

AGRICULTURE DECISIONS

Volume 72

Book Two

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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COURT DECISION

SUN PACIFIC MARKETING COOPERATIVE, INC. v. DiMARE FRESH, INC.

No. 1:06 – CV – 1404 AWI GSA.

Court Order.

Filed December 17, 2013.

[Cite as: No. 1:06 – CV – 1404 AWI GSA, 2013 WL 6633988, at *1 (E.D. Cal. Dec. 17, 2013)].

PACA – Appeal bond – Letter of credit – Reparations.

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

Court granted Appellant’s motion to change the form of its appeal bond, holding that the Court had the discretion to permit a letter of credit to be substituted for Appellant’s existing surety bond. The Court found that it, as a district court, had jurisdiction to modify, disallow, or release the Appellant from bond as the case was pending on appeal.

**ANTHONY W. ISHII, Senior District Judge, delivered the opinion
of the court.**

ORDER RE: MOTION TO MODIFY APPEAL BOND

I. History

Both Appellant Sun Pacific Marketing Cooperative, Inc. (“Sun Pacific”) and Appellee DiMare Fresh, Inc. (“DiMare”) are companies engaged in buying and selling wholesale quantities of produce. Both parties are licensed commission merchants and dealers under 7 U.S.C. § 499a(b)(5) and (6) of the Perishable Agricultural Commodities Act (“PACA”). By contract dated June 5, 2006 (“Original Contract”), DiMare agreed to buy from Sun Pacific a set quantity of various types of

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tomatoes at set prices every week from July 17, 2006 through October 31, 2006. The Original Contract specified that “In the event of a product shortage caused by an Act of God, Natural disaster or other incident that could not be foreseen and is beyond the control of Sun Pacific, then performance under this contract shall be excused.” Starting in July the San Joaquin Valley of California, where Sun Pacific’s growing facilities were located, experienced a heat wave that negatively affected tomato crops. On August 31, 2006, Sun Pacific invoked the Act of God clause. The parties thereafter came to an impasse. DiMare purchased tomatoes from other companies on the open market for the remainder of the Original Contract term.

DiMare first brought suit on September 14, 2006 against Sun Pacific, alleging breach of the Original Contract and seeking specific performance (*DiMare v. Sun Pacific*, CIV 06–1265 AWI). This court denied DiMare’s request for a temporary restraining order. On September 25, 2006, DiMare voluntarily dismissed the suit without prejudice. On October 11, 2006, Sun Pacific filed suit against DiMare (the origin of the present case). On January 8, 2007, DiMare filed a formal reparation complaint with the United States Department of Agriculture pursuant to PACA provision 7 U.S.C. § 499f(a) (“Reparation Proceeding”) for hearing and decision by an Administrative Law Judge. On April 19, 2007, this court stayed this case pending the resolution of the Reparation Proceeding. The Reparation Proceeding resulted in a decision in favor of DiMare, awarding that party \$1,136,599 plus interest, fees, and costs.

On September 19, 2008, Sun Pacific appealed that decision to this court. Under PACA, the district court rules on USDA reparations decisions on a de novo basis except that the prior findings of fact constitute prima facie evidence. Sun Pacific posted an appeal bond which followed the requirements of 7 U.S.C. § 499g(c): it took the form of an undertaking by International Fidelity Insurance Company (“International Fidelity”), a surety, in the amount of \$2.5 million, double the amount awarded under the Reparation Proceeding. A bench trial was held on November 9 and 10, 2010. On August 15, 2011, the court issued findings of fact and conclusions of law in favor of DiMare, awarding that party \$980,289 plus interest, fees, and costs. The award was later modified to be \$1,132,562 plus interest, fees, and costs. Sun Pacific appealed to the

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Ninth Circuit. The appeal bond, furnished by International Fidelity in the amount of \$2.5 million, remains in place.

Sun Pacific now seeks permission to change the form of the bond (but not the amount). DiMare opposes the request to change the form of the bond. The matter was taken under submission without oral argument.

