a PACA licensee during the period applicable to the transactions. Wagon Wheel alleges that Ballantine acted as a grower's agent for Wagon Wheel. Wagon Wheel alleges that it delivered harvested tree fruit to Ballantine, who would then sell the fruit on behalf of Wagon Wheel (as its commission merchant). Wagon Wheel shipped produce to Ballantine between October 16 and December 3, 2008. *See* Kingsburg Opposition at page 5. Wagon Wheel alleges that Ballantine received and accepted the produce. Wagon Wheel appears to have received an accounting from Ballantine for those shipments on or about April 13, 2009. *See* Kingsburg Opposition at page 5. The accounting reflected commodities sold and the amount outstanding. *See* Kingsburg Opposition at page 5.

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Wagon Wheel contends that a May 1, 2008 letter (“May 1, 2008 Letter”) from Craig Sorensen, President for Wagon Wheel, addressed to Ballantine and David Albertson, served as a Notice of Intent, preserving its PACA trust interest pursuant to 7 U.S.C. § 499e(c)(3). The May 1, 2008 Letter, provides, in pertinent part:

You have asked my family to deliver our 2008 Tree Fruit crop to Ballantine Produce Co ... My family (Wagon Wheel Farms) now gives you, David Albertson and Ballantine Produce, this written notice to preserve Wagon Wheel Farms' P.A.C.A. trust benefits for the 2008 harvest. Please inform your staff and banking institutions about Wagon Wheel Farms' high priority P.A.C.A. lien to proceeds from the sale of Wagon Wheel Farms' fruit. This lien will exist indefinitely until Wagon Wheel Farms is paid in full.

See Exhibit A to Wagon Wheel Motion to Determine Validity of PACA Claims. Wagon Wheel alleges that the total amount past due and unpaid from Ballantine totals \$1,018,306.22, all of which qualifies for PACA trust protection.

### ***1. Discussion***

PACA Congress enacted PACA in 1930 with the intent of “preventing unfair business practices and promoting financial responsibility in the fresh fruit and produce industry.” *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 282 (9th Cir.1997). Under PACA, a statutory trust is created in favor of all unpaid suppliers or sellers of perishable agricultural commodities upon receipt of such goods by a “commission merchant, dealer, or broker.”<sup>1</sup> 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.” *In re Southland + Keystone*, 132 B.R. 632, 639 (9th Cir.BAP1991), (quoting *In re Milton Poulos, Inc.*, 94 B.R. 648, 650 (Bankr.C.D.Cal.1988)). The statute

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<sup>1</sup> The term “received” means at “the time when the buyer, receiver, or agent gains ownership, control, or possession of the perishable agricultural commodities.” See 7 C.F.R. § 46.36(a) (1).

Kingsburg Apple Packers, Inc. d/b/a Kingsburg Orchards 711  
et al. v. Ballantine Produce Co., Inc., et al.  
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provides, in relevant part:

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

7 U.S.C. § 499e(c)(2).

The PACA trust is a “nonsegregated floating trust” that applies to the perishable “commodities, products derived therefrom, and any receivables or proceeds from their sale in the hands of the commission merchant, dealer, o[r] broker.” H.R. REP. NO. 98-98-543, at 2 (1983), reprinted in 1984 U .S.C.C.A.N. 405, 406.

Any supplier or seller of agricultural commodities who gives proper notice of its interest in the PACA trust has a claim against the trust. *In re Southland*, 132 B.R. at 639. PACA requires the beneficiary to preserve its trust right by providing written notice of its intent to preserve the trust within thirty days after the time payment is due. The PACA trust preservation provision provides:

The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received such notice that the payment instrument promptly presented for payment has been dishonored. The written notice to the

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commission merchant, dealer, or broker shall set forth information in sufficient detail to identify the transaction subject to the trust. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction. 7 U.S.C. § 499e(c)(3).

If a beneficiary does not comply with the notice requirements, it loses the benefits of the PACA trust. *See In re Marvin Properties, Inc.*, 854 F.2d 1183, 1186 (9th Cir.1988) (“The language of section 499e(c)(3) is unambiguous on its face. It clearly states that the seller shall lose the trust benefits unless ‘such person has given written notice of intent to preserve benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary ....’ ”); *see also In re Fresh Approach, Inc.*, 51 B.R. 412, 423 (Bankr.N.D.Tex.1985) (“Use of the words ‘shall lose’ and ‘preserve’ plainly refer to rights or interests existing prior to perfection. The clear meaning of the preservation provisions is that a beneficiary's pre-existing beneficial interest would evaporate absent affirmative steps by such a beneficiary to protect such interests. In short, the beneficial interest arises, by operation of law, upon delivery to a dealer of qualifying produce, and said interest exists unless and until either the claim is satisfied or the beneficiary fails to take the necessary steps to perfect.”).

Thus, under the statutory language, a PACA trust is created, in favor of unpaid suppliers, sellers, or their agents at the time the perishable commodities are received by a commission merchant, dealer, or broker but, in order to preserve the PACA trust, the beneficiaries are further required to provide written notice to the commission merchant, dealer, or broker in receipt of those commodities within a specified time period. *See* 7 U.S.C. §§ 499e(c)(2), (c)(3). If the beneficiary, however, is a licensee, then it may perfect its PACA trust rights by including certain statutory language on its invoices. *See* 7 U.S.C. §§ 499e(c)(4). Under the plain language of the statute, it does not appear that a beneficiary that is not also a licensee can rely on invoices to preserve its trust rights. *See In*

*re Enoch Packing Company, Inc. v. Joe Flores*, 2007 WL 1589537, \*4  
(E.D.Cal. June 1, 2007).

## **II. Wagon Wheel's Arguments**

Wagon Wheel contends that it perfected its PACA trust rights when it sent the May 1, 2008 letter to Ballantine. Wagon Wheel argues that the letter complied with PACA's statutory timing requirements under 7 U.S.C. § 499e(c)(3) and regulations under 7 C.F.R. § 46.46(f)(1)<sup>2</sup> Wagon Wheel asserts that the requirements of 7 U.S.C. § 499e(c)(3) that the trust notice be issued within thirty days after expiration of when payment from buyer is due merely establishes the last day when such notice may be given, and that there is no requirement that a seller must wait until payment default by the buyer before issuing its Notice of Intent. *See* Wagon Wheel Reply at page 2.

Wagon Wheel also argues that Kingsburg Group's interpretation of the PACA statute and regulations means that a grower's trust rights would depend on arbitrary elements of timing. Wagon Wheel contends that this interpretation would create a situation “where a grower using the ‘invoice’ method of preserving his PACA trust rights (under 499e(c)(4) could have its rights vitiated simply because the invoice he provided (with the requisite PACA trust language) arrived at the commission merchant hours, or even moments, before the commission merchant actually took possession or control of the fruit itself.” *See* Wagon Wheel Reply at page 3.

Lastly, Wagon Wheel argues that nothing in the PACA statute

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<sup>2</sup> 7 C.F.R. § 46.46(f)(1) provides that a Notice of Intent must include information, which establishes for each shipment:

- (i) the names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable,
- (ii) the date of the transaction, commodity, invoice price, and terms of payment (if appropriate),
- (iii) the date of receipt of notice that a payment instrument has been dishonored (if appropriate), and
- (iv) the amount past due and unpaid.

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requires that the Notice of Intent contain all the information set forth in the regulations and that the purpose of the notice requirement was served because Ballantine was on notice that all of its transactions with Wagon Wheel would be subject to PACA trust protection.

### **III. Resolution**

The court finds that Wagon Wheel failed to properly preserve its prospective trust rights because their Notice of Intent/May 1, 2008 letter was sent five months before the creation of its beneficial interests in the PACA trust assets.[U]nder the statutory language, a PACA trust is created in favor of unpaid suppliers, sellers, or their agents at the time the perishable commodities are received by a commission merchant, dealer, or broker but, in order to preserve the PACA trust, the beneficiaries are further required to provide written notice to the commission merchant, dealer or broker in receipt of those commodities within a specified time period. *See In re Enoch Packing Company*, 2007 WL 1589537 at \*4 (citing to 7 U.S.C. § 499e(c)(2), (c)(3)).

Wagon Wheel's letter did not comply with 7 U.S.C. § 499e(c) because it was prematurely sent to Ballantine before a PACA trust interest had arisen given that Wagon Wheel had not delivered the fruit, and Ballantine had not received the produce, at the time the letter was sent. Simply put, Wagon Wheel could not preserve an interest in a trust claim that did not exist. Additionally, Wagon Wheel did not preserve its trust assets after they delivered the produce to Ballantine, because they did not serve a Notice of Intent within 30 days of the relevant payment term as required by 7 U.S.C. § 499e(c)(3). Because Wagon Wheel did not send any Notice of Intent after the creation of its trust interest, Wagon Wheel lost the benefit of the PACA trust. *See In re Enoch Packing Company*, 2007 WL 1589537 at \*4; *see also In re Fresh Approach*, 51 B.R. at 423.

Wagon Wheel cites to *In re Richmond Produce*, 112 B.R. 364, 369-370 (Bankr.N.D.Cal.1990) and *In re W.L. Bradley Company, Inc.*, 75 B.R. 505, 511-512 (Bankr.E.D.Pa.1987) for the proposition that trust notices issued prior to any delinquent payments by the buyer are not premature and are valid. *See Wagon Wheel Reply* at page 2. *In re Richmond* and

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*In re W.L. Bradley* are distinguishable from the facts of this case because in both of those cases, the supplier issued their trust notices after the delivery of their produce, but before the deadline for payment by the buyer. Both courts found that a supplier's beneficial interest in the PACA trust was created upon delivery of the produce to the buyer, not when payment was due. *See In re Richmond*, 112 B.R. at 369-370; *In re W.L. Bradley*, 75 B.R. at 511, 512. Once the suppliers' interests were created in the PACA trust assets (i.e. the delivery of the produce), they had 30 days from the applicable payment term to issue a Notice of Intent to preserve their PACA trust rights. *Id.* Because both suppliers served their Notices of Intent after the delivery of produce, their claims were ruled valid PACA trust claims despite the fact that their Notices of Intent were served before the applicable payment term expired. *Id.*

In contrast, it is undisputed that Wagon Wheel served its Notice of Intent around five months before Ballantine actually received the produce. Wagon Wheel could not preserve trust rights that did not exist. Thus, Wagon Wheel failed to properly perfect its trust rights pursuant to the applicable PACA statutes and regulations.<sup>3</sup>

Wagon Wheel argues that to interpret 7 U.S.C. § 499e to mean that a grower's rights do not arise until the buyer takes possession of the produce means that a grower's trust rights would depend on arbitrary elements of timing. Wagon Wheel contends that this interpretation would create a situation "where a grower using the "invoice" method of preserving his PACA trust rights could have its rights vitiated simply because the invoice he provided (with the requisite PACA trust language) arrived at the commission merchant hours, or even moments, before the commission merchant actually took possession or control of the fruit itself." *See Wagon Wheel Reply* at page 3.

The court is not persuaded by Wagon Wheel's argument. Wagon Wheel's example is irrelevant because it does not address circumstances under which a non-licensed PACA grower seeks to perfect its trust

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<sup>3</sup> The court notes that Wagon Wheel has not cited, and this Court's research did not uncover, any case law that holds that a grower can preserve its trust rights before the rights are created.

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rights. Rather, Wagon Wheel is citing to 7 U.S.C. § 499e(c)(4), which provides for an alternate method of preserving PACA trust rights for licensees. Licensees are entities that hold a valid license issued under PACA. *See* 7 U.S.C. § 499c(a). Essentially, licensees may preserve their trust benefits by using ordinary and usual billing or invoice statements to provide notice of the licensee's intent to preserve the trust, which include certain PACA trust language.<sup>4</sup> *See* 7 U.S.C. § 499e(c)(4). Here, Wagon Wheel has admitted that it was not a PACA licensee, at the time in question. Therefore, Wagon Wheel's argument is inapplicable to the facts of this case.

***IV. Insufficient Information Argument***

Because the court has found that Wagon Wheel did not timely serve a Notice of Intent and failed to preserve their trust benefits, it is unnecessary for the court to address Bank of the West's and Kingsburg Group's objections that Wagon Wheel's Notice of Intent contained insufficient information regarding the transactions subject to PACA.

***ORDER***

The Court finds that the notice provided and filed by Wagon Wheel was inadequate to preserve the trust benefits created by PACA and the court determines that Wagon Wheel does not have a valid PACA claim. IT IS SO ORDERED.

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**KINGSBURG APPLE PACKERS INC. d/b/a KINGSBURG ORCHARDS, et al. v. BALLANTINE PRODUCE CO., INC., et al. No. 1:09-CV-901-AWI-JLT. Filed February 18, 2010.**

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<sup>4</sup> The court notes that under the plain language of 7 U.S.C. § 499e(c)(4), it does not appear that a beneficiary that is not also a licensee can rely on invoices to preserve its trust rights. *See In re Enoch Packing Company, Inc. v. Joe Flores*, 2007 WL 1589537 (E.D.Cal. June 1, 2007).

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[Cite as: 2010 WL 653549].

**PACA-R – PACA trust – Equitable tolling not effective.**

Notice of intent to preserve PACA trust rights were untimely and reliance on repeated assurance of buyer's principal is not an excuse for late filing of PACA trust claim.

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

**ORDER ON DIBUDUO'S MOTION TO DETERMINE THE  
VALIDITY OF PACA CLAIMS**

ANTHONY W. ISHII, Chief Judge.

On October 28, 2009, this court issued an order that directed DiBuduo Land Management Company (“DiBuduo”) to file a motion with the court to determine the validity of its Perishable and Agricultural and Commodities Act (“PACA”) claims. *See* Doc. No. 116. DiBuduo complied and filed its motion the same day. Kingsburg Group and Bank of the West oppose the motion and assert that DiBuduo's claims are invalid because DiBuduo's Notice of Intent to Preserve Trust Benefits (“Notice of Intent”) was served late. For the reasons described below, the court finds that DiBuduo failed to preserve its PACA trust claims.

**FACTUAL BACKGROUND<sup>1</sup>**

DiBuduo sold and delivered to Ballantine Produce Co. (“Ballantine”) perishable agricultural commodities on credit. *See* DiBuduo Proof of Claim dated July 29, 2009. DiBuduo was not licensed by the United States Department of Agriculture (“USDA”) as a PACA licensee during the period applicable to the transactions. DiBuduo shipped produce to

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<sup>1</sup> The factual history is provided for background only and does not form the basis of the court's decision; the assertions contained herein are not necessarily taken as adjudged to be true. The legally relevant facts relied upon by the court are discussed within the analysis.

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Ballantine between November and December 2008, and delivered shipments in January 2009. Ballantine received and accepted the produce. DiBuduo received accountings from Ballantine in December 2008, and January 2009. DiBuduo alleges that there is no evidence that it entered into a post-default written agreement for different terms.

On June 19, 2009, DiBuduo served a Notice of Intent upon Ballantine. The June 19, 2009 Notice of Intent provides, in pertinent part:

DiBuduo ... expressly states its intent to preserve trust benefits relating to the commodities described in this notice ... The dates of the transactions between the parties to which this notice applies are open and unpaid invoices for deliveries of 2008 commodities (described below) dated January 2, January 8, and January 15, 2009.

*See Exhibit A to DiBuduo's Motion to Determine Validity of PACA Claims.*

According to DiBuduo, it did not send its Notice of Intent prior to June 19, 2009 because Jerry DiBuduo (DiBuduo's president) relied on the representations of principals and managing agents of Ballantine that DiBuduo would be promptly paid for the fruit deliveries. DiBuduo contends that it reasonably relied upon those representations, especially since Jerry DiBuduo personally knew David Albertson ("Albertson"), the treasurer and principal of Ballantine. The Notice of Intent addressed the representations of Albertson as follows:

Trust claimant through its principal, Jerry DiBuduo was repeatedly advised by Ballantine's principal, David Albertson, that "it was not a question of whether but when" claimant would be paid. Over a two and one half year period, Jerry DiBuduo was negotiating the sale of a property co-owned with Ballantine and later in February 2009 Mr. DiBuduo negotiated the purchase of a Ballantine owned property and as part of those negotiations, was assured that trust claimant's account would be brought current so that sufficient cash would be available for closing the transactions. The first transaction was concluded and trust claimant's grower account partially paid as a result of trust claimant's continued diligence.

The second transaction never materialized but representations were made to Jerry DiBuduo which he reasonably relied on in delaying trust claimant's assertion of this claim. Ballantine at least partially paid when in connection with the first escrow.

Throughout February and March 2009 after trust claimant's repeated requests, some payments were made on the account albeit late payments. These delays interrupted claimant's cash flow and caused claimant to borrow substantial advances on a personal line of credit to pay ordinary operating expenses. From the weeks of March 6, through the week of March 23, 2009, trust claimant received \$25,000 per week to reduce the outstanding claim along with further assurances of full payment.

In April 2009, trust claimant was informed by John Pelton, then acting as Ballantine's CEO, that a dispute arose concerning the settlement of the first property transaction and payments were going to be suspended. After trust claimant [sic] promptly provided requested evidence, Mr. Pelton submitted the error and on April 20, 2009, assured trust claimant that he would be paid in full by the first week of May 2009. No payments have been received as of the date of presentation of this claim, less than 45 days after the date by which trust claimant was assured by the then acting CEO of Ballantine that trust claimant would be paid.

Trust claimant has repeatedly pursued payment but was assured payment was forthcoming. Trust claimant received some payments and therefore reasonably relied on the statements. Neither Mr. Albertson nor Mr. Pelton ever denied Ballantine's liability for trust claimant's claim. *See* Exhibit A to DiBuduo's Motion to Determine Validity of PACA Claims.

DiBuduo alleges that the total amount past due and unpaid from Ballantine totals \$100,498.00, all of which qualifies for PACA trust protection.

## **DISCUSSION**

I. *PACA* Congress enacted PACA in 1930 with the intent of "preventing unfair business practices and promoting financial

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responsibility in the fresh fruit and produce industry.” *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 282 (9th Cir.1997). Under PACA, a statutory trust is created in favor of all unpaid suppliers or sellers of perishable agricultural commodities upon receipt of such goods by a “commission merchant, dealer, or broker.”<sup>2</sup> 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.” *In re Southland + Keystone*, 132 B.R. 632, 639 (9th Cir.BAP1991), (quoting *In re Milton Poulos, Inc.*, 94 B.R. 648, 650 (Bankr.C.D.Cal.1988)). The statute provides, in relevant part:

Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

7 U.S.C. § 499e(c)(2).

The PACA trust is a “nonsegregated floating trust” that applies to the perishable “commodities, products derived therefrom, and any receivables or proceeds from their sale in the hands of the commission merchant, dealer, or broker.” H.R. REP. NO. 98-98-543, at 2 (1983), reprinted in 1984 U.S.C.A.N. 405, 406. Any supplier or seller of agricultural commodities who gives proper notice of its interest in the PACA trust has a claim against the trust. *In re Southland*, 132 B.R. at 639. PACA requires the beneficiary to preserve its trust right by providing written notice of its intent to preserve the trust within thirty days after the time payment is due. The PACA trust preservation provision provides:

The unpaid supplier, seller, or agent shall lose the benefits of

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<sup>2</sup> The term “received” means at “the time when the buyer, receiver, or agent gains ownership, control, or possession of the perishable agricultural commodities.” See 7 C.F.R. § 46.36(a) (1).

such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer or broker within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received such notice that the payment instrument promptly presented for payment has been dishonored. The written notice to the commission merchant, dealer, or broker shall set forth information in sufficient detail to identify the transaction subject to the trust. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed on invoices, accountings, and other documents relating to the transaction.

7 U.S.C. § 499e(c)(3).

If a beneficiary does not comply with the notice requirements, it loses the benefits of the PACA trust. *See In re Marvin Properties, Inc.*, 854 F.2d 1183, 1186 (9th Cir.1988) (“The language of section 499e(c)(3) is unambiguous on its face. It clearly states that the seller shall lose the trust benefits unless ‘such person has given written notice of intent to preserve benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary ....’ ”); *see also In re Fresh Approach, Inc.*, 51 B.R. 412, 423 (Bankr.N.D.Tex.1985) (“Use of the words ‘shall lose’ and ‘preserve’ plainly refer to rights or interests existing prior to perfection. The clear meaning of the preservation provisions is that a beneficiary’s pre-existing beneficial interest would evaporate absent affirmative steps by such a beneficiary to protect such interests. In short, the beneficial interest arises, by operation of law, upon delivery to a dealer of qualifying produce, and said interest exists unless and until either the claim is satisfied or the beneficiary fails to take the necessary steps to

perfect.”).

Thus, under the statutory language, a PACA trust is created, in favor of unpaid suppliers, sellers, or their agents at the time the perishable commodities are received by a commission merchant, dealer, or broker but, in order to preserve the PACA trust, the beneficiaries are further required to provide written notice to the commission merchant, dealer, or broker in receipt of those commodities within a specified time period. *See* 7 U.S.C. §§ 499e(c)(2), (c)(3). If the beneficiary is a licensee, however, then it may perfect its PACA trust rights by including certain statutory language on its invoices. *See* 7 U.S.C. §§ 499e(c)(4). Under the plain language of the statute, a beneficiary that is not also a licensee cannot rely on invoices to preserve its trust rights. *See In re Enoch Packing Company, Inc. v. Joe Flores*, 2007 WL 1589537 (E.D.Cal. June 1, 2007).

## **II. DiBuduo's Arguments**

DiBuduo contends that it perfected its PACA trust rights for the following reasons: (1) DiBuduo's June 19, 2009 Notice of Intent complied with PACA's statutory timing requirements under 7 U.S.C. § 499e(c)(3); (2) DiBuduo preserved its trust rights because it served its Notice of Intent after Ballantine stopped making payments; (3) PACA's timing requirements do not apply to disputed transactions and that a disputed transaction existed between DiBuduo and Ballantine; (4) DiBuduo did not waive its PACA rights because DiBuduo did not enter into a post-default written agreement, oral agreement, or course of dealing, which altered the terms of PACA; and (5) Even if this court determines that the claim was not timely, the objecting parties are estopped from asserting timeliness objections to DiBuduo's claim because Albertson's representations equitably tolled PACA's statute of limitation periods.

## **III. Resolution**

First, the court finds that DiBuduo failed to properly preserve its trust rights because its Notice of Intent was delivered late in violation of 7 U.S.C. § 499e(c)(3). In order to comply with PACA regulations,

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DiBuduo needed to issue its Notice of Intent within thirty days of receiving an accounting from Ballantine. *See* 7 C.F.R. § 46.2(aa)(9). DiBuduo alleges in its Proof of Claim that Ballantine submitted accountings between December 6, 2008 and January 16, 2009. Thus, DiBuduo should have served its Notice of Intent between January 5 and February 15, 2009. However, it is undisputed that DiBuduo served its Notice of Intent on June 19, 2009. Because DiBuduo sent its Notice of Intent several months after the applicable statutory deadline, DiBuduo lost the benefit of the PACA trust. *See In re Marvin*, 854 F.2d at 1186; *In re Fresh Approach*, 51 B.R. at 423. Therefore, DiBuduo did not timely preserve its trust rights under PACA.

Second, the court is not convinced by DiBuduo's argument that it preserved its trust rights because it served its Notice of Intent after Ballantine stopped making payments as opposed to the deadlines provided by PACA. DiBuduo relies on *In re Marvin Properties* and *In re Richmond Produce*, 112 B.R. 364 (Bankr.N.D.Cal.1990) to support its argument. *In re Marvin* and *In re Richmond* are not helpful to DiBuduo's position because neither case involved a grower who submitted a late notice and neither case held that PACA deadlines are tolled until the grower realizes that the buyer can no longer make payment. *In re Marvin* merely held that a grower's failure to give notice to the buyer resulted in a forfeiture of trust benefits. *In re Richmond* is distinguishable because the suppliers there served their Notice of Intent before the applicable PACA payment term had expired. *Id.* In contrast, it is undisputed that DiBuduo served its Notice of Intent several months after the applicable PACA deadline had expired.

Third, with respect to DiBuduo's "disputed transaction" argument, the court does not find merit to this argument. DiBuduo correctly states that PACA's prompt payment deadlines only apply to undisputed amounts.<sup>3</sup> DiBuduo, however, fails to allege that there was a disputed amount that related to the delivery of fruit. Instead, DiBuduo represented

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<sup>3</sup> 7 C.F.R. § 46.2(aa) provides in part: "If there is a dispute concerning a transaction, the foregoing time periods for prompt payment apply only to payment of the undisputed amount."

in its June 29, 2009 Proof of Claim filed with this Court that:

In April 2009, trust claimant was informed by John Pelton, then acting as Ballantine's CEO, that a dispute arose concerning the settlement of the first property transaction and payments were going to be suspended. After the trust clamant [sic] promptly provided requested evidence, Mr. Pelton admitted the error and on April 20, 2009, assured trust claimant that he would be paid in full by the first week of May 2009.

See Exhibit A to DiBuduo's Motion to Determine Validity of PACA Claims. Based on DiBuduo's admissions in its Proof of Claim, the dispute between DiBuduo and Ballantine relates to a property transaction and does not relate to fruit delivery. Furthermore, DiBuduo does not allege that it ever disputed the accuracy of the accountings that it received from Ballantine in December 6, 2008, and January 16, 2009.

Fourth, the court is not persuaded by DiBuduo's argument that it did not waive its trust rights because it did not enter into any post-default agreements (i.e. a written agreement or oral agreement, or course of dealings) that extended the payment terms provided by PACA. In the instant matter, the presence or absence of a post-default agreement is irrelevant because DiBuduo did not timely file a Notice of Intent. DiBuduo relies on *Hull Company v. Hauser's Foods, Inc.*, 924 F.2d 777 (8th Cir.1991) and *Patterson Frozen Food v. Crown Foods International*, 307 F.3d 666 (7th Cir.2002) to establish that it did not waive its rights. DiBuduo argues that these cases establish that PACA is to be construed liberally in favor of sellers and that oral agreements or "course of dealing" will not abrogate PACA trust rights. While the court accepts the general principle that PACA is to be construed liberally, these cases do not aid DiBuduo's position. Neither *Patterson* nor *Hull* dealt with a Notice of Intent that was served outside of the PACA deadlines.

The *Hull* court held that an oral agreement had no effect on a seller's rights to trust protection. *Hull*, 924 F.2d at 783. Importantly, the *Hull* court specifically stated that it was not expressing an opinion on the validity of the district court's determination that the grower's Notice of Intent was valid. Thus, *Hull* is not applicable to the facts of this case. *Patterson* is distinguishable from the facts of this case because the

*Patterson* court focused on whether a post-default written agreement between the parties nullified the grower's PACA trust rights where a seller had preserved its rights by including the required PACA statutory language in its invoices. *See Patterson*, 307 F.3d at 668. Here, it is undisputed that DiBuduo was not a PACA licensee and needed to preserve its rights by timely filing a Notice of Intent. Therefore, even assuming that DiBuduo did not enter into any post-default agreements, it does not change the fact that DiBuduo did not comply with PACA and timely file a Notice of Intent.

Accordingly, DiBuduo failed to properly perfect its trust rights pursuant to the applicable PACA statutes and regulations because it did not timely serve its Notice of Intent.

#### ***IV. Equitable Tolling Argument***

The facts of this case do not support an extension of the PACA deadlines. DiBuduo argues that it diligently pursued collection for the outstanding balance from Ballantine. The relevant question, however, is whether DiBuduo diligently preserved its trust rights. After reviewing DiBuduo's efforts to preserve its trust rights, the court finds that DiBuduo did not exercise diligence in protecting its trust rights, namely, because DiBuduo did not timely file a Notice of Intent. Furthermore, DiBuduo does not explain in its briefs why it was not able to timely file a Notice of Intent.

DiBuduo relies on *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir.2000) and asserts that: "equitable tolling focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant." DiBuduo, however, does not present any facts to the court that would excuse it from not complying with PACA's limitations period. DiBuduo seems to be arguing that because it received verbal promises of full payment from Ballantine, that the PACA's deadlines should not be enforced. The court does not find that assurances of payment from Ballantine excuses DiBuduo from complying with PACA in light of the fact that DiBuduo was aware of the PACA deadlines, and was aware that Ballantine was late in paying

the fruit invoices. *See* DiBuduo's Notice of Intent (“In February and March 2009 after [DiBuduo's] repeated requests, some payments were made on the account albeit *late* payments”) (emphasis added).

Additionally, DiBuduo alleges in its Notice of Intent that the last payment from Ballantine was received on March 23, 2009. Therefore, even if the court could look past PACA's prompt payment terms and allow DiBuduo to submit a Notice of Intent from the date of last payment received as opposed to when the invoices were due as required by PACA, DiBuduo's Notice of Intent was still late because it was not served until June 19, 2009.

Accordingly, for the reasons listed above, the court finds that DiBuduo has not met its burden to establish excusable ignorance of the PACA limitations period.

***ORDER***

The Court finds that the notice filed by DiBuduo was untimely and failed to preserve the trust benefits created by PACA. Thus, the court determines that DiBuduo does not have a valid PACA claim.  
IT IS SO ORDERED.

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**SUNRISE ORCHARDS, INC. v. PETS CALVERT CO. AND  
MICHAEL F. O'NEILL AND BORZYNSKI BROS.  
DISTRIBUTING, INC. v. PETS CALVERT CO. AND MICHAEL  
F. O'NEILL.  
No. 08-cv-6684.  
Filed March 23, 2010.**

**[Cite as: 2010 WL 1194203].**

**PACA-R. – Stipulation of PACA debt – Sales subsequent to Stipulation – Res  
judicata.**

Seller brought suit for PACA claims and eventually entered into a court approved stipulation. Sales of produce made contemporaneous with stipulation again resulted in new PACA claims. Res judicata did not apply since the invoices for the subsequent sales were not in existence at the time of the court approved stipulation.

Sunrise Orchards, Inc. v. Pets Calvert Co. and Michael F. O'Neill and Borzynski Bros. Distributing, Inc.  
v. Pets Calvert, et al.  
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**United States District Court,  
N.D. Illinois, Eastern Division.**

**MEMORANDUM OPINION AND ORDER**

ROBERT M. DOW, JR., District Judge.

On November 21, 2008, Plaintiff Sunrise Orchards, Inc. filed suit against Defendants Pets Calvert Co. and Michael F. O'Neill to enforce its rights pursuant to the Perishable Agricultural Commodities Act ("PACA") and to recover for common-law breach of contract. On December 18, 2008, Plaintiff Borzynski Bros. Distributing, Inc. intervened in this action, also to enforce its PACA rights. On June 3, 2009, Defendant O'Neill moved for partial summary judgment [56] against Sunrise and Borzynski, which corporate Defendant Pets Calvert Co. joined on August 3, 2009. Defendants seek to dismiss all PACA claims in the complaints filed by Sunrise and Borzynski. Also on August 3, 2009, Borzynski moved for summary judgment [72] against Defendants. For the following reasons, the Court grants Borzynski's motion for summary judgment [72], and grants in part and denies in part Defendants' motion for partial summary judgment [56].

**I. Background**

**A. Procedural History**

On November 21, 2008, Plaintiff Sunrise Orchards, Inc. ("Sunrise") filed its complaint against Defendants Pets Calvert Co. and Michael F. O'Neill, alleging the following causes of action: Failure to Maintain Trust (Count I), Dissipation of Trust Assets (Count II), Failure to Pay Trust Funds/Unfair Conduct (Count III), Breach of Fiduciary Duty/Non-Dischargeability (Count IV), and Breach of Contract (Count V). On December 9, 2008, Borzynski Bros. Distributing, Inc. ("Borzynski") filed a motion to intervene, which the Court granted on December 12, 2008, and on December 18, 2008, Borzynski filed its

complaint against Defendants Pets Calvert Co. and Michael F. O'Neill, alleging the following causes of action: Declaratory Relief Validating PACA Trust Claim (Count I), Enforcement of Payment from PACA Trust Assets (Count II), Violation of PACA-Failure to Maintain PACA Trust Assets and Creation of Common Fund (Count III), Violation of PACA-Failure to Pay Promptly (Count IV), Breach of Contract (Count V), Breach of Fiduciary Duty to PACA Trust Beneficiaries (Count VI), Conversion and Unlawful Retention of PACA Trust Assets (Count VII), and Constructive Trust (Count VIII).<sup>1</sup>

Defendants initially did not respond to Sunrise's complaint, and on January 22, 2009, the Court entered a default against both Defendants. Sunrise then moved for default judgment, which the Court denied, and Defendants filed answers to both complaints. At a status hearing on February 5, 2009, Defendant O'Neill, appearing *pro se*, acknowledged on the record that he owed a debt to Sunrise and that he had no dispute with the amount Sunrise claimed he owed. Then, on June 3, 2009, Defendant O'Neill filed a motion for partial summary judgment on all PACA claims asserted by Sunrise and Borzynski, which Defendant Pets Calvert was permitted to join on August 3, 2009. Sunrise responded to Defendants' summary judgment motion, but Borzynski did not. However, on August 3, Borzynski moved for summary judgment against Defendant Pets Calvert on Counts IV and V. Sunrise has not moved for summary judgment.

In order to clarify issues raised by the summary judgment motions, the Court held a telephonic oral argument on February 16, 2010. During the argument, the Court specifically asked the parties to clarify the relationship between this litigation and prior litigation in the Western District of Wisconsin between Sunrise and Pets Calvert, to which the parties referred in their briefs. The Court also requested that the parties clarify the nature of the PACA claims at issue. After the oral argument, the Court allowed supplemental briefing.

## **B. Factual History**

### *1. Litigation between Sunrise Orchards and Defendants*

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<sup>1</sup> Borzynski's Constructive Trust count was inadvertently numbered as "Count IX."

Sunrise Orchards, Inc. v. Pets Calvert Co. and 729  
Michael F. O'Neill and Borzynski Bros. Distributing, Inc.  
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Plaintiff Sunrise, a Wisconsin corporation that grows, harvests, and sells fresh apples (“produce”), sold produce to Defendant Pets Calvert Co. between November 2004 and January 2007. Pets Calvert, an Illinois corporation solely owned by Defendant Michael O'Neill, is a licensed “dealer” of perishable agricultural commodities within the meaning of the Perishable Agricultural Commodities Act (“PACA”), 7 U.S.C. 499 *et seq.* Pets Calvert buys and resells fruits and vegetables. Between November 2004 and January 2007, Defendants ordered, received, and accepted \$116,669.00 worth of fresh apples on credit. The principal amount of \$89,169.00 remains unpaid.

As of October 31, 2005, there was principal in the amount of \$83,668.00 and accrued interest in the amount of \$12,843.42 owed by Pets Calvert to Sunrise, with interest continuing to accrue at 1.5% month. After Defendants failed to timely pay for the produce delivered by Sunrise, Sunrise filed suit in the United States District Court for the Western District of Wisconsin, Case No. 3:05-cv-651-bbc (“Wisconsin lawsuit”). The lawsuit sought payment for fresh apples ordered, received, and accepted by Defendants from the period of November 19, 2004, through February 26, 2005. On December 21, 2005, an agreement to repay the debt was reached and memorialized by a stipulation filed in the Wisconsin lawsuit. Pursuant to the stipulation, Pets Calvert and O'Neill agreed to pay a principal amount of \$83,668.00 and accrued interest of \$12,843.42, plus attorneys fees and interest at 1.5% per month on the unpaid principal balance. The stipulation was approved by District Court Judge Barbara Crabb.

Defendants began making payments pursuant to the court order, but eventually stopped. On June 5, 2007, Sunrise filed a motion to reopen the Wisconsin litigation and for entry of judgment. On July 13, 2007, Judge Crabb entered judgment against Pets Calvert and O'Neill and in favor of Sunrise in the amount of \$95,409.46, with interest at a rate of \$41.26/day from June 2, 2007 through the date of judgment.<sup>2</sup>

Between October 2006 and January 2007, Sunrise continued to sell

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<sup>2</sup> Intervenor Plaintiff Borzynski was not a party to the Wisconsin lawsuit.

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produce to Pets Calvert. According to the evidence submitted by the parties-which the parties confirmed during the February 16, 2010 oral argument-the remaining balance on the produce sold outside of the Wisconsin litigation that remains unpaid amounts to \$33,001.00.

### *2. Litigation between Borzynski Bros. and Defendants*

Intervenor Plaintiff Borzynski, a Wisconsin corporation, also supplied produce to Defendants. Between May 20 and June 17, 2008, Borzynski sold seven loads of produce, worth \$19,563.00, to Defendants. Borzynski and Defendants negotiated the price for each shipment, and Defendants accepted the produce delivered by Borzynski. The invoices provided for payment in ten days. Defendants failed to pay for the produce. According to Defendants,<sup>3</sup> Borzynski and Defendants entered into an agreement in which Defendants would pay Borzynski \$500/week for forty weeks to satisfy the outstanding debt. In an e-mail to Defendants on September 26, 2008, Borzynski stated, "Mike, Did you forget something? I think you are behind on our agreed upon schedule of \$500/week. Let me know. (Nothing last week and nothing this week)." Despite this agreement extending the payment terms, Defendants failed to satisfy their debt to Borzynski.

## **II. Summary Judgment Standard**

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

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<sup>3</sup> Because Borzynski failed to submit responses to Defendants' statement of facts, the Court deems admitted Defendants' factual allegations that are properly supported by admissible record evidence. See *Malec v. Sanford*, 191 F.R.D. 581, 583 (N.D.Ill.2000) ("Factual allegations not properly supported by citation to the record are nullities."). In turn, because Defendants failed to respond to several of Borzynski's statements of fact with admissible evidence, the Court deems admitted those factual allegations submitted by Borzynski that are properly supported by admissible record evidence. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (to avoid summary judgment, the opposing party must go *beyond the pleadings* ).

law.” Fed.R.Civ.P. 56(c). In determining whether there is a genuine issue of fact, the Court “must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party.” *Foley v. City of Lafayette, Ind.*, 359 F.3d 925, 928 (7th Cir.2004). To avoid summary judgment, the opposing party must go beyond the pleadings and “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal quotation marks and citation omitted). A genuine issue of material fact exists if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248. The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is proper against “a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Id.* at 322. The non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). “The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].” *Anderson*, 477 U.S. at 252.

### III. Analysis

#### A. PACA Background

The Perishable Agricultural Commodities Act of 1930 imposes various duties on commercial buyers and sellers of produce. In addition to PACA's comprehensive regulatory scheme, the Act allows buyers and sellers to seek redress in the courts for certain statutory violations. See 7 U.S.C. §§ 499e(b)(2), (c)(5) (conferring jurisdiction for the alleged PACA violations in Plaintiff's complaint).

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Two provisions are important for the instant motion and for this case. The first, 7 U.S.C. § 499b(4), pertains to prompt payment; it makes it unlawful for any dealer or broker “to fail or refuse truly and correctly to account and make full payment promptly” for a shipment of produce. The terms “dealer” and “broker”—the people who have a duty to make prompt payment<sup>4</sup> are defined broadly. A “dealer” basically is one who buys or sells produce. Under the Act, and subject to a handful of statutory exceptions, the term means “any person engaged in the business of buying or selling [in quantities defined by the Secretary of Agriculture] any perishable agricultural commodity in interstate \* \* \* commerce.” *Id.* at § 499a(b)(6). And a “broker” is basically an agent who buys produce. The term, likewise subject to limited exceptions, includes “any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate \* \* \* commerce for or on behalf of the vendor or purchaser.” *Id.* at § 499a(b)(7). A dealer or broker who fails to tender prompt payment “shall be liable to the person or persons injured thereby for the full amount of damages \* \* \* sustained in consequence of such violation.” *Id.* at 499e(a).

The second important provision is a statutory trust provision. In 1984, PACA was amended to create a statutory trust in favor of sellers in produce sold to buyers (*e.g.*, grocery stores and certain agents), under which the buyer holds the produce and any proceeds and receivables from the produce in trust for the benefit of the seller. 7 U.S.C. § 499e(c)(2). This floating trust is automatically created when the dealer accepts the goods so long as the supplier complies with the specific notice requirements set out in 7 U.S.C. § 499e(c) and 7 C.F.R. § 46.46(f).<sup>5</sup> *Greg Orchards & Produce, Inc. v. Roncone*, 180 F.3d 888, 890-91 (7th Cir.1999). PACA trust rights take priority over the interests of all other creditors, including secured creditors. *C.H. Robinson Co. v.*

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<sup>4</sup> The Act also imposes duties on “commission merchants.” A commission merchant is “any person engaged in the business of receiving in interstate \* \* \* commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another.” 7 U.S.C. § 499a(b)(5).

<sup>5</sup> That notice can take the form of “ordinary and usual billing or invoice statements” so long as the invoices recite statutorily required language. 7 U.S.C. § 499e(c)(4).

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*Trust Co. Bank, N.A.*, 952 F.2d 1311, 1315 (11th Cir.1992). Thus, PACA gives sellers of perishable goods a superior secured interest, just as a seller of durable goods may perfect an interest in its property.

A trust beneficiary can initiate an action in federal court "to enforce payment from the trust." 7 U.S.C. § 499e(c)(5)(i). This remedy permits recovery against both the corporation and its controlling officers. *Golman-Hayden Co. v. Fresh Source Produce, Inc.*, 217 F.3d 348, 351 (5th Cir.2000). The principal justifications Congress has given for granting such generous protection for sellers of produce are (1) the need to protect small dealers who require prompt payment to survive and (2) the importance of ensuring the financial stability of the entire produce industry. *In re Magic Rests., Inc.*, 205 F.3d 108, 111 (3d Cir.2000). In return for its protections, PACA establishes strict eligibility requirements. A PACA supplier must be selling produce on a cash or short-term credit basis. *Greg Orchards*, 180 F.3d at 891. The Secretary of Agriculture has determined that "the maximum time for payment for a shipment to which [parties] can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance." 7 C.F.R. § 46.46(e)(2). If a produce supplier enters a written post-default agreement with a dealer that extends the dealer's time for payment beyond thirty days, the supplier becomes ineligible to assert its trust rights. See *Patterson Frozen Foods, Inc. v. Crown Foods Intern., Inc.*, 307 F.3d 666, 669-70 (7th Cir.2002); *Greg Orchards*, 180 F.3d at 892; *In re Lombardo Fruit and Produce Co.*, 12 F.3d 806, 809 (8th Cir.1993). On the other hand, an oral agreement for an extension or a course of dealing allowing more than thirty days for payment will not abrogate a PACA trust. See *Patterson*, 307 F.3d at 670.

## **B. Litigation between Sunrise Orchards and Defendants**

### *1. Res Judicata*

Under the doctrine of *res judicata* (or claim preclusion), a final judgment on the merits in a case precludes the parties from relitigating claims that were or could have been raised in that case. See *Highway J*

*Citizens Group v. U.S. Dep't of Transp.*, 456 F.3d 734, 741 (7th Cir.2006). For claim preclusion to apply, there must be (i) a final judgment on the merits in an earlier action; (ii) an identity of the causes of action in the earlier and later action; and (iii) an identity of the parties. See, e.g., *Highway J* at 741; *Doe v. Allied-Signal, Inc.*, 985 F.3d 908, 913 (7th Cir.1993). In the present case, there was a final judgment entered by Judge Crabb in the Wisconsin lawsuit on July 13, 2007, and the parties to this suit and the Wisconsin lawsuit (other than Intervenor Plaintiff Borzynski, whose claims are separate from Plaintiff Sunrise's claims) are the same.

An identity of causes of action occurs if a later claim “emerges from the same core of operative facts as [the] earlier action.” *Highway J*, 456 F.3d at 741. Claims are considered the same for purposes of claim preclusion if they are “based on the same, or nearly the same, factual allegations.” *Cole v. Bd. of Trustees of Univ. of Ill.*, 497 F.3d 770, 772-73 (7th Cir.2007) (internal quotation marks and citation omitted). In other words, “a subsequent suit is barred if the claim on which it is based arises from the same incident, events, transaction, circumstances, or other factual nebula as a prior suit that had gone to final judgment.” *Okoro v. Bohman*, 164 F.3d 1059, 1062 (7th Cir.1999).

The judgment entered by Judge Crabb in the Wisconsin lawsuit in the principal amount of \$83,668.00 cannot be collaterally attacked in this lawsuit. The factual predicate for the portion of Sunrise's claims in this lawsuit that are related to the \$83,668.00 due on the unpaid produce delivered to Defendants between November 19, 2004, and February 26, 2005, is identical to the factual allegations in the Wisconsin lawsuit. See *Cole*, 497 F.3d at 772. Indeed, during the telephonic conference on February 16, the parties conceded this point. Thus, any claims that Sunrise has with respect to this amount, as well as any defenses asserted by Defendants, are barred by *res judicata*. However, the produce sold outside of the Wisconsin litigation that remains unpaid, which totals \$33,001.00, is not subject to claim preclusion and is properly before this Court for consideration.

Defendants contend for the first time in their surreply that Plaintiff's entire claim in this case, including the \$33,001.00, should be barred by *res judicata*. Defendants rely on *In Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir.1986), in support of their position that

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Plaintiff should have incorporated into the Wisconsin case the produce sold (and not paid for) between October 2006 and January 2007. In *Car Carriers*, the Seventh Circuit upheld a district court's dismissal on *res judicata* grounds of a complaint filed in 1983 that was based on different theories, but the same transactions, as a complaint filed in 1982.

*Car Carriers* is readily distinguishable from this case. In *Car Carriers*, the additional claims were based on facts which were "admittedly in existence prior to the 1982 complaint," although unknown to the parties until after judgment on that complaint. In the present case, not only were the 2006 and 2007 invoices not in existence when Sunrise filed its complaint in the Wisconsin litigation in November 2005, the 2006 and 2007 invoices were not in existence when the court-approved settlement was entered into in December 2005. Because the unpaid sales transactions encompassed in the 2006 and 2007 invoices accrued subsequent to (i) the filing of the complaint, (ii) the settlement agreement between the parties, and (iii) the court order approving the settlement agreement, those claims did not "emerge[ ] from the same core of operative facts as [the] earlier action." *Highway J*, 456 F.3d at 741. Furthermore, the July 2007 judgment entered by Judge Crabb was premised entirely on Defendants' breach of the court-approved settlement, which did not encompass the unpaid sales transaction from 2006 and 2007.<sup>6</sup> Thus, the prior litigation-which ended first in settlement between the parties and was reopened only because Defendants did not honor that settlement-will not act as a bar on the \$33,001.00 at issue in this litigation because claims over that amount were not, and did not need to be, raised in the Wisconsin litigation. See, e.g., *Ross v. International Bd. of Elec. Workers*, 634 F.2d 453, 458-59 (9th Cir.1980) ("*res judicata* should not be applied so rigidly as to defeat the ends of justice").

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<sup>6</sup> Plaintiff was not required to seek leave of court, after a settlement had already been reached and the case dismissed, to amend its complaint to include these new unpaid transactions from 2006 and 2007.

## 2. Merits

The principal dispute remaining between Sunrise Orchards and Defendants is not whether Defendants owe the money to Sunrise; indeed, Defendant O'Neill acknowledged on the record in court both the existence of the debt to Sunrise and the amount owed. Instead, the issue is whether the post-default dealings between the parties nullified Sunrise's PACA trust rights. If Sunrise and Pets Calvert entered into a written post-default agreement giving Pets Calvert more than thirty days to pay for the produce, there is no enforceable PACA trust. See *Patterson*, 307 F.3d at 669-70. If that were the case, Defendant O'Neill would not be subject to any fiduciary duty derived from PACA (which is the only source of such a duty alleged here). On the other hand, if the parties had no agreement to extend the time for payment, or if any such agreement was merely oral, then PACA remains in force and O'Neill can be personally liable for any breach committed by Pets Calvert. As set forth above, the only unpaid sales transactions at issue between Sunrise and Defendants concern the produce sold outside of the Wisconsin litigation, between October 2006 and January 2007, which amounts to \$33,001.00. Thus, the Court need not consider Defendants' argument that the Wisconsin court settlement—in which Plaintiff and Defendants entered into an agreement by which Defendants would pay \$500/week for fifty-two weeks to satisfy the outstanding balance from the 2004 and 2005 sales—removed the claims in the Wisconsin litigation from PACA trust protection.

After the settlement was reached, Sunrise continued selling produce to Defendants. And again, Defendants did not pay. Between October 13, 2006 and January 11, 2007, Plaintiff sent produce and eight invoices to Defendants. Those invoices obviously did not exist at the time of the December 2005 settlement, and Defendants have not presented any evidence that the new invoices were subject to the \$500/week payment plan. Defendants contend that the new invoices were subject to a “Second Agreement” in which Defendants “agreed to re-amortize this new PACA debt into another obligation for weekly \$500 payments to Sunrise.” Def. Reply at 10. According to Defendants, this “\$500/week payment was now extended to cover not just the first [eleven] invoices, but also the new eight invoices that arose after the date of the First Agreement.” *Id.*

The problem with Defendants argument is that they have not presented a shred of evidence demonstrating the existence of a new "Second Agreement" between the parties. Plaintiff readily admitted that an agreement was reached, within the context of the Wisconsin litigation, for repayment of the debt owed to Plaintiff through 2005. Of course, Plaintiff disputes the effect of that agreement, but that issue is no longer before this Court. The only issue before this Court is whether the remaining \$33,001.00 is subject to a PACA trust. The e-mails to which Defendants point in support of their position-sent on January 22, 2007 and June 26, 2007-merely reiterate, as with the many other e-mails that Sunrise sent to Defendant O'Neill, that Defendants were behind on their \$500/week payments that they promised to make in the court-approved settlement. None of those e-mails suggests that a new "Second Agreement" was negotiated.

Defendants have failed to meet their burden at summary judgment to point to any post-default dealings between the parties that nullified Sunrise's PACA trust rights. Thus, Defendants' motion for summary judgment as to Sunrise's claims is denied and all of Sunrise's claims with respect to the \$33,001.00 at issue in this lawsuit, including its PACA trust claims, remain pending.

### **C. Litigation between Borzynski and Defendants**

#### *1. Jurisdiction*

Defendants do not contest, with admissible evidence, that Borzynski sold seven loads of produce to Pets Calvert totaling \$19,563.00. Nor do Defendants contest, with admissible evidence, that Pets Calvert failed to pay for the produce that it received from Borzynski. However, rather than paying this undisputed debt, Defendants challenge the Court's jurisdiction to render a judgment in favor of Borzynski on the non-PACA trust claims (Count IV and V). Defendants assert that the PACA trust claims (Counts I-III, VI-VII, and IX) served as the "real" basis for this Court's jurisdiction and that the non-PACA trust claims are

only before this Court pursuant to supplemental jurisdiction.

Even if the Court granted summary judgment as to all the PACA claims over which it has original jurisdiction (see 28 U.S.C. § 1367(c)(3))-including Count IV, which states a non-trust PACA claim and alleges that Pets Calvert violated the “prompt payment” provision of § 499b(4)-the Court still may retain jurisdiction over Borzynski's state law contract claim. Although “it is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial,” (see *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir.1999)), the Seventh Circuit has recognized that there occasionally are “cases in which the balance of factors to be considered under the pendent jurisdiction doctrine-judicial economy, convenience, fairness, and comity-will point to a federal decision of the state-law claims on the merits.” *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1251-53 (7th Cir.1994).

Departure from the usual practice is appropriate here. The Court has devoted substantial judicial resources to learning the record in this case, and the state law breach of contract claim is straightforward and largely uncontested. Defendants have engaged in various tactics to delay a decision on the merits in this case-first by ignoring service of process, then failing to appear as ordered, then by insisting on proceeding *pro se* and shortly thereafter hiring and firing counsel. Eventually, the Court was forced to impose this circuit's policy of “graduated sanctions for recalcitrant defendants” in order to advance this case along. Simply put, Defendants' tactics have served to delay this case, waste judicial resources, and add to Defendants' own indebtedness through the accrual of additional contractual interest. Therefore, even if all of Borzynski's PACA claims-including the non-trust claim-were dismissed, considerations of judicial economy, convenience, and fairness to the parties all counsel in favor of resolving the merits of Count V at this time. See also *Chicago United Industries, Ltd. v. City of Chicago*, 2010 WL 234994, at \*30 (N.D.Ill. Jan.15, 2010).

Additionally, Count IV of Borzynski's complaint alleges that Pets Calvert violated the prompt payment section of § 499b(4). See, *e.g.*, *Baiardi Food Chain v. United States*, 482 F.3d 238, 243-44 (3d Cir.2007) (discussing whether a merchant has satisfied its obligation

under § 499b(4) to “make full payment promptly” even if a creditor agrees to accept partial or deferred payment as a settlement). Count IV therefore arises under federal law (see 7 U.S.C. § 499b(4)) and presents a federal question. Defendants did not move for summary judgment on Count IV, but Borzynski did. Defendants only moved for summary judgment on PACA trust claims.<sup>7</sup> Thus, this Court has federal question jurisdiction over Borzynski's claim under § 499b(4) and supplemental jurisdiction over Borzynski's breach of contract claim. See 28 U.S.C. § 1367(a).

## 2. *Merits*

Defendants have not produced any evidence that Pets Calvert paid the money that it owes Borzynski, promptly or otherwise. Instead, they argue that the invoices were superseded by a subsequent agreement that allowed Pets Calvert to pay the outstanding balance with weekly payments. When Pets Calvert failed to make the promised payments, Defendants insist that Borzynski's only recourse was to enforce the subsequent agreement, not the invoices at issue. Notably, Defendants do not include a single citation to legal authority in their response to Borzynski's motion for summary judgment. Additionally, Defendants' argument confuses the remedy for failure to “make full payment promptly” under 7 U.S.C. § 499b(4) with the trust protection afforded under 7 U.S.C. § 499e(c). Defendants point to an e-mail allegedly extending the original payment terms on the invoices as evidence that Borzynski voided its PACA trust rights. Assuming that the e-mail did extend the payment terms on the invoices, that fact only would undermine Borzynski's PACA trust claims against Defendants. As set

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<sup>7</sup> Borzynski has abandoned the following PACA trust claims: Declaratory Relief Validating PACA Trust Claim (Count I), Enforcement of Payment from PACA Trust Assets (Count II), Violation of PACA-Failure to Maintain PACA Trust Assets and Creation of Common Fund (Count III), Breach of Fiduciary Duty to PACA Trust Beneficiaries (Count VI), Conversion and Unlawful Retention of PACA Trust Assets (Count VII), and Constructive Trust (Count VIII). Thus, summary judgment is appropriate for Defendants with respect to these claims.

forth earlier, this Circuit has found that if a produce supplier enters into a post-default agreement with a dealer that extends the time for payment beyond thirty days, the supplier becomes ineligible to assert its PACA trust rights. See *Patterson Frozen Foods, Inc. v. Crown Foods Intern., Inc.*, 307 F.3d 666, 669-70 (7th Cir.2002). However, Borzynski is not attempting to enforce its PACA trust claims against Defendants.<sup>8</sup> Rather, Borzynski seeks a judgment against Pets Calvert for its failure to tender prompt payment under § 499b(4). The e-mails that Defendants submitted as evidence of a post-default agreement do not aid Defendants on Count IV.

Actions to enforce payment from a PACA trust (Section 499e(c)(5)(i)) and for failure to pay promptly (Sections 499b(4) and 499e(a)) are purely statutory creatures, and Plaintiff need not look outside the four-corners of the statute in its prayer for relief.<sup>9</sup> With respect to Count IV (Failure to Pay Promptly), Section 499b(4) of Title VII of the United States Code makes it unlawful for any “dealer[ ] or broker” \* \* \* to fail or refuse \* \* \* [to] make full payment promptly” in connection with a produce transaction under PACA. And Section 499e(a) states that brokers or dealers who violate Section 499b “shall be liable to the person or persons injured thereby for the full amount of damages \* \* \* sustained in consequence of such violation.” Payment terms under PACA are set forth in the regulations promulgated by the Secretary of the U.S. Department of Agriculture (“Secretary”). 7 C.F.R. § 46.1 *et seq.* The term “full payment promptly” is used to identify the period of time

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<sup>8</sup> Several circuits have held that the PACA statutory trust provision allows a plaintiff to recover against both a corporation and its controlling officers for breach of fiduciary duty. See, e.g., *Weis-Buy Svcs., Inc. v. Paglia*, 411 F.3d 415, 421-22 (3d Cir.2005); *Golman-Hayden Co., Inc. v. Fresh Source Produce*, 217 F.3d 348, 351 (5th Cir.2000). The Seventh Circuit has likewise indicated, albeit in dicta, that such an action may be maintained. *Patterson Frozen Foods, Inc. v. Crown Foods Int'l, Inc.*, 307 F.3d 666, 669 (7th Cir.2002) (citing *Golman-Hayden*, 217 F.3d at 351). In the present action, as indicated in the previous footnote, Borzynski has abandoned its fiduciary claims against Defendant O'Neill.

<sup>9</sup> Where Congress has explicitly created a cause of action, the task of courts is limited. See *United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (invalidating a congressionally-created cause of action but “only upon a plain showing that Congress \* \* \* exceeded its constitutional bounds”).

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during which payment must be made by the buyer. 7 C.F.R. § 46.2(aa) defines these payment terms as:

- (5) Payment for produce by a buyer, within 10 days after the day on which the produce is accepted,
- (11) Parties who elect to use different times of payment \* \* \* must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute “full payment promptly,” provided, that the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

Based upon this regulatory scheme, payment is due within ten days after delivery, unless different terms have been agreed to in writing by the parties before the transaction. In this case, any agreement extending the time for payment came after the produce already had been delivered. Therefore, 7 C.F.R. § 46.2(aa)(11) does not apply and the invoices and the ten-day payment period specified therein control.

Defendants (i) fall within the definition of a dealer or broker, (ii) received produce from Borzynski, and (iii) failed to pay Borzynski, despite repeated requests, in violation of the parties' agreement. Therefore, Defendants failed or “refuse[d] \* \* \* [to] make full payment promptly” in connection with a produce transaction under PACA, and Defendant Pets Calvert is liable to Borzynski for the “full amount of damages \* \* \* sustained in consequence of such violation.”<sup>10</sup> The Court

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<sup>10</sup> The parties have not presented, nor has the Court discovered, any cases in which a court has determined that a produce supplier loses all PACA rights, in addition to PACA *trust* rights, when it enters into a post-default agreement with a dealer that extends the time for payment beyond thirty days. However, the cases that the Court has found addressing the failure-to-promptly-pay provision (once trust rights have been lost) primarily have dealt with the Secretary of Agriculture's enforcement of this provision. See, e.g., *Baiardi Food Chain v. U.S.*, 482 F.3d 238, (3d Cir.2007) (holding that (continued...))

will not allow Defendants to “utilize [their] breach as a shield against an action on the underlying claim.” See *F.C. Bloxom Co. v. Rojo Produce Import and Export, LLC*, 2006 WL 2021697, at \*3 (D.Or. July 16, 2006) (refusing to allow defendant, who settled a claim under PACA based on a settlement agreement but then defaulted on the settlement agreement, to use its breach as a shield against liability on the original claim).

