

**JODY DESOMMA d/b/a IMPACT BROKERAGE v. ALL WORLD FARMS,
INC.
PACA Docket R-01-190.
Decision and Order.
Filed August 21, 2002.**

Collateral Attack on State Court Judgment.

Accord and Satisfaction — Payment did not specify account to which it was to be applied.

F.O.B. Acceptance Final — Material breach of contract.

Damages for Material Breach — Alternative determination.

Damages — Accounting without breakdown of sales utilized in restricted circumstances.

Where a reparation respondent brought an action in state court against an out of state reparation complainant, and the reparation complainant was served with process under the forum state's long arm statute, the judgment of the state court was subject to collateral attack in the reparation forum if minimal contacts were not present between the reparation complainant and the state where the civil suit was brought.

Where a partial payment check was tendered on the condition that it be accepted as payment in full, but the debtor did not specify to what debt it was to be applied, and there were several open accounts at the time of tender, the creditor was within its rights when it applied the payment to an open freight bill, and no accord and satisfaction of the produce debt was accomplished.

Where contract terms were f.o.b. acceptance final, the supply of vine ripe tomatoes when the contract specified gas green tomatoes was a material breach.

Where an f.o.b.a.f. contract called for the supply of gas green tomatoes, and, at a distant destination, the contract was discovered to have been breached by the supply of vine ripe tomatoes which could not be expected to carry to a distant destination as well as gas green tomatoes, it was held that it was reasonable under the peculiar circumstances of the case to assess damages by the differential between market price and the value of delivered product at destination even though the warranty of suitable shipping condition was not applicable, and even though acceptance took place at shipping point.

An accounting that supplied the sales total rather than showing a breakdown of sales could be utilized where sales were reasonably close to market price, and the difference could be accounted for because of the ripeness of the product.

George S. Whitten, Presiding Officer.

Pro se, for Complainant.

Robert E. Goldman, for Respondent.

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

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a et seq.). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of \$14,216.50 in connection with a transaction in interstate commerce involving a truckload of tomatoes.

A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. The Department did not file a report of investigation.

The amount claimed in the formal complaint does not exceed \$30,000.00, and 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 a part of the evidence in the case. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Respondent filed a brief.

In conjunction with the filing of the brief, on June 8, 2001, Respondent's counsel also filed a motion to reopen the proceeding to take further evidence. In this motion Respondent's counsel pointed out that a copy of his client's check, tendered as an accord and satisfaction of the claim at issue in this proceeding, was attached to his client's answering statement. Respondent's counsel then stated that in the statement in reply Complainant claimed "that 'On the check that All World Farms sent to Impact Brokerage there was no invoice, lot or file number to apply it to,' and that he did not know that 'this specific check was to be applied [sic] to the trouble file in question.'" Respondent's counsel stated that by moving to reopen the proceeding he sought to respond to Complainant's claim as stated above. However, Respondent's counsel failed to disclose in his motion that accord and satisfaction was pleaded in his client's answer, and that in its opening statement Complainant set forth essentially the same claim that is reiterated in its statement in reply, and quoted above. Complainant's opening statement states:

At the time All World Farms said it paid Impact Brokerage on this file, All World Farms owed Impact Brokerage for several files. All World sent Impact a check for \$2,679.50 with no lot # or statement. Impact applied the check to the oldest file which was not paid yet, not the file in question. Then All World Farms sent another check for that old file that Impact thought it had paid. This showed as an over payment on an old file so impact applied it to the file in question. All World Farms puts "payment in full" on almost all of it [sic] checks, and again there is no lot # on the check to show what file it belongs to. . . .

Obviously, Respondent's counsel had ample opportunity to submit responsive evidence in the answering statement. The Rules of Practice (7 C.F.R. § 47.24(b)) require that a petition to reopen the hearing to take further evidence shall set forth a good reason why such evidence was not adduced at the hearing. By stating that he sought, by moving for a reopening of this matter, to reply to the allegation in Complainant's statement in reply (the last evidentiary submission permitted under the Documentary Procedure) Respondent's counsel clearly implied that there had been no previous opportunity to respond to such evidence. This implication was not true. The Presiding Officer correctly denied the motion to reopen.