II. Discussion

Sun Pacific's appeal bond is provided by International Fidelity. In order to retain International Fidelity's services, Sun Pacific has obtained an irrevocable letter of credit, issued by Wells Fargo Bank N.A. ("Wells Fargo") in the amount of \$2.5 million for the benefit of International Fidelity. "A letter of credit creates an absolute, independent obligation and payment must be made upon presentation of the proper documents regardless of any dispute between the buyer and seller concerning their agreement. Like a Travelers Check (which is a letter of credit), it enables international business to be done safely and securely because the vendor need only rely on the financial strength of the issuing bank, and not on the financial strength and willingness to pay of the vendee." *Warner Bros. Int'l TV. Distrib. v. Golden Channels & Co.*, 522 F.3d 1060, 1062–63 (9th Cir. 2008), citations omitted. The specific letter of credit in question indicates that Wells Fargo will provide International Fidelity \$2.5 million upon demand "not subject to any condition, or qualification. The obligation of Wells Fargo Bank N.A. under this letter of Credit shall be the individual obligation of Wells Fargo Bank N.A., in no way contingent upon reimbursement with respect thereto." Doc. 186, Ex. A. Sun Pacific wishes to modify the appeal bond to allow Sun Pacific to obtain a \$2.5 million irrevocable letter of credit for the benefit of DiMare directly instead of using International Fidelity as surety; this change would save \$18,750 a year in fees. Doc. 186, Brief, 2:16–3:2. Apart from a surety or letter of credit, Sun Pacific's chief financial officer has provided an affidavit stating that Sun Pacific's net worth at the end of 2012 was over \$220 million. Doc. 188, Part 1, Maitland–Lewis Declaration, 2:14–16. Apart from a surety or letter of credit, the demonstrated assets of Sun Pacific would guarantee recovery should DiMare have execute a monetary judgment against Sun Pacific directly.

DiMare first argues that the district court lacks jurisdiction to

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entertain this motion to modify the bond. Doc. 187, Opposition, 2:22–23. Fed. Rule Civ. Proc. 62(c) states “While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” A district court has clear jurisdiction to modify the terms of a bond while the case is before an appellate court. *See Sun-Tek Industries, Inc. v. Kennedy Sky Lites, Inc.*, 856 F.2d 173, 174 (Fed. Cir. 1988) (changing the monetary amount of bond); *Natural Res. Def. Council v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. Cal. 2001) (changing terms of injunction). This court retains authority to modify, disallow, or release appellant from bond during the pendency of appeal.

The parties disagree as to what law applies. Sun Pacific asserts that Fed. Rule Civ. Proc. 62(d) governs: “If an appeal is taken, the appellant may obtain a stay by supersedeas bond.... The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.” DiMare notes that this court has stated “The heart of the case is a breach of contract claim. The substantive law applied is California commercial law; PACA provides for the forum and procedure.” Doc. 165, Findings of Fact and Conclusions of Law, 10:26–27. The Federal Rules of Civil Procedure explicitly provides for certain statutes to provide superseding procedures, stating “These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: (A) 7 U.S.C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture.” Fed. Rule Civ. Proc. 81(a) (6). PACA provides for specific procedures in appealing a reparation order issued by an ALJ:

Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held.... Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of the reparation awarded against the appellant conditioned upon the

payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. ***Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States....*** Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated.

7 U.S.C. § 499g(c), emphasis added. DiMare argues that this specific language governs. DiMare's argument is sound. The Federal Rules of Civil Procedure explicitly defer to this specific PACA provision.

Sun Pacific argues that an irrevocable letter of credit constitutes a negotiable security, satisfying the PACA provision. Doc. 188, Reply, 5:17–23. There does not appear to be a working definition of “negotiable security.” Black's Law Dictionary defines “negotiable” as “1. (Of a written instrument) capable of being transferred by delivery or indorsement when the transferee takes the instrument for value, in good faith, and without notice of conflicting title claims or defenses.” BLACK'S LAW DICTIONARY 1064 (8th ed. 2004). There is no indication that the letter of credit may be transferred by DiMare to anyone else; it does not appear to fit into the definition. While there is only limited case law on the subject, courts seem to consider letters of credit and negotiable securities to constitute separate categories of assets. *See Cronin v. Executive House Realty*, 1981 U.S. Dist. LEXIS 11164, *2 (S.D.N.Y. Feb. 27, 1981) (defendant sought injunction barring plaintiff from “collecting, disposing of or realizing upon the letters of credit, negotiable securities or other security”); *In re G. Heileman Brewing Co.*, 128 B.R. 876 (Bankr. S.D.N.Y. 1991) (appending statutory text, specifically Oregon Revised Statutes 471.210(b) which asks for a surety bond substitute in the form of “the equivalent value in cash, bank letters of credit recognized by the State Treasurer or negotiable securities of a character approved by the State Treasurer”). Sun Pacific has not

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demonstrated that an irrevocable letter of credit is a negotiable security.

