

AGRICULTURE DECISIONS

Volume 76

Book One

Part Three (PACA)

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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

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JANUARY – JUNE 2017

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The Editor regrets having overlooked the timely inclusion of two Reparation Decisions, specifically:

- (1) *Four Rivers Packing Co. v. Sam Wang Produce, Inc.*, PACA Docket No. R-08-089 (U.S.D.A. Sept. 4, 2009);¹ and
- (2) *Titanium Fabrics LLC v. Watermelons, Inc.*, PACA Docket No. E-R-2013-277 (U.S.D.A. Apr. 3, 2015).²

The decisions follow this page with special pagination for guidance.

¹ This decision should have appeared in Volume 68 of *Agriculture Decisions*.

² This decision should have appeared in Volume 74 of *Agriculture Decisions*.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

**68 Agric. Dec.
July – December 2009**

**FOUR RIVERS PACKING CO., INC. v. SAM WANG PRODUCE,
INC.**

Docket No. R-08-089.

Decision and Order.

Filed September 4, 2009.

[Cite as: 76 Agric. Dec. A (U.S.D.A. 2009)].

PACA-R.

Notice of Breach – Timeliness

Where Respondent waited four days to look at onions received via railcar from Complainant, and upon discovery of a breach at that time gave notice to Complainant through the broker, found that such notice was not timely. We also noted, however, that the load remained intact in the railcar under constant refrigeration between the time of arrival and the time the car was opened. Moreover, after a U.S.D.A. inspection was performed on the onions the following day, Complainant had the opportunity, if the results of the inspection were in question, to request an appeal. Since the timeliness of the notice provided by Respondent therefore did not appear to have prejudiced Complainant's rights with respect to securing its own evidence of the condition of the onions following arrival, found the untimely notice of breach provided by Respondent should not bar Respondent's recovery of damages resulting from the breach.

Inspections – Timeliness

Although the inspection performed on the onions five days after arrival was not performed in a timely manner, noted the onions remained on the conveyance under constant refrigeration at the transit temperature specified by Complainant from the time of arrival to the time of inspection and concluded on this basis that the extreme amount of decay disclosed by the untimely inspection was sufficient to establish with reasonable certainty that a more timely inspection would have also disclosed abnormal deterioration in the onions.

Complainant, Pro se.

Maria C. Simon, Washington, DC, for Respondent.

Patrice Harps, Presiding Officer.

Leslie Wowk, Examiner.

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

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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 \$17,105.00 in connection with one railcar load of onions shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto, denying liability to Complainant and asserting a Counterclaim for an unspecified amount of damages allegedly incurred in connection with the railcar load of onions at issue in the Complaint.¹

Neither the amount claimed in the Complaint nor the Counterclaim exceeds \$30,000.00. Therefore, the documentary procedure provided in Section 47.20 of the Rules of Practice (7 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, Four Rivers Packing Co., Inc., is a corporation whose post office address is P.O. Box 8, Weiser, Idaho, 83672-0008. At the time of the transaction involved herein, Complainant was licensed under the Act.

¹ Respondent subsequently submitted an Answering Statement wherein it specifies the amount of damages claimed in the Counterclaim is \$2,290.91.

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2. Respondent, Sam Wang Produce, Inc., is a corporation whose post office address is 300 A-Morse Street NE, Washington, DC, 20002. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On or about November 30, 2006, Complainant, by oral contract, sold to Respondent, and agreed to ship from loading point in the state of Idaho, to Respondent's customer, SW Produce, in Jessup, Maryland, 2,550 50-pound sacks of U.S. No. 2 Jumbo yellow onions at \$6.50 per sack, plus \$500.00 for a non-refundable railcar surcharge and \$30.00 for two temperature recorders. The sale of the onions was negotiated by a broker, Dean Bearden, of CDC Sales, Inc., Boerne, Texas. (Compl. Ex. 5).

INSPECTION CERTIFICATE T-001-0023-02229

CARRIER OR LOT ID: PO 10524-1	APPLICANT: SW PRODUCE	12/19/2006	6:00 AM
LOADING STATUS: UNLOADED	JESSUP, MD	12/19/2006	7:10 PM
STATED BY: APPLICANT	SHIPPER: FOUR RIVERS PACKING CO	12/21/2006	10:13 AM
ADDITIONAL ID: NA	WEISER, ID		
CARRIER TYPE: NA	MARKET BALTIMORE/WASHINGTON	OFFICE:	
REFRIG UNIT: NA	DOORS: NA	INSP SITE: APPLICANT'S WAREHOUSE	\$316.25

REMARKS:

CHECK NO: 10413 CHECK AMT: \$316.25
THIS CERTIFICATE SUPERCEDES CERTIFICATE T-001-0023-02216 ACCOUNT WRONG
APPLICANT'S REQUEST TO REPORT INSPECTION ORIGINALLY REQUEST RECEIVED
6:00 AM 12/18/06

LOT A (CON) – ONIONS, OTHER THAN BGG, YELLOW

Temperatures: 47° to 49°F **NUMBER OF CONTAINERS:** 250 OPEN MESH **ORIGIN:** ID
SACK(S)
Markings: BRAND: CUTTER'S CHOICE
MARKINGS: PRODUCE OF USA 50 LBS NET WT IDAHO-OREGON ONIONS PACKED BY FOUR
RIVERS
PACKING INC, WEISER, IDAHO SPANISH SWEETS
PLI: NONE **OTHER ID:** JUMBO

INJURY	DAM	SER. DAM	V.S. DAM	OFFSIZE/DEFECTS
NA	11	11	NA	DECAY (7 to 15%)
NA	11	11	NA	CHECKSUM

GRADE:	XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXX
LOT DESC:	INSPECTION: RESTRICTED TO CONDITION ONLY AT APPLICANT'S REQUEST FIRMNESS: GENERALLY FIRM STAGES OF DECAY: GENERALLY EARLY, SOME ADVANCED, SOME MODERATE

5. On December 19, 2006, the onions were unloaded and railcar ARMN 768007 was released to the carrier. (Compl. Ex. 9a). At 7:10 a.m. on the same date, a USDA inspection was performed on the onions at SW Produce, in Jessup, Maryland, the report of which disclosed the following, in pertinent part (Compl. Ex. 11a-11b):

INJURY	DAM	SER. DAM	V.S. DAM	OFFSIZE/DEFECTS
NA	2	0	NA	TRANSLUCENT SCALES (0 to 6%)
NA	30	30	NA	DECAY (9 to 65%)
NA	32	30	NA	CHECKSUM
GRADE:		XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXX		
LOT DESC:		INSPECTION: RESTRICTED TO CONDITION ONLY AT APPLICANT'S REQUEST FIRMNESS: MOSTLY FIRM STAGES OF DECAY: MOSTLY EARLY, MANY MODERATE, FEW ADVANCED		

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6. On January 24, 2007, Respondent's Hong Kim sent the broker, Dean Bearden, a fax message stating as follows (ROI Ex. D10):

Mr. Dean

This is the summary regarding to Jumbo onions (Invoice # 10524-01) you sent by train (ARMN 768007). Here is the Settlement Summary.

Received Onions	2,550
INV# 108899 (Return)	-850
INV# 108903 (Return)	-806
Dump Onion (Please see the Dump Ticket)	-387

Sold Onion	507
------------	-----

- Out of 507 Onions, 182 been thrown away in DC Sam Wang, and remaining (325 Onions) has been trimmed and sold. Sam Wang would pay half price of Delivered price (\$10.44)

- Charged to Sam Wang

\$1,827.00 = 350(Total Onion Sold) * \$5.22(Adjusted Price)

- Sam Wang Expenses

Inspection Fee	\$ 316.25
Inspection Fee	\$ 89.00
Trash (1)	\$ 413.66
Return Onion Pallet (2)	\$ 170.00
Unloading Fee	\$ 200.00

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Train Access Charge	\$ 90.00
Total	\$ 1,278.91

- (1) 6.7 tons * \$61.74 per Ton
- (2) 34 Pallet * \$5.00 per Pallet

According to the above summary, Sam Wang would pay 4Rivers in the amount of \$548.09.

If you have any concern or question, please let me know!

- 7. Respondent has not paid Complainant for the onions billed on Complainant's invoice number 10524-01.
- 8. The informal complaint was filed on April 13, 2007, 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 one railcar load of onions sold to Respondent. The onions arrived at the contract destination on Thursday, December 14, 2006, at 8:30 a.m., after which the railcar was opened and closed twice before being unloaded and released empty to the carrier on December 19, 2006, just prior to a USDA inspection.² Complainant states it was not notified until the following day, December 20, 2006, that the onions were showing problems. Complainant states this notice, which came six days after arrival, is outside PACA requirements for timely notification.³ On this basis, Complainant asserts it is entitled to payment of the full contract price of the onions, or \$17,105.00, which amount Complainant seeks to recover from Respondent through this proceeding.

There is no dispute Respondent accepted the subject railcar load of onions. A buyer who accepts produce becomes liable to the seller for the

² See Compl. Ex. 9C.

³ See ROI Ex. A1.

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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 (U.S.D.A. 2001); *World Wide Imp-Ex, Inc. v. Jerome Brokerage Dist. Co.*, 47 Agric. Dec. 353 (U.S.D.A. 1988); *Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (U.S.D.A. 1987). Where goods are accepted the buyer has the burden of proof to establish a breach of contract. See U.C.C. § 2-607(4); see also *The Grower-Shipper Potato Co. v. Southwestern Produce Co.*, 28 Agric. Dec. 511 (U.S.D.A. 1969).

The onions were sold under f.o.b. terms, which means the warranty of suitable shipping condition is applicable. Suitable shipping condition is defined in the Regulations (7 CFR § 46.43(j)) as meaning:

... that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.⁴

⁴ The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination “without *abnormal* deterioration,” or what is elsewhere called “good delivery” (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See WILLISTON ON 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 (U.S.D.A. 1987); *G & S Produce v. Morris Produce*, 31 Agric.

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By definition, the warranty of suitable shipping condition is applicable only when the transportation service and conditions are normal. While the record shows Respondent asserted a claim against the railroad alleging abnormal transit conditions (ROI Ex. H2), the record also includes a copy of a letter Union Pacific Railroad sent to Respondent in response to the claim, which reads, in pertinent part, as follows:

...

Based on release and in accordance with the average transit time on onions as published by the UP, this shipment was due for market at Jessup on December 16, 2006 and was available on Friday December 15, 2006. No delay is admitted. The shipper requested a MPS of 42 degrees and temps were within 5 degrees of the requested setting. I note the destination USDA was made on December 19, 2006.

The carriers have a clear record of handling with no delay or bad temps. I must advise your claim as filed is respectfully disallowed.⁵

Both the DeltraTRAK temperature recorder tape and the reefer status report submitted by Complainant affirm that proper temperatures were maintained throughout the transit period.⁶ We therefore find the transportation service and conditions were normal, so the warranty of suitable shipping condition is in effect.

According to the memorandum of sale prepared by the broker, the onions were sold under the grade designation U.S. No. 2.⁷ Complainant secured a Federal-State inspection at the time of shipment showing that 2,228-50 pound sacks of "No Brand" yellow onions graded U.S. No. 2, 3-inch minimum; and 322-50 pound sacks of "Cutter's Choice" yellow onions graded U.S. No. 1, 2-7/8 inch minimum.⁸ The United States

Dec. 1167 (U.S.D.A. 1972); Lake Fruit Co. v. Jackson, 18 Agric. Dec. 140 (U.S.D.A. 1959); and Haines Assn. v. Robinson, 10 Agric. Dec. 968 (U.S.D.A. 1951).

⁵ See ROI Ex. H5.

⁶ See Compl. Exs. 9a-9e and ROI Ex. D6-D8 of D11.

⁷ See ROI Ex. A4.

⁸ See Compl. Ex. 7. While the broker raises the allegation that this inspection does not refer to the onions in question because of discrepancies between the quantities and labels shown

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Standards for Grades of Onions (Other Than Bermuda-Granex-Grano and Creole Types)⁹ provide a tolerance at shipping point of five percent for onions that fail to meet the requirements of the grade, including therein not more than two percent for onions affected by decay or sunscald. For onions sold f.o.b., we apply an additional allowance to these tolerances to provide for normal deterioration in transit. Based on the expected length of the transit period, which was slightly more than two weeks according to the railroad, we will apply an allowance of eight percent for average defects, including therein not more than four percent for decay.

The USDA inspection secured by Respondent was performed on December 19, 2006, which was eighteen days after shipment and five days after arrival. The inspection disclosed 32 percent average defects, including 30 percent decay, in 2,300 sacks of Four Rivers Packing Co. onions; and 11 percent average defects, including 11 percent decay, in 250 sacks of Cutter's Choice onions.¹⁰ There is no question the inspection secured five days following arrival was not performed in a timely manner.¹¹ Nevertheless, we must still consider whether the extreme

on the Federal-State inspection versus those shown on the destination inspection—2,228 sacks of “No Brand” onions v. 2,300 sacks of Four Rivers Packing Co. onions, and 322 v. 250 sacks of Cutter's Choice onions (*see* ROI Ex. H2)—we note the total quantity inspected on both certificates is the same. Moreover, the other identifying information on the Federal-State inspection certificate, including the railcar number and the purchase order number, is sufficient to establish the inspection covers the load of onions at issue here. We should also note Mr. Bearden asserts in the same correspondence that the shipping point inspection shows the 322 sacks of Cutter's Choice onions were 2-7/8 inch minimum, which is not a jumbo size. While the U.S. Grade Standards specify a 3-inch minimum for jumbo-size onions (*see* 7 C.F.R. § 51.2836), there is also a tolerance provided for onions that fail to meet the specified size (*see* 7 C.F.R. §§ 51.2837). Therefore, without an inspection showing the percentage of onions that were below 3 inches in diameter, there is insufficient evidence to establish these onions were not the correct size.

⁹ *See* 7 C.F.R. §§ 51.2830-51.2854. USDA Grade Standards are also accessible on the Internet at www.ams.usda.gov.