Findings of Fact

1. Complainant, Jody DeSomma, is an individual doing business as Impact Brokerage, whose address is 144 South Hillside Ave., Nesconset, New York 11767.

2. Respondent, All World Farms, Inc., is a corporation whose address is 1180 S. Powerline Rd., Suite 208, Pompano Beach, Florida 33069.

3. On or about April 5, 2000, Complainant sold to Respondent one truckload containing 1,600 cartons of size 6 x 6 gas green "Mr. Tasty" brand tomatoes at \$10.50 per carton, plus \$96.00 for a federal shipping point inspection, or \$16,896.00, F.O.B. Acceptance Final.

4. The tomatoes were grown in Florida by Dimare Homestead of Florida City, Florida. While physically located in Hapeville, Georgia, and without moving from that location, the tomatoes were sold by Fresh Pac, LLC of Hapeville, Georgia to D & C Produce of Bass, North Carolina, by D & C Produce to Jody DeSomma d/b/a Impact Brokerage (Complainant) of Nesconset, New York, by Jody DeSomma to All World Farms, Inc. (Respondent) of Pompano Beach, Florida, and by All World Farms, Inc. to R & R Fresh Fruit & Vegetables, Inc. of Boca Raton, Florida. The tomatoes were then sold by R & R Fresh Fruit & Vegetables, Inc. to Global M.J.L. Ltd., and shipped from Hapeville, Georgia, to Global M.J.L. Ltd. in Montreal, Quebec, Canada.

5. On April 5, 2000, at 7:55 a.m., a federal inspection was made of the tomatoes, following unloading from the transport, while they were stored in the warehouse of Fresh Pac, LLC, in Hapeville, Georgia. That inspection showed in relevant part as follows:

LOT: A
 TEMPERATURES: 53 to 57°F.
 PRODUCT: Tomatoes
 BRAND/MARKINGS: "Mr. Tasty" Dimare 6x6 25lbs
 ORIGINS: FL
 LOT ID.: See Remarks
 NUMBER OF CONTAINERS: 1,600 Cartons
 INSP. COUNT: N

LOT	AVERAGE DEFECTS	including SER. DAM.	Including V. S. DAM.	OFFSIZE/DEFECT	OTHER
A	04 %	01 %	00 %	Quality - misshappen (sic), scars	Corresponds to size as marked. Average approximately 20% Turning & Pink, 75% Light Red & Red
	04 %	00 %	00 %	Abnormal color	
	01 %	01 %	01 %	Soft	
	0½ %	0½ %	0½ %	Decay	

09 % 02 % 01 % Checksum

GRADE: U S No 1

REMARKS: USDA/FL PLI: 12930CGR14; 12928C50; 12928CGR86; 12927CGR50; 12929CGR14; 12930CGR14; 12929C48; 12929CGR60.

6. Following arrival at the place of business of Global M.J.L. Ltd. in Montreal, Canada, a Canadian inspection was made of the tomatoes on April 9, 2000, between 9:55 and 11:00 a.m., which showed the following in relevant part:

[illegible] Packages: Produce of U.S.A. Mr. Tasty brand, The Dimare Co., Homestead, Fl. 33090. USDA/FL. 129[?]?C. [??] 15-86-12-14-48-60-50-47.

Produce or [illegible] Variety: Tomatoes
No. [illegible] of Pkgs.: 1313 ctms. [illegible]
Size of Produce: 6X6
Temperature: Product: 12°C
Condition of Vehicle [illegible] Pkgs. and Pack: Clean containers, in good order, properly packed.
Condition: Decay - average 10%, range nil to 24%
 Mature green - average 1%
 Semi ripe - average 2%
 Ripe - average 87%
 [illegible] - average 4%
 Soft areas - average 6%

Inspection requested for and restricted to condition only.

7. On or about April 9, 2000, Respondent received a faxed notice from the party to which it sold the tomatoes that the tomatoes received were vine ripe instead of the gas green tomatoes ordered. On April 10, 2000, Respondent notified Complainant by telephone of the trouble with the load, and faxed a copy of the Canadian inspection to Complainant. On April 12, 2000, Respondent faxed a copy of Complainant's invoice back to Complainant. Complainant's invoice clearly stated: "FOB ACCEPTANCE FINAL WITH USDA INSPECTION US # 1." Across the bottom of the invoice Respondent had hand written the following: "Jody - After further review, I had thought we had discussed doing FOB Final on the second load which never materialized, not on this load. Thanks, George."