Sun Pacific then argues that the court should exercise its inherent authority to modify the bond condition. “District courts have inherent discretionary authority in setting supersedeas bonds. This includes the discretion to allow other forms of judgment guarantee and broad discretionary power to waive the bond requirement if it sees fit.” *Cotton v. City of Eureka*, 860 F. Supp.2d 999, 1028 (N.D. Cal. 2012), citations and quotations omitted. Courts have accepted letters of credit lieu of supersedeas bonds (or have considered them roughly equivalent). *See, e.g., Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1472 (9th Cir. 1992); *FTC v. Kykendall*, 466 F.3d 1149, 1154 (10th Cir. 2006); *Lindquist Ford, Inc. v. Middleton Motors, Inc.*, 2008 WL 4690515, *1 (W.D. Wis. 2008); *Cooper v. B & L, Inc.*, 66 F.3d 1390, 1393 n.3 (4th Cir. 1995); *Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173, 177 (2nd Cir. 1975). In this instance, the court will exercise the discretion to allow a letter of credit to be substituted for the existing surety bond. Sun Pacific has provided adequate evidence to demonstrate that DiMare’s interests will be adequately protected by an irrevocable letter of credit issued by Wells Fargo (in addition to Sun Pacific’s assets). DiMare does not argue, or suggest in any way, that they fear the proffered letter of credit from Wells Fargo would not be honored.

III. Order

Sun Pacific’s motion is GRANTED. International Fidelity Insurance Company is released from any obligation pursuant to the Appeal Bond on file in this action, effective and final as of the date of entry of this order. The release of International Fidelity Insurance Company is absolute and not dependent upon Sun Pacific’s compliance with this Order. Sun Pacific shall obtain and file with this Court an irrevocable letter of credit in the amount of \$2.5 million, naming DiMare as the beneficiary by 2:00 PM, Monday, January 6, 2014. If the letter of credit is not filed by that deadline, the stay on monetary judgment pending appeal may be lifted.

IT IS SO ORDERED.

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DEPARTMENTAL DECISIONS

In re: RDM International, Inc.
Docket Nos. 12-0458, 12-0601.
Decision and Order.
Filed July 23, 2013.

PACA.

Charles L. Kendall, Esq. for Complainant.
Robert Moore for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matters involve whether RDM International, Inc. (“Respondent”) is fit to be licensed under the Perishable Agricultural Commodities Act (“PACA”).

I. Procedural History

This action was initiated by a Notice to Show Cause and Request for Expedited Hearing (assigned Docket No. 12-0458) filed with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) on June 4, 2012 by the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States of Agriculture (“AMS”; “USDA”; “Complainant”). The Notice was issued in response Respondent’s application for a license. The Notice alleged that Respondent had failed to make full payment promptly of the agreed purchase prices, or balances thereof, for perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce, thereby making Respondent unfit to be granted a license under PACA.

Complainant also moved to consolidate the matter filed on June 4, 2012 with another matter that was not yet filed. The second complaint was filed on August 27, 2012 and alleged that Respondent had

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committed willful, flagrant and repeated violations of PACA by failing to make full payment promptly to eight (8) sellers for purchases of 74 lots of perishable agricultural commodities in the course of interstate and foreign commerce during the period November 13, 2008 through June 17, 2011, in the total amount of \$832,934.95. Respondent failed to file an Answer to the Complaint assigned Docket No. 12-0601, but submitted additional filings with the first case. By Order issued January 23, 2013, I consolidated cases No. 12-0458 and 12-0601. I also directed Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued, allowing Respondent thirty (30) days from the date of service of the Order to demonstrate that it made full payment by February 15, 2013, of the \$832,934.95, which Complainant alleged was owed by Respondent to eight (8) produce sellers. Respondent failed to respond to the Order.