As set forth below, because the Court finds in the alternative that Defendant Pets Calvert breached its contract with Borzynski, Borzynski is entitled to the full amount of damages requested under both federal (PACA) and state law.

Finally, even if this transaction—as with the PACA trust claims—fell out of PACA entirely by virtue of Borzynski agreeing to an extended payment plan, Borzynski also has sued Defendants for breach of contract. In order to establish a cause of action for breach of contract under Illinois law, a plaintiff must prove “(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff.” *Henderson-Smith & Assocs. v. Nahamani Family Serv. Ctr., Inc.*, 323 Ill.App.3d 15, 256 Ill.Dec. 488, 752 N.E.2d 33, 43 (Ill.App.Ct.2001). Between May 20 and June 17, 2008, Borzynski sold seven loads of produce, worth \$19,563.00, to Defendants. Borzynski and Defendants negotiated the price for each shipment, and Defendants accepted the produce delivered by Borzynski. The invoices identified the commodity sold, the quantity, the price, the date of the sale, and the payment terms. Defendants did not object to any of the invoice terms, and Defendants then failed to pay for the produce. In responding to Borzynski's motion for summary judgment, Defendants do not argue that Pets Calvert did not breach its contract with Borzynski; rather, they limit their arguments

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<sup>10</sup>(...continued)

post-default agreements between company and its suppliers did not bar the Secretary's enforcement of PACA); *Finer Food Sales Co., Inc. v. Block*, 708 F.2d 774, 782 (D.C.Cir.1983) (“Such a belated payment of a small portion of a licensee's obligation does not constitute the making of the ‘full payment promptly’ that section 2(4) requires”); *Marvin Tragash Co., Inc. v. United States Dep't of Agriculture*, 524 F.2d 1255, 1258 (5th Cir.1975) (“This partial payment under the plan entered into some months after the purchases cannot be characterized as either full or prompt payment as required by the Act \* \* \*”).

to the PACA trust claims and supplemental jurisdiction. The breach of contract claim is not a PACA trust claim, and the Court already has determined that it has jurisdiction to decide the state law claim. Borzynski has demonstrated that Pets Calvert breached its agreement to pay for the produce delivered by Borzynski and accepted by Pets Calvert. Accordingly, summary judgment is granted in favor of Borzynski and against Defendant Pets Calvert on Counts IV and V of Borzynski's Intervenor Complaint. Borzynski's PACA trust claims (Counts I-III, VI-VII, and IX) are dismissed.

*3. Pre-judgment interest*

The final issue before the Court is pre-judgment interest, which Borzynski has requested and Defendants have not addressed. In cases involving breach of contract, prejudgment interest can be awarded if the damages are "fixed or easily computed" prior to judgment. See 815 ILCS 205/2; *Medcom Holding Co. v. Baxter Travenol Laboratories*, 200 F.3d 518, 519 (7th Cir.1999). In this case, the damages (\$19,563.00) are "easily ascertainable." Therefore, the Court awards prejudgment interest at the rate of five percent per annum. See 815 ILCS 205/2.

**III. Conclusion**

For these reasons, the Court denies Defendants' motion for partial summary judgment [56] as to Plaintiff Sunrise and grants Defendants' motion for partial summary judgment [56] as to Intervenor Plaintiff Borzynski on the PACA trust claims. Plaintiff Sunrise's claims against Defendants remain pending. The Court grants Intervenor Plaintiff Borzynski's motion for summary judgment [72] on the remaining PACA claim (Count IV) and on the state law breach of contract claim (Count V). Judgment is entered in favor of Intervenor Plaintiff Borzynski and against Defendant Pets Calvert on Counts IV and V in the amount of \$19,563.00 plus pre-judgment interest at a rate of 5% per annum. Borzynski's remaining claims are dismissed.

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**MOVSOVITZ & SONS OF FLORIDA, INC., et al. v. DORAL BANK, et al.**

**Civil No. 08-1898 (SEC).**

**Filed May 17, 2010.**

**[Cite as: 2010 WL 1978958].**

**PACA-R-**

**United States District Court,  
D. Puerto Rico.**

**OPINION & ORDER**

SALVADOR E. CASELLAS, Senior District Judge.

Pending before this Court is Plaintiffs, Movsovit & Sons of Florida, Inc. (“Movsovit”), Puerto Nuevo Cold Storage, Inc. (“Puerto Nuevo”), Frank Garguilo & Son, Inc. (“Garguilo”), F.C. Bloxom Company (“Bloxom”), and New York Export Company, Inc.'s (“NY Export”) (collectively “Plaintiffs”) Motion for Summary Judgment (Docket # 48). Defendant, Doral Bank (“Doral” or “Defendant”) has filed an opposition thereto (Docket # 53) to which Plaintiffs have replied (Docket # 53). Upon reviewing the filings, and the applicable law, Plaintiffs' motion is **GRANTED in part and DENIED in part.**

**Undisputed Facts**

This case involves the Perishable Agricultural Commodities Act (“PACA”), 7 U.S.C. §§ 499a-499t, which creates a trust over assets connected to receivables and proceeds of certain agricultural commodities products until suppliers, sellers, and agents have been fully repaid. Dee Produce Corporation (“Dee”) was a Puerto Rico corporation engaged in the business of buying and selling wholesale quantities of produce in interstate commerce. The company was also a dealer subject

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to and licensed under the provisions of PACA.<sup>1</sup> Plaintiffs' Statement of Undisputed Facts (S.U.F.) # 6, Docket # 48-2. Dee funded its operations and business from the proceeds of the purchase and sale of fresh fruits and vegetables.<sup>2</sup>

Plaintiffs are all engaged in the business of buying and selling wholesale quantities of produce in interstate commerce. S.U.F.1-5. During the period relevant to this suit, they have all been dealers or producers subject and licensed under PACA, § 499e(c).<sup>3</sup> *Id.* Between March and August 2004, Plaintiffs collectively sold and delivered to Dee, wholesale quantities of produce worth \$539,574.60, of which \$360,082.81 remains unpaid.<sup>4</sup> *Id.* at # 11-14. Plaintiffs delivered the produce to Dee, which Dee accepted. *Id.* Plaintiffs did not notify the Secretary of Agriculture of the United States of Dee Produce's default in payment. However, the invoices sent by Plaintiffs to Dee also contained the contracted terms that Dee was required to pay Plaintiffs interest on all outstanding invoices and all collection costs, including reasonable attorneys' fees, incurred by Plaintiffs in collecting any debt

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<sup>1</sup> Dee was licensed under PACA in 1991 (License No. 19911097).

<sup>2</sup> This is contested in as much as Doral asserts that Dee also obtained funding from capital loans originating from various local banks. Docket # 52-2 at 24.

<sup>3</sup> Movsovit (License No. 2001153); Puerto Nuevo (License No. 20040327); Gargiulo (License No. 19762004); Bloxom (License No. 19207275); NY Export (License No. 19790637).

<sup>4</sup>

	Dates of Sale	Amount Due
Movsovit & Sons of Florida, Inc.	7/23/2004 - 9/4/2004	\$113,068.07
Puerto Nuevo Cold Storage, Inc.	7/15/2004 -10/6/2004	\$69,705.80
Frank Gargiulo & Sons, Inc.	8/26/04 -10/4/2004	\$15,627.71
F.C. Bloxom Company New York Export Co., Inc.	6/2/2004 -8/4/2004	\$120,206.24

owed to them by Dee.<sup>5</sup> *Id.* at # 15.

Doral, was, and is, a secured creditor of Dee's. *Id.* at # 7. On March 24, 2003, Doral granted commercial loan number 3002001103 to Dee in the principal amount of \$55,000. This loan is secured by personal guarantees. *Id.* at # 19. On October 11, 2003, Doral also granted a commercial line of credit number, 3002001286 to Dee in the principal amount of \$100,000.<sup>6</sup> *Id.* at # 20. Said loan was secured by mortgage note for the principal amount of \$110,000 over the property identified as “la Nave 14,”<sup>7</sup> locale number 14 in the “Centro de Acopio y Carnicerías de Caguas” in Caguas, Puerto Rico (hereafter “Nave 14”). A final relevant credit relationship existed with Doral's loan number 7580008062, granted on November 26, 2003, to Dee in the principal amount of \$103,337.00, secured by a pledge of Doral Bank certificate of deposit number 657109, account number 0860024231 (the “CD”).<sup>8</sup> The CD on deposit with Doral originated from Dee.<sup>9</sup> *Id.* at 21–23. As of December 31, 2005, Doral was holding account number 840004410 in Dee's name with a balance of \$78,025.44. These funds included the \$60,000 transferred to the account as mentioned above, and deposits

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<sup>5</sup> This Court finds that Plaintiffs therefore complied with the language and requirements under PACA § 499e(c)(4). Accordingly, they preserved the benefits of the trust under PACA § 499e. Doral argues that notice of to the Secretary of Agriculture was necessary, under PACA § 499e(c)(4), but this argument is spurious given the statute's clear language. *See, e.g., In re Bartlett*, 367 B.R. 21, 32 (Bkrtey.D.Mass.2007).

<sup>6</sup> In 2004, Doral increased commercial line of credit number 3002001286 to the principal amount of \$210,000.

<sup>7</sup> Dee acquired Nave 14 on September 18, 2001.

<sup>8</sup> The CD was liquidated on October 22, 2008 and applied to Dee's debt with Doral. At the time of liquidation, the CD had a balance of \$124,793.98.

<sup>9</sup> Doral argues that these funds came from Arnaldo Detres, and not from Dee's PACA related activities. Docket # 52–2 at 4, # 5. However, this Court agrees with Plaintiffs that Doral has not proffered admissible evidence sufficiently controverting the PACA nature of the funds, or asserting their non-PACA trust origins. Doral's fact # 5 will therefore not be considered.

made by Dee Produce from October 1, 2004 to October 29, 2004.<sup>10</sup> *Id.* at # 29.

Before entering into the credit relationship, Doral requested and received from Dee accounts receivable reports, profit and loss statements, and audited financial statements from Dee before approving and executing the aforementioned transactions. Within this process, Doral requested and examined Dee's financial condition and conducted a due diligence investigation of Dee. This due diligence investigation included reviewing Dee's accounts payable reports, accounts receivable reports, profit and loss statements, and the financial condition of Dee's shareholders. *Id.* at # 23. Therefore, Doral knew that Dee was in the business of buying and selling fresh fruits and vegetables. *Id.* at # 24.

At some point Dee appears to have entered into financial difficulties, because on October 4, 2004, Plaintiffs Bloxom, N.Y. Export, and other creditors filed an action in U.S. District Court for the District of Puerto Rico against Dee and its principals under the trust provisions of the PACA, 7 U.S.C. § 499e(c), in the aggregate amount of \$290,152.56. *F.C. Bloxom Company, et al. v. Dee Produce Corporation, et al.*, Civ. No. 04-02043 (D.P.R. filed October 4, 2004). A Temporary Restraining Order enjoining the transfer and dissipation of Dee's assets, including real property, was entered on October 5, 2004. *Id.* at # 8. Additionally, on October 8, 2004, Movsovitz filed an action in U.S. District Court for the District of Puerto Rico against Dee and its principals under the trust provisions of PACA, 7 U.S.C. § 499e(c), in the amount of \$169,359.65. *Movsovitz & Sons of Florida, Inc. v. Dee Produce Corp.*, Civ. No. 04-02079 (D.P.R. filed October 8, 2004). However, these efforts to recover the amounts owed were interrupted when Dee Produce Corporation filed for relief under Chapter 11 of the United States Bankruptcy Code on October 12, 2004. *In re Dee Produce Corp.*, Case No. 04-10488 (Br.P.R.2004); Docket # 53-2 at 3. This stay was lifted

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<sup>10</sup> In summary, Dee Produce owed Doral Bank:  
(a) The \$87,842.65 detailed in Paragraph 5, loan # 3002001288;  
(b) \$86,387.29, loan # 7580006802;  
(c) \$29,336.27, loan # 3002001103.  
Docket # 52-2.

in 2006 with respect to assets in which Doral asserts a security interest, subject to the claims of Dee's PACA trust creditors.

In Dee's bankruptcy action, Plaintiffs, along with other sellers of produce, and Dee, filed a Stipulation and Agreed Order for PACA Claims Procedure ("PACA Claims Procedure"). S.U.F. # 16. The purpose of the PACA Claims Procedure was to facilitate collection and distribution of PACA trust assets to qualified beneficiaries of the PACA trust by establishing which entities had properly preserved their status as PACA trust beneficiaries and, thus, held valid PACA trust claims, and also to establish the principal amount of such PACA claims. *Id.* The Order approving the PACA Claims Procedure was entered on March 17, 2005. *Id.* at # 17.

Plaintiffs in the abovementioned action timely filed their PACA declarations and were found to be qualified PACA beneficiaries in the aggregate amount of \$539,574.60. *Id.*; see Notice of Filing of Amended PACA Trust Chart (Br.Doc. # 177). The Order approving the Amended PACA Trust Chart and the related distribution motion (Br.Doc.# 182) was entered at BK Doc. 221. As qualified PACA beneficiaries, Plaintiffs received \$179,491.79 through the distributions of PACA assets leaving a total principal amount due to Plaintiffs of \$360,082.81, as discussed above. Additionally, Plaintiffs N.Y. Export and Bloxom obtained a judgment against Dee's principals under PACA, and Banco Popular de Puerto Rico and BBVA Puerto Rico have also filed claims in Dee's bankruptcy claims for various lines of credit issued to the company. *Id.* at # 18.

### Standard of Review

*FED.R.CIV.P. 56*

The Court may grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *FED.R.CIV.P. 56(c)*; *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202(1986); *Ramírez Rodríguez v. Boehringer Ingelheim*, 425 F.3d 67, 77 (1st Cir.2005). In reaching such a determination, the Court may not

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weigh the evidence. *Casas Office Machs., Inc. v. Mita Copystar Am., Inc.*, 42 F.3d 668 (1st Cir.1994). At this stage, the court examines the record in the “light most favorable to the nonmovant,” and indulges all “reasonable inferences in that party's favor.” *Maldonado–Denis v. Castillo–Rodriguez*, 23 F.3d 576, 581 (1st Cir.1994).

Once the movant has averred that there is an absence of evidence to support the nonmoving party's case, the burden shifts to the nonmovant to establish the existence of at least one fact in issue that is both genuine and material. *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir.1990) (citations omitted). “A factual issue is ‘genuine’ if ‘it may reasonably be resolved in favor of either party and, therefore, requires the finder of fact to make ‘a choice between the parties’ differing versions of the truth at trial.’” *DePoutout v. Raffaely*, 424 F.3d 112, 116 (1st Cir.2005)(quoting *Garside*, 895 F.2d at 48 (1st Cir.1990)); *see also SEC v. Ficken*, 546 F.3d 45, 51 (1st Cir.2008).

#### **Applicable Law & Analysis**

The purpose of PACA is to aid agricultural traders recover payment for goods delivered to produce dealers and retailers. The statute recognizes that because farmers and agricultural distributors must quickly move their perishable inventory, they often have to sell their products to companies whose creditworthiness is unverifiable in such a short time-frame. *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1067 (2nd Cir.1995). PACA was first passed in 1930, but expanded in 1984 to give greater priority vis a vis secured creditors. The amendment sought to protect PACA sellers, who “... as unsecured creditors, the sellers recover[ed], if at all, only after banks and other lenders who have obtained security interests in the defaulting purchaser's inventories, proceeds, and receivables.” *Id.*; *see also* H.R.Rep. No. 543, 98th Cong., 2d Sess. 3 (1983), reprinted in 1984 U.S.C.C.A.N. 405, 406–407. Accordingly, Congress created Section 499e(c) creating a trust in favor of the sellers of agricultural products. The PACA trust “... applies to all of the buyer's produce in inventory and all proceeds from the sale of produce until full payment is made.” *Movosovitz & Sons of Florida, Inc. v. Axel Gonzalez, Inc.*, 367 F.Supp.2d 207, 212

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(D.P.R.2005)(“*Movosovitz I*”). Here, this Court must decide if the assets in question are part of the PACA trust. Essentially, the trust comprises: “(1) produce purchased from suppliers, (2) all inventories of foods or other products derived from the produce, and (3) receivables or proceeds from the sale of said produce.” *Movosovitz & Sons of Florida, Inc. v. Scotiabank*, 447 F.Supp.3d 156, 163 (D.P.R.2006)(“*Movosovitz II*”). Furthermore, “[t]he law is clear that a ‘PACA beneficiary has priority over any secured creditor on the purchaser’s commodity-related assets to the extent of the amount of his claim.’” *Id.* (citing *Hiller Cranberry Prods. v. Koplovsky*, 165 F.3d 1, 8–9 (1st Cir.1999)); *see also In re Kornblum & Co., Inc.*, 81 F.3d 280, 284 (2d. Cir.1996).

As already stated, the case in hand turns on the existence of a PACA trust covering the particular funds in controversy, or if, on the contrary, Doral can prove that the monies are exempt from PACA, or co-mingled with PACA funds. To do this, Doral has the burden of establishing:

- (1) no PACA trust existed when the property was transferred;
- (2) even though a PACA trust existed at that time, the transfer of property did not include trust assets; or
- (3) although a PACA trust existed when the property was transferred and the property included trust assets, all unpaid sellers were paid in full prior to the transaction.

*Movsovitz II*, 447 F.Supp.2d at 163–164 (summarizing the *Kornblum* exclusion factors).

However, this Court must be able to determine that the funds in questions were trust monies in order to be able to enter summary judgment in favor of Plaintiffs. *Id.* at 166. The existence of a PACA trust, “... does not necessarily mean that the funds used to purchase those properties were proceeds from [Dee’s dealings in perishable agricultural goods] .” *Id.*

In *Kornblum*, which has been cited and endorsed by the First Circuit, the Second Circuit concluded, when analyzing the statutory intent of the trust provision in 7 U.S.C. Sec. 499e(c)(2), that “all of the emphasized language [in PACA] points to a single, undifferentiated trust for the benefit of all sellers or suppliers of Produce except the phrase ‘involved in the transaction,’ which we do not read as countermanding the clear import of the balance of the statutory language.” *Id.* at 286. This Court will follow said ruling, that there is “... a single, undifferentiated trust for

the benefit of all sellers and suppliers.” *Id.*

The acquisition of assets before a particular transaction or business relationship is started with a particular creditor does not preclude an action if a PACA trust was already in existence, because it must continue “until all of the outstanding beneficiaries have been paid in full.” *Kornblum*, 81 F.3d at 286. Accordingly, Defendants are wrong on the main points of law they argue. These are, the existence and date of creation of the PACA trust, and whether the acquisition of an asset prior to a transaction with a creditor impedes a PACA claim. Furthermore, the burden of establishing the non-existence of the PACA trust falls on the non-beneficiary, in this case Doral. *Id.* at 287. Given the aforementioned framework, this Court will rule on the motion for summary judgment as to the following assets.

*Nave 14*

As to Nave 14 particularly, the undisputed facts of this case establish that Dee acquired Nave 14 in 2001, and that a PACA trust existed at said moment. Doral alleges that all three (3) *Kornblum* exclusion exceptions apply to this property. However, the first (1 st) and third (3rd) are obviously not applicable. As stated above, a PACA trust does not apply only to an individual supplier, rather it constitutes a “ ‘non-segregated floating trust’ that applies to all of the buyer's produce in inventory and all proceeds from the sale of produce until full payment is made.” *Movsovit II*, 447 F.Supp.2d at 162. Therefore, given that Dee engaged in PACA related activities between 1991 and 2004, its assets were presumably subject to PACA in 2001 when it acquired Nave 14. Doral has done nothing to controvert this contention, and thus fails to assert *Kornblum* assertion number one (1), nor has it proffered any evidence that all unpaid sellers of produce were paid either when Nave 14 was acquired, or in 2004 when Plaintiffs engaged in business with Dee, so it fails to argue exclusion number three (3) as well. As to *Kornblum* exclusion number two (2), Doral has not proffered admissible evidence that Nave 14 was acquired with Dominic D'Abate's (“D'abate”), a Dee shareholder, non-trust personal assets. All that

has been submitted is a pleading to the Bankruptcy Court, which is clearly insufficient to controvert the presumption that a PACA trust existed over the funds. On the other hand, Plaintiffs have submitted evidence, in the form of a title search (Docket # 48-17, Exh. 13), that Dee acquired the property on September 18, 2001. At said time, a PACA trust existed, and given that Dee funded its operations with proceeds from the purchase and sale of fresh fruits and vegetables, and Doral has not proffered any admissible evidence that a *Kornblum* exclusion factor should apply, this Court must conclude that Nave 14 is part of the PACA trust. Accordingly, summary judgment as to Nave 14 shall be **GRANTED**. Doral shall account for and disgorge any funds received from the sale of Nave 14, or return said property to Plaintiffs.

*The CD*

A similar analysis applies to the CD. Clearly, a PACA trust existed in 2003, and no evidence has been given to suggest that all unpaid sellers were paid in full prior to the transaction. Accordingly, Doral would have to prove that the CD was not connected to trust assets, which it has not done. The Bankruptcy pleading alleges that the CD was acquired with funds from Arnaldo Detres (“Detres”), who was a Dee principal, but is insufficient to controvert Plaintiffs' well pled facts, as a pleading does not constitute testimonial evidence of a particular fact. Nevertheless, as in *Movsovitz II*, Plaintiffs have not provided sufficient evidence as to the origin of the CD to, “... put the Court in a position to evaluate the evidence and be able to draw reasonable conclusions therefrom.” *Movsovitz II*, 447 F.Supp.2d at 166. In fact, the very admissions Plaintiffs refer to (S.U.F.# 26) to substantiate that the CD came from trust funds, also allude to, “... personal funds transferred from Detres' personal accounts.” Docket # 48 at 15. Accordingly, summary judgment as to the CD must be **DENIED**. *Doral Bank Account # 840004410*

These funds were loaned to Dee by Doral on October 11, 2004. This fact is uncontroverted, and therefore shows that these

monies originated from a bank loan, and not from PACA trust assets. Accordingly, this Court is satisfied that Doral has met *Kornblum* exception two (2) could apply to these monies. Therefore, as to Doral Account # 840004410, summary judgment must be **DENIED**.

### CONCLUSION

In light of the above, Plaintiffs' motion for summary judgment is **GRANTED** in part and **DENIED** in part. Furthermore, pursuant to Local Rule 83.10(b)(1), the Court refers this case to mediation. Under Local Rule 83.10(c)(4)(A), the parties are hereby granted **10 days**, until **May 31, 2010**, to notify the name of the person selected as mediator from the approved list maintained by the Court, and file a written agreement with the selected mediator. If the parties cannot agree to a mediator within the 10-day period, they may submit up to two names each for the Court to take into account when selecting the mediator. Local Rule 83.10(c)(4)(B). If the parties fail to notify the Court about their selection within the 10-day period, the Court will select a mediator from the approved list maintained by the Court. *Id.* On a final note, this Court finds that Plaintiffs do have a right to collect costs and attorney's fees. Nevertheless, these are limited to the assets of the PACA trust, and cannot be levied against Doral's other assets.  
**IT IS SO ORDERED.**

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**PROCACCI BROS. SALES CORP. v. FOUR RIVERS PACKING CO., INC.**

**Civil Action No. 09-cv-04067-JF.**

**Filed May 18, 2010.**

**[Cite as: 2010 WL 2038008].**

**PACA-R – Reasonable attorney fees, award of, for litigation.**

Court determined post trial that multiple witnesses and high airfare were in excess of “reasonable costs.”

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

MEMORANDUM

FULLAM, Senior District Judge.

Procacci Bros. Sales Corp. filed an appeal from an order of the Secretary of Agriculture entered in a reparation proceeding pursuant to the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a *et seq.* After a non-jury trial *de novo* in this Court, the decision of the Secretary was affirmed. The appellee, Four Rivers Packing Co., Inc., has filed an application for counsel fees and costs pursuant to the PACA, which provides that “if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.” 7 U.S.C. § 499g(c). Four Rivers has submitted sufficiently detailed time records, and the hourly rate appears to be reasonable for cases of this sort. However, counsel performed certain tasks that could have been handled by a secretary or paralegal, and I am not persuaded that all of the time expended was necessary, given the development of the record at the administrative level. Four Rivers also seeks the costs associated with three witnesses attending the trial from Idaho. Although Procacci Bros. does not dispute that these costs are recoverable, it disputes the need for multiple witnesses to attend the trial, and the high airfare for one of those witnesses. I agree, and will adjust the costs accordingly.

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An order will be entered.

**ORDER**

AND NOW, this 18th day of May 2010, upon consideration of the application for counsel fees and costs and the response thereto, IT IS ORDERED:

That the appellee, Four Rivers Packing Co., Inc. is awarded \$25,000 in counsel fees, \$463.09 in counsel's costs, and \$3,500 in witness costs.

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**CORONA FRUITS & VEGGIES, INC. v. CLASS PRODUCE GROUP, LLC,**  
**Civil Action No. RDB-09-967.**  
**May 25, 2010.**

[Cite as: 2010 WL 2132652].

**PACA-R – Suitable shipping, warranty of.**

Court affirmed the Judicial Officer's (JO) decision which found that Seller of perishable commodities failed to carry burden that the warranty of suitable shipping conditions were void due to abnormal shipping conditions. In motion to re-open, sellers failed to make a prima facie showing of a genuine issue for trial.

**United States District Court,  
D. Maryland.**

***MEMORANDUM OPINION***

RICHARD D. BENNETT, District Judge.

Petitioner Corona Fruits & Veggies, Inc. ("Corona") brought suit against Respondent Class Produce Group, LLC ("Class") seeking reparations under the Perishable Agricultural Commodities Act of 1930

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(“PACA”), 7 U.S.C. § 499a *et seq.* Corona has appealed the ruling of the Secretary of the United States Department of Agriculture (“USDA”) rendered in favor of Class in an administrative reparation proceeding.<sup>1</sup> Currently pending before this Court is Corona's Motion to Remand Case to State Court (Paper No. 20) and Class' Motion for Summary Judgment (Paper No. 25). The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D.Md.2009). For the reasons stated below, Petitioner's motion to remand is DENIED and Respondent's motion for summary judgment is GRANTED.

### BACKGROUND

Corona Fruits & Veggies, Inc. (“Corona”) and Class Produce Group, LLC (“Class”) are produce companies licensed under the Perishable Agricultural Commodities Act of 1930 (“PACA”), 7 U.S.C. § 499a *et seq.*<sup>2</sup> On June 1, 2007, Corona entered into a contract with Class' broker, J.J. & Son Marketing, Inc., for the sale of 3,360 flats of strawberries at the contract price of \$24,076. Under this agreement, Corona was required to load a shipment of strawberries at its place of operations in Santa Maria, California, for shipment on a Free-On-Board (“FOP”) basis to The Kroger Co. (“Kroger”) in Roanoke, Virginia, and to Class, in Jessup, Maryland.

On June 2, 2007, the strawberries were shipped from the loading point in California. The product was wrapped in Tectrol pallet bags and cardboard was placed on the top and bottom of each pallet of strawberries. The bill of landing informed L & M Transportation Services, Inc., the carrier responsible for shipment, to keep the load of strawberries in an environment cooled to a temperature of 32 degrees Fahrenheit.

On June 4, 2007, Kroger rejected the strawberries upon arrival at the

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<sup>1</sup> Under section 499g(c) of the Perishable Agricultural Commodities Act of 1930, the order and decision issued by the Secretary in an administrative reparation proceeding may be appealed to federal district court.

<sup>2</sup> The background facts are culled from the Secretary's Decision and Order of March 17, 2009, and from Petitioner's Counter-Statement of Disputed and Undisputed Facts. *See* Ex. 1 to Resp't Mot. Summ. J.; Ex. 1 to Pet.'s Opp'n to Mot. Summ. J.

company's Roanoke Division. The load was then sent to Class' place of business in Jessup, Maryland, where it arrived on June 5, 2007—three and a half days after shipment. Upon arrival, a USDA inspection was performed on the strawberries while they remained on the truck. The report concluded that the strawberries had pulp temperatures of 40–42 Fahrenheit and that 24 percent of the strawberries were in a defective condition. Specifically, the inspection disclosed that 15 percent of the product was bruised, 8 percent was overripe, and 1 percent was decayed. After inspection, a representative of Class wrote “Reject” on the inspection certificate, a copy of which was faxed to Corona. Soon thereafter, Corona faxed the certificate back to Class with the handwritten note: “TOO–HOT YOU HAVE A TRUCK CLAIM.” After Class' rejection the strawberries were delivered to Frank Leone/B.R.S. Produce in Philadelphia, Pennsylvania. B.R.S. Produce ultimately sold the strawberries for gross proceeds of \$15,594. Class never paid for any of the strawberries at issue, nor did it ever receive any of the sale proceeds collected by B.R.S. Produce.

On August 1, 2007, L & M Transportation Services filed suit against Corona in the Superior Court of the State of California, County of Santa Barbara, Cook Division, for failure to pay the transportation costs for the delivery of strawberries. On August 13, 2007, Corona timely filed an informal complaint with the USDA seeking reparations of \$24,676 for the rejected strawberries. On February 25, 2008, during the pendency of the suit before the Secretary, Corona filed a Cross–Complaint against Class in the state court case for failure to pay for the strawberries. On February 9, 2009, L & M Transportation Services dismissed its lawsuit against Corona.

On March 17, 2009, the Secretary issued a Decision and Order in which it determined that Class was not liable to Corona because Corona had failed to ship strawberries in suitable shipping condition. On April 16, 2009, Corona filed an appeal in this Court under 7 U.S.C. § 499g(c). The state court proceeding was stayed on June 8, 2009, pending a final ruling in the instant matter.

#### **STANDARD OF REVIEW**

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). A material fact is one that “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue over a material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* In considering a motion for summary judgment, a judge's function is limited to determining whether sufficient evidence exists on a claimed factual dispute to warrant submission of the matter to a jury for resolution at trial. *Id.* at 249. In undertaking this inquiry, a court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). After the moving party has established the absence of a genuine issue of material fact, the nonmoving party must present evidence in the record demonstrating an issue of fact to be resolved at trial. *Pension Ben. Guar. Corp. v. Beverley*, 404 F.3d 243, 246–47 (4th Cir.2005) (citing *Pine Ridge Coal Co. v. Local 8377, UMW*, 187 F.3d 415, 422 (4th Cir.1999)). Summary judgment will be granted if the nonmoving party “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The instant action is also governed by section 499g(c) of PACA, which provides that in an appeal of a reparation order:

Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated ....

7 U.S.C. § 499g(c).

Accordingly, in an appeal of the Secretary's adverse ruling, a petitioner must bear the initial burden of production at trial. *Lee Loi Industries, Inc. v. Impact Brokerage Corp.*, 473 F.Supp.2d 566, 568

(S.D.N.Y.2007) (“Generally, the party petitioning for an appeal has the burden of production of evidence that rebuts the findings of fact by the Secretary.”). “It follows that a court must enter summary judgment against a nonmovant who will bear an initial burden of production at trial and who fails to make a showing sufficient to meet that burden.” *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1032 (D.C.Cir.1988). On the other hand, the movant in this context can satisfy its burden “by showing that there is an absence of evidence to rebut the *prima facie* case presented by the Secretary's order.” *Id.* In sum, courts interpret section 499g(c) of PACA as “making the Secretary's findings conclusive unless effectively rebutted. Once rebutted, the Court is then able to reweigh the evidence, thus giving effect to the provision for *de novo* review .” *Id.* at 1033.

#### ANALYSIS

**I. Motion to Remand Case to State Court** On October 21, 2009, Corona filed a Motion to Remand Case to State Court (Paper No. 20). Corona contends that this Court should, pursuant to its inherent prudential authority and “the abstention doctrine,”<sup>3</sup> remand this matter so that it may be consolidated with the case currently pending before the Santa Barbara Superior Court. Alternatively, Corona argues that if remand is denied, this Court should adopt the discovery conducted and certain evidentiary sanctions that were imposed against Class in the state

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<sup>3</sup> Pursuant to the abstention doctrines, “federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest ... [such as] considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (internal citations and quotations omitted). An abstention doctrine provides “an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it.” *Id.* (internal quotations omitted). The Fourth Circuit has recently emphasized that “the Supreme Court has *never* allowed abstention to be a license for free-from *ad hoc* judicial balancing of the totality of state and federal interests in a case. The Court has instead defined specific doctrines that apply in particular classes of cases.” *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir.2007) (emphasis in original). In this case, Corona has not specified any particular abstention doctrine, nor has it cited any applicable Supreme Court precedent.

court case.<sup>4</sup> Pursuant to the abstention doctrines, “federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest ... [such as] considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (internal citations and quotations omitted). An abstention doctrine provides “an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it.” *Id.* (internal quotations omitted). The Fourth Circuit has recently emphasized that “the Supreme Court has *never* allowed abstention to be a license for free-from *ad hoc* judicial balancing of the totality of state and federal interests in a case. The Court has instead defined specific doctrines that apply in particular classes of cases .” *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir.2007) (emphasis in original). In this case, Corona has not specified any particular abstention doctrine, nor has it cited any applicable Supreme Court precedent.

This Court finds no basis or justification for the remedy sought in Corona's Motion for Remand. The present matter cannot be “remanded” to the Santa Barbara County Superior Court, because it did not originate in that court, and this Court is not authorized to order the state court to adjudicate its case. Additionally, there are no exceptional circumstances in this case that would cause this Court to decline to exercise its jurisdiction pursuant to any abstention doctrine. Finally, there is no convincing reason for this Court to adopt the discovery rulings issued in the separate state court action.

The instant matter is properly before this Court on appeal of the Secretary's administrative ruling. Pursuant to 7 U.S.C. § 499e(b), a party may seek redress under PACA either by pursuing a USDA administrative proceeding or by instituting a civil action in either state or federal court. Through its appeal of the Secretary's Decision and Order, Corona has elected to pursue redress against Class through the administrative channel, rather than through completion of the state court

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<sup>4</sup> During the discovery process, the state court issued monetary and evidentiary sanctions against Class for its failure to respond to Corona's deposition requests.

proceeding. Therefore, the Secretary's decision is *res judicata* as to the state court action. *See In re Ruma Fruit & Produce Co., Inc.*, 55 Agric. Dec. 642, 656 (1996).

Consequently, Corona's Motion to Remand Case to State Court (Paper No. 20) is DENIED.

## **II. Motion for Summary Judgment**

In the reparation proceeding before the Secretary, the parties disputed the causes of the strawberries' defective condition. Corona argued that it satisfied its contractual obligations by ensuring that the strawberries were in suitable shipping condition at the time they were loaded for transportation. It maintained that the carrier must be held liable because temperature fluctuations during the product's transit resulted in the strawberries' defective condition. Class, on the other hand, contended that Corona was the responsible party because the strawberries were in a poor condition at the time they were loaded on the truck. It argued that many of the strawberries were overripe prior to shipment or were otherwise damaged during harvesting and packing. In its reparation decision of March 17, 2009, the Secretary noted that with respect to the issue of whether Class' rejection was warranted, Corona bore the burden of showing both that the strawberries were in a suitable shipping condition at the time they were loaded and that the transportation conditions were abnormal. *See Ex. 1 to Resp't Mot. Summ. J.* at 6. It was noted that strawberries are "an extremely perishable commodity that should be transported at or as near as possible to 32 degrees Fahrenheit." *Id.* at 9. The Secretary analyzed a series of temperature reports generated from two portable temperature recorders that were placed with the load of strawberries at both ends of the truck. The recorders reported that temperatures at the nose of the truck primarily ranged from 31 to 34 degrees, while the temperatures at the tail end generally ranged between 34 and 37 degrees. The data revealed that the truck's temperatures fluctuated during the transit period, and the Secretary noted that such fluctuations are normal due to certain environmental factors experienced during shipping. *Id.* at 12. The Secretary concluded that because the temperatures did not reach or exceed 37 degrees for any substantial

period of time, the temperatures should not have adversely impacted the strawberries. *Id.* While the temperatures occasionally dipped to around the freezing point for strawberries of 30.6 degrees, the Secretary noted that because the product was wrapped in Tectrol bags and surrounded by cardboard, it was insulated from the direct effect of the cold temperatures. *Id.* at 13. The Secretary also found that the insulating effect of the Tectrol bags trapped in the natural respiratory heat of the strawberries, resulting in their elevated pulp temperatures. *Id.* at 14. Based on its thorough analysis of the temperature recordings, the Secretary concluded that Corona “failed to sustain its burden to prove that the warranty of suitable shipping condition is void due to abnormal transit conditions.” *Id.*

On April 16, 2009, Corona filed a Petition for Appeal of the Secretary's decision in this Court. (Paper No. 1.) Corona contends that Class' rejection of the product was wrongful, and that it is liable for the strawberries because they were loaded in a suitable shipping condition. In addition, Corona claims that Class arranged for the resale of the strawberries and failed to forward the resale proceeds it received. *See* Corrected Opinion (Paper No. 6).

On January 11, 2010, Class filed the pending motion for summary judgment in which it claims that because there is no issue of material fact in this case, the Secretary's decision should be affirmed and judgment should be entered in its favor. (Paper No. 25.) In support of its motion, Class relies upon the findings of fact in the Secretary's decision and the declaration and report of its expert, Dr. Patrick E. Brecht. *See* Ex 1(A) to Resp't Mot. Summ. J. In opposing Class' dispositive motion, Corona claims that there is a genuine issue of material fact as to whether the strawberries were in a suitable condition at the time they were loaded for transportation.<sup>5</sup> Corona argues—as it

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<sup>5</sup> In its reparation decision, the Secretary also determined that (1) Class' rejection was procedurally valid; (2) the USDA inspection results established that the strawberry load was defective; and (3) after Class' rejection of the strawberries, Corona did not give Class any instructions as to the disposition of the load and Corona did not make any effort to have the strawberries shipped elsewhere. Corona does not contest these findings of Secretary, therefore they are deemed conclusive. *See Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1033 (D.C.Cir.1988).

did before the Secretary—that the temperature fluctuations during transit caused the strawberries' defective condition and their elevated pulp temperatures. In support of its Opposition, Corona has proffered declarations from its President, Jose Corona, and from its Vice President, Gerry Corona. *See* Declaration of Jose Corona; Declaration of Gerry Corona. In addition, Corona has filed several articles and publications that address the handling and shipping of strawberries. *See* Exs. A–D to Pet.'s Opp'n to Mot. Summ. J.

This Court finds that Class has discharged its duty as the party moving for summary judgment, as section 499g(c) of PACA assigns *prima facie* status to findings of fact contained in the Secretary's reparation order. *See Frito–Lay*, 863 F.2d at 1032–33. Corona, on the other hand, has not satisfied its corresponding burden as the non-moving party in this case. *Id.* at 1033–34 (holding that the moving party may obtain entry of summary judgment by relying upon the *prima facie* value of the Secretary's decision unless the non-moving party makes an affirmative showing that there is a genuine issue for trial). The declarations submitted by Corona's principals do not establish that a genuine dispute exists regarding the Secretary's factual findings; instead they merely restate the arguments that are set forth in the Petitioner's brief. The declarations cite the truck's temperature reports in support of the argument that the strawberries' defective condition was due to improper transportation conditions. However, in its Decision, the Secretary reached the opposite conclusion after thoroughly analyzing the same undisputed facts, namely, the truck's temperature reports. Corona could have satisfied its burden of production if it had proffered pre-shipment, handling, or cold storage records indicating that the strawberries at issue were properly handled before shipment. However, Corona failed to produce any evidence concerning the condition of the strawberries prior to loading.<sup>6</sup> Indeed, there is no indication that the declarants ever personally observed the subject strawberries. Finally, Corona's evidentiary deficiency is not remedied by its submission of

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<sup>6</sup> Respondent's expert witness, Dr. Patrick E. Brecht, noted in his expert report that he did not receive any pre-shipment quality, handling, pre-cooling, or cold storage records from Petitioner. *See* Declaration of Dr. Patrick E. Brecht, at 6, 7.

secondary materials and publications that present general advisory information on strawberry delivery, shipping, and handling practices. Such information does not create an issue of material fact with respect to the particular strawberries at issue in this case.

In sum, Corona has failed to demonstrate a material issue of fact regarding the causes of the strawberries' defective condition.<sup>7</sup> With regard to the transportation of the strawberries, Corona's submissions merely rehash its arguments that are based upon the undisputed temperature reports. Similarly, with respect to the pre-loading treatment and condition of the strawberries, Corona merely provides conclusory assertions and generalized statements that do not shed light upon the treatment of the particular strawberries at issue in this case. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (the nonmovant “must do more than simply show that there is some metaphysical doubt as to the material facts ... the nonmoving party must come forward with ‘specific facts showing that there is a genuine issue for trial.’ ” (citations and emphasis omitted)). Accordingly, the Secretary's findings are deemed conclusive, and Class is entitled to entry of summary judgment in its favor.

### CONCLUSION

For the aforementioned reasons, Petitioner's motion to remand is DENIED and Respondent's motion for summary judgment is GRANTED. A separate Order follows.

### ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 25th day of May, 2010, ORDERED and ADJUDGED, that:

1. Petitioner Corona Fruits & Veggies, Inc.'s Motion to Remand Case to State Court (Paper No. 20) is DENIED;

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<sup>7</sup> Corona's opposition brief and submissions do not address—let alone support—the separate contention set forth in its Petition for Appeal that Class improperly withheld proceeds obtained from the resale of the product in Philadelphia.

2. Respondent Class Produce Group, LLC's Motion for Summary Judgment (Paper No. 25) is GRANTED;
  3. That judgment BE, and it hereby IS, entered in favor of the Respondent and against the Petitioner;
  4. The Clerk of the Court transmit copies of this Order and accompanying Memorandum Opinion to the parties; and
  5. The Clerk of Court CLOSE this case.
- D.Md.,2010.

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**FRESH DIRECT, INC., et al. v. HARVIN FOODS, INC., et al.**  
**C.A. No. 10-040-GMS.**  
**Filed June 22, 2010.**

**[Cite as: 2010 WL 2541925].**

**PACA-R – Apparent authority – Reliance, reasonable.**

The court granted a temporary restraining order (TRO) where the moving party has shown (1) likelihood of success, (2) irreparable harm, (3) no greater harm to non-moving party, (4) TRO is in the public interest. The PACA licensee set in motion circumstances in which a reasonable person would believe that the agents temporarily operating out of licensee's office and making purchases therefrom were agents acting on behalf of licensee even though licensee later accused the agents (now gone) with fraud.

**United States District Court,  
D. Delaware.**

***MEMORANDUM***

GREGORY M. SLEET, Chief Judge.

**I. INTRODUCTION**

On January 15, 2010, Fresh Direct, Inc. ("Fresh Direct") filed suit against Harvin Foods, Inc. and its principal officer (collectively, "Harvin

Foods”).<sup>1</sup> In its initial complaint, Fresh Direct sought a temporary restraining order (“TRO”) and preliminary injunction to freeze Harvin Foods' assets, based on that company's alleged violation of Section 5(c) of the Perishable Agricultural Commodities Act (the “PACA”), 7 U.S.C. § 499e(c). Specifically, Fresh Direct alleged that Harvin Foods failed to compensate it for produce received and accepted by Harvin Foods and, in so doing, violated the statutory trust ensured by the PACA. (D.I. 1 at 3.) On January 20, 2010, this court denied Fresh Direct's motion, because it had failed to show that it would be “irreparably harmed” if this court did not grant the injunction. (D.I. 11 at 1.) In response, Fresh Direct filed an amended complaint, on February 1, 2010, which included Whitmore Distributing Co. (“Whitmore”) as a co-plaintiff. On that same date, Fresh Direct also filed a motion for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(b). (D.I. 16 at 1.) On February 15, 2010, Harvin Foods filed an answering brief (D.I.33) and proposed order asking this court to deny Fresh Direct's request for a preliminary injunction (D .I. 34). Presently before the court, is Fresh Direct and Whitmore's (collectively, the “plaintiffs”) Rule 65(b) preliminary injunction motion to freeze the entirety of Harvin Foods' assets until resolution of this dispute in order to prevent dissipation of the PACA statutory trust.<sup>2</sup> (D.I.16.) For the reasons that follow, the court will grant the plaintiffs' motion in part by freezing Harvin Foods' assets in the amount allegedly owed the plaintiffs.

## II. BACKGROUND

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<sup>1</sup> Fresh Direct's original complaint was filed against Harvin Foods, Keith Harvin, and Grady Harvin. (D.I. 1 at 1.) At the time Fresh Direct filed its complaint, it believed that Keith Harvin and Grady Harvin served as officers and directors of Harvin Foods. (D.I. 8 at 2.) In its reply brief to the preliminary injunction motion, Harvin Foods notes that its principal officer's name is Grady Keith Harvin and refers to Mr. Harvin as “Keith Harvin.” (D.I. 26 at 1.)

<sup>2</sup> According to Fresh Direct and Whitmore, the total amount Harvin Foods owes to both parties is \$170,720.57. (D.I. 16 at 2.) Specifically, Fresh Direct alleges that Harvin Foods owes it \$113,358.97, and Whitmore claims that Harvin Foods owes it \$57,361.60. (D.I. 15 at 3.) Harvin Foods contests the validity of this amount and contends that the amount owed should be determined based upon the price of the produce at delivery rather than the contract price.

The plaintiffs are produce dealers licensed under the PACA. (D.I. 17 at 4.) Harvin Foods is a produce wholesale business that purchases produce from dealers. The produce is then stored in Harvin Foods' warehouse before it is sold and delivered to restaurants and other customers of Harvin Foods. (D.I. 20 at 5–6.) The plaintiffs claim that they collectively delivered \$170,720.57 worth of produce to Harvin Foods, which it accepted. Harvin Foods, however, failed to pay the amount it owed to either party. (D.I. 17 at 5.) The produce delivered is subject to the PACA and the plaintiffs note that they preserved their rights in the statutory trust as required under PACA, 7 U.S.C. § 499(e)(c), and the relevant accompanying regulations.<sup>3</sup> The plaintiffs allege that Harvin Foods has refused to pay them, because of an internal dispute with former Harvin Foods' employees. (D.I. 17 at 3–4; D.I. 20 at 2–4.)

Harvin Foods does not contest that its refusal to pay the plaintiffs results from a dispute with former employees. (D.I. 20 at 6–7.) Instead, Harvin Foods explains that it has refused to pay the plaintiffs because it did not purchase the produce in question. (*Id.*) Specifically, Harvin Foods states that the produce purchased from the plaintiffs was ordered by two individuals, Raymond Maragni, Jr. (“Maragni”) and Vincenzo Giuffrida (“Giuffrida”), with whom Harvin Foods briefly entered into a food brokerage business. (*Id.* at 6.) Harvin Foods notes that in or around July 2009, it agreed to enter into a limited affiliation brokerage business with Maragni and Giuffrida, wherein the brokerage business would buy product from vendors that would then be transported by a trucking company from the vendor to the customer. (*Id.* at 2.) Harvin Foods indicates that the brokerage business initially went well, and Maragni and Giuffrida worked from Harvin Foods' office. (*Id.*) Maragni and Giuffrida later stopped working from the Harvin Foods' office, however, and became unresponsive when business began to “pick up.” (*Id.*) Soon after, Harvin Foods began receiving complaints from the

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<sup>3</sup> The plaintiffs preserved their rights in the statutory trust pursuant to 7 U.S.C. § 499(e)(c), 7 C.F.R. Part 46, 49 Fed.Reg. 45735 (Nov. 20, 1984), through the invoices it sent with the produce. (D.I. 17 at 2.)

brokerage business vendors that had not been paid for produce they shipped to Harvin Foods. (*Id.*) Harvin Food notes that it had not done business with many of these vendors in past. (*Id.*) Upon investigating the complaints, Harvin Foods learned that Maragni and Giuffrida were fraudulently ordering produce from growers and/or vendors on Harvin Foods' credit, but having brokerage business customers send their payment checks directly to them. (*Id.*) Harvin Foods then terminated its affiliation with Maragni and Giuffrida and filed a criminal complaint with the Wilmington Police Department to alert them of the fraudulent scheme. (*Id.* at 3.)

Harvin Foods contends that Maragni and Giuffrida—rather than the company itself—purchased produce from Fresh Direct and Whitmore. Therefore, the plaintiffs are not entitled to payment from Harvin Foods. (*Id.* at 5.) Conversely, the plaintiffs argue that they are entitled to such payment and seek a preliminary injunction to preserve the PACA statutory trust by freezing Harvin Foods' assets. (D.I. 16; D.I. 17 at 1–2.)

### III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 65(b) permits a party to seek a preliminary injunction prior to the resolution of trial proceedings. Fed.R.Civ.P. 65. A preliminary injunction is “an extraordinary remedy, which should be granted only in limited circumstances.” *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir.1988) (citation omitted). Specifically, such injunctive relief should only be granted if: (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the preliminary relief will not result in even greater harm to the nonmoving party; and (4) granting the injunction is in the public interest. *See Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132 (3d Cir.2000) (citing *Council for Alternative Political Parties v. Hooks*, 121 F.3d 876, 879 (3d Cir.1997)). A court should balance these factors in determining whether to grant a preliminary injunction, and should deny such relief where the plaintiff has failed to establish each element. *See NutraSweet Co. v. Vit-Mar Enterprises, Inc.*, 176 F.3d 151, 153 (3d Cir.1999); *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir.1982).

#### **IV. DISCUSSION**

In deciding whether to issue a preliminary injunction under the PACA, the Third Circuit has required courts to consider the four elements defined in the Standard of Review. The court considers each of these elements in turn below.

##### **A. Likelihood of Success on the Merits**

To prove likelihood of success on the merits of a PACA claim, a plaintiff must demonstrate that it is a PACA trust beneficiary with a perfected interest, and that it is entitled to payment. *Chiquita Brands Co. N.A., Inc. v. Del Monte Fresh Produce, N.A., et al.*, No. Civ. A. 03CV05283, 2004 WL 2536860, at \*8 (E.D.Pa. Nov.8, 2004) (citing *Tanimura*, 222 F.3d at 140). While Harvin Foods does not challenge the plaintiffs' status as PACA trust beneficiaries, it contends that the plaintiffs cannot prove they are entitled to payment from Harvin Foods itself. (D.I. 20 at 5.) Specifically, Harvin Foods argues that the produce orders in question were the result of a scheme to defraud Harvin Foods and its customers, and that the plaintiffs failed to request verification from the officers or owners of Harvin Foods as to whether Maragni and/or Giuffrida were authorized users of Harvin Foods' credit. (*Id.*) Moreover, Harvin Foods argues that the plaintiffs cannot prove that Harvin Foods actually received the produce in question. In response to Harvin Foods' contention that they are not entitled to payment because of Maragni and Giuffrida's scheme to defraud the company, the plaintiffs argue that Maragni and Giuffrida were acting in an actual or apparent authority capacity as agents of Harvin Foods. (D.I. 38 at 2–3.) An agency relationship is created when “one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent.” *Fisher v. Townsends, Inc.*, 695 A.2d 53, 57–58 (Del.1997). Harvin Foods does not contest that Maragni and Giuffrida were agents of the company, but asserts instead that Maragni and Giuffrida did not have actual or apparent authority to purchase produce from the plaintiffs. (D.I. 43 at 4.)

Actual authority is created when the principal's words or conduct

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would “reasonably cause the agent to determine that the principal wishes the agent to act on the principal's behalf.” *Creedon Controls, Inc. v. Banc One Bldg. Corp.*, 470 F.Supp.2d 457, 460 (D.Del.2007). Apparent authority is established when the principal, by words or conduct, would cause a third party—here, the plaintiffs—to believe that the agent is acting on the principal's behalf. *Id.* at 460; *Edwards v. Born, Inc.*, 792 F.2d 387, 389–90 (3d Cir.1986). That is, “[a]pparent authority [is] ... that authority which, though not actually granted, the principal knowingly or negligently permits the ‘agent’ to exercise or which he holds him out as possessing.” *Old Guard Ins. Co. v. Jimmy's Grille, Inc.*, No. 542, 2004 Del. LEXIS 417, at \*10, 2004 WL 2154286 (Del.Super.Sept. 21, 2004) (quoting *Finnegan Constr. Co. v. Robino–Ladd Co.*, 354 A.2d 142 (Del.Super.Ct.1976)). If a third party relies on the agent's apparent authority in good faith and does so reasonably in view of the surrounding circumstances, the principal is liable. *Old Guard Ins. Co.*, 2004 Del. LEXIS 417, at \*10, 2004 WL 2154286.

In support of their agency argument, the plaintiffs state that when the orders at issue were placed, Harvin Foods' Blue Book<sup>4</sup> information did not list an Exclusive Buyer, which would have alerted the plaintiffs that Maragni and Giuffrida could not act as buyers.<sup>5</sup> (D.I. 43 at 5.) Moreover, the plaintiffs note that Maragni and Guiffrida worked from Harvin Foods' offices and operated under the Harvin Foods' name when the orders were placed. (*Id.* at 5.) In addition, as evidence of Maragni's agency status, the plaintiffs include in their exhibits a Note issued by the United States Department of Agriculture, Agricultural Marketing Service, on December 8, 2009, which shows that Harvin Foods posted a \$40,000 bond to hire Maragni as an employee, as well as a December 2, 2009 facsimile from Harvin Foods' President, Keith Harvin, to Fresh Direct indicating that Maragni was authorized to purchase on the

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<sup>4</sup> Blue Book Services, Inc. is a credit and marketing information service that provides information and ratings on companies in the international wholesale produce industry.

<sup>5</sup> Keith Harvin was not listed in the Blue Book as Harvin Foods' “Exclusive Buyer” until December 10, 2009, which is after the plaintiffs made the produce purchases at issue in the present case. (D.I. 38 at 9.)

company's behalf.<sup>6</sup> (D.I. 39 at 10, Exhibit 3.) Whitmore also has produced evidence of a similar communication with Harvin Foods, wherein Keith Harvin emailed it, on December 1, 2009, to indicate that Giuffrida had not collected payment from Harvin Foods' customers for the produce purchased, but that Whitmore would be paid when the money was received. (D.I. 38 at 10.) The plaintiffs further note that Harvin Foods did not contest any of the invoices sent by the plaintiffs to Harvin Foods' business address prior to identifying Maragni and Giuffrida's fraudulent scheme, and did not terminate its relationship with the two individuals until after the orders at issue were placed. (*Id.* at 11.)

Given these facts, governing authority would seem to suggest that Maragni and Giuffrida were, indeed, acting as agents of Harvin Foods, that the plaintiffs relied in good faith on the belief that these two individuals were authorized Harvin Foods buyers, and that the plaintiffs preserved their interest in the PACA trust pursuant to the relevant statute and regulations. Thus, the court concludes that Fresh Direct and Whitmore have shown a likelihood of success on the merits of their claim.

### **B. Irreparable Harm**

In order for the court to grant a preliminary injunction for a PACA claim, the plaintiff must show that it will be irreparably harmed by the denial of such relief. *See Tanimura*, 222 F.3d at 140. The Third Circuit has recognized that PACA trust dissipation can constitute irreparable harm, and further that such “dissipation ... can render money damages inadequate, thereby necessitating equitable relief, especially when the

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<sup>6</sup> Keith Harvin sent a separate facsimile to Fresh Direct, on December 8, 2009, indicating that Maragni's authority was no longer valid. (D.I. 39 at 12, Exhibit 4.) Harvin Foods alleges that because Keith Harvin's communication with Fresh Direct authorizing Maragni to purchase on the company's behalf was sent after the produce orders at issue were placed, Fresh Direct had no reason to believe that Maragni was an authorized buyer at the time of the purchases. (D.I. 43 at 5–6.) In light of the surrounding circumstances detailed, however, the court concludes that the plaintiffs' belief that Maragni and Giuffrida were agents of Harvin Foods at the time of the purchases was not unreasonable.

dissipation will clearly result in the debtor's inability to make payment.” *Id.* at 139–40. Trust dissipation is defined as “any act or failure to act which could result in the diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money owed in connection with a produce transaction.” 7 C.F.R. § 46.46(a)(2). In their preliminary injunction motion, the plaintiffs contend that they meet the irreparable harm requirement because Harvin Foods has failed to pay either company in direct violation of the PACA, and has not provided evidence of the availability of sufficient funds to pay the plaintiffs or similarly situated creditors. (D.I. 17 at 9.) Moreover, the declaration of Angel Ruiz, president of Fresh Direct, which the plaintiffs offer in support of their motion, has attached as an exhibit a Blue Book Services report which shows that Harvin Foods' credit rating has declined since December 2009, and that its rating is under investigation because it has been categorized as a “reported slow payer.” (D.I. 18 at 24.)

Harvin Foods counters that a preliminary injunction is unwarranted, because money damages would provide an adequate remedy should the plaintiffs ultimately succeed on the merits. (D.I. 43 at 7.) To support this assertion, Harvin Foods presents an affidavit by Keith Harvin, stating that Harvin Foods has “substantial current assets in excess of \$200,000, and is not insolvent or in danger of filing bankruptcy.” (*Id.* at Exhibit 4.) The Third Circuit in *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, however, established that trust dissipation can warrant a preliminary injunction even where money damages are the appropriate relief. *See Tanimura*, 222 F.3d at 140.

The record before the court contains evidence that the plaintiffs could be prejudiced or impaired in their ability to “recover money owed in connection with [the] produce transaction.” *See* 7 C.F.R. § 46.46(a)(2). In addition, Harvin Foods' has refused to pay the plaintiffs for produce ordered by those seemingly acting as its agents, and the plaintiffs have adduced evidence of Harvin Foods' decreasing credit rating. Under these circumstances, the plaintiffs have demonstrated the potential that they may suffer irreparable harm.

### **C. Greater Harm to the Non–Moving Party**

Harvin Foods further argues that the court should deny the plaintiffs' preliminary injunction motion, because granting the motion would result in harm to Harvin Foods that significantly outweighs any harm to the plaintiffs that would result from the denial. (D.I. 33 at 11.) Specifically, Harvin Foods notes that if the court grants a preliminary injunction freezing the entirety of its assets, the company will be unable to conduct its business and pay its employees and creditors. (*Id.*) According to the Third Circuit, injunctive relief should not be granted where such relief would result in a greater harm to the non-moving party. *Tanimura*, 222 F.3d at 140 (citing *Hooks*, 121 F.3d at 879). In light of this standard and Harvin Foods' argument, the court will only freeze the assets of Harvin Foods in the amount allegedly owed to Fresh Direct and Whitmore, pending the final outcome of this action.