8. The Canadian firm rendered an accounting of its handling of the tomatoes which showed the following in relevant part:

ACCOUNT OF SALE

DATE: 4/18/00
SHIPPER: R&R FRESH FRUIT & VEG
 BOCA RATON, FLA.

BROKER: BRUCE

...
SHIPMENT DATE 04/05/00 DATE RCV'D: 04/09/00
...

LOT ITEM, QUANTITY, DESCRIPTION; 1600 LG TOMATOES
LABEL: M TASTY

EXPENSES IN U.S. DOLLARS		
QUANTITY	1600	
FREIGHT	\$ 1.25	
RYAN & OTHER	\$ 0.01	
ENTRY	\$ 0.02	
INSPECTION	\$ 0.19	
OTHER		
REPACKING	\$ 0.75	
DUMPING	\$ 0.05	202 CRTN LOST IN REGRADING (\$80.00)
...		
TOTAL	\$ 2.27	TOTAL EXPENSES: \$3,632.00

SALES IN CANADIAN DOLLARS		SALES IN U.S. DOLLARS	
SALES AVE ON 1600 ONLY 1398 SOLD			
TOTAL SALES THIS LOT	\$16,259.00	TOTAL SALES ...	\$10,912.08
AVERAGE PER PACKAGE	\$ 10.16	AVERAGE ...	\$ 6.82
...			
EXCHANGE RATE USED: 149%			

TOTAL RECEIPTS LESS TOTAL EXPENSES:	\$7,280.08
COMMISSION (15% OF SALES) ...	\$1,636.81
TOTAL NET RETURN (LOSS)	\$5,643.27
NET RETURN (LOSS) PER PACKAGE	\$ 3.53

9. The Canadian firm, Global M.J.L. Ltd., paid R & R \$5,643.27. R & R paid Respondent \$5,248.00. On October 24, 2000, Respondent sent Complainant a check for \$2,679.50. This check had stamped upside down on its face the following: "CASHING THIS CHECK CONSTITUTES ACCEPTANCE OF PAYMENT IN FULL FOR A DISPUTED DEBT." The same stamp appeared on the back of the check. No information was on the check, or accompanied the check, that would indicate what transaction was being paid, and there was no direction from Respondent as to how the payment was to be applied. Complainant applied the payment to an open freight invoice.

10. The formal complaint was filed on December 1, 2000, which was within nine months after the cause of action alleged herein accrued.

Conclusions

On September 6, 2001, Respondent's counsel filed a motion to dismiss the complaint. The background facts relevant to this motion are as follows. On March 19, 2001, approximately one week prior to the filing of Respondent's answering statement, Respondent filed a civil complaint, against Jody DeSomma doing business as Impact Brokerage, in the County Court of the 17th Judicial Circuit in

and for Broward County, Florida. This civil complaint alleged fraud and breach of contract arising out of the same transaction, and embracing the principal issue,¹ involved in this proceeding before the Secretary. The complaint was personally served upon Jody DeSomma at his place of business in Nesconset, New York, on March 29, 2001. Thereafter, on June 13, 2001, Jody Desoma d/b/a Impact Brokerage, acting pro se, filed a paper with the Florida court which disclosed the existence of “USDA PACA case NO:R-9889,”² acknowledged that “both cases pertain to the same information,” and stated that he could “not supply all evidence pertaining to [the Florida civil case] until the first case is finished.” On August 13, 2001, the Florida court issued an order in which, after stating that “Jody DeSomma, d/b/a Impact Brokerage did not appear,” it made findings of fact based on the sworn testimony of a witness who appeared on behalf of All World Farms, Inc., concluded that the parties contracted for gas green tomatoes, and that Impact knew or should have known that it was not delivering gas green tomatoes, but instead delivering vine ripe tomatoes. On this basis the Court concluded that All World Farms, Inc. suffered a cessation of business with the customer to which it supplied the tomatoes, and consequent damages. The Court entered an order in favor of All World Farms, Inc. for \$15,000.00, the maximum jurisdictional award of the Court. Respondent’s motion to dismiss relies upon the judgment of the Florida court as being res judicata of the issues before the Secretary.