¹⁰ *See* Compl. Exs. 11a-12b.

¹¹ *See* Villalobos v. Am. Banana Co., 56 Agric. Dec. 1969 (U.S.D.A. 1997) (five days after arrival of tomatoes in a delivered sale); Borton & Sons, Inc. v. Firman Pinkerton Co., Inc., 51 Agric. Dec. 905 (U.S.D.A. 1992) (four days after arrival of pears); Dodds v. Produce Products, Inc., 48 Agric. Dec. 682 (U.S.D.A. 1989) (eight days after arrival of potatoes, citing case where seven days held too long); U.S.A. Fruit, Inc. v. Roxy Produce Wholesalers, Inc., 48 Agric. Dec. 705 (U.S.D.A. 1989) (four days after arrival of plums); Dave Westendorf Produce Sales, Inc. v. John Livacich Produce, Inc., 46 Agric. Dec. 536 (four days after arrival of tomatoes); Bruce Newlon Co., Inc. v. Richardson Produce Co., 34 Agric. Dec. 897 (U.S.D.A. 1975) (six days after arrival of potatoes); D.L. Piazza Co. v.

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amount of damage disclosed by the untimely inspection might still impel us to infer that a timely inspection would have clearly shown a breach of contract.¹²

As we mentioned, we would consider anything in excess of eight percent damage, including not more than four percent decay, to be abnormal and in breach of the suitable shipping condition warranty. The subject onions were affected by decay many times in excess of what is permitted under the suitable shipping condition allowance. It is important to note the onions remained on the conveyance under constant refrigeration at the transit temperature specified by Complainant from the time of arrival to the time of inspection.¹³ On this basis, we find the defects disclosed by the inspection performed on December 19, 2006, are sufficiently extensive to establish with reasonable certainty that a more timely inspection would have also disclosed abnormal deterioration in the onions. Accordingly, we find Respondent has sustained its burden to prove the onions shipped by Complainant were not in suitable shipping condition, thereby constituting a breach of contract by Complainant.¹⁴ Before we consider the damages allegedly incurred by Respondent as a result of Complainant's breach, we must address Complainant's contention that it was not timely notified of the breach. Dean Bearden, the broker for the load, informed the Manassas, Virginia PACA Branch Office during the informal handling of this claim that the "rail was placed late Friday, December 15, 2006 and was not looked at until Monday, December 18, 2006 when it was decided to call for an inspection."¹⁵ We

Stacy Distributing Co., 18 Agric. Dec. 307 (U.S.D.A. 1959) (four days after arrival of carrots); Vaughn-Griffin Packing Co. v. Thomas Aeozzo & Son, 17 Agric. Dec. 1035 (U.S.D.A. 1958) (five to six days after arrival of oranges); P. F. Likins Co. v. Walter Holm & Co., 10 Agric. Dec. 593 (U.S.D.A. 1951) (extensive defects in tomatoes five days after arrival).

¹² See *SEL Int'l Corp. v. Brown*, 52 Agric. Dec. 740 (U.S.D.A. 1993) (where a survey conducted four days after the onions at issue were made available for inspection, and which disclosed 46.14 percent average defects, was found to establish a breach of the warranty of suitable shipping condition).

¹³ See Compl. Ex. 9a.

¹⁴ The burden is on the buyer to establish a breach as to accepted goods. See U.C.C. § 2-607(4); see also *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc.*, 60 Agric. Dec. 840 (U.S.D.A. 2001); and *The Grower-Shipper Potato Co. v. Sw. Produce Co.*, 28 Agric. Dec. 511 (U.S.D.A. 1969).

¹⁵ See ROI Ex. D1. Although the record shows the railcar was opened at 1:52 a.m. CST on Friday, December 15, 2006, and closed at 1:56 a.m. CST the same day (see ROI Ex. A9),

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note, however, that Mr. Bearden asserts in an affidavit submitted as part of Respondent's Answering Statement that the load arrived in Jessup, Maryland, on December 14, 2006.¹⁶ In addition, the record includes a tracking report from the railroad, which shows railcar number ARMN 768007, the railcar containing the onions in question, was "PLACED AT INDUSTRY" at 9:30 a.m., on December 14, 2006.¹⁷ Furthermore, Respondent's Vice President, Chung "Nae" Choi, has testified the onions "arrived in Jessup, Maryland on December 14, 2006."¹⁸ We therefore find the preponderance of the evidence establishes the load arrived at the contract destination in Jessup, Maryland, on December 14, 2006.

According to Respondent's Chung "Nae" Choi, the car arrived at the end of the loading dock's work day, so the car was not transported to Respondent's loading dock until Friday, December 15, 2006.¹⁹ Because of the car's arrival on Friday, Mr. Choi states the car was not unloaded until Monday, December 18, 2006. At the time of unloading, Mr. Choi states he noticed the onions contained excessive amounts of decay, so he immediately instructed SW Produce to call for an inspection. Mr. Choi states he also contacted the broker, CDC Sales, Inc., regarding the decay.²⁰ CDC Sales' Dean Bearden affirms in his Answering Statement affidavit that he was contacted by Respondent regarding the onions' excessive amount of decay on December 18, 2006, after which Mr. Bearden states he immediately sent a trouble report via facsimile to Complainant.²¹ Mr. Bearden states further that after the USDA inspection was conducted on December 19, 2006, he resent the trouble report to Complainant along with a copy of the USDA inspection certificate.²² Complainant's salesman, Robert L. Hert, acknowledges in an affidavit submitted as part of Complainant's Statement in Reply that notification of a problem was faxed

it is unlikely the product was "looked at" at this time given the short duration the doors were open.

¹⁶ See Affidavit of Dean Bearden in Support of Respondent's Answering Statement ("Bearden Affidavit") ¶ 4.

¹⁷ See ROI Ex. A7.

¹⁸ See Respondent's Answering Statement Affidavit of Chung "Nae" Choi, Vice President Sam Wang Produce, Inc. ("Choi Affidavit") ¶ 4.

¹⁹ See Choi Aff. ¶ 5.

²⁰ See Choi Aff. ¶ 6.

²¹ See Bearden Aff. ¶ 5.

²² See Bearden Aff. ¶ 6.

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to Complainant on December 18 and 20, 2006.²³ The evidence therefore establishes Complainant was first notified of a problem with the onions on December 18, 2006, which was four days after arrival. Complainant's statement that notice was not provided until six days after arrival is therefore erroneous.²⁴

The issue that must be determined then is whether the notice provided four days following arrival is timely. Arguing in the affirmative, Respondent states the Department has long recognized that the reasonable amount of time for notice of a breach hinges upon the type of produce involved, because different types of produce have varying degrees of perishability. In making this argument, Respondent states that while notice of a breach provided three days after arrival for tomatoes was found to be untimely in *Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc.*, 42 Agric. Dec. 1194 (U.S.D.A. 1983), the decision made a point of distinguishing between the inherently perishable nature of the tomatoes in that case and the chipping potatoes at issue in *Spudco, Inc. v. Yick Lung Co., Inc.*, 36 Agric. Dec. 715, 778 (U.S.D.A. 1977), clarifying that while seven days after arrival constitutes untimely notification for produce as hardy as potatoes in *Spudco*, three days after arrival is untimely for the highly perishable tomatoes. Respondent also points out that in *Well-Pict, Inc. v. Sam Wang Food Corp., Inc.*, 45 Agric. Dec. 389, 393 (U.S.D.A. 1986), notice provided two to three days after arrival for strawberries was held to be timely. Respondent asserts the onions in question are far more similar in nature to potatoes than tomatoes. Specifically, Respondent states the onions in question are harvested during the summer and fall and may be stored for several months. On this basis, Respondent asserts the nature of the subject onions permits a two to three-day window after arrival for notice of a breach to be given.²⁵ This argument nevertheless overlooks the fact that the notice provided in the instant case came four days after arrival. We conclude the notice of breach was untimely.

Section 2-607(3) of the Uniform Commercial Code specifies that where a tender has been accepted, the buyer must notify the seller of any

²³ See Affidavit of Robert Hert for Complainant's Statement in Reply ("Hert Affidavit") ¶4.

²⁴ See ROI Ex. A1.

²⁵ See Resp't's Br. at 4-5.

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breach within a reasonable time after it discovers or should have discovered the breach. In their Handbook of the Law under the Commercial Code,²⁶ J. White and R. Summers, provide the following three reasons for the notice requirement:

First, it enables the seller to make adjustments or replacements or to suggest opportunities for cure to the end of minimizing the buyer's loss and reducing the seller's own liability to the buyer.

Second, it affords the seller an opportunity to arm himself for negotiation and litigation.

Third, it gives the seller that same kind of mind balm he gets from the statute of limitations.

In *A. C. Carpenter, Inc. v. Boyer Potato Chips*²⁷, a case cited by White and Summers, we said:

The requirement that notice be given within a reasonable time is important, especially when the alleged breach concerns perishables. The purpose of the rule, as stated in the comment to the UCC, is to defeat commercial bad faith. If the seller is notified of a breach within a reasonable time he has opportunity to ascertain for himself the nature and extent of the breach by taking advantage of UCC section 2-515 which gives either party upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence.

Similarly, in *SEL International Corp. v. Brown*, 52 Agric. Dec. 740 (U.S.D.A. 1993), we stated:

²⁶ J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-9, 344 (1972).

²⁷ 28 Agric. Dec. 1557 (U.S.D.A. 1969).

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Without the notice afforded by section 2-607(3), a seller might find himself relatively defenseless against a claim for consequential damages. Absent notice, he might not have any opportunity to inspect the consequences of the alleged breach, and evidence thereof might thus be left entirely in the province of the alleged aggrieved party. But with such notice, the seller might have been able to take steps to minimize his damages

We note that in both of the cases cited above, the continued existence of the goods at the time the notice of breach is provided is deemed paramount.

In this regard, we have already determined the onions in question arrived at the contract destination on Thursday, December 14, 2006. Complainant was notified of a problem with the onions four days later, on December 18, 2006, the same day Respondent's customer, SW Produce, discovered the problem. Although we are bothered by the failure of SW Produce to act with greater speed and diligence to take physical possession of the onions once the load was made available by the railroad, we are nevertheless cognizant of the fact that the load remained intact in the railcar under constant refrigeration between the time of arrival, on Thursday, December 14, 2006, and the time the car was opened, on Monday, December 18, 2006. Hence, Respondent's failure to give notice of a problem with the onions to Complainant until four days following arrival, however untenable, nevertheless did not deprive Complainant of the opportunity to ascertain for itself the exact nature of the alleged breach through any means available. Moreover, after a USDA inspection was performed on the onions on December 19, 2006, Complainant was timely advised of the results of the inspection on December 20, 2006, at which time Complainant had the opportunity, if the results of the inspection were in question, to request an appeal inspection. Consequently, the untimely notice provided by Respondent does not appear to have prejudiced Complainant's rights with respect to securing its own evidence of the condition of the onions following arrival.

As we already mentioned, the onions were held under refrigerated conditions from the time of arrival to the time of inspection. Such conditions are presumed to retard, rather than promote, the progression of

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the decay in the onions. In spite of this, the majority of the onions, at the time of the inspection, exhibited a percentage of decay more than seven times the suitable shipping condition allowance. Such results are plainly indicative of product that was not in suitable shipping condition. Moreover, in light of the conditions under which the onions were held pending inspection, it is highly unlikely the onions were significantly less deteriorated at the time of arrival. Under this assumption, to refuse to allow Respondent to recover damages due to its failure to timely notify Complainant of the breach would certainly result in a disproportionate forfeiture on the part of Respondent. Consequently, based on the facts of this case, we conclude the notice of breach provided by Respondent, although untimely, should not prevent Respondent from recovering damages resulting from Complainant's breach.

The general measure of damages for a breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. U.C.C. § 2-714(2). The value of accepted goods is best shown by the gross proceeds of a prompt and proper resale as evidenced by a proper accounting prepared by the ultimate consignee. Respondent's Chung "Nae" Choi asserts in his Answering Statement affidavit that after the inspection was complete, SW Produce, with the assistance of Respondent, started trying to sell the onions to customers, but the customers kept refusing them because of excessive amounts of decay.²⁸ Mr. Choi states Dean Bearden of CDC and Bob Hert, a representative of Complainant, subsequently agreed to move the onions off the fresh market to an onion processor in Elizabeth, New Jersey.²⁹ Per Complainant's directive, Mr. Choi states SW Produce sent 1,656 sacks of onions to the processing plant in New Jersey, yielding a return of \$3.75 per sack f.o.b., less \$0.25 per sack for brokerage, for a net return of \$5,796.00.³⁰ To maximize the value of the onions, Mr. Choi states SW Produce repacked the remaining onions, 187 sacks of which were lost in repacking and 387 sacks were dumped.³¹ Mr. Choi states that after deducting inspection costs

²⁸ See Choi Aff. ¶9.

²⁹ See Choi Aff. ¶10.

³⁰ See Choi Aff. ¶11.

³¹ See Choi Aff. ¶12.

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of \$405.25 and dump fees of \$413.66, Respondent received a total gross return of \$7,218.09 from the sale of the onions.³²

Concerning Mr. Choi's allegation that Complainant's Robert Hert was involved in the decision to move the onions to a processor, Mr. Hert asserts in his Statement in Reply affidavit that he advised CDC it was Respondent's option to move part of the produce to another receiver, as the product in the car was theirs.³³ Since Respondent had already accepted the onions at the time the discussion in question took place, the responsibility lay with Respondent to sell the onions in a prompt and proper fashion, so as to mitigate the damages sustained as a result of Complainant's breach. Therefore, whether or not Mr. Hert was involved in the decision to move the onions to a processor is of no material consequence.