On May 13, 2013, Complainant moved to renew its Order directing Respondent to show cause why a Decision and Order on the record should not be issued. On June 14, 2013, Respondent requested an extension of time to respond. By Order issued June 24, 2013, I allowed Respondent until July 1, 2013 to answer the motion. By correspondence dated July 2, 2013, Respondent asked for clarification that it would be allowed twenty (20) days from the date of service of the motion on June 28, 2013 to respond. By email addressed to both the representative for Respondent and counsel for Complainant, I confirmed that Respondent had twenty days to respond, or until July 18, 2013, pursuant to 7 C.F.R. § 1.139.

As of the date of this Decision and Order, Respondent has failed to respond to Complainant's motion. Considering the age of these consolidated actions, and the many opportunities afforded to Respondent to defend Complainant's allegations, I find it appropriate to GRANT Complainant's Order. This Decision and Order is based upon the evidence of record, associated with Complainant's motions and complaints, as well as all of Respondent's submissions and the arguments of the parties.

II. Discussion

The record establishes that on March 27, 2012, the United States

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District Court for the Central District of California ordered default judgment in favor of plaintiff Newland North America Foods, Inc., against Respondent for a valid PACA Trust debt in the amount of \$400,013.37, including interest at the statutory rate of 7% per annum. *Newland North America Foods, Inc. v. RDM International*, Docket 12-cv-00323, U.S. D.C for Central District of California. I take official notice of this finding and conclude that Respondent failed to pay a PACA debt in the amount of \$400,013.37, due to Newland North America Foods, Inc.

USDA conducted an investigation into Respondent's PACA related activities, and established that as of May 9, 2013, an additional amount of \$404,243.67 was due to six (6) of the remaining seven (7) sellers identified in Complainant's complaint. Complainant's investigation failed to establish that \$32,370.23 of the total of \$832,934.95 allegedly unpaid by Respondent was owed to the seventh remaining seller.

In its submissions, Respondent did not contest the allegations that it had failed to make full payment promptly. Respondent discussed actions that it intended to pursue against some of the produce suppliers listed in the Complaint. Respondent failed to specifically address the evidence demonstrating lack of payment.

All of the evidence of record demonstrates that Respondent failed to make payment to at least eight (8) produce sellers within the time provided by law. When a complaint alleges the failure to make full payment promptly under PACA, if Respondent fails to completely comply with the Act within the first of either 120 days after the complaint is served upon Respondent, or the date of the hearing, then the case shall be considered a "no pay" case that merits the sanction of license revocation. *Scamcorp, Inc.*, 57 Agric. Dec., 527, 548-49 (U.S.D.A. 1998).

As Respondent has failed to respond to Orders and Notices with proof of payment within the time frame consistent with *Scamcorp, supra*, it is appropriate to consider the instant actions as a "no pay" case. The record establishes that Respondent failed to make full and prompt payment for produce purchases in willful, flagrant and repeated violation of section 2(4) of the PACA, 7 U.S.C. § 499b(4).

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III. Findings of Fact

1. RDM International, Inc. is a corporation organized and existing under the laws of the State of California, with a business and mailing address of 11643 Otsego Street, N. Hollywood, California 91601.
2. Respondent is not currently licensed under PACA, but is subject to the licensing requirements of PACA.
3. On March 5, 2007, Respondent was issued PACA License Number 20070534, which terminated on March 5, 2012.
4. Since the date its license terminated, Respondent continued to conduct business subject to PACA.
5. Respondent's PACA license records list Robert D. Moore as the sole principal and 100% shareholder of Respondent.
6. At all times material to the instant actions, Respondent has operated under the management, direction and control of Robert D. Moore.
7. During the period from November 13, 2008 through June 17, 2011, Respondent failed to make full payment promptly to eight (8) sellers for purchases of 74 lots of perishable agricultural commodities in the course of interstate and foreign commerce, in the amount of \$832,934.95, of which \$804,257.04 remained unpaid as of May 19, 2013.
8. Respondent submitted an application to USDA for a PACA license on May 7, 2012.

IV. Conclusions of Law

1. The Secretary has jurisdiction over Respondent and the subject matter of these actions.
2. Respondent's PACA License Number 20070534 terminated on March 5, 2012, when Respondent failed to pay the required annual fee. See, section 4(a) of PACA, 7 U.S.C. § 499d(a).