Under 28 U.S.C. section 1738 all courts of the United States are required to give full faith and credit to the judgements of the courts of the several states. Although this tribunal is not a court, its rulings are appealable to the district courts of the United States, and we obviously fall within the intent of the statute. The only way in which we would not be bound by the judgment of the Florida Court would be if that Court did not have jurisdiction over the person of the defendant in that Court, Jody DeSomma.³

Personal service was apparently effectuated on Mr. DeSomma under the Florida long-arm statute. The United States Supreme Court, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), affirmed the constitutionality of personal service under the Florida long-arm statute on individual residents of Michigan. The Michigan residents, Rudzewicz, and a partner, had entered into a contract with Burger King whereby they became the owner of a Burger King franchise. The contract provided that the franchise relationship would be established in Miami and governed by Florida law. Burger King maintained a Michigan district office that

¹That issue is whether Complainant herein contracted to supply gas green tomatoes, and instead breached the contract by supplying vine ripe tomatoes.

²This was the number assigned to this case during the informal stages of the proceeding.

³*Old Wayne Mut. Life Ass'n v. McDonough* 204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 (1907).

carried on day-to-day monitoring of the franchisees. Rudzewicz and the partner executed the contract in Michigan, and never visited Florida. When a dispute arose over the operation of the franchise Burger King brought a diversity action in Federal District Court in Florida, alleging that the franchisees had breached their franchise obligations, and requesting damages and injunctive relief. The franchisees claimed that, because they were Michigan residents, and because appellant's claim did not "arise" within Florida, the District Court lacked personal jurisdiction over them. The Court held that the District Court's exercise of jurisdiction pursuant to Florida's long arm statute did not violate the Due Process clause of the Fourteenth Amendment. The Court stated:

The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a *472 forum with which he has established no meaningful "contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S., at 319. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (STEVENS, J., concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and the litigation results from alleged injuries that "arise out of or relate to" those activities, *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 *473 (1984).¹⁵ Thus "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers. *World-Wide Volkswagen Corp. v. Woodson, supra*, at 297-298. Similarly, a publisher who distributes magazines in a distant State may fairly be held accountable in that forum for damages resulting there from an allegedly defamatory story. *Keeton v. Hustler Magazine, Inc., supra*; see also *Calder v. Jones*, 465 U.S. 783 (1984) (suit against author and editor). And with respect to interstate contractual obligations, we have emphasized that parties who "reach out beyond one state and create continuing relationships and obligations with citizens of another state" are subject to

regulation and sanctions in the other State for the consequences of their activities. *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647 (1950). See also *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223 (1957).

...
Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State. Although territorial presence frequently will enhance a potential defendant's affiliation with a State and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. *Keeton v. Hustler Magazine, Inc.*, *supra*, at 774-775; see also *Calder v. Jones*, 465 U.S., at 788-790; *McGee v. International Life Insurance Co.*, 355 U.S., at 222-223. Cf. *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 317 (1943).

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S., at 320. Thus "courts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'" *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S., at 292. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. See, e. g., *Keeton v. Hustler Magazine, Inc.*, *supra*, at 780; *Calder v. Jones*, *supra*, at 788-789; *McGee v. International Life Insurance Co.*, *supra*, at 223-224. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another

State may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue. Nevertheless, minimum requirements inherent in the concept of "fair play and substantial *478 justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. *World-Wide Volkswagen Corp. v. Woodson, supra*, at 292; *see also* Restatement (Second) of Conflict of Laws 36-37 (1971). As we previously have noted, jurisdictional rules may not be employed in such a way as to make litigation "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (re forum-selection provisions); *McGee v. International Life Insurance Co.*, *supra*, at 223-224.⁴

In this case since personal service was effected upon Mr. DeSoma[,] we will assume that the requirements of the Florida long arm statute were met.⁵ Complainant herein has filed a reply to Respondent's motion to dismiss this action. In its reply Complainant, now represented by counsel, contends that the determination of the Florida county court should not be given res judicata effect herein. Complainant thus seeks to collaterally attack the decision of the Florida court. The grounds alleged by Complainant for not giving effect to the Florida court's order are that the merits of the Florida action were never litigated, that the receipt of evidence herein was well underway prior to the institution of the Florida action, and that Respondent's motion to dismiss "is a sham and constitutes nothing more than a "end run" seeking to circumvent the jurisdiction of P.A.C.A. to determine this case."