In addition to the affidavit testimony of Mr. Choi, Respondent submitted a number of documents that concern the resale or other disposition of the onions. First, Respondent submitted copies of two sales tickets evidencing the return of 1,656 sacks of onions to SW Produce on January 2, 2007.³⁴ Respondent also submitted copies of SW Produce invoices showing that the same 1,656 sacks of onions were resold on the same date to F & S Produce Co., Inc., Rosenhayn, New Jersey, for \$3.75 per sack.³⁵ There is, however, no evidence of the date the onions were originally sold, prior to their return to SW Produce, and the sale to F & S Produce Co., Inc., which took place two weeks after the onions were inspected, is not considered prompt. We also note that the sale to F & S Produce Co., Inc. yielded gross proceeds of \$6,210.00, from which Respondent reportedly deducted \$0.25 per sack for brokerage, leaving a net return of \$5,796.00. Respondent reported a gross return from the sale of the onions of \$7,208.09. In an account of sale Respondent faxed to CDC, Respondent indicated that 325 sacks of the onions were trimmed and sold.³⁶ Respondent did not, however, submit copies of invoices or a sufficiently detailed account of sales to establish the dates of sale and the prices at which these onions were sold. Furthermore, Respondent did not

³² See Choi Aff. ¶13.

³³ See Hert Aff. ¶7.

³⁴ See ROI Ex. D9.

³⁵ See Answering Statement Ex. A.

³⁶ See ROI Ex. D10.

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fully account for the onions that were reportedly dumped, as the copy of the ESI – AmeriWaste Transfer ticket submitted by Respondent evidences the disposal of 13,460 pounds of onions, or the equivalent of approximately 269-50 pound sacks.³⁷ Respondent reported sales of 1,981 sacks of onions, which means that 569 sacks of onions were not resold. Since the dump ticket apparently covers only 269 sacks of the onions, 300 sacks of the onions are not accounted for (original quantity of 2,550 sacks less 1,981 sacks sold and 269 sacks dumped = 300 sacks).

Given the noted discrepancies in the evidence submitted by Respondent concerning the resale of the onions, we find that Respondent has failed to establish that the onions were either promptly resold or properly disposed of, in the event they could not be resold. Consequently, we cannot use the gross resale proceeds reported by Respondent as the value of the onions as accepted. An alternative means of determining the value of the onions as accepted is to reduce the value they would have had if they had been as warranted by the percentage of condition defects disclosed by the inspection. *Barry Mathes, d/b/a Barry Mathes Farms v. Kenneth Rose, Co., Inc.*, 46 Agric. Dec. 1562 (U.S.D.A. 1987); *South Florida Growers Association, Inc. v. Country Fresh Growers & Distributors, Inc.*, 52 Agric. Dec. 684 (U.S.D.A. 1993).

The first and best method of ascertaining the value the onions would have had if they had been as warranted is to use the average price as shown by USDA Market News Service Reports. *Pandol Bros., Inc. v. Prevor Marketing International, Inc.*, 49 Agric. Dec. 1193 (U.S.D.A. 1990). The terminal market report for Baltimore, Maryland shows that Idaho-Oregon jumbo yellow onions in 50-pound sacks were mostly selling for \$17.00 per sack on Thursday, December 14, 2006; \$18.00 per sack on Friday, December 15, 2006, and Monday, December 18, 2006; and \$19.00 per sack on Tuesday, December 19, 2006. We conclude on the basis of the reported prices that the onions had a value if they had been as warranted of \$18.00 per sack, or a total of \$45,900.00 for 2,550 sacks.

Using a weighted average of the results from the two lots of onions inspected, we find that the \$45,900.00 value that the onions would have had if they had been as warranted should be reduced by 30 percent, or \$13,770.00, to arrive at the value of the onions as accepted. This results

³⁷ See Answering Statement Ex. 4.

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in a value for the onions as accepted of \$32,130.00. Respondent's damages equal the difference between the value the onions would have had if they had been as warranted, \$45,900.00, and their value as accepted, \$32,130.00, or \$13,770.00. In addition, Respondent may recover the U.S.D.A. inspection fee of \$316.25 as incidental damages. Respondent's total damages therefore amount to \$14,086.25. When Respondent's damages of \$14,086.25 are deducted from the \$17,105.00 contract price of the onions, there remains a balance due Complainant from Respondent for the onions of \$3,018.75.

The Counterclaim submitted by Respondent seeks recovery of damages resulting from the breach of contract by Complainant with respect to the subject load of onions. Respondent asserts that its damages exceed the contract price of the onions by \$2,290.91. We have, however, already considered the damages sustained by Respondent as a result of Complainant's breach and determined that there is still a balance owed by Respondent to Complainant. Respondent's Counterclaim should, therefore, be dismissed.

Respondent's failure to pay Complainant \$3,018.75 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 (U.S.D.A. 1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (U.S.D.A. 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 (U.S.D.A. 2006) (Order on Reconsideration). Complainant in this action paid \$300.00 to

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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 \$3,018.75, with interest thereon at the rate of .45% per annum from January 1, 2006, until paid, plus the amount of \$300.00.

The Counterclaim is dismissed.

Copies of this Order shall be served upon the parties.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

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April – June 2015

**TITANIUM FABRICS LLC v. WATERMELONS INC., d/b/a ALL
SWEET WATERMELONS.**

Docket No. E-R-2013-277.

Decision and Order.

Filed April 3, 2015.

[Cite as: 76 Agric. Dec. T (U.S.D.A. 2015)].

PACA-R.

Price After Sale

The term “price after sale” is not defined in either the Uniform Commercial Code or the Act and Regulations (Other Than Rules of Practice) under the Act (7 C.F.R. § 46.43(j)). It is considered a subcategory of the “open price term” (U.C.C. § 2-305(1)), and is generally understood as meaning that the parties will agree on a price following the prompt resale of the produce. *See Eustis Fruit Co. v. Auster Co.*, 51 Agric. Dec. 865, 877 (1991). If the parties are unable to agree upon a price, U.C.C. § 2-305(1) provides that the price shall be a reasonable price at the time for delivery.

Complainant, Pro se.

Paul T. Gentile, P.C., Counsel for Respondent.

Shelton S. Smallwood, Presiding Officer.

Leslie S. Wowk, Examiner.

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-499s) (PACA); and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) (Rules of Practice). On October 7, 2013, Titanium Fabrics LLC (“Titanium Fabrics”) filed a timely formal Complaint seeking an award of reparation in the amount of \$238,376.10 from Respondent Watermelons, Inc., doing business as All Sweet Watermelons (“All Sweet”), in connection with 23

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shipments of watermelons imported from Mexico and shipped from Nogales, Arizona, to Respondent in Howell, New Jersey. Respondent filed an Answer on December 5, 2013, denying the material allegations in the Complaint and requesting an oral hearing. Copies of the Department's Report of Investigation were served on the parties.

Based on Respondent's request for an oral hearing, and because the amount of damages alleged in the Complaint is in excess of \$30,000.00, a hearing was held in accordance with section 47.15 of the Rules of Practice (7 C.F.R. § 47.15). The oral hearing was held on Tuesday, October 7, 2014, via audio-visual telecommunication. The Presiding Officer, Shelton S. Smallwood, attended in Washington, D.C., while Complainant attended in San Dimas, California, and Respondent attended in Somerset, New Jersey. The Complainant was not represented by counsel. The Respondent was represented by Paul T. Gentile of Paul T. Gentile, P.C., New York, New York.

At the hearing, the parties were given an opportunity to present testimony and submit evidence. Complainant called one witness, Ramin Namvar, Vice President of Titanium Fabrics. Respondent called two witnesses: 1) Charles Pagano, President of All Sweet Watermelons, and 2) Frank Basso, an independent contractor who assisted Complainant with the sale of the watermelons to Respondent. Complainant introduced sixty exhibits into evidence at the hearing. Complainant's hearing exhibits are cited herein as CX-1 through CX-23A and Exhibit F Page 1 and Page 2 of 2. In addition, the record remained open for 30 days following the hearing to allow Respondent to provide accounts of sale for the watermelons. Respondent submitted the accounts of sale into evidence and those documents are cited herein as RX-1 at 1-23. The Department's Report of Investigation is also considered evidence in this case.

At the conclusion of the hearing, a schedule was set for the filing of post-hearing briefs and requests for fees and expenses. Simultaneous briefs were due by December 1, 2014. Both parties submitted post-hearing briefs and counsel for Respondent submitted a request for fees and expenses. Complainant's and Respondent's briefs are referred to herein as "CB" and "RB," respectively.

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Findings of Fact

1. Complainant is a limited liability company whose post office address is 6001 E. Slauson Avenue, Commerce, CA 90040. Complainant is not licensed under the PACA.
2. Respondent is a corporation whose mailing address is 19 Miller Road, Howell, NJ 07731. At the time of the transactions involved herein, Respondent was licensed under the PACA.
3. On April 30, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 15 2/3 bins of seedless watermelon 45's, 42 2/3 bins of seedless watermelon 60's, and 3 2/3 bins of seedless watermelon 80's. *See* CX-4B. Respondent prepared the following account of sales for the watermelons:

	Dumps	80ct	45ct	60ct	Total
Bins Sold		3	15	42	60
Price Sold P/B		\$120	\$230	\$225	\$13,260.00
Wash and Repack \$10.50 P/B		3	15	42	(\$630.00)
Trucking from AZ to NJ					(\$6,400.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$970.50)
Lumper Fee \$2.50 P/B		3	15	42	(\$150.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,200.00)

All Sweet's Return \$3,909.50

See RX-1 at 4. For this shipment, Complainant issued invoice number P-0007 billing Respondent for 40,708 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,177.00. *See* CX-4.

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4. On May 1, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 9 2/3 bins of seedless watermelon 40's, 27 2/3 bins of seedless watermelon 45's, and 24 2/3 bins of seedless watermelon 60's. *See CX-2B.* Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		9	27	24	60
Price Sold P/B		\$170	\$250	\$235	\$13,920.00
Wash and Repack \$10.50 P/B		9	27	24	(\$630.00)
Trucking from AZ to NJ					(\$6,600.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$931.50)
Lumper Fee \$2.50 P/B		9	27	24	(\$150.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,200.00)

All Sweet's Return \$4,408.50

See RX-1 at 2. For this shipment, Complainant issued invoice number P-0005 billing Respondent for 40,040 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,010.00. *See CX-2.*

5. On May 1, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 15 2/3 bins of seedless watermelon 40's, 36 2/3 bins of seedless watermelon 45's, and 9 2/3 bins of seedless watermelon 60's. *See CX-5B.* Respondent prepared the following account of sales for the watermelons:

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	Dumps	40ct	45ct	60ct	Total
Bins Sold		18	33	9	60
Price Sold P/B		\$160	\$230	\$225	\$12,495.00
Wash and Repack \$10.50 P/B		18	33	9	(\$630.00)
Trucking from AZ to NJ					(\$6,400.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$873.00)
Lumper Fee \$2.50 P/B		18	33	9	(\$150.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,200.00)

All Sweet's Return \$3,242.00

See RX-1 at 5. For this shipment, Complainant issued invoice number P-0008 billing Respondent for 40,198 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,049.50. See CX-5.

6. On May 3, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 9 2/3 bins of seedless watermelon 40's, 33 2/3 bins of seedless watermelon 45's, and 18 2/3 bins of seedless watermelon 60's. See CX-6B. Respondent prepared the following account of sales for the watermelons:

	Dumps	40ct	45ct	60ct	Total
Bins Sold		9	33	18	60
Price Sold P/B		\$160	\$230	\$225	\$13,080.00
Wash and Repack \$10.50 P/B		9	33	18	(\$630.00)
Trucking from AZ to NJ					(\$6,200.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$931.50)

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Lumper Fee \$2.50 P/B		9	33	18	(\$150.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,200.00)

All Sweet's Return \$3,968.50

See RX-1 at 6. For this shipment, Complainant issued invoice number P-0009 billing Respondent for 40,300 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,075.00. See CX-6.

7. On May 3, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 21 2/3 bins of seedless watermelon 40's, 21 2/3 bins of seedless watermelon 45's, and 18 2/3 bins of seedless watermelon 60's. See CX-8B. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		19	19	18	56
Price Sold P/B		\$160	\$230	\$225	\$11,460.00
Bins Dumped \$20 P/B		2	2		(\$300.00)
Wash and Repack \$10.50 P/B		19	19	18	(\$588.00)
Trucking Deduct \$103 P/B					(\$412.00)
Trucking from AZ to NJ					(\$6,200.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$565.50)
Lumper Fee \$2.50 P/B		19	19	18	(\$140.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,120.00)

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All Sweet's Return \$2,119.50

See RX-1 at 8. For this shipment, Complainant issued invoice number P-0011 billing Respondent for 40,788 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,197.00. *See* CX-8.

8. On May 4, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 15 $\frac{2}{3}$ bins of seedless watermelon 40's, 24 $\frac{2}{3}$ bins of seedless watermelon 45's, and 21 $\frac{2}{3}$ bins of seedless watermelon 60's. *See* CX-7A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		9	26	19	54
Price Sold P/B		\$160	\$230	\$225	\$11,695.00
Bins Dumped \$20 P/B		3	1	2	(\$120.00)
Wash and Repack \$10.50 P/B		9	26	19	(\$567.00)
Trucking Deduct \$103 P/B		3	1	2	(\$618.00)
Trucking from AZ to NJ					(\$6,200.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$832.50)
Lumper Fee \$2.50 P/B		9	26	19	(\$135.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,080.00)

All Sweet's Return \$2,142.50

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See RX-1 at 7. For this shipment, Complainant issued invoice number P-0010 billing Respondent for 40,540 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,135.00. *See CX-7.*

9. On May 6, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 9 2/3 bins of seedless watermelon 40's, 21 2/3 bins of seedless watermelon 45's, and 30 2/3 bins of seedless watermelon 60's. *See CX-1B.* Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		12	12	15	39
Price Sold P/B		\$170	\$250	\$235	\$8,565.00
Bins Dumped \$20 P/B	15				(\$300.00)
Wash and Repack \$10.50 P/B		12	12	15	(\$409.50)
Trucking Deduct \$116 P/B	15				(\$1,740.00)
Trucking from AZ to NJ					(\$6,300.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$565.50)
Lumper Fee \$2.50 P/B		12	12	15	(\$97.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$780.00)

All Sweet's Return (\$1,627.50)

See RX-1 at 1. For this shipment, Complainant issued invoice number P-0004 billing Respondent for 36,660 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$9,165.00. *See CX-1.*

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10. On May 7, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 21 2/3 bins of seedless watermelon 40's, 21 2/3 bins of seedless watermelon 45's, and 18 2/3 bins of seedless watermelon 60's. *See* CX-9A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		20	19	18	57
Price Sold P/B		\$160	\$230	\$225	\$11,620.00
Bins Dumped \$20 P/B		1	2		(\$60.00)
Wash and Repack \$10.50 P/B		20	19	18	(\$598.50)
Trucking Deduct \$103 P/B		1	2		(\$309.00)
Trucking from AZ to NJ					(\$6,200.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$810.50)
Lumper Fee \$2.50 P/B		20	19	18	(\$142.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,140.00)

All Sweet's Return \$2,359.50

See RX-1 at 9. For this shipment, Complainant issued invoice number P-0012 billing Respondent for 42,080 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,520.00. *See* CX-9.