#### **D. Public Interest**

Finally, in determining whether to grant a preliminary injunction, the Third Circuit directs that courts should consider if doing so would be in the public interest. *See Tanimura*, 222 F.3d at 140. With respect to this element, Harvin Foods argues that the public interest here favors protecting the company as a victim of fraud, rather than punishing it by freezing its assets. (D.I. 33 at 12.) In support of this contention, Harvin Foods provides two quotations from 49 Federal Regulation 45737, indicating that the PACA was enacted to “suppress unfair and fraudulent practices” and to “aid traders in enforcing contracts.” 49 Fed.Reg. 45735. Conversely, the plaintiffs maintain that the Third Circuit has held that Congress passed the PACA to protect “small suppliers who could not withstand a significant loss or delay in receipt of monies owed,” and that the public interest, therefore, favors granting a preliminary injunction. (D.I. 17 at 9–11.); *Tanimura*, 222 F.3d at 135. Indeed, the Federal Regulation that Harvin Foods cites supports the plaintiffs' position. Specifically, the Regulation states that Congress enacted the PACA trust provision in recognition of “changes in the [produce] industry's financial picture [that have] added an abnormal marketing risk burden against which sellers are unable to protect themselves,” such as the “marked increase in delayed payments for produce.” 49 Fed.Reg.

45735. In view of the Third Circuit precedent in this area and Congress' intent in enacting the PACA, it is clear that the public interest supports preserving the trust from possible dissipation to protect the produce seller, or Fresh Direct and Whitmore, in this case.

## VI. CONCLUSION

Because the court concludes that the plaintiffs have demonstrated a likelihood of success on the merits and irreparable harm, and because the remaining factors weigh in favor of a preliminary injunction, the court will grant the plaintiffs' request. In view of the fact that freezing the entirety of Harvin Foods' assets will not permit it to conduct its business or pay its employees and creditors, however, the court will freeze Harvin Foods' assets only in the amount allegedly owed to the plaintiffs, or \$170,720.57. Accordingly, the court will grant in part and deny in part the plaintiffs' motion for a preliminary injunction pursuant to Rule 65(b).

## ORDER

For the reasons stated in the court's Memorandum of this same date, IT IS HEREBY ORDERED that:

1. Fresh Direct, Inc. and Whitmore Distributing, Co.'s motion for a preliminary injunction (D.I.16) is GRANTED in part and DENIED in part. The court will freeze Harvin Foods' assets in the amount allegedly owed to the plaintiffs, or \$170,720.57.

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**ONIONS ETC, INC. AND DUDA FARM FRESH FOODS, INC. v.  
Z & S FRESH, INC., et al. AND RELATED CROSS ACTIONS.  
No. 1:09-CV-00906-OWW-SMS.  
Filed June 25, 2010.**

[Cite as: 2010 WL 2598392].

PACA-R – Standing, brokers do not have –

A broker who contracted with a PACA buyer to sell under buyer's name and who never took possession nor had an equitable interest of/in the produce is not one of the parties the PACA is designed to protect. Broker (who rendered brokerage services) has no interest in the PACA trust.

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

**MEMORANDUM DECISION RE MOTION TO DETERMINE  
VALIDITY OF AND OBJECTIONS TO PROOF OF CLAIM (Doc.  
259.)**

OLIVER W. WANGER, District Judge.

**I. INTRODUCTION**

Before the Court for decision is Intervening Plaintiff I.G. Fruit, Inc.'s "Motion To Determine Validity of and Objections to Proofs of Claim." The motion pertains to the \$198,467.34 PACA trust claim filed by I.G. on July 13, 2009. Defendant Z & S Fresh, Inc. objected to the claim on July 23, 2009, arguing that I.G. rendered "brokerage services," which are not PACA-protected.<sup>1</sup>

**II. FACTUAL BACKGROUND**

This case arises out of the Perishable Agricultural Commodities Act of 1930 ("PACA"), 7 U.S.C. § 499a *et seq.*, which was enacted to protect sellers of perishable agricultural commodities from unfair conduct by buyers of such commodities, including failure to pay promptly and fully for produce ordered. PACA creates a statutory trust in favor of sellers of produce to buyers (e.g., grocery stores and certain agents), under which the buyer holds the produce and any proceeds and

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<sup>1</sup> Many of Z & S trade partners (i.e., sellers) filed PACA trust claims based on produce provided by them to Z & S. Defendant Z & S objected to a number of these trust claims. However, the parties resolved nearly all of these objections on December 3, 2009. (See Doc. 381, "Notice of Settlement of Specific Parties.")

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receivables from the produce in trust for the benefit of the seller. 7 U.S.C. § 499e (c)(2). Defendant Z & S Fresh, Inc. (“Z & S”), a California corporation, is a licensed “dealer” of perishable agricultural commodities within the meaning of PACA. Z & S buys and resells fruits and vegetables. In 2004, Z & S entered into an agreement with Ira Greenstein, doing business as I.G. Fruit, granting I.G. the right to sell fresh fruits and vegetables under the Z & S trade name.<sup>2</sup> (Doc. 398, M. Zaninovich Dec., ¶ 5.) In exchange, I.G. acknowledged that all marketing efforts were done for Z & S' benefit, all fruit/vegetable sales were made through Z & S, and all invoicing and administrative functions were performed by Z & S. (*Id.* ¶ 8.) Ira Greenstein was also identified as an East Coast sales representative on Z & S' website. (*Id.* ¶ 11.) However, he never held an equity interest in Z & S and never took title or control of any produce. (*Id.* ¶ 13.) According to Z & S, I.G. never acted on behalf of growers or suppliers and the “Agreement specifically required all of Greenstein's efforts and activities to be performed on behalf of Z & S Fresh, Inc.” (*Id.* ¶ 15.)

Between January 5 and June 1, 2009, I.G. brokered the sale of \$198,467.34 worth of perishable agricultural commodities on behalf of Z & S. For each arranged sale, Z & S delivered the produce to the buyer, who accepted the items on credit and without adjustment. The entire amount remains unpaid.

According to I.G., it preserved its PACA trust interest against Z & S by including the statutorily required language on each invoice. The invoices provide, in relevant part:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by Section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received. (Doc. 99, pgs. 4 through 143.)

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<sup>2</sup> I & G Fruit was permitted to use Z & S' trademarks, service markers, and trade dress to represent itself as a sales agent for Z & S. (*Id.* ¶ 6.)

### **III. PROCEDURAL BACKGROUND.**

On May 22, 2009, two sellers of perishable agricultural commodities, Intervening Plaintiffs Onions Etc., Inc. and Duda Farm Fresh Foods, Inc., commenced this action against Defendant Z & S to recover money owed to them for the sale of produce to Z & S. Also named as Defendants were the officers of Z & S: Martin J. Zaninovich, Loren Schoenburg, and Margaret Schoenburg. Intervening Plaintiffs claim that 7 U.S.C. § 499e(c)(2) created a trust for their benefit over the proceeds of their produce and that Defendants owed money to Intervening Plaintiffs as beneficiaries of the trust. Intervening Plaintiffs also alleged that the officers breached their fiduciary duties as trustees of the trust. On June 3, 2009, the Court entered a temporary restraining order against Defendants and set a preliminary injunction hearing. (Doc. 15.) On June 24, 2009, the parties agreed to entry of a preliminary injunction, and the Court entered an order setting forth the PACA claims procedure (the "PACA Claims Order"). (Doc. 48.) The PACA Claims Order established a PACA trust account, appointed Terence J. Long as Trustee of the PACA Trust, and created a PACA claims procedure. (*Id.*) Potential PACA creditors were required to file complaints in intervention and proofs of claim by July 13, 2009. Objections were to be filed by July 23, 2009 and responses to the objections were due on August 3, 2009. The parties were allowed to file motions to rule on objections by August 10, 2009.

On July 13, 2009, I.G. Fruit filed a complaint in intervention and proof of claim based on brokerage sales it performed on behalf of Z & S Fresh. (Docs. 99 & 100.) Defendant Z & S Fresh, Inc. objected to the claim on July 23, 2009. (Doc. 168.) I.G. Fruit filed this motion on August 24, 2009. (Doc. 259.)

Oral argument on I.G. Fruit's motion was held on December 4, 2009, at which time the parties were requested to submit supplemental briefing on the issue of whether I.G. Fruit qualifies as a PACA trust beneficiary based on the brokerage services it provided to Z & S. The parties filed supplemental briefing on December 9 and December 11, 2009. (Docs. 395, 397.)

#### IV. DISCUSSION

The motion presents a question of law unique to the Perishable Agricultural Commodity Act: Was it Congress' intent to provide PACA trust protections to brokers of PACA sellers, to protect their rights to the same extent as the clearly preferred PACA claimant—the grower/supplier? I.G. advances three arguments to support its position that “sell-side brokers” are beneficiaries under PACA. First, I.G. argues that the terms “broker” and “agent” are interchangeable under § 499e(c)(2), therefore brokers have the same PACA rights as agents. Second, I.G. asserts that § 499e(c)(2)'s words “in connection with” include broker fees for selling produce held by the original buyer, here Z & S. Specifically, I.G. contends that the “in connection with” language includes not only the price of produce sold to the original purchaser, but also additional related expenses, including broker fees connected to the secondary or “to market” transaction. Third, I.G. contends that *Eastside Food Plaza, Inc. v. “R” Best Produce, Inc.*, No. 03–CV–106–SAS, 2003 WL 21727788 (S.D.N.Y. July 23, 2003), controls the facts of this case.

##### A. “Agents” and “Brokers” Under PACA

I.G.'s first argument is based on its contention that “brokers” and “agents” are synonymous under PACA. According to I.G., because the statute fails to distinguish the two terms—or one incorporates the other, brokers have the same PACA rights as agents. I.G. explains: Clearly the protection of agents is part of the express purpose of [PACA]. A ‘broker’ has been defined in Black's Law Dictionary, Ninth Edition, as a person employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. An agent has been defined in the same dictionary as ‘one who is authorized to act for an in the place of another.’ Endemic to the purchase and sale of perishable agricultural commodities in the United States is the role of brokers. There are no cases in wherein it has been reported that hold brokers are not considered ‘agents’ within the definition of the statute, nor are there any cases expressly holding that brokers are included in the definition of the term ‘agent.’ The reason is clear—common sense and plain

language reveal that these terms are virtually synonymous.  
(Doc. 343 at 112:2–112:11.)

I.G.'s arguments with respect to the connection between agents and brokers are without merit. Under PACA, these terms do not share a common meaning, nor are they incorporated into one another; they do not have the same PACA rights or responsibilities. *Compare A & J Produce Corp. v. Chang*, 385 F.Supp.2d 354, 358 (S.D.N.Y.2005) (PACA ‘restricts those subject to liability to ‘commission merchant[s], dealer[s] or broker[s]’ [...]”) with 7 U.S.C § 499e(c) ( “Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents [...]”). The statute itself belies I.G.'s contention, as the term “broker” is specifically defined in 7 U.S.C § 499a (b)(7):

‘The term ‘broker’ means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a “broker” if such person is an independent agent negotiating sales for and on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of \$230,000 in any calendar year.

*Id.*

Section 499a(12) delineates the difference between brokers and agents: brokers are involved in the transaction based on their relationship with the produce buyer, not the produce supplier—the preferred PACA-protected claimant. In the ordinary case: grower sells produce on credit to a Buyer.<sup>3</sup> The Buyer then sells the produce on credit to a Supermarket, generating an account receivable from Supermarket. Broker earns a commission by arranging the sale between Buyer and Supermarket. An agent facilitates the original sale from Grower to

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<sup>3</sup> See *JSG Trading Corp. v. Department of Agriculture*, 235 F.3d 608, 616 (D.C.Cir.2001) (“Brokers by definition negotiate ‘for or on behalf of the vendor or the purchaser.’”).

Buyer.<sup>4</sup> Congress drafted the statute to provide an additional layer of protection to the sellers, suppliers, and agents of the original produce transaction. It did not include brokers within this ambit of protection. *See, e.g.*, 7 U.S.C. § 499e(c).

With respect to the PACA trust, 7 U.S.C. § 499e provides that: “The unpaid supplier, seller, or *agent* shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or *broker* within thirty calendar days [....]” *Id.* (emphasis added). Applying I.G.’s analysis to § 499e, if brokers and agents are treated alike, a broker preserves its PACA rights by providing notice to *a broker*? Such an interpretation is nonsensical under the statute’s express language. Moreover, the statute does not define the circumstances under which a broker loses its PACA rights. This is best explained by the non-existence of such rights.

The interpreting regulations further explain the distinction between agents and brokers. 7 C.F.R. § 46.46(a)(2) defines trust “dissipation” as any act resulting in the “diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money owed in connection with produce transactions.” Section 46.46(d)(2) imposes a duty on an *agent* to maintain the principal’s rights as a PACA trust beneficiary:

Agents who sell perishable agricultural commodities on behalf of a principal are required to preserve the principal’s rights as a trust beneficiary as set forth in § 46.2(z), (aa) and paragraphs (d), (f), and (g) of this section. Any act or omission which is inconsistent with this responsibility, including failure to give timely notice of intent to preserve trust benefits, is unlawful and in violation of Section 2 of the Act [ ... ]

*Id.*

I.G.’s argument that brokers and agents have the same PACA rights conflicts with the relevant statutes and interpreting regulations. Title 7 U.S.C. §§ 499a and 499c make clear that when a party arranges a produce sale between a purchaser and a grocery outlet, it acts as a

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<sup>4</sup> Illustration taken from *Boulder Fruit Exp. & Heger Organic Farm Sales v. Transportation*, 251 F.3d 1268, 1271 (9th Cir.2001).

broker, not an agent. A broker has an entirely different function from an agent, who acts on behalf of the grower. There is no ambiguity on this point. *See* 7 U.S.C. § 499e(c)(1) (“It is hereby found that a burden on commerce in [produce] is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for [produce] purchased, contracted to be purchased, or otherwise handled by them [...]”). In addition, there are no facts that I.G. acted as an agent *and* a broker in this case. Here, I.G. arranged sales from Z & S—the original purchaser—to several produce outlets (retailers), including Winn Dixie and Nature's Best. There is nothing to indicate that I.G. arranged, facilitated, or played an integral role in the original transaction from grower to Z & S.<sup>5</sup> It was therefore only a broker under PACA.

I.G.'s rights to PACA assets, if any, are separate and distinct from those of an agent. Here, I.G.'s interpretation of the agency/broker relationship runs contrary to the applicable statutes and interpreting regulations, which conclusively demonstrate that “agents” and “brokers” are involved in different aspects of the produce transaction.

**B. “In Connection With”**

I.G. next argues that § 499e(c)(2)'s language “in connection with” includes broker fees for selling produce held by the purchaser, here Z & S. According to I.G., Congress intended that all goods and services incurred “in connection with” the produce sale transaction qualify for PACA trust protection. I.G. suggests that because a broker's fees are “‘intimately associated’ with the transaction, they are covered under PACA's remedies, which necessarily include the primary enforcement tool, the statute's trust provisions.” (Doc. 219 at 3:20–3:23.)Z & S

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<sup>5</sup> At oral argument on December 4, 2009, it was suggested that a “broker” could occupy dual roles in certain produce transactions: (1) as a broker for the merchant; and (2) the broker could sell its own produce to the merchant. Based on the record, I.G. only occupied the first role—as a broker for Z & S. There is nothing in the record to indicate that I.G. maintained a separately-owned supply of produce. There is also no evidence that Z & S ever purchased produce from I.G. Fruit.

responds that there is no basis for I.G.'s theory because PACA protects only growers/suppliers of produce, not “sell-side brokers” like I.G. Z & S acknowledges that § 499e(c)(2) protects unpaid suppliers, sellers, and/or agents in connection with agricultural commodity transactions, but argues that the protection ends there, i.e., sell-side brokers are not PACA-protected. Z & S further contends that I.G. fails to harmonize the text of § 499e(c) (2) and its legislative history and purpose. According to Z & S, I.G.'s application of § 499e(c)(2) leads to an illogical result: a party who did not take title to or possession of any produce, who acted on behalf of the buyer (not any of the growers, suppliers, or producers), and who did not sell/supply any produce, is protected under PACA to the same extent as growers.

7 U.S.C. § 499e(c) provides a starting point. In 1984, Congress amended PACA to more effectively protect produce sellers. Congress recognized that time constraints inherent in selling produce often required sellers of produce to sell their produce to commission merchants, dealers or brokers before ascertaining the creditworthiness of buyers. Under such circumstances, sellers typically became unsecured creditors of buyers, able to recover from defaulting buyers only after lenders holding security interests in defaulting buyers' assets recover in full. Often, after secured lenders collect on their security interests, no assets to pay sellers remain. To guard against such situations, Congress added § 499e(c), which enacted a statutory trust for the benefit of produce growers and their agents:

Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents [ ... ]

It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in, such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on

commerce in perishable agricultural commodities and to protect the public interest.

*Id.* at § 499e (c)-(c)(1).

Section 499e(c)(2) delineates trust eligibility, benefits, and preservation of the res:

[Produce] received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from [produce], and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

*Id.*

The substance of I.G.'s arguments is that § 499e (c)(2)'s words "until full payment of the sums owing in connection with such transactions" include broker fees for selling produce held by the purchaser. However, Courts have universally held that Congress enacted § 499e (c) to give sellers a right to recovery against buyers superior to that of all other creditors, including brokers. *See Middle Mountain Land & Produce v. Sound Commodities*, 307 F.3d 1220, 1224 (9th Cir.2002) ("[T]he enactment of the PACA amendment elevated the claims of unpaid perishable agricultural commodities suppliers over all other creditors of the bankrupt estate with regard to funds in the PACA trust."); *R Best Produce, Inc. v. Shulman-Rabin Marketing Corp.*, 467 F.3d 238, 242 (2d Cir.2007) ("[T]he legislative history and the text of the statute as well as the implementing regulations all make clear that [PACA] trust assets are intended exclusively to benefit produce suppliers.") (citation omitted); *Am. Banana Co., Inc. v. Republic Nat. Bank of New York, N.A.*, 362 F.3d 33, 38 (2d Cir.2001) ("Through these mechanisms [PACA] Congress, in effect, extended a new benefit to produce sellers."). No Court has held that brokers are one of the classes intended to be protected by the PACA Trust.

I.G.'s legal theory incorporates language from *Coosemans*

*Specialties, Inc. v. Gargiulo*, 485 F.3d 701 (2d Cir.2007), *Country Best v. Christopher Ranch, LLC*, 361 F.3d 629 (11th Cir.2004), and *Middle Mountain*, 307 F.3d 1220, three cases holding that “where the parties’ contracts include a right to attorneys’ fees, they can be awarded as ‘sums owing in connection with’ perishable commodities transactions under PACA.” *Coosemans Specialties*, 485 F.3d at 709. *Middle Mountain* is particularly instructive. There, an agricultural supplier filed a proof of claim under PACA for amounts due on unpaid invoices, outstanding attorneys’ fees and interest. The supplier argued that it was entitled to fees and interest based on language included in its invoices to the buyer, which created a contractual right to such an award. The district court denied the claim. On appeal, the supplier argued that § 499e(c)(2)’s words “in connection with” encompassed not only the price of the produce but also related attorneys’ fees and interest. The Ninth Circuit agreed:

The plain meaning of the PACA statute’s words ‘in connection with’ encompasses not only the price of the perishable agricultural commodities but also additional related expenses, including contractual rights to attorneys’ fees and interest, in a PACA claim. We must give the statutory language its ordinary meaning, and ‘[w]here Congress has, as here, intentionally and unambiguously drafted a particularly broad definition, it is not our function to undermine that effort.’

Congress wrote the statute broadly to include not only the value of commodities sold but also expenses in connection with the sale of perishable agricultural commodities when it drafted the statute. It did not limit the claim to perishable agricultural commodities alone [ ... ] A fair reading of the statute brings contractually due attorneys’ fees and interest within the scope of the statute’s protection of ‘full payment owing in connection with the [perishable agricultural commodities] transaction.’

*Id.* at 1223 (citations omitted).

The Court also held that allowing a supplier to file a claim for attorneys’ fees and interest was consistent with PACA’s legislative history:

[I]t cannot be contended seriously that interpreting PACA claims to include contractual rights to attorneys’ fees and interest under

the 'in connection with' language of the statute is contrary to the statute's purpose, absurd, or 'demonstrably at odds with the intentions of the drafters.' There is no evidence that Congress intended to exclude contractual rights to attorneys' fees and interest as outside the scope of a PACA claim. Rather, a congressional committee stated that PACA was intended 'to increase the legal protection for unpaid sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received by them.' The House Agriculture Committee Report stated that it did not contemplate that PACA would affect 'the ability of the [seller] ... to set contract terms.' It is unlikely that Congress, in enacting a statute to provide better insolvency remedies to perishable agricultural commodities sellers, wanted selectively to exclude legitimate portions of a covered contract from the scope of a PACA claim.

The inequities of including contractual rights to attorneys' fees and interest in a PACA claim is minimal since a PACA claimant can include terms in its contracts with a buyer that allow for collection of expenses arising from a perishable agricultural commodities transaction. *Id.* at 1224 (citations omitted).

I.G.'s claim for broker fees is distinguishable from the claims advanced in *Coosemans Specialties*, *Country Best*, and *Middle Mountain*. In relying on the language contained in these cases, I.G. overlooks the critical distinction of the claimants' roles in those cases, unlike I.G., were sellers and suppliers who qualified as trust beneficiaries. Specifically, in all three cases, a PACA beneficiary sought to recover legal expenses and interest in addition to its underlying claims for unpaid produce. Here, I.G. is not a PACA trust beneficiary as it is not a "supplier, seller, or agent" and I.G. does not seek to recover administrative expenses in addition to unpaid charges for the produce itself. I.G.'s claim is distinguishable.

In addition, unlike *Middle Mountain*, expanding the PACA trust to "sell-side" brokers is contrary to the statute's purpose and "demonstrably at odds with the intentions of the drafters." There is considerable evidence that Congress intended to give produce sellers a meaningful

opportunity to recover full payment of the amounts due for their sales. *See Patterson Frozen Foods, Inc. v. Crown Foods Intern., Inc.*, 307 F.3d 666, 669 (7th Cir.2002) (one of the principal justifications Congress has given for granting such generous protection for sellers of produce is the need to protect small dealers who require prompt payment to survive.).<sup>6</sup> As the broker fees requested by I.G. were incident to a produce sale between a purchaser and a grocery outlet, they are outside the scope of a PACA claim. *See Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132, 138 (3rd Cir.2000) (PACA's stated purpose is to ensure "payment to the unpaid seller in the perishable agricultural commodities industry.").

Moreover, allowing I.G.'s claim opens the door to other creditors asserting similar claims and subverts Congress's intent to protect sellers as the exclusive beneficiaries of the PACA trust. *Pac. Int'l Marketing, Inc. v. A & B Produce, Inc.*, 462 F.3d 279 (3rd Cir.2006) is instructive. There, the Court denied a logistic company's claim for administrative expenses from the PACA trust for its services in transporting produce for Defendant A & B Produce. It held that the transaction between A & B and the logistics company was not made "in connection with" a covered commodities transaction under PACA. The Court also discussed how allowing such a claim would directly conflict with both the text of the statute and the purposes underlying it:

As Pacific correctly notes, if we accepted Exel's characterization of its transportation services as being 'in furtherance of its administration of the trust, a multitude of general unsecured creditors [of the buyer of the produce] could step forward and assert administrative expense claims for services performed in the course of produce transactions.' A partial list of these creditors would include 'trucking companies which transport produce, utility companies, which ensure that produce companies have electrical power to refrigerate the produce, paper companies,

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<sup>6</sup> *See also D.M. Rothman & Co. v. Korea Commercial Bank of N.Y.*, 411 F.3d 90, 93 (2d Cir.2005) (PACA provides growers and sellers of agricultural produce with "a self-help tool enabling them to protect themselves against the abnormal risk of losses resulting from slow-pay and no-pay practices by buyers or receivers of fruits and vegetables.").

which provide the paper on which invoices are printed and employees, who sold the [p]roduce and collected the proceeds.’

Ultimately characterizing Exel's services as administrative expenses would enable all sorts of the buyer's unpaid creditors to assert priority administration expense claims ahead of the claims of the sellers and other entities that Congress intended to protect as beneficiaries of the PACA trust. The claims of such creditors, including Exel's, are simply too tangential to the claims that Congress intended PACA to protect to permit their payment as PACA administrative expenses.

*Id.* at 285 (citations and quotations omitted).

This language applies with equal force to the facts of this case.

I.G.'s final argument to support its position is that it included the statutorily-required PACA language in its invoices with Z & S. A review of the invoices confirms that I.G.'s invoices contain the required language. (See Doc. 99, pgs. 4 through 143.) That is not dispositive of the inquiry, however. If all that is required for an entity to become a PACA beneficiary is a statement that “all items are sold subject to PACA,” then the 1984 amendments are without legal effect. Here, whether a party is a PACA beneficiary depends on the statute and its relationship to other parties in a transaction, not boilerplate language inserted into a contract.<sup>7</sup>

The facts of this case are clear. I.G. did not sell or supply produce to Z & S but instead brokered a number of produce transactions between Z & S and several grocery outlets. The transactions were performed pursuant to a written contract between Z & S and I.G., and did not include PACA-intended beneficiaries, the original growers/suppliers. *Middle Mountain* makes clear that Congress intended to protect growers, sellers and suppliers of produce, not brokers who are ancillary to the

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<sup>7</sup> There is also no indication that I.G. provided notice of—or bargained for—the PACA language to the intended beneficiaries of the PACA trust, which was critical to the Ninth Circuit's analysis in *Middle Mountain*. See 307 F.3d at 1224 (“The inequities of including contractual rights to attorneys' fees and interest in a PACA claim is minimal since a PACA claimant can include terms in its contracts with a buyer that allow for collection of expenses arising from a perishable agricultural commodities transaction.”).

original sale of produce between the seller and purchaser. As in *Pac. Int'l*, the provisions and intent of PACA cannot be interpreted to allow I.G. to recover its broker fees prior to the distribution of trust funds to the qualified beneficiaries.

*C. Eastside Food Plaza, Inc. v. "R" Best Produce, Inc.*

I.G. argues that *Eastside Food Plaza, Inc. v. "R" Best Produce, Inc.*, No. 03-CV-106-SAS, 2003 WL 21727788 (S.D.N.Y. July 23, 2003) controls the facts of this case. In particular, I.G. relies on *Eastside Food Plaza* for the proposition that "[i]f a broker is eligible under 7 U.S.C. § 499e(b) to recover brokerage commissions, then he is also eligible under the trust statute after complying with the requirements of invoice language and timely service of the invoice to render him eligible." (Doc. 396 at 4:20-4:21.) The *Eastside Food Plaza* decision is distinguishable. The issue in *Eastside* was whether a broker of produce sales has standing to advance an unfair conduct claim under PACA.<sup>8</sup> Defendant argued that Plaintiff lacked standing to bring a PACA claim because "PACA was enacted to protect unpaid sellers and suppliers of produce, and [Plaintiff] is merely an alleged unpaid broker of produce sales." The Court disagreed, finding that Defendant's approach was "constricting" and inconsistent with a plain reading of 7 U.S.C. § 499b:

[§ 499b(4) ] restricts those subject to liability to 'commission merchant [s], dealer[s] or broker[s]' and defines these terms in great detail. In contrast, [§ 499b(4) ] denotes the protected claimant very generally as 'the person with whom such transaction is had.' [§ 499e(a) ], which governs the amount of damages available under an unfair conduct claim, also refers to claimants as 'persons': 'If any commission merchant, dealer, or broker violates any provision of section 499b of this title he shall be liable to the person or persons injured thereby for the full amount of damages ... sustained in consequence of such

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<sup>8</sup> PACA's unfair conduct provision provides, in relevant part: It shall be unlawful [ ... ] [f]or any commission merchant, dealer, or broker [ ... ] to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any [perishable agricultural] commodity to the person with whom such transaction is had [....]

7 U.S.C. § 499b.

violation.’ ‘Person’ is defined broadly to include ‘individuals, partnerships, corporations and associations.’ [Plaintiff], as a corporation, is a ‘person.’

*Id.* at 2 (citations omitted). The *Eastside* Court also held that a broker can pursue an unfair conduct claim under the “full payment promptly” language of § 499b(4):

Moreover, as a broker, plaintiff may pursue an unfair conduct claim in light of the definition of ‘full payment promptly.’ ‘Full payment promptly’ is defined in part as ‘[p]ayment of brokerage earned and other expenses in connection with produce purchased or sold, within 10 days after the day on which the broker's invoice is received by the principal...’ There is no question that the unfair conduct provision of PACA permits a broker to sue a principal for failure to remit ‘full payment promptly.’

*Id.* (citations omitted).

I.G.'s proposed reading of *Eastside Food Plaza* is flawed for two reasons. First, *Eastside Food Plaza*'s holding was limited to whether an unpaid broker could properly raise an unfair conduct claim under 7 U.S.C. § 499b. *Eastside Food Plaza* never addressed whether an unpaid broker is a PACA beneficiary pursuant to 7 U.S.C. § 499e(c)(2). As it never reached the issue—or even discussed § 499e(c)(2)—it is not helpful to I.G.'s claim in this case. Second, § 499b and § 499e (c)(2) are two different statutory schemes that do not apply to or interrelate to one another. For instance, § 499b(4) prohibits “unfair conduct” by entities in the agricultural commodities business, including the failure to maintain a statutory trust. It is an independent cause of action. Conversely, § 499e(c)(2) creates a statutory trust in favor of unpaid sellers, defines eligible parties, and preserves the trust res. *Eastside Food Plaza* is factually distinguishable.

#### **D. Conclusion**

Courts have held that § 499e(c)(2)'s words “in connection with” encompass not only the price of produce but also related attorneys' fees

and interest. *See Country Best*, 361 F.3d at 632; *Middle Mountain*, 307 F.3d at 1223. However, those are different cases. Here, I.G. did not sell, supply, or broker the sale of produce to Z & S. Rather, it brokered a number of produce transactions between Z & S and grocery outlets, parties not intended beneficiaries of § 499e(c)(2). I.G. is also not a PACA trust beneficiary as it is not a “supplier, seller, or agent” and it does not seek to recover administrative expenses in addition to unpaid charges for the produce itself. Allowing I.G.'s claim also opens the door to other creditors asserting similar claims and subverts Congress's intent to protect sellers as the exclusive beneficiaries of the PACA trust. Including invoice language stating that “all items are sold subject to PACA,” does not conclusively demonstrate PACA beneficiary status. I.G. is not one of the classes intended to be protected by the PACA Trust. I.G.'s motion is DENIED.

#### **IV. CONCLUSION**

For the reasons stated:(1) Intervening Plaintiff I.G. Fruit, Inc.'s Motion To Determine Validity of and Objections to Proofs of Claim is DENIED.

Defendant Z & S shall submit a form of order consistent with, and within five (5) days following electronic service of, this memorandum decision.

*IT IS SO ORDERED.*

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**REPARATIONS**

**DEPARTMENTAL DECISIONS**

**PRODUCE SUPPLY, INC. v. GUY E. MAGGIO, INC.**

**PACA Docket No. R-08-042.**

**Decision and Order.**

**Filed December 12, 2008.**

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

Respondent, a PACA licensee located in the state of California, purchased California-grown broccoli crowns from Complainant, a PACA licensee also located in the state of California. In defense of its alleged failure to pay Complainant the unpaid balance of the agreed purchase price for the broccoli crowns, Respondent asserted that neither the commodity in question, nor any of the products purchased by Respondent, are ever shipped out of state, so the Secretary lacks jurisdiction over this transaction. It was found that since the shipment in question involves a type of produce commonly shipped in interstate commerce and was shipped by a produce dealer that does a substantial portion of its business in interstate commerce, the subject shipment is considered to be in interstate commerce under the PACA. Based on this analysis, the Department could properly exercise jurisdiction over this dispute.

Gary Ball, Presiding Officer.

Thomas Oliveri, Representative for Complainant

Respondent, *pro se*.

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

**Decision and Order**

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of \$1,232.00 in connection with one

truckload of broccoli crowns allegedly shipped in contemplation 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 that the Respondent does not operate in "interstate commerce."

The amount claimed in the Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement and an Affidavit of Patrick Smith, Complainant's President. Respondent did not elect to file any additional evidence. Neither party submitted a Brief.

In an effort to determine whether the disputed shipment was made in interstate commerce under the PACA, the Presiding Officer issued a Notice to Show Cause Why Complaint Should not be Dismissed. The Notice to Show Cause was served upon Complainant on July 7, 2008 and upon Respondent on July 9, 2008. On July 25, 2008, Complainant submitted a timely Motion To Show Cause Why Complaint Should Not Be Dismissed and an affidavit of Patrick Smith in support of its Motion. Complainant's Motion was served upon Respondent by the Department. Respondent did not submit a response to Complainant's Motion.

#### **Findings of Fact**

1. Complainant, Produce Supply, Inc., is a corporation whose post office address is P.O. Box 336, Arroyo Grande, California, 93421-0336. At the time of the transaction involved herein, Complainant was licensed under the Act.
2. Respondent, Guy E. Maggio, Inc., is a corporation whose post office address is 1320 E. Olympic Boulevard, Room 220, Los Angeles, California, 90021. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about March 15, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Santa Maria, California, to Respondent, in Los Angeles, California, 616 cartons of broccoli crowns at \$4.25 per carton, for a total f.o.b. contract price of \$2,618.00. Respondent paid Complainant \$2.25 per carton, or a total of \$1,386.00, for the broccoli crowns, thereby leaving an unpaid invoice balance of \$1,232.00.
4. The informal complaint was filed on May 11, 2007, which is within nine months from the accrual of the cause of action.

### Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for one truckload of broccoli crowns sold and shipped to Respondent. Complainant states Respondent accepted the broccoli crowns in compliance with the contract of sale, but has since paid only \$1,386.00 of the agreed purchase price thereof, leaving a balance due Complainant of \$1,232.00. In response to Complainant's allegations, Respondent asserts in its sworn Answer that the broccoli crowns were rejected upon arrival, after which Complainant verbally agreed to change the price terms of the contract to \$2.25 per carton, which offer was accepted by Respondent, and Respondent remitted payment in full to Complainant in accordance with this agreement.<sup>1</sup> Respondent also asserts that the Department does not have jurisdiction to consider this dispute because the transaction was not conducted in the course of interstate commerce.<sup>2</sup>

We will first consider the jurisdictional defense asserted by Respondent, because Respondent's success or failure in proving this defense will determine whether we are able to consider the other matters in dispute. Goods must be sold in or in contemplation of interstate commerce for this forum to have jurisdiction. Miller Farms & Orchards v. C.B. Overby, 26 Agric. Dec. 299 (1967). In addition to claiming that

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<sup>1</sup> See Answer, paragraphs 6 and 8.

<sup>2</sup> See Answer, paragraph 7.

the transaction in question was not conducted in interstate commerce, Respondent asserts in its sworn Answer that, “[a]t no time has Respondent ever entered into interstate commerce, nor does any of the product ever handled by Guy E. Maggio, Inc. dba GEM Sales, ever leave the state of California.”

Complainant has the burden of establishing that the Department has jurisdiction over the disputed transaction. This burden can be met by providing adequate evidence that: (1) the shipment actually moved from a state to any place outside that state;<sup>3</sup> (2) the shipment moved between points within the same state but through any place outside that state;<sup>4</sup> (3) the transaction was negotiated by parties located in different states;<sup>5</sup> (4) the parties entered into the transaction contemplating that the shipment would travel in interstate commerce;<sup>6</sup> or (5) “the shipment is of a type of produce that commonly moves in interstate commerce and was shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce.”<sup>7</sup>

Based on the Report of Investigation and the initial evidence submitted by Complainant, we were unable to determine whether the Department had jurisdiction over this matter. While Complainant alleges in its Complaint that the shipment was made in “contemplation of interstate commerce,” Complainant did not submit any evidence to support this claim. Furthermore, Respondent asserted in its Answer that it does not operate in interstate commerce.<sup>8</sup> In an effort to determine

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<sup>3</sup> 7 U.S.C. 499a(b)(3).

<sup>4</sup> 7 U.S.C. 499a(b)(3).

<sup>5</sup> *Steve Almquist d/b/a Steve Almquist Sales & Brokerage v. Mountain High Potatoes & Onion, Inc.*, 65 Agric. Dec. 1418 (2006).

<sup>6</sup> *Tulelake Potato Distributors, Inc. V. John M. Giustino d/b/a Grand Slam Produce*, 52 Agric Dec. 752 (1993).

<sup>7</sup> *The Produce Place v. United States Department of Agriculture*, 319 U.S. App D.C. 369 (1996).

<sup>8</sup> See Answer at p. 1.

whether the Department has jurisdiction in this matter, a Notice to Show Cause Why Complaint Should not be Dismissed was issued to both parties. In response to the Notice to Show Cause, Complainant submitted evidence in the form of an affidavit from Patrick Smith, president and 100% shareholder of Produce Supply, Inc.<sup>9</sup> Mr. Smith's affidavit indicates that Complainant ships produce to numerous destinations outside the State of California, including Arizona, Texas, Kentucky, Washington, and Canada.<sup>10</sup>

Based on the evidence submitted by Complainant, we conclude that Complainant conducts a substantial portion of business in interstate commerce. Because broccoli is a commodity commonly shipped in interstate commerce and this particular shipment was shipped for resale by a produce dealer doing a substantial portion of its business in interstate commerce, the shipment in question was in interstate commerce under the PACA. See *The Produce Place v. United States Department of Agriculture*, 319 U.S. App D.C. 369 (1996). The Department has interstate commerce jurisdiction in this matter and may properly resolve the pending dispute between Complainant and Respondent.

Having resolved the interstate commerce issue raised by Respondent, we will now consider Respondent's allegation that it accepted the broccoli crowns only after Complainant verbally agreed to change the price terms of the contract to \$2.25 per carton. The party who claims the contract was modified has the burden of proof. *Regency Packing Co., Inc. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983); *F. H. Hogue Prod. Co. v. Singer's sons*, 33 Agric. Dec. 451 (1974). The only evidence Respondent offers to support its allegation that the price terms of the contract were changed to \$2.25 per carton is its statement to this

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<sup>9</sup> Complainant submitted additional evidence with its Motion in response to the Notice to Show Cause. Complainant's Motion in response to the Notice to Show Cause is being treated as a petition to reopen the hearing to take further evidence under Section 47.24(b) of the Rules of Practice (7 C.F.R. § 47.24(b)).

<sup>10</sup> Complainant also submitted invoices indicating that, in June of 2006, a shipment of carrots purchased by Complainant from Respondent was ultimately shipped to Complainant's customer in Alberta, Canada.

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effect in its sworn Answer. While Respondent also states that it has telephone records to support this allegation, Respondent neglected to submit these records.

In response to Respondent's sworn allegation of a contract price modification, Complainant submitted additional evidence in the form of an Opening Statement Affidavit from its President and Sales Manager, Patrick Smith, wherein Mr. Smith asserts, in pertinent part, as follows:

As I recall it was on March 15, 2007 that I personally sold 616 cartons of broccoli crowns to Mr. Guy Maggio of GEM Sales for a confirmed price of \$4.25 per carton... At no time was I ever advised by Mr. Maggio that the product had condition problems. At no time was I ever advised by Mr. Maggio or did I ever receive from Mr. Maggio a USDA inspection on the 616 cartons of broccoli crowns. At all times I was expecting payment in full as invoiced totaling \$2,618.00.

Respondent did not submit any additional evidence in response to Mr. Smith's sworn denial that the contract price of the broccoli crowns was modified. Moreover, we also note that after Respondent paid Complainant \$2.25 per carton, or a total of \$1,386.00, for the broccoli crowns, Complainant's Patrick Smith promptly sent Respondent a memo that reads as follows:

I RECEIVED YOUR CHECK NO. 042376, DATED 4/13/07 FOR \$5,867.30. PSI NO. P6873 FOR \$2,618.00 WAS SHORT PAID BY \$1,232.00. THIS AMOUNT IS DUE AND PAYABLE. APPARENTLY, YOU MADE AN UNAUTHORIZED DEDUCTION ON MY INVOICE NO. 6873. WE DID NOT AGREE TO ANY ADJUSTMENT ON THIS FILE. PLEASE PAY THE BALANCE DUE OF \$1,232.00.<sup>11</sup>

Given the promptness with which Mr. Smith took exception to the payment received from Respondent, and in light of his testimony asserting that he was never advised of any condition problems with the

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<sup>11</sup> See Complaint, Exhibit No. 3.

product and that he at all times expected payment in full as invoiced, we conclude that Respondent has failed to sustain its burden to prove by a preponderance of the evidence that Complainant agreed to reduce the price of the broccoli crowns to \$2.25 per carton.

Having failed to establish that the contract price of broccoli crowns was modified, Respondent is liable to Complainant for the broccoli crowns it accepted at the agreed purchase price of \$4.25 per carton, or \$2,618.00. Respondent paid Complainant \$1,386.00 for the broccoli crowns. Therefore, there remains a balance due Complainant from Respondent of \$1,232.00.

Respondent's failure to pay Complainant \$1,232.00 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

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

**Order**

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$1,232.00, with interest thereon at the rate of 0.69 % per annum from April 1, 2007, until paid, plus the amount of \$300.00.

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

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**JAMES C. CONNER AND ALICIA ISAIS v. MCBRYDE  
PRODUCE, LLC D/B/A FARMERS SELECT.  
PACA Docket No. R-09-033.  
Decision and Order.  
Filed January 13, 2010.**

**PACA-R -- Breach of Contract - Breach of warranty of merchantability -  
Cabbage.**

A timely inspection of green cabbage, showing 35% quality defects (ranging 15% - 61%), and 3% yellowing, and 2% insect damage, for a checksum of 40% damage by quality and condition defects, including 8% serious damage by quality defects, was held to show a breach of the implied warranty of merchantability (U.C.C. § 2-314).

Patrice H. Harps, Presiding Officer.

Earl E. Elliott, Examiner.

Complainant, *pro se*.

Respondent, *pro se*.

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

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of \$13,839.02 in connection with eight truckloads of perishable agricultural commodities, consisting of cabbage and watermelon, 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 the loads in dispute did not all cross state lines in the course of interstate commerce.

The amount claimed in the Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in 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. Neither party filed any additional evidence or Briefs.

#### **Findings of Fact**

1. Complainant is a partnership comprised of James C. Conner and Alicia Isais doing business as Farmers Select, whose post office address is 34123 FM 490, Edinburg, Texas, 78541-6995. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, McBryde Produce, LLC, is a limited liability company, whose post office address is P.O. Box 1483, Uvalde, Texas, 78802-1483. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about April 10, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 175 (14-16 count) sacks of cabbage at \$4.00 per sack f.o.b., or \$700.00, plus \$25.00 for pallets, for a total agreed price of \$725.00, billed on invoice number 07-3005 in accordance with Respondent's purchase order number 07-572. (ROI, Ex. A, p. 4) Respondent paid Complainant \$725.00 in full for the cabbage with its check number 1605, dated December 13, 2007. (ROI, Ex. G, p. 1-2)
4. On or about April 26, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of

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Texas to Respondent, "AS PER BUYER," 200 sacks of jumbo cabbage at \$4.00 per sack f.o.b., or \$800.00, plus \$25.00 for pallets, for a total agreed price of \$825.00, billed on invoice number 07-3034 in accordance with Respondent's purchase order number 07-605. (ROI, Ex. A, p. 5) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the cabbage on April 26, 2007, with instructions to maintain temperature of 34 degrees Fahrenheit. (Complaint, Ex. 27) Respondent paid Complainant \$800.00 with its check number 1426, dated July 16, 2007, leaving an unpaid balance of \$25.00. (ROI, Ex. A, p. 6)

5. On or about May 2, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 120 sacks of jumbo cabbage at \$4.50 per sack f.o.b., or \$540.00, plus \$15.00 for pallets, for a total agreed price of \$555.00, billed on invoice number 07-3044 in accordance with Respondent's purchase order number 07-611. (Complaint, Ex. 2-3) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the cabbage on May 2, 2007, with instructions to maintain temperature between 32 to 34 degrees Fahrenheit. (Complaint, Ex. 3) Respondent resold the truckload of cabbage and diverted it to a customer in Denver, Colorado. Respondent paid Complainant \$495.00 with its check number 1448, dated August 8, 2007, leaving an unpaid balance of \$60.00. (Complaint, Ex. 4-5)

6. On or about May 10, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 753 cartons of red cabbage at \$10.00 per carton f.o.b., for a total agreed price of \$7,530.00, billed on invoice number 07-3063 in accordance with Respondent's purchase order number 07-623A. (Complaint, Ex. 6) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the cabbage on May 10, 2007, with instructions to maintain temperature at 34 degrees Fahrenheit. (Complaint, Ex. 7) Respondent paid Complainant \$3,738.25 with its check number 1448, dated August 8, 2007, leaving an unpaid balance of \$3,791.75. (Complaint, Ex. 8)

7. On or about May 21, 2007, Complainant, by oral contract, sold to

Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 35 cartons of red cabbage at \$9.75 per carton f.o.b., or \$341.25, plus \$5.00 for pallets, for a total agreed price of \$346.25, billed on invoice number 07-3091A in accordance with Respondent's purchase order number 07-658. (Complaint, Ex. 1, and ROI, Ex. A, p. 14) Respondent paid Complainant \$341.25 with its check number 1606, dated December 13, 2007. Though Respondent's check was short \$5.00, Complainant accepted the check as payment in full for the red cabbage. (Complaint, Ex. 1, and ROI Ex. G, p. 3) Complainant also sold and shipped 350 cartons of green cabbage to Respondent in the same shipment, number 07-3091A, in accordance with Respondent's purchase order number 07-658. Complainant did not bill Respondent for the 350 cartons of green cabbage, which were rejected by Respondent's customer. (Answer, Ex. 34-38)

8. On May 24, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business in Oklahoma City, Oklahoma, on the 350 cartons of green cabbage mentioned in Finding of Fact number 7. The cabbage was loaded at the time of the inspection and the inspector verified the carton count. The pulp temperatures ranged from 45 to 46 degrees Fahrenheit at the time of the inspection. The inspection revealed the cabbage was affected by 35% quality defects (15% to 61% thrips injury or edema, insect), 3% yellowing, and 2% insect damage, for a total of 40% damage by quality and condition defects, including 8% serious damage by quality defects. (Answer, Ex. 35)

9. On or about June 8, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 56-35 count bins (42,859 pounds) of seeded watermelons at \$.095 per pound f.o.b., for a total agreed price of \$4,071.61, billed on invoice number 07-3113 in accordance with Respondent's purchase order number 1005. (Complaint, Ex. 9) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 8, 2007, with instructions to maintain temperature

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between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 10) Respondent resold the watermelons to a customer in Chicago, Illinois. (Answer, Ex. 5) Respondent paid Complainant \$3,594.25 with its check number 1283, dated September 18, 2007, leaving an unpaid balance of \$477.36. (Complaint, Ex. 11)

10. On or about June 9, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 40,886 pounds of seedless watermelons (45 count bins) at \$.128 per pound f.o.b., for a total agreed price of \$5,233.41, billed on invoice number 07-3115 in accordance with Respondent's purchase order number 1007. (Complaint, Ex. 12) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 9, 2007, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 13) Respondent resold the watermelons to a customer in San Antonio, Texas, who rejected the watermelons to Respondent. Respondent then sold the watermelons to another customer in San Antonio, Texas. (Answer, Ex. 7-8) Respondent paid Complainant \$825.00 with its check number 1283, dated September 18, 2007, leaving an unpaid balance of \$4,408.41. (Complaint, Ex. 14)

11. On or about June 13, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 58-45 count bins (41,843 pounds) of seeded watermelons at \$.095 per pound f.o.b., for a total agreed price of \$3,975.09, billed on invoice number 07-3117, in accordance with Respondent's purchase order number 1020. (Complaint, Ex. 15) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons to "AS PER BUYER" on June 13, 2007, in a trailer with license plate number 197445, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 16) On or about June 14, 2007, Respondent sold 58 bins of small red watermelons, to a customer in North Kansas City, Missouri, and shipped the watermelons

to a destination in Overland Park, Kansas, in a trailer with license plate number 361587, which was pulled by a tractor with license plate number 361018. (Answer, Ex. 10 and 13) The customer in Overland Park, Kansas, had the watermelons weighed (Answer, Ex. 9-15), and Respondent alleges the weight was 4,000 pounds short.<sup>1</sup> Respondent paid Complainant \$3,524.59 with its check number 1283, dated September 18, 2007, leaving an unpaid balance of \$450.50. (Complaint, Ex. 17)

12. 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 Texas to Respondent, "AS PER BUYER," 58-35 count bins (41,984 pounds) of seeded watermelons at \$.11 per pound, f.o.b., for a total agreed price of \$4,618.24, billed on invoice number 07-3194 in accordance with Respondent's purchase order number 1038. (Complaint, Ex. 18) The corresponding bill of lading is signed by the truck driver, "Roldan R Gonzalez Rolgon Corp," as agent of Respondent and shows Complainant shipped the watermelons on June 15, 2007, in a trailer with license plates number C1434wFL, and with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 19) On or about June 17, 2007, Respondent sold 58 bins of watermelons, to Wal-Mart, New Caney, Texas, which rejected the watermelons to Respondent on June 18, 2007. (Answer, Ex. 19, and ROI, Ex. C, p. 29) Respondent then resold the 58 bins of watermelons to Roger Ramos Produce, Houston, Texas. Respondent's invoice number 07-1039 shows it used the same trucking company, Rolgon, as shown on Complainant's original invoice. (Answer, Ex. 17) Respondent paid Complainant \$1,932.58 with its check number 1132, dated August 9, 2007, leaving an unpaid balance of \$2,685.66. (Complaint, Ex. 20)

13. On June 18, 2007, the U.S.D.A. issued an inspection report at

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<sup>1</sup> There is no U.S.D.A. inspection report in the case file and no other evidence in the case file to account for the 4,000 pound discrepancy in the weight of the watermelons.

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Respondent's customer's place of business, Roger Ramos Produce, Houston, Texas, on 58 bins of watermelons. The inspector verified the bin count of the watermelons, which were loaded at the time of the inspection in a trailer with identification number 2141CB FL, which does not match the truck identification shown on the bill of lading. (Finding of Fact 12) In addition, the weight of the watermelons shown on the inspection report (39,150 pounds) does not match the (41,984 pounds) invoiced weight.<sup>2</sup> (Finding of Fact 12) The inspection was restricted to the 25 bins nearest the rear door of the trailer. The pulp temperatures ranged from 60 to 62 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by an average of 16% quality defects (scars and rind worm injury), 4% transit rubs, and 2% decay, for a total of 22% damage by quality and condition defects, including 5% serious damage by quality and condition defects. (Complaint, Ex. 22)

14. On or about June 16, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 54-45 count bins (38,294 pounds) of seeded watermelons at \$.095 per pound f.o.b., for a total agreed price of \$3,637.93, billed on invoice number 07-3164 in accordance with Respondent's purchase order number 1022. (Complaint, Ex. 23) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 16, 2007, in a trailer with license plate number 78810/465085, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (ROI, Ex. A, p. 26) On or about June 16, 2007, Respondent sold 54 bins of red seeded watermelons, to a customer in Overland Park, Kansas, in the same trailer used by Complainant with license plate numbers 78810/465085. (Answer, Ex. 30) Respondent paid Complainant \$1,697.59 with its check number 11283, dated September 18, 2007, leaving an unpaid balance of \$1,940.34. (Complaint, Ex. 25)

15. On June 18, 2007, the U.S.D.A. issued an inspection report at

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<sup>2</sup> There is no evidence in the case file to account for the discrepancy in the Truck identification number or the weight of the truckload of watermelons.

Respondent's customer's place of business in Overland Park, Kansas, on 54 bins (38,450 pounds) of seeded watermelons. This weight does not match the (38,294pounds) invoiced weight of the watermelons.<sup>3</sup> (Fact number 14) The watermelons were unloaded at the time of the inspection and the inspector verified the bin count. The pulp temperatures ranged from 62 to 64 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by an average of 19% quality defects (rind worm injury), 3% bruising, and 3% decay, for a total of 25% damage by quality and condition defects, including 3% serious damage by condition defects. (Answer, Ex. 27) 16.The informal complaint was filed on October 20, 2007, which is within nine months from the accrual of the cause of action.

### **Conclusions**

Complainant brings this action to recover the unpaid balance of the agreed purchase price for eight truckloads of perishable agricultural commodities, consisting of cabbage and watermelon, allegedly sold and shipped f.o.b. to Respondent in the course of interstate commerce. Complainant states Respondent accepted all of the vegetables in compliance with the contracts of sale. Complainant originally filed its informal complaint with the Department claiming \$14,910.27 was due on ten truckloads of fruits and vegetables,<sup>4</sup> but Complainant has since accepted \$1,071.25 from Respondent as payment for two of the truckloads and has thereby reduced the amount of its Complaint to \$13,839.02.<sup>5</sup> In support of its allegations, Complainant submitted copies

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<sup>3</sup> There is no evidence in the case file to account for the discrepancy in the weight of the truckload of watermelons.

<sup>4</sup> ROI, Ex. A, p. 1-3.

<sup>5</sup> Complaint, ¶¶4-10, and Ex. 1.

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of its receivables report, invoices, and bills of lading.<sup>6</sup>

In response to Complainant's allegations, Respondent submitted a sworn Answer generally denying the allegations and asserting the following:

The loads in dispute did not all cross state lines in the course of interstate commerce. McBryde load #07-0623A, 07-1007 and 07-1030 were all loaded at a loading point in the state of Texas and delivered to a delivery point in the state of Texas. There fore [*sic*] these loads were not in the course of interstate commerce.<sup>7</sup>

We will first consider the jurisdictional defense asserted by Respondent, because Respondent's success or failure in proving this defense will determine whether we are able to consider all of the matters in dispute. Goods must be sold in or in contemplation of interstate commerce for this forum to have jurisdiction. *Miller Farms & Orchards v. C.B. Overby*, 26 Agric. Dec. 299 (1967). Complainant has the burden of establishing that the Department has jurisdiction over the disputed transactions. This burden can be met by proving that the shipments were sold in or in contemplation of interstate commerce by providing adequate evidence that: (1) the shipments actually moved from a state to any place outside that state;<sup>8</sup> (2) the shipments moved between points within the same state but through any place outside that state;<sup>9</sup> (3) the transactions were negotiated by parties located in different states;<sup>10</sup> (4) the parties entered into the transactions contemplating that the shipments

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<sup>6</sup> Complaint, Ex. 1-28, and ROI, Ex. A, p. 4-27.

<sup>7</sup> Answer, ¶7.

<sup>8</sup> See, 7 U.S.C. 499a(b)(3).

<sup>9</sup> *Id.*

<sup>10</sup> *Steve Almquist d/b/a Steve Almquist Sales & Brokerage v. Mountain High Potatoes & Onion, Inc.*, 65 Agric. Dec. 1418 (2006).

would travel in interstate commerce;<sup>11</sup> or (5) “the shipments are of a type of produce that commonly moves in interstate commerce and were shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce.”<sup>12</sup>

Copies of invoices, bills of lading, and inspection reports attached by Respondent to its Answer show it sells and ships produce to numerous destinations outside of the state of Texas, including the states of Colorado, Illinois, Kansas, Missouri, and Oklahoma.<sup>13</sup> Similar evidence showing Respondent sells and ships produce to numerous destinations outside of the state of Texas, including the states of Colorado, Illinois, Kansas, Missouri, and Oklahoma was submitted by the parties in the course of the Department’s informal proceedings and is contained in the ROI.<sup>14</sup>

Based on the evidence submitted by the parties, we conclude that Respondent conducts a substantial portion of its business in interstate commerce. Cabbage and watermelons are produce items commonly shipped in interstate commerce and these particular produce items were purchased for resale by a produce dealer doing a substantial portion of its business in interstate commerce. Therefore, all of the shipments in question were in interstate commerce. The Department has jurisdiction in this matter and may properly resolve the pending dispute between Complainant and Respondent.

Complainant’s invoices and bills of lading in evidence show Uvalde, Texas, as Respondent’s billing address, but show the contract destinations were, “AS PER BUYER,” which indicates Complainant was aware Respondent would resell the vegetables and the ultimate

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<sup>11</sup> *Tulelake Potato Distributors, Inc. V. John M. Giustino d/b/a Grand Slam Produce*, 52 Agric Dec. 752 (1993).

<sup>12</sup> *The Produce Place v. United States Department of Agriculture*, 91 F.3d 173 (1996), *cert. den.*, 519 U.S. 1116 (1997).

<sup>13</sup> Answer, Ex. 1-6, 9-15, 27-30, and 31-38.

<sup>14</sup> ROI, Ex. C, p. 8-15, 21-28, 41-47, and 51-53.

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destinations would not be Respondent's address in Uvalde, Texas. On this basis, we conclude the warranty of suitable shipping condition was applicable for all of the shipments in question to the ultimate destinations assigned by Respondent, which could be a greater distance than Uvalde, Texas. *Bud Antle, Inc. v. Pacific Shore Marketing Corp.*, 50 Agric. Dec. 954 (1991).

In f.o.b. sales the warranty of suitable shipping condition is applicable.<sup>15</sup> Suitable shipping condition is defined in the Regulations (7 C.F.R. § 46.43(j)) as meaning:

. . . that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.<sup>16</sup>

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<sup>15</sup> See, 7 C.F.R. § 46.43(i), which defined f.o.b. as meaning “. . . the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.”

<sup>16</sup> The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) require delivery to contract destination “without *abnormal* deterioration”, or what is elsewhere called “good delivery” (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See, Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be U. S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination  
(continued...)

Having resolved the interstate commerce issue and the applicability of the warranty of suitable shipping condition to all of the shipments in question, we will now consider the testimony and evidence submitted by the parties in relation to the ten invoices originally submitted by Complainant for our consideration, as follows:

Complainant's invoice number 07-3005

This shipment involves 175 (14-16 count) sacks of cabbage purchased by Respondent for a total agreed price of \$725.00 f.o.b.<sup>17</sup> Respondent paid Complainant \$725.00 in full.<sup>18</sup> Therefore this invoice has been resolved in full.

Complainant's invoice number 07-3034

This shipment involves 200 sacks of jumbo cabbage Respondent purchased for a total agreed price of \$825.00 f.o.b.<sup>19</sup> Respondent paid Complainant \$800.00, leaving an unpaid balance of \$25.00,<sup>20</sup> which Complainant seeks to recover in this proceeding. Respondent does not

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<sup>16</sup>(...continued)  
without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951).

<sup>17</sup> ROI, Ex. A, p. 4.

<sup>18</sup> Complaint, Ex. 1, and ROI, Ex. G, p. 1-2.

<sup>19</sup> Complaint, ¶4a, and ROI, Ex. A, p. 5.

<sup>20</sup> Complaint, ¶4a, and ROI, Ex. A, p. 6.

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deny accepting the cabbage.