In determining whether the Florida court rightly exercised jurisdiction, the first question that must be answered is whether the minimum contacts requirement necessary to satisfy the due process clause, as delineated by the Supreme Court in *Burger King*, was met. The complaint filed by All World in the Florida county court states that "[v]enue is appropriate in this jurisdiction because the parties entered into the subject transaction in part in Broward County, Florida, and because the transaction concerns perishable agricultural commodities grown in Florida." While it is certainly true that the tomatoes were grown in Florida, at the time the contract was entered into the tomatoes were physically located in Georgia, and did not move from Georgia by reason of that contract. Subsequently they were shipped to the

⁴*Burger King Corp. v. Rudzewicz*, 471 U.S. 462, at 471-478 (1985). (footnotes omitted.)

⁵The provisions of that statute are not before us.

ultimate purchaser in Canada.⁶ While the record in this proceeding discloses that at least two other transactions had occurred between the parties to this proceeding,⁷ the initiating party to those transactions is not disclosed.⁸ The complaint before the Florida county court does not make any reference to other transactions, nor does the order of that court. There is nothing to show that the subject tomato transaction was initiated by Complainant. The usual nature of transactions in perishables such as the one between Complainant and Respondent is fairly informal, and these transactions are not normally preceded by extensive negotiation in terms of substance or time. The number of times the subject tomatoes were traded is indicative of the fact that quick turnover and small profits were contemplated. There is no reason to believe that Mr. DeSomma had any reason to contemplate that he was subjecting himself to the jurisdiction of the Florida courts by these transactions. It should be remembered that only the actions of the non-resident defendant determine whether the court has jurisdiction over him.⁹ In defining the “minimum contacts” needed to establish personal jurisdiction, the Supreme Court has prescribed that the defendant must “purposely avail[] itself of the privilege of conducting activities within the forum State. . . .”¹⁰ The Fourth Circuit has stated the law as follows:

For a defendant to be subject to suit in a forum where it is not physically present, due process demands certain “minimum contacts” with the forum such “as make it reasonable . . . to require the corporation to defend the

⁶The subject tomatoes were grown in Florida by Dimare Homestead. This record does not disclose how the tomatoes came into the possession of Fresh Pac, LLC in Hapeville, Georgia, but no doubt it was through direct sale by Dimare, or by sale through undisclosed intermediaries. Then, without physically changing hands, the tomatoes were sold by Fresh Pac in Georgia to D & C Produce in North Carolina, by D & C to Complainant in New York, by Complainant to Respondent in Florida, and by Respondent to R & R Fresh Fruit & Vegetables, Inc. in Florida. Finally, by R & R they were sold, and shipped from Georgia, to the ultimate purchaser, Global M.J.L. Ltd., in Canada.

⁷In its opening statement Complainant states that the time of Respondent’s payment it “owed [Complainant] for several files. In its statement in reply Complainant disclosed that these several files were a freight bill and a cucumber transaction. In addition, another transaction was apparently contemplated, but failed to occur. Attached to Respondent’s answering statement is a copy of Complainant’s invoice on which a “George” connected with Respondent wrote a note to “Jody” stating: “After further review, I had thought we had discussed doing the FOB Final on the second load which never materialized, not on this load.”

⁸These transactions appear to fit within the characterization “casual . . . single or isolated” as used in *International Shoe Co. v. Washington*, 326 U.S. 310, 316, at 317, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). See also *Choon Young Chung v. Nana Development Corporation*, 783 F.2d 1124 (4th Cir.1986).

⁹*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-17 (1984).

¹⁰See *Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958).

particular suit which is brought there.” *International Shoe*, 326 U.S. at 316-17, 66 S.Ct. at 158-59. Ordinarily these contacts should be “continuous and systematic,” as opposed to “casual . . . single or isolated,” *id.* at 317, 66 S.Ct. at 159, a requirement springing from the essential principle “that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson*, 357 U.S. at 253, 78 S.Ct. at 1240.