11. On May 7, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 12 2/3 bins of seedless watermelon 40's, 24 2/3 bins of seedless watermelon 45's, and 24 2/3 bins of seedless watermelon 60's. *See* CX-3A. Respondent prepared the following account of sales for the watermelons:

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Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		12	20	22	54
Price Sold P/B		\$170	\$230	\$225	\$11,590.00
Bins Dumped \$20 P/B	6				(\$120.00)
Wash and Repack \$10.50 P/B		12	20	22	(\$567.00)
Trucking Deduct \$103 P/B	6				(\$618.00)
Trucking from AZ to NJ					(\$6,200.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$813.00)
Lumper Fee \$2.50 P/B		12	20	22	(\$135.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,080.00)

All Sweet's Return \$2,057.00

See RX-1 at 3. For this shipment, Complainant issued invoice number P-0006 billing Respondent for 41,100 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,275.00. See CX-3.

12. On May 9, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 15 2/3 bins of seedless watermelon 40's, 10 2/3 bins of seedless watermelon 45's, and 35 2/3 bins of seedless watermelon 60's. See CX-11A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		10	11	32	53
Price Sold P/B		\$160	\$230	\$225	\$11,330.00

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Bins Dumped \$20 P/B		2	2	3	(\$140.00)
Wash and Repack \$10.50 P/B		10	11	32	(\$556.50)
Trucking Deduct \$107.50 P/B		2	2	3	(\$752.50)
Trucking from AZ to NJ					(\$6,450.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$809.50)
Lumper Fee \$2.50 P/B		10	11	32	(\$132.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,060.00)

All Sweet's Return \$1,429.00

See RX-1 at 11. For this shipment, Complainant issued invoice number P-0014 billing Respondent for 41,920 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,480.00. *See* CX-11.

13. On May 10, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 12 2/3 bins of seedless watermelon 40's, 15 2/3 bins of seedless watermelon 45's, 6 2/3 bins of seedless watermelon 60's, and 27 2/3 bins of seedless watermelon #2's. *See* CX-12A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		12	15	6	33
Price Sold P/B		\$160	\$230	\$225	\$6,720.00
Bins Dumped \$20 P/B	27				(\$540.00)

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Wash and Repack \$10.50 P/B		12	15	6	(\$346.50)
Trucking Deduct \$105 P/B	27				(\$2,835.00)
Trucking from AZ to NJ					(\$6,300.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$466.50)
Lumper Fee \$2.50 P/B		12	15	6	(\$82.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$660.00)

All Sweet's Return (\$4,510.50)

See RX-1 at 12. For this shipment, Complainant issued invoice number P-0015 billing Respondent for 42,320 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,580.00. *See* CX-12.

14. On May 12, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 18 2/3 bins of seedless watermelon 40's, 18 2/3 bins of seedless watermelon 45's, and 24 2/3 bins of seedless watermelon 60's. *See* CX-10A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		16	15	22	53
Price Sold P/B		\$160	\$230	\$225	\$10,960.00
Bins Dumped \$20 P/B		2	3	2	(\$140.00)
Wash and Repack \$10.50 P/B		16	15	22	(\$556.50)

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Trucking Deduct \$103 P/B		2	3	2	(\$721.00)
Trucking from AZ to NJ					(\$6,200.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$770.50)
Lumper Fee \$2.50 P/B		16	15	22	(\$132.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,060.00)

All Sweet's Return \$1,379.50

See RX-1 at 10. For this shipment, Complainant issued invoice number P-0013 billing Respondent for 42,480 pounds of watermelons at \$0.25 per pound, for a total invoice price of \$10,620.00. *See* CX-10.

15. On May 13, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 30 bins of seedless watermelon 8's and 27 bins of seedless watermelon 4's. *See* CX-13A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		16	3	9	28
Price Sold P/B		\$160	\$230	\$225	\$5,275.00
Bins Dumped \$20 P/B	29				(\$580.00)
Wash and Repack \$10.50 P/B		16	3	9	(\$294.00)
Trucking Deduct \$109 P/B	29				(\$3,161.00)
Trucking from AZ to NJ					(\$6,200.00)

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Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$358.00)
Lumper Fee \$2.50 P/B		16	3	9	(\$70.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$560.00)

All Sweet's Return (\$5,948.00)

See RX-1 at 13. For this shipment, Complainant issued invoice number P-0016 billing Respondent for 39,445 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,255.70. See CX-13.

16. On May 14, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 57 2/3 bins of seedless watermelons. *See CX-14A.* Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		34	20	3	57
Price Sold P/B		\$160	\$230	\$225	\$10,715.00
Bins Dumped \$20 P/B					\$0.00
Wash and Repack \$10.50 P/B		34	20	3	(\$598.50)
Trucking Deduct \$109 P/B					\$0.00
Trucking from AZ to NJ					(\$6,200.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$719.50)
Lumper Fee \$2.50 P/B		34	20	3	(\$142.50)

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All Sweet Commission P/B		\$20	\$20	\$20	(\$1,140.00)
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All Sweet's Return \$1,914.50

See RX-1 at 14. For this shipment, Complainant issued invoice number P-0017 billing Respondent for 39,225 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,198.50. *See* CX-14.

17. On May 14, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 57 2/3 bins of seedless watermelons. *See* CX-16A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		17	22	21	60
Price Sold P/B		\$160	\$230	\$225	\$12,505.00
Bins Dumped \$20 P/B					\$0.00
Wash and Repack \$10.50 P/B		17	22	21	(\$630.00)
Trucking Deduct \$103 P/B					\$0.00
Trucking from AZ to NJ					(\$6,200.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$879.50)
Lumper Fee \$2.50 P/B		17	22	21	(\$150.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,200.00)

All Sweet's Return (\$3,445.50)

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See RX-1 at 1. For this shipment, Complainant issued invoice number P-0019 billing Respondent for 41,000 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,660.00. See CX-16.

18. On May 16, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 60 2/3 bins of seedless watermelons. See CX-17A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		54			54
Price Sold P/B		\$155	\$230	\$225	\$8,370.00
Bins Dumped \$20 P/B		6			(\$120.00)
Wash and Repack \$10.50 P/B		54			(\$567.00)
Trucking Deduct \$105 P/B					(\$630.00)
Trucking from AZ to NJ					(\$6,300.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$540.00)
Lumper Fee \$2.50 P/B		54			(\$135.00)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,080.00)

All Sweet's Return (\$1,002.00)

See RX-1 at 17. For this shipment, Complainant issued invoice number P-0020 billing Respondent for 42,040 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,930.40. See CX-17.

19. On May 17, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 60 bins of seedless

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watermelon 4's. *See* CX-15A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		42	10	3	55
Price Sold P/B		\$160	\$230	\$225	\$9,695.00
Bins Dumped \$20 P/B	2				(\$40.00)
Wash and Repack \$10.50 P/B		42	10	3	(\$577.50)
Trucking Deduct \$109 P/B	2				(\$218.00)
Trucking from AZ to NJ					(\$6,200.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$634.50)
Lumper Fee \$2.50 P/B		42	10	3	(\$137.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,100.00)

All Sweet's Return \$787.50

See RX-1 at 1. For this shipment, Complainant issued invoice number P-0018 billing Respondent for 39,240 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,202.40. *See* CX-15.

20. On May 17, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 60 2/3 bins of watermelon 40's. *See* CX-19A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
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Bins Sold					0
Price Sold P/B		\$155	\$230	\$225	\$0.00
Bins Dumped \$20 P/B	60				(\$1,200.00)
Wash and Repack \$10.50 P/B					\$0.00)
Trucking Deduct \$105 P/B	60				(\$6,300.00)
Trucking from AZ to NJ	Charged back to truck company for damages				\$2,025.00
Trucking to Customer P/B		\$10	\$16.50	\$16.50	\$0.00
Lumper Fee \$2.50 P/B					\$0.00
All Sweet Commission P/B		\$20	\$20	\$20	\$0.00

All Sweet's Return (\$5,475.00)

See RX-1 at 19. For this shipment, Complainant issued invoice number P-0022 billing Respondent for 41,360 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,753.60. See CX-19.

21. On May 17, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 60 bins of seedless watermelon 60's. See CX-21A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold				45	45
Price Sold P/B		\$155	\$230	\$225	\$10,125.00
Bins Dumped \$20 P/B	15				(\$300.00)

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Wash and Repack \$10.50 P/B				45	(\$472.50)
Trucking Deduct \$107 P/B	15				(\$1,605.00)
Trucking from AZ to NJ					(\$6,400.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$742.50)
Lumper Fee \$2.50 P/B				45	(\$112.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$900.00)

All Sweet's Return (\$407.50)

See RX-1 at 21. For this shipment, Complainant issued invoice number P-0024 billing Respondent for 40,440 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,514.40. See CX-21.

22. On May 17, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 60 bins of seedless watermelon 45's. See CX-22A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold			57		57
Price Sold P/B		\$155	\$230	\$225	\$13,110.00
Bins Dumped \$20 P/B	3				(\$60.00)
Wash and Repack \$10.50 P/B			57		(\$598.50)
Trucking Deduct \$105 P/B	3				(\$321.00)

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Trucking from AZ to NJ					(\$6,400.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$940.50)
Lumper Fee \$2.50 P/B			57		(\$142.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,140.00)

All Sweet's Return \$3,507.50

See RX-1 at 22. For this shipment, Complainant issued invoice number P-0025 billing Respondent for 41,460 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,779.60. See CX-22.

23. On May 18, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 30 bins of seedless watermelon 40's and 30 bins of seedless watermelon 45's. See CX-23A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		30	10		40
Price Sold P/B		\$155	\$230	\$225	\$6,950.00
Bins Dumped \$20 P/B	20				(\$400.00)
Wash and Repack \$10.50 P/B		30	10		(\$420.00)
Trucking Deduct \$105 P/B	20				(\$2,100.00)
Trucking from AZ to NJ					(\$6,300.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$465.00)
Lumper Fee \$2.50 P/B		30	10		(\$100.00)

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All Sweet Commission P/B		\$20	\$20	\$20	(\$800.00)
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All Sweet's Return (\$3,635.00)

See RX-1 at 23. For this shipment, Complainant issued invoice number P-0026 billing Respondent for 41,820 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,873.20. See CX-23.

24. On May 18, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 30 2/3 bins of seedless watermelon 60's, 27 2/3 bins of seedless watermelon 40's, and 3 2/3 bins of seedless watermelon 45's. See CX-20A. Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold		3	21	29	53
Price Sold P/B		\$155	\$230	\$225	\$11,820.00
Bins Dumped \$20 P/B	7				(\$140.00)
Wash and Repack \$10.50 P/B		3	21	29	(\$556.50)
Trucking Deduct \$105 P/B	7				(\$735.00)
Trucking from AZ to NJ					(\$6,300.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$855.00)
Lumper Fee \$2.50 P/B		3	21	29	(\$132.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$1,060.00)

All Sweet's Return \$2,041.50

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See RX-1 at 20. For this shipment, Complainant issued invoice number P-0023 billing Respondent for 40,660 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,571.60. *See CX-20.*

25. On May 18, 2013, Complainant shipped from loading point in Nogales, Arizona, to Respondent in Howell, New Jersey, 60 bins of seedless watermelon 60's. *See CX-18A.* Respondent prepared the following account of sales for the watermelons:

Account of Sales	Dumps	40ct	45ct	60ct	Total
Bins Sold			45		45
Price Sold P/B		\$155	\$230	\$225	\$10,350.00
Bins Dumped \$20 P/B	15				(\$300.00)
Wash and Repack \$10.50 P/B			45		(\$472.50)
Trucking Deduct \$105 P/B	15				(\$1,575.00)
Trucking from AZ to NJ					(\$6,300.00)
Trucking to Customer P/B		\$10	\$16.50	\$16.50	(\$742.50)
Lumper Fee \$2.50 P/B			45		(\$112.50)
All Sweet Commission P/B		\$20	\$20	\$20	(\$900.00)

All Sweet's Return (\$52.50)

See RX-1 at 18. For this shipment, Complainant issued invoice number P-0021 billing Respondent for 39,820 pounds of watermelons at \$0.26 per pound, for a total invoice price of \$10,353.20. *See CX-18.*

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26. The informal complaint was filed on August 13, 2013, which is within nine months from the date the cause of action accrued.

Conclusions

The Complainant and Respondent agree that Complainant sold to Respondent 23 loads of watermelons, by oral contract, for shipment from the state of Arizona to Respondent's place of business in Howell, New Jersey. The 23 loads were shipped on or between April 20, 2013, and May 18, 2013. In dispute are the terms of the agreement. Complainant alleges that the sales were for an agreed upon set price of \$0.25 and \$0.26 per pound as indicated on its invoices, which Complainant's Ramin Namvar states were timely sent to Respondent. *See* ROI Ex. A, 2-25; Tr. 41: 13-14, 70: 2-20. Respondent alleges that the transactions were on a price after sale basis and states it did not receive Complainant's invoices until mere days before Complainant filed its informal complaint. *See* Tr. 129: 3-12, 130: 18-19, 155: 9-13.