In defense of its failure to make payment in full, Respondent asserts in its Answer that it was not aware of the \$25.00 pallet charge until it received Complainant's invoice.<sup>21</sup> We note, Respondent does not allege it promptly objected to the \$25.00 charge. 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 (1983). On this basis, we find Respondent liable to Complainant for the unpaid balance of \$25.00.

Complainant's invoice number 07-3044

This shipment involves 120 sacks of jumbo cabbage Respondent purchased for a total agreed price of \$555.00 f.o.b.<sup>22</sup> Respondent alleges the cabbage had brown and yellow leaves, and looked old on arrival in Denver, Colorado.<sup>23</sup> Respondent, however, has not provided any evidence it attempted to reject any of the cabbage to Complainant. Failure to reject produce is an act of acceptance.<sup>24</sup> A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc.*, 60 Agric. Dec. 840 (2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353 (1988). The burden to prove a breach of contract rests with the buyer of accepted goods. See, U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (1969).

Respondent paid Complainant \$495.00, leaving an unpaid balance of

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<sup>21</sup> Answer, ¶4a.

<sup>22</sup> Complaint, ¶4b, and Ex. 2.

<sup>23</sup> Answer, ¶4b, and Ex. 1.

<sup>24</sup> See, 7 C.F.R. § 46.2 (dd)(3).

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\$60.00,<sup>25</sup> which Complainant seeks to recover in this proceeding. Respondent did not submit any evidence to establish a breach of contract by Complainant, but asserts in its Answer:

This load had some tipburn in the cabbage. This was reported to Mr. Conner at 9:00AM on May 5, 2007. It was agreed between me and Mr. Conner not to take an inspection on the 120 bags and let the customer handle the cabbage on an open basis. . .<sup>26</sup>

The party who claims the contract was modified has the burden of proof. *Regency Packing Co., Inc. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983); *F. H. Hogue Prod. Co. v. Singer's Sons*, 33 Agric. Dec. 451 (1974). Finding no evidence that Complainant breached the contract or that Complainant agreed to modify the contract to open terms, we find Respondent liable to Complainant for the unpaid balance of \$60.00.

Complainant's invoice number 07-3063

This shipment involves 753 cartons of red cabbage Respondent purchased for a total agreed price of \$7,530.00 f.o.b.<sup>27</sup> Respondent paid Complainant \$3,738.25, with check number 1448, leaving an unpaid balance of \$3,791.75,<sup>28</sup> which Complainant seeks to recover in this proceeding. Respondent does not deny accepting the cabbage, but asserts the following defense in its Answer, "This load was originally billed at \$10.00 per box I told Mr. Conner that I could only pay \$8.00

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<sup>25</sup> Complaint, ¶4b, and Ex. 4-5.

<sup>26</sup> Answer, ¶4b.

<sup>27</sup> Complaint, ¶4c, and Ex. 6.

<sup>28</sup> Complaint, ¶4c, and Ex. 8.

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and he agreed to the \$8.00 price.”<sup>29</sup> The party who claims the contract was modified has the burden of proof.<sup>30</sup>

Respondent has not provided any evidence Complainant breached the contract or that Complainant agreed to modify the contract but deducted the amount of the alleged contract modification, \$2.00 x 753 cartons = \$1,506.00, plus \$2,285.75 in alleged damages arising from green cabbage purchased in transaction number 07-3091A discussed below, for a total deduction of \$3,791.75. On this basis we find Respondent liable to Complainant for the unpaid balance of \$3,791.75.

Complainant’s invoice number 07-3091A

This shipment involves 35 cartons of red cabbage Respondent purchased for a total agreed price of \$346.25 f.o.b.<sup>31</sup> Respondent paid Complainant \$341.25, which Complainant accepted as payment in full for the red cabbage.<sup>32</sup>

Respondent also purchased 350 cartons of green cabbage in the same transaction, which Complainant did not include on the invoice because Respondent’s customer rejected the green cabbage, and Respondent rejected the cabbage back to Complainant. In its Answer, Respondent alleges Complainant breached the contract due to the condition of the green cabbage upon arrival.<sup>33</sup>

On May 24, 2007, the U.S.D.A. issued an inspection report at Respondent’s customer’s place of business in Oklahoma City, Oklahoma, on the 350 cartons of green cabbage. The green cabbage was loaded at the time of the inspection and the inspector verified the carton count. The pulp temperatures ranged from 45 to 46 degrees Fahrenheit

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<sup>29</sup> Answer, ¶4c.

<sup>30</sup> *Regency Packing Co., Inc.*, 42 Agric. Dec. 2042; *F.H. Hogue Prod. Co.*, 33 Agric. Dec. 457.

<sup>31</sup> Complaint, Ex. 1, and ROI, Ex. A, p. 14.

<sup>32</sup> Complaint, Ex. 1, and ROI, Ex. G, p. 1 and 3.

<sup>33</sup> Answer, ¶10, and Ex. 34-38, and ROI, Ex. G, p. 1 and 3.

at the time of the inspection. The inspection revealed the green cabbage was affected by an average of 35% quality defects (ranging 15% - 61% thrips injury or edema, insect), 3% yellowing, and 2% insect, for a total of 40% damage by quality and condition defects, including 8% serious damage by quality defects.<sup>34</sup>

To determine whether a commodity was in suitable shipping condition based on a federal inspection at destination, we normally look at the shipping point tolerances for defects set forth in the U.S. grade standards for the commodity, and we apply an additional allowance to the tolerances set forth in the standards to allow for normal deterioration in transit. We consulted the *United States Standards for Grades of Cabbage*,<sup>35</sup> which specifies defect tolerance at shipping point for cabbage sold under the U.S. No. 1 Grade, as follows:

. . . not more than a total of 10 percent, by weight, of the heads in any lot may fail to meet the requirements of this grade, but not more than one-fifth of this amount, or 2 percent, shall be allowed for soft decay.

The green cabbage in question was affected by 5% condition defects. Finding no evidence that the green cabbage was sold with a grade designation, only the tolerances for condition defects set forth in the U.S. Grade Standards are relevant to determining whether the green cabbage was in suitable shipping condition. We need not consider the suitable shipping allowance, since the 5% condition defects revealed by the federal inspection fall within the shipping point tolerances specified in the standards. However, the inspection also disclosed the green cabbage was affected by 35% quality defects (ranging 15% - 61% thrips injury or edema, insect), which are permanent defects not normally

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<sup>34</sup> Answer, Ex. 35.

<sup>35</sup> See, 7 C.F.R. §§ 51.450 - 51.464 the *United States Standards for Grades of C a b b a g e* available on the Internet at: <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5050254>.

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relevant to produce sold without a grade specification.<sup>36</sup> There are, however, instances where permanent defects are sufficiently extensive to cause the product to be unmerchantable, which would be a breach of the implied warranty of merchantability. For goods to be merchantable they must pass without objection in the trade under the contract description.<sup>37</sup>

The common law warranty of merchantability is applicable only at shipping point. *North American Produce Distributors, Inc. v. Eddie Arakelian*, 41 Agric. Dec. 759 (1982); and *J. D. Bearden Produce Company v. Pat's Produce Company*, 12 Agric. Dec. 682 (1953). Therefore, when we look at a destination inspection to establish a breach of the warranty of merchantability, the defects disclosed by the inspection must be sufficiently severe so as to allow us to conclude with reasonable certainty that the produce was non-conforming at shipping point.<sup>38</sup>

In *Martori Bros. Distributors v. Olympic Wholesale Produce & Foods, Inc.*, 53 Agric. Dec. 887 (1994) a timely inspection showing 37% quality defects in broccoli in the form of hollow stem, with a range of 7 to 79%, was held to show a breach of the warranty of merchantability where the broccoli was sold f.o.b. without reference to any grade.

Similarly, here, where the green cabbage was sold f.o.b. without reference to any grade and a timely inspection revealed 35% quality defects (ranging 15% - 61% thrips injury or edema, insect), and 3% yellowing, and 2% insect, for a total of 40% damage by quality and

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<sup>36</sup> Permanent or quality defects may be relevant to the determination of whether there is a breach of contract for produce sold without a grade specification where the defects are sufficiently extensive to establish that the produce is not merchantable. *Martori Bros. Distributors v. Olympic Wholesale Produce & Foods, Inc.*, 53 Agric. Dec. 887 (1994), where a timely inspection showing 37% quality defects in broccoli in the form of hollow stem, ranging 7% to 79%, was held to show a breach of the warranty of merchantability where the broccoli was sold f.o.b. without reference to any grade. See, also, *Teixeira Farms, Inc. v. Community-Suffolk, Inc.*, 52 Agric. Dec. 1700 (1993).

<sup>37</sup> See, U.C.C. § 2-314(2)(a).

<sup>38</sup> *Martori Bros. Distributors v. Houston Fruitland, Inc.*, 55 Agric. Dec. 1331 (1996).

condition defects, including 8% serious damage by quality defects,<sup>39</sup> we find the defects are sufficiently severe for us to conclude with reasonable certainty the cabbage was non-conforming at shipping point, and to find that Complainant breached the warranty of merchantability.<sup>40</sup> Rejection of the green cabbage by Respondent's customer was justified. Where a load of produce is effectively rejected the seller has the burden of proving it complied with the contract. *Bud Antle v. Bohack*, 32 Agric. Dec. 1589 (1973). We assume Complainant agrees the green cabbage did not comply with the contract since Complainant did not bill Respondent for the green cabbage.

Respondent is claiming damages from incidental expenses resulting from Complainant's breach of contract.<sup>41</sup> We find Respondent is entitled to deduct such damages, including \$125.00 for the cost of the federal inspection,<sup>42</sup> and \$1,260.00 for inbound freight for the 350 cartons of cabbage at \$3.60 per carton,<sup>43</sup> for total damages of \$1,385.00. Since Respondent's customer rejected the green cabbage, we do not understand Respondent's deduction for expenses relating to truck detention and layover, unloading and reloading, and extra drops. We find that these expenses are not sufficiently explained and documented, and we find no evidence that Complainant agreed to be liable for these expenses. Therefore, these expenses should be disallowed.<sup>44</sup>

A party may offset losses from one transaction by deducting them from payment due on another. *Phillip Richard Weller d/b/a Richard Weller v. William P. George d/b/a William King George*, 41 Agric. Dec.

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<sup>39</sup> Complaint, Ex. 8, and Answer, ¶10, and Ex. 35.

<sup>40</sup> See, U.C.C. § 2-314.

<sup>41</sup> See, U.C.C. § 2-715(1).

<sup>42</sup> Answer, Ex. 35.

<sup>43</sup> Answer, Ex. 36.

<sup>44</sup> Answer, Ex. 34-38.

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294 (1982); *McMillan Brokerage Co. v. Bushman Growers Sales, Inc.*, 32 Agric. Dec. 950 (1973). However, as previously discussed, Respondent deducted its total alleged damages of \$2,285.75 from a payment made to Complainant with its check number 1448, dated August 8, 2007,<sup>45</sup> for Complainant's invoice number 07-3063. We find Respondent's allowable deduction for damages is only \$1,385.00.

Complainant's invoice number 07-3113

This shipment involves 56-35 count bins (42,859 pounds) of seeded watermelons Respondent purchased for a total agreed price of \$4,071.61 f.o.b.<sup>46</sup> Respondent paid Complainant \$3,594.25, leaving an unpaid balance of \$477.36,<sup>47</sup> which Complainant seeks to recover in this proceeding.

In defense of its failure to pay Complainant in full, Respondent alleges in its Answer that four bins of watermelons were leaking upon arrival in Chicago, Illinois, and were lost due to shrinkage during repacking, which it alleges Complainant acknowledged.<sup>48</sup> Respondent has not provided any evidence to support this allegation and has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce in a reasonable time is an act of acceptance.<sup>49</sup> We conclude Respondent accepted the truckload of watermelons. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages

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<sup>45</sup> Complaint, ¶4c, and Ex. 8, and Answer, Ex. 34.

<sup>46</sup> Complaint, ¶4d, and Ex. 9.

<sup>47</sup> Complaint, ¶4d, and Ex. 11.

<sup>48</sup> Answer, ¶4d, and Ex. 2.

<sup>49</sup> See, 7 C.F.R. § 46.2 (dd)(3).

resulting from any breach of contract by the seller.<sup>50</sup> The burden to prove a breach of contract rests with the buyer of accepted goods.<sup>51</sup>

Respondent has not provided any evidence Complainant breached the contract or agreed to be liable for any watermelons lost due to shrinkage in repacking. On this basis, we find Respondent liable to Complainant for the unpaid balance of \$477.36.

Complainant's invoice number 07-3115

This shipment involves 40,886 pounds of seedless watermelons (45 count bins) Respondent purchased for a total agreed price of \$5,233.41 f.o.b.<sup>52</sup> Respondent resold the watermelons to a customer in San Antonio, Texas, who rejected the watermelons to Respondent. Following its customer's rejection, Respondent sold the watermelons to another customer in San Antonio, Texas.<sup>53</sup> Respondent paid Complainant \$825.00, leaving an unpaid balance of \$4,408.41,<sup>54</sup> which Complainant seeks to recover in this proceeding. Respondent has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce is an act of acceptance.<sup>55</sup> We conclude Respondent accepted the truckload of watermelons.

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

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<sup>50</sup> *Ocean Breeze Export, Inc.*, 60 Agric. Dec. 840; *World Wide Imp-Ex, Inc.*, 47 Agric. Dec. 353.

<sup>51</sup> See, U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co.*, 28 Agric. Dec. 511.

<sup>52</sup> Complaint, ¶4e, and Ex. 12.

<sup>53</sup> Answer, ¶4e, and Ex. 7-8.

<sup>54</sup> Complaint, ¶4e, and Ex. 14.

<sup>55</sup> See, 7 C.F.R. § 46.2 (dd)(3).

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contract by the seller.<sup>56</sup> The burden to prove a breach of contract rests with the buyer of accepted goods.<sup>57</sup> Respondent has not provided any evidence to establish Complainant breached the contract. On this basis, we find Respondent liable to Complainant for the unpaid balance of \$4,408.41.

Complainant's invoice number 07-3117

This shipment involves 58-45 count bins (41,843 pounds) of seeded watermelons Respondent purchased for a total agreed price of \$3,975.09 f.o.b.<sup>58</sup> The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons to a final destination "AS PER BUYER" on June 13, 2007, in a trailer with license plate number 197445.<sup>59</sup>

On June 14, 2007, Respondent sold 58 bins of red watermelons, to a customer in North Kansas City, Missouri, with a final destination of Overland Park, Kansas, which Respondent shipped in a trailer with license plate number 361587, and pulled by a tractor with license plate number 361018.<sup>60</sup> Respondent's customer had the watermelons weighed,<sup>61</sup> and Respondent alleges the weight was 4,000 pounds short.<sup>62</sup> No U.S.D.A. inspection report is contained in the case file. Respondent

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<sup>56</sup> *Ocean Breeze Export, Inc.*, 60 Agric. Dec. 840; *World Wide Imp-Ex, Inc.*, 47 Agric. Dec. 353.

<sup>57</sup> See, U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co.*, 28 Agric. Dec. 511.

<sup>58</sup> Complaint, ¶¶4f, and Ex. 15.

<sup>59</sup> Complaint, Ex. 16.

<sup>60</sup> Answer, Ex. 10 and 13.

<sup>61</sup> Answer, ¶¶4f, and Ex. 9-15.

<sup>62</sup> See, n. 1.

paid Complainant \$3,524.59, leaving an unpaid balance of \$450.50,<sup>63</sup> which Complainant seeks to recover in this proceeding.

Respondent has not provided any evidence it attempted to reject any of the watermelons on the original shipment to Complainant. Failure to reject produce in a reasonable time is an act of acceptance.<sup>64</sup> We therefore conclude Respondent accepted the original truckload of watermelons. 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.<sup>65</sup> The burden to prove a breach of contract rests with the buyer of accepted goods.<sup>66</sup>

We note the carrier's license plate numbers recorded on Respondent's scale tickets do not match the license plates recorded on Complainant's bill of lading. On this basis, we are unable to conclude with reasonable certainty that the identity of the bins of watermelons Respondent's customer had weighed matches the identity of the bins of watermelons Complainant shipped on a different truck. Furthermore, Complainant states the following in its Complaint, ". . . unauthorized deductions were made without any notification. . ." <sup>67</sup>

Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach of contract notify the seller of the breach or be barred from any remedy. *Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc.*, 42 Agric. Dec. 1194 (1985); *Granada Marketing Co. v. Ben Gatz Co.*, 37 Agric. Dec. 448 (1978).

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<sup>63</sup> Complaint, ¶4f and Ex. 17.

<sup>64</sup> See, 7 C.F.R. § 46.2 (dd)(3).

<sup>65</sup> *Ocean Breeze Export, Inc.*, 60 Agric. Dec. 840; *World Wide Imp-Ex, Inc.*, 47 Agric. Dec. 353.

<sup>66</sup> See, U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co.*, 28 Agric. Dec. 511.

<sup>67</sup> Complaint, ¶4(f).

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The purpose of the requirement is to defeat commercial bad faith; i.e., if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the breach by taking advantage of U.C.C. § 2-515, which gives either party upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence. *A. C. Carpenter, Inc. v. Boyer Potato Chips*, 28 Agric. Dec. 1557, 1560 (1969).

In the instant case, Complainant denies it was notified and Respondent has not furnished any evidence that it provided timely notification to Complainant and is thereby barred from any remedy. Finding no evidence Complainant breached the contract, we find Respondent is liable to Complainant for the unpaid balance of \$450.50.

Complainant's invoice number 07-3194

This shipment involves 58-35 count bins (41,984 pounds) of seeded watermelons Respondent purchased for a total agreed price of \$4,618.24 f.o.b.<sup>68</sup> The corresponding bill of lading is signed by the truck driver, "Roldan R Gonzalez Rolgon Corp, as agent of Respondent and shows Complainant shipped the watermelons on June 15, 2007, in a trailer with license plates number C1434wFL, and with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times.<sup>69</sup> On or about June 17, 2007, Respondent sold 58 bins of watermelons, to Wal-Mart, New Caney, Texas, which rejected the watermelons to Respondent on June 18, 2007.<sup>70</sup> Respondent resold the truckload of watermelons to Roger Ramos Produce, Houston, Texas. Respondent's invoice number 07-1039 shows it used the same trucking company, Rolgon, as shown on

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<sup>68</sup> Complaint, ¶4g, and Ex. 18.

<sup>69</sup> Complaint, Ex. 19.

<sup>70</sup> Answer, Ex. 19, and ROI, Ex. C, p. 29.

Complainant's original invoice.<sup>71</sup> Respondent paid Complainant \$1,932.58 with its check number 1132, dated August 9, 2007, leaving an unpaid balance of \$2,685.66,<sup>72</sup> which Complainant seeks to recover in this proceeding.

On June 18, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business, Roger Ramos Produce, Houston, Texas, on 58 bins of watermelons. The inspector verified the bin count of the watermelons, which were loaded at the time of the inspection in a trailer with identification number 2141CB FL, which does not match the truck identification number shown on the bill of lading. In addition, the weight of the watermelons shown on the inspection report (39,150 pounds) does not match the (41,984 pounds) invoiced weight.<sup>73</sup> The inspection was restricted to the 25 bins nearest the rear door of the trailer. The pulp temperatures ranged from 60 to 62 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by a total of 22% damage by quality and condition defects, including 5% serious damage by quality and condition defects.<sup>74</sup>

Respondent has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce is an act of acceptance.<sup>75</sup> A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from

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<sup>71</sup> Answer, Ex. 17.

<sup>72</sup> Complaint, Ex. 20.

<sup>73</sup> See, n. 2.

<sup>74</sup> Complaint, Ex. 22.

<sup>75</sup> See, 7 C.F.R. § 46.2 (dd)(3).

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any breach of contract by the seller.<sup>76</sup> The burden to prove a breach of contract rests with the buyer of accepted goods.<sup>77</sup>

Before we can consider whether the evidence supports a breach of contract by Complainant, we must consider the following statement by Complainant in its Complaint:

No trouble was reported on this file, . . . federal inspection provided does not match our load's identification . . . please note that inspection DOES NOT match our load's license plates and/or weight shipped; therefore, leaving us skeptical about this inspection . . .<sup>78</sup>

In its defense, Respondent asserts the following in its sworn Answer: The inspection taken on Farmers Select 07-3194 on the said commodity. Was taken in a timely manner and Famers Select was notified of the actions. The license plate number was written down incorrectly at the loading dock. Enclosed in (Exhibit 19-22) you will notice that the same carrier name is on all the bill and rejection notice.<sup>79</sup>

Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach of contract notify the seller of the breach or be barred from any remedy. *Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc.*, 42 Agric. Dec. 1194 (1985); *Granada Marketing Co. v. Ben Gatz Co.*, 37 Agric. Dec. 448 (1978).

The purpose of the requirement is to defeat commercial bad faith; *i.e.*, if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the breach by taking advantage of U.C.C. § 2-515, which gives either party

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<sup>76</sup> *Ocean Breeze Export, Inc.*, 60 Agric. Dec. 840; *World Wide Imp-Ex, Inc.*, 47 Agric. Dec. 353.

<sup>77</sup> See, U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co.*, 28 Agric. Dec. 511.

<sup>78</sup> Complaint, ¶¶4(g) and 5.

<sup>79</sup> Answer, ¶5.

upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence. *A. C. Carpenter, Inc. v. Boyer Potato Chips*, 28 Agric. Dec. 1557, 1560 (1969).

In *Quail Valley Marketing, Inc. v. John A. Cottle, d/b/a Valley Fresh Produce*, 60 Agric. Dec. 318 (2000), where the buyer knew how to contact the seller, and had the inspection results but delayed conveying them while sales were made, we found the buyer did not act in good faith, and notice of breach was not timely because the seller was prevented from procuring a U.S.D.A. appeal inspection. Similarly, here, Complainant denies it was notified and Respondent has not furnished any evidence that it provided timely notification to Complainant and is thereby barred from any remedy. We find Respondent is liable to Complainant for the unpaid balance of \$2,685.66.

Complainant's invoice number 07-3164

This shipment involves 54-45 count bins (38,294 pounds) of seeded watermelons Respondent purchased for a total agreed price of \$3,637.93 f.o.b.<sup>80</sup> The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 16, 2007, in a trailer with license plate number 78810KS/465085, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times.<sup>81</sup> On or about June 16, 2007, Respondent sold 54 bins of red seeded watermelons, to a customer in Overland Park, Kansas, in the same trailer used by Complainant with license plate

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<sup>80</sup> Complaint, ¶4h, and Ex. 23.

<sup>81</sup> ROI, Ex. A, p. 26.

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numbers 78810/465085.<sup>82</sup> Respondent alleges problems with the watermelons on arrival.<sup>83</sup> Respondent paid Complainant \$1,697.59, leaving an unpaid balance of \$1,940.34,<sup>84</sup> which Complainant seeks to recover in this proceeding.

On June 18, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business in Overland Park, Kansas, on 54 bins (38,450 pounds) of watermelons. This weight does not match the (38,294 pounds) invoiced weight of the watermelons.<sup>85</sup> The watermelons were unloaded at the time of the inspection and the inspector verified the bin count. The pulp temperatures ranged from 62 to 64 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by a total of 25% damage by quality and condition defects, including 3% serious damage by condition defects.<sup>86</sup>

Respondent has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce is an act of acceptance.<sup>87</sup> 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.<sup>88</sup> The burden to prove a breach of contract rests with the buyer of accepted goods.<sup>89</sup> Before we can consider whether the evidence supports a breach of

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<sup>82</sup> Answer, Ex. 30.

<sup>83</sup> Answer, Ex. 28-29.

<sup>84</sup> Complaint, ¶4h, and Ex. 25.

<sup>85</sup> See, n. 3.

<sup>86</sup> Answer, Ex. 27.

<sup>87</sup> See, 7 C.F.R. § 46.2 (dd)(3).

<sup>88</sup> *Ocean Breeze Export, Inc.*, 60 Agric. Dec. 840; *World Wide Imp-Ex, Inc.*, 47 Agric. Dec. 353.

<sup>89</sup> See, U.C.C. § 2-607(4). See, also, *The Grower-Shipper Potato Co.*, 28 Agric. Dec. 511.

contract by Complainant, we must consider the following statement by Complainant in its Complaint:

. . . (no trouble reported on this load, no federal inspection provided, unauthorized deduction).<sup>90</sup>

In its defense, Respondent asserts the following in its sworn Answer:

Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach of contract notify the seller of the breach or be barred from any remedy.<sup>91</sup> The purpose of the requirement is to defeat commercial bad faith; *i.e.*, if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the breach by taking advantage of U.C.C. § 2-515, which gives either party upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence.<sup>92</sup>

In *Quail Valley Marketing, Inc. v. John A. Cottle, d/b/a Valley Fresh Produce*, 60 Agric. Dec. 318 (2000), where the buyer knew how to contact the seller, and had the inspection results but delayed conveying them while sales were made, we found the buyer did not act in good faith, and notice of breach was not timely because the seller was prevented from procuring a U.S.D.A. appeal inspection. Similarly, here, Complainant denies it was notified and Respondent has not furnished any evidence that it provided timely notification to Complainant and is thereby barred from any remedy. However, Respondent asserts in its sworn Answer that Complainant agreed to

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<sup>90</sup> Complaint, ¶4(h).

<sup>91</sup> *Produce Specialists of Arizona, Inc.*, 42 Agric. Dec. 1194; *Granada Marketing Co.*, 37 Agric. Dec. 448.

<sup>92</sup> *A. C. Carpenter, Inc.*, 28 Agric. Dec. 1557, 1560.

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let its customer handle the watermelons on an open basis.<sup>93</sup> The party who claims the contract was modified has the burden of proof.<sup>94</sup> Respondent has not provided any evidence to prove Complainant agreed to amend any part of the contract. Finding no evidence Complainant breached the contract or agreed to amend the terms thereof, we find Respondent liable to Complainant for the unpaid balance of \$1,940.34.

The following table summarizes our findings, which were based upon the statements and evidence submitted by the parties for the ten transactions discussed above:

<u>Shipment Number</u>	<u>Invoice or Contract Number</u>	<u>Respond ent's Purchase Order Number</u>	<u>Agreed Contract Price</u>	<u>Amount Paid by Respond ent</u>	<u>Respond ent's Damages</u>	<u>Amount Respond ent owes to Complainant</u>
1	07 3005	572	\$725.00	\$725.00		\$0.00
2	07 3034	605	\$825.00	\$800.00		\$25.00
3	07 3044	611	\$555.00	\$495.00		\$60.00
4	07 3063	623A	\$7,530.00	\$3,738.25		\$3,791.75
5	07 3091A	558	\$346.25	\$346.25	\$1,385.00	(\$1,385.00)
6	07 3113	1005	\$4,071.61	\$3,594.25		\$477.36
7	07 3115	1007	\$5,233.41	\$825.00		\$4,408.41
8	07 3117	1020	\$3,975.09	\$3,524.59		\$450.50
9	07 3194	1038	\$4,618.24	\$1,932.58		\$2,685.66
10	07 3164	1022	<u>\$3,637.93</u>	<u>\$1,697.59</u>		<u>\$1,940.34</u>
			\$31,517.53	\$17,678.51	\$1,385.00	\$12,454.02

As shown on the table above, after we deducted Respondent's total payments of \$17,678.51, and Respondent's damages of \$1,385.00 from the total agreed contract price of \$31,517.53, we find Respondent liable

<sup>93</sup> Answer, ¶4h.

<sup>94</sup> *Regency Packing Co., Inc.*, 42 Agric. Dec. 2042; *F. H. Hogue Prod. Co.*, 33 Agric. Dec. 451.

to Complainant in the amount of \$12,454.02 for the mixed vegetables Respondent purchased from Complainant in the ten transactions.

Respondent, in further defense of its failure to pay this amount, asserts it is owed \$3,876.48 by Complainant based upon a separate and unrelated transaction with Complainant that occurred on August 29, 2007, in accordance with its purchase order number 07-1575.<sup>95</sup> This transaction was not included by Complainant during the Department's informal or formal proceedings. Respondent is thereby asserting a Counterclaim, which must be accompanied by the required handling fee,<sup>96</sup> which Respondent did not submit. Therefore, we are unable to hear Respondent's Counterclaim for \$3,876.48.

Respondent's failure to pay Complainant \$12,454.02 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, the Secretary also has the duty, where appropriate, to award interest. *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

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<sup>95</sup> Answer, ¶10.

<sup>96</sup> See, 7 C.F.R. §47.8(a).

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

**Order**

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$12,454.02, with interest thereon at the rate of 0.41 % per annum from July 1, 2007, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

Done at Washington DC.

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**BANACOL MARKETING CORPORATION v. JARD  
MARKETING CORPORATION.  
PACA Docket No. RD-09-164.  
Decision and Order.  
Filed January 22, 2010.**

**PACA – Jurisdiction – Consent Injunction – Failure to Notify.**

A Consent Injunction issued by a federal district court in a trust proceeding brought pursuant to section 5(c) of the Perishable Agricultural Commodities Act (7 U.S.C. 499e(c)) is given effect in reparation proceedings with proper notice to the Secretary. Where proper notice is given, reparation actions before the Secretary may be stayed. Where parties fail to provide the Secretary with proper notice of a Consent Injunction before the Secretary's reparation order becomes final, the Secretary lacks jurisdiction to consider a petition to reopen or request to vacate the order.

Delisle Warden, Presiding Officer.

Mark A. Amendola, Counsel for Complainant.

Steven C. Reingold, Counsel for Respondent.

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

**Order Denying Parties' Request to Set Aside  
or Vacate Default Order**

Banacol Marketing Corporation v Jard Marketing Corporation 829  
69 Agric. Dec. 828

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*; hereinafter “PACA”). On July 2, 2009, a Default Order was issued ordering Jard Marketing Corporation (“Respondent”) to pay Banacol Marketing Corporation (“Complainant”) \$246,540.00, with interest thereon at the rate of 0.48 percent per annum from May 1, 2009 until paid, plus \$500.00. On August 19, 2009, Complainant and Respondent filed correspondence petitioning the Secretary to set aside the July 2, 2009 Default Order.

In their respective requests, Complainant and Respondent give the Secretary notice of a pending civil action in the U.S. District Court for the District of Massachusetts in which Respondent is a defendant.<sup>1</sup> Respondent argues that the Secretary did not have jurisdiction to issue a default order in this proceeding because all actions by claimants based on unpaid produce debt pending before the Secretary (including the reparation case) were enjoined by a Consent Injunction and Agreed Order Establishing PACA Trust Claims Procedure issued in the district court proceeding on April 27, 2009 (the “Consent Injunction”), which preceded the issuance of the Default Order. Respondent claims that the Consent Injunction, specifically ¶35 thereof, divested the Secretary of jurisdiction to issue the Default Order.<sup>2</sup> Complainant, in its request, stated that a PACA Trust claim was filed on behalf of the Complainant in the aforesaid U.S. District Court case on June 10, 2009. Complainant further stated that its counsel was not informed of the reparation proceeding until August 6, 2009, and requested that the Secretary set aside the July 2, 2009 Default Order.

The Consent Injunction, per its terms, stays actions pending before the Secretary at the time of issuance. It must be noted that the Consent

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<sup>1</sup> *John Cerasuola Co., Inc., et al. v. Jard Marketing Corp., et al.*, Case No. 1:09-cv-10553-NG.

<sup>2</sup> Respondent cites to ¶35 of the Consent Injunction which states:  
Any and all pending action by or on behalf of other persons or entities against JARD Marketing, its officers or employees, which arise under or relate to the trust provisions of PACA are hereby stayed and all subsequent actions by any unpaid seller of Produce under the trust provisions of PACA to JARD Marketing are hereby barred.

Injunction was issued more than two months prior to the issuance of the Secretary's Default Order. At the time of issuance of the Default Order, the Secretary had no knowledge of the Consent Injunction. At the time of the issuance of the Default Order, Complainant and Respondent were both parties to the district court action and this reparation proceeding. It was incumbent upon Complainant or Respondent to notify the Secretary of the Consent Injunction in order for that injunction to have any effect on the procedures followed in this case. Without notification of the issuance of the Consent Injunction and its terms, this reparation proceeding ran its normal course. Respondent's default in filing a timely answer to the Complaint herein warranted the issuance of the Default Order. If the Secretary had been notified of the Consent Injunction prior to the issuance of the Default Order, he would have given effect to the district court's injunction and stayed the proceeding at that time.<sup>3</sup>

Respondent's request contains several arguments challenging the issuance of the Default Order, including that the Secretary did not have jurisdiction to issue the Default Order at all. However, at this juncture, the pivotal issue is whether the Secretary has jurisdiction to consider the parties' respective requests. We find that the Secretary does not have jurisdiction to rule on the parties' requests.

In accordance with section 47.4 of the Rules of Practice (7 C.F.R. §47.4), the Default Order and service letter were mailed to Respondent at its last known business address by commercial mail delivery service (Federal Express). The express mail package was delivered on July 6, 2009, and Respondent is deemed to have received it on that date pursuant to section 47.4(b)(1) of the Rules of Practice (7 C.F.R. §47.4(b)(1)). Respondent therefore had 20 days from the date of receipt

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<sup>3</sup> Citing Federal Rule of Civil Procedure 65, the district court states that "this Order is binding upon the parties to this action, their officers, agents, employees, banks, or attorneys and all other persons or entities who receive actual notice of the entry of this order." Consent Injunction, ¶ 1. The Consent Injunction, by its own terms, is not binding on the Secretary. Arguably, the Secretary would be bound by the injunction once he received actual notice thereof. However, notice of the injunction was provided by the Respondent well after the Default Order was issued and had become final.

of the Default Order on July 6, 2009, to file its petition.<sup>4</sup> The 20 day period to file a petition challenging the Default Order expired.

The Default Order required Respondent to pay reparation to Complainant within 30 days of the date of the Default Order. If neither a petition nor an appeal to the district court is filed within 30 days after the date of issuance of an order,<sup>5</sup> the order becomes final. The parties' requests, which were filed more than 30 days after the issuance of the Default Order, cannot stay this proceeding. Complainant's request and Respondent's request were each filed on August 19, 2009—well after the date the Default Order became final. The Secretary's jurisdiction in this case ended on August 1, 2009, when the Default Order became final. We, therefore, do not have jurisdiction to rule on the parties' requests.<sup>6</sup>

For the forgoing reason, Complaint's request and Respondent's request are denied for lack of jurisdiction.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

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**DEL CAMPO SUPREME, INC. v. CH RIVAS, LLC**  
**PACA Docket No. R-09-040**  
**Decision and Order.**  
**Filed March 26, 2010.**

**PACA-R.**

#### **Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural

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<sup>4</sup> 7 C.F.R. § 47.24(a).

<sup>5</sup> *See*, 7 U.S.C. §499g(c).

<sup>6</sup> *See, Morgan of Washington, Inc., v. Mort Bramson*, 48 Agric. Dec. 1121 (1989); *Southland Produce Co. v. Caamano Brothers Wholesale*, 39 Agric. Dec. 789 (1980).

## 832 PERISHABLE AGRICULTURALCOMMODITIES ACT

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 \$62,043.73 in connection with six truckloads of tomatoes shipped in the course of foreign commerce.

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

Although the amount claimed in the Complaint exceeds \$30,000.00<sup>1</sup>, the parties waived oral hearing. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 CFR § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Neither party elected to file any additional evidence or a Brief.

### **Findings of Fact**

1. Complainant, Del Campo Supreme, Inc., is a corporation whose post office address is P.O. Box 6550, Nogales, Arizona, 85628-6550. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, CH Rivas, LLC, is a limited liability company whose post office address is P.O. Box 6990, Nogales, Arizona, 85628-6990. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about January 8, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 1,600 25-pound cartons of Del

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<sup>1</sup> We should also note the amount claimed in the Complaint is in error, as it fails to account for payments received from Respondent during the informal handling of this claim. (ROI Ex. D2, E2, F2, and G2) After crediting these payments, the amount that remains unpaid and in dispute is \$19,555.73.

Campo Supreme extra large Roma tomatoes. Complainant issued invoice 72811 billing Respondent for the tomatoes at \$8.95 per carton, f.o.b., for a total invoice price of \$14,320.00. (Comp. Ex. 4; ROI Ex. A) Respondent paid Complainant \$14,320.00 for the tomatoes billed on invoice 72811 with check number 6538, dated May 13, 2008. (Ans. Ex. 4)

4. On or about January 8, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 1,600 25-pound cartons of Del Campo Supreme large Roma tomatoes. Complainant issued invoice 73677 billing Respondent for the tomatoes at \$10.95 per carton, f.o.b., for a total invoice price of \$17,520.00. (Comp. Ex. 4; ROI Ex. A14)

5. On January 11, 2008, a USDA inspection was performed on 1,584 25-pound cartons of Del Campo Supreme large Roma tomatoes at Mex Flores Produce, in Houston, Texas. The inspection disclosed the following:

INSPECTION: RESTRICTED TO WEIGHT ONLY AT APPLICANT'S REQUEST

WEIGHT: NET WEIGHT RANGE 21.25 TO 26.75 POUNDS, AVERAGE 24.26 POUNDS. TARE WEIGHT AVERAGE 1.5 POUNDS.

TEMPERATURES(3): 51°F (PRODUCT LOCATED IN COOLER), 49°F (PRODUCT LOCATED IN COOLER), 49°F (PRODUCT LOCATED IN COOLER)

6. On January 6, 2008, Complainant issued a "Trouble Adjustment" in the amount of \$1,376.27 for the Roma tomatoes billed on invoice 73677. (ROI Ex. A14) Respondent has not paid Complainant for the tomatoes billed on invoice 73677.

7. On or about January 8, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 1,600 25-pound cartons of Del Campo Supreme large Roma tomatoes. Complainant issued invoice 73679 billing Respondent for the tomatoes at \$7.95 per carton, f.o.b., for

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a total invoice price of \$12,720.00. (Comp. Ex. 4; ROI Ex. A18) Respondent paid Complainant \$12,720.00 for the tomatoes billed on invoice 73679 with check number 6413, dated April 11, 2008. (ROI Ex. E2)

8. On or about January 9, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 1,600 25-pound cartons of Del Campo Supreme extra large Roma tomatoes. Complainant issued invoice 72813 billing Respondent for the tomatoes at \$8.95 per carton, f.o.b., for a total invoice price of \$14,320.00. (Comp. Ex. 4; ROI Ex. A10) Respondent paid Complainant \$12,800.00 for the tomatoes billed on invoice 72813 with check number 6496, dated May 12, 2008. (Ans. Ex. 12)

9. On or about January 9, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 160 2-layer flats of Rancho Lucero 4x4 vine-ripe tomatoes and 80 2-layer flats of Rancho Lucero 4x5 vine-ripe tomatoes. Complainant issued invoice 72815 billing Respondent for the tomatoes at \$12.95 per flat, f.o.b., for a total invoice price of \$3,108.00. (Comp. Ex. 4; ROI Ex. A12) Respondent paid Complainant \$1,216.00 for the tomatoes billed on invoice 72815 with check number 6362, dated April 4, 2008. (ROI Ex. D2)

10. On or about January 26, 2008, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in Nogales, Arizona, to Respondent, in Rio Rico, Arizona, 160 25-pound cartons of Del Campo Supreme extra large Roma tomatoes. Complainant issued invoice 73877 billing Respondent for the tomatoes at \$8.95 per carton, f.o.b., for a total invoice price of \$1,432.00. (Comp. Ex. 4; ROI Ex. A20) Respondent paid Complainant \$1,432.00 for the tomatoes billed on invoice 73877 with check number 6362, dated April 4, 2008. (ROI Ex. D2)

11. Complainant's invoices referenced in Findings of Fact 3, 4, and 7 through 10 above, as well as the bills of lading issued for each shipment reference the 2002 Tomato Suspension Agreement. (Comp. Ex. 4-5). Respondent signed a document issued by Complainant indicating that future sales of tomatoes from Mexico would be made subject to the terms of the Suspension Agreement and the Clarification thereto. (ROI

Ex A 24-25).

12 The informal complaint was filed on March 10, 2008, which is within nine months from the date the cause of action accrued.

### Conclusions

Only three of the six truckloads of tomatoes at issue in the Complaint remain in dispute, as Respondent has paid invoices 72811, 73679, and 73877 in full. We will address each of the remaining three truckloads of tomatoes individually by invoice number below.

#### Invoice 72813

There is no dispute the contract price of the 1,600 25-pound cartons of Del Campo Supreme extra large Roma tomatoes in this shipment was \$8.95 per carton, or a total of \$14,320.00. Respondent accepted the tomatoes and has paid Complainant \$12,800.00, leaving an unpaid invoice balance of \$1,520.00. Respondent states it paid the invoice in full based on an allowance granted by Complainant of \$0.95 per carton, or a total of \$1,520.00. (Ans. ¶2) Respondent, as the party asserting the contract price of the tomatoes was modified, has the burden to prove this allegation by a preponderance of the evidence.<sup>2</sup>

As evidence to substantiate its contention that Complainant granted a \$0.95 per carton allowance, Respondent submitted a copy of both the invoice and the passing that Complainant prepared for the shipment. (Ans. Ex. 10-11) On the copies submitted by Respondent, the contract price of \$8.95 per carton is crossed through and the alleged adjusted price of \$8.00 per carton is handwritten beside it. As these notations do not appear on the invoice and passing copies submitted by Complainant (ROI Ex. A10-11), we presume these notations were made by

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<sup>2</sup> The party which claims the contract was modified has the burden of proof. Regency Packing Co., Inc. v. The Auster Company, Inc., 42 Agric. Dec. 2042 (1983); F. H. Hogue Prod. Co. v. Singer's Sons, 33 Agric. Dec. 451 (1974). The party with the burden of proof must establish its allegation by a preponderance of the evidence. See Wigmore, Evidence, Vol. IX, § 2483 *et seq.*

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Respondent. Respondent did not submit any documents prepared by Complainant indicating it agreed to reduce the price of the tomatoes by \$0.95 per carton.

Complainant, on the other hand, submitted a copy of a document titled "Terms and Conditions of Sale," which was drafted by Complainant and signed by a representative of Respondent on November 11, 2005. (Comp. Ex. 2) As this document was signed by Respondent prior to the transaction in question and there is no termination date indicated, we find the terms and conditions stated in this document are incorporated into the parties' agreement. One of the terms specified in this document is: "Any adjustment must be authorized and accompanied by a written credit memo from Del Campo Supreme, Inc." (Comp. Ex. 2, ¶2) A written credit memo confirming the allowance claimed by Respondent is not contained in the record. Without such evidence, we conclude Respondent has failed to sustain its burden to prove the contract price of the tomatoes in this shipment was modified. Consequently, Respondent remains liable to Complainant for the unpaid balance of the agreed purchase price of the tomatoes, or \$1,520.00.

Invoice 72815

There is no dispute the contract price of the 160 2-layer flats of Rancho Lucero 4x4 vine-ripe tomatoes and the 80 2-layer flats of Rancho Lucero 4x5 vine-ripe tomatoes was \$12.95 per flat, or a total of \$3,108.00. Respondent accepted the tomatoes and has paid Complainant \$1,216.00, leaving an unpaid invoice balance of \$1,892.00. Respondent states it paid this invoice (Ans. ¶1); however, the evidence of payment submitted by Respondent consists solely of a copy of check number 6362, made payable to Complainant in the amount of \$2,648.00 (Ans. Ex. 7), and only \$1,216.00 of this amount was applied to invoice 72815. (ROI Ex. D2) As there is no evidence showing Respondent made any additional payments to Complainant for the tomatoes billed on this invoice, Respondent is liable to Complainant for the unpaid invoice balance of \$1,892.00.

Invoice 73677

There is no dispute the contract price of the 1,600 25-pound cartons of Del Campo Supreme large Roma tomatoes in this shipment was \$10.95 per carton, or a total of \$17,520.00. The record shows the actual quantity of tomatoes received by Respondent's customer was 1,584 cartons. (Ans. Ex. 20-20A) Respondent accepted the tomatoes but has not remitted any payment. In defense of its failure to pay Complainant for the tomatoes it accepted, Respondent asserts a federal inspection was performed for underweight, after which the tomatoes were repacked and 308 cartons were lost due to shrink. (Ans. ¶4) Respondent states its customer remitted \$8,542.00, delivered, for the tomatoes, and that it paid \$2,250.00 for freight. Respondent states it will pay Complainant the net amount of \$6,292.00 (\$8,542.00 - \$2,250.00), but Complainant has refused to issue a credit memo in the correct amount. (Ans. ¶5)

The record shows Complainant granted an allowance for the tomatoes in this shipment in the amount of \$1,376.27. (Ans. Ex. 13) Complainant calculated this allowance as follows:

Complainant calculated the adjustment set forth above based on a USDA inspection performed on January 11, 2008, showing 1,584 cartons of Del Campo Supreme large Roma tomatoes had an average net weight of 24.26 pounds. This constituted a misbranding violation under section 46.45 of the Regulations under the Perishable Agricultural Commodities Act, as the cartons were marked as weighing 25 pounds. (Ans. Ex. 19)

Respondent secured a subsequent USDA inspection on 967 cartons of the tomatoes on January 17, 2008, which disclosed these cartons had an average net weight of 25.42 pounds. (Ans. Ex. 16) On January 18, 2008, Respondent received a faxed message from Floyd E. White, Misbranding Officer of the PACA Branch, stating:

OK WITH PACA TO SELL 967 CARTONS OF TOMATOES  
COVERED ON USDA T-025-0034-03653. PACA NEEDS  
YOUR EXPLANATION [sic] AS TO WHAT HAPPENED TO  
THE OTHER 517 CARTONS NOT COVERED BY ANY USDA

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INSPECTION. (Ans. Ex. 18)

In reference to the above message, Respondent received from its customer, Mex Flores Produce, a fax message advising that 308 cartons were lost due to shrink, and that the other 209 cartons were sold after reweighing disclosed the short weight was corrected. (Ans. Ex. 21)

Complainant's shipment of tomatoes that were misbranded constitutes a breach of contract for which Respondent is entitled to recover provable damages. Assuming Respondent's customer lost 308 cartons of tomatoes in repacking as reported, the reported return of \$6,192.00 (not \$6,292.00 as erroneously stated by Respondent) equals \$4.85 per carton for the remaining 1,276 cartons. (Ans. Ex. 22) We note the tomatoes were sold by Complainant at an f.o.b. price of \$10.95 per carton, a price that is approximately \$6.00 per carton higher than the reported return. The tomatoes were inspected for net weight only, so there is no evidence of any quality or condition defects that would affect the resale value of the tomatoes once they were repacked to the correct carton weight. Without such evidence, the repacked tomatoes are presumed to be of average marketable quality, and should have been sold at prevailing market prices. In addition, we note that Respondent did not submit any repacking records to establish that 308 cartons were lost in repacking as alleged. We cannot, therefore, accept the reported return or the reported loss in repacking as evidence in the computation of Respondent's damages resulting from Complainant's breach.

As we mentioned, Complainant calculated an allowance based upon the actual shortage in weight disclosed by the inspection. In light of the deficiencies in the evidence presented by Respondent, we find this presents a better measure of the damages sustained by Respondent as a result of Complainant's breach. Complainant's allowance calculation does, however, omit the cost Respondent incurred to have the tomatoes inspected in order to establish a breach. Respondent is entitled to recover this cost, \$167.50, as incidental damages. (Ans. Ex. 14) In addition, although we are unable to use the sales and losses reported by Respondent's customer to determine Respondent's damages, the documents submitted by Respondent establish it was necessary for Respondent's customer to have the tomatoes inspected following repacking to show the Department that the cartons were no longer

misbranded. Respondent may also recover the cost of this inspection, \$151.00, as incidental damages. (Ans. Ex. 15-19) When the inspection fees totaling \$318.50 are added to the \$1,376.27 allowance calculated by Complainant, the total amount Respondent is entitled to deduct from the contract price of the tomatoes is \$1,694.77.

As the shipment in question contained only 1,584 cartons of tomatoes, rather than the 1,600 cartons invoiced by Complainant, the total contract price for the shipment was \$17,344.80 (1,584 cartons at \$10.95 per carton). When we deduct from this amount the damages incurred by Respondent as a result of Complainant's breach, \$1,694.77, the net amount due Complainant from Respondent for the tomatoes is \$15,650.03.

In regard to our calculation of damages set forth above, we should note that the tomatoes in question were sold subject to the "Terms and Conditions of Sale" mentioned earlier in our discussion, as well as the 2002 Suspension Agreement covering fresh tomatoes imported from Mexico.<sup>3</sup> (ROI Ex. A24-25) Respondent appears to have satisfied the requirements for asserting a claim under Complainant's "Terms and Conditions of Sale," as Complainant acknowledges granting an allowance in response to Respondent's claim. (ROI Ex. A23) With respect to the 2002 Suspension Agreement, we note that there are specific procedures outlined in this Agreement for making adjustments to the sales price due to certain changes in condition after shipment. (67 FR 77044, Appendix D) However, the Agreement is silent as to what adjustments may be made for a material breach, or more specifically for damages resulting from a misbranding violation. The Agreement merely specifies that "any reimbursements from, by, or on behalf of the Selling Agent [Complainant] that are not specifically mentioned in items B.2., B.3., B.4., or B.5., above, or that are not properly documented, will be factored into the calculation of the price for the accepted tomatoes." (67

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<sup>3</sup> This reference is to the December 4, 2002 Suspension Agreement signed by Mexican growers/exporters of tomatoes [Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico, Federal Register: December 16, 2002 (Volume 67, Number 77044)]. The Agreement may also be accessed on the Internet at <http://ia.ita.doc.gov/tomato/index.html>.

FR 77044, Appendix D, ¶B6) The Agreement further specifies that the price for the accepted tomatoes may not fall below the reference price established under the Agreement. (67 FR 77044, Appendix D, ¶B1) Each signatory to the Agreement “individually agrees that, in order to prevent price suppression or undercutting, it will not sell, on and after the effective date of the Agreement, merchandise subject to the Agreement at prices that are less than the reference price.” (67 FR 77044, Part III) Taken as a whole, we interpret this as meaning that any adjustments made to the sales price, other than those allowed for certain changes in condition following shipment, must be factored into the determination of the price of the tomatoes accepted, and that price must not fall below the reference price. The reference price at the time of the transaction was \$0.2169 per pound.<sup>4</sup> We have determined that Respondent’s liability for the 1,584 cartons of tomatoes in question is \$15,650.03. The USDA inspection disclosed these cartons had an average net weight of 24.26 pounds. On this basis, we find the 1,584 cartons of tomatoes in question weighed a total of 38,427.84 pounds (1,584 cartons at 24.26 pounds each). The amount due from Respondent is, therefore, approximately equal to \$0.4073 per pound (\$15,650.03 ÷ 38,427.84 pounds). Since this price does not fall below the reference price, we conclude that the adjusted remittance is in accordance with the terms of the 2002 Suspension Agreement.

The total amount due Complainant from Respondent for six truckloads of tomatoes referenced in the Complaint is \$19,062.03. Respondent’s failure to pay Complainant \$19,062.03 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act “the full amount of damages sustained in consequence of such violations.” Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. *See Pearl Grange Fruit Exchange,*

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<sup>4</sup> This price was obtained on April 27, 2009, from the Department of Commerce website at <http://ia.ita.doc.gov/tomato/2002-agreement/announcement-10-02-2003.html>.

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*Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, 65 Agric. Dec. 669 (2006).

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

#### Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$19,062.03, with interest thereon at the rate of 0.41% per annum from March 1, 2008, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

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**FRESH HARVEST INTERNATIONAL, INC. v. TOMAHAWK  
PRODUCE, INC.**

**PACA Docket No. R-09-057.**

**Decision and Order.**

**Filed March 31, 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

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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.*

### **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 \$23,474.20 in connection with three truckloads of sugar snap peas shipped in the course of interstate commerce.

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

The amount claimed in the Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties also submitted a Brief.

### **Findings of Fact**

1. Complainant, Fresh Harvest International, Inc., is a corporation whose post office address is 1121 S. Military Trl. #325, Deerfield Beach, Florida, 33442-7604. At the time of the transactions involved

herein, Complainant was licensed under the Act.

2. Respondent, Tomahawk Produce, Inc., is a corporation whose post office address is P.O. Box 3077, Shell Beach, California, 93448-3077. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about September 5, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Florida, to Respondent in Pismo Beach, California, one truckload of snow peas and sugar snap peas. On the same date, Complainant issued invoice 26253 billing Respondent for 840 10-pound boxes of snow peas at \$6.10 per box, or \$5,124.00, and 600 10-pound boxes of sugar snap peas at \$8.76 per box, or \$5,256.00, plus \$25.00 for a temperature recorder, for a total f.o.b. invoice price of \$10,405.00. (ROI Ex. A2)

4. On or about September 11, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Florida, to Respondent in Pismo Beach, California, one truckload of sugar snap peas. On the same date, Complainant issued invoice 26290 billing Respondent for 600 10-pound boxes of sugar snap peas at \$6.81 per box, for a total f.o.b. contract price of \$4,086.00. (ROI Ex. A3)

5. On or about September 19, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Florida, to Respondent in Pismo Beach, California, one truckload of sugar snap peas. On the same date, Complainant issued invoice 26334 billing Respondent for 1,140 10-pound boxes of sugar snap peas at \$7.88 per box, for a total f.o.b. contract price of \$8,983.20. (ROI Ex. A4)

6. The invoices described in Findings of Fact 3, 4 and 5 each bear a stamp that reads:

THIS ACCOUNT HAS BEEN SOLD TO AGRICAP  
FINANCIAL CORPORATION OWNER/ASSIGNEE TO  
WHOM PROMPT WRITTEN NOTICE MUST BE GIVEN TO  
ANY OBJECTION TO PAYMENT. PAYMENT IN PAR  
FUNDS SHOULD BE SENT TO: AGRICAP FINANCIAL  
CORPORATION P.O. BOX 100364, PASADENA, CA 91189-

0364

7. Respondent made two payments to Complainant of \$11,000.00 each, via wire transfers on September 5 and 14, 2007. (ROI Ex. G4, G7)
8. The informal complaint was filed on January 16, 2008, which is within nine months from the date the cause of action accrued.

### **Conclusions**

Complainant brings this action to recover the agreed purchase price for three truckloads of snow peas and sugar snap peas sold and shipped to Respondent. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling \$23,474.20. In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it generally denies the allegations of the Complaint. We note, however, that Respondent subsequently submitted an affidavit from its sales associate, Steve Hin, wherein Mr. Hin states, "I do not deny purchasing the product from Fresh Harvest International Inc. and the product was paid for with the \$22,000 we advanced Complainant, Fresh Harvest International." (Ans. Stmt. p. 2) We therefore find Respondent's purchase and acceptance of the commodities at issue in the Complaint is not in dispute.

As Mr. Hin indicates, Respondent's defense to the action brought by Complainant is that the invoices in question were satisfied via Respondent's wire transfers to Complainant on September 5 and 14, 2007, totaling \$22,000.00.<sup>5</sup> There are two problems with this contention. First, the evidence shows Complainant promptly invoiced Respondent for the produce on the respective dates of shipment, September 5, 11, and 19, 2007. Copies of the invoices submitted by Complainant disclose the existence of a prominent statement on the front of the invoice advising Respondent that the account was "sold to

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<sup>5</sup> Inexplicably, Respondent fails to explain how it purportedly satisfied the remaining invoice amount of \$1,474.20 (\$23,474.20 less \$22,000.00).

Agricap Financial Corporation” (hereafter “Agricap”), and that the invoice amount due should therefore be remitted to Agricap. (Comp. Ex. A-A2) Respondent does not deny receipt of these invoices. 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.

We should note that while the statement on the invoice indicating the account was “sold” to Agricap would appear to call into question Complainant’s standing to bring this action, a factoring agreement such as that presumably entered between Complainant and Agricap is generally considered a secured loan rather than a bona fide purchase, because the risk of non-payment by the account debtor typically remains with the “seller” of the accounts receivable, in this case Complainant. *Nickey Gregory Co., LLC v. AgriCap, LLC*, 592 F. Supp. 2d 862, 878 (D.S.C. 2008). Accordingly, in the absence of any evidence that the agreement between Complainant and Agricap specified otherwise, we find Complainant did not relinquish its standing to pursue this claim by entering a factoring agreement with Agricap.<sup>6</sup>

A second problem with Respondent’s assertion that it satisfied its liability to Complainant for the three invoices in question through wire transfers is the contrary assertion from Complainant, that the wire transfers represent Respondent’s share of a joint investment between Complainant, Respondent, and a Peruvian firm, Andean Produce, to secure supplies of sugar snap peas grown in Peru. (ROI Ex. D2) To substantiate this contention, Complainant submitted evidence it wired

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<sup>6</sup> While Agricap may have an enforceable lien against any proceeds collected by Complainant for the factored invoices, Complainant’s obligation to Agricap is not a matter before us for consideration here.

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\$22,794.80 to the bank account of Andean Produce on September 5, 2007, and \$26,794.80 on September 13, 2007. (ROI Ex. G3, G6) To explain the discrepancy in the dates and amounts, Complainant states it was asked for more money than the \$22,000.00 provided by Respondent, and that the second wire transfer from Respondent was late, so Complainant had to send the funds a day before it received the wire from Respondent. (ROI Ex. G1) Complainant also submitted copies of e-mail messages exchanged between representatives of Complainant, Respondent, and Andean Produce in August and September of 2007. Two of the messages are particularly relevant to Complainant's claim concerning Respondent's alleged investment in a Peruvian sugar snap pea joint venture. The first message, dated August 14, 2007, is from Andean Produce's Tom Schuler to Respondent's Tom Israel, and reads, in pertinent part:

...

We have allready [sic] 30 hectares on the ground and we need to rent land and grow an additional 30 hectares. In order to keep up with the delivery schedule we need to sow 16 hectares next week and the rest the week after that.

Our cash requirements for the all growing [sic], up-keep, and harvesting cost until the first shipment is made on week 42, is of \$20,000 per week for the next 6 weeweeks [sic]. Making it a total of \$120,000.

I spoke with Ana Maria, and we agree, if we reach an agreement, it will be long term.

Please let me know your possission [sic].

...

(ROI Ex. D7)

The second message, dated September 21, 2007, is from Complainant's George Ellis to Andean Produce's Anamaria, and copied to Respondent's Tom Israel, Complainant's Gustavo Martinez and Dominique Ellis, and Andean Produce's Tom Schuler, and reads:

anamaria we tried to call you on the telephone but could not get through.

tom Israel and myself feel the cold weather can reduce the volume of product and delay it several weeks and after losing \$270,000 plus the \$22,000 for fresh harvest and tom losing \$22,000 this is to [sic] much of a risk.