The significant contacts considered are those actually generated by the defendant. It is firmly established that “[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.” *Id.* See also *World-Wide Volkswagen*, 444 U.S. at 298, 100 S.Ct. at 567. Jurisdiction may not be manufactured by the conduct of others. Rather, “the defendant’s conduct and connection with the forum State [must be] . . . such that he should reasonably anticipate being ha[u]led into court there.” *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567. Absent foreseeability of this sort, derived from purposeful contacts, it is irrelevant that a defendant could foresee the likelihood that its product would arrive in the forum state. *Id.*¹¹

As regards interstate contractual obligations the Court in *Burger King* stated that the required minimum contacts would be such as create “continuing relationships and obligations with citizens of another state.” We do not see these type contacts as being present between the parties to the litigation before the Florida court. We find that the Florida court did not have jurisdiction to enter the order upon which Respondent relies herein in its motion for dismissal on res judicata grounds.

Although not the basis of our finding of lack of jurisdiction in the Florida court, there are other considerations that bear upon that finding which should be mentioned. The jurisdiction accorded to the Secretary of Agriculture under the Act is not exclusive jurisdiction. On the contrary, the Act specifically provides that liability for violation of section 2:

may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.¹²

¹¹*Choon Young Chung v. Nana Development Corporation*, 783 F.2d 1124 (1986).

¹²7 U.S.C. 499(e)(b).

However, once a reparation complaint is filed with the Secretary against a licensee the matter is then within the Secretary's jurisdiction, and some deference should be accorded by other tribunals to that jurisdiction. This is particularly true where a licensee under the Act, properly before the Secretary as a reparation respondent, files an action in another forum based upon the same subject matter as that before the Secretary, and seeks damages arising out of that subject matter that could have been sought before the Secretary. Respondent's action in the Florida court was not filed until the submission of evidence before the Secretary under the documentary procedure was well underway. It is our opinion that under the doctrine of primary jurisdiction¹³ the Florida court should have deferred to this administrative agency.¹⁴ While this, in and of itself, is insufficient to sustain a collateral attack on the judgment of the Florida court, it is relevant to one of the other factors listed by the Court in *Burger King* for the determination of whether the assertion of personal jurisdiction would comport with "fair play and substantial justice," namely, "the interstate judicial system's interest in obtaining the most efficient resolution of controversies." In this regard it is relevant that Mr. DeSomma, acting pro se, notified the Florida court of the pendency of this action. Apparently, the Florida court correctly treated this notice as a special appearance, because the order of the Florida court specifically states that Mr. DeSomma did not appear in that proceeding.

Another factor impinging upon the "fair play and substantial justice" determination is the fact that since Complainant is a licensee under the Act,

¹³The primary jurisdiction doctrine applies where a court and agency have concurrent jurisdiction to decide issues within the special competence of the administrative agency. Under the doctrine the court is required to stay or dismiss the action before it in favor of the jurisdiction of the agency. The doctrine has no application where only a question of law is concerned. *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961). The purpose of the doctrine is to promote uniformity and consistency in the regulation of business entrusted to an administrative agency (*Weinberger v. Bendex Pharmaceuticals, Inc.* 412 U.S. 645 (1973)), to promote the employment of agency expertise in cases raising issues of fact not within the conventional experience of judges (*Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)), and the promotion of efficiency (*Christian v. New York State Board of Labor*, 414 U.S. 614 (1974)). State courts also apply the primary jurisdiction doctrine. See, for example, *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695 (Fla. 1978); *Florida Marine Fisheries Commission, et al. v. Raymond S. Pringle, Jr. and Ronald Fred Crum*, 736 So.2d 17 (Fla. Dist. Ct. App. 1999) *The State Bar of Texas v. David Lee McGee*, 972 S.W.2d 770 (Tex. App. 1998); *South Lake Worth Inlet District v. Town of Ocean Ridge, et al.*, 633 So.2d 79 (Fla. Dist. Ct. App. 1994); *Dioxin/Organochlorine Centerv. The Department of Ecology*, 119 Wash. 2d 761, 837 P.2d 1007 (1992); and *Hawaii Blind Vendors Assn. v. Department of Human Services*, 71 Haw. 367, 791 P.2d 1261 (1990).