Where the parties put forth affirmative but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish his allegation by a preponderance of the evidence. *Vernon C. Justice v. Eastern Potato Dealers of Maine, Inc.*, 30 Agric. Dec. 1352, 1356 (U.S.D.A. 1971); *Harland W. Chidsey Farms v. Bert Guerin*, 27 Agric. Dec. 384, 386 (U.S.D.A. 1968). Complainant's allegation that the watermelons were sold to Respondent at the prices reflected on its invoices is supported only by the testimony of its Vice President, Mr. Ramin Namvar (Tr. 40: 2-20), which is refuted by the testimony of Respondent's President, Mr. Charles Pagano (Tr. 129: 3-22), and the copies of its invoices, which Respondent states it did not receive until just before the informal complaint was filed. (Tr. 130: 13-19). Since the informal complaint was filed on August 13, 2013, this would mean that Respondent did not receive the invoices until several months after the transactions took place.

As Respondent has refuted Complainant's testimony concerning a price agreement for the watermelons, and Complainant has not established by a preponderance of the evidence that it sent invoices to Respondent at the time of the transactions that were received by Respondent without objection, we conclude that Complainant has failed to sustain its burden

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to prove that Respondent agreed to purchase the subject watermelons at the prices invoiced.

As we mentioned, Respondent asserts that the price terms of the transactions were price after sale. The term “price after sale” is not defined in either the Uniform Commercial Code or the Act and Regulations (Other Than Rules of Practice) under the Act (7 C.F.R. § 46.43(j)). It is considered a subcategory of the “open price term” (U.C.C. § 2-305(1)),¹ and is generally understood as meaning that the parties will agree on a price following the prompt resale of the produce. *See Eustis Fruit Co., Inc. v. The Auster Co., Inc.*, 51 Agric. Dec. 865, 877 (U.S.D.A. 1991). If the parties are unable to agree upon a price, U.C.C. § 2-305(1) provides that the price shall be a reasonable price at the time for delivery.

Respondent admittedly purchased the 23 loads of watermelons in question from Respondent, and the record establishes that the parties failed to agree upon a price. Therefore, it matters not whether the parties specifically agreed that the watermelons were sold “price after sale.” Where there is a purchase agreement and a failure to reach an agreement on price, the buyer is liable to the seller for a reasonable price. (U.C.C. § 2-305(1)). Accordingly, Respondent is liable to Complainant for the reasonable value of the watermelons it purchased and accepted.

To determine the reasonable value of the watermelons, we refer to relevant USDA Market News reports.² *Idaho Bonded Produce & Supply Co. v. Farm Market Service, Inc.*, 42 Agric. Dec. 1679, 1682 (U.S.D.A.

¹ *See Well Pict, Inc. v. Ag-West Growers, Inc.*, 39 Agric. Dec. 1221, 1227-28 (U.S.D.A. 1980). U.C.C. section 2-305(1) states “the parties if they so intend can conclude a contract for sale even though the price is not settled.” 38 U.C.C. § 2-305(1).

² While we have held that there are instances where a detailed account of sale provided by the receiver may provide a better measure of reasonable value than USDA Market News reports, such as when the produce is in poor condition (*see M. Offutt Co. v. Caruso Produce, Inc.*, 49 Agric. Dec. 596, 605 (U.S.D.A. 1990)), Respondent did not submit a USDA inspection or any other independent evidence showing the condition of the subject watermelons; also, the accounts of sale submitted by Respondent (*see* RX-1 at 1-23) do not provide a description of each individual sale (date, quantity sold and price), and therefore lack sufficient detail to be accepted as evidence of the reasonable value of the watermelons. *Supreme Berries, Inc. v. McEntire*, 49 Agric. Dec. 1210, 1217 (U.S.D.A. 1990).

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1983). The terminal price reports for New York City, the nearest reporting location to Respondent, do not list prices for 40, 45, and 60-count watermelons originating from Mexico during the time period in question. Alternatively, we refer to the shipping point price report for watermelons crossing the U.S./Mexico border through Nogales, Arizona. The reports issued during the time period in question show that between April 30 and May 6, 2013, 24-inch bins of seedless watermelons, 35 to 60-count, were mostly selling for \$0.22 per pound. From May 7 to May 10, 2013, the prevailing price for the same watermelons decreased to \$0.20 to \$0.22 per pound, and from May 13 to May 17, 2013, the price decreased again to \$0.20 per pound.

Complainant submitted into evidence a copy of a fax cover sheet received from Respondent's Charles Pagano on May 22, 2013, attached to which is a table listing the 23 loads of watermelons in question and showing the ship weight, received weight, and the quantity of #2 watermelons received in each shipment, if any. *See* Exhibit F Page 1 and Page 2 of 2. The table lists received weights totaling 928,901 pounds, of which 82,695 pounds is designated as "#2's/Garbage." For the remaining 846,206 pounds of watermelons, the document states these watermelons needed to be washed and repacked at a cost of \$0.015 per pound, or a total of \$12,693.09 (846,206 pounds at \$0.015 per pound).

In reference to this document, Complainant's Ramin Namvar testified at hearing, "[h]e (Charles Pagano) agreed to all the invoices, less all the deductions he had on that exhibit, based on the prices that were invoiced." *See* Tr. 41: 14-17. Further, when asked "[w]as All Sweet entitled to a credit of some sort?" Mr. Namvar answered, "I told you yes" (*see* Tr. 50: 4-6); and when Mr. Namvar was asked "what was the credit that they were entitled to?" Mr. Namvar answered "82,000 pounds." *See* Tr. 50: 7-9. This is apparently in reference to the 82,695 pounds of watermelons that Respondent referred to as "#2's/Garbage" on the document in question. With respect to the charge for washing and repacking, Mr. Namvar stated "you (Charles Pagano) had told me that every melon needed to be washed, re-packed at labor cost of .105 per pound."³ All Sweet will be needing \$12,693.09 re-packing and shipping these melons." *See* Tr. 170: 11-15.

³ While the hearing transcript describes the repacking cost as ".105" or 10 and a half cents per pound, the parties testify that the cost was a penny and a half (*see*

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While Mr. Namvar asserts in Complainant’s post-hearing brief that the “claimed expenses for washing and claimed deductions for allegedly dirty loads should be disallowed” (*see* CB at 3), Mr. Namvar did not, at any time during the hearing, indicate that he objected to these charges. Rather, Mr. Namvar’s testimony at hearing indicates that he submitted the document in question listing these charges to establish that Respondent made no claim with respect to the balance of the watermelons, thereby creating the presumption that those watermelons were received in good condition. *See* Tr. 174: 8-19. In so doing, Mr. Namvar also indicated that he was in agreement with the losses and charges listed on this document. Therefore, we will not entertain his assertion made post-hearing, when Respondent had no opportunity for rebuttal, that the claimed deductions should be disallowed.

Assigning a reasonable value to the watermelons using the f.o.b. shipping point prices reported by USDA Market News, and allowing the deductions just mentioned, we arrive at the following:

INV/PO Number	Date	LBS. Received	Price/LB	Total
P-0007/31134	4/30/2013	40655	\$0.22	\$8,944.10
P-0005/31132	5/01/2013	39634	\$0.22	\$8,719.48
P-0008/31135	5/01/2013	40198	\$0.22	\$8,843.56
P-0009/31136	5/03/2013	39811	\$0.22	\$8,758.42
P-0011/31138	5/03/2013	40420	\$0.22	\$8,892.40
P-0010/31137	5/04/2013	41922	\$0.22	\$9,222.84
P-0004/31131	5/06/2013	25230	\$0.22	\$5,550.60
		11430 #2	\$0.00	\$0.00
P-0012/31139	5/07/2013	41779	\$0.21	\$8,773.59
P-0006/31133	5/07/2013	40495	\$0.21	\$8,503.95
P-0014/31146	5/09/2013	41456	\$0.21	\$8,705.76
P-0015/31150	5/10/2013	41801	\$0.21	\$8,778.21
P-0013/31145	5/12/2013	41971	\$0.20	\$8,394.20
P-0016/31151	5/13/2013	18317	\$0.20	\$3,663.40

Tr. 169:17-22), and the total claim for repacking of \$12,693.09 represents 846,206 pounds at \$0.015 per pound.

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		20225	#2	\$0.00	\$0.00
P-0017/31152	5/14/2013	38782		\$0.20	\$7,756.40
P-0019/31154	5/14/2013	40218		\$0.20	\$8,043.60
P-0020/31155	5/16/2013	41669		\$0.20	\$8,333.80
P-0018/31153	5/17/2013	39088		\$0.20	\$7,817.60
P-0022/31157	5/17/2013	41360	#2	\$0.00	\$0.00
P-0024/31159	5/17/2013	40440		\$0.20	\$8,088.00
P-0025/31160	5/17/2013	40877		\$0.20	\$8,175.40
P-0026/31162	5/18/2013	41452		\$0.20	\$8,290.40
P-0023/31158	5/18/2013	40409		\$0.20	\$8,081.80
P-0021/31156	5/18/2013	29582		\$0.20	\$5,916.40
		9680	#2	\$0.00	\$0.00
TOTAL					\$176,253.91
LESS: Washing and Repacking (846,206 LBS @ \$0.015/LB)					(\$12,693.09)
NET AMOUNT DUE					\$163,560.82

Since the f.o.b. shipping point prices reported by USDA Market News do not include freight, it is unnecessary to deduct freight from the prices listed above. Also, unlike terminal market prices, the prices reported at shipping point do not include a profit markup for the buyer who purchased the produce at shipping point. Therefore, no further deduction for Respondent's profit and handling is warranted. Accordingly, we find that that Respondent owes Complainant \$163,560.82 for the 23 loads of watermelons that it purchased and accepted from Complainant.

Respondent asserts in its post-hearing brief that "the sum of \$20,000.00 must be credited to Respondent for a check in the amount of \$20,000.00 payable to Complainant as a measure of 'good faith' near the time this reparation action was commenced," and that "[t]he \$20,000.00 payment was neither denied nor refuted by the Complainant at the hearing." *See* RB at 8. Respondent references page 126, lines 14-21, of the hearing transcript in connection with this assertion. *See* RB at 8. This reference is to testimony from Charles Pagano wherein Mr. Pagano states, in pertinent part: "He (Ramin Namvar) did come down about six weeks later, came down, said, I do need some money, we didn't negotiate price yet, but I did give him a check for \$20,000 in good faith." *See* Tr. 126: 14-17. Mr. Namvar, during his cross-examination of Mr. Pagano did not question Mr. Pagano concerning the alleged payment. Accordingly, we find that the preponderance of the evidence supports Respondent's claim that it paid

ERRATA

\$20,000.00 for the watermelons at issue in this dispute. Therefore, the net amount due Complainant from Respondent for the watermelons is \$143,560.82.

Respondent's failure to pay Complainant \$143,560.82 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the PACA (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 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 Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (U.S.D.A. 2006); Notice of Change in Interest Rate Awarded in Reparation Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

Section 7(a) of the PACA (7 U.S.C. § 499g(a)) states that, after an oral reparation hearing under the PACA, the "Secretary shall order any commission merchant, dealer, or broker, who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any such hearing." Complainant is the prevailing party. Complainant did not submit a claim for fees and expenses, so none will be awarded.

Complainant in this action paid \$500.00 to file its formal Complaint as required by section 47.6(c) of the Rules of Practice (7 C.F.R. § 47.6(c)). Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2

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of the PACA (7 U.S.C. § 499b) 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 \$143,560.82, with interest thereon at the rate of 0.26 of one percent per annum from July 1, 2013, until paid, plus the amount of \$500.00.

Copies of this Order shall be served upon the parties.

—

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: JONATHAN DYER; DREW JOHNSON, a/k/a DREW R. JOHNSON; and MICHAEL S. RAWLINGS.

Docket Nos. 14-0166, 14-0168, 14-0169.

Decision and Order.

Filed May 19, 2017.

PACA-APP.

Stephen P. McCarron, Esq., and Mary Jean Fassett, Esq., for Petitioners.
Charles L. Kendall, Esq., for Respondent.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

Decision Summary

1. Each of these three Petitioners, Jonathan Dyer; and Drew Johnson, also known as Drew R. Johnson; and Michael S. Rawlings, was a Director (and NOT *only nominally* a Director), of Adams Produce Company LLC during at least part of August 8, 2011 through May 18, 2012, when Adams Produce Company LLC violated the Perishable Agricultural Commodities Act (PACA), specifically section 2(4) of the PACA (7 U.S.C. § 499b(4)). Yet none of these three Petitioners was “responsibly connected” within the meaning of section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), because none of these three Petitioners was actively involved in the activities resulting in the PACA violations during August 8, 2011 through May 18, 2012, and none of these three Petitioners was ever an owner of Adams Produce Company LLC which was the alter ego of Chief Executive Officer Scott Grinstead, full name Scott David Grinstead, who was an owner and not only Chief Executive Officer but also a Director with three of six votes. Chief Executive Officer Scott Grinstead, Director with three of six votes, through his crimes and fraud and profligate spending, rendered Adams Produce Company LLC’s financial statements and information false and misleading beginning with 2009 financial statements and information and continuing thereafter, and destroyed Adams Produce Company LLC’s corporate form and made these three Petitioners

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powerless to get Adams Produce Company LLC's suppliers of perishable agricultural commodities paid on time, or at all. Scott Grinstead was the sole owner and operator of Grinstead & Associates, LLC, a 44.7 per cent owner of Adams Produce Company LLC during the PACA violations. Scott Grinstead destroyed and disrupted the corporate form of not only Adams Produce Company LLC, but also Grinstead & Associates, LLC; Scott Grinstead operated both Adams Produce Company LLC and Grinstead & Associates, LLC as if he were the lawless sole proprietor of each of them. Adams Produce Company LLC was the alter ego of its owner Scott Grinstead.