(ROI Ex. D14)

We note these e-mail exchanges took place before the dispute with respect to the subject invoices arose.<sup>7</sup> Moreover, Respondent has failed to address the issue raised by the email messages. On this basis, we find the foregoing messages, coupled with the evidence showing Complainant wired funds to Andean Produce at the same time it received the wire transfers in question from Respondent, are sufficient to establish Complainant's contention that the \$22,000.00 paid by Respondent was an investment in a Peruvian sugar snap pea joint venture, which was appropriately applied as such. Having therefore failed to prove its defense of payment, Respondent is liable to Complainant for the three truckloads of snow peas and sugar snap peas it accepted at the agreed purchase prices totaling \$23,474.20.

Respondent's failure to pay Complainant \$23,474.20 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co.*

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<sup>7</sup> The record shows Complainant's George Ellis sent an e-mail message to Respondent's Tom Israel on December 26, 2007, stating, in pertinent part, "I have sent you several e mails you have sent us a check with a major deduction that was for an investment in the peruvian project you can not [sic] offset the agric cap [sic] invoice with another deal I need you to pay agricap the amount they financed." (ROI Ex. D12)

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*v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc., Order on Reconsideration*, 65 Agric. Dec. 669 (2006).

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

**Order**

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$23,474.20, with interest thereon at the rate of 0.42% 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, DC.

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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.**

**Decision and Order.**

**Filed April 4, 2010.**

**March 5, 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

Jose Magallon, d/b/a JM Farming v.  
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69 Agric. Dec. 848

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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 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*

**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 the Respondents in the amount of \$118,851.70 in connection with multiple truckloads of tomatoes shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. Copies of the Complaint were served upon the Respondents. Respondent Pacific Sun Distributing, Inc. filed an Answer to the Complaint denying liability to Complainant. Respondent Value Produce, Inc. filed an Answer and Counterclaim, denying liability and asserting a claim for unpaid storage fees allegedly owed by Complainant to Respondent Value Produce, Inc. Complainant

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filed a reply to the Counterclaim, denying liability to Respondent Value Produce, Inc.

The amount claimed in the Complaint exceeds \$30,000.00, and both Respondents requested an oral hearing. Therefore, in accordance with section 47.15 of the Rules of Practice (7 CFR § 47.15), an oral hearing was held on December 2, 2008, in Los Angeles, California, before Mr. Jonathan Gordy, Presiding Officer. The Complainant was represented by Mr. Thomas R. Oliveri of Western Growers, Newport Beach, California. Respondent Pacific Sun Distributing, Inc. was represented by Mr. Joseph Choate, Jr., Esq., San Marino, California. Respondent Value Produce, Inc. was represented by Mr. William L. Zeltonoga, Esq., Los Angeles, California.

Respondent Value Produce, Inc. introduced into evidence Exhibit RVX-1 and the deposition of Mr. Raymond Lowell Park, attached to which are three exhibits. All documents contained in the Report of Investigation are automatically considered as being in evidence. (7 C.F.R. § 47.7) After the hearing, the parties were afforded the opportunity to file proposed findings of fact and conclusions of law, as well as briefs in support thereof, and claims for fees and expenses. The Department received post-hearing briefs and timely claims for fees and expenses from all parties. Copies of all pertinent documents were served upon each party in accordance with the Rules of Practice.

### **Findings of Fact**

1. Complainant is an individual, Jose M. Magallon, doing business as JM Farming, whose post office address is 1941 Spyglass Trail, Oxnard, California, 93030-2765. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, Pacific Sun Distributing, Inc., is a corporation whose post office address is 5624 Bandini Boulevard, Bell, California, 90201-6407. At the time of the transactions involved herein, this Respondent was licensed under the Act.
3. Respondent, Value Produce, Inc., is a corporation whose post office address is P.O. Box 21486, Los Angeles, California, 90021. At the time of the transactions involved herein, this Respondent was licensed under the Act.

4. On or about November 20, 2006, Complainant shipped to Value Cold Storage, a cold storage facility owned and operated by Respondent Value Produce, Inc., load JM# 2251/Value# 12634, comprised of 1,360 cartons of roma tomatoes. The load was received by Value Cold Storage on November 21, 2006. (ROI Ex. A76-A77) Between November 22 and 27, 2006, the 1,040 cartons of large roma tomatoes and 320 cartons of medium roma tomatoes in load JM# 2251/Value# 12634 were sold to DiMare Fresh, Brea, California, at prices ranging from \$5.00 to \$8.00 per carton, for gross proceeds of \$9,280.00. (ROI Ex. E1, E27)
5. On or about November 23, 2006, Complainant shipped to Value Cold Storage load JM# 2138/Value# 12643, comprised of 1,680 cartons of roma tomatoes. (ROI Ex. A36) The load was received by Value Cold Storage on November 24, 2006. (ROI Ex. A40) Between November 27 and December 4, 2006, the 1,440 cartons of large roma tomatoes and 240 cartons of medium roma tomatoes in load JM# 2138/Value# 12643 were sold to DiMare Fresh and CV Fruit, Inc. (hereafter "CV Fruit"), Glendale, California, at prices ranging from \$4.50 to \$6.50 per carton, for gross proceeds of \$8,640.00. (ROI Ex. A37-A38, E2)
6. On or about November 24, 2006, Complainant shipped to Value Cold Storage load JM# 2033/Value# 12645, comprised of 1,600 cartons of roma tomatoes. (ROI Ex. A13) The load was received by Value Cold Storage on November 25, 2006. (ROI Ex. A16) Between November 30 and December 5, 2006, the 1,120 cartons of large roma tomatoes and 480 cartons of medium roma tomatoes in load JM# 2033/Value# 12645 were sold to DiMare Fresh and CV Fruit at prices ranging from \$4.50 to \$5.00 per carton, for gross proceeds of \$7,720.00. (ROI Ex. A14-A15, E3)
7. On or about November 28, 2006, Complainant shipped to Value Cold Storage load JM# 2036/Value# 12654, comprised of 1,280 cartons of roma tomatoes. (ROI Ex. A20) The load was received by Value Cold Storage on November 28, 2006. (ROI Ex. A24) Between December 1 and 5, 2006, the 1,280 cartons of large roma tomatoes in load JM# 2036/Value# 12654 were sold to DiMare Fresh and CV Fruit at prices ranging from \$4.50 to \$6.00 per carton, for gross proceeds of \$6,620.00. (ROI Ex. A21-A22, E3)

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8. On or about November 30, 2006, Complainant shipped to Value Cold Storage load JM# 2039/Value# 12673, comprised of 1,599 cartons of roma tomatoes. (ROI Ex. A27) The load was received by Value Cold Storage on November 30, 2006. (ROI Ex. A31) Between December 1 and 6, 2006, the 1,599 cartons of large roma tomatoes in load JM# 2039/Value# 12673 were sold to DiMare Fresh and CV Fruit at prices ranging from \$2.00 to \$4.75 per carton, for gross proceeds of \$7,335.50. (ROI Ex. E4, E13, E14)

9. On or about December 5, 2006, Complainant shipped to Value Cold Storage load JM# 2141/Value# 12695, comprised of 1,600 cartons of roma tomatoes. (ROI Ex. A43) On December 6, 2006, 240 cartons of large roma tomatoes and 1,200 cartons of medium roma tomatoes from load JM# 2141/Value# 12695 were sold to DiMare Fresh and CV Fruit at prices ranging from \$1.00 to \$5.00 per carton, for gross proceeds of \$3,840.00. The remaining 160 cartons of large roma tomatoes were dumped. (ROI Ex. E17-E18)

10. On or about December 8, 2006, Complainant shipped to Value Cold Storage load JM# 2158/Value# 12706, comprised of 1,600 cartons of roma tomatoes. (ROI Ex. A64) The load was received by Value Cold Storage on December 8, 2006. (ROI Ex. A81) Between December 11 and 14, 2006, the 1,040 cartons of large roma tomatoes and 560 cartons of medium roma tomatoes in load JM# 2158/Value# 12706 were sold to DiMare Fresh and E.D. Produce, Los Angeles, California, at prices ranging from \$2.00 to \$7.00 per carton, for gross proceeds of \$5,600.00. (ROI Ex. H1)

11. On or about December 14, 2006, Complainant shipped to Value Cold Storage load JM# 2154/Value# 12734, comprised of 1,760 cartons of roma tomatoes. (ROI Ex. A44) The load was received by Value Cold Storage on December 14, 2006. (ROI Ex. A47) Between December 15 and 18, 2006, the 1,040 cartons of large roma tomatoes and 720 cartons of medium roma tomatoes in load JM# 2154/Value# 12734 were sold to E.D. Produce at prices ranging from \$4.00 to \$5.00 per carton, for gross proceeds of \$7,920.00. (ROI Ex. A45 to A46)

12. On or about December 14, 2006, Complainant shipped to Value Cold Storage load JM# 2155/Value# 12738, comprised of 1,760 cartons of roma tomatoes. (ROI Ex. A50) The load was received by Value Cold Storage on December 15, 2006. (ROI Ex. A52) Between December 18

and 19, 2006, the 720 cartons of large roma tomatoes and 1,040 cartons of medium roma tomatoes in load JM# 2155/Value# 12738 were sold to E.D. Produce at prices ranging from \$3.00 to \$5.00 per carton, for gross proceeds of \$6,440.00. (ROI Ex. A51).

13. On or about December 15, 2006, Complainant shipped to Value Cold Storage load JM# 2156/Value# 12744, comprised of 1,280 cartons of roma tomatoes. (ROI Ex. A54) The load was received by Value Cold Storage on December 16, 2006. (ROI Ex. A56) Between December 19 and 26, 2006, the 720 cartons of large roma tomatoes and 560 cartons of medium roma tomatoes in load JM# 2156/Value# 12744 were sold to DiMare Fresh and E.D. Produce at prices ranging from \$1.50 to \$5.00 per carton, for gross proceeds of \$3,680.00. (ROI Ex. A55)

14. On or about December 18, 2006, Complainant shipped to Value Cold Storage load JM# 2157/Value# 12747, comprised of 1,760 cartons of roma tomatoes. (ROI Ex. A59) The load was received by Value Cold Storage on December 18, 2006. (ROI Ex. A61) Between December 19 and 20, 2006, the 1,040 cartons of large roma tomatoes and 720 cartons of medium roma tomatoes in load JM# 2157/Value# 12747 were sold to DiMare Fresh and E.D. Produce at prices ranging from \$2.00 to \$5.00 per carton, for gross proceeds of \$5,440.00. (ROI Ex. A60)

15. On or about December 21, 2006, Complainant shipped to Value Cold Storage load JM# 2163/Value# 12763, comprised of 1,504 cartons of roma tomatoes. (ROI Ex. A65) The load was received by Value Cold Storage on December 21, 2006. (ROI Ex. A68) Between December 22 and 26, 2006, the 624 cartons of large roma tomatoes and 880 cartons of medium roma tomatoes in load JM# 2163/Value# 12763 were sold to DiMare Fresh at prices ranging from \$4.50 to \$5.00 per carton, for gross proceeds of \$7,168.00. (ROI Ex. A66)

16. On or about December 27, 2006, Complainant shipped to Value Cold Storage load JM# 2165/Value# 12813, comprised of 480 cartons of roma tomatoes. (ROI Ex. A69) The 480 cartons of roma tomatoes in load JM# 2165/Value# 12813 were sold at prices ranging from \$3.00 to \$4.00 per carton, for gross proceeds of \$1,840.00. (ROI Ex. H3)

17. Respondent Pacific Sun Distributing, Inc., who invoiced and collected payment from the purchasers of the tomatoes, issued the

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following payments to Complainant for the tomatoes:

Date	Check No.	Amount
12/05/2006	29093	\$15,000.00
12/22/2006	28947	\$10,000.00
01/11/2007	29229	\$12,000.00
01/19/2007	29308	\$7,000.00
02/06/2007	29461	\$20,000.00
03/09/2007	29820	\$16,723.50
Total		\$80,723.50

(ROI Ex. A70-A75)

18. The informal complaint was filed on April 16, 2007, which is within nine months from the date the cause of action accrued.

### Conclusions

Complainant brings this action to recover the fair market value for 19,263 25-pound cartons of roma tomatoes that were allegedly handled by the Respondents on a consignment basis for the account of Complainant. Based on the prices reported by USDA Market News during the time period in question, Complainant states the tomatoes had a fair market value of \$13.00 per carton, or a total of \$250,419.00 for the 19,263 cartons of roma tomatoes in question. Complainant states the Respondents may withhold from this amount 20 percent, or \$50,083.80, for commission, leaving a net amount due Complainant of \$200,335.20. Complainant states the Respondents have paid a total of \$81,483.50<sup>8</sup> for the tomatoes, thereby leaving a balance due Complainant of \$118,851.00.

In response to Complainant's allegations, both Respondents deny having a contractual relationship with Complainant. In addition, Respondent Value Produce, Inc. (hereafter "Value Produce") asserts a

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<sup>8</sup> This amount includes the check payments listed in Finding of Fact 17, as well as a cash payment of \$760.00 made by Raymond Park to Complainant (ROI Ex. E4 and F3).

Counterclaim, contending Complainant stored produce in Value Produce's cold storage facility but has failed and refused to pay Value Produce \$5,215.75 for cold storage fees.

Certain basic facts of this case are undisputed. The subject tomatoes were shipped by Complainant to Value Cold Storage, a cold storage facility owned and operated by Respondent Value Produce. (TR-H<sup>9</sup> 17:8-18:1; 28:14-17; 105:19-21; TR-RP<sup>10</sup> 8:6-10:6) Complainant reached a verbal agreement with Raymond Park, warehouse manager for Value Cold Storage, whereby Mr. Park would contact customers who normally purchased product stored at Value Cold Storage to see if those customers would be interested in purchasing Complainant's tomatoes. (TR-RP 11:14-12:2; 14:18-24; TR-H 26:8-17; ROI Ex. A4) Three of those customers, DiMare Fresh, CV Fruit, and E.D. Produce, purchased all of the tomatoes in question. (TR-RP 19:18-20) Raymond Park contacted Ray Davis, President of Respondent Pacific Sun Distributors, Inc. (hereafter "Pacific Sun"), who agreed on behalf of Pacific Sun, and as a favor to Mr. Park, to have Pacific Sun invoice and collect payment for Complainant's tomatoes. (TR-H 130:16-132:4) Pacific Sun issued a number of checks to Complainant representing the proceeds it collected from the sale of the tomatoes. (ROI Ex. A70-A75) Neither Respondent Pacific Sun nor Respondent Value Produce, nor its employee Raymond Park, received any compensation for the services provided to Complainant. (TR-H 114:13-16; 133:19-22; TR-RP 36:8-12)

Before we consider Complainant's claims, we must first consider Respondent Value Produce's contention in its post-hearing brief that the Secretary lacks jurisdiction to consider this claim because the transactions did not occur in the course of interstate commerce. (Value Produce Brief, ¶¶ 39-41.) Respondent Value Produce bases this claim on the lack of any evidence indicating the tomatoes in question were shipped outside the state of California. We have, however, recently held

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<sup>9</sup> Transcript from the Oral Hearing.

<sup>10</sup> Transcript from the Deposition of Raymond Lowell Park.

that when the shipment is of a type of produce that commonly moves in interstate commerce and was shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce, the subject shipment is considered to be in interstate commerce under the Act. *Produce Supply, Inc. v. Guy E. Maggio, Inc.*, PACA Docket R-08-042, slip op. at 4 (December 12, 2008). Applying this analysis to this case, we find the transactions in question were conducted in interstate commerce. First, tomatoes are a commodity that is commonly shipped in interstate commerce. Second, one of the companies to which the tomatoes were sold, DiMare Fresh, is a dealer licensed by the Department to engage in the business of buying and selling produce in interstate and foreign commerce. We take judicial notice of license records in these proceedings.<sup>11</sup> The license records for DiMare Fresh, Inc., indicate that it has offices in many different states, including California and Texas. Thousands of dollars of produce in this case alone was delivered from Value Produce to DiMare Fresh. We believe that this fact alone demonstrates that Value Produce, by doing substantial business in these transactions with DiMare Fresh, shipped a substantial portion of its business in interstate commerce. Further, Respondent did not present countervailing evidence at the hearing or raise the issue until its post hearing brief. We therefore consider the transactions to be in interstate commerce and find that the Secretary can properly exercise jurisdiction over this dispute.

As it pertains to Respondent Value Produce, the issue to be determined here is whether Value Produce is responsible to Complainant for the actions undertaken by its employee, Raymond Park, who sold the tomatoes on behalf of Complainant. Raymond Park used Pacific Sun to invoice and collect payment for the tomatoes, so the issue to be determined with respect to Respondent Pacific Sun is whether its performance of these functions created any liability on the part of Pacific Sun to Complainant.

Complainant, in its post-hearing Brief, asserts Raymond Park was acting on behalf of Respondent Value Produce when he agreed to handle

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<sup>11</sup> See, e.g., *Washburn Potato, Co. v. B.R. Wood and Troy A. Wood, d.b.a. Wood Bros.*, 46 Agric. Dec. 1717 (1987); *Tom Lange Company, Inc. v. Emerson H. Elliot d/b/a Emerson Elliot Produce*, 44 Agric. Dec. 1026 (1985).

Complainant's tomatoes on consignment. (Complainant's Brief, pp. 2-3) With respect to Respondent Pacific Sun, Complainant states Pacific Sun issued checks made payable to Complainant, and argues on this basis that there was a contractual relationship between Pacific Sun and Complainant. (Complainant's Brief, p. 6) Complainant does not, however, cite any basis for this conclusion, and we conclude that Raymond Park's use of Pacific Sun to collect and remit the funds from the buyers of Complainant's tomatoes did not create a contractual relationship between Complainant and Respondent Pacific Sun. Moreover, it also does not appear there was any agency relationship between Respondent Pacific Sun and Raymond Park. Respondent Pacific Sun did not employ Raymond Park, and there is no indication that either Raymond Park or Pacific Sun represented to Complainant that Mr. Park was acting as agent for Respondent Pacific Sun. (TR-H 43:6-17, 129:21-130:7) Complainant was not even aware of any involvement on the part of Respondent Pacific Sun until the proceeds from the sale of the tomatoes were remitted to Complainant, at which time Complainant noted that the checks were issued by Pacific Sun. (TR-H 76:7-19) Consequently, absent a contractual relationship between Complainant and Respondent Pacific Sun, or any indication of an agency relationship between Raymond Park, the individual who sold Complainant's tomatoes, and Respondent Pacific Sun, we find Complainant has failed to establish a cause of action against this Respondent. The Complaint against Respondent Pacific Sun should therefore be dismissed.

Next we will consider whether the evidence establishes any liability on the part of Respondent Value Produce. As we mentioned, Complainant states Raymond Park was acting on behalf of Value Produce when he agreed to handle Complainant's tomatoes on consignment. Complainant has not alleged Raymond Park had actual authority from Respondent Value Produce to act as its agent in regard to sales, and the evidence of record in this proceeding fails to establish the existence of such actual authority. (TR-H 105:22-106:19) Rather, the allegation here is that Raymond Park, through his employment as warehouse manager at Value Produce's cold storage facility, was placed

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in the position of having apparent authority to conduct sales as agent for Respondent Value Produce.

In response to this allegation, Respondent Value Produce asserts Complainant knew Mr. Park was not acting within the scope of his duties and authority as manager of Value Produce's cold storage facility when he conducted the tomato sales transactions in question. As evidence to substantiate this contention, Respondent Value Produce points out that it has a sales office at 1601 Olympic Boulevard, Los Angeles, California, which is separate and distinct from Value Produce Cold Storage, which is located at 640 Santa Fe Avenue, Los Angeles, California. Respondent Value Produce states Raymond Park's management position was at the cold storage facility, not at the sales office, and that this is plainly stated in Value Produce's listing in the industry publication, *The Blue Book*, which reads, in pertinent part:

Value Produce, Inc.  
P.O. Box 21486 (90021-0486)  
1601 E. Olympic Blvd.,  
Suite 210-212.

...

Buying & Sales handled by  
Jesse Martin, Lupe Martin,  
Chris Martin, Sal Barba, Jr.,  
Gordon Dixon, Gabriel Barba,  
Joe Duran, Dave Hirata,  
Jose (Pete) Martin,  
Alexandra Ruiz & Hector Flores

...

Cold Storage Facility:  
Value Produce Cold Storage,  
640 Santa Fe Ave. (90021)

...

Raymond Park, Warehouse Mgr.

(ROI Ex. A4)

Complainant has, however, testified he was unaware that Value Produce maintained a separate sales office. (TR-H 77:6-22, 78:1-9.) Moreover, there is no indication in the Blue Book that Raymond Park was not authorized to conduct sales.

The general rule for creation of apparent authority, as stated in the Restatement (Second) of Agency, § 27, is as follows:

Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Comment (a) to Restatement (Second) of Agency, § 27, explains further, Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such a belief.

The conduct of Respondent Value Produce that caused Complainant to believe Raymond Park was authorized to conduct sales on Respondent Value Produce's behalf was: (1) its employment of Raymond Park as manager of its cold storage facility; (2) its failure to provide notice to those that dealt with Raymond Park that he did not have the authority to conduct sales; (3) and its failure to properly supervise Raymond Park to prevent him from exercising authority that would cause a reasonable observer that understand that he was not authorized to conduct sales on behalf of Respondent Value Produce.

At the hearing, Mr. Jesse Martin, president of Value Produce, testified there were no notices posted at the cold storage facility stating Raymond Park could not buy or sell fruits and vegetables. (TR-H 121:20-22, 122:1) Respondent Value Produce also acknowledges in its post-hearing brief that the cold storage facility was open to the public.

(Value Produce Brief, ¶3) Such access was apparently provided for the purpose of affording potential buyers the opportunity to view the produce stored there. (TR-RP 12:16-22, 14:16-24) And, in 2005, even before Raymond Park sold the tomatoes at issue in this case, he had arranged for the sale of some chilies on behalf of Complainant Jose Magallon. (TR 67.) Under the circumstances, we must consider whether a reasonable person visiting this facility and encountering Raymond Park, the manager of the facility, being advised by Mr. Park that he could locate buyers for the produce stored at the facility, and having received this service in the past, would be justified in believing Mr. Park had authority from the owner of the facility, Value Produce, to engage in this activity.

The most prevalent situations in which apparent authority is created are those in which an agent is appointed to a position which, because of business customs, would include implied authority to conduct a variety of acts, unless his authority to do this was excluded by the principal. *Jacobsen Produce Company, Inc. v. R.L. Burnett, Jr.*, 37 Agric. Dec. 1743, 1745 (1978), quoting Seavey, *Law of Agency*, 1964. A principal is liable in contract for the acts its agents when: (1) the agent has the express authority from the principal to do those acts; (2) the agent has the implied authority to do all that is proper, usual, and necessary to exercise the authority actually granted; (3) the principal provides apparent authority by holding one out as an agent by words or conduct; and (4) the principal, through culpable negligence in failing to supervise the affairs of his agent, allows him to exercise powers not granted to him, and so justifies others in the belief that the agent possesses the requisite authority. *Jacobsen Produce Co.*, 37 Agric. Dec. at 1746.

For example, in *A. Levy and J. Zentner Co. v. American National Growers*, 19 Agric. Dec. 1022 (1960), we held that William L. Mailloux, an employee of American National Growers (“ANG”), had at least apparent authority to purchase potatoes on ANG’s behalf by virtue of the fact that ANG placed Mailloux in the position of representing the firm at its field office in Bakersfield and did not provide notice to the trade that Mailloux had no authority to make produce purchases. Similarly, in *Goldston v. Murlas Bros.*, 21 Agric Dec. 542 (1962), we held that an employee was clothed with at least apparent authority to make purchases on behalf of his employer by virtue of his employment

as manager of a branch office.

In this case, Raymond Park held a management position at Value Produce's cold storage facility, and Value Produce did not post any notice within that facility advising the trade that neither Mr. Park, nor anyone else employed at the cold storage facility, was authorized to conduct sales out of that facility.

In consequence, we find Respondent Value Produce clothed Mr. Park with apparent authority to conduct such sales.

While Respondent Value Produce was clearly unaware of Mr. Park's conduct with respect to the sale of Complainant's tomatoes at the time the sales were taking place (TR-H 112:22, 113:1-7, 137:6-10), Value Produce is nevertheless responsible for any damages suffered by Complainant as a result of Mr. Park's conduct.<sup>12</sup> Section 8 of the Restatement (Second) of Agency, defines apparent authority as:

...the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

Comment (a) to section 8 points out that when there is apparent authority, a third person has the same rights against the principal as where the agent is authorized, and that this circumstance normally results from a prior relation of principal and agent. Comment (g) to section 49 of the Restatement (Second) of Agency, explains:

...the fact that an agent secretly intends to act for a purpose of his own or otherwise to disobey the principal does not prevent the existence of a power to bind the principal to one who relies upon facts which indicate

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<sup>12</sup> An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal. *California Civil Code*, § 2330.

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apparent authority, unless the one dealing with the agent has notice of such intent.

There is no indication in this case that Complainant was aware Mr. Park was acting in his own interest, and that his actions were not in accordance with the instructions he received from his employer, Respondent Value Produce. (TR-H 99:5-12)

For the foregoing reasons, we find Respondent Value Produce may be held liable to Complainant for any damages caused by the actions of Raymond Park.

Returning to our consideration of Complainant's claim for damages, Complainant bases its claim on the delivery of 19,263 cartons of roma tomatoes to Value Cold Storage. (TR-H 7:4-6) As is set forth more fully in Findings of Fact 4 through 16, Raymond Park promptly resold 19,103 cartons of the tomatoes at prices ranging from \$1.00 to \$8.00 per carton. The remaining 160 cartons of tomatoes were reportedly dumped. While Complainant takes issue with the prices at which some of the tomatoes were sold (TR-H 81:10-18, 91:8-92:4), we hasten to point out that Complainant made the decision to allow Raymond Park to sell the tomatoes on his behalf. A consignor chooses his agent and derives full benefit from exceptionally good performance and must also bear the consequences of poor performance. Absent fraud, or some other breach of its fiduciary obligations, a consignee is not liable to a consignor merely because the goods fetched less on resale than the market price or the amount the consignor expected.<sup>13</sup> Accordingly, for the 19,103 cartons of tomatoes Raymond Park sold, Complainant is entitled to recover the proceeds collected from those sales, which total \$81,523.50.

With regard to the 160 cartons of tomatoes from the 1,600 cartons in the load JM # 2141/Value # 12695 (Finding of Fact No. 9) that were reportedly dumped, section 46.22 of the Regulations, Accounting for dumped produce, states the following, in pertinent part:

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<sup>13</sup> *Tex-Sun Produce v. International Produce Distributors, Inc.*, 48 Agric. Dec. 1111 (1989); *Pacific Fruit & Produce Co. v. Wm. C. Denny, Inc.*, 31 Agric. Dec. 1420 (1972); *Monash Produce v. Pearl*, 15 Agric. Dec. 1250 (1956); *Haven Citrus Sales v. Dietz & Co.*, 15 Agric. Dec. 1091 (1956).

A clear and complete record shall be maintained showing justification for dumping of produce received on joint account, on consignment, or handled for or on behalf of another person if any portion of such produce regardless of percentage cannot be sold due to poor condition or is lost through resorting or reconditioning. In addition to the foregoing, if five percent or more of a shipment is dumped, an official certificate, or other adequate evidence, shall be obtained to prove the produce was actually without commercial value, unless there is a specific agreement to the contrary between the parties.

7 C.F.R. § 46.22. The record does not contain a USDA inspection certificate or other adequate evidence to establish the 160 cartons of tomatoes that were dumped had no commercial value. Moreover, there is no indication the parties specifically agreed that such evidence was not needed. Consequently, for the shipment of tomatoes in question, which contained a total of 1,600 cartons of tomatoes, only five percent, or 80 cartons, could be dumped without securing evidence that the dumped tomatoes had no commercial value. Therefore, Respondent Value Produce is liable to Complainant for the fair market value of the remaining 80 cartons of tomatoes that were unjustifiably dumped. In this case, we find the best measure of this value is the average sales price Raymond Park obtained from the sale of the remaining 1,440 cartons of tomatoes in the shipment. The account of sales prepared Mr. Park (ROI Ex. E18) shows gross sales of \$3,840.00, which equates to an average sales price of \$2.67 per carton based on sales of 1,440 cartons. Assigning a value of \$2.67 per carton to the 80 cartons of tomatoes that were unjustifiably dumped results in additional sales proceeds of \$213.60.

After taking into account the additional sales proceeds of \$213.60, the total proceeds from the sale of the thirteen consigned loads (19,263 cartons) of roma tomatoes in question amount to \$81,737.10 (\$81,523.50 plus \$213.60). With respect to commission, Raymond Park has testified "I didn't expect anything nor did I ask." (TR-RP 18:15-21) Accordingly, we will not deduct commission from the gross proceeds of \$81,737.10 owed to Complainant for the tomatoes. The record shows

that Respondent Pacific Sun paid Complainant a total of \$81,483.50 for the tomatoes. Therefore, Respondent Value Produce is liable to Complainant for the remaining balance due of \$253.60.

Next we will consider the Counterclaim asserted by Respondent Value Produce against Complainant. As we mentioned, Respondent Value Produce asserts Complainant stored produce in Value Produce's cold storage facility but has failed and refused to pay "rent and related costs concerning such produce in a sum to be proved." (Value Produce Ans. and Counterclaim ¶A) Respondent Value Produce subsequently asserted in its post-hearing brief that Complainant owes \$5,215.75 for cold storage fees. (Value Produce Brief ¶107) This is apparently based on the storage of 20,863 cartons of tomatoes at Respondent Value Produce's stated storage rate of \$0.25 per carton. (ROI Ex. E1-E3) We note, however, that the evidence establishes only 19,263 cartons of tomatoes were delivered to Value Cold Storage under the consignment agreement in question. At \$0.25 per carton, the amount Respondent Value Storage is entitled to recover for storing 19,263 cartons of tomatoes is \$4,815.75. In this reparations forum, we do not have jurisdiction over storage contracts that are not incident to the purchase, sale or consignment of a perishable agricultural commodity.<sup>14</sup> However, these cold storage fees were a part of the consignment and sale of the tomatoes, because storage of these tomatoes was a necessary expense to carry out the consignment of the tomatoes. Thus, this case fits within a line of cases, such as *Krzmarzick v. King Salad Avocado Co.*, 44 Agric. Dec. 1048 (1985), which allow storage fee counterclaims on consigned produce. As Complainant offered nothing more than a general denial in response to the Counterclaim, and since it is undisputed Complainant delivered 19,263 cartons of tomatoes to Value Cold Storage for the purpose of resale, we conclude Respondent Value

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<sup>14</sup> See *Burden v. Taylor*, 50 Agric. Dec. 1009, 1012 (1991); see also *The Kingsbury Co. v. Metzler*, 52 Agric. Dec. 1724 (1993) citing *Grand Prairie Produce Brokerage, Inc. v. Royal Packing Co.*, 34 Agric. Dec. 1580 (1975); *Maine Banana Corp. v. Walter D. Davis*, 32 Agric. Dec. 983 (1973); *R. B. Todd Produce Co., Inc. v. Frostreat Frozen Foods, Inc.*, 22 Agric. Dec. 917 (1963); *C. J. Prettyman, Jr. v. J. E. Nelson & Sons*, 20 Agric. Dec. 947 (1961); *Reid & Joyce Packing Co. v. Touchstone*, 15 Agric. Dec. 884 (1956); *Anonymous*, 7 Agric. Dec. 1128 (1948); *Anonymous*, 4 Agric. Dec. 934 (1945); *Anonymous*, 4 Agric. Dec. 332 (1945).

Produce is entitled to recover \$4,815.75 in storage fees from Complainant pursuant to its Counterclaim.

In summary, we have determined Respondent Value Produce is liable to Complainant in the amount of \$253.60. Respondent Value Produce's failure to pay Complainant \$253.60 is a violation of section 2 of the Act. We have also determined that Respondent Value Produce can recover \$4,815.75 from Complainant through its Counterclaim. Complainant's failure to pay Respondent Value Produce \$4,815.75 is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, Order on Reconsideration, 65 Agric. Dec. 669 (2006).

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 Value Produce to file its Counterclaim. As the handling fees paid by the parties offset one another, neither party is liable for the handling fee paid by the other.

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.” In this case, Respondent Pacific Sun has successfully defended against the claims asserted by Complainant, and while Respondent Value Produce did not successfully defend against the claims asserted by Complainant, it did prevail on its Counterclaim. Therefore, both Respondents are considered to be prevailing parties.

Complainant, on the other hand, recovered only \$253.60 of the \$118,851.70 sought in the Complaint and failed to defend against the Counterclaim asserted by Respondent Value Produce. Consequently, Complainant cannot be considered a prevailing party. *Newbern Groves, Inc. v. C. H. Robinson Company*, 53 Agric. Dec. 1766 (1994), *petition for reconsideration denied* 54 Agric. Dec. 1444 (1995). *See, also, Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric. Dec. 342 (2003); and *M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596 (1990).

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853, 864 (2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715 (1989). In accordance with 7 CFR § 47.19(d), Mr. William L. Zeltonoga, attorney for Respondent Value Produce, timely filed a statement of attorney’s fees and costs. Mr. Zeltonoga claims a total of \$2,778.85, including \$520.00 (1.3 hours at \$400.00 per hour) for attendance at the deposition of Raymond Park, \$1,400.00 (3.5 hours at \$400.00 per hour) for attendance at the oral hearing, \$300.00 for the Counterclaim filing fee, \$263.85 for the transcript of Raymond Park’s deposition, and \$295.00 for the transcript of the oral hearing. Aside from the counterclaim filing fee, which is not an expense incurred in connection with the oral hearing and is therefore not recoverable,<sup>15</sup> the remaining costs totaling \$2,478.85

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<sup>15</sup> Only expenses incurred in connection with the oral hearing will be awarded. *Mountain Tomatoes*, 48 Agric. Dec. 707, 715 (1989).

appear reasonable and will be permitted.<sup>16</sup> This amount should be awarded to Respondent Value Produce.

Mr. Joseph Choate, Jr., attorney for Respondent Pacific Sun, also timely filed a statement of fees and costs. Mr. Choate claims a total of \$7,712.50, including \$5,747.50 (20.9 hours at \$275.00 per hour) for preparation for the hearing, \$1,100.00 (4 hours at \$275.00 per hour) for attendance at the oral hearing, \$570.00 for the cost of transcripts, and \$275.00<sup>17</sup> (1 hour at \$275.00 per hour) for review of transcript and objections. Mr. Choate also submitted an itemized list of the work done in preparation of the hearing. Upon review, we find that \$2,997.50 (10.9 hours at \$275.00 per hour) of the amount claimed for work done in preparation for the oral hearing is recoverable.<sup>18</sup> The fee for time spent at the hearing is also recoverable; however, since the hearing lasted only 3.5 hours, this expense should be adjusted to \$962.50. The \$570.00 claimed for the cost of transcripts is also recoverable. With respect to the review of the transcript and objections, the time spent on these activities was presumably for the purpose of preparing a post-hearing brief. Fees and expenses for the preparation of post-hearing briefs are not allowed because they are fees that would also be incurred in the

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<sup>16</sup> The costs associated with depositions admitted into evidence at the hearing are allowable expenses. See *Potato Sales v. Perfection Produce*, 38 Agric. Dec. 273, 281 (1979).

<sup>17</sup> The claim was written "\$290.00," but we expect that the "9" was a typographical error.

<sup>18</sup> The allowable charges include: telephone call to Presiding Officer and draft notice of appearance (1 hr.), preparation for deposition of Raymond Park (4.5 hrs.), deposition of Raymond Park (1.3 hrs., adjusted for actual time of attendance not including travel time), and review witness list (0.6 hr.). In addition, Mr. Choate claimed 2.8 hours for "review of Raymond Park deposition and letter to client" and 4.1 hours for "final preparation for hearing and drafting of brief; telephone call to presiding officer." As only the review of the deposition, the preparation for the hearing, and the call to the Presiding Officer may be viewed as expenses that would not have been incurred if the matter had been heard by documentary procedure, we included only one-half of the amount claimed, or 3.5 hours, in our calculation of the amount recoverable for time spent in preparation for the oral hearing.

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documentary procedure. *E.g., East Produce*, 59 Agric. Dec. at 865; *Pinto Bros., Inc. v. Frank J. Balestrieri Co.*, 38 Agric. Dec. 269, 272 (1979). Therefore, we will award Respondent Pacific Sun fees and expenses totaling \$4,530.00 for the legal services of Mr. Choate.

**Order**

Within 30 days from the date of this Order, Respondent Value Produce, Inc., shall pay Complainant as reparation \$253.60, with interest thereon at the rate of 0.34 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 per annum from February 1, 2007, until paid. Within 30 days from the date of this Order, Complainant shall pay Respondent Value Produce, Inc., \$4,530.00 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of \_\_\_\_\_ per annum from the date of this Order, until paid.

Within 30 days from the date of this Order, Complainant shall pay Respondent Pacific Sun Distributing, Inc., \$2,478.85 for fees and expenses incurred in connection with the oral hearing, with interest thereon at the rate of 0.34 per annum from the date of this Order, until paid.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

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**PAGANINI FOODS, LLC v. WESTLAKE DISTRIBUTORS, INC.**

**PACA Docket No. R-08-047.**

**Decision and Order.**

**Filed June 8, 2010.**

**PACA-R.**

**Proof of Oral Contract – Written Confirmations**

Complainant's unilateral email proposals to Respondent did not prove the existence of a sales contract for 150 containers of Italian oranges where neither parties' conduct adhered to the terms of the proposed agreement and the oranges were not received or accepted by Respondent. The sender of a written confirmation of an oral agreement

must prove that a contract was in fact made orally prior to the sending of the written confirmation.

**Bankruptcy -- Claim for Fees and Expenses Stayed**

Respondent, as the prevailing party, is entitled to reasonable fees and expenses pursuant to 7 U.S.C. § 499g(a), however, the award of fees and expenses is stayed pursuant to the automatic stay provision of the Bankruptcy Code because Complainant filed a Chapter 11 bankruptcy petition before the issuance of a Decision and Order.

Charles Spicknall, Presiding Officer  
Stephen P. McCarron, Counsel for Complainant  
Lawrence H. Meurs and Steven E. Nurenberg, Counsel for Respondent  
*Decision and Order issued by William G. Jenson, Judicial Office.*

**Decision and Order**

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the “Act.” A formal Complaint was timely filed by Paganini Foods, LLC, (“Paganini Foods”), on October 31, 2007, seeking an award of reparation in the amount of \$3,034,202.89 from Respondent Westlake Distributors, Inc., (“Westlake”), in connection with multiple shipments of oranges from Italy to the United States in 2007. Respondent filed an Answer on December 17, 2007, denying the material allegations in the Complaint and asserting a number of affirmative defenses. Copies of the Department’s Report of Investigation were served on the parties. Both parties requested an oral hearing. Based on the parties’ requests, and because the amount of damages alleged in the Complaint is in excess of \$30,000.00, a hearing was held in Los Angeles, California on September 9 -10, 2008. *See* 7 C.F.R. § 47.15(a)(2) (requiring a hearing where the amount in controversy exceeds \$30,000). Charles Spicknall of the United States Department of Agriculture, Office of the General Counsel, Trade Practices Division, served as the Presiding Officer. Complainant was represented at the hearing by Stephen P. McCarron, McCarron & Diess, Washington, DC. Respondent was represented at the hearing by

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Lawrence H. Meuers and Steven E. Nurenberg, Meuers Law Firm, P.L., Naples, Florida.

At the hearing, the parties were given an opportunity to present testimony and submit evidence. Complainant called one witness, Celso Paganini, the president of Paganini Foods. Respondent Westlake called two witnesses: 1) Leonard Wallace, the former general manager of Paganini Foods, and 2) Jeffrey Miller, the president of Westlake Distributors. The hearing was transcribed and is cited herein as "Hrg Tr. at \_\_\_\_." Complainant introduced nineteen exhibits into evidence at the hearing. Complainant's hearing exhibits are cited herein as CX-1 through 9 and CX-2A, 3A, 3B, 4A, 4B, 4C, 4D, 4E, 5A and 5B. Respondent introduced thirty-three exhibits into evidence at the hearing which are cited as RX-1 through 33. In addition, the Department's Report of Investigation is considered as evidence in this case. Following the hearing, Complainant and Respondent both filed post-hearing briefs, as well as claims for fees and expenses.

### **Findings of Fact**

Complainant Paganini Foods is a limited liability company whose address is 100 Dartmouth Drive, Suite 400, Swedesboro, New Jersey 08085. *See* Complaint at ¶ 1. Paganini is licensed under the PACA. *See id.*, at ¶ 2. Paganini Foods imports food and produce from Italy for sale in the United States. *See id.*; Hrg Tr. at 20 (Paganini).

Paganini Foods has been in business since August 8, 2002. *See* Hrg Tr. at 20, 352 (Paganini). Celso Paganini is the president of the company. *See id.*, at 20. Celso Paganini's family has been in the produce business in Europe for generations. *See id.*, at 345.

At the time of the transactions at issue in this case, Paganini Foods' general manager was Leonard Wallace. *See id.*, at 580 (Wallace). Mr. Wallace was hired by Celso Paganini in March of 2006. *See id.* He ran the company's North American operation for approximately 18 months. *See id.*, at 581.

Westlake is a corporation doing business as Westlake Produce Company. *See* Answer at ¶ 3. Westlake's business address is 1320 E. Olympic Blvd., Suite 208, Los Angeles, California 90021. *See id.* Westlake is licensed under the PACA. *See id.*, at ¶ 5. Westlake sells

wholesale quantities of fruits and vegetables to retail stores, including large chain stores, primarily in Southern California. *See id.*, at ¶ 4; Hrg Tr. at 797 – 798 (Miller).

Jeffrey Miller is a partner in Westlake and is also the president of the company. *See* Hrg Tr. at 779 (Miller). He has been in the produce business for over 30 years and has worked for Westlake since 1997. *See id.*, at 779, 785.

In October of 2006, Paganini Foods promoted its products, including oranges, at the Produce Marketing Association (“PMA”) convention. *See id.*, at 782 (Miller), 610, 618 - 619 (Wallace). Jeff Miller of Westlake attended the PMA convention and visited Paganini Foods’ booth. *See id.*

Following the PMA convention, representatives of Paganini Foods and Westlake discussed the prospect of doing business together. *See id.*, at 786 (Miller). The discussions focused on Tarocco oranges that Paganini Foods imports from Italy. *See id.*, at 784. The Tarocco is a blood orange. *See* CX-1 at 6 (Paganini Foods’ promotional materials); Hrg Tr. at 32 (Paganini). It is the most popular table orange in Italy. *See* CX-1 at 6. Taroccos are easy to peel, seedless, and high in vitamin C. *See id.*, at 5; Hrg Tr. at 33 (Paganini). Paganini Foods sells Tarocco oranges in the United States under its own “BellaVita” brand. *See* CX-1 at 5.

#### Paganini’s “First Proposal” – January 5, 2007

On January 3, 2007, Celso Paganini and another representative of Paganini Foods, Tip Murphy, met with representatives of Westlake to discuss the possibility of selling Tarocco oranges to Westlake’s customers in or around the State of Florida. *See* Hrg Tr. at 32, 34 (Paganini); 788 – 791 (Miller). At the time, Tip Murphy was Paganini Foods’ director of corporate sales. *See id.*, at 34 (Paganini). Tip Murphy memorialized the terms of Paganini Foods’ proposal to Westlake in an internal email to Leonard Wallace on January 4, 2007. *See* CX-1 at 13 – 14. Paganini Foods proposed that Westlake would order 125 loads of Tarocco oranges and return \$13.50 per box to Paganini. *See id.*, at 14. Westlake would receive a three percent

commission on the Tarocco sales, promotional money, and fifty percent of any sales amounts that exceeded the base price of \$13.50 per box. *See id.*

Tip Murphy's January 4<sup>th</sup> internal email containing the terms of Paganini Foods' Tarocco orange proposal to Westlake was ultimately forwarded to Jeff Miller in Westlake's California office. *See id.*, at 12 – 13. Jeff Miller rejected Paganini Foods' proposal via email on January 5<sup>th</sup>. *See id.* Westlake refused to commit to moving 125 loads of Tarocco oranges. *See id.*; Hrg Tr. at 38 (Paganini). Westlake could not predict how its customers would promote the new orange or how consumers would respond. *See CX-1* at 13.

Shortly thereafter, on January 11, 2007, a freeze hit parts of California. *See Hrg Tr.* at 801 (Miller); 44 - 46 (Paganini). Some forecasters predicted severe damage to the California navel orange crop. *See CX-7*. Paganini Foods and Westlake anticipated that the damage to the California orange crop would generate interest in imported Tarocco oranges. *See CX-1* at 16, 21.

On January 12, 2007, Westlake requested price look-up ("PLU") numbers from Paganini Foods for Tarocco oranges and asked when the fruit would be available. *See id.*, at 16. Five containers of Taroccos were scheduled to arrive in the Port of Newark on February 5, 2007. *See CX-8* at 2. Six more containers of Taroccos were scheduled to arrive on February 12<sup>th</sup>. *See id.* Paganini Foods advised Westlake of the arrival date for the first shipment. *See CX-1* at 17.

On January 13, 2007, Paganini Foods' president, Celso Paganini, expressed his concern about "putting too many containers on the water without orders/programs" in an email to his staff and Jeff Miller of Westlake. *See id.*, at 17. It takes at least four weeks for an order of Tarocco oranges from Italy to arrive in the United States. *See Hrg Tr.* at 53 (Paganini); *CX-5* (Paganini logistics from Italy).

On January 16, 2007, Jeff Miller at Westlake emailed Celso Paganini to inform him that as a result of the freeze in California, customers were interested in the Tarocco oranges and that they were anxious to see samples. *See CX-1* at 21. Westlake represented that it could get commitments on "all fruit available as early as next week." *See id.* Celso Paganini noted his desire to finalize an agreement on "pricing, commitments, and building our partnership." *See id.*, at 23.

In mid-January of 2007, Westlake learned that Paganini Foods was working with one of Westlake's competitors in Los Angeles. *See id.*, at 24. Jeff Miller advised Paganini Foods that Westlake could not put together a program for the Tarocco oranges if a direct competitor was pushing the same fruit. *See id.* Paganini Foods' general manager, Leonard Wallace, assured Jeff Miller that Westlake was Paganini Foods' West Coast distribution partner of choice. *See id.*, at 25. Leonard Wallace noted that they would be able to work out the details of their partnership when he visited Westlake in California the following week. *See id.*

During the week of January 22 through 26, 2007, Tip Murphy and Leonard Wallace of Paganini Foods visited Westlake and potential chain store customers for the Tarocco in California. *See id.*, at 25 – 27, 29.

On January 26, 2007, Westlake requested advertising money from Paganini Foods that would be used to promote the Tarocco orange in one large retail chain store starting on February 21<sup>st</sup>. *See id.*, at 28.

Paganini's "Second Proposal" – January 27, 2007

On January 27, 2007, Tip Murphy of Paganini Foods sent an email to Jeff Miller and Dale Leifer of Westlake thanking them for their hospitality and letting them know that Paganini Foods would be sending Westlake an "understanding of our Partnership Agreement." *See id.*, at 29. Tip Murphy's email listed the following points:

1) Volumes – We will sell a minimum of 150 containers of the Bellavita brand Tarocco oranges from Feb 2007 – May 2007.

Listed below is the size breakdown, volumes per container, etc.

Size	% volume (est)	boxes/pallet	pallets/cont
4's	20%	140	21
6's	40%	140	21
8's Loose/	40%	140	21
8's Bags		65	21

2) Pricing – As we discussed, we need the following net return to Paganini Foods per box (prices are FOB Swedesboro, NJ)

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Size FOB price/box

4's \$16.00

6's \$14.00

8's Loose/ \$?? (I will have to follow up on this one 8's Bags  
\$25.20

3) Samples – We will send you at least one more box of the Tarocco oranges and at least one box of our Kiwi's.

4) By the end of next week (Feb 2<sup>nd</sup>), Jeff will provide to Tip the following by customer:

\*Overview of volumes/sizes

\*Ad dates

\*projected promotional dollars

\*other POS needs

5) We will send the following to Jeff:

\*300 of the POS signs for Ralph's

\*PDF file of our artwork for Stater Bros. (this is what Roger talked about . . . doing a story line, etc.)

6) future visits for me – I tentatively would like to come back to the West Coast on the following weeks: Feb 26<sup>th</sup>, March 19<sup>th</sup>, April 16<sup>th</sup> and May 17<sup>th</sup>. Please let me know of this works for you guys.

These are my notes . . . if I missed something, let me know. Also, feel free to share this e-mail with Joe. Thanks again for an outstanding week!!

*See id.*, at 29 – 30 (emphasis added). Jeff Miller of Westlake responded to Tip Murphy's email on January 30, 2007 stating:

Tip, this all looks good. Let me get with our customers and try and get a feel of their volumes. So far ad dates are as follows: Kroger/Ralphs-Feb 21<sup>st</sup>. 5 to 7,000 ctns. 6's and 8's. Stater Bros. Feb. 21<sup>st</sup>. 6's and 4's. Food 4 Less Feb. 28<sup>th</sup>. volume to be determined. Bristol Farms ad date to be determined.

*See id.*, at 32.

Paganini's "Third Proposal" – January 30, 2007

As promised in Tip Murphy's January 27<sup>th</sup> email to Westlake, Leonard Wallace of Paganini Foods sent a proposed partnership agreement to Westlake via email on January 30, 2007, which stated as follows:

Good Morning Jeff and Dale,

I wanted to tag onto Tip's email and thank each of you for your time and incredible hospitality. More importantly thank you for the many laughs and quality time spent. I believe we will have a very long friendship and develop an outstanding partnership over the years.

This will outline our Partnership Agreement. Please put this on your official letterhead, have your attorney look at and send back a signed copy to Tip and myself.

This Partnership agreement is only going to address our Tarocco Orange season; however, our desire is to have Westlake Produce Co. represent Paganini Foods LLC. in the Western US on all of our products for many years to come!!

1) Volumes – We agreed to a minimum of 150 containers of Tarocco oranges from Feb 2007 – May 2007.  
Westlake Produce Company will place a non-cancelable purchase order commitment for a minimum of 150 standard size containers of Italian Tarocco oranges which meet or exceed US#1 grade and condition as determined by USDA Inspection Standards.  
Paganini Foods LLC. will in turn place a non-cancellation purchase with its growers and packers for an equal number of containers and coordinate a schedule of deliveries based on fruit size and class for the term of the purchase agreement.  
Westlake Produce Company will supply and pack the fruit for the term of the purchase agreement.

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breakdown, volumes per container, etc.

Size	% of volume (est)	boxes/pallet	pallets/cont
4's	20%	140	21
6's	40%	140	21
8's Loose/	40%	140	21
8's Bags		65	21

2) Pricing – As we discussed, we need the following net return to Paganini Foods per box (prices are FOB Swedesboro, NJ)

Size	FOB price/box
4's	\$16.00
6's	\$14.00
8's Loose/	\$13.00
8's Bags	\$25.20

3) Invoicing – Each transaction will be invoiced from Paganini Foods LLC, to Westlake Produce Company.

4) Westlake commission – Westlake Produce Company will mark up our product by at least 5 – 6%, and Westlake will keep the difference between invoice price to end user and price paid to Paganini Foods.

5) Freight – Westlake Produce Company will manage and arrange all shipments and freight using it own carriers. Pananini Foods LLC will provide carrier support when needed.

6) Terms – Our payment terms are full payment in 10 days from invoice.

7) Territory – Westlake Produce will cover all customers West of the Rocky Mountains with the exception of Costco and Sam's.

8) Promotional Money – Westlake Produce will negotiate promotional plans/dollars with retailers. The promotional money

includes Demos, ads, pos, etc. Westlake will plan promotional money with Paganini in advance. Westlake will pay the retailers and Paganini will reimburse Westlake. All invoicing provided by Westlake must be specific on company letter head indicating Print Advertising, In store demo Run dates from/to, number of stores covered and coverage area ect.

We are very excited about this opportunity with our Partnership with Westlake Produce Company. Our desire is to have Westlake represent Paganini on all o[f] our products for many years to come! Should you have any questions or comments please feel to contact us at any time.

Respectfully;

Leonard Wallace

*See id.*, at 35 – 36 (emphasis added).

Westlake did not execute or return the partnership agreement that Paganini Foods proposed via email on January 27, 2007. *See* Hrg Tr. at 389, 395 (Paganini).

Paganini's "Fourth Proposal" – February 6, 2007

In response to Westlake's continuing objections to any requirement that it purchase a set number of containers of oranges, Paganini Foods sent a revised partnership agreement to Westlake via email on February 6, 2007. *See* CX-1 at 40. The email read as follows:

Listed below are the changes to our Partnership Agreement that we discussed today. Please have your lawyer put this on your official letterhead, have your attorney look at and send back a signed copy to Leonard and myself.

This Partnership agreement is only going to address our Tarocco Orange season; however, our desire is to have Westlake Produce

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Co. represent Paganini Foods LLC. in the Western US on all of our products for many years to come!!

1) Volumes – We agreed to a target volume of 150 containers of Tarocco oranges from Feb 2007 – May 2007. We will review the volumes weekly and Westlake will provide advance notice of changes to the target volume (150 containers). The advance notice is a minimum of 4 weeks. Westlake Produce Company will place a non-cancelable purchase order commitment for a standard size container of Italian Tarocco oranges which meet or exceed US#1 grade and condition as determined by USDA Inspection Standards. Paganini Foods LLC. will in turn place a non-cancellation purchase order with its growers and packers for an equal number of containers and coordinate a schedule of deliveries.

Listed below is the size breakdown, volumes per container, etc.

Size/ % of volume (est)/ boxes per pallet/ pallets per container

4's	20%	140	21
6's	40%	140	21
8's Loose/	40%	140	21
8's Bags		65	21

2) Pricing – As we discussed, we need the following net return to Paganini Foods per box (prices are FOB Swedesboro, NJ)

Size FOB price/box

4's	\$16.00
6's	\$14.00
8's Loose/	\$13.00
8's Bags	\$25.20

3) Invoicing – Each transaction will be invoiced from Paganini Foods LLC, to Westlake Produce Company.

4) Westlake commission – Westlake Produce Company will mark up our product by at least 5 – 6%, and Westlake will keep the difference between invoice price to end user and price paid to Paganini Foods.

5) Freight – Westlake Produce Company will manage and arrange all shipments and freight using its own carriers. Paganini Foods LLC will provide carrier support when needed.

6) Terms – Our payment terms are full payment in 10 days from invoice.

7) Territory – Westlake Produce will cover all customers West of the Rocky Mountains with the exception of Costco and Sam's.

8) Promotional Money – Westlake Produce will negotiate promotional plans/dollars with retailers. The promotional money includes Demos, ads pos, etc. Westlake will plan promotional money with Paganini in advance. Westlake will pay the retailers and Paganini will reimburse Westlake. All invoicing provided by Westlake must be specific on company letterhead indicating Print Advertising, in store demo run dates from/to, number of stores covered and coverage area, etc.

We are very excited about this opportunity with our Partnership with Westlake Produce Company. Our desire is to have Westlake represent Paganini on all of our products for many years to come! Should you have any questions or comments please feel to contact us at any time.

Respectfully;

Leonard Wallace and Tip Murphy

*See id.*, at 40-41 (emphasis added).

Despite the softening of the purchase volume provision in the proposed agreement to a “target” sales volume, Westlake continued to refuse to execute the agreement. *See Hrg Tr.* at 101, 389, 395, 468 - 469 (Paganini). Nevertheless, representatives of Paganini Foods and Westlake continued to discuss the business of marketing and selling Tarocco oranges in California. *See, e.g., id.*, at 829 - 830 (Miller); 681 - 697 (Wallace); CX-1 at 44- 45, 49 (email correspondence regarding

promotional activities at retail stores). Some of Westlake's customers communicated directly with representatives of Paganini Foods about promotional events for the Tarocco orange. *See* RX-2 at 80 – 86.

The first five shipping containers of Tarocco oranges from Italy arrived in Newark on or about February 7, 2007. *See* CX-8 at 2; CX-1 at 48. Six more containers of oranges arrived on February 12, 2007. *See id.* Westlake placed its first Tarocco order for five truckloads of oranges on February 13, 2007. *See* CX-1 at 53; CX-2 at 5 – 49; Hrg Tr. at 153 – 154 (Paganini). Westlake forwarded positive customer comments that it received about samples of Taroccos to Paganini Foods. *See* RX-2 at 94.

On February 25, 2007, an additional twenty-three containers of Tarocco oranges destined for Paganini Foods' warehouse arrived in the port of Newark. *See* CX-1 at 56; CX-8 at 2.

On March 4, 2007, another fifteen containers of Tarocco oranges arrived at port from Italy. *See* CX-8 at 2.

On March 5, 2007, Jeff Miller of Westlake emailed Leonard Wallace at Paganini Foods to let him know that Westlake had several chain stores that were interested in the Tarocco oranges and that one chain store was running an advertisement featuring the oranges on the coming weekend. *See* CX-1 at 62.

On March 7, 2007, Westlake emailed an order for a sixth truckload of Tarocco oranges to Paganini Foods. *See id.*, at 63; CX-2 at 69 - 84. The email noted that several chain stores were "putting the oranges in" and running ads. *See* CX-1 at 63.

On March 12, 2007, Jeff Miller at Westlake emailed Celso Paganini about great responses that Westlake had gotten from their chain stores. *See id.*, at 68. One chain store had ordered 5000 cartons of Tarocco oranges. *See id.* Celso Paganini's email response to Mr Miller, which copied several people at Paganini Foods, including Leonard Wallace, stated that: "[a]t this point, without any programs, I don't feel we should order more containers, but given the situation this might be a mistake." *See id.*, at 67. He requested information about the inventory and prices of other oranges being sold in California. *See id.* Mr. Paganini also noted that of the fifty containers of Taroccos that had arrived thus far, "we sold about 20 already, consequently we still have another 30 containers to go." *See id.* Paganini Foods had an additional

fifteen containers on order. *See id.* Mr. Paganini's message further stated that: "[W]e need to decide by Wednesday, if we want to go ahead with our original program of 150 containers." *See id.* Westlake did not respond to Mr. Paganini's email. *See Hrg Tr.* at 202 (Paganini).

By March 23, 2007, Paganini Foods had received a total of sixty containers of Italian blood oranges at its warehouse in New Jersey. *See CX-8* at 2.

On or about March 25, 2007, Paganini Foods ordered three more containers of Tarocco oranges from Italy. *See Hrg Tr.* at 205 – 206 (Paganini).

By early April it was clear to Paganini Foods that the Tarocco orange was not selling as well as anticipated and that the company was "faced with the challenge of distributing approximately 200,000 boxes [i]n the remaining 6 to 8 week selling period." *See CX-1* at 76. On April 3, 2007, Leonard Wallace sent an email to Jeff Miller and various sales people at Paganini Foods allocating sales targets for the remaining 200,000 boxes of oranges in Paganini Foods' warehouse. *See id.*

On April 24, 2007, Celso Paganini and other representatives of Paganini Foods met with representatives of Westlake in California. *See id.*, at 90. The Paganini representatives looked at shipments that were affected by condition issues, such as skin breakdown or decay. *See id.*, at 91, 93, 94.