¹⁴The variable caducity of the different commodities subject to the Act has occasioned the development of unique expertise in this administrative agency in the assessment of whether there is a breach relative to the sale of such commodities under differing terms of sale, and in the assessment of damages for breach.

Respondent could have filed a counterclaim in the action before the Secretary, but did not do so. Thus “the [Florida] plaintiff’s interest in obtaining convenient and effective relief” was not furthered by subjection of the non-resident to the jurisdiction of the Florida court. These additional considerations bolster our opinion that the Florida court’s assertion of jurisdiction over Mr. DeSomma involved a violation of due process which deprived it of jurisdiction. For these reasons Respondent’s motion to dismiss is denied.

Turning to the substantive allegations of the parties, we will first deal with Respondent’s defense of accord and satisfaction, already discussed in another context in the preliminary statement. As stated in the Findings of Fact, no information was on Respondent’s payment check, or accompanied the check, that would indicate what transaction was being paid, and there was no direction from Respondent as to how the payment was to be applied. Where a debtor does not specify to what debt a payment is to be applied the creditor may apply the payment to whatever open account it wishes.¹⁵ Without such information the implied mutual assent consequent upon the negotiation of the check could not be present, and no accord could be accomplished. We find, therefore, that there was no accord and satisfaction relative to the subject tomato transaction.

We turn now to consideration of the merits of Complainant’s claim. We note initially that the acceptance of the tomato load by Respondent is embodied in the contract terms, and accordingly, Respondent is liable to Complainant for the full purchase price of the load, less any damages caused by any breach of contract by Complainant. Although Respondent disputes that the terms of the contract were f.o.b. acceptance final, it is clear that Complainant’s invoice, stating those terms in all caps clearly on its face, was issued very promptly on the day of the sale, April 5, 2000, and was faxed on that day to Respondent. However, the somewhat equivocal objection to those terms written across the bottom of the invoice by Respondent was not faxed to Complainant until April 12, 2000. The Regulations provide that:

“F.o.b. acceptance final” or “Shipping point acceptance final” means that the buyer accepts the produce at shipping point and has no right of rejection. Suitable shipping condition does not apply under this trade term. The buyer does have recourse for a material breach of contract, providing the shipment is not rejected. The buyer’s remedy under this type of contract is by recovery of damages from the seller and not by rejection of the shipment.¹⁶

¹⁵*Mendelson-Zeller Co. v. Bleier*, 34 Agric. Dec. 683 (1975).

¹⁶7 C.F.R. §46.43(m).

The question, therefore, is not whether the Canadian inspection demonstrates a breach of the suitable shipping condition warranty, but whether Complainant committed a material breach of the contract by failing to supply gas green tomatoes. Complainant asserts that the contract did not call for gas green tomatoes, and that, therefore, there was no breach. However, this assertion is made in the statement in reply following Respondent's submission of an affidavit from the grower stating that the "Mr. Tasty" label is applied only to vine ripe tomatoes. In the opening statement Complainant contended strongly that he had supplied gas green tomatoes. We conclude that the contract called for gas green tomatoes, and that Complainant breached that contract by supplying vine ripe tomatoes.

The Uniform Commercial Code, section 2-714 provides that:

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under section 2-715 may also be recovered.

The place of acceptance for this f.o.b. acceptance final contract was the place of shipment in Georgia. Market reports furnished by the Federal-State Market News Service of this Department (of which we take official notice) show that on April 5, 2000, the day of sale and shipment, 6x6 vine ripe tomatoes were selling for \$2.25 more per carton than mature green tomatoes. Thus it would appear that under the measure of damages suggested by the UCC Respondent was not damaged by the breach. However, this ignores the peculiar facts of this transaction. The fact that a material breach occurred was not discovered until the arrival of the tomatoes in Canada, and the nature of the breach, meant that the tomatoes supplied were not as appropriate for transport to a distant market as gas green tomatoes would have been. The above quoted section of the UCC provides, in addition to the measure of damages set forth in paragraph (2), that the buyer may "recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." As stated earlier, the f.o.b. acceptance final terms of the sale negate any applicability of the warranty

of suitable shipping condition.¹⁷ However, to allow recovery of reasonable damages “resulting in the ordinary course of events from the seller's breach” will, in the peculiar circumstances of this case, require an assessment very similar to that in which we engage when we award damages for breach of the warranty of suitable shipping condition. The similarity, however, is only that, and is occasioned by the nature of the breach, and the fact that it was not discovered until arrival of the tomatoes in Canada.¹⁸