Overview

2. Two factors loom large: (a) the law established by the United States Court of Appeals in *Taylor and Finberg*, 636 F.3d 608 (D.C. Cir. 2011); and (b) the crimes and fraud and profligate spending by Chief Executive Officer Scott David Grinstead, Director with three of six votes, at the expense of, among others:

(i) suppliers of fresh fruit and vegetables to Adams Produce Company LLC owed more than \$10 million not paid when due during August 8, 2011 through May 18, 2012; and

(ii) investors in Adams Produce Company LLC, including CIC Partners with which these 3 Petitioners were affiliated and its wholly-owned subsidiary API Holdings LLC.

3. One paragraph from the twenty-one-page United States Sentencing Memorandum concerning Scott David Grinstead is particularly haunting (PX-3, p. 5):

A large portion of the reduction in income the defendant [Scott David Grinstead] is advancing here is attributable to false and fraudulent accounts receivables that he required be put on Adams Produce's financial statements. He later supported the false accounts receivables with counterfeited and forged confirmation letters. The defendant benefitted from his deceit then. He should not benefit a second time by reducing tax loss now

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based on the removal of fraudulently-included income
from the Adams Produce financial statements.

PX-3, p. 5.

Procedural History

4. The Hearing was held in Dallas, Texas on March 22, 2016; and in Washington, D.C. on August 31, 2016. The Transcript is Tr. 1 - Tr. 317, in two volumes.

5. Four Petitions were consolidated for Hearing; this Decision addresses three of those four Petitions. Each Petitioner requested review of (appealed) the determination by the Director, PACA Division, Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture, that each was “responsibly connected” with Adams Produce Company LLC during August 8, 2011 through May 18, 2012 when Adams Produce Company LLC failed to make full payment promptly of the purchase prices or balances thereof totaling \$10,735,186.81 for fruits and vegetables, all being perishable agricultural commodities.

6. To understand “responsibly connected,” *see* section 1(b)(9) of the Perishable Agricultural Commodities Act, 7 U.S.C. § 499a(b)(9):

(9) The term “responsibly connected” means 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.

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7 U.S.C. § 499a(b)(9).

7. The parties' Updated Stipulation as to Proceedings was filed on June 11, 2015. Petitioners' Exhibits 1 through 26 (PX 1 - PX 26) were admitted into evidence by stipulation. (Tr. 29). Respondent's Exhibits, one volume of Agency Records for each Petitioner, were admitted into evidence (Tr. 11); and Government Exhibit 11 (RX 11) and Government Exhibit 12 (RX 12), were admitted into evidence (Tr. 272).

8. The parties filed briefs: (a) January 13, 2017, Petitioners' Opening Brief; (b) March 10, 2017, AMS's Opposition Brief; and (c) April 10, 2017, Petitioners' Reply Brief.

Parties and Allegations

9. This Decision and Order¹ decides Petitions brought by three non-government parties, each an individual, challenging "responsibly connected" determinations made in 2014 by the PACA Director. [The cases of 4 Petitioners were consolidated for Hearing; I intend to decide the case of the fourth Petitioner in a separate Decision and Order, to be issued in approximately six weeks, because his circumstances are distinct from the three whose Petitions are decided here, who were more similarly situated to one another.] These three Petitioners became Directors of Adams Produce Company LLC in 2010. The fourth Petitioner, Steven C. Finberg, was not a Director but an Officer of Adams Produce Company LLC, who had been hired in 2007 to be Executive Vice President of Adams Produce Company, Inc. (Tr. 223), and who remained an officer, becoming Chief Operating Officer in 2009. Tr. 230; RX-11, p. 3.]

10. The PACA Division is a Division of the Specialty Crops Program, Agricultural Marketing Service, United States Department of Agriculture. The three Petitioners here are Jonathan Dyer; and Drew Johnson, also known as Drew R. Johnson; and Michael S. Rawlings. Each of these three Petitioners was either a "principal" (employee) of, or partner in, CIC Partners, a private equity investment firm that became interested in about

¹ This Decision and Order does *not* address the Petition of Steven C. Finberg, a/k/a Steve Finberg (PACA-APP Docket No. 14-0167), which will be decided separately in approximately six weeks.

2009 in investing in a company named Adams Produce Company, Inc. CIC Partners did accomplish investment, buying out Adams and McCray family members. See PX-7, a letter of intent, dated in February 2010. Adams Produce Company, Inc. created Adams Produce Company LLC, in part to contain the investment. On or about September 29, 2010, CIC Partners through a wholly-owned subsidiary named API Holdings LLC became an investor in Adams Produce Company LLC. Finberg RX-4, pp. 41-93. [The evidence from any of the four cases is available for each case. Tr. 16.] On or about September 29, 2010 is when the three Petitioners here became three of the six Directors of Adams Produce Company LLC.

Findings of Fact

11. This timeline consists of Findings of Fact, with additional Findings of Fact following.

- | | |
|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2009 - | In 2009 the company with which these three Petitioners were affiliated, CIC Partners, had not yet invested in the yet-to- be-formed Adams Produce Company LLC but had begun investigating the predecessor, Adams Produce Company Inc., performing due diligence. |
| 2010 March 1 - | Frost Cummings Tidwell Group, LLC, an outside accounting firm hired by Adams Produce Company Inc. agreed to audit 2009. PX-8, PX-24 (duplicates). |
| 2010 March 11-16 - | Chief Executive Officer Scott David Grinstead had been “cooking the books” to make Adams Produce Company Inc. look more profitable by fraudulently increasing income and had enlisted the help of the Chief Financial Officer John Stephen (“Steve”) Alexander. The email string at PX-9 documents a portion of the fraudulent alterations of the financial statements and information that Chief Executive Officer Scott David Grinstead ordered be done. PX-9. |

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2010 September 29 - CIC Partners, through a wholly-owned subsidiary named API Holdings LLC, invested in Adams Produce Company LLC, oblivious to the fraudulent alterations of the 2009 financial statements and information, which fraud induced it to invest. Finberg RX-4, pp. 41-93.

2011 August 8 through

2012 May 18 - Suppliers of fresh fruit and vegetables were not timely paid by purchaser Adams Produce Company LLC, the overdue amount totaling \$10,735,186.81, according to a Default Decision.

2011 October - Adams Produce Company LLC received a letter from the Department of Justice which advised that DOJ had begun an investigation (“whistle-blower”).

Fulbright & Jaworski was hired to assist in the DOJ investigation of Adams Produce Company LLC, ultimately costing CIC Partners, which had to pay this expense, roughly \$2 million or more. Tr. 112, 117.

2011 November 9 - Petitioner Michael S. Rawlings resigned as a Director of Adams Produce Company LLC. PX-26.

2012 February - Much crime, fraud and profligate spending had been uncovered due to the work of Fulbright & Jaworski and the work of the “Special Committee” comprised of Petitioner Jonathan Dyer and Petitioner Drew Johnson; finally Adams Produce Company LLC CEO Scott Grinstead & CFO Steve Alexander, when separated into different rooms and confronted without the other present, confessed wrongdoing to the “Special Committee.”

2012 March first week, or

mid- to late February - Chief Executive Officer Scott David Grinstead was removed “let go” Tr. 253 (2012 March, first week, per Steven C. Finberg); Tr. 136-37 (2012

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mid- to late February, per Drew Johnson). The damage lived on.

2012 early March - Chief Restructuring Officer (CRO) Tom Donoghue with Deloitte became management of Adams Produce Company LLC.

2012 March 3rd week -\$1 million deposited by CIC Partners, through its wholly-owned subsidiary named API Holdings LLC; and \$1 million deposited by Adams and McCray family members (enough to pay the remainder owed to suppliers of fresh fruit and vegetables, \$1,928,417.74). Tr. 118.

PNC Bank advised by Petitioner Drew Johnson with CRO Tom Donoghue in telephone conference NOT to sweep the money owed to the suppliers of fresh fruit and vegetables; PNC Bank nevertheless took the \$2 million for itself.

2012 April 25 - Bankruptcy filing of Adams Produce Company LLC.

2012 April - Adams Produce Company LLC ceased operations.

12. The profligate spending by CEO Scott Grinstead, using the money of Adams Produce Company LLC as if that money were his personal funds, is strong evidence that Adams Produce Company LLC was the alter ego of Scott Grinstead, full name Scott David Grinstead. Adams Produce Company LLC paid for between \$200,000.00 and \$400,000.00 of personal expenses for Scott David Grinstead during 2011 and early 2012, which Scott David Grinstead charged on his American Express card; then caused Adams Produce to wire funds to American Express in payment; which he falsely promised to reimburse and intentionally did not repay, for clothing, jewelry, personal travel for himself and his family, casino debts, strip clubs, lawn care at his home, and items related to his vacation home. PX-1, PX-2, PX-3.

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13. In contrast, CIC Partners invested \$8.2 million and lost nearly all of it. A settlement with the auditor (*see* Dyer RX 8) returned some money, but then the \$2 million plus paid to Fulbright & Jaworski to assist DOJ used that. Petitioner Drew Johnson testified credibly: “We didn’t take a dime. Once the DOJ gave any indication there was a problem, we never took a dime out of this company. All we did is put money in, and that money went to the banks or it went to pay PACA bills. So all the money we put in, none of it went to us.” Tr. 116-18.

14. Regarding the Board meetings that these three Petitioners attended, CEO Scott Grinstead did 90% of the talking, controlling and communicating the information that the Directors relied on. These three Petitioners were three of six Directors; CEO Scott Grinstead was the only other Director, with three votes. Directors rely on management to give accurate information, but that, of course, was not happening at Adams Produce Company LLC. It was not until about February 2012 that the “Special Committee” was formed (Petitioner Jonathan Dyer and Petitioner Drew Johnson) and started to uncover hard evidence that there were problems. (Petitioner Michael S. Rawlings had already been gone about three months.) Tr. 111-14.

15. BEFORE CIC Partners invested, fraudulent activities were hidden from them. The audit they relied on, of 2009, was not reliable. Sometime before March 1, 2010, Adams Produce Company, Inc. hired Frost Cummings Tidwell Group LLC to audit the Adams Produce Company, Inc. December 31, 2009 balance sheet and the related statements of operations, stockholders’ equity (deficit), and cash flows for 2009. PX-24.

16. BEFORE CIC Partners invested, a number of fraudulent entries regarding 2009 were made and documented with false statements within Adams Produce Company, Inc. by CEO Scott Grinstead, including two Kontos forgeries. These two Kontos forgeries may not have been known to anyone other than CEO Scott Grinstead, except for Adams Produce Company, Inc. CFO Steve Alexander:

- (a) the 2010 forgery by Scott Grinstead on Alex Kontos Fruit Co. letterhead appearing to bear the signature of its President John

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Kontos, falsely promising \$390,000.00 reimbursement to Adams Produce Company. PX-22, p. 2.

- (b) the 2010 forgery by Scott Grinstead on Alex Kontos Fruit Co. letterhead appearing to bear the signature of its President John Kontos, falsely promising \$665,000.00 reimbursement to Adams Produce Company. PX 22, p. 3.

17. Bonus payments to two former employees, Tommy Sundy (\$260,000.00) and Mike Alise (\$312,000.00), were fraudulently reclassified to inflate earnings. This was CEO Scott Grinstead at work again, with the knowledge of CFO Steve Alexander, changing the financial history of 2009. Instead of showing these payments as earnings that Adams Produce Company, Inc. was required to pay, these payments were classified as notes receivable. The auditors, Frost Cummings Tidwell Group, LLC, failed to perform any due diligence on the illegal reclassifications of the Tommy Sundy and Mike Alise bonus payments, which falsely increased earnings by \$572,000.00. PX-9, Tr. 44-49. Tr. 112.

18. CEO Scott Grinstead fabricated fraudulent receivables from other customers besides Kontos, including a \$136,000.00 receivable from Pro Act, a produce vendor to Adams; and a \$113,000.00 receivable from Amber Street Produce Company, another produce vendor to Adams. These fraudulent entries were apparently known to no one within Adams Produce Company, Inc. except CEO Scott Grinstead and CFO Steve Alexander. PX-9.

19. On September 24, 2010, a few days before the closing of the transaction on September 29, 2010, CEO Scott Grinstead and CFO Steve Alexander sent a letter to the auditors, Frost Cummings, stating that all representations regarding the accounting transactions were true and correct, which was of course false. PX-25.

20. It was not until about February 2012 that the fraudulent altering of 2009 financial statements and information became known to the "Special Committee" comprised of Petitioner Jonathan Dyer and Petitioner Drew Johnson. The work of Fulbright & Jaworski in uncovering a whole other set of fraud, the fraud against the United States, referred to as the "Tom

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Lange” or DOJ investigation, was helpful; but much of the fraud against Adams Produce Company LLC (including fraud against investor CIC Partners through its wholly-owned subsidiary named API Holdings LLC), would not have been found except for the work by Petitioner Jonathan Dyer and Petitioner Drew Johnson. Not counting the fraud against the United States, the fraud against the investors in Adams Produce Company LLC began with about \$2 million in fraudulent mis-statement of 2009 earnings.

21. Each of the three Petitioners here, Jonathan Dyer; and Drew Johnson, also known as Drew R. Johnson; and Michael S. Rawlings was a Director of Adams Produce Company LLC during a portion of the August 8, 2011 through May 18, 2012 period when Adams Produce Company LLC failed to pay produce sellers timely. Each had become a Director of Adams Produce Company LLC at its inception, on or about September 29, 2010 (RX 5, Tr. 36), after having taken part in a due diligence evaluation without realizing that the financial audit of Adams Produce Company, Inc.’s 2009 performance relied on false and fraudulent accounts receivable and notes receivable that CEO Scott Grinstead had required be put on Adams Produce Company, Inc.’s 2009 financial statements, which false accounts receivable and notes receivable were later supported by counterfeited and forged confirmation letters and other false documents created by CEO Scott Grinstead. On November 9, 2011, Petitioner Michael S. Rawlings stopped being a Director of Adams Produce Company LLC. PX 26. At the end of April 2012, when Adams Produce Company LLC ceased operations after filing bankruptcy, Petitioner Jonathan Dyer and Petitioner Drew Johnson stopped being Directors. Adams Produce Company LLC’s suppliers of perishable agricultural commodities were paid all but \$1,928,417.74 before the Complaint in PACA-D Docket No. 13-0284 was filed on June 28, 2013, as stated in paragraph III of that Complaint.