On May 7, 2007, Jeff Miller of Westlake sent an email to Celso Paganini and Leonard Wallace requesting Paganini Foods' approval to sell the fruit at less than \$10.00 per carton delivered based on the condition of the oranges. *See id.*, at 94.

By May 7, 2007, sixty loads of Tarocco oranges still needed to be sold in the remaining four to six weeks of the season. *See id.*, at 93.

Between April 6 and May 11, Westlake ordered an additional thirteen truckloads of oranges from Paganini Foods. *See CX-2* at 3 - 4.

On May 22, 2007, Jeff Miller sent Celso Paganini and Leonard Wallace a letter requesting a signed acknowledgement from Paganini Foods that Westlake could price the oranges as it saw fit. *See CX-1* at 96 - 98. Paganini Foods refused to sign the agreement. *See id.*, at 99. Westlake did not purchase any more Tarocco oranges from Paganini Foods.

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In total, during the period of February through May of 2007, Westlake purchased 27 truckloads (roughly 22 containers) of Tarocco oranges from Paganini Foods' warehouse in New Jersey. *See* CX-2. Paganini Foods was unable to sell many of the Tarocco oranges that it imported in 2007.

### Conclusions

Complainant Paganini Foods asserts that Respondent Westlake contracted to purchase 150 containers of Italian "Tarocco"<sup>1</sup> oranges from Paganini at fixed prices during the period of February through May of 2007 and that Westlake breached the agreement by refusing to take a majority of the oranges that it ordered. *See* Complainant's Brief at pp. 16 - 17. Ultimately, Westlake only purchased twenty-seven truckloads of Tarocco oranges from Paganini Foods in 2007. *See* CX-2.<sup>2</sup> Complainant asserts that it suffered damages in the amount of \$2,812,934.58 as result of Respondent's breach of the parties' contract. *See* Complainant's Brief at p. 28. Westlake denies that it ever contracted to purchase 150 containers of Tarocco oranges from Complainant.

As the proponent of the claim of a 150-container purchase agreement with Respondent, Complainant bears the burden of proving its claim by a preponderance of the evidence. *See Carlton Jones v. Samuel S. Barrage*, 16 Agric. Dec. 1142, 1143 (1957) (the "[c]omplainant has the burden of proving by a preponderance of evidence the essential

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<sup>1</sup> As noted in the findings of fact above, the "Tarocco" is a blood orange. *See* CX-1 at 6 (Paganini Foods' promotional materials); Hrg Tr. at 32 (Paganini). It is the most popular table orange in Italy. *See* CX-1 at 6. Paganini Foods sells imported Tarocco oranges in the United States under the "BellaVita" brand. *See id.*, at 5.

<sup>2</sup> A truckload is not equivalent to a container of oranges. "A container loads about 55,000 pounds. A load is about 44,000 pounds." *See* Hrg Tr. at 160 (Paganini). The twenty-seven truckloads of oranges that Westlake purchased from Paganini Foods equated to approximately 22 ocean containers. *See id.*, at 160, 471.

allegations of his complaint”).<sup>3</sup> Paganini Foods first presented a Tarocco orange distribution proposal to Westlake in an email on January 4, 2007, following a meeting with Westlake representatives in Florida. *See* CX-1 at 12 – 14. Westlake’s Florida office was not interested in partnering with Paganini Foods to sell imported oranges. The Florida office forwarded Paganini Foods’ Tarocco proposal to Jeff Miller in Westlake’s California office. At the time, Jeff Miller was a partner in Westlake and a salesman for the company. He is now Westlake’s president.

Paganini Foods’ initial proposal was that Westlake would order 125 loads of Tarocco oranges and return \$13.50 per box to Paganini. *See id.*<sup>4</sup>

Westlake would receive a three percent commission, promotional money, and fifty percent of any sales amounts that exceeded the base price of \$13.50 per box. *See id.* Jeff Miller of Westlake rejected Paganini Foods’ first proposal. Although Westlake was interested in selling Tarocco oranges in California, Westlake refused to be obligated to purchase 125 loads. *See id.* Westlake explained that it could not predict how its customers would promote the new orange or how consumers would respond. *See id.*

Despite Respondent’s refusal to commit to purchase a large volume of oranges from Complainant, the parties continued making plans to

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<sup>3</sup> *See also G.W. Palmer & Co., Inc. v. Sun Valley Potato Growers, Inc.*, 65 Agric. Dec. 673, 677 (2006) (“the party alleging that the contract called for Respondent to supply up to a truckload of 60-count cartons of Idaho Russet potatoes on a weekly basis . . . has the burden to prove this allegation by a preponderance of the evidence”); *Esch Far, v. Packers Canning Co., Inc.*, 50 Agric. Dec. 930, 933 (1991) (“[t]he burden is on the moving party . . . to prove the contract terms by a preponderance of the evidence”); *Sun World International, Inc. v. J. Nichols Produce Co., Inc.*, 46 Agric. Dec. 893, 894 (1987) (“a complainant has the burden of proving all of the allegations of its complaint including the existence of a contract with the respondent, the terms of the contract, respondent’s breach of the contract, and the resulting damages, by a preponderance of the evidence”).

<sup>4</sup> Paganini Foods’ former general manager testified that Paganini wanted Westlake to move 125 loads of oranges because that was the number of loads that Paganini Foods needed to sell in order to break even for the season. *See* Hrg Tr. at 647 – 648 (Wallace).

promote and sell Tarocco oranges to Westlake's customers in California. In mid-January 2007, a freeze hit parts of California. Some forecasters predicted severe damage to the California navel orange crop. *See* CX-7. As a result of the freeze, Westlake's customers were interested in the Tarocco oranges and were anxious to see samples. *See* CX-1 at 18, 21.

On January 16, 2007, Westlake represented to Paganini Foods that it could get commitments on "all fruit available as early as next week." *See id.*, at 21. Paganini Foods was concerned about "putting too many containers on the water without orders/programs." *See id.*, at 17.<sup>5</sup> During the latter part of January 2007, representatives of Paganini Foods, including the company's general manager, Leonard Wallace, visited Westlake in California. *See id.*, at 24. At Westlake's request, Paganini Foods terminated its relationship with other potential distributors in southern California. The parties worked together to arrange for promotional events and advertisements for the Tarocco with Westlake's chain store customers. On January 27, 2007, Paganini Foods' director of corporate sales, Tip Murphy, sent an email to Jeff Miller and others at Westlake to let them know that Paganini Foods was going to send Westlake another proposal for a partnership agreement between the parties. *See id.*, at 29.

Tip Murphy's email to Jeff Miller at Westlake listed the main points of Paganini Foods' second proposal.<sup>6</sup> With regard to volume, the email stated: "We will sell a minimum of 150 containers of the Bellavita brand Tarocco oranges from Feb 2007 – May 2007." *See id.* Jeff Miller of Westlake responded to Tip Murphy's email on January 30, 2007 stating:

Tip, this all looks good. Let me get with our customers and try and get a feel of their volumes. So far ad dates are as follows:  
Kroger/Ralphs- Feb 21<sup>st</sup>. 5 to 7,000 ctns. 6's and 8's. Stater

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<sup>5</sup> Celso Paganini testified that "'program' . . . means commitment. It means hard sales. It [means] when it arrives here it is sold, it goes to somebody." *See* Hrg Tr. at 55, 68 -69.

<sup>6</sup> As Respondent points out in its brief, the "second proposal" from Tip Murphy was not really a proposal at all. *See* Respondent's Reply Brief at p. 10. It was merely Tip Murphy's summary of key points of a proposed agreement that Paganini Foods anticipated sending to Westlake. *See* CX-1 at 29.

Bros. Feb. 21<sup>st</sup>. 6's and 4's. Food 4 Less Feb. 28<sup>th</sup>. volume to be determined. Bristol Farms ad date to be determined.

*See id.*, at 32.

Shortly after receiving Jeff Miller's response to Tip Murphy's email, Paganini Foods' general manager, Leonard Wallace, sent a third proposal, which was merely a more refined version of the second proposal, to Westlake by email that stated as follows:

Good Morning Jeff and Dale,

I wanted to tag onto Tip's email and thank each of you for your time and incredible hospitality. More importantly thank you for the many laughs and quality time spent. I believe we will have a very long friendship and develop an outstanding partnership over the years.

This will outline our Partnership Agreement. Please put this on your official letterhead, have your attorney look at and send back a signed copy to Tip and myself.

This Partnership agreement is only going to address our Tarocco Orange season; however, our desire is to have Westlake Produce Co. represent Paganini Foods LLC. in the Western US on all of our products for many years to come!!

1) Volumes – We agreed to a minimum of 150 containers of Tarocco oranges from Feb 2007 – May 2007. Westlake Produce Company will place a non-cancelable purchase order commitment for a minimum of 150 standard size containers of Italian Tarroco oranges which meet or exceed US#1 grade and condition as determined by USDA Inspection Standards. Paganini Foods LLC. will in turn place a non-cancellation purchase with its growers and packers for an equal number of containers and coordinate a schedule of deliveries based on fruit size and delivery date[s] as set forth in exhibit (A) to meet Westlake produce supply chain requirements. Listed below is the size breakdown, volumes per

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container, etc.

Size	% of volume (est)	boxes/pallet	pallets/cont
4's	20%	140	21
6's	40%	140	21
8's Loose/	40%	140	21
8's Bags		65	21

2) Pricing – As we discussed, we need the following net return to Paganini Foods per box (prices are FOB Swedesboro, NJ)

Size	FOB price/box
4's	\$16.00
6's	\$14.00
8's Loose/	\$13.00
8's Bags	\$25.20

3) Invoicing – Each transaction will be invoiced from Paganini Foods LLC, to Westlake Produce Company.

4) Westlake commission – Westlake Produce Company will mark up our product by at least 5 – 6%, and Westlake will keep the difference between invoice price to end user and price paid to Paganini Foods.

5) Freight – Westlake Produce Company will manage and arrange all shipments and freight using it own carriers. Pananini Foods LLC will provide carrier support when needed.

6) Terms – Our payment terms are full payment in 10 days from invoice.

7) Territory – Westlake Produce will cover all customers West of the Rocky Mountains with the exception of Costco and Sam's.

8) Promotional Money – Westlake Produce will negotiate promotional plans/dollars with retailers. The promotional money includes Demos, ads, pos, etc. Westlake will plan promotional money with Paganini in advance. Westlake will pay the retailers and Paganini will reimburse

Westlake. All invoicing provided by Westlake must be specific on company letter head indicating Print Advertising, In store demo Run dates from/to, number of stores covered and coverage area ect.

We are very excited about this opportunity with our Partnership with Westlake Produce Company. Our desire is to have Westlake represent Paganini on all o[f] our products for many years to come! Should you have any questions or comments please feel to contact us at any time.

Respectfully;

Leonard Wallace

*See id.*, at 35 – 36 (emphasis added). Leonard Wallace testified that Paganini Foods’ third proposal was intended to force Westlake to commit to purchase 150 containers of Tarocco oranges. *See Hrg Tr.* at 665 -- 666 (Wallace). The strategy failed. *See id.*, at 670, 685 - 686 (Wallace). Westlake refused to sign the agreement and informed Paganini Foods that if it was going to insist on a volume commitment, it would have to find a new distributor. *See id.*, at 669 – 670, 682 (Wallace); 829 (Miller); 90 (Paganini).

Based on Westlake’s continuing refusal to order 150 containers of Tarocco oranges, Paganini Foods sent a fourth proposal to Westlake on February 6, 2007, which read, in relevant part, as follows:  
Listed below are the changes to our Partnership Agreement that we discussed today. Please have your lawyer put this on your official letterhead, have your attorney look at and send back a signed copy to Leonard and myself.

This Partnership agreement is only going to address our Tarocco Orange season; however, our desire is to have Westlake Produce Co. represent Paganini Foods LLC. in the Western US on all of our products for many years to come!!

1) Volumes – We agreed to a target volume of 150 containers of Tarocco oranges from Feb 2007 – May 2007. We will review the

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volumes weekly and Westlake will provide advance notice of changes to the target volume (150 containers). The advance notice is a minimum of 4 weeks. Westlake Produce Company will place a non-cancelable purchase order commitment for a standard size container of Italian Tarroco oranges which meet or exceed US#1 grade and condition as determined by USDA Inspection Standards. Paganini Foods LLC. will in turn place a non-cancellation purchase order with its growers and packers for an equal number of containers and coordinate a schedule of deliveries.

Listed below is the size breakdown, volumes per container, etc.

Size/ % of volume (est)/ boxes per pallet/ pallets per container

4's	20%	140	21	
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Size FOB price/box

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We are very excited about this opportunity with our Partnership with Westlake Produce Company. Our desire is to have Westlake represent Paganini on all of our products for many years to come! Should you have any questions or comments please feel to contact us at any time.

Respectfully;

Leonard Wallace and Tip Murphy

*See* CX-1 at 40-41 (emphasis added). Despite the softening of the purchase volume requirement to a “target” sales volume of 150 containers of oranges, Westlake still declined to execute or return the proposed agreement. *See* Hrg Tr. at 101, 389, 395, 468 - 469 (Paganini).<sup>7</sup> Nevertheless, the parties continued to work together to promote and sell Tarocco oranges to Westlake’s chain store customers in California. *See, e.g., id.*, at 829 – 830 (Miller); 681 -- 697 (Wallace); CX-1 at 44-45, 49; RX-2 at 80 – 86 (email correspondence regarding promotional activities at retail stores). Paganini Foods’ first five containers of

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<sup>7</sup>*See also id.*, at 674 (Wallace) (discussing the reason for the change to a “target” volume in Paganini Foods’ final proposal of February 6, 2007).

Tarocco oranges from Italy arrived in port at Newark on or about February 7, 2007. *See* CX-8 at 2; CX-1 at 48. Westlake ordered its first truckload of Tarocco oranges from Paganini Foods' warehouse in New Jersey on February 13, 2007. *See* CX-1 at 53; CX-2 at 5 - 14.

Although many of Westlake's chain store customers responded positively to the samples of the Tarocco oranges that they received, the positive feedback did not result in the overall sales volume that Paganini Foods had anticipated.<sup>8</sup> By mid-March 2007, Westlake and Paganini Foods, which independently marketed the Tarocco oranges throughout the remainder of the United States, had only sold twenty of the fifty containers that had arrived from Italy. *See* CX-1 at 67. Paganini Foods had an additional fifteen containers of Tarocco oranges on order. *See id.* By May 7, 2007, Paganini Foods had sixty loads of Tarocco oranges in its warehouse that needed to be sold in the remaining four to six weeks of the season. *See id.*, at 93. The condition of the oranges began to deteriorate over time. *See* Hrg Tr. at 237 (Paganini); CX-1 at 93. On May 22, 2007, Jeff Miller sent Celso Paganini and Leonard Wallace a letter requesting a signed acknowledgement from Paganini Foods that Westlake could price the oranges as it saw fit. *See* CX-1 at 96 - 98. Paganini Foods refused to sign the agreement. *See id.*, at 99. Westlake did not purchase any more Tarocco oranges from Paganini Foods. *See* Hrg. Tr at 247 (Paganini).

Paganini Foods was unable to sell many of the Tarocco oranges that it imported from Italy in 2007. Some had to be destroyed. Paganini Foods asserts that its final email proposal to Westlake, (the "fourth" proposal), dated February 6, 2007, was a written confirmation of an oral agreement that had been reached between the parties.<sup>9</sup> From Paganini's

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<sup>8</sup> The freeze that affected the California orange crop in 2007 produced little benefit for Paganini Foods' Tarocco orange sales. *See* Hrg Tr. at 637 - 638 (Wallace). The Tarocco orange was more expensive than other table oranges in the market. *See id.*, at 643.

<sup>9</sup> Under the Uniform Commercial Code ("UCC"), failing to object to a written confirmation of an oral contract takes the contract out of the statute of frauds where the sales transaction is between merchants. *See* UCC § 2-201(2). A merchant is defined as someone "who deals in goods of the kind" or who "holds himself out as having  
(continued...)

perspective, “the parties formed a contract under which Westlake purchased 150 containers of Tarocco oranges from Paganini unless Westlake gave a four (4) week advance notice of a lesser quantity.” *See* Complainant’s Brief at p. 16. Paganini Foods contends that “Westlake started ordering Tarocco oranges from Paganini, confirming that it agreed to the terms in the February 6 email.” *See* Complainant’s Reply Brief at p. 3.<sup>10</sup>

Typically, a contract for the sale of goods in excess of \$500 is unenforceable unless it is in writing and signed by the party against whom enforcement is sought. *See* UCC § 2-201(1).<sup>11</sup> Enforcement is barred by the statute of frauds. *See, e.g., Thomson Printing Machinery Co. v. B.F. Goodrich Co.*, 714 F.2d 744, 746 (7<sup>th</sup> Cir. 1983) (outlining the dispute over a fighting cock named Fiste that led to the creation of the original “statute of frauds” in 1677). However, procedural applications of state law statute of fraud provisions are not applied to render oral contracts unenforceable in reparation proceedings under the PACA. *See Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 528 (3<sup>rd</sup> Cir. 1950).<sup>12</sup> Although there is no statute of frauds bar to

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<sup>9</sup>(...continued)

knowledge or skill peculiar to the practices or goods involved in the transaction.” *See* UCC § 2-104. Westlake and Paganini Foods are both licensed under the PACA to do business in the produce trade and both are “merchants” as that term is used in the UCC.

<sup>10</sup> *See also* Hrg Tr. at 444 (Paganini) (confirming that Complainant is alleging that the February 6<sup>th</sup> proposal is the agreement between the parties).

<sup>11</sup> *See also* N.J. Stat. Ann. § 2-201 (2005) (section 2-201 as adopted in Complainant’s principal place of business, New Jersey); Cal. Com. Code § 2201 (section 2-201 as adopted in Respondent’s principal place of business, California). In this case, there is no question that Westlake refused to sign the agreement that was proposed by Paganini Foods. *See* CX-1 at 84; Hrg Tr. at 389, 395 (Paganini).

<sup>12</sup> *See also* *G.W. Palmer*, 65 Agric. Dec. at 679; *Faris Farms v. Lassen Farms d/b/a Midstate Corp.*, 59 Agric. Dec. 471, 478 - 479 (2000); *Donald Woods v. Conogra Inc., et al.*, 50 Agric. Dec. 1018, 1020 - 1022 (1991); *Barton Willoughby d/b/a Willoughby Farms v. Frito-Lay, Inc.*, 45 Agric. Dec. 1245, 1259 - 1260 (1986); *Ron Whitfield d/b/a*  
(continued...)

Complainant’s claim, Complainant still bears the “burden of persuading the trier of fact that a contract was in fact made orally prior to the written confirmation.” *See* Comment 3 to UCC § 2-201.<sup>13</sup> The terms of Complainant’s unilateral email proposals to Respondent “are not conclusive evidence of the terms of an agreement.” *See General Matters, Inc. v. Penny Products, Inc.*, 651 F.2d 1017, 1020 (5th Cir. 1981).<sup>14</sup> For the reasons discussed below, we conclude that Complainant has failed to sustain its burden of proving that Respondent contracted to purchase 150 containers of Tarocco oranges from it in 2007.

As Complainant points out, “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” *See* UCC § 2-204. “The parties themselves know best what they meant by their words of agreement and their action under the agreement is the best indication of what the meaning was.” *See* Comment 1 to UCC § 2-208

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<sup>12</sup>(...continued)

*Whitfield Brokerage Co. v. City Wide Distributors, Inc.*, 44 Agric. Dec. 936, 941 - 945 (1985); *Hegel Branch and James Bennett v. Mission Shippers, Inc.*, 35 Agric. Dec. 726, 731 - 732 (1976). “Reparations precedent presumes that the Statute of Frauds in the U.C.C. is procedural, and not substantive.” *See G.W. Palmer*, 65 Agric. Dec. at 679. The party seeking to invoke the statute of frauds bears “the burden of showing that a particular statute of frauds is a part of the substantive law of a state in the sense that it renders an agreement null and void as a contract and not merely unenforceable.” *See Donald Woods*, 50 Agric. Dec. at 1021 - 1022 (finding California’s statute of frauds inapplicable to reparation proceedings). Although Westlake asserted a statute of frauds defense in its Answer, it did not argue the defense in its post-hearing briefs. *See Answer* at p. 15 (“Second Affirmative Defense”).

<sup>13</sup> “Beyond producing a writing ‘sufficient to indicate that a contract for sale has been made between the parties,’ the [complainant] must still persuade the trier of fact that the parties did make an oral contract and that its terms were thus and so.” *See* WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 2.3 (5<sup>th</sup> ed. 2006) (quoting *Perdue Farms, Inc. v. Motts, Inc.*, 459 F.Supp. 7, 14 (N.D. Miss. 1978)). *See also Thomson Printing*, 714 F.2d at 746 (“[t]he sender [of the written confirmation] must still persuade the trier of fact that a contract was in fact made orally, to which the written confirmation applies”) (quoting Ohio Rev. Code Ann. § 1302.04(B)).

<sup>14</sup> *See also Perdue Farms*, 459 F.Supp. at 14 (“[a]lthough the confirmatory writing may be used as evidence to prove the contract’s terms, it is not conclusive proof”).

(course of performance). In the instant case, although the parties' conduct confirms that Westlake agreed to market Paganini Foods' Tarocco oranges to its customers in California, it does not support the allegation that Westlake ordered 150 containers of oranges from Complainant in 2007.

As Paganini Foods received multiple container shipments of Tarocco oranges from Italy during the period of February through April of 2007, it did not tender the containers to Westlake and demand payment. "Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery." *See* UCC § 2-503(1).<sup>15</sup> Instead of holding the containers of oranges for Respondent, Complainant stored the oranges in its own warehouse and waited for orders from customers, including Westlake, while admittedly bearing the risk of loss as the oranges deteriorated over time. *See* Hrg Tr. at 773 – 774 (Wallace), 555 – 557, 562 (Paganini). Westlake emailed orders for truckload quantities of oranges to Paganini Foods. *See* CX-1 at 53 (order for five truckloads of oranges on February 13, 2007), 65 (order for one truckload of oranges on March 7, 2007). Paganini Foods prepared an invoice and demanded payment after an order was received, processed, and shipped. *See e.g.*, CX-2 at 70 – 84 (Westlake purchase order no. 139385); CX-1 at 71 – 72 (demanding payment for \$167,156 on five shipments to Westlake); RX-2 at 89 (demanding payment for \$5,536 on a shipment to Westlake).

Paganini Foods' orange sales in 2007 are well documented. *See* Hrg Tr. at 163 – 171 (Paganini) (discussing sales documentation). The sales files contain, *inter alia*, handwritten orders, email correspondence, invoices, bills of lading, freight bills and USDA inspection reports. *See* CX-2 (documentation for sales to Westlake). Although we would expect to see similar documentation, tender of delivery, and payment demands in connection with a sale of 150 containers of oranges to

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<sup>15</sup> Complainant's February 6<sup>th</sup> proposal to Westlake addressed this issue. It required the parties to "coordinate a schedule of deliveries." *See* CX-1 at 42. Earlier versions of the agreement attached a delivery schedule for the proposed orange shipments to Respondent. *See* CX-1 at 35.

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Westlake, there is nothing to show that the sale was ever consummated.<sup>16</sup> Paganini Foods did not invoice Westlake for 150 containers of oranges until July 24, 2007, after filing an informal complaint with the Department on July 13, 2007. *See* Report of Investigation at Exhibit B1.<sup>17</sup> As Paganini Foods' president conceded at the hearing in this case:

[Lawrence Meuers, Attorney for Respondent]

Q. But, my question was before the complaint was filed, was there ever any written communication or invoice statements to Westlake saying that they [owed] Paganini for those 150 containers?

[Celso Paganini, President of Paganini Foods]

A. No.

*See* Hrg Tr. at 522 (Paganini). Consistent with this testimony, there is no evidence to suggest that Paganini Foods ever demanded assurances from Westlake that it would honor its purported commitment to purchase 150 containers. *See* UCC § 2-609 (right to adequate

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<sup>16</sup> Paganini Foods' claim that Westlake ordered 150 containers of oranges is documented solely by its partnership proposals to Westlake, including Paganini's final proposal on February 6, 2007. *See* Hrg Tr. at 401 - 402 (Paganini). The proposed agreement unambiguously required express acceptance by Respondent. *See* CX-1 at 40 ("put this on your official letterhead, have your attorney look at and send back a signed copy to [Paganini Foods]"). Offers to form a contract can generally be accepted in any manner reasonable under the circumstances, *unless* the offer unambiguously specifies the manner of acceptance. *See* UCC § 2-206(1). Here, Respondent unquestionably refused to sign and return any of Complainant's offers to sell 150 containers of Italian oranges. *See, e.g.,* CX-1 at 84 (email from Celso Paganini noting the absence of the signed contract); Hrg Tr. at 101, 389, 395, 468 - 469 (Paganini).

<sup>17</sup> Self-serving documents prepared or exchanged after the institution of a proceeding do not prove the existence of a contract between the parties. *See, e.g., Sun World*, 46 Agric. Dec. at 894.

assurance).<sup>18</sup>

Although Paganini Foods solicited input from Westlake with regard to the number of containers of oranges that it should import from Italy on at least one occasion, Westlake declined to respond. *See* CX-1 at 67; Hrg Tr. at 202, 205 – 206, 411 (Paganini), 701 - 702 (Wallace). In the absence of any input from Westlake, Paganini Foods exercised its own judgment in deciding the overall volume of oranges that it ordered from Italy in 2007. As Paganini Foods' former general manager explained: HEARING OFFICER SPICKNALL: Okay. Well, how did it end up that there ended up being so much inventory in Swedesboro, New Jersey that was unsold?

THE WITNESS: I think Celso [Paganini] just made the decision to keep bringing the product in. Because at any -- at any given time, he could have -- he could have stopped with the ordering as long as there was four weeks in advance because that's what it takes to put it on the water. You know, with picking time and -- and carrying and everything, it just takes 14 [days] that long to get over -- over the water. So, there was plenty of time. There was plenty of time. You know, I mean we -- only to bring in about 90 -- 90 or so containers and, you know, we'd bring in 150. We brought in about 90 and of those, you know, we -- we had severe loss. So.

HEARING OFFICER SPICKNALL: So, was there a certain point in time, and I think this came up earlier, that you -- it was your -- did you voice the opinion to stop at some point in time?

THE WITNESS: Yes, Tip [Murphy] and myself, yes, we -- we had several discussions with Celso that, you know, that based on the numbers that were coming in throughout the United States there was no more -- it was impossible to continue to -- continue bringing it in.

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<sup>18</sup> Representatives of Westlake and Paganini Foods communicated by telephone every day -- sometimes two or three times a day. *See* Hrg Tr. at 696 – 697, 742 (Wallace) (discussing telephone contact with Westlake); 81, 441 (Paganini) (same).

You know, but I think at that point, we had -- we already had so much on the water and then, I don't know if he was in Italy or where he was doing his -- his additional buying from -- he made one more trip to Italy, but, you know, we had put I think 20 or 25 containers on the water when we already had, you know, maybe 50 in-house. So -- that we were desperately trying to move. So, that was unfortunate, but that's the way it worked out. . . .

*See* Hrg Tr. at 770 – 771 (Wallace). Even when it became clear that Paganini Foods had an overwhelming amount of orange inventory on hand, the company still did not tender the oranges to Westlake and demand payment. Instead, Paganini Foods attempted to motivate the company's own sales staff and Westlake to sell more oranges. *See* CX-1 at 76, 93; Hrg Tr. at 704 – 706, 708 – 710 (Wallace), 524 – 530 (Paganini). Complainant's conduct is not consistent with its allegation that it truly believed that Westlake had already purchased these oranges. Although Paganini Foods' president testified that he would have only imported ten to twenty containers in the absence of any dealings with Westlake, the reality is that by the time of Paganini Foods' final partnership proposal to Respondent on February 6, 2007, the company had already ordered at least thirty-four containers of oranges from Italy. *See* Hr Tr. at 138, 505 (Paganini).<sup>19</sup> Paganini Foods was not relying on a standing order from Westlake when it imported these oranges.<sup>20</sup> As Paganini Foods' former general manager explained at the hearing:

[Steven Nurenberg, Attorney for Respondent]

Q. So, when you're talking about the 150 containers, what was your anticipation of how this fruit was going to be moved once it got here? Was it all going to be sold by Westlake?

[Leonard Wallace, former General Manager of Paganini Foods]

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<sup>19</sup> *See also* CX-1 at 48 (Paganini Foods' tracking sheet showing orders for 56 containers as of February 9, 2007).

<sup>20</sup> Paganini Foods' former general manager, Leonard Wallace, testified that the company had planned to import sixty to sixty-five containers of Tarocco oranges in 2007, even before meeting Westlake. *See* Hrg Tr. at 617 - 618, 715 - 716.

A. All 150 containers?

Q. Right.

A. No, I mean it's -- it's -- we have the responsibility -- I mean it's my responsibility as general manager/managing director of North America is to -- is to move the fruit. If I depended on one company, I -- then I wouldn't be making a very good business decision. My -- my business decision and strategy are based upon, you know, a global perspective and I have to look at things how do we -- how do we sell what we're bringing in to -- to the masses and Jeff Miller is -- is only one of many -- many retailers out there and obviously, you know, him and his -- his organization have great distribution channels. But, you know, it would be a bad decision on my part to say well, I'm only going to sell, you know -- well, we had -- we had many. We had -- we had the northeast. We had the northwest. We had the -- we had all the south. We had a lot of -- a lot of retailers that we had to sell to.

Q. Who was going to sell to the northeast?

A. We were. We did sell to the northeast.

Q. Who's we?

A. Paganini Foods, the entire company.

Q. Okay.

A. Steve, Tip, myself. Celso was involved with many of the sales when it came to Path Mart, et cetera.

Q. Okay.

HEARING OFFICER SPICKNALL: When it came to?

THE WITNESS: Path Mart. Path Mart. Price Shopper. Those were

Celso's accounts specifically that he had built relationships with. That we had sold the year before and we were going to do it again.

*See* Hrg Tr. at 660 – 662. Paganini Foods' sales of Tarocco oranges to other customers in 2007 exceeded the company's sales to Westlake. *See, e.g.*, Report of Investigation at Exhibit B1; CX-8 at 1.

Complainant's claim that Westlake was obligated to take all of the Tarocco oranges that it imported from Italy unless it gave four weeks' advance notice of changes to the "target" sales volume of 150 containers, is derived from the language of Paganini Foods' final proposal to Westlake on February 6, 2007, which reads as follows:

Volumes – We agreed to a target volume of 150 containers of Tarocco oranges from Feb 2007 – May 2007. We will review the volumes weekly and Westlake will provide advance notice of changes to the target volume (150 containers). The advance notice is a minimum of 4 weeks.

*See* CX-1 at 40; Complainant's Reply at 6.<sup>21</sup> Complainant's argument that Westlake was obligated to pay for all of the oranges that it imported in 2007 because it failed to give advance notice of a change to the "target" sales volume of 150 containers of oranges simply ignores the fact that the proposed agreement goes on to specify the manner in which Westlake became obligated to purchase a container of oranges from Italy:

Westlake Produce Company will place a non-cancelable purchase order commitment for a standard size container of Italian Tarocco oranges . . . Paganini Foods LLC. will in turn place a non-cancellation purchase order with its growers and packers for an equal number of containers and coordinate a schedule of deliveries.

*See* CX-1 at 40. There is no evidence to suggest that Westlake ever placed a purchase order for a standard size container of Tarocco oranges

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<sup>21</sup> The notice provision in the Paganini Foods' final proposal to Westlake was designed to account for the four weeks that it takes for an ocean container of oranges from Italy to reach the United States. *See* Hrg Tr. at 53, 97 -98, 442 - 443 (Paganini).

from Italy. Nor did Paganini Foods ever, “in turn,” convey an order from Westlake to orange growers in Italy.

As noted above, by the time of Complainant’s final partnership proposal to Respondent on February 6, 2007, Paganini Foods had already ordered at least thirty-four containers of oranges from Italy, despite having no purchase order commitments from Westlake. *See Hr Tr.* at 505 (Paganini).<sup>22</sup> Even after the proposal was transmitted to Westlake, and purportedly agreed to verbally by Westlake, Paganini Foods continued to order oranges from Italy without purchase orders from Westlake. As Jeff Miller of Westlake explained at the hearing:

[Lawrence Meuers, Attorney for Respondent]

Q. Now, at anytime, did you ask Paganini to order Taroccan oranges for you from Italy that you would receive them five/six weeks later in California?

[Jeff Miller, President of Westlake]

A. Never.

Q. So, isn't it true that you were ordering them from the New Jersey warehouse?

A. Correct.

Q. And you -- when you had some e-mails back and forth saying we'll take all available, you're talking about in the New Jersey warehouse.

A. I think that e-mail was referring to something that was just getting started and there was only a few loads in the warehouse or maybe

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<sup>22</sup> *See also* CX-1 at 48 (Paganini Foods’ tracking sheet showing orders for 56 containers as of February 9, 2007). Celso Paganini testified that Paganini Foods would have only imported ten to twenty containers in the absence of an agreement with Westlake. *See Hrg Tr.* at 138.

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coming out of the warehouse. So.

Q. Then you were talking about the warehouse?

A. Exactly.

Q. You're not talking about Italy.

A. Correct.

Q. So, is it safe to say that how they came from Italy was not your concern?

A. No, it was Celso's doing I guess and Leonard I believe and Tip and his other salesmen were also selling off their warehouse.

Q. But, it was your concern from the warehouse?

A. Well, we were -- we were placing our orders on what we knew was there. Correct.

*See id.*, at 880 – 881. In short, Respondent's orange orders from Paganini Foods' existing inventory in New Jersey did not signal acceptance of Complainant's February 6<sup>th</sup> proposal. Westlake's orders did not follow the purchase procedure set forth in the proposed agreement. As discussed above, Respondent never issued a purchase order for a container of oranges from Italy. *See id.*, at 401 (Paganini). Respondent was under no obligation to cancel orders for containers of oranges that it never placed.

Consistent with the lack of evidence that either party performed in accordance with the Paganini Foods' February 6<sup>th</sup> proposal, the principal negotiators for both parties testified that Westlake did not agree to purchase 150 ocean containers of Italian oranges from Complainant. Paganini Foods' general manager, Leonard Wallace, testified as follows: [Steven Nurenberg, Attorney for Respondent]

Q. Okay. What, if anything, was said by Mr. Miller or what, if

anything, was his response to the proposal that Westlake would place a noncancelable purchase order commitment for a minimum of 150 standard-size containers?

[Leonard Wallace, former General Manager of Paganini Foods]

A. He said Leonard, you know I can't do that. You know, I'm not willing to do that.

\* \* \*

[Steven Nurenberg, Attorney for Respondent]

Q. To the best of your recollection, was this proposal of February 6, 2007 accepted by Westlake either verbally or in writing?

[Leonard Wallace, former General Manager of Paganini Foods]

A. Accepted how?

Q. Did they ever accept the terms -- did they ever accept this agreement or this proposal either orally or in writing?

A. No. No. We talked about the target. We talked about the targets of we could -- what each -- what I wanted each of them to hit.

*See id.*, at 670, 676 – 677 (Wallace).<sup>23</sup> Westlake's representative, Jeff Miller, gave similar testimony:

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<sup>23</sup> *See also id.*, at 655 – 656. Paganini Foods' president, Celso Paganini, who believed that Westlake had agreed orally to purchase 150 containers of oranges from Paganini Foods, relied on Leonard Wallace and Tip Murphy to negotiate with Westlake. *See CX-1* at 84 (“[in] words though, you and Tip told me, they agreed”); *Hrg Tr.* at 80 (“[t]hey told me that they had an agreement of [ ]150”), 393, 454 – 455, 537 – 538, 571, 574 - 575 (Paganini). Leonard Wallace testified that he informed Celso Paganini that Westlake had not agreed to Paganini Foods' February 6<sup>th</sup> proposal. *See Hrg Tr.* at 714 (Wallace).

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[Lawrence Meuers, Attorney for Respondent]

Q. Okay. What did you do or did you discuss this February 6th agreement with anybody after you received it?

[Jeff Miller, President of Westlake]

A. Yes, this was the e-mail that I was referring to earlier. This was the third one and for some reason, it seemed like they were continuing to send proposals and we were continuing to -- to -- to disagree. That we weren't going to sign them. Therefore, at that point, I called. Leonard and Celso and myself got on a conference call and they wanted me to sign this and I said absolutely not and it got to the point where I told them that if they wanted to have someone sign off and agree to accept 150 loads of fruit without having any -- you know, flat out, that we would absolutely not do that and they should find another handler for their product and another distributor and we were going to quit.

Q. And what was their response?

A. I don't believe that there was a response on that phone call, but we later talked and agreed that we would be buying this product on a load-by-load basis and that they would give us prices at the time of shipment and that we would take those -- those prices and those -- and go -- go attack our customers.

*See id.*, at 828 – 830. The transactional documents that were produced by both parties are fully consistent with this testimony. *See, e.g.*, CX-2.

As noted above, Westlake ordered oranges on a load-by-load basis from Paganini Foods' existing inventory in New Jersey. *See id.* Respondent did not issue purchase orders for ocean containers of oranges from Italy. Typically, oral contracts are enforceable with respect to the goods for which payment has been made and accepted, or which have been received and accepted. *See, e.g., La Casita Farms, Inc. v. Johnston City Produce Co.*, 34 Agric. Dec. 506, 507 - 508 (1975) (enforcing oral

contracts for cantaloupes that were received and accepted).<sup>24</sup> In the instant case, Respondent paid in full for the truckload quantities of oranges that it ordered, received, and accepted. See Complainant's Reply Brief at p. 4 (noting that "Westlake paid Paganini for the oranges in accord with the invoices"). Respondent was required to do no more.

Complainant's reliance on our decision in *George P. McDonald d/b/a Lazy Nag Produce v. Eagles Three, Inc. d/b/a Trademark Produce & Sales*, 46 Agric. Dec. 882, 885 (1987), is misplaced. In that case, the complainant sought an award of reparation in connection with a sale of 850 sacks of yellow onions, grade U.S. No. 1. The respondent brokered the sale to a customer in New York at an agreed price of \$7.00 per sack on July 11, 1984. The onions shipped that same day and the respondent sent a confirmation of sale to complainant noting that the delivery terms of the contract were "f.o.b. as to price – delivered as to grade and condition." On July 12, 1984, complainant issued an invoice which stated that the sale was "f.o.b. – Net due 10 days." The shipment of onions experienced transportation problems and a destination inspection on July 16, 1984, found that the onions had deteriorated and failed to grade U.S. No. 1. The respondent negotiated a price adjustment of \$5.25 per sack and sent a written confirmation of the adjusted price to the complainant. Roughly a week later, the complainant denied that it had accepted the price adjustment and ultimately filed a claim against respondent to recover the original sale price of the onions.

In deciding the *George P. McDonald* case, we found that complainant's failure to timely object to the terms of the respondent's

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<sup>24</sup> See also, e.g., *Jerome M. Matthews d/b/a Matthews Groves v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681, 1682 - 1683 (1987) (enforcing oral contracts for longnans that were received, accepted, and partially paid for by the respondent); *Saras, Inc. v. Continental Farms, Inc.*, 46 Agric. Dec. 1260, 1261 - 1262 (1987) (enforcing oral contracts for peppers, squash and pickles that were received, accepted, and partially paid for by the respondent); *Gold Bell, Inc. v. S. Naiman & Sons, Inc.*, 46 Agric. Dec. 1132 (1987) (enforcing oral contracts for broccoli, potatoes, turnips and onions that were received and accepted by the respondent). Obviously, oral contracts are also enforceable if the party against whom enforcement is sought admits that a contract was made. See, e.g., UCC § 2-201(3)(b).

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confirmation of sale established that the transaction was “f.o.b. as to price – delivered as to grade and condition.” As a result, the complainant was responsible for the onions making grade at destination, regardless of whether the transportation service was normal. Our decision in *George P. McDonald* is consistent with section 2-207(2) of the UCC which states in relevant part:

The additional terms [in confirmations of sale] 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.

*See* UCC § 2-207(2). We also found that the complainant in *George P. McDonald* failed to prove that it had rejected the price adjustment negotiated by respondent.

In *George P. McDonald* it was abundantly clear that the parties had agreed to a sale involving 850 sacks of yellow onions, grade U.S. No. 1. The onions were received and accepted at their destination after an inspection and price adjustment. The dispute was over price and conflicting delivery terms in respondent’s confirmation of sale and complainant’s invoice. In the instant case, the facts are far different. Complainant’s February 6<sup>th</sup> proposal to Respondent was not a confirmation of sale – it was an offer to sell Respondent 150 containers of oranges. For the reasons already discussed, we find that Complainant has failed to prove that Respondent ever accepted the offer. Neither party performed in accordance with the terms of Complainant’s proposed agreement. Respondent did not receive or accept 150 ocean containers of oranges. *George P. McDonald* and section 2-207(2) of the UCC, which resolve disputes over the terms of otherwise valid sales contracts, have no application to the instant case.

Accordingly, Complainant’s claim for reparation is denied. Complainant has failed to prove by a preponderance of the evidence that

Respondent contracted to purchase 150 containers of Italian oranges in 2007. Therefore, Respondent is the prevailing party. Under section 7(a) of the PACA, Respondent is entitled to reasonable fees and expenses incurred in connection with the hearing. *See* 7 U.S.C. § 499g(a).

Although we would have awarded Respondent a total of \$83,290.11 in fees and expenses that were incurred in connection with the hearing in this case as reparation, Complainant has now filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey, Case No. 10-13006-GMB. The bankruptcy filing stays proceedings, including administrative proceedings, against the debtor. *See* 11 U.S.C. § 362(a)(1). Respondent's claim for fees and expenses against Complainant, pursuant to 7 U.S.C. § 499g(a), is an "action or proceeding against the debtor" within the meaning of § 362(a)(1), notwithstanding the fact that Complainant initiated this case. *See, e.g., M. Offutt Co., Inc. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596, 607 (1990) (staying an order for fees and expenses as a result of complainant's bankruptcy filing). Therefore, the award of fees and expenses to Respondent must be stayed.

The parties are instructed to notify the PACA Branch when the bankruptcy court grants relief from the automatic stay or when the stay lapses. Until such information is received by the PACA Branch, all further proceedings with regard to Respondent's claim for fees and expenses are stayed.

### **Order**

The Complaint in this matter is dismissed.

Respondent's claim for fees and expenses is hereby stayed pending the conclusion of Complainant's bankruptcy proceeding.

Copies of this Order shall be served upon the parties.

Done in Washington, D.C.

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**METZ FRESH LLC v. D'ARRIGO BROS. CO. OF CALIFORNIA.**

**PACA Docket No. R-09-074.**

**Decision and Order.**

**Filed June 15, 2010.**

**PACA-R.**

**Bailment.**

Where Respondent took possession of product sold by Complainant to a third party, Kingston, solely for the purpose of "cross-docking," *i.e.*, segregating the product into smaller lots so that it could be shipped, following consolidation with product from other shippers, to Kingston, found that Respondent and Kingston were engaged in a bailment. Although Respondent agreed to take billing for the commodities, the sales prices were negotiated between Complainant and Kingston, with Respondent billing Kingston an additional \$0.25 per carton for its cross-docking fee. Since Kingston was the true purchaser of the commodities, found that Respondent, as part of the bailment arrangement, was acting as agent for Kingston, its disclosed principal, when it agreed to taking billing, and that Respondent did not incur any liability under the contracts absent any indication that it specifically agreed to pay for the commodities in the event that Kingston did not pay.

Patrice Harps, Presiding Officer.

Leslie Wowk, Examiner.

Complainant, pro se

Respondent, pro se

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

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of \$7,958.80 in connection with eight truckloads of spinach and spring mix shipped in the course of interstate commerce.

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

The amount claimed in the Complaint does not exceed \$30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties also submitted a brief.

#### **Findings of Fact**

1. Complainant, Metz Fresh LLC, is a limited liability company whose post office address is 39405 Metz Road, King City, California, 93930. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, D'Arrigo Bros. Co. of California, is a corporation whose post office address is P.O. Box 850, Salinas, California, 93902. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On August 18, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach and spring mix. (ROI Ex. A p. 5) Complainant prepared invoice number 180820 billing Respondent for 140 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at \$10.50 per carton, or \$1,470.00, and 288 cartons of Metz Fresh pillow spring mix (3 lb.) at \$4.50 per carton, or \$1,296.00, for a total invoice price of \$2,766.00. (ROI Ex. A p. 4) Respondent paid Complainant \$1,103.60 for the spinach and spring mix billed on this invoice. (ROI Ex. A p. 3)
4. On August 20, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach and spring mix. (ROI Ex. A p. 7) Complainant prepared invoice number 180918 billing Respondent for 210 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at \$10.50 per carton, or \$2,205.00, and 288 cartons of Metz Fresh pillow spring mix (3 lb.) at \$4.50 per carton,

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or \$1,296.00, for a total invoice price of \$3,501.00. (ROI Ex. A p. 6) Respondent paid Complainant \$1,296.00 for the spinach and spring mix billed on this invoice. (ROI Ex. A p. 3)

5. On August 21, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 9) Complainant prepared invoice number 180926 billing Respondent for 140 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at \$10.50 per carton, for a total invoice price of \$1,470.00. (ROI Ex. A p. 8) Respondent has not paid Complainant for the spinach billed on this invoice.

6. On August 23, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 11) Complainant prepared invoice number 181074 billing Respondent for 70 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at \$10.50 per carton, for a total invoice price of \$735.00. (ROI Ex. A p. 10) Respondent has not paid Complainant for the spinach billed on this invoice.

7. On August 24, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 13) Complainant prepared invoice number 181118 billing Respondent for 140 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at \$10.50 per carton, for a total invoice price of \$1,470.00. (ROI Ex. A p. 12) Respondent has not paid Complainant for the spinach billed on this invoice.

8. On August 27, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach and spring mix. (ROI Ex. A p. 15) Complainant prepared invoice number 181265 billing Respondent for 350 cartons of Metz Fresh cello spinach (4 x 2.5 lb.) at \$10.50 per carton, or \$3,675.00, and 432 cartons of Metz Fresh pillow spring mix (3 lb.) at \$4.50 per carton, or \$1,944.00, for a total invoice price of \$5,619.00. (ROI Ex. A p. 14) Respondent paid Complainant \$5,517.75 for the spinach and spring mix billed on this invoice. (ROI Ex. A p. 3)

9. On November 12, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 17) Complainant prepared invoice number 184363 billing Respondent for 144 cartons of Metz Fresh pillow

spring mix (3 lb.) at \$4.50 per carton, for a total invoice price of \$648.00. (ROI Ex. A p. 16) Respondent paid Complainant \$375.00 for the spinach billed on this invoice. (ROI Ex. A p. 3)

10. On November 16, 2007, Complainant shipped from loading point in the state of California, to Respondent, in Salinas, California, one truckload of spinach. (ROI Ex. A p. 19) Complainant prepared invoice number 184586 billing Respondent for 288 cartons of Metz Fresh pillow spring mix (3 lb.) at \$4.50 per carton, for a total invoice price of \$1,296.00. (ROI Ex. A p. 18) Respondent paid Complainant \$1,253.85 for the spinach and spring mix billed on this invoice. (ROI Ex. A p. 3)

11. The informal complaint was filed on April 4, 2008, which is within nine months from the date the cause of action accrued.

### **Conclusions**

Complainant brings this action to recover the unpaid balance of the invoice price for eight truckloads of spinach and spring mix allegedly sold and shipped to Respondent. Complainant states Respondent purchased and accepted the commodities in compliance with the contracts of sale, but that it has since paid only \$9,546.20 of the agreed purchase prices thereof, leaving a balance due Complainant of \$7,958.80. (Complaint ¶ 6) In response to Complainant's allegations, Respondent states it was invoiced for the product in question on a "collect and remit" cross-dock basis as a convenience for Complainant's customer, Kingston Produce ("Kingston"), and that it remitted full payment to Complainant for the commodities based on the proceeds collected from Kingston. (Answer ¶ 4, Second and Third Affirmative Defenses)

There is no dispute that Respondent took billing, received delivery, and remitted partial payment to Complainant for the subject loads of spinach and spring mix. The controversy concerns the issue of whether Respondent was the true purchaser of the product, or whether it was simply taking billing on a collect and remit basis as a convenience to a third party purchaser, Kingston. Respondent's sales manager, Matthew Amaral, explains in affidavit testimony submitted as part of

Respondent's Answering Statement that Respondent acted as a cross-docking facility for Kingston. Mr. Amaral describes "cross-docking" as the consolidation of product from several vendors at a single "cross dock" location for shipment to a common destination. Mr. Amaral states Respondent would get product that Kingston had negotiated with individual shippers throughout Monterey County, and, for a fee, Respondent would consolidate the loads and do the accommodation invoicing as a convenience for the shippers and Kingston. When billing Kingston, Mr. Amaral states Respondent would add a cross-docking charge to the original f.o.b. price billed by the shipper, but would not otherwise mark up the price of the product. Because the amount of product Kingston purchased from individual shippers such as Complainant was small, Mr. Amaral states it would not be practical for Complainant to ship less than trailer load (LTL) equivalents to Kingston. Mr. Amaral states it was more economical and efficient to consolidate Complainant's product with that of other shippers into a full trailer load. With respect to the contract negotiations, Mr. Amaral states he was the "point person" on behalf of Respondent with Kingston, and that he dealt with Mr. Bill Stafford, who at the time was employed as lead salesperson for Complainant. Mr. Amaral states he never discussed pricing with Complainant and asserts that all prices were negotiated between Complainant and Kingston directly. Mr. Amaral states Kingston paid Respondent, after which Respondent paid Complainant the full proceeds received from Kingston minus the cross-docking fees. According to Mr. Amaral, this business relationship was working until Complainant issued a voluntary recall of its spinach on August 28, 2007, prompting Kingston to dump all the spinach received from Complainant during that timeframe and to deduct their cost from Respondent's invoices, which Respondent in turn deducted from its remittance to Complainant. Mr. Amaral states he did not participate in any discussions with Kingston concerning their decision to dump the spinach. (Answering Statement Affidavit of Matthew Amaral pp. 1-3)

To further substantiate its allegations regarding its relationship with Complainant and Kingston, Respondent submitted affidavit testimony from Richard Connelly, a buyer for Kingston. Mr. Connelly states he was the individual on behalf of Kingston who negotiated the purchases of spring mix and spinach from Complainant. Mr. Connelly states he

negotiated the contracts, including pricing, with Mr. Bill Stafford, Complainant's former salesperson. Mr. Connelly states the parties reached an agreement whereby product would be brought by Complainant to Respondent's cold storage facility for cross-docking. The purpose of the agreement, according to Mr. Connelly, was to enhance the efficiency of the loads being sent to Kingston's distribution centers and to avoid shipping partial truckloads. Mr. Connelly states it was mutually agreed with all parties that Respondent would be doing all of the invoicing for all of the outside commodities that shippers brought to Respondent's facility as a service for Kingston and its suppliers. On August 28, 2007, when Kingston was advised that Complainant had voluntarily recalled its spinach, Mr. Connelly states Kingston made the decision to dump all of the spinach shipped during that timeframe for preconditioning reasons and for the safety of its customers. Mr. Connelly states this action was taken as a precaution due to the prior unrelated spinach outbreak of 2006 which sickened hundreds of people. When remitting to Respondent, Mr. Connelly states Kingston deducted the cost of the dumped spinach and related expenses, and Kingston expected these deductions would be passed to Complainant by Respondent. Mr. Connelly states Kingston understood that its contract was with Complainant, and that Respondent, as a courtesy to Kingston, invoiced on a collect and remit basis. According to Mr. Connelly, Kingston considered itself as purchasing the product from Complainant, not Respondent. (Answering Statement Affidavit of Richard Connelly pp. 1-2)

In response to the affidavit testimony of Matthew Amaral and Richard Connelly,<sup>1</sup> Complainant submitted a sworn statement from its sales manager, Marty Howington. In this statement, Mr. Howington acknowledges that what is said in the affidavits of Mr. Amaral and Mr. Connelly is basically true. Mr. Howington states Matthew Amaral and

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<sup>1</sup> Respondent's Answering Statement also includes an affidavit from David Martinez, Respondent's Director of Sales; however, we are not considering Mr. Martinez's testimony here because Mr. Martinez readily admits he "was never involved in the establishment of the agreement by Kingston Produce to purchase spinach and spring mix from Metz Fresh LLC." (Answering Statement Affidavit of David Martinez p. 1)

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Richard Connelly did deal with Mr. Bill Stafford, who at the time was part of Complainant's sales staff. Mr. Howington states the prices were negotiated between Complainant and Kingston, and that Respondent's role was that of a facilitator who presumably added a cross-docking charge to the invoices issued to Kingston. Mr. Howington states Kingston would pay Respondent the f.o.b. price plus the cross-docking charge, and Respondent, in turn, would pay Complainant the f.o.b. price. According to Mr. Howington, this relationship was working until Complainant issued a voluntary recall of its spinach on August 28, 2007, prior to which Respondent either paid Complainant's invoices in full or would call citing trouble with quality upon arrival at different distributors around the country. Mr. Howington states he agrees with Mr. Amaral and Mr. Connelly that the decision to dump the spinach supplied by Complainant was made by Kingston, and that Kingston evidently did so due to concerns resulting from a spinach problem in 2006. Mr. Howington states he also agrees with Mr. Amaral and Mr. Connelly that the spinach problem of 2006 was totally unrelated and had nothing to do with the voluntary recall issued by Complainant in the summer of 2007. The voluntary recall, Mr. Howington states, was of one lot of spinach produced on one production day, August 22, 2007, and identified by three different eight-digit tracking codes. With respect to Respondent's remittances, Mr. Howington disagrees with Mr. Amaral's implication that Respondent was only obligated to pay the proceeds received from Kingston less cross-docking fees. Mr. Howington states that unless Complainant was notified in a timely manner that there were quality problems upon arrival at the distributor's dock, Complainant was to be paid the full f.o.b. invoice price of the product by Respondent. Mr. Howington states he sees no reason why Complainant should not be paid the full f.o.b. price for the subject loads that were cross-docked at Respondent's facilities, since both Kingston and Respondent freely admit that Kingston took it on their own to destroy the spinach. Finally, Mr. Howington states there was never any mention of Respondent acting in a collect and remit capacity for Complainant and Kingston, nor did Complainant receive any documentation from Respondent or Kingston stating that Respondent would be working as a collect and remit broker. (Statement in Reply pp. 1-2)

As the aforementioned testimony illustrates, there is really no dispute as to the manner in which the transactions in question took place. The parties agree that prices were negotiated between Kingston's Richard Connelly and Complainant's Bill Stafford, after which Respondent placed orders with Complainant presumably based on the projected needs communicated by Kingston's Richard Connelly to Respondent's Matthew Amaral. The product was then shipped to Respondent, where it was segregated into multiple lots to be shipped in smaller quantities to Kingston's various distribution outlets. A single invoice was then issued by Complainant to Respondent for each individual truckload of spinach and spring mix, and Respondent, in turn, issued multiple invoices to Kingston for the consolidated loads that were comprised of small quantities of Complainant's product along with product from other suppliers. (Complaint Ex. 1-8; Answering Statement Ex. 3-4, 7-11, 14-17, 19-21, 24-32, 37, 39-40) In each case, Complainant billed Respondent for the spinach at \$10.50 per carton, and for the spring mix at \$4.50 per carton. Respondent, in turn, billed Kingston for the spinach at \$10.75 per carton (\$10.50 plus \$0.25 for cross-docking), and for the spring mix at \$5.25 per carton (\$4.50 plus \$0.75 for cross-docking).

While Respondent asserts its involvement in the invoicing of the product was on a "collect and remit" basis, the term "collect and remit," when used in connection with produce transactions, typically refers to a brokered sale where the seller invoices the broker who, in turn, invoices the buyer, collects, and remits to the seller. *See* 7 C.F.R. § 46.28(b). In such a case, the agreement to collect from the buyer and remit to the seller is not a guarantee by the broker that the buyer will pay for the produce purchased, unless there is a specific agreement by the broker that he will pay if the buyer does not pay. *See* 7 C.F.R. § 46.28(c). There is, however, no indication Respondent was acting as a broker in the subject transactions. The Regulations (other than Rules of Practice) under the Act state that the primary function of a broker "is to facilitate good faith negotiations between parties which lead to valid and binding contracts." *See* 7 C.F.R. § 46.28(b). The parties are in agreement that the price negotiations for the subject transactions were conducted between Complainant and Kingston, without Respondent's involvement. That Respondent subsequently agreed to be billed by

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Complainant at the price Complainant negotiated with Kingston, and to bill Kingston at the same price plus cross-docking fees, does not make Respondent a broker.

The relationship between Respondent and Kingston may be more properly characterized as a bailment.

Courts have described bailments in broad terms that are applicable to this situation. In a broad sense a bailment is the delivery of a thing to another for some special object or purpose, on a contract, express or implied, to conform to the objects or purposes of the delivery which may be as various as the transactions of men. Ordinarily the identical thing bailed or the product of, or substitute for, that thing, together with all increments and gains, is to be returned or accounted for by the bailee when the use to which it is to be devoted is completed or performed or the bailment has otherwise expired. *H. S. Crocker Company, Inc. v. McFaddin*, 307 P.2d 429 (Cal. Ct. Ap. 1957)

The record establishes that Kingston was the true purchaser of the commodities from Complainant, as Complainant negotiated the sales prices directly with Kingston. Respondent did not have any input, nor did it have any involvement at all, in the sales price negotiations.<sup>2</sup> Rather, Respondent took possession of the commodities Kingston purchased from Complainant for the sole purpose of segregating Complainant's product into smaller lots so that it could be shipped, following consolidation with product from other Monterey County shippers, to Kingston. Therefore, when Respondent accepted the commodities for cross-docking it was acting as bailee for Kingston.

As part of the bailment, Respondent agreed to take billing for the commodities on Kingston's behalf. This billing arrangement allowed Complainant to invoice for the product sold to Kingston in truckload quantities, while at the same time it allowed Kingston to be billed according to the truckloads of commodities it received after the cross-docking services were provided by Respondent. That Kingston was the

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<sup>2</sup> Respondent also was not involved in Kingston's decision to dump certain lots of the spinach received from Complainant. See Answering Statement Affidavit of Richard Connelly pp. 1.

actual purchaser of the commodities was plainly disclosed to Complainant because, as we already mentioned, the sales prices were negotiated directly between Complainant and Kingston. Respondent recovered its cross-docking fee by adding \$0.25 per carton to the prices negotiated between Complainant and Kingston. Therefore, when Respondent accepted billing for the commodities it was acting as agent for Kingston, its disclosed principal.