One reasonable way to assess damages flowing from Complainant's breach is to allow Respondent the difference between the value the tomatoes would have had in Montreal if they had met contract specifications, and the value of the non-conforming tomatoes. Market quotations in Montreal do not list any quotations for

¹⁷The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) are made applicable in f.o.b. sales. The Regulations (7 C.F.R. § 46.43 (i)) define f.o.b. as meaning “that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.” Suitable shipping condition is defined 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.” The rule is 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 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. See *Pinnacle Produce, Ltd. v. Produce Products, Inc.*, 46 Agric. Dec. 1155 (1987); *G & S Produce v. Morris Produce*, 31 Agric. Dec. 1167 (1972); *Lake Fruit Co. v. Jackson*, 18 Agric. Dec. 140 (1959); and *Haines Assn. v. Robinson & Gentile*, 10 Agric. Dec. 968 (1951). 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 *Harvest Fresh Produce Inc. v. Clark-Ehre Produce Co.*, 39 Agric. Dec. 703 (1980).

¹⁸It might be objected that under the f.o.b. acceptance final terms Respondent should have inspected the tomatoes at shipping point in Georgia, and should not be allowed damages based on the discovery of the breach in Canada. However, this ignores the fact that Complainant knew that Respondent was not located in Georgia, and the multiple trades of the tomatoes were by firms not located there. It also ignores the fact that by the express provision of the f.o.b. acceptance final terms the seller is liable for any material breach.

mature green tomatoes, but only for vine ripe tomatoes. However, it was no doubt contemplated that the sale in Montreal would be of tomatoes that were at a greater degree of ripeness, and the order for gas green tomatoes was made to assure their arriving without being overripe. The accounting supplied by Respondent from the Canadian firm was reasonably prompt and detailed as to expenses, and how the tomatoes were handled, but did not break down the sales on a lot by lot basis. However, the total sales accord with both the condition of the tomatoes and the quotations for vine ripe tomatoes on the Montreal market. The tomatoes were reworked by the Canadian firm which recorded the loss of 202 cartons out of the original 1,600. This loss is not at all excessive considering the degree of decay, softness, and ripeness recorded by the Canadian inspection. Gross sales for the remaining 1,398 cartons amounted to \$16,259.00 Canadian. This amounts to \$11.63 per carton for each of the cartons sold. Prices in Montreal on April 12, 2000, the first date for which there are any available prices after April 7, averaged \$15.55 per carton. Since the tomatoes were ripe they would not likely bring as much, even after reworking, as the average sales for vine ripers. Accordingly, we will accept the \$16,259.00, Canadian, realized from the sales in Montreal as showing the value of the tomatoes accepted.¹⁹ As the value of the tomatoes if they had been as warranted we will accept the \$15.55 average market price for vine ripers. The difference between these two figures, is \$3.92 per carton, or \$6,272.00 Canadian for the 1,600 cartons, or \$4,209.39 U.S. funds. This constitutes Respondent's basic damages. In addition we should allow the \$1,200.00 for repacking, the \$80.00 cost of dumping, and the \$304.00 cost of inspection, or \$1,584.00. Respondent's total damages, therefore, amount to \$5,793.39.

As stated earlier, since Respondent accepted the tomatoes it became liable to Complainant for the full purchase price of \$16,896.00. Respondent's damages deducted from this amount leaves \$11,102.61 as Respondent's basic liability for this load. Respondent has already paid Complainant \$2,679.50, which leaves \$8,423.11 still owing to Complainant. Respondent's failure to pay Complainant this amount 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.²⁰ Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation

¹⁹See *Great American Farms, Inc. v. William P. Hearne Produce Co., Inc.*, 59 Agric. Dec. 466 (2000).

²⁰*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

award.²¹ We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a \$300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499(e)(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order Respondent shall pay to Complainant, as reparation, \$8,423.11, with interest thereon at the rate of 10% per annum from May 1, 2000, until paid, plus the amount of \$300.

Copies of this order shall be served upon the parties.

²¹See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).