22. On or about September 29, 2010, at the formation of Adams Produce Company LLC, each the three Petitioners here was tasked by CIC Partners to be a Director of Adams Produce Company LLC, in part to oversee the investment to Adams Produce Company LLC: \$7-1/2 million of CIC Partners’ money, invested through a wholly-owned subsidiary API Holdings, LLC; plus \$3-1/2 million borrowed from PNC Bank on a term

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note. Tr. 36. Each was a Director with one of six votes; Director Scott Grinstead held the other three of six votes.

23. In or about October 2011, the United States Department of Justice (DOJ) delivered a letter to Adams Produce Company LLC, advising that it was conducting a fraud investigation. Had it not been for a “whistle-blower,” DOJ would not have known to investigate, and the Directors of Adams Produce Company LLC would not have known to investigate. Well, one Director knew: Scott Grinstead knew. Scott Grinstead was a Director; in fact, he was the equivalent of 3 Directors. But none of these 3 Petitioners knew or could have known. Scott Grinstead was the equivalent of three Directors because he had three votes to cast. He was authorized to appoint up to two other Directors, but he chose to retain the authority himself.

24. To assist the Department of Justice in its investigation of Adams Produce Company LLC, CIC Partners paid into Adams Produce Company LLC the more than \$2 million paid to Fulbright & Jaworski. Tr. 112, 117.

25. Petitioner Jonathan Dyer was an employee, a principal, not a partner, in CIC Partners. Tr. 32, Tr. 199. Petitioner Drew Johnson was a partner in CIC Partners. Tr. 120. Petitioner Michael S. Rawlings was a partner in CIC Partners. Tr. 199.

26. During the telephone conference with PNC Bank and the Chief Restructuring Officer (CRO) Tom Donoghue, Petitioner Drew Johnson made it clear to management and lenders what the PACA statutes were, and that all the produce sellers needed to be paid in accordance with their contracts. All the money (the new \$2 million, one-half provided by former owners Adams and McCray, and the other half provided by the parent company of API Holdings LLC, CIC Partners) needed to go in to assure liquidity to pay PACA. Nevertheless, the PNC Bank swept the accounts. Tr. 126.

Discussion

27. Every witness was credible, and Drew Johnson was especially knowledgeable and persuasive: Drew Johnson’s testimony was consistent with the documents in evidence and helpful to me in understanding how

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Scott David Grinstead could so quickly destroy, without more people being aware, the Adams Produce company with 400 employees that had operated continuously for more than 100 years.

28.Scott Grinstead accomplished his crimes and fraud and profligate spending nearly single-handedly: Grinstead needed the assistance of only Chief Financial Officer John Stephen (“Steve”) Alexander and the auditing firm Frost Cummings Tidwell Group. At the end, after Scott Grinstead had been stripped of his authority and had stopped coming to work, PNC Bank completed the destruction. PNC Bank helped itself to the \$2 million, \$1 million freshly deposited by former owners Adams and McCray and \$1 million freshly deposited by the parent company of API Holdings LLC, CIC Partners. PNC Bank had been warned in a conference call not to sweep that \$2 million and knew the \$2 million was intended to keep the company operating and to pay the suppliers of perishable agricultural commodities. When PNC Bank instead took the \$2 million for itself, Adams Produce was caused to file bankruptcy and cease operations.

29.Hear how Drew Johnson explains it. CIC Partners had been introduced to Scott Grinstead through investments that CIC Partners had made in the food industry. Tr. 107.

Mr. McCarron: All right. And what happened after your introduction with Mr. Grinstead?

Mr. Johnson: We subsequently did extensive diligence to analyze Adams, and met with him over a series of months.

Mr. McCarron: What did that diligence consist of?

Mr. Johnson: We hired third-party firms to meet with management, to assess their capability. We hired a group to do a facilities inspection. We waited for the auditors to finish their audit before we would ever invest, which proved to be a fraudulent audit.

Mr. McCarron: Which proved to be what?

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Mr. Johnson: A fraudulent audit. But we waited for that to transpire because we expected the auditors to verify the financials, which they didn't do.

Mr. McCarron: And who was the auditor?

Mr. Johnson: A firm named Frost Cummings Tidwell.

Tr. 107. *See* Johnson RX 8.

30. Hear how Drew Johnson explains the 6 Directors of the newly formed Adams Produce Company LLC Board. Tr. 127-29. *See* Johnson RX 5 (67 page agreement).

Judge Clifton: RX 5. Back to page 28 and on to page 29.

Mr. Johnson: Uh-huh.

Judge Clifton: So, right here in this agreement, it says that the CIC directors would be -- and what does it say?

Mr. Johnson: Drew Johnson, Jonathan Dyer, Michael Rawlings.

Judge Clifton: All right. And on the previous page, it says that there would be six directors.

Mr. Johnson: Uh-huh.

Judge Clifton: But now that we get to RX 5, page 29, it tells about the other three, and what does it tell us about those Grinstead directors?

Mr. Johnson: That he can appoint them at such time as he wishes, or that he can use those votes for himself.

Judge Clifton: Right. So the initial Grinstead director will be Scott Grinstead.

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Mr. Johnson: Uh-huh.

Judge Clifton: Until such time as he appoints additional Grinstead directors, Scott Grinstead is entitled to cast three votes.

Mr. Johnson: Yap.

Judge Clifton: So it's not as unbalanced as I thought.

Mr. Johnson: Nope.

Judge Clifton: It's not a matter of four to one or three to one, it's –

Mr. Johnson: I had a note here to talk to you about that, because you asked earlier.

Judge Clifton: I'm glad that Mr. Kendall led us to that, so now I understand that part.

Mr. Johnson: And it's now presumably clear why he didn't want to appoint somebody else, because he wanted to exercise his own votes.

Judge Clifton: Yes.

Mr. Johnson: When you're perpetrating a fraud, it's a little easier to do that when you control them.

Tr. 127-29.

31.Hear how Drew Johnson explains his role as a Director of Adams Produce Company LLC. Tr. 110-119.

Mr. McCarron: So, now, after the investment was made, in September of 2010, what was your role in that -- in the company?

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Mr. Johnson: Initially, my role, I would describe as standard role for any director of a privately held company. So, we reviewed information that management supplied us, asked them questions about compliance with various laws and financial issues. My role changed materially once we had the DOJ letter. So, until the DOJ letter, I would say my responsibilities were consistent with a normal board member, which were, you know, limited board meetings. Subsequent to the DOJ letter, my role significantly changed.

Mr. McCarron: Right. And in what respect did your role change? What did you do?

Mr. Johnson: Well, at that point, it became clear that the audit and the management had both made fraudulent, negligent decisions, and so we could not rely on either management nor the audit findings, so we brought in new management, we fired the old management, we took a very active role.

Mr. Johnson: I say "we," Jonathan probably did more -- essentially, more work than I did, but we brought in new people, forensic accountants to try to get to the bottom of the problems. We met with Sundy on the lease, we tracked down the Kontos fraudulent receivable to try to understand the nature of the problems.

Mr. McCarron: So, when was -- when did you learn about the problem, initially?

Mr. Johnson: Well, we certainly were alerted to a potential problem in October, when we got the DOJ letter. At the time, management continued to maintain their innocence, and we really had no basis for knowing what was going on at that point.

Mr. McCarron: Wait. Can you explain that a little bit more?

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Mr. McCarron: At the time the notice came from DOJ, what did Grinstead tell you? Did he continue to say there was no fraud?

Mr. Johnson: Yes, he maintained his innocence really until -- we stopped talking to Grinstead -- the DOJ's case was about the contracting with the government, and I really still to this day don't know much about that. But because that investigation was going on, we started to ask other questions and scrutinize accounts generally, looking for that fraud or any fraud, and we found other fraud that wasn't part of the DOJ scope. That fraud included the Kontos forged receivable, the Sundry and Alise re-bookings and mis-bookings. So, we found that because we started to dig and asks questions. That really wasn't the DOJ's scope, even though they ended up using our findings for their prosecution. Does that answer your question?

Mr. McCarron: It does. So, you hired Fulbright, and how much did you pay Fulbright, do you recall?

Mr. Johnson: Exceptionally a lot. If I had to guess, it was over \$2 million.

Mr. McCarron: All right. Now, after the October --

Mr. Johnson: You asked when I found out about that. I would say that we had -- our suspicions were raised when the DOJ started -- sent us a letter, we started to dig and ask questions. I would say by February of 2012, we started to uncover specific, hard evidence that there was problems.

Mr. McCarron: And after this October surprise from the DOJ, did you -- and you started -- and Fulbright started to go into the records, what was your contact, if any, with the auditing company, Frost auditing?

Mr. Johnson: Well, it became very clear quickly that they had violated their duties, so we didn't have much discussion with them.

Mr. McCarron: All right. Now, can you just give us a brief overview of these board meetings? How many did you have, to your recollection?

Mr. Johnson: Oh, maybe four, if I had to guess.

Mr. McCarron: All right. And what happened in those meetings?

Mr. Johnson: Well, in a board meeting, you're relying on management to provide you information, you're not auditing their information, you expect, you know, an auditor and the management team to feed you accurate information. So, we would get a report on operations, on finance, on new companies that -- they wanted to buy more companies. Most of that information was controlled and communicated by Scott Grinstead. I would say he did 90 percent of the talking in these meetings.

Mr. McCarron: And what did he tell you at the meetings, in terms of the health of the company and how things were going?

Mr. Johnson: Well, as has been well chronicled, Scott's a master of manipulation, so he thought things were going great, and he was going to take over the world.

Mr. McCarron: Now, after the investigation that you started with Fulbright, what role did you take, as a board member, at that point? Were there still other meetings after Fulbright came on board in October or November?

Mr. Johnson: Other meetings or other board meetings?

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Mr. McCarron: Board meetings.

Mr. Johnson: No. Because at that point, the board was comprised of somebody who we knew was a fraud, and we were advised by the lawyers that having a meeting with him was probably not a good idea.

Mr. McCarron: I see. All right. But then, did you form some other sort of an entity that was to investigate everything that happened?

Mr. Johnson: Yeah, we formed a special committee, which I believe included Jonathan and me.

Mr. McCarron: And what did you do, as a special committee?

Mr. Johnson: We terminated Scott Grinstead or put him on leave, I guess was the technical term at the time.

Mr. McCarron: When was that?

Mr. Johnson: I don't recall exact date. We also hired outside -- a new -- somebody with accounting background to come in and help ascertain the financial health of the business. We also put -- analyzed the situation to decide if we should put more money in to try to help.

Mr. McCarron: What was the result of that analysis about putting more money in to see if you could salvage the situation?

Mr. Johnson: Well, the barriers to putting more money in were two-fold. One, we wanted the DOJ -- we felt like we were cooperating with the DOJ, providing them actual help in their prosecution, which I think if you'll ask them they would say we were great citizens in helping prosecute Scott. But we wanted them to tell us that they were going after him and that they weren't going to go

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after us, because we couldn't put money into a black hole which would just potentially go away. They, of course, had a hard time doing that, number one. Number two, if we put money in the banks were going to take it. In fact, Counsel here asked if we gave a directive to management to pay PACA vendors instead of others. Management at this time was gone. Scott Grinstead was out of there.

Mr. McCarron: When was this now, just to give an approximate? January? February?

Mr. Johnson: It had to be after January, probably after February, I actually think. I don't recall the exact date. But there was a very specific conversation when we did put money in, we told the lenders, we need you to let us use this for liquidity and to pay PACA. You can't sweep -- you know, we don't want you to sweep this. We don't want to put money in and have you take it all, that's not going to help us. We hard[sic] a hard time getting the lenders to agree to anything in writing. We specifically told them, if you sweep this money, you're sweeping it at the expense of PACA vendors, that's on you, that's your liability, it's not us. We don't have control over the account. The bank had control. The bank swept the accounts. So, when we put money in, we'd hope that Tom O'Donoghue, who was in there as a chief restructuring officer, would use it to pay vendors and figure out how to keep the lights on so that we didn't go into bankruptcy, because if we go into bankruptcy, of course, no PACA guys are going to get paid. So, we specifically gave direction to PNC, do not sweep this. So the people you should be talking to, in my opinion, that's -- USDA Counsel -- is go talk to PNC. They took the money, not us. We didn't take a dime. Once the DOJ gave any indication there was a problem, we never took a dime out of this company. All we did is put money in, and that money went to the banks or it went to pay PACA bills. So all the money we put in, none of it went to us. It all went to PACA or it went to the banks.

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And if the banks took it instead of PACA, that's their problem, not mine.

Mr. McCarron: So, how much money did CIC lose in this deal?

Mr. Johnson: I think we invested \$8.2 million, and we lost nearly all of it. We got a little bit back from the settlement. Well, we invested 8.2, we got back some, but then had to pay Fulbright two plus million. So whatever we got back in settlement from the auditors who defrauded us and from the sellers who defrauded us, all that money basically went back to pay the lawyers, which we funded the DOJ's investigation.

Mr. McCarron: Explain that a little bit more, when you say that you helped fund the DOJ's investigation.

Mr. Johnson: We paid Fulbright. Fulbright then spent money with us going through all the e-mails, and we spent all that time and money. That money was used to uncover the fraud, which then the DOJ used in their prosecution of Grinstead. It's all in the sentencing memo.

Mr. McCarron: Now, so who funded the investigation by Fulbright to uncover –

Mr. Johnson: Technically, the company did, but with the money that we put in.

Mr. McCarron: When you say "we," who do you mean by "we"?