The general law of agency is that an agent for a disclosed principal does not become a party to the contract unless he agrees independently to be bound.<sup>3</sup> Respondent's agreement to take billing on behalf of Kingston does not make it liable under the contracts negotiated between Kingston and Complainant, and there is no evidence indicating that Respondent agreed to pay for the commodities in the event Kingston did not pay. Respondent is, therefore, only liable to Complainant for what it collected from Kingston. *See Forney Fruit & Produce Co., Inc. v. Dixie Brokerage Co.*, 29 Agric. Dec. 1433 (1970). After withholding its cross-docking fees, Respondent paid Complainant the sales prices it collected from Kingston. The Complaint should, therefore, be dismissed.

#### **Order**

The Complaint is dismissed.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

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<sup>3</sup> This principle has been applied in numerous reparation decisions under the Packers and Stockyards Act, 1921, as amended and Supplemental (7 U.S.C. §§ 181 *et. seq.*) that hold that where an agent buys livestock for a disclosed principal, there is no liability for the purchase price on the part of the agent absent a specific agreement between the parties to the contrary. *See, e.g., Ward v. Scale, et al.*, 31 Agric. Dec. 105, 106-107; (1972); *Bottorff v. Ault*, 22 Agric. Dec. 20, 22-23 (1963).

**ROSENTHAL FOODS CORP. v. W-W PRODUCE, INC.**  
**PACA Docket No. R-09-049.**  
**Decision and Order.**  
**June 18, 2010.**

**PACA-R – Damages – Seller’s for wrongful rejection.**

Following Complainant’s wrongful rejection of several lots of corn, Respondent could not recover damages using the measure set forth in U.C.C. § 2-706, *i.e.*, the difference between the contract price and the resale price, because Respondent did not submit any evidence of the proceeds collected from the resale of the corn. Respondent was relegated to recovery of damages under U.C.C. § 2-708, *i.e.*, the difference between the contract price and the market price. However, since relevant U.S.D.A. Market News reports showed market prices for similar corn that were substantially greater than the f.o.b. contract price plus freight, Respondent failed to establish it was damaged according to the measure of damages set forth in U.C.C. § 2-708(1).

Patrice H. Harps, Presiding Officer.

Leslie Wowk, Examiner.

Complainant, Pro se.

Respondent, Pro se.

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

**Preliminary Statement**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of \$16,482.29 in connection with five truckloads of corn shipped in the course of interstate commerce.

Copies of the Report of Investigation and the Amended 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 \$15,120.00 in connection with the same five truckloads of corn at issue in the Complaint. Due to a procedural error, Complainant was never instructed that it could file a reply to Respondent’s Counterclaim. Instead, upon receipt of Respondent’s Answer with Counterclaim, Complainant was instructed that it could file

an Opening Statement. Complainant did file an Opening Statement in which it denied liability to Respondent on the Counterclaim. Because Complainant's Opening Statement responds to Respondent's Counterclaim, it is deemed to constitute a reply as well as an Opening Statement and throughout this Decision and Order, will be referred to as "Opening Statement and Reply."

Neither the amount claimed in the Complaint nor the Counterclaim exceeds \$30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as are the Department's Report of Investigation (ROI) and Amended Report of Investigation (AROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and Reply. Respondent did not elect to file any additional evidence. Neither party submitted a brief.

#### **Findings of Fact**

1. Complainant, Rosenthal Foods Corp., is a corporation whose post office address is P.O. Box 237, Sioux City, Idaho, 51102-0237. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent, W-W Produce, Inc., is a corporation whose post office address is P.O. Box 891, Belle Glade, Florida, 33430-0891. At the time of the transactions involved herein, Respondent was licensed under the Act.
3. On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22014 billing Complainant for the corn at \$3.00 per crate, for a total invoice price of \$3,024.00. (Answer with Counterclaim Ex. A)
4. On October 25, 2007, a USDA inspection was performed on the corn mentioned in Finding of Fact 3 at Capital City Fruit, Inc., in Norwalk,

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Iowa. The inspection disclosed 42 percent injury by quality defects (not well filled, poorly filled, auxiliary ears), including 20 percent which was scored as damage and 8 percent which was scored as serious damage. Pulp temperatures at the time of the inspection ranged from 41 to 43 degrees Fahrenheit. (AROI Ex. A p. 3) Following the inspection, the corn was moved to Proffer Wholesale, in Park Hills, Missouri.

5. The transportation of the corn billed on invoice 22014, from the initial haul originating in Bainbridge, Georgia, to the final reconsignment in Park Hills, Missouri, was handled by D.J. Franzen, Inc. On October 31, 2007, D.J. Franzen, Inc. issued invoice 2014 billing Complainant \$1,100.00 for the initial haul and \$1,003.86 for the reconsignment, for a total invoice amount of \$2,103.86. (AROI Ex. A p. 2) Complainant paid D.J. Franzen, Inc. \$2,103.86 for invoice 2014 with check number 34461, dated November 14, 2007. (AROI Ex. H p. 4)

6. On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22015 billing Complainant for the corn at \$3.00 per crate, for a total invoice price of \$3,024.00. (Answer with Counterclaim Ex. C)

7. On October 25, 2007, a USDA inspection was performed on the corn mentioned in Finding of Fact 6 at Capital City Fruit, Inc., in Norwalk, Iowa. The inspection disclosed 23 percent injury by quality defects (not well filled, poorly filled, auxiliary ears), including 13 percent which was scored as damage and 4 percent which was scored as serious damage. Pulp temperatures at the time of the inspection ranged from 41 to 44 degrees Fahrenheit. (AROI Ex. A p. 6) Following the inspection, the corn was moved to The Auster Company, in Chicago, Illinois.

8. The transportation of the corn billed on invoice 22015, from the initial haul originating in Bainbridge, Georgia, to the final reconsignment in Chicago, Illinois, was handled by Beer Transportation, Inc. On October 29, 2007, Beer Transportation, Inc. issued invoice 10582 billing Complainant \$1,100.00 for the initial haul, \$1,600.00 for redelivery, and \$500.00 (5 days at \$100.00 per day) for detention, for a total invoice amount of \$3,200.00. (AROI Ex. A p. 5) Complainant paid Beer Transportation, Inc. for the freight billed on invoice 10582

with check number 34484, dated November 15, 2007. (AROI Ex. H p. 5)

9. On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22016 billing Complainant for the corn at \$3.00 per crate, for a total invoice price of \$3,024.00. (Answer with Counterclaim Ex. E)

10. On October 25, 2007, a USDA inspection was performed on the corn mentioned in Finding of Fact 9 at Capital City Fruit, Inc., in Norwalk, Iowa. The inspection disclosed 20 percent injury by quality defects (not well filled, auxiliary ears, immature), including 4 percent which was scored as damage and 3 percent which was scored as serious damage. Pulp temperatures at the time of the inspection ranged from 41 to 42 degrees Fahrenheit. (AROI Ex. A p. 11) Following the inspection, the corn was moved first to Heartland Produce, Kenosha, Wisconsin, and then to Rochester Produce, in Winona, Minnesota.

11. The transportation of the corn billed on invoice 22016, from the initial haul originating in Bainbridge, Georgia, to the final reconsignment in Winona, Minnesota, was handled by Nottestad Trucking, Inc. On November 1, 2007, Nottestad Trucking, Inc. issued invoice 211 billing Complainant \$1,100.00 for the initial haul, \$450.00 for detention, \$714.00 for redelivery to Heartland Produce, Kenosha, Wisconsin, \$312.00 for redelivery to Rochester Produce, Winona, Minnesota, and \$424.00 for fuel and extended trailer usage, for a total invoice amount of \$3,000.00. (AROI Ex. G p. 4) Complainant paid Nottestad Trucking, Inc. \$3,000.00 for invoice 211 with check number 34466, dated November 9, 2007. (AROI Ex. A p. 8)

12. On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22017 billing Complainant for the corn at \$3.00 per crate, for a total invoice price of \$3,024.00. (Answer with Counterclaim Ex. G) Hy-Vee Food Stores accepted 714 crates of the corn and rejected the remaining 294 crates.

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13. On October 26, 2007, a USDA inspection was performed on the 294 crates of corn rejected by Hy-Vee Food Stores at Capital City Fruit, Inc., in Norwalk, Iowa. The inspection disclosed 35 percent injury by quality defects (not well filled, auxiliary ears), including 4 percent which was scored as damage. Pulp temperatures at the time of the inspection ranged from 42 to 44 degrees Fahrenheit. (AROI Ex. A p. 16) Following the inspection, the 294 crates of corn were unloaded at Capital City Fruit, Inc.

14. The transportation of the corn billed on invoice 22017, from the initial haul originating in Bainbridge, Georgia, to the reconsignment in Norwalk, Iowa, was handled by Stoughton Trucking, Inc. On November 8, 2007, Stoughton Trucking, Inc. issued invoice 230882 billing Complainant \$1,100.00 for the initial haul and \$500.00 for detention/layover, for a total invoice amount of \$1,600.00. (AROI Ex. A p. 13) Complainant paid Stoughton Trucking, Inc. \$1,600.00 for invoice 230882 with check number 34477, dated November 16, 2007. (AROI Ex. H p. 6)

15. On or about October 23, 2007, Respondent, by oral contract, sold to Complainant, and agreed to ship from loading point in the state of Georgia, to Hy-Vee Food Stores, in Chariton, Iowa, 1,008 crates of yellow corn. On the same date, Respondent issued invoice 22018 billing Complainant for the corn at \$3.00 per crate, for a total invoice price of \$3,024.00. (Answer with Counterclaim Ex. I)

16. On October 26, 2007, a USDA inspection was performed on the corn mentioned in Finding of Fact 15 at Capital City Fruit, Inc., in Norwalk, Iowa. The inspection disclosed 14 percent injury by quality defects (not well filled, poorly filled), including 6 percent which was scored as damage and 4 percent which was scored as serious damage, and 4 percent injury by indented kernels. Pulp temperatures at the time of the inspection ranged from 46 to 48 degrees Fahrenheit. (AROI Ex. A p. 19) Following the inspection, the corn was moved to Strube Celery Co., in Chicago, Illinois.

17. The transportation of the corn billed on invoice 22018, from the initial haul originating in Bainbridge, Georgia, to the final reconsignment in Chicago, Illinois, was handled by Elliott Transport Systems, Inc. On October 31, 2007, Elliott Transport Systems, Inc. issued invoice 83661 billing Complainant \$1,100.00 for the initial haul,

\$544.05 for redelivery, \$133.38 for a fuel surcharge, and \$1,500.00 for detention, for a total invoice amount of \$3,277.43. (AROI Ex. A p. 18) Complainant paid Elliott Transport Systems, Inc. \$3,277.43 for invoice 83661 with check number 34460, dated November 14, 2007. (AROI Ex. H p. 7)

18. The informal complaint was filed on December 11, 2007, which is within nine months from the date the cause of action accrued.

### **Conclusions**

Complainant brings this action to recover \$16,482.29 for freight and related expenses allegedly incurred in connection with its rejection of five loads of corn purchased from Respondent. Respondent asserts in response that Complainant accepted the corn in compliance with the contracts of sale, but has since failed, neglected and refused to pay Respondent the agreed purchase prices totaling \$15,120.00, which amount Respondent seeks to recover through its Counterclaim.

We will address each transaction individually by invoice number below:

#### Invoice 22014

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee Food Stores (hereinafter "Hy-Vee") in Chariton, Iowa. (Complaint Ex. 1-2; AROI Ex. A pp. 2, 4) Hy-Vee rejected the corn, after which the load was moved to Capital City Fruit, Inc. (hereinafter "Capital City"), in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 6, Ex. 4; AROI Ex. A p. 3) Based on the results of the inspection, Complainant rejected the corn, after which Respondent states it placed the product for resale to minimize the loss to Complainant. (Answer with Counterclaim ¶ 4)

As Complainant's claim for damages is based on its alleged rejection of the corn in this shipment, we must first determine whether Complainant accomplished an effective rejection. As we mentioned, Complainant's rejection of the corn took place after the load was moved from Hy-Vee to Capital City for the purpose of securing an inspection.

James E. Wade, Respondent's president, asserts in Respondent's sworn Answer that Respondent never directed the loads to be inspected at any location other than Hy-Vee's warehouse. (Answer with Counterclaim ¶ 3) Brent Rosenthal, Complainant's president, asserts in response that when Hy-Vee complained about the quality of the corn, he asked Dale Pope, Respondent's salesman, if he would have any objection to moving the product from Hy-Vee to Capital City to secure an inspection. (Opening Statement and Reply ¶ 2) Mr. Rosenthal states Mr. Pope advised "moving the product and having the inspection taken at Capital City was fine with him." (Opening Statement and Reply ¶ 2) Respondent did not submit a statement from Dale Pope to refute Mr. Rosenthal's statement. Sworn statements that have not been controverted must be taken as true in the absence of other persuasive evidence. *Sun World International, Inc. v. Bruno Dispoto Co.*, 42 Agric. Dec. 1675, 1678 (1983); *Apple Jack Orchards v. M. Offutt Brokerage Co.*, 41 Agric. Dec. 2265, 2267 (1982). We therefore find the preponderance of the evidence supports Complainant's contention that Respondent acquiesced to the movement of the load from Hy-Vee to Capital City for the purpose of inspection.

Although it is not specifically stated in the record, it appears Complainant clearly and promptly communicated its rejection to Respondent following the inspection, as Respondent proceeded to have the corn moved to an alternate receiver. (See Answer with Counterclaim ¶ 4) We therefore find that Complainant's rejection of the corn was effective. We must now determine whether Complainant's rejection of the corn was wrongful.

Respondent asserts that the rejection claimed by Complainant is improper because the corn was sold with no grade specification. (Answer with Counterclaim ¶¶ 4-8) Mr. Rosenthal asserts in response that Mr. Pope assured that the corn would make "good delivery," and stated specifically "this corn was of good quality and could go anywhere." (Opening Statement and Reply ¶ 1) As we mentioned, the record is absent a statement from Dale Pope to refute Mr. Rosenthal's testimony. Nevertheless, the statement attributed to Mr. Pope is too vague to establish that Complainant warranted the corn would meet the requirements of a specific grade.

The parties agree that the load of corn in question was sold under f.o.b. terms. (Complaint ¶ 4; Answer with Counterclaim ¶ 2) Where produce is sold f.o.b., the warranty of suitable shipping condition is applicable. *E.g., Martori Bros. Distribs. v. Houston Fruitland Inc.*, 55 Agric. Dec. 1331, 1336 (1996). The Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j); hereinafter “Regulations”) define suitable shipping condition as meaning:

that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.<sup>1</sup>

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<sup>1</sup> The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination “without *abnormal* deterioration” (emphasis added), or what is elsewhere called “good delivery” (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. *See* Williston, *Sales* § 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is “normal” or abnormal deterioration is judicially determined. *See Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155, 1157-58 (1987); *G & S Produce Co. v. Morris Produce Ex.*, 31 Agric. Dec. 1167, 1169-70 (1972); *The Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140, 142-143 (1959); *Haines City Citrus Growers Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968, 972-73 (1951).

Complainant secured a destination inspection of the corn which disclosed 42 percent injury by quality defects<sup>2</sup> (not well filled, poorly filled, auxiliary ears), including 20 percent which was scored as damage and 8 percent which was scored as serious damage. (AROI Ex. A p. 3) No condition defects were found.<sup>3</sup> As we previously discussed, it has not been established that the corn in question was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when the produce is sold without a U.S. grade specification. *E.g.*, *Sucasa Produce v. A.P.S. Mktg., Inc.*, 59 Agric. Dec. 421, 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the USDA inspection of the corn disclosed only quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish that the corn was unmerchantable at the time of sale, i.e., at shipping point. *E.g.* *Lookout Mountain Tomato & Banana Co. v. Consumer Produce Co.*, 50 Agric. Dec. 957, 964 (1991). “Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” U.C.C. § 2-314(1). For goods to be merchantable, they must “pass without objection in the trade under the contract description.” U.C.C. § 2-314(2)(a). The evidence demonstrates that Respondent is a wholesale dealer of corn. (Answer with Counterclaim ¶ 1; AROI Ex. E) Therefore, any sale by Respondent of corn would include a warranty of merchantability. The inspection secured by Complainant was based on the requirements of the U.S. Fancy grade, and while it disclosed 42 percent injury by quality defects, the *damage* disclosed by the inspection

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<sup>2</sup> Quality defects are defects that do not tend to change over time. *E.g.*, *The Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 457 (2000); *Diazteca Co. v. The Players Sales, Inc.*, 53 Agric. Dec. 909, 914 n. 7 (1994).

<sup>3</sup> Condition defects tend to be of a progressive nature; they are subject to change due to a worsening condition. *The Lionheart Group*, 59 Agric. Dec. at 457; *Diazteca*, 53 Agric. Dec. at 914 n. 7. All decays are condition defects. *Diazteca*, 53 Agric. Dec. at 914 n. 7.

averaged only 20 percent. We have previously held that no grade lettuce containing 27 percent average quality defects (seedstems), as determined by a federal inspection at destination, is merchantable. *Pemberton Produce, Inc. v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1686, 1692 (1987). Because the corn was not sold with a U.S. grade specification and the damage averaged only 20 percent, we find the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

As Complainant has failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent, we conclude Complainant's rejection of the corn was wrongful. Consequently, Complainant is not entitled to recover the expenses claimed in the Complaint. Respondent, on the other hand, is entitled to recover damages resulting from Complainant's wrongful rejection of the corn. Although Respondent seeks through its Counterclaim to recover the contract price of the corn (Answer with Counterclaim ¶¶ 19, 21), there was no acceptance of the corn by Complainant. Rather, title to the corn reverted back to Respondent following the effective rejection by Complainant. *Yokoyama Bros. v. Cal-Veg Sales, Inc.*, 41 Agric. Dec. 535, 537 (1982); *Produce Brokers & Distributors, Inc. v. Monsour's, Inc.*, 36 Agric. Dec. 2022, 2025 (1977).

One of Respondent's available remedies under the circumstances is to resell the corn and claim damages under section 2-706 of the Uniform Commercial Code.<sup>4</sup> U.C.C. section 2-706(1) states specifically:

In an appropriate case involving breach by the buyer, the seller may resell the goods concerned or the undelivered balance thereof. If the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the contract price and the resale price together with any incidental or consequential damages allowed under Section 2-710, but less expenses saved in consequence of the buyer's breach.

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<sup>4</sup> U.C.C. § 2-703(2)(g) states, "[i]f the buyer is in breach of contract the seller, to the extent provided for by this Act or other law, may . . . (g) resell and recover damages under Section 2-706."

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As we already mentioned, Respondent states it placed the product for resale to minimize the loss to Complainant. Respondent did not, however, provide any evidence of the proceeds collected from the resale of the corn. Without this information, we cannot determine the damages sustained by Respondent using the method provided in U.C.C. § 2-706.

Although Respondent cannot avail itself of the measure of damages provided in U.C.C. § 2-706, it may still be able to recover damages under U.C.C. § 2-708(1)(a),<sup>5</sup> which states the measure of damages for nonacceptance or repudiation by the buyer “is the difference between the contract price and the market price at the time and place for tender together with any incidental or consequential damages provided in Section 2-710, but less expenses saved in consequence of the buyer’s breach.” The contract price of the corn was \$3.00 per crate f.o.b., to which we will add \$1.09 for freight (\$1,100.00 inbound freight ÷ 1,008 crates = \$1.09 per crate), which results in an f.o.b. plus freight price of \$4.09 per crate. (Complaint Ex. 1-2; AROI Ex. A p. 2) By comparison, the USDA Market News Report for Chicago, Illinois, the nearest reporting location to the contract destination of Chariton, Iowa,<sup>6</sup> shows that on October 25, 2007, yellow sweet corn originating from Georgia was mostly selling for \$11.00 per crate. Since the prevailing market price, and the price at which Respondent would presumably be able to resell the corn, is substantially greater than the f.o.b. contract price plus freight, there is no indication Respondent was damaged according to the

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<sup>5</sup> U.C.C. § 2-706, Official Comment 11.

<sup>6</sup> U.C.C. § 2-723(2) states:

If evidence of a price prevailing at the times or places described in this Article is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

The distance from the shipping point of Bainbridge, Georgia, to Chicago, Illinois, is approximately equal to the distance from Bainbridge, Georgia, to Chariton, Iowa; therefore, no freight adjustment is needed in this case.

measure of damages set forth in U.C.C. § 2-708(1). *See* U.C.C. § 2-708, Comment 1(c).

We conclude that neither party has proven their respective claims for damages in connection with the load of corn billed on invoice 22014.

Invoice 22015

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee in Chariton, Iowa. (Complaint ¶ 7; AROI Ex. A pp. 5-7) Hy-Vee rejected the corn, after which the load was moved to Capital City, in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 7; AROI Ex. A pp. 5-7) Based on the results of the inspection, Complainant rejected the corn.

Since Complainant's claim for damages is based on its alleged rejection of the corn in this shipment, we must first determine whether Complainant accomplished an effective rejection. As we mentioned, Complainant's rejection of the corn took place after the load was moved from Hy-Vee to Capital City for the purpose of securing an inspection. While Respondent has asserted that it never directed the loads to be inspected at any location other than Hy-Vee's warehouse (Answer with Counterclaim ¶ 3), Complainant has submitted uncontroverted sworn testimony from its President, Brent Rosenthal, wherein Mr. Rosenthal asserts that Respondent's salesman, Dale Pope, advised that "moving the product and having the inspection taken at Capital City was fine with him." (Opening Statement and Reply ¶ 2) We therefore find that the preponderance of the evidence supports Complainant's contention that Respondent acquiesced to the movement of the load from Hy-Vee to Capital City for the purpose of inspection.

Although it is not specifically stated in the record, it appears Complainant clearly and promptly communicated its rejection to Respondent following the inspection because, as the discussion that follows will demonstrate, Respondent proceeded to have the corn moved to an alternate receiver. We therefore find that Complainant's rejection of the corn was effective. We must now determine whether Complainant's rejection of the corn was wrongful.

The parties agree that the load of corn in question was sold under f.o.b. terms. (Complaint ¶ 4; Answer with Counterclaim ¶ 2) Where produce is sold f.o.b., the warranty of suitable shipping condition is applicable. *E.g., Martori Bros. Distribs. v. Houston Fruitland Inc.*, 55 Agric. Dec. 1331, 1336 (1996). The USDA inspection of the corn disclosed 23 percent injury by quality defects (not well filled, poorly filled, auxiliary ears), including 13 percent which was scored as damage and 4 percent which was scored as serious damage. (AROI Ex. A p. 6) No condition defects were found. As our discussion of invoice 22014 already noted, it has not been established that the corn was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when produce is sold without a U.S. grade specification. *E.g., Sucasa Produce*, 59 Agric. Dec. at 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the USDA inspection of the corn disclosed only quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish that the corn was unmerchantable at the time of sale, *i.e.*, at shipping point. *E.g., Lookout Mountain*, 50 Agric. Dec. at 964. As our discussion of invoice 22014 already noted, Respondent is a wholesale dealer of corn and therefore, any sale by Respondent would include a warranty of merchantability. The USDA inspection secured by Complainant was based on the requirements of the U.S. Fancy grade, and while it disclosed 23 percent injury by quality defects, the *damage* disclosed by the inspection averaged only 13 percent. This is less than the 20 percent average damage in invoice 22014 where we found the corn to be merchantable. Therefore, because the corn was not sold with a U.S. grade specification and the damage averaged only 13 percent, we conclude that the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

As Complainant has failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent, we conclude Complainant's rejection of the corn was wrongful. Consequently, Complainant is not entitled to recover the

expenses claimed in the Complaint. Respondent, on the other hand, is entitled to recover damages resulting from Complainant's wrongful rejection of the corn. As with invoice 22014, one possible remedy is that Respondent may resell the corn and claim damages under U.C.C. § 2-706; namely, the difference between the contract price and the resale price together with any incidental damages, but less expenses saved in consequence of Complainant's breach. Respondent asserts, however, that it did not redirect the load following the rejection. (Answer with Counterclaim ¶ 5) In response, Complainant references several documents which it states establish that Respondent did, in fact, reconsign the load to The Auster Company at the Chicago market. (Opening Statement and Reply ¶ 4) The first is a gate entrance fee ticket made out to Beer Transportation, Inc., the trucking company that transported the load of corn in question, which purportedly shows the corn was delivered to The Auster Company, on October 30, 2007. (Opening Statement and Reply Ex. A) We note, however, that the license plate number shown on this ticket is SA6159, whereas the truck license plate number for the load of corn in question was TC6117 Ia. (*Compare* Opening Statement and Reply Ex. A to Answer with Counterclaim ¶ 5, Ex. C-D) No explanation for this discrepancy is provided.

Complainant also references Respondent's invoice 22016a, whereon Respondent billed Windsor Distributing, Inc., Naples, Florida, on a delivered open price basis, for 1,008 crates of yellow corn delivered to The Auster Company on October 28, 2007. (Opening Statement and Reply Ex. B) The invoice bears a stamp dated October 30, 2007, that reads "AUSTER ACQUISITIONS, LLC RECEIVED SUBJECT TO USDA INSPECTION." (Opening Statement and Reply Ex. B) We note, however, that both the invoice number "22016a" and the license number "529131 Wi." indicate this invoice was issued in connection with the corn billed to Complainant on invoice 22016, rather than the load at issue here, which was billed on Complainant's invoice 22015. (*Compare* Opening Statement and Reply Ex. B and Complaint Ex. 10 to Complaint Ex. 5 and AROI Ex. A p. 5)

The third and final document referenced by Complainant is a copy of trucking instructions prepared by Complainant on October 29, 2007,

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advising Beer Transportation, Inc. to deliver a load of rejected corn to The Auster Company in Chicago. (Opening Statement and Reply Ex. C) Review of the record discloses that Beer Transportation, Inc. issued invoice 10582 billing Complainant \$1,100.00 for the initial haul, \$1,600.00 for redelivery, and \$500.00 (5 days at \$100.00 per day) for detention, for a total invoice amount of \$3,200.00. (Complaint Ex. 6; AROI Ex. A p. 5) This invoice indicates the corn was delivered to Chicago, Illinois, on October 29, 2007. (Complaint Ex. 6; AROI Ex. A p. 5)

Respondent, in its response submitted during the informal stages of this claim, states, in pertinent part, as follows:

W-W Produce, Inc. can only account for three loads of rejected corn. We shipped one load to Strube in Chicago and the other two loads were handled by Windsor Dist., one of these loads was shipped to their customer, Auster Co. in Chicago and the other one to Proffer Wholesale Produce in Park Hills, Mo.

(AROI Ex. E p. 1) A review of the evidence shows that the invoice Complainant received from D.J. Franzen, Inc. for the corn billed on invoice 22014, discussed above, indicates the corn was reconsigned to Proffer Wholesale, in Park Hills, Missouri. (AROI Ex. A p. 2) Another invoice in the file, invoice 22017a, from Respondent to Strube Celery & Vegetable Co. (hereafter "Strube"), indicates the corn billed to Complainant on invoice 22017 was resold by Respondent to Strube on or about October 28, 2007, on a delivered open price basis. (Opening Statement and Reply Ex. K) We note, however, that the corn billed to Complainant on invoice 22017 was transported by Stoughton Trucking, LLC (AROI Ex. A p. 12), and the record includes correspondence prepared by a representative of Stoughton Trucking, LLC, advising that only seven pallets of the corn in this load were rejected. (AROI Ex. G p. 6) This is in accord with the testimony of Brent Rosenthal, wherein Mr. Rosenthal states that Hy-Vee kept 714 crates of the corn and rejected the other 294 crates. (Opening Statement and Reply ¶ 6, Ex. E) Mr. Rosenthal states the 294 crates that were rejected were re-consigned by Respondent to Capital City, and the evidence substantiates this contention. (Opening Statement and Reply ¶ 6; AROI Ex. G pp. 10-23)

The freight bill for the corn billed to Complainant on invoice 22018, on the other hand, indicates the corn in this load was redelivered by Elliott Transport Systems, Inc. (AROI Ex. A p. 17; Answer with Counterclaim Ex. J), to Chicago, Illinois. (AROI Ex. A p. 18; Opening Statement and Reply Ex. M) Although the name of the consignee is not provided, Complainant asserts the load billed on invoice 22018 was redelivered to Strube, in Chicago, Illinois (Opening Statement and Reply ¶ 7), and we believe the preponderance of the evidence supports this assertion.

We are therefore left with only two loads of corn that Respondent could have sent to The Auster Company in Chicago, Illinois, i.e., the corn billed to Complainant on invoice 22015 and the corn billed to Complainant on invoice 22016. As we already mentioned, Respondent billed Windsor Distributing, Inc., Naples, Florida, on a delivered open price basis, for 1,008 crates of yellow corn delivered to The Auster Company on October 28, 2007. (Opening Statement and Reply Ex. B) As we also mentioned, the invoice number used by Respondent is "22016a" and the license number listed thereon is "529131 Wi." (Opening Statement and Reply Ex. B) This information comports with the corn billed to Complainant on invoice 22016. (*Compare* Opening Statement and Reply Ex. B to AROI Ex. A p. 9) We note, however, that the corn billed to Complainant on invoice 22016 was transported by Nottestad Trucking, Inc. (Answer with Counterclaim Ex. F) The record includes both an invoice and correspondence from a representative of Nottestad Trucking, Inc., showing the corn billed to Complainant on invoice 22016 was redelivered to Heartland Produce in Kenosha, Wisconsin, and Rochester Produce, in Winona, Minnesota. (AROI Ex. G p. 4; Opening Statement and Reply Ex. D) On this basis, we find the preponderance of the evidence supports the conclusion that the load of corn under discussion here, that billed to Complainant on invoice 22015, was redelivered by Respondent to The Auster Company, in Chicago, Illinois.

Respondent did not provide any evidence of the resale proceeds collected from The Auster Company for the subject load of corn. Without this information, we cannot determine the damages sustained by Respondent using the method provided in U.C.C. § 2-706. We will, therefore, resort to the alternative measure of damages set forth in

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U.C.C. § 2-708(1)(a), i.e., the difference between the contract price and the market price at the time and place for delivery. The contract price of the corn was \$3.00 per crate f.o.b., to which we will add \$1.09 for freight (\$1,100.00 inbound freight ÷ 1,008 crates = \$1.09 per crate) (Complaint Ex. 5-6; AROI Ex. 7), which results in an f.o.b. plus freight price of \$4.09 per crate. By comparison, the USDA Market News Report for Chicago, Illinois, the nearest reporting location to the contract destination of Chariton, Iowa,<sup>7</sup> shows that on October 25, 2007, yellow sweet corn originating from Georgia was mostly selling for \$11.00 per crate. Since the prevailing market price, and the price at which Respondent would presumably be able to resell the corn, is substantially greater than the f.o.b. contract price plus freight, there is no indication Respondent was damaged according to the measure of damages set forth in U.C.C. § 2-708(1). See U.C.C. § 2-708, Comment 1(c).

We conclude that neither party has proven their respective claims for damages in connection with the load of corn billed on invoice 22015.

Invoice 22016

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee in Chariton, Iowa. (Complaint ¶ 8, Ex. 10-11; AROI Ex. A p. 9) Hy-Vee rejected the corn, after which the load was moved to Capital City, in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 8; AROI Ex. A p. 11) Based on the results of the inspection, Complainant rejected the corn.

Since Complainant's claim for damages is based on its alleged rejection of the corn in this shipment, we must first determine whether Complainant accomplished an effective rejection. As we mentioned, Complainant's rejection of the corn took place after the load was moved from Hy-Vee to Capital City for the purpose of securing an inspection. While Respondent has asserted that it never directed the loads to be inspected at any location other than Hy-Vee's warehouse (Answer with Counterclaim ¶ 3), Complainant has submitted uncontroverted sworn testimony from its President, Brent Rosenthal, wherein Mr. Rosenthal

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<sup>7</sup> The use of Chicago market prices to estimate the market value of the corn in Chariton is in accordance with U.C.C. § 2-723(2). *Supra* note 6.

asserts that Respondent's salesman, Dale Pope, advised that "moving the product and having the inspection taken at Capital City was fine with him." (Opening Statement and Reply ¶ 2) We therefore find that the preponderance of the evidence supports Complainant's contention that Respondent acquiesced to the movement of the load from Hy-Vee to Capital City for the purpose of inspection.

Although it is not specifically stated in the record, it appears Complainant clearly and promptly communicated its rejection to Respondent following the inspection because Respondent proceeded to have the corn moved to an alternate receiver. (Answer with Counterclaim ¶ 6) We therefore find that Complainant's rejection of the corn was effective. We must now determine whether Complainant's rejection of the corn was wrongful.

The parties agree that the load of corn in question was sold under f.o.b. terms. (Complaint ¶ 4; Answer with Counterclaim ¶ 2) Where produce is sold f.o.b., the warranty of suitable shipping condition is applicable. *E.g., Martori Bros. Distribs. v. Houston Fruitland Inc.*, 55 Agric. Dec. 1331, 1336 (1996). The USDA inspection disclosed 20 percent injury by quality defects (not well filled, auxiliary ears, immature), including 4 percent which was scored as damage and 3 percent which was scored as serious damage. (AROI Ex. A p. 11) No condition defects were found. As our discussion of Invoice 22014 already noted, it has not been established that the corn was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when produce is sold without a U.S. grade specification. *E.g., Sucasa Produce*, 59 Agric. Dec. at 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the USDA inspection of the corn disclosed only quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish the corn was unmerchantable at the time of sale, i.e., at shipping point. *E.g., Lookout Mountain*, 50 Agric. Dec. at 964. As our discussion of invoice 22014 already noted, Respondent is a wholesale dealer of corn and therefore,

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any sale by Respondent would include a warranty of merchantability. The USDA inspection secured by Complainant was based on the requirements of the U.S. Fancy grade, and while it disclosed 20 percent injury by quality defects, the *damage* disclosed by the inspection averaged only 4 percent. This is less than the 20 percent average damage in invoice 22014 where we found the corn to be merchantable. Therefore, because the corn was not sold with a U.S. grade specification and the damage averaged only 4 percent, we conclude that the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

As Complainant has failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent, we conclude Complainant's rejection of the corn was wrongful. Consequently, Complainant is not entitled to recover the expenses claimed in the Complaint. Respondent, on the other hand, is entitled to recover damages resulting from Complainant's wrongful rejection of the corn. As with invoice 22014, one possible remedy is that Respondent may resell the corn and claim damages under U.C.C. § 2-706; namely, the difference between the contract price and the resale price together with any incidental damages, but less expenses saved in consequence of Complainant's breach.

As we already mentioned in our discussion of invoice 22015, this load was redirected first to Heartland Produce in Kenosha, Wisconsin, and then to Rochester Produce, in Winona, Minnesota. Brent Rosenthal testifies specifically:

At the sole direction of Respondent/W-W Product [sic], this product was re-consigned to Heartland Produce, Kenosha, WI (262-653-1000). Attached as exhibit "D" is a letter from Nottestad Trucking (608-625-2203) explaining what they were directed to do with this load. Unfortunately, Heartland Produce felt that there was no salvage to this load. At this point, Dale told Brent to take the product anywhere you can get it off the truck, so we attempted to take to Rochester Produce, which also failed to accept it. Finally, after Dale Pope of W-W Produce gave up trying to find any other home for the product, the trucker, with no option to sell the product, gave it to a farmer to dump.

(Opening Statement and Reply ¶ 5) The letter from Nottestad Trucking, Inc., referenced by Mr. Rosenthal above, reads as follows:

Nottestad Trucking of Westby, WI hauled a load of sweet corn for Rosenthal Foods that was rejected at Hyvee Chariton.

Next we were instructed to deliver at 6 AM Sunday morning at Heartland Produce in Kenosha, WI. But, they rejected it on the spot.

The corn was unloaded at Rochester Produce in Winona, MN. The receiver stated they would sort the corn and make an attempt to sell. I spoke with Rochester Produce days after the delivery and was told that the product was not being accepted by anyone and due to the corn starting to rot it was donated to a local farmer.

(Opening Statement and Reply Ex. D) Although the letter from Nottestad says nothing in regard to who directed the load to Heartland Produce, Brent Rosenthal has testified that the movement of the load was done at the direction of Dale Pope, and Respondent did not submit a statement from Mr. Pope to refute this assertion. Nevertheless, whether the rejected corn was moved at the direction of Respondent, or Complainant acting on behalf of Respondent, the evidence shows the corn could not be resold and had to be donated. (Opening Statement and Reply ¶ 5, Ex. D) Therefore, according to the measure of damages set forth in U.C.C. § 2-706, i.e., the difference between the contract price and the resale price, Respondent is entitled to recover \$3,024.00 (the contract price of \$3,024.00 less \$0.00 resale proceeds) as damages resulting from Complainant's wrongful rejection of the corn.

While Respondent's inability to sell the corn following Complainant's rejection may appear to raise a question once again as to the corn's merchantability at the time of sale, we hasten to point out that the corn was originally shipped on Tuesday, October 23, 2007 (AROI Ex. A p. 7), was delivered to and refused by Heartland Produce five days later, on Sunday, October 28, 2007 (Opening Statement and Reply Ex. D), and after further attempts to rework and resell the corn were made

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by Rochester Produce, it was ultimately deemed unsalable due to rot (Opening Statement and Reply Ex. D). In addition, at the time of inspection on October 25, 2007, the damage disclosed by the inspection only averaged 4 percent. (AROI Ex. A p. 11) Therefore, by the time the corn was donated, the unmerchantability of the corn was likely due to the normal senescence of the product rather than any inherent defect present at the time of sale.

We conclude that Respondent is entitled to damages in the amount of \$3,024.00 for the load of corn billed on invoice 22016.

Invoice 22017

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee in Chariton, Iowa. (Complaint ¶ 9, Ex. 14-15; AROI Ex. 12-13) Hy-Vee accepted 714 crates of the corn and rejected the remainder. The remaining 294 crates were moved to Capital City, in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 9; AROI Ex. A p. 16) Following the inspection, Complainant states the 294 crates were reconsigned by Respondent to Capital City. (Opening Statement and Reply ¶ 6)

The Uniform Commercial Code provides that “[a]cceptance of a part of any commercial unit is acceptance of that entire unit.” U.C.C. § 2-606(2). “Commercial unit” is defined in the Code as:

such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

U.C.C. § 2-105(5). The Regulations (7 C.F.R. § 46.43(ii)) define “commercial unit” as “a single shipment of one or more perishable agricultural commodities tendered for delivery on a single contract.” Under these definitions, the 1,008 crates of corn in this shipment

comprise a commercial unit. A commercial unit must be accepted or rejected in its entirety. See 7 C.F.R. § 46.43(ii); U.C.C §§ 2-105(5), 2-601(c). Therefore, Hy-vee's acceptance of 714 crates of corn from the shipment operated as acceptance of the entire shipment. Since "[a]n acceptance is operative all the way up the line to the ultimate seller", Hy-vee's acceptance of the corn prevented any subsequent rejection by Complainant. *Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345, 1349 (1996). Accordingly, we find Complainant accepted the corn in this shipment.

Complainant is liable to Respondent for the full purchase price of the corn it accepted, less any damages resulting from any breach of warranty by Respondent. Complainant secured a destination inspection of the corn which disclosed 35 percent injury by quality defects (not well filled, auxiliary ears), including 4 percent which was scored as damage. (AROI Ex. A p. 16) No condition defects were found. As our discussion of invoice 22014 already noted, it has not been established that the corn was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when produce is sold without a U.S. grade specification. *E.g., Sucasa Produce*, 59 Agric. Dec. at 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the USDA inspection of the corn disclosed only quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish the corn was unmerchantable at the time of sale, i.e., at shipping point. *E.g., Lookout Mountain*, 50 Agric. Dec. at 964. As our discussion of invoice 22014 already noted, Respondent is a wholesale dealer of corn and therefore, any sale by Respondent would include a warranty of merchantability. The USDA inspection secured by Complainant was based on the requirements of the U.S. Fancy grade, and while it disclosed 35 percent injury by quality defects, the *damage* disclosed by the inspection averaged only 4 percent. This is less than the 20 percent average damage in invoice 22014 where we found the corn to be merchantable.

Therefore, because the corn was not sold with a U.S. grade specification and the damage averaged only 4 percent, we conclude that the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

Having failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent, Complainant is liable to Respondent for the corn it accepted at the agreed purchase price of \$3,024.00. While it would, however, be appropriate to reduce this amount by any proceeds collected by Respondent for the 294 crates of corn that were sold on its behalf by Capital City, the record shows Capital City's attempts to sell the corn were unsuccessful and that the corn was ultimately donated or dumped. (AROI Ex. G pp. 10-23)

We conclude that Respondent is entitled to damages in the amount of \$3,024.00 for the load of corn billed on invoice 22017.

#### Invoice 22018

The 1,008 crates of corn billed on this invoice were shipped on October 23, 2007, from Bainbridge, Georgia, to Hy-Vee in Chariton, Iowa. (Complaint ¶ 10, Ex. 18-19; AROI Ex. A pp. 17-18) Hy-Vee rejected the corn, after which the load was moved to Capital City, in Norwalk, Iowa, so that a USDA inspection could be performed. (Complaint ¶ 10; AROI Ex. 19) Based on the results of the inspection, Complainant rejected the corn.

Since Complainant's claim for damages is based on its alleged rejection of the corn in this shipment, we must first determine whether Complainant accomplished an effective rejection. As we mentioned, Complainant's rejection of the corn took place after the load was moved from Hy-Vee to Capital City for the purpose of securing an inspection. While Respondent has asserted that it never directed the loads to be inspected at any location other than Hy-Vee's warehouse (Answer with Counterclaim ¶ 3), Complainant has submitted uncontroverted sworn testimony from its President, Brent Rosenthal, wherein Mr. Rosenthal asserts that Respondent's salesman, Dale Pope, advised that "moving the product and having the inspection taken at Capital City was fine with him." (Opening Statement and Reply ¶ 2) We therefore find that the

preponderance of the evidence supports Complainant's contention that Respondent acquiesced to the movement of the load from Hy-Vee to Capital City for the purpose of inspection.

Although it is not specifically stated in the record, it appears Complainant clearly and promptly communicated its rejection to Respondent following the inspection because Respondent proceeded to have the corn moved to an alternate receiver. (Opening Statement and Reply ¶ 7, Ex. K-M) We therefore find that Complainant's rejection of the corn was effective. We must now determine whether Complainant's rejection of the corn was wrongful.

The parties agree that the load of corn in question was sold under f.o.b. terms. (Complaint ¶ 4; Answer with Counterclaim ¶ 2) Where produce is sold f.o.b., the warranty of suitable shipping condition is applicable. *E.g., Martori Bros. Distribs. v. Houston Fruitland Inc.*, 55 Agric. Dec. 1331, 1336 (1996). The USDA inspection disclosed 14 percent injury by quality defects (not well filled, poorly filled), including 6 percent which was scored as damage and 4 percent which was scored as serious damage, and 4 percent injury by indented kernels. (AROI Ex. A p. 19) No condition defects were found. As our discussion of invoice 22014 already noted, it has not been established that the corn was sold with a U.S. grade specification. In determining whether there is a breach of the suitable shipping condition warranty, only condition defects are relevant when produce is sold without a U.S. grade specification. *E.g., Sucasa Produce*, 59 Agric. Dec. at 425 (2000); *Diazteca*, 53 Agric. Dec. at 914 n. 7. Therefore, because the only damage disclosed by the USDA inspection consisted of quality defects, we find the inspection results fail to establish a breach by Respondent of the suitable shipping condition warranty.

Although Complainant has not shown a breach of the suitable shipping condition warranty, Complainant may still establish a breach of the warranty of merchantability if it can establish the corn was not merchantable at the time of sale, i.e., at shipping point. *E.g., Lookout Mountain*, 50 Agric. Dec. at 964. As our discussion of invoice 22014 already noted, Respondent is a wholesale dealer of corn and therefore, any sale by Respondent would include a warranty of merchantability. The USDA inspection secured by Complainant was based on the

requirements of the U.S. Fancy grade, and while it disclosed 18 percent injury by quality defects, the *damage* disclosed by the inspection averaged only 6 percent. This is less than the 20 percent average damage in invoice 22014 where we found the corn to be merchantable. Therefore, because the corn was not sold with a U.S. grade specification and the damage averaged only 6 percent, we conclude that the inspection results are insufficient to establish a breach by Respondent of the warranty of merchantability.

As Complainant has failed to establish a breach of either the warranty of suitable shipping condition or the warranty of merchantability by Respondent, we conclude Complainant's rejection of the corn was wrongful. Consequently, Complainant is not entitled to recover the expenses claimed in the Complaint. Respondent, on the other hand, is entitled to recover damages resulting from Complainant's wrongful rejection of the corn. As with invoice 22014, one possible remedy is that Respondent may resell the corn and claim damages under U.C.C. § 2-706; namely, the difference between the contract price and the resale price together with any incidental damages, but less expenses saved in consequence of Complainant's breach.

We have already determined that Respondent sent the rejected corn to Strube, in Chicago, Illinois. Respondent did not, however, provide any evidence of the resale proceeds collected from Strube for the subject load of corn. Without this information, we cannot determine the damages sustained by Respondent using the method provided in U.C.C. § 2-706. We will, therefore, resort to the alternative measure of damages set forth in U.C.C. § 2-708(1), i.e., the difference between the contract price and the market price at the time and place for delivery. The contract price of the corn was \$3.00 per crate f.o.b., to which we will add \$1.09 for freight ( $\$1,100.00 \text{ inbound freight} \div 1,008 \text{ crates} = \$1.09 \text{ per crate}$ ) (Complaint Ex. 19; AROI Ex. A p. 18), which results in an f.o.b. plus freight price of \$4.09 per crate. By comparison, the USDA Market News report for Chicago, Illinois, the nearest reporting location to the contract destination of Chariton, Iowa,<sup>8</sup> shows that on October 26, 2007, yellow sweet corn originating from Georgia was mostly selling for \$9.00 to \$10.00 per crate, or an average of \$9.50 per

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<sup>8</sup> The use of Chicago market prices to estimate the market value of the corn in Chariton is in accordance with U.C.C. § 2-723(2). *Supra* note 6.

crate. Since the prevailing market price, and the price at which Respondent would presumably be able to resell the corn, is substantially greater than the f.o.b. contract price plus freight, there is no indication Respondent was damaged according to the measure of damages set forth in U.C.C. § 2-708(1). See U.C.C. § 2-708, Comment 1(c).

We conclude that neither party has proven their respective claims for damages in connection with the load of corn billed on invoice 22018. Complainant has failed to establish a breach of either the suitable shipping condition warranty or the warranty of merchantability by Respondent with respect to any of the five loads of corn at issue in this dispute. We have concluded on this basis that Complainant's rejection of the corn billed on invoice numbers 22014, 22015, 22016, and 22018 was wrongful. For the load of corn billed on invoice 22017, the evidence established that Complainant accepted the corn. On the basis of these findings, we conclude that the Complaint, where Complainant seeks recovery of expenses incurred in connection with its rejection of the corn, should be dismissed. Respondent, on the other hand, is entitled to recover \$3,024.00 as damages resulting from Complainant's wrongful rejection of the corn billed on invoice 22016, and \$3,024.00 for the agreed purchase price of the accepted load of corn billed on invoice 22017, for a total of \$6,048.00.

Complainant's failure to pay Respondent \$6,048.00 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Respondent. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217, 239-240 (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/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978, 979 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 338 (1970); *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

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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.*, 65 Agric. Dec. 669, 672-73 (2006).

Respondent in this action paid \$500.00 to file its Counterclaim. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act (7 U.S.C. § 499b) is liable for any handling fees paid by the injured party.

**Order**

The Complaint is dismissed.

Within 30 days from the date of this Order, Complainant shall pay Respondent as reparation \$6,048.00, with interest thereon at the rate of 0.33 percent per annum from December 1, 2007, until paid, plus the amount of \$500.00.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.

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**L&M FARMS, INC. v. Y2S TRADING, INC., AND TOPLINE TRADING, INC. AND TOPLINE TRADING, INC. v. L&M COMPANIES, INC.**

**PACA Docket No. R-07-072.**

**PACA Docket No. R-08-050.**

**Filed June 30, 2010.**

**PACA-R -- Alter ego – evidence of.**

An a newly-formed corporation was found to have been the alter ego of an established corporation because the established corporation: (1) accepted produce for both corporations, (2) provided warehouse space for both corporations, (3) comingled funds by delivering remittance checks from accounts it controlled, (4) shared an employee and owner, and (5) the employee in common to both corporations negotiated for both corporations. There was some evidence of separation, but the weight of the evidence

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showed that the two corporations were not acting as separate entities for the purposes of the joint venture. Because of these facts, the newly-formed corporation's interests were dominated by the established corporation to the extent that the newly-formed corporation was the alter-ego of the established corporation

**Alter-ego, evidence of**

Two corporations that were formed in different states, at different times, and the corporations had different owners and officers, separate employees, and accounting departments, were not alter-egos of one another.

**Joint Venture , duties of**

Partners in a joint account relationship owe each other the utmost good faith in their dealings with one another. If the joint venture sustains damages because a joint venturer breaches his duties, the breaching partner must bear the loss, although in matters of judgment the joint venturer will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud.

**Joint venture, evidence of**

Where parties to an agreement agreed to share profits, and committed time, effort, and money, to the growing of Napa cabbage, the agreement was held to be a joint venture.

**Joint venture, evidence of**

Where one party to an agreement only marketed the cabbage from a joint venture, and took on no risk or control over the venture, that party was held to not be a part of a joint venture.

**Joint venture, expenses of**

The ordinary rule of a joint venture is that each party bears their individual expenses. The basic principle is that general overhead expenses are excluded from the gross profit of the joint venture where the overhead represents an attempt to charge compensation for services in providing capital and in providing the organization to handle the transaction. Joint account partners may agree to share expenses differently, however, joint venturers do not ordinarily agree to share the expenses of turning on the lights, making telephone calls, buying uniforms, or paying the salaries of office staff.

**Accounting , adequacy of**

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An accounting from a joint venturer showed the date of shipment, the lot number, the name of the purchaser, the amount of cabbage sold, the initial invoice price, the amount actually received, the bill of lading number, the trucking company who delivered the cabbage, and notes on the problems with each load was held to be an adequate accounting even though it lacked an itemized explanation of the shipping charges, the commissions taken, or costs incurred, and it referred to the date of shipment without regard to the date of sale.

### **Accounting – damages for failure to account**

Damages in the amount of the reasonable value of the produce are awarded when a party fails to account for produce.

### **Dumping, evidence of**

Where a joint venturer accounted zero and negative returns for lots of cabbage, the accounting must also have included other adequate evidence to justify the zero and negative returns. Inspections or other adequate evidence are required to demonstrate that produce is without commercial value, and that documentation must be given to the joint account partner. Because the expenses were not separately accounted for, presumption arose that zero and negative returns were a result of dumping.

### **Attorney's Fees and Expenses**

Attorney's fees and expenses were not awarded because there was no prevailing party. Each of the four parties to this litigation failed in aspects of their allegations. With the exception of one party, all of the other parties were required to pay damages. The single party that did not have to pay damages, however, made arguments contrary to the statements of its witnesses at the hearing, and charged excessive amounts to the joint venture that was the subject of the litigation. It did not substantially prevail on the arguments it made in its complaint or on the arguments that it made in its post-hearing briefs.

Jonathan Gordy, Presiding Officer  
Louis W. Diess, III, Counsel for L&M Farms, Inc. and L&M Companies, Inc.  
Paul T. Gentile, Counsel for Y2S Trading, Inc., and Topline Trading, Inc.  
*Decision and Order issued by William G. Jenson, Judicial Officer.*

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499t)(PACA). A timely formal complaint (L&M Farm's Complaint) was filed with the Department on February 20, 2007, in which Complainant L&M Farms, Inc. (L&M Farms) sought a reparation award of \$142,536.25 in connection with transactions in interstate commerce involving sales of

Napa cabbage, which is also known as Chinese cabbage. L&M Farms claimed that Respondents Y2S Trading, Inc., (Y2S) and Topline Trading, Inc., (Topline) had received cabbage from L&M Farms as a grower's agent. L&M Farms claimed that Y2S and Topline failed to fully account and remit the net proceeds of the sales of cabbage.

On April 6, 2007, Y2S and Topline filed answers that denied the allegations of the Complaint, and Topline filed a counterclaim. Topline claimed that it and L&M Farms had entered into a joint venture whereby L&M Farms would plant seeds provided by Topline, and Topline would sell the cabbage on consignment. Topline claimed that it had accounted for the cabbage, and that it was owed commission, expenses, and excessive charges that L&M Farms charged the joint account for planting and harvesting the cabbage.

In its Complaint, L&M Farms claimed that it was not a licensee subject to the PACA. During the initial telephone conference on August 15, 2007, the presiding officer, Jonathan Gordy, informed the parties that Topline's counterclaims could be dismissed for lack of jurisdiction.<sup>1</sup>

At that telephone conference, the representative of Y2S and Topline requested an opportunity to file a motion to amend the pleadings. The presiding officer granted the request and permitted Topline's motion and L&M Farm's response. On November 26, 2007, the Presiding Officer issues an order that denied Y2S's and Topline's motion to amend the pleadings, but permitted Topline to file a separate Complaint against L&M Companies, Inc. (L&M Companies).

Accordingly, Topline filed a Complaint against L&M Companies on December 17, 2007 (Topline's Complaint). Topline's Complaint reiterated, in substance, the same claims it originally brought as part of its counterclaim. Topline sought \$131,991.00 in damages in connection with the same loads of Napa cabbage that were the subject of L&M

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<sup>1</sup> See, e.g., *L.J. Crawford v. Ralph & Cono Comunal Produce Corp.*, 51 Agric. Dec. 804, 809 (1992); *E.S. Harper Co., Inc., v. Magic Valley Growers, Ltd.*, 46 Agric. Dec. 1864, 1866 (1987); *Kesteren Jr. v. Yukon & Sons Produce, Inc.*, 12 Agric. Dec. 989, 995 (1953).

Farm's Complaint against Y2S and Topline. L&M Companies timely answered Topline's Complaint, and denied its allegations.

The cases were consolidated for hearing, which was held in Washington, DC from July 29, 2008 through July 31, 2008, before Presiding Officer Jonathan Gordy of the Office of the General Counsel. L&M Farms and L&M Companies presented 16 exhibits (CX) and Y2S and Topline presented 42 exhibits (RX). L&M Farms and L&M Companies presented the testimony of two witnesses, and Y2S and Topline presented the testimony of three witnesses. After the hearing, the parties timely filed briefs in this matter. L&M Farms and L&M Companies initially filed a joint "Brief of L&M Farms, Inc. and L&M Companies, Inc." (L&M's Initial Brief) and, after the initial briefing, L&M Farms and L&M Companies filed a "Reply of L&M Companies, Inc. and L&M Farms, Inc." (L&M's Reply Brief). Y2S and Topline initially filed a joint "Proposed Findings of Fact and Conclusions of Law by Respondents/Complainants Y2S Trading, Inc. and Topline Trading, Inc." (Y2S Initial Brief) and, after the initial filings, Y2S and Topline filed a joint "Reply Brief of Topline Trading, Inc. and Y2S Trading, Inc." (Y2S Reply Brief). The parties also timely filed requests for fees and expenses. The exhibits from the Report of Investigation (ROI EX) are considered a part of the evidence in this proceeding. *See* 7 C.F.R. § 47.7.

### **Findings of Fact**

L&M Farms is a produce growing operation incorporated and existing under the laws of the State of Florida, with its corporate headquarters located at Suite 204, 2925 Huntleigh Dr., Raleigh, North Carolina. L&M Farms does not maintain a PACA license, and sells produce of its own raising.

L&M Companies is a produce dealer incorporated and existing under the laws of the state of North Carolina. L&M Companies is a licensee under the PACA, PACA license No. 19980840, which is next due for renewal on March 18, 2011. L&M Companies corporate headquarters is located at Suite 204, 2925 Huntleigh Dr., Raleigh, North Carolina. Y2S Trading is a corporation, with a business address of 16-28 Prince Street, Brooklyn, New York. According to its corporate records, Y2S

Trading was founded in May 7, 2002 as Seven Seas Wholesale Produce, Inc. (CX 14-15.) Before that, its employees and owners had been a part of Seven Seas Trading Co., Inc., d/b/a Valley View Farms (Valley View). On April 25, 2005, Valley View was found to have committed willful repeated and flagrant violations of the PACA. Abraham Tan, the owner of Valley View, was subject to employment restrictions from April 26, 2005 to April 28, 2006. (Letter of Karla D. Whalen, File PACA RC N-A-2002-2357.) But, he remained associated with Y2S Trading as an advisor. (TR 264.) By the time of the Hearing, Y2S Trading was a licensee under the PACA. It received its PACA license, number 20021589, on September 23, 2002. (CX 16.) Also, at the time of the Hearing, Tan described his role at Y2S Trading as similar to a CEO, managing daily operations and purchasing produce from the United States, Canada, and Mexico. (TR 285-86.)

In the summer of 2005, Abraham Tan, acting on behalf of Y2S, began to seek out a growing operation in Florida. He intended that this operation would supply Napa cabbage to Y2S for the winter of 2005. Y2S would sell the cabbage to its Asian American customers, particularly Korean customers. Tan contacted Steve Rosen, a friend in California, who recommended that Tan speak with Joseph McGee. (TR 162-64.) Joseph McGee, who was an owner of both L&M Farms, and L&M Companies, spoke with Tan via telephone, and agreed to meet with Tan in August of 2005. (TR 164-65.)

In August, the parties met to discuss a joint venture for the growing and marketing of Napa cabbage. Present from L&M Companies and L&M Farms were Joseph McGee, Mike McGee, Scott Beach (Beach), and Jim Mackenzie (Mackenzie); present from Y2S was Abraham Tan (Tan); and, present from a to-be-named-in-the-future company was Jae Ha (Ha), and Ha's son. (See TR 36-37, 561.) There was also an eighth person that attended the meeting who was a friend of Ha's son. (TR 561; see TR 37.)

The parties agreed to the following terms: Joseph McGee and McKenzie would make arrangements through L&M Farms to grow approximately 150 acres of Napa cabbage for the joint venture. (See TR 298; 621.) L&M Farms would arrange for packing and shipments of

70% of the cabbage to the companies related to Tan. Tan's companies — the company that would later be named Topline Trading, Inc. and Y2S — would market 70% of the cabbage. The remaining 30% of the cabbage would be marketed by L&M Companies. (TR 239.) Ha would provide advice to the joint venture on the growing of Napa cabbage, (TR 38) and he would provide one quarter of the capital to start the process of planting cabbage (*See* TR 42). Y2S would also provide one quarter of the capital for the joint venture. (*See id.*) L&M Farms would provide the other half of the capital for the joint venture. The marketing operations of L&M Companies, and Tan's companies would each take a percentage commission before returning the proceeds to the joint venture. If the gross proceeds exceeded the costs, any net proceeds would be divided equally between L&M Farms and Tan's companies.

There was disagreement at the meeting concerning the specifics of the costs to be allocated to the joint venture. Beach had prepared an expense report of L&M Farm's attempt to grow Napa cabbage on a test basis the prior year. (RX 32.) Those expenses reached the sum of \$1635.12 per acre. (*Id.*) These costs were not acceptable to Tan or Ha. In their experience, both concluded that expenses for growing Napa cabbage should not exceed \$1,000.00 per acre. (*See* TR 33-34; 57; 179; 282.) As a result, the parties did not agree on a fixed expense per acre that would be charged to the operation.

The parties also failed to agree on a minimum price to be set for the cabbage. Beach and Joseph McGee believed that a minimum (or floor) price agreement was reached, (*see* TR 340; 669) but there is no indication that Y2S or Topline agreed to a minimum price. When L&M Companies marketed its portion of the cabbage, it did not pay a minimum price to the joint venture. (*See* TR 669.)

Despite the fact that L&M Farms and L&M Companies had their attorney draft a written contract, none of the parties signed the contract. (TR 240; 343)

Sometime before the end of October 2005, Ha and Sung Y. Yang (aka Michelle Yang) (Yang), who is the owner of Y2S, formed Topline for the purpose of entering into the joint venture with L&M Farms and L&M Companies. PACA licensing records show that Topline had a business address of 16-28 Prince Street, Brooklyn, NY, 11201. It was

issued a PACA license on October 31, 2005, and that license terminated on November 4, 2006 for failure to file the annual renewal fee.

On October 24, 2005, November 28, 2005 and December 29, 2005, Y2S sent three checks to the order of "L&M Companies" to the corporate headquarters of L&M Farms and L&M Companies as the initial amount of capital to cover half of the expenses for growing the Napa cabbage. These payments totaled \$70,000.00. (CX 13 at 2-4.) This is half of a projected cost of \$1000 per acre.

On January 14, 2006, Napa cabbage began to ship to Y2S at its facility at 16-28 Prince Street, Brooklyn, NY. After the first two bills of lading issued to "Y2S Trading, Inc.," later bills of lading were issued to "Topline." (RX 59; CX 5.) All the loads shipped to 16-28 Prince St., Brooklyn, NY 11201. (*Id.*)

As the cabbage was delivered to Y2S Trading and Topline, Topline began writing checks to "L&M." These were: a \$50,000 check on April 28, 2006, a \$20,000 check on May 26, 2006, a \$25,000 check on June 9, 2006, and a \$24,871 check on July 6, 2006. (RX 13-20.) The total amount Y2S and Topline remitted to "L&M" and "L&M Companies", including the checks to cover expenses, was \$189,871.00.

During this period, Y2S and Topline were selling the cabbage. Topline and Y2S employed Brian Cho (Cho) to sell most of the cabbage, and a smaller portion of the cabbage was also sold by Y2S and Yang. According to Cho and Tan, the buyers were unhappy with the cabbage. There were two quality defects that caused this unhappiness: First, the cabbages had begun to bolt.<sup>2</sup> This occurs when a flower develops inside the center of the cabbages. The center of the cabbage becomes bitter and undesirable. (TR 116.) In Napa cabbage, which is an oblong cabbage, early bolting can only be detected by cutting the cabbage in half. (*See* TR 117.) Second, the cabbage was the wrong size for the Asian market. (*See* TR 26-27; 51.)

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<sup>2</sup> The term used at the hearing was variously "seeder" or "flower." (*See, e.g.*, TR 115-16.) This decision will use the term "bolt" instead of the awkward "seeder." *A Dictionary of Agricultural and Allied Terminology*, Winburn, Michigan State Press (1962), defines "bolt" as "5. to flower or to produce seed stalks, often prematurely."

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Despite the money remitted to “L&M,” Tan’s companies did not send an accounting until sometime after all of the sales were complete. Tan ordered Cho to prepare a typed accounting sometime during the end of April or beginning of May 2006 that was later modified with handwritten entries from Michelle Yang, who had sold the other loads of cabbage. (*See* TR 133, 135-38, 140; RX 34-35)

The accounting (RX 34-35) included the date of sale, a lot number, the name of the purchaser, the amount of cabbage sold, the price obtained per unit, the total price, the bill of lading number, the trucking company who delivered the cabbage, and finally notes on the problems that Cho had with each load. (TR 134-37.) The handwritten entries, from Michelle Yang, are intended to substitute for “Topline” in the columns for the total price of the sale. (TR 136.)

Topline and Y2S did not account for the commission that they were owed under the contract.

L&M Companies remitted to L&M Farms a return of a little more than \$8,000 on 13,880 boxes of Napa cabbage. (TR 663.) It accounted for the cabbage to L&M Farms, but, Y2S and Topline did not receive an accounting from L&M Companies or L&M Farms.

### **Discussion**

#### 1. The parties’ allegations.

In August of 2005, representatives of the parties met to negotiate an agreement for the growing, harvesting, and marketing of Napa Cabbage. This case is based on the disagreements that resulted from the oral agreement the parties reached. The parties have disagreed as to nearly every term of this contract. The parties dispute: the kind of agreement, the parties to the agreement, breaches of contractual duties, and breaches of regulatory duties, and the amount of damages that result from the breaches of those duties.

The dispute begins with the type of agreement that the parties entered into, because, depending on the type of agreement, the parties’ duties could be substantially different. At first, L&M Farm’s Complaint claimed that Y2S and Topline were grower’s agents. Later, in L&M’s Initial Brief, L&M Farms and L&M Companies describe these transactions as a consignment. In Topline’s Complaint against L&M

Companies, Topline discusses both an “oral joint venture” agreement, (Topline’s Complaint ¶ 3) and a “consignment” of the cabbage (Topline’s Complaint ¶ 6). In their Initial Brief, Topline and Y2S settle on calling the agreement a “joint venture.” (Y2S Initial Brief at 3.)

The parties also dispute who was a party to the agreement. In the informal proceeding, L&M Farms has focused its allegations against Y2S. But, Y2S has claimed it was not a party to the oral contract, and that, instead, Topline was the party to the agreement. Only after this was brought to the attention of L&M Farms during the informal proceeding did it add Topline as a Respondent in its formal Complaint. While Topline initially made counterclaims against L&M Farms, it withdrew its counterclaims and Topline filed its Complaint exclusively against L&M Companies. Topline insists that L&M Companies was the party to the agreement, and that L&M Farms was never referred to as a separate corporate entity from L&M Companies during the negotiations. (Y2S Initial Brief at 3-4.)

Next, the parties have presented several possible breaches of contractual or regulatory duties, which they believe warrant a damage award.

L&M Farms may have intended, at first, to treat the agreement as one for the sale of cabbage from L&M Farms to Y2S, because it created and sent a package of invoices to Abraham Tan and Y2S. But, by the time of the informal complaint, L&M Farms alleged that Y2S was a grower’s agent that had failed in the various regulatory duties of a grower’s agent. (See ROI EX 1 at 2.)

In its formal Complaint, L&M Farms based its claims on Y2S’ purported failure to account for its handling of consigned cabbage, and Y2S’ purported failure to remit the net proceeds from those sales. (L&M Farm’s Complaint ¶ 7.) After the hearing, however, L&M Farms conceded that it received “a document apparently summarizing the sales” of Topline and Y2S. (L&M’s Initial Brief at 6.) But, L&M Farms asserted that the accounting was inadequate. (L&M’s Initial Brief at 7.) Moreover, L&M Farms also added the claim that by using Brian Cho to sell the cabbage, and by selling the cabbage outside of the New York area, Y2S and Topline were liable for breaching the duties of a

consignee. (L&M's Initial Brief at 9-10.) Finally, L&M Farms claimed that Y2S and Topline failed to exercise reasonable care in the handling of the cabbage. (L&M Complaint at 2; L&M's Initial Brief at 7.)

For these breaches, L & M Farms has claimed the fair market value of the cabbage minus the amounts remitted by Y2S. (Complaint ¶ 8; L&M's Initial Brief at 16.) The fair market value was based, in part, on invoices that L&M Farms presented in the informal procedure. (ROI at Exhibit 1.) The total amount claimed is \$142,536.25. (Complaint ¶ 8; L&M's Initial Brief at 16.)

Topline and Y2S have countered that they — or at least Topline — accounted for the cabbage, and that the net proceeds were remitted. (Y2S Initial Brief at 6-7.) In reply to the allegations that it mishandled the produce, Topline and Y2S presented evidence that the cabbage was of poor quality, and that L&M Farms failed to follow their instructions regarding the proper seed and planting of the cabbage. Topline also countered that the invoices were fraudulent, and did not represent the agreement of the parties. (*See* Topline's Complaint ¶ 11.)

Topline, on the other hand, originally claimed that L&M Companies — which Topline treats as the alter-ego of L&M Farms — owes Topline for: commissions on the sale of the cabbage in the amount of \$13,156.05, un-reimbursed expenses in the amount of \$5,132.00, box credit in the amount of \$10,703.00, and L&M Companies' overcharges for the planting and harvesting of the cabbage in the amount of \$102,000.00. (Topline's Complaint ¶¶ 7-10.) In its Initial Brief, however, Topline revised its claims and claimed it was owed \$70,000.00 for growing costs due because L&M Companies failed to follow the planting instructions, commission in an unspecified amount for the sales it conducted, and some portion of L&M Companies' sale of 30% of the cabbage. (Y2S Initial Brief at 7.) Or, more broadly, "Topline, Y2S, Ha, Cho, and Tan, have received not a penny for their efforts and/or sales relating to the joint venture." (*Id.*)

First, we must decide the questions of alter-ego; second we must decide the terms of the agreement and whether it was a consignment, or a joint venture; third, we will decide who was a party to the agreement and what duties, if any, these parties had; fourth, we will decide whether the parties breached their duties; fifth, we will determine what damages

resulted from any breach; and finally, we will calculate to what extent each party will recover damages.

2. The evidence shows that Topline Trading was the alter-ego of Y2S, but L&M Farms was not the alter-ego of L&M Companies.

*In re: Marysville Enterprises, Inc.*, 59 Agric. Dec. 299, 315 (2000), explained that control determines if a corporation is the *alter ego* of its owner. Control must be active and substantial, though it need not be exclusive. In general, the corporate form may be ignored when an individual so dominates a corporation so that the corporation fails to have a separate personality. Some of the factual factors which demonstrate that a company is the *alter ego* of an individual are: (1) the individual directed the formation of the corporation; (2) the individual exercised substantial control over the corporation; (3) the individual's funds and the corporation's funds were commingled; (4) the corporation failed to have persons other than the individual as corporate officers and directors; (5) corporate formalities, such as meetings of the board of directors, were not followed; and (6) the individual used the corporation as a façade for his or her operations. *See id.*

A. Topline was the alter-ego of Y2S.

There is substantial evidence that Y2S controlled Topline. Y2S provided warehouse space to Topline, and the initial \$70,000 in checks to L&M. Moreover, Y2S also delivered the later remittances; Y2S's mailed the later remittance checks in envelopes with its name on the return address. (CX 13 at 5, 8.) The mailings and the initial checks show that Y2S may have commingled funds. In addition to sharing funds, Topline and Y2S shared an owner, Yang, and the two companies shared an agent, Tan.

Tan's actions indicate further direct control of Topline by Y2S. Tan, who negotiated the agreement, later ordered Cho to produce a report for L&M. There is no indication that Topline had separate accounting or staffing from Y2S. The produce was either shipped directly to customers or shipped to the warehouse controlled by Y2S. Because of Y2S's involvement in arranging this venture and because Y2S intended

to receive this venture's benefits, Y2S dominated Topline's interests and Topline ceased to have a separate will from the interests of Y2S.

Not all of the evidence supports our finding of alter-ego. We recognize that Ha testified that he invested \$35,000 into Topline, and Cho testified that he was hired by Ha. Thus, there is some indication that Topline was a separate entity. But, we conclude that the preponderance of the evidence presented shows that the Y2S and Topline were the same entity for the purposes of this venture.

B. L&M Farms was not the alter-ego of L&M Companies.

In contrast to Y2S and Topline, L&M Companies was a separate entity from L&M Farms. L&M's Exhibits, CX 1 and CX 2, show that L&M Companies had different owners and officers from L&M Farms. L&M Companies and L&M Farms were founded in different states and at different times. Both companies appeared to follow corporate formalities, submitting their statutory filings in their respective states. As the witnesses explained, the two companies have separate accounting departments, with separate employees. (See TR 560.) There is no indication in the record that L&M Farms or L&M Companies intentionally commingled funds. When it came to L&M Companies' attention that it had mistakenly deposited checks intended for L&M Farms, L&M Companies remitted the money over to L&M Farms. (See TR 501; 582.)

Accordingly, the evidence does not show that L&M Companies exercised the requisite level of control over L&M Farms to lead to the conclusion that L&M Farms was an alter-ego of L&M Companies.

3. The oral agreement between the parties

There have been three different agreement types suggested during this litigation. Before there was an informal complaint, L&M Farms delivered 74 invoices to Abraham Tan at Y2S Trading that showed the sale of 13,880 boxes of "Cabbage-Napa" for the value of \$332,407.25. (ROI 1 at 3-76.) If this was in fact the original position of L&M Farms, L&M Farms reconsidered. L&M Farms filed its informal and formal complaints alleging that L&M Farms had consigned the produce to Y2S and Topline who acted as grower's agents for L&M Farms. Accordingly, L&M Farms has conceded that as to the type of the agreement, this was not a sale for which L&M Farms expected a fixed

price per box. Topline has argued that this was a joint venture between Topline and L&M Companies and L&M Farms. L&M Companies denies that it was a party to a joint venture. (L&M Companies Answer at ¶ 2.)

After considering all of the available evidence and arguments of the parties, we conclude that Y2S, Topline, and L&M Farms entered into a joint venture. The joint venture did not include L&M Companies, who instead entered into a consignment with the joint venture.

A. Y2S, Topline, and L&M Farms entered into a joint venture for the growing and marketing of the Napa cabbage.

A joint account transaction is defined in the PACA regulations as “a produce transaction in commerce in which two or more persons participate under a limited joint venture arrangement whereby they agree to share in a prescribed manner the costs, profits, or losses resulting from such transaction.” 7 C.F.R. § 46.2(s). A joint venture is based on an agreement — express, or implied from the parties’ conduct — where: (1) the parties contribute money, property, effort or knowledge to a common undertaking; (2) there are joint property interests in the subject matter of the venture; (3) there is a right of mutual control or management of the venture; and, (4) the parties agree to share profits and losses of the venture. *See In re: Produce Distributors, Inc.*, 58 Agric. Dec. 506, 529 fn. 5 (1999).

The elements of a joint venture are met by this agreement. Y2S, Topline, and L&M Farms committed money, effort and knowledge to the undertaking. Y2S contributed money to this venture, issuing three checks for \$70,000.00 to “L&M” from October to December 2005. (CX 13, 2-4; RX 7-12.) Ha provided seeds, (*see* TR 38), expert advice on growing techniques, (*see* TR 39, 568), and planting schedules (TR 125). L&M Farms provided equipment, land, and personnel to grow the cabbages.

We infer joint property interests from the fact that both parties exercised control over the cabbage and that Topline remitted the money from the sales of the cabbage to “L&M.” Both parties intended to exercise control over the venture, because the parties intended that

Topline and L&M Farms would provide oversight over the process of growing the cabbage.

Finally, these parties agreed to share the profits and losses; Tan testified that costs of planting were intended to be shared equally, and Joseph McGee agreed that profits and the growing costs from the venture were to be split equally. (*See* Tr. 235, 340, 452.) For these reasons, we conclude that this was a joint venture of L&M Farms, Y2S, and Topline.

B. The joint venture consigned cabbage to L&M Companies, which was not a member of the joint venture.

L&M Companies did not participate in the joint venture. L&M Companies did not have managerial rights in the venture, did not intend to share in the profits and losses of the venture, and did not contribute to the venture. Unlike L&M Farms, which provided the expertise and property to grow the cabbage, and clearly took on considerable risk, there is no evidence in the record that L&M Companies was expected to take on any risk as part of the venture. The only writing that is evidence of the oral agreement — a consignment marketing agreement drafted by L&M Farms and L&M Companies — shows that L&M Companies expected that it would only have responsibility for marketing the cabbage. (ROI 4 at 4.)

The testimony for Y2S and Topline focused on whether L&M Farms was an alter-ego of L&M Companies. As explained in the earlier sections, L&M Farms was not the alter-ego of L&M Companies.

However, even while L&M Companies was not a member of the joint venture, L&M Companies did have contractual responsibilities. As a commission merchant, L&M Companies was designated to market 30% of the cabbage in exchange for a 7% commission. (TR 239; ROI 4 at 4.)

2. The parties' rights and duties under the oral contract and the regulations.

Even though we find this agreement was a joint venture, it is also clear that the parties to this agreement did not have equal rights and duties under the oral agreement, or under the regulations. The duties of each firm were hotly contested at the hearing and in the briefs. When the parties disagree on the terms of a contract, each party bears the burden to establish its allegations by a preponderance of the evidence.

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and Topline Trading, Inc.  
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*See, e.g., Stake Tomatoes v. Worldwide Consultants, Inc.*, 52 Agric. Dec. 770, 771-72 (1993); *Justice v. Eastern Potato Dealers of Maine, Inc.*, 30 Agric. Dec. 1352 (1971); *Harland W. Chidsey Farms v. Guerin*, 27 Agric. Dec. 384 (1968).

A. The contractual rights and duties of Y2S and Topline.

The companies that Tan represented, Y2S and Topline, had two primary contractual duties. First, they were to provide advice to L&M Farms on the proper methods of growing Napa cabbage so that it would be suitable for sale to Asian food stores and restaurants. In particular, Ha — who ultimately became a part owner in Topline — was to provide the seeds, (TR 38), expert advice on growing techniques, (*see* TR 39), and planting schedules (TR 125). Second, Y2S and Topline were to market approximately 70% of the cabbage to customers in the Asian market. In addition, these two companies were to pay half of the growing costs of the cabbage. In exchange, Y2S and Topline would have the right to a 7% commission on sales directly shipped to customers and a 15% commission on sales that were redistributed from Y2S's warehouse. (TR 498-99.)

A joint venturer has the duties of a partner in a partnership. *See Florida Lime & Avocado Growers, Inc. v. Keglar-Caribe of 158 Florida, Inc.*, 20 Agric. Dec. 795 (1961); *A. Bertolla & Sons v. Hyman Distributing Company*, 13 Agric. Dec. 961 (1954); *L. Gillarde Company v. Elbert D. Ball*, 4 Agric. Dec. 588 (1945). As joint venturers with L&M Farms, the evidence shows that Topline and Y2S had the right to half of the profits, if any, on the sale of all of the cabbage. Likewise, as joint venturers, they would also have the duty to bear half of any losses from the joint venture. As a practical matter, there is no dispute that Topline took on these duties as part of the contract to grow and market the cabbage. But, there is some dispute of whether Y2S should be considered to have the same duties as Topline.

During the informal proceeding, Y2S claimed that it was not a part of the joint venture. Y2S claimed that only a "small portion" of the cabbage was sold to Y2S by Topline. (ROI EX 4 at 1-2.) The position that Y2S was not a party to the contract persisted into Y2S and Topline's Answer and Topline's own Complaint. (*See* Y2S and Topline

Answer at ¶ 5-11; Topline's Complaint at ¶ 12.) We disagree. We have found, *supra*, that Topline was the alter-ego of Y2S. When there is a finding of alter-ego, a court may pierce the corporate veil and hold the controlling entity liable for the obligations of the alter-ego. *E.g.*, *Filo America v. Olhoss Trading Co.*, 321 F. Supp. 2d 1266, 1269 (M.D. Ala. 2004); *Village at Camelback Property Owners Assn. Inc. v. Carr*, 538 A.2d 528, 533 (Pa. Sup. Ct. 1988). Therefore, we will permit L&M Farms to pierce the corporate veil and hold Y2S directly responsible for Topline's actions in this case.

Even if we had not found alter-ego in this instance, we think Y2S shared contractual duties with Topline as a member of the joint venture. In general, an obligation entered into by more than one person is presumed to create a joint duty unless the contract states otherwise. *See Calamari & Perillo, Contracts*, § 20.2 (4th ed. 1998); *Mileaseing Co. v. Hogan*, 451 N.Y.S.2d 211, 213 (N.Y. Supreme Court, Third Department, 1982).

The evidence shows that Y2S jointly accepted the same duties as Topline. For instance, Tan's testimony contradicts Y2S's position that it was not a party to the agreement. He explained that the impetus for the August meeting with Joseph McGee was that Y2S needed a steady supply of Napa cabbage for the winter months to supply Y2S's Korean customers. (TR 162.) The joint venture, as Tan described it at the hearing, would be a "good project for both sides, for L&M and also for Y2S Trading." (TR 166.) Moreover, Y2S issued three checks for \$70,000.00 to "L&M" from October to December 2005, (CX 13, 2-4; RX 7-12) which, according to Tan, covered half of the growing costs (TR 197-98). In addition, Y2S issued at least two of these checks after Ha and Yang formed Topline. L&M Farms also presented evidence that Joseph McGee had the strong impression, even if unstated, that Y2S was an important part of the joint venture. (TR 335.)

**B. The contractual rights and duties of L&M Farms and L&M Companies.**

For the most part, the parties agree that L&M Farms had a contractual duty to grow the cabbage and deliver it to L&M Companies and Topline. L&M Farms also has the right to half of the profits, if any,

on the sale of the cabbage, and L&M Farms shares equally in any losses from the venture.

The evidence, from the witnesses and the Report of Investigation, shows that L&M Companies had the duty to market approximately 30% of the cabbage that L&M Farms grew. It had the right to receive a 7% commission on the sales it made for the joint venture. But, L&M Companies had no right to profits, nor does L&M Companies share the losses of the joint venture.

C. The regulatory duties of the parties.

Aside from contractual duties, the four parties had other duties because this case involves an agreement concerning perishable agricultural commodities between licensees under the PACA.

Joint account partners who receive produce have a duty to exercise reasonable care and diligence in disposing of produce promptly and in a fair and reasonable manner. 7 C.F.R. § 46.29(a). Those partners must also truly and correctly account for produce handled on a joint account. 7 C.F.R. § 46.29(a). True and correct accounts in connection with joint account transactions means accountings that include: the date of receipt and date of final sale, the quantities sold at each price or other disposition of produce, the joint account cost of the produce, and the expenses properly incurred or other charges specifically agreed to in the handling of the produce. 7 C.F.R. § 46.2(y)(2). For produce that has been dumped, a joint account partner must forward the original dump certificate or other adequate evidence to justify dumping to its partner. 7 C.F.R. § 46.22.

Unless the parties otherwise agree, joint account partners do not ordinarily charge commission. 7 C.F.R. § 46.29(b). But, commission merchants — who are engaged to sell consigned produce on commission — have a duty to sell the produce inside their geographic area, and not to hire other people or firms to dispose of the produce, unless the consignor gives specific prior permission. *Id.* In all consignments, receivers of produce may not re-consign produce to other persons or firms, or incur additional commissions, charges or expenses, unless the receiver has the consignor's approval. *Id.*

Because this was a joint venture, Topline and Y2S had those duties of a joint account partner to L&M Farms. In addition, Y2S, Topline, and L&M Companies were expected to charge commission, and therefore they had the duties of commission merchants as well.

4. Breaches of the contract or regulations by the parties.

As discussed, the parties allege a wide variety of contractual breaches and regulatory violations. L&M Farms alleges that Y2S and Topline failed in their duty to properly handle the cabbage; failed to timely provide an adequate accounting; failed to justify negative returns and dumping (Complaint's Initial Brief at 10-11); and employed, without authorization, an agent to resell the produce.

In turn, Topline has alleged that L&M Companies failed to account for the produce that it sold; charged excessive fees to the joint venture; and failed to remit commissions that Topline was owed under the contract.

A. Y2S and Topline did not breach their duty to exercise reasonable care in the sale of the Napa Cabbage.

L&M Farms alleged that Y2S and Topline failed to exercise reasonable care and diligence in marketing of the cabbage. (L&M Complaint at 2; L&M's Initial Brief at 7.) Poor performance alone is not enough to find that produce was handled negligently:

Market circumstances vary widely from time to time and place to place. In addition, perishable commodities can be merchantable and still vary over a wide range as to quality and as to desirability on a given market dependent on many varying characteristics of such produce. [The consignee] was a company chosen by complainant to act as complainant's agent. . . . We are very reluctant to subject the performance of complainant's agent to the scrutiny of our hindsight.

*Lavern Co-operative Citrus Ass'n v. Mendelson-Zeller Co., Inc.*,  
46 Agric. Dec. 1673, 1678 (1987).

Also, partners in a joint account relationship owe each other the utmost good faith in their dealings with one another. *D. L. Piazza Company, Inc. v. Harshfield Brothers*, 13 Agric. Dec. 521, 524 (1954). If the partnership sustains injuries because a partner breaches his duties, the breaching partner must bear the loss, although in matters of

judgment the partner will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud. *Florida Lime & Avocado Growers, Inc.*, 20 Agric. Dec. at 799; *D.L. Piazza Co.*, 13 Agric. Dec. at 524.

While *Lavern* considered negligence in the handling of consigned produce, and *D.L. Piazza Company, Inc.* considered the duties of a partnership in a joint account relationship, we believe that these same principles from those cases apply to a joint venture. Presumably, the parties to a joint venture would not jeopardize their own interests in the handling of produce, because parties to a joint venture share the profits and the losses of the venture. See, *The Kunkel Co., Inc. v. Salisch Produce Company, Inc.*, 32 Agric. Dec. 1585, 1588 (1973). A joint venturer contracts for good faith and integrity, but, the venturer does not receive a guarantee that a co-venturer will make no mistakes. *Id.*, quoting *L. Gillarde Co. v. Ball*, 4 Agric. Dec. 588, 592 (1945).

L&M Farms must show that Y2S or Topline breached its duties as a joint-venturer by a preponderance of evidence, and that L&M Farms suffered damages as a result of that breach. *C.f. Sam Petro Produce v. Vega and Sons Produce*, 39 Agric. Dec. 980 (1980); *A Bertolla & Sons*, 13 Agric. Dec. at 968.

L&M Farms complained that the sales were below market prices. However, Y2S and Topline presented testimony from individuals that examined the cabbage in the field, sold the cabbage, and communicated with customers concerning its quality and condition. The testimony was that the cabbages had begun to bolt and were bitter. (See TR 116.) In addition, Topline and Y2S were unable to market the cabbage for as much as they had hoped because the cabbage was the wrong size for their Asian customers. (See TR 26-27; 51.) In other words, the cabbage suffered from quality issues that prevented its being sold for a higher price. (See TR 248.) Quality was not the only issue, because some customers purportedly reported condition defects, such as mold, with some loads of the cabbage. (See TR 142-45.)

Y2S and Topline's explanation for the low returns was corroborated by the poor returns that L&M Companies received for cabbage from L&M Farms. Beach testified that L&M Companies — which did not

present an accounting to Y2S and Topline — received an extremely low per-box return on the Napa cabbage grown by L&M Farms. Beach testified that L&M Farms received from L&M Companies a return of a little more than \$8,000 on 13,880 boxes of Napa cabbage. (TR 663.)

This is a \$0.58 per box return.<sup>3</sup> By comparison, for the 52,519 boxes<sup>4</sup> Topline and Y2S sold, their accounting showed that they received at least \$143,816.75. When averaged, this is \$2.74 per box. In the final calculation, Topline and Y2S received over four times the per box amount that L&M Companies remitted to L&M Farms. Thus, we cannot find that Y2S and Topline were negligent in their handling of this cabbage.

B. Y2S and Topline did not breach their regulatory duty to provide an accounting to L&M Farms and L&M Companies.

L&M Farms alleges that Y2S and Topline failed to timely render an account of sales. (L&M Farm's Complaint at 2; L&M's Initial Brief at 7, 9.) In this respect, L&M Farms claims that the accounting that Y2S and Topline provided (RX 34-35) was late and inadequate.

To support this position, L&M Farms has cited cases that held consignees responsible for false or fraudulent accountings. (L&M's Initial Brief at 7-8.) In *Sam Petro Produce v. Vega and Sons Produce*, 39 Agric. Dec. 980 (1980), for example, a tomato consignor complained that it had received inadequate accountings from its agent. The consignor requested an audit of the accounting. The USDA audit and Report of Investigation showed that the agent had failed to maintain the records including sales tickets with lot numbers and dumping certificates that the agent is required to maintain under 7 C.F.R. §§ 46.18-23, 46.29. Therefore, the agent's internal records did not support the accounting. We drew a negative inference from the agent's lack of

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<sup>3</sup> L&M Companies probably also took its commission before remitting this amount to L&M Farms. Even assuming that L&M Companies took a 7% commission, it would have received only \$0.62 per box return (\$0.58/.93).

<sup>4</sup> The number of boxes listed in the accounting was not disputed at the hearing. Complainant had clearly used the accounting to create a set of invoices (CX 9) which included the names of the firms that Y2S and Topline sold the cabbage. To create those invoices, L&M Farms adopted the same number of boxes as appeared on the accounting. Therefore, L&M Farms has tacitly admitted that the number of boxes in the accounting were accurate.

records. Likewise, when there was no accounting at all for a lot of consigned grapes in *Shipley v. Tom Lange, Co.*, 52 Agric. Dec. 679, 683 (1992), we awarded the complaining party a reasonable price based on market reports.

In this case, Y2S and Topline supplied an accounting to L&M Farms which included: the date of shipment, the lot number, the name of the purchaser, the amount of cabbage sold, the initial invoice price, the amount actually received, the bill of lading number, the trucking company who delivered the cabbage, and notes on the problems with each load. The accounting lacks, however, an itemized explanation of the shipping charges, the commissions taken, or costs incurred, and it refers to the date of shipment without regard to the date of sale. (See RX 34-35.)

This account of sale raises some questions concerning its validity, but those questions do not rise to the level of deception in *Sam Petro Produce* or the complete absence of an accounting in *Shipley*. The most serious question raised by the accounting is a discrepancy between the amount accounted for, and the amount remitted. The sale of cabbage accounted for on the typed portion of the accounting was \$134,648.75. (RX 35.) After subtracting \$10,703.00 for boxes, the total amount on the accounting is \$123,945.75. The total amount Y2S and Topline remitted (not including the \$70,000 for initial expenses) was only \$119,871.00. (CX 13 at 5-8.) Moreover, the total amount on the accounting should be increased by at least \$22,871.00<sup>5</sup> for the handwritten amounts which were added later by Yang in order to account for the cabbage sold by Y2S. The difference between the

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<sup>5</sup> RX 34-35 shows the following hand written amounts on the following lines:

Amount	Line No.
\$3,234.00	1
\$3,234.00	8
\$3,234.00	10
\$3,272.50	21
\$3,272.50	22
\$3,003.00	29
\$3,003.00	30
\$618.00	35

amount remitted from the sale of the cabbage, which was \$119,871.00, and the amount that Y2S and Topline actually accounted, is \$23,945.75. The accounting also includes numerous examples of zero and negative returns, for which Y2S and Topline have not supplied Federal Inspections or other adequate evidence to justify dumping.

But, there is no audit or records in this proceeding that establishes that Y2S and Topline did not keep the required records or falsified this accounting. Unlike *Sam Petro Produce* — and cases similar to *Sam Petro Produce* — L&M Farms did not present evidence of the underlying records, or evidence of the absence of those records. Accordingly, this accounting from a joint venturer has not been shown to be fraudulent or inadequate. Therefore, to the extent that Y2S and Topline have not remitted the full value accounted for, they have breached the agreement. However, we do not find that the accounting itself demonstrates that L&M Farms is due the “market” value of all of the produce listed on the accounting.

As to the accounting’s lateness, L&M Farms has not alleged that it suffered economic harm from the lateness, and there is no evidence in the record that demonstrates L&M Farms was harmed by the late accounting. While late delivery of the accounting is a violation of the regulations, the reparation forum does not provide a remedy where there is no injury. *See* 7 U.S.C. § 499g(a) (“[T]he [Secretary] shall . . . determine the amount of damage, if any, to which such person is entitled . . .”)

C. Y2S and Topline failed to provide L&M Farms with evidence to justify dumping in violation of the regulations.

The regulations are clear that dump certificates<sup>6</sup> or other adequate evidence to justify dumping must not only be maintained, but also “shall be forwarded to the consignor or joint account partner with the accounting.” 7 C.F.R. § 46.22; *Franklin Produce, Inc., v. Val-Pro, Inc.*, 46 Agric. Dec. 1861, 1863-64 (1987). Beach and Joseph McGee have explained that they did not receive dump certificates, and this testimony

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<sup>6</sup> There is some indication — from testimony in prior cases — that the USDA no longer issues “dump certificates.” Even if a dump certificate could not be obtained, 7 C.F.R. § 46.22 requires that other adequate evidence be obtained to prove that the produce is without commercial value.

was unchallenged. No documentary evidence to show that the produce had no commercial value was presented at the hearing. While the overall quality of the cabbage was not good quality, evidence to justify dumping produce is required by the regulation, even when we conclude — as we did in *Franklin Produce* — that the produce is in otherwise poor condition. *Franklin Produce, Inc.*, at 1864. Inspections or other adequate evidence are required to demonstrate that produce is without commercial value, and that documentation must be given to the joint account partner. *See id.*; 7 C.F.R. § 46.22.

In *Franklin Produce*, we awarded damages in the amount of the reasonable value of produce that allegedly lacked commercial value. In this case, there are many instances of zero or negative returns on the accounting. Because expenses are not separately accounted for, we must assume that the lack of return resulted from outright rejections of the cabbage and dumping. If the cabbage had no commercial value, Y2S and Topline should have provided timely proof to L&M Farms. They did not so provide. Accordingly, we will award damages to L&M Farms for Y2S's failure to demonstrate that its dumping and reported negative returns were justified.

D. Y2S and Topline did not violate the regulations by employing Cho to sell the cabbage.

L&M Farms has alleged that Y2S and Topline hired Brian Cho to sell the produce in violation of 7 C.F.R. § 46.29, because L&M Farms did not give express prior permission to hire a person not employed by Topline to sell the cabbage. The regulations at 7 C.F.R. § 46.29(b) require that “the receiver may not reassign produce to another person or firm, including auction companies, and incur additional commissions, charges or expenses without a specific prior authority of the consignor.”

Cho — although he may have owned a produce business at the time of hearing — was not hired as a commission merchant separate and apart from Topline. Cho testified that he was contacted by Ha to sell the produce, and he testified that he did not receive a commission or a salary. While the absence of compensation is suspicious, there was no indication in the record that he was a separate “person or firm” within

the meaning of 7 C.F.R. § 46.29(a). Cho was an employee, taking direction from Ha and Tan.

E. L&M Companies failed to account to Y2S and Topline.

At the hearing it also became clear the L&M Companies has never accounted for its sales to Y2S or Topline. As we have explained, the failure to account is a breach of the regulations for which Y2S and Topline may receive proven damages.

F. L&M Farms breached the agreement by charging the joint venture excessive expenses.

Topline has claimed that L&M Farms (as the *alter ego* of L&M Companies) had overcharged for expenses, and never accounted for the expenses that it charged the joint venture. (Respondent's Initial Brief at 6; Respondent's Complaint ¶ 11.) L&M Farms, at the hearing, presented an exhaustive accounting of all of its expenses associated with the packaging and shipment of the Napa cabbage. (CX 10-11.) The two accountings are a "cost summary sheet," CX 10, (Summary Report) and a "cost accounting activity report," CX 11, (Activity Report). These accountings show the growing costs of the joint venture were between \$486,000 on the Activity Report (CX 11 at 28) and \$308,000 (CX 10 at 1) on the Summary Report. The Summary Report shows that L&M Farms allocated over \$176,000 of the packing costs to Y2S alone. (*Id.*). Thus, on the Summary Report, L&M Farm's claimed a total due from Y2S of over \$330,000 (*Id.*). After reviewing these accountings, we find that L&M Farms misallocated expenses to the joint venture in two ways: by improperly charging individual expenses, and by unequally allocating harvesting and packing costs.

First, L&M Farms improperly charged individual expenses to Y2S and Topline. The ordinary rule of a joint venture is that each party bears their individual expenses. *See Florida Lime & Avocado Growers, Inc.*, 20 Agric. Dec. at 801. For instance, we have held that costs like telephone calls are not a part of the expenses properly charged to a joint venture. *Id.* The basic principle is that general overhead expenses are excluded from the gross profit of the joint venture where the overhead represents an attempt to charge compensation for services in providing capital and in providing the organization to handle the transaction. *Commercial Metals Co. v. Pan Am Trade and Inv. Corp.*, 163 A.2d 264 (1960).

It is clear from the Summary Report, that L&M Farms has accounted for far more than the costs directly associated with planting and harvesting the cabbage. On the face of the Summary Report, L&M Farms has charged much of its individual expenses to the joint venture. Included in these individual expenses on the accounting are: consulting, utilities, well analysis, supplies, uniforms, scouting, depreciation, and general and administrative costs. (*See CX 10.*) In addition, the accounting that was presented at the parties' first meeting (RX 32) included fewer items than the accounting presented at the hearing. Some of the new items are: Rent - labor camp, soil/ph amendments, equipment maintenance - parts, contract labor - discing, weeding, weeding - burden, contract labor - field supervisor.

Another type of misallocation of individual expenses was the many items that were not segregated expenses. Beach was the accountant from L&M Farms that created the Summary Report and the Activity Report. He explained that two kinds of costs were shown on L&M Farms' accounting: those directly associated with the production of the cabbages, and those that were allocated and "indirectly related." (TR 604.) These allocations were part of an overhead allocation calculation that was done by computer program. (*See id.*)

Allocated costs are, in effect, an estimation based on all the costs for all of the produce grown by L&M Farms. Y2S and Topline did not agree to pay L&M Farms to turn on the lights, make telephone calls, buy uniforms, or pay the salaries of the office staff. Those sorts of expenses are not a part of the ordinary shared expenses of a joint venture. We also will not allow charges for items like "weeding" and "cover crop" when the evidence shows that that cost was "allocated" and not actually separately accounted for the 150 acres of Napa cabbage.

Therefore, L&M Farm's allocated costs are a part of the compensation for services that should be excluded from the costs taken by the joint venture. It may be that the parties could have agreed to share in these allocated costs; however, the evidence at the hearing was that they did not agree. Therefore, we will not allow the allocated costs. As such, L&M Farms has made excessive claims for expenses, and we will adjust the damages accordingly.

Second, L&M Farms also unequally allocated the costs of growing and harvesting the cabbage. On the Summary Report, L&M Farms allocated the costs of the pallets, harvesting, packing house in/out, and boxes entirely to L&M Companies and Y2S. (CX 10.) For example, the cost of "Contract Labor - Harvesting" on the Summary Report was \$55,221.63. But, the actual charges listed in the Activity Report were \$70,316.12. On the Summary Report, Beach distinguished "growing" costs from "cost of goods." (See TR 816-17.) He explained that the cost of goods were not a part of the costs that were shared equally. Some of the charges under the "cost of goods" had been charged directly to L&M Companies, with the remainder to be paid by Y2s and Topline. Beach believed that L&M Companies should pay approximately twenty percent of the harvesting costs and Y2S and Topline, should pay eighty percent of the harvesting costs.<sup>7</sup>

When we compare the Summary Report to the Activity Report we see that there are four expenses that are accounted for differently between the two accountings. On the Summary Report, there are the expenses, "Packing House In/Out" and "Boxes" which are not on the Activity Report, and "Handling" which is not on the Summary Report. In addition, "Contract Labor - Harvesting" is \$70,316.12 on the Activity Report, but only \$55,221.63 on the Summary Report. Beach's testimony at the hearing fairly shows that "Packing House In/Out" and "Boxes" were created by estimating values to the number of boxes shipped. (Tr. 565.) Meanwhile, the Activity Report shows all of the expenses Beach actually calculated.

The record, however, does not reflect that the parties actually agreed to an unequal distribution of harvesting and packing costs. Therefore, the total expenses from the Activity Report for "Pallets," "Handling," and "Contract Labor - Harvesting" will be divided equally between Y2S/Topline and L&M Farms. We will base the calculation of this expense on the Activity Report, which we believe is a more accurate representation of these costs.

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<sup>7</sup> Beach testified that L&M Companies had paid a portion of the "cost of goods." L&M Companies did not submit an accounting at the hearing, and therefore, L&M Farms and L&M Companies have failed to show that the amounts on the accountings should be reduced.

G. Topline failed to show that L&M Companies owe them for unreimbursed expenses or a box credit.

In its formal Complaint, Topline alleged it was owed \$13,156.05, unreimbursed expenses in the amount of \$5,132.00 and box credit in the amount of \$10,703.00. (Topline Complaint ¶ 10.) At hearing, there was no significant evidence presented on this point, and Topline abandoned this position in the briefing of the case.

H. Y2S and Topline are contractually owed a commission for their sales.

The parties agreed that Y2S and Topline would be owed a 7% commission on their sales that were sent directly to buyers and 15% on sales that were sorted at the Y2S facility. However, Y2S and Topline did not account for a commission, and Tan testified that no commission was taken. (TR 246, 250-51.) Therefore, Y2S and Topline are owed their commission from the joint venture.

But, the accounting is not entirely clear on which produce was handled at Y2S's warehouse. The bills of lading show that all of the cabbage was shipped to the warehouse at Y2S's location in New York. (CX 5.) Y2S and Topline made no attempt to show on which sales they would have been owed the larger commission. Accordingly, we will limit Y2S and Topline to a 7% commission for the sales they conducted in this case.

I. L&M Farms was not shown to have breached the duty of care in the growing of the cabbage.

In this instance, Topline has claimed that L&M Companies, the licensee, breached its duty to exercise due care in the planting and harvesting of the cabbage. L&M Companies did not have the duty to grow the cabbage. Therefore, L&M Companies did not breach the duty, and Topline will not receive a damage award for the alleged breach.

We will accept, for the purposes of argument, that Topline's claim applies equally to L&M Farms as it does to L&M Companies. L&M Farms is a grower, and not a licensee under the PACA. In past cases, we have allowed licensees to offset the monetary claims of unlicensed growers against damages caused by the licensee. But, even if we were to agree that Topline's claim should hold equally for L&M Companies

as it does for L&M Farms, we do not believe that L&M Farms breached its standard of care.

Ha was a key member of this joint venture. He was to impart his expertise in growing Napa cabbage, including the types of seed, planting schedules, and presumably, planting instructions. At an early point, when seeing a bag of seed at the greenhouse in Georgia, he became convinced that the wrong seed had been used. (*See* TR 53, 62-63.) His testimony relied on the fact that he saw a different seed than he had sent to L&M Farms. (*See id.*) Perhaps he was right; but, we are not convinced that his word is enough considering that he was not there at the time of planting, and no witness present at the planting testified. There was some testimony that the bolting can be caused by the use of the wrong type of seed, but as Ha explained bolting could also have been caused by fluctuations in temperature. (TR 30.) There was no evidence that this factor was not the cause of premature bolting in this instance.

At the point that Ha believed that the wrong seed had been used, he gave up on the venture. (TR 53-54.) There is little evidence that Topline then gave the level of advice that could have improved the cabbage's chances of success. L&M Farms appears to have proceeded in the manner in which it was familiar with other kinds of cabbage, and we will not second guess those choices here. Neither side presented disinterested testimony on this matter, but it was Topline's burden to show that L&M Farms failed to meet the appropriate standard of care. Even if we could find that L&M Farms breached the standard of care, it would be difficult to apportion damages between Topline and L&M Farms, where both companies took on the responsibility of the success of the crop. As we explained in earlier sections, a joint venturer contracts for good faith and integrity, but, there is no a guarantee against mistakes. *See L. Gillarde Co. v. Ball*, 4 Agric. Dec. 588, 592 (1945). This principal applies fairly to decisions on growing produce as well as the handling of it.

### **5. Damages**

Y2S and Topline have breached the agreement, and violated the PACA, by failing to provide evidence that justified dumping some of the cabbage and failing to fully remit the proceeds from the sales of

cabbage. However, the proceeds should be reduced by their 7% commission. L&M Farms charged excessive expenses to the joint venture. L&M Companies failure to account is also a violation of the PACA, for which it owes reparation to Topline. Because L&M Farms has actually covered the expenses of this venture, and Y2S and Topline have remitted funds to L&M Farms, the amounts that each suffered damages need to be reconciled.

A. Damages sustained by L&M Farms

The parties agree that 74 loads of cabbage were consigned to Y2S and Topline. But, Y2S and Topline failed to account for, or failed to justify the dumping of and negative returns for 8553 boxes of cabbage from those loads. On the other hand, Y2S and Topline accounted for positive returns of \$163,654.75 for 43,966 boxes of cabbages.<sup>8</sup> For the boxes that Y2S and Topline accounted for a positive return, the companies received an average of \$3.49 per box.

As we have explained, we agree with Y2S and Topline that the cabbages were of poor quality, and that Y2S and Topline did not breach their responsibility to handle the cabbage with due care. However, Y2S and Topline have violated the regulations by failing to provide dump certificates or federal inspections for the cabbages that it accounted for as lacking in commercial value. In *Franklin Produce, Inc.*, 46 Agric. Dec. at 1863-64, the award of damages was based on the average value of the produce that the consignee had sold. Following this precedent, we believe that Y2S and Topline owe an additional \$3.49 per box for the 8553 boxes for which it failed to adequately account. The 8553 boxes of cabbages have a value of \$29,849.97. Thus, the total value of the 74 loads of cabbage was \$193,504.72.

The parties agreed that Y2S and Topline would earn a 7% commission on their sales that were sent directly to buyers and 15% on sales that were sorted at the Y2S facility. Y2S and Topline did not account for a commission, and Tan testified that no commission was taken. (TR 246, 250-51.) But, the accounting is not entirely clear on which produce was handled at Y2S's warehouse. The bills of lading show that all of the cabbage was shipped to the warehouse at Y2S's

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<sup>8</sup> This amount includes the handwritten positive returns.

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location in New York. (CX 5.) Y2S and Topline have not shown, by preponderance, on which sales that they would be owed the larger commission. Accordingly, we only allow the 7% commission. Therefore, Y2S and Topline owe the joint venture for 93% of the value of the 74 loads of cabbage, or \$179,959.39.

B. Damages sustained by Y2S and Topline

As we have explained, L&M Farms has improperly attempted to charge fees to the joint venture, and it did not equally allocate expenses. Allocated costs and individual expenses must be eliminated from the costs that L&M Farms charged the joint venture. In addition, those costs must be equally divided between L&M Farms, on the one side, and Y2S and Topline, on the other.

A close examination of the Activity Report and the Summary Report show that the following expenses are the expenses of the joint venture. All other expenses claimed are disallowed because they were either allocated or estimated.

Pallets	\$5,118.00
Handling	\$116,154.25 <sup>1</sup>
Contract Labor - Planting	\$4,045.49
Planting - Day Labor	\$17,471.76
Planting - Day Labor Burden	\$24,652.79
Contract Labor - Harvesting	\$70,316.12 <sup>2</sup>
Chemicals	\$255.85
Fertilizer/Nutrition	\$39,273.87
Fumigant	\$10,214.37
Fungicide	\$12,679.21
Insecticide	\$19,698.27
Machine Hire - Spraying	\$7,146.94
Plants	\$45,580.64

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Total	\$372,607.56
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The parties share these expenses equally.

In addition, Y2S and Topline never received an accounting from L&M Companies (or L&M Farms) that set forth the value of the 13,880 boxes of cabbage that L&M Companies sold on behalf of the joint venture. Beach noted that L&M Companies provided a return of a little more than \$8,000 on the 13,880 boxes of Napa cabbage. (TR 663.) And, L&M Companies supplied and account to L&M Farms. (TR 664.) However, as we have explained when analyzing L&M Farm's claims against Y2S and Topline, we award the reasonable value of the produce in consignment transactions where there has been no accounting. *Shiple v. Tom Lange, Co.*, 52 Agric. Dec. 679, 683 (1992).

This rule fairly applies in this instance, where L&M Companies has failed to account to Y2S and Topline. L&M Companies therefore owes a reasonable amount for the 13,880 boxes of cabbage that it sold on behalf of Y2S and Topline. Without knowing in which geographic markets the Napa cabbage was sold, it would be inappropriate to assign a value associated with a specific region. Further, we have already concluded that the cabbage was of poor quality. It would, therefore, be unreasonable to assert a higher value based on market reports for a specific geographic area. Accordingly, we will award damages as we did, *supra*, using the precedent of *Franklin Produce, Inc.*, 46 Agric. Dec. at 1864.

A reasonable amount would be the average amount that Y2S and Topline received per box, or \$3.49 per box. The reasonable amount for 13,880 boxes is \$48,441.20. L&M Companies was expected to take a 7% commission. L&M Companies would, therefore, owe for 93% of the reasonable value of the 13,880 boxes of cabbage, or \$45,050.32 to the joint venture. Half of this amount is owed to Y2S and Topline.

C. Reconciliation of the damages and payments already made by Y2S and Topline.

The expenses of the joint venture were \$372,607.56. All of the allowed expenses from this venture were borne by L&M Farms.

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Therefore, Y2S and Topline owed the joint venture half of those expenses, or \$186,303.78. Y2S and Topline should have also received, for the benefit of the joint venture, \$179,959.39, as returns of the consigned cabbage. Half of these returns are due to L&M Farms, or \$89,979.70. For this reason, the amount Y2S and Topline should have remitted to L&M Farms is \$276,283.48 for Y2S's and Topline's share of the expenses and returns.

Y2S and Topline remitted a total of \$70,000.00 to cover the initial expenses, and \$119,871.00 as returns on the consigned cabbage. In total, Y2S and Topline remitted \$189,971.00 to L&M Farms. Accordingly, Y2S and Topline owe L&M Farms \$86,312.48.<sup>9</sup> As for the profits from L&M Companies, L&M Companies only paid \$8,000 to L&M Farms in this matter. Y2S and Topline did not receive any of this profit. L&M Companies owes \$22,525.16 to Y2S and Topline for its failure to account for the cabbage.<sup>10</sup>

6. Fees, expenses, and interest.

Fees and expenses will not be awarded, because we do not believe that any of the parties prevailed in this case. Handling fees, however, are awarded to Topline and L&M Farms. And, finally, interest is awarded as additional reparation in this matter.

A. Fees and Expenses will not be awarded because no party prevailed at hearing.

Under section 7 of the PACA (7 U.S.C. § 499g), “[t]he Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any [reparation] hearing.” Because this fee shifting provision only covers fees incurred in connection with an oral hearing, any determination with respect to a prevailing party should be made by looking specifically at

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<sup>9</sup> These calculations share the losses equally between L&M Farms and Y2S/Topline. According to our calculations — which include the amounts for L&M Companies failure to account — when divided equally between L&M Farms and Y2S/Topline, each side has lost over \$73,000 from this venture.

<sup>10</sup> L&M Farms did not make a claim against L&M Companies, but, even if it had, L&M Farms claims that L&M Companies made an accounting to L&M Farms. In this action, however, Topline claimed that L&M Companies had failed to account to it.

the outcome of claims and issues raised at the hearing. *See Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric. Dec. 343 (2003). The pleadings, the hearing, and the briefs, were all contentious to a fault, with arguments at nearly every point of the litigation. With so many varied claims and counterclaims, we must ultimately conclude that no party prevailed on their claims.

In the formal Complaint, L&M Farms misconstrued the agreement of the parties in this case, by claiming that this was a grower's agent relationship with Y2S and Topline. While they prevailed on their claims that both Y2S and Topline were party to the agreement, the witnesses from L&M Farms were forced to concede that the agreement was a joint venture, with the costs of the venture shared between the parties. Moreover, of the \$142,536.25 L&M Farms initially claimed, it received \$86,312.48. This was mainly because Topline and Y2S did not provide adequate funds to cover the expenses that L&M Farms incurred when growing the cabbage. The damage award was not due because L&M Farms proved that Topline and Y2S had submitted a false accounting and underpaid for the consigned cabbage; or because we awarded the fair market value of the cabbage, as L&M Farms claimed in its briefs. We have found, in fact, that Y2S and Topline paid \$189,971.00 to L&M Farms, which exceeded the amount that was due for the consigned cabbage. And, Y2S and Topline succeeded in demonstrating that they had not taken a commission from the sales of the cabbage, which they were due under the joint venture agreement.

Much of L&M Farms' arguments and evidence failed to carry the day. For example, Beach attempted to claim expenses that were well beyond any possible agreement of the parties, by claiming L&M Farms was due over \$300,000 of expenses from Y2S. Moreover, L&M Farms initially plead in its Complaint that Y2S was a grower's agent. But, after the hearing, L&M Farms argued in its briefs that the agreement was a consignment. (See L&M Farms Initial Brief at 8.) Nonetheless, Joseph McGee testified that the parties met, discussed a joint agreement, and they agreed to enter into a joint venture agreement. (TR 338-39.) L&M Farm's shifting positions in the Complaint and then in its post-hearing briefs was not supported by its own witnesses, who conceded that this

was a joint venture. Therefore, while L&M Farms prevailed for monetary damages, it did not prevail on many of its main allegations in the Complaint and in the briefs. L&M Farms is not a prevailing party. Likewise, we determined that L&M Companies did not account to Y2S and Topline. The actual amount remitted from L&M Companies was only demonstrated during the cross examination of Beach. Otherwise, we would never have found out how much L&M Companies paid to L&M Farms for the cabbage marketed on behalf of the joint venture. We have found that L&M Companies must pay Topline \$22,525.16 for its violation of the PACA and regulations. Therefore, L&M Companies is not a prevailing party.

Moreover, we found that Y2S and Topline owe L&M Farms damages in the amount of \$86,312.48 while Topline claimed \$131,991.00 in damages. Topline was able to prevail against L&M Companies for \$22,525.16, but, when offset against the damage award to L&M Farms, Y2S and Topline are actually \$63,787.32 poorer for their litigation. They failed to show that L&M Companies was the alter-ego of L&M Farms, which was one of their main allegations in this proceeding. Y2S and Topline were not prevailing parties.

For these reasons, we will not award fees and expenses.

B. Handling fees are awarded to those parties that were injured.

Topline and L&M Farms paid the handling fees required by section 6(a)(2) of the PACA. Section 5(a) of the PACA provides: "If any commission merchant, dealer, or broker violates any provision of section 2, he shall be liable to the person or persons injured thereby for the full amount of the damages (including any handling fee paid by the injured person or persons under section 6(a)(2))...." As discussed, L&M Companies violated section 2 of the PACA, and, therefore, must pay Topline its handling fees. Y2S and Topline violated section 2 of the PACA, and, therefore, must pay L&M Farms for its handling fees.

C. Interest is awarded as additional reparation.

Y2S and Topline's failure to pay L&M Farms \$86,312.48 is a violation of section 2 of the PACA. L&M Companies failure to pay Topline \$22,525.16 is a violation of section 2 of the PACA. Section 5(a) of the PACA requires that we award to the person or persons injured by a violation of section 2 of the PACA "the full amount of damages sustained in consequence of such violations." These damages

include interest. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Because the Secretary is charged with the duty of awarding damages, the Secretary also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. See *Thomas Produce Co. v. Lange Trading Co.*, 62 Agric. Dec. 331, 341-42 (2003); *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Ass'n, Inc.*, 22 Agric. Dec. 66 (1963). The interest that is to be applied is determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate is 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.*, 65 Agric. Dec. 669 (2006).

### **Order**

Within 30 days from the date of this Order, Y2S Trading, Inc. and Topline Trading, Inc. shall pay, jointly and severally, L&M Farms, Inc. as reparation \$86,312.48, with interest thereon at the rate of 0.29 % per annum from June 1, 2006, until paid, plus the amount of \$300.00. Within 30 days from the date of this Order, L&M Companies, Inc. shall pay Topline Trading, Inc. as reparation \$22,525.16, with interest thereon at the rate of 0.29% per annum from June 1, 2006, until paid, plus the amount of \$300.00.

Copies of this Order shall be served upon the parties.

Done at Washington, DC.

**PERISHABLE AGRICULTURAL COMMODITIES ACT**

**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>

**UNITED PRODUCE CORP.**  
**PACA Docket No. D-09-0164.**  
**Dismissal Order.**  
**Filed May 14, 2010.**

**PACA.**

Leah C. Battaglioli, for AMS.  
Respondent, Pro se.  
*Order issued by Peter M. Davenport, Acting Chief Administrative Law Judge.*

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**PERISHABLE AGRICULTURE COMMODITIES ACT**

**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>.*

**J & M PRODUCE SALES, INC.**  
**PACA Docket No. D-09-0016.**  
**Default Decision.**  
**Filed March 22, 2010.**

**PACA-D -- Default.**

Charles E. Spicknall, for the Deputy Administrator, AMS.  
James L. Odom, for Respondent.  
*Default Decision issued by Jill S. Clifton, Administrative Law Judge.*

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**KALIL FRESH MARKETING, INC., d/b/a HOUSTON'S FINEST  
PRODUCE CO.**  
**PACA Docket No. D-09-0095.**  
**Default Decision.**  
**Filed March 23, 2010.**

**PACA – Default.**

Ciarra A. Toomey, for AMS.  
Respondent, Pro se.  
*Default Decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.*

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**VINE RIPE TEXAS, INC.**  
**PACA Docket No. D-09-0163.**  
**Default Decision.**  
**Filed April 9, 2010.**

**PACA – Default.**

Leah Batagioli for AMS.  
Respondent Pro se.  
*Default Decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.*

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**MEXI PRODUCTS, INC.**  
**PACA Docket No. D-09-0156.**  
**Default Decision.**  
**Filed May 3, 2010.**

**PACA – Default.**

Jonathan Gordy, for AMS.  
Michael Radzilowsky, for Respondent.  
*Default Decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.*

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**SALYER AMERICAN FRESH FOODS, INC.**  
**PACA Docket No. 10-0140.**  
**Default Decision.**  
**Filed June 4, 2010.**

**PACA – Default.**

Brian P. Sylvester, for AMS.  
Respondent, Pro se.  
*Default Decision issued by Peter M. Davenport, Acting Chief Administrative Law Judge.*

Vine Ripe Texas, Inc.  
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**Consent Decisions**

**Perishable Agricultural Commodities Act**

Z & S Fresh, Inc., PACA D-10-0070, 10/02/19.

LBD Produce, Inc., Randall Berger, Michael Hirsch, John Thomas

PACA-D-09-0171 , 0172, 0173, 0174, 10/04/01.