Mr. Johnson: A combination of CIC, the sellers, who at that point realized that they had misrepresented, whether intentionally or not, I don't know, but the sellers signed documents saying that they didn't -- that the financials they were giving us were accurate. That proved not to be true. So, the sellers put in money, as did we, and the

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company was making money every day on commercial accounts, not government accounts, and that money also got used to pay Fulbright expenses and the DOJ investigation.

Mr. McCarron: So, when you say -- let me just -- so when you say "we," you're including you, as CIC, and Adams and McCray. Are they the families, is that correct?

Mr. Johnson: That's correct.

Mr. McCarron: Now, how much money did they put in, Adams and McCray, to try to salvage the investment that clearly was fraudulent from the beginning?

Mr. Johnson: I don't recall the exact number.

Mr. McCarron: And then, after Fulbright did the investigation and Grinstead was charged with all these crimes -- and have you seen the indictment and the plea agreement --

Mr. Johnson: Yes. And I was present at the sentencing because I was a witness against Grinstead.

Mr. McCarron: And what was the nature of your testimony at the criminal sentencing?

Mr. Johnson: That he had defrauded us out of all of our money.

Mr. McCarron: And after PNC swept the account, was it then that the company filed for bankruptcy?

Mr. Johnson: Yes.

Tr. 110-119.

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32. Hear Drew Johnson at the end of his testimony, analyzing AMS's "responsibly connected" claim against him for his work at Adams Produce Company LLC. Tr. 132-37.

Mr. Johnson: Well, responsibly connected, I got that one, the alter ego issue. And I don't know where alter ego and fraud overlap, and so forth. I can say this, I was a victim, personally. I lost a significant amount of money, so did my partners and those people whose money I represent. We all lost significant amounts of money because of the fraud here, not just by Grinstead but by an auditing firm. I think I did everything any reasonable person would do in my position. I haven't heard anybody argue that somehow I wasn't fiscally responsible, as brought up by Counsel Kendall. I believe we were beyond fiscally responsible. In fact, I would argue we put, you know, money in a situation where very few people would because we were trying to help a situation. And, in fact, PACA people were better off because of our actions, not worse. We didn't know the fraud. It took our money to uncover it. Once we did, we were still putting money in, which some of which went to PNC but some of it did go to the PACA payables. So I would assert the PACA people were better off for our actions, not worse. So, I feel like here I am, I lost enough -- lost a lot of money, that was painful enough, that had reputational impact, et cetera. We aided the DOJ in their investigation, and I would suggest, if you care, talk to the DOJ lawyer, who I think would say, yeah, those guys were great, did everything we asked them to do and more. All the forgeries, all the mis-bookings, that was found by us, not the DOJ. The DOJ was off working on the Tom Lange stuff, which I don't know what happened with that. All I can tell you is, I think we were responsible stewards of our duties and discharging them and getting facts in front of the DOJ to aid their efforts. So, it's a bit offensive to me to have the federal government, who I think should send me a thank you for helping victims get paid, instead of trying to sanction me for behavior that I think is beyond

reproach. My reputation has already been besmirched by a fraudulent investor. I did everything I could to help the government. I find it offensive that now, on top of that, my reputation be further besmirched by sanctioning me, when all I did is do everything a responsible person would do and more. Most people would have ran for the hills and said, fine, DOJ, run your own investigation, good luck, because we'd already lost our money. We put in more money. We tried to save the company. We tried to save the employees' jobs. The commercial business was a legitimate business. We were hoping somehow we could keep it going. It didn't work. So, I don't understand how all this law stuff works, but all I know is, we did everything any responsible person would do. We discharged our duties the best we knew how. I lost a lot of money and a lot of time, and I think the government and the PACA people should be thanking me, not sanctioning me.

Judge Clifton: If it hadn't been for your work, Grinstead would not have been removed, and you would not have brought in the Deloitte management.

Mr. Johnson: Absolutely. And I think the DOJ's case would have been a lot weaker. The smoking gun was the forgery that we found. I don't know even --he pled to the government contract problem, but I don't even know how good that evidence was. The smoking gun was the forgery, which we found. So, I don't even know if Grinstead -- what would have happened to Grinstead. The guy needed to be brought to justice, we helped aid.

Judge Clifton: At what point did the chief financial officer begin to help you, if at any?

Mr. Johnson: Well, never really. He -- we had a point where we started to uncover the problems through our -- the special committee's investigation. We flew Grinstead to see -- and the CFO out. We started scrutinizing them,

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asking questions about payments to their Amex bills, which we scrutinized what's this Amex bill for, et cetera, et cetera.

Judge Clifton: Now, you're talking about the credit card for personal items of Grinstead that the company paid for.

Mr. Johnson: And by that time, we said, this Kontos thing looks fishy to us, let us understand that. So, we were asking these questions. They were both in the room. At one point, we dismissed one and put one in the other room and put one in the other room and kept going. We were there until midnight that night, I'm sure, trying to get to the bottom of this. At that point, the CFO finally said, yeah, I let this go on. We said, why did you not tell us? It's your job. He said, well, I feared for my job. Grinstead was a persuasive but also a tyrant, and I think he put fear in his CFO, and the CFO was reluctant to share these things with us until he was backed into a corner.

Judge Clifton: Was he also let go, when Grinstead was let go?

Mr. Johnson: I don't recall that. Once the CRO came in, I think he determined who he wanted there to help manage it. I don't recall the exact timing.

Judge Clifton: And what was the date on the time line when Grinstead was let go?

Mr. Johnson: I don't know exactly, must have been after February, this February meeting I'm talking about, but shortly thereafter. So if I had to guess, I would guess late February, mid to late February.

Judge Clifton: And that's 2012.

Mr. Johnson: Yes, ma'am.

Tr. 132-37.

33. I conclude that Scott Grinstead, full name Scott David Grinstead, is an owner. There were two owners of Adams Produce Company LLC during the time of the PACA violations: API Holdings, LLC [which was wholly owned by CIC Partners] at 55.3%; and Grinstead & Associates, LLC [which was wholly owned by Scott Grinstead] at 44.7%.

34. Why do I pierce through, to conclude that Scott Grinstead is an owner? - - when I do NOT do the same with API Holdings, LLC? Scott Grinstead, nearly single-handedly, although he needed the help of Chief Financial Officer John Stephen ("Steve") Alexander, is the one who destroyed and disrupted the corporate form. *See Findings of Fact*, paragraphs 11 through 26. *Taylor and Finberg*, 636 F.3d 608 (D.C. Cir. 2011) instructs me not to choose form over substance. *Taylor and Finberg* controls here.

35. The thievery by Scott Grinstead took years and millions of dollars to detect and prove - - I conclude that Mr. McCarron's theory of the case is correct - - Scott Grinstead managed to use Adams Produce as his personal piggy bank despite corporate structure with the intended safeguards of prudent investment employed by the firm with which the 3 Petitioners were associated. Scott Grinstead destroyed and disrupted the corporate form of Adams Produce Company LLC AND of Grinstead & Associates, LLC, each of which he operated as if he were the lawless sole proprietor. Scott Grinstead was an owner.

Conclusions

36. The Secretary of Agriculture has jurisdiction over Petitioner Jonathan Dyer, and over Petitioner Drew Johnson a/k/a Drew R. Johnson, and over Petitioner Michael S. Rawlings, and over the subject matter involved herein.

37. A Default Decision and Order was issued against Adams Produce Company LLC, filed with the USDA Hearing Clerk on November 25, 2013 in PACA-D Docket No. 13-0284, issued by former Chief Judge Peter M. Davenport. That Default Decision can be seen on the USDA / Office of Administrative Law Judges website, currently

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<https://www.oaljdecisions.dm.usda.gov/sites/default/files/DD%20-%20Adams%20Produce%20-%202013-0284.pdf>.

38. I take official notice of the Default Decision and Order identified in paragraph 37 and conclude accordingly that Adams Produce Company LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly during August 8, 2011 through May 18, 2012 of the purchase prices or balances thereof totaling \$10,735,186.81 for fruits and vegetables, all being perishable agricultural commodities that Adams Produce Company LLC purchased, received, and accepted in the course of interstate commerce, as specified in Appendix A to the Complaint in PACA-D Docket No. 13-0284. I conclude further that \$1,928,417.74 remained unpaid when that Complaint was filed on June 28, 2013, as stated in paragraph III of that Complaint and confirmed by Mr. Kendall in the AMS Brief filed March 10, 2017, p. 2.

39. If this were the usual situation, I would find the Directors during August 8, 2011 through May 18, 2012 of Adams Produce Company LLC to be “responsibly connected” (within the meaning of the PACA) to Adams Produce Company LLC, which would subject those Directors to licensing restrictions under section 4(b) of the PACA, 7 U.S.C. § 499d(b); and employment sanctions under section 8(b) of the PACA, 7 U.S.C. § 499h(b). This is NOT the usual situation; here, only one of the Directors, Scott Grinstead, full name Scott David Grinstead, who was also the Chief Executive Officer, was in a position to know of his own crimes and fraud and profligate spending which destroyed Adams Produce Company LLC’s ability to make full payment promptly for the fruits and vegetables it purchased. So long as AMS was effective in subjecting Scott Grinstead to licensing restrictions under section 4(b) of the PACA, 7 U.S.C. § 499d(b); and employment sanctions under section 8(b) of the PACA, 7 U.S.C. § 499h(b), AMS has met its duty under the PACA with regard to the Directors. No other Director of Adams Produce Company LLC need be similarly sanctioned. *See* paragraphs 27 through 35.

40. Each of these three Petitioners, Jonathan Dyer; Drew Johnson a/k/a Drew R. Johnson; and Michael S. Rawlings, was not an officer of Adams Produce Company LLC. Each of these three Petitioners was a Director of Adams Produce Company LLC during a portion of August 8, 2011

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through May 18, 2012, but each of these three Petitioners was NOT “responsibly connected” within the meaning of the PACA to Adams Produce Company LLC for the following reasons. Each of these three Petitioners was NOT actively involved in the activities that resulted in the failures to make full payment promptly to the Adams Produce Company LLC’s suppliers of perishable agricultural commodities. Each of these three Petitioners’ contributions to Adams Produce Company LLC were positive and exemplary and in direct contrast and opposition to the crimes and fraud and profligate spending of Scott Grinstead. Each of these 3 Petitioners was not an owner of Adams Produce Company LLC. There were two owners: API Holdings, LLC [which was wholly owned by CIC Partners] and Grinstead & Associates, LLC [which was only Scott Grinstead]. Scott Grinstead destroyed and disrupted the corporate form of Adams Produce Company LLC AND of Grinstead & Associates, LLC, each of which he operated as if he were the lawless sole proprietor. Scott Grinstead was an owner, and Adams Produce Company LLC was the alter ego of its owner Scott Grinstead.

ORDER

41. The PACA Division Director’s Determinations in July 2014 regarding each of these 3 Petitioners, Jonathan Dyer; Drew Johnson a/k/a Drew R. Johnson; and Michael S. Rawlings, are reversed: each of these 3 Petitioners was NOT responsibly connected with Adams Produce Company LLC during August 8, 2011 through May 18, 2012. Each of these 3 Petitioners, even though he was a Director with 1 of 6 votes of Adams Produce Company LLC from September 28, 2010 through April 2012, was NOT responsibly connected with Adams Produce Company LLC during August 8, 2011 through May 18, 2012, because the crimes and fraud and profligate spending of Scott Grinstead, who was not only Chief Executive Officer but also a Director with 3 of 6 votes, destroyed Adams Produce Company LLC’s ability to make full payment promptly for the fruits and vegetables it purchased and destroyed the corporate form by concealing Scott Grinstead’s activities from the Directors and others; and made Adams Produce Company LLC the alter ego of Scott Grinstead; consequently the corporate form must be disregarded so as not work an injustice. Consequently, NO licensing restrictions under section 4(b) of the PACA, 7 U.S.C. § 499d(b); and NO employment sanctions under

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section 8(b) of the PACA, 7 U.S.C. § 499h(b); will be imposed on any of these 3 Petitioners.

Finality

42. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145; *see* Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, with a courtesy copy to Steven C. Finberg, a/k/a Steve Finberg (PACA-APP Docket No. 14-0167), for whom a Decision and Order will be issued separately.

Miscellaneous Orders & Dismissals

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues 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. Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. 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: <https://www.oaljdecisions.dm.usda.gov/misc-current>.

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No Miscellaneous Orders or Dismissals reported.

DEFAULT DECISIONS

DEFAULT DECISIONS

Editor's Note: This volume continues 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. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. 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: www.dm.usda.gov/oaljdecisions/.

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SOUTHERN MELON DISTRIBUTORS, INC.

Docket No. 16-0185.

Default Decision and Order.

Filed January 30, 2017.

WORLD BEST TROPICAL, LLC.

Docket No. 16-0077.

Default Decision and Order.

Filed February 9, 2017.

ABL FARMS, INC.

Docket No. 16-0184.

Default Decision and Order.

Filed March 22, 2017.

ACCEL SERVICES, INC.

Docket No. 16-0183.

Default Decision and Order.

Filed May 2, 2017.

VIRGINIO MORENO, d/b/a FRESHPAK DISTRIBUTION.

Docket No. 17-0005.

Default Decision and Order.

Filed June 21, 2017.

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Consent Decisions
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CONSENT DECISIONS

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Fresh & Easy, LLC.

Docket No. 17-0014.
Consent Decision and Order.
Filed January 17, 2017.

Felda Vegetable Farms, Inc.

Docket No. 16-0041.
Consent Decision and Order.
Filed January 26, 2017.

American Fruit and Produce Corporation.

Docket No. 17-0015.
Consent Decision and Order.
Filed February 2, 2017.

Northern Produce Mushrooms, Inc.

Docket No. 17-0010.
Consent Decision and Order.
Filed March 22, 2017.

Cathy G. Poppell.

Docket No. 16-0151.
Consent Decision and Order.
Filed May 23, 2017.

Organic Avenue, LLC.

Docket No. 17-0216.
Consent Decision and Order.
Filed June 9, 2017.

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