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3. Respondent's failure to make full payment promptly to eight (8) sellers in the total of \$832,934.95 for 74 lots of perishable agricultural commodities constitutes willful, repeated and flagrant violations of section 2(4) of the Act.

4. Respondent is unfit to be licensed under PACA, as Respondent's willful, repeated and flagrant violations of section 2(4) of the Act under the management, direction and control of its sole principal and 100% shareholder Robert D. Moore, are practices of a character prohibited by PACA.

ORDER

Respondent has committed willful, repeated and flagrant violations of section 2(4) of the Act, and the facts and circumstance of the violations shall be published.

Pursuant to sections 4 and 8 of PACA, 7 U.S.C. §§ 499d and 499h, the Secretary's refusal to issue a PACA license to Respondent is affirmed.

This Order shall take effect on the eleventh (11th) day after this Decision become final.

Pursuant to the Rules of Practice, this Decision shall become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in 7 C.F.R. §§ 1.139 and 1.145.

Copies of this Decision Order shall be served upon the parties by the Hearing Clerk.

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In re: J & S PRODUCE CORP.

Docket No. 13-0177.

Decision and Order.

Filed August 8, 2013.

PACA.

Charles Kendall, Esq. for Complainant.

Ariel Weissberg, Esq. for Respondent.

Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

The instant matter involves a Complaint filed by the United States Department of Agriculture (“Complainant”) against J & S Produce Corp. (“Respondent”), alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. § 499a *et seq.* (“PACA”; “the Act”). The Complaint alleged that Respondent failed to make full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities during the period from December 1975 through February 2012.

This Decision and Order is issued pursuant to Complainant’s Motion for a Decision Without Hearing by Reason of Admissions, which I hereby GRANT.

I. Procedural History

On February 11, 2013, Complainant filed a Complaint against Respondent alleging violations of PACA. Respondent’s Motion for an Extension of Time to File an Answer was granted, and on March 28, 2013, Respondent filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) for the United States Department of Agriculture (“Hearing Clerk”).

By Order issued April 4, 2013, I set a schedule for pre-hearing submissions. On April 28, 2013, Complainant moved for a Decision on the Record by Reason of Admissions. Respondent filed Motions for Extensions to Respond, which were granted. On June 7, 2013,

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Respondent filed an objection to Complainant's motion. Respondent also filed lists of witnesses and exhibits pursuant to my pre-hearing Order.

Upon review of the documents and arguments submitted by both parties, I conclude that a hearing in this matter is not necessary and that Complainant's motion is fully supported by the record. I hereby admit to the record the Attachments to Complainant's motion and the Appendices to Complainant's Complaint and the Attachments to Respondent's Response to Complainant's motion.

II. Findings of Fact & Conclusions of Law

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. Pursuant to 7 C.F.R. § 1.139, the Rules allow for a Decision Without Hearing by Reason of Admissions. "...[A] respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held." *In re: H. Schnell & Co., Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998).

Respondent's admissions and the filed documentary evidence establish that there is no material issue of fact requiring a hearing. Additionally, it is uncontested that the outstanding balance due to sellers is in excess of \$5,000.00, which represents more than a *de minimis* amount. *See In re: Fava & Co.*, 46 Agric. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (U.S.D.A. 1985). "[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed". *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (U.S.D.A. 1985). Ergo, I find that a hearing is not necessary in this matter.

PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are

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reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11). In its Answer to the Complaint, Respondent admitted that it had failed to timely pay sellers for perishable agricultural commodities. However, Respondent denied that it willfully violated PACA and further challenged the dates of transactions and amounts due to the thirteen (13) sellers identified by Complainant.

The documentary evidence filed by both parties reflects that on March 26, 2012, Respondent filed a petition in bankruptcy with the United States Bankruptcy Court for the Northern District of Illinois. (Petition # 12-12063). Respondent's Schedule F filed in that matter listed undisputed debts in the aggregate amount of \$602,650.59 due to eleven (11) of the twelve (12) produce suppliers listed in Appendix A to Complainant's Complaint. *See also* Attachments to Respondent's Response to Complainant's Motion. In its Schedule D filed with the bankruptcy court, Respondent reported a disputed secured claim to another of the identified produce suppliers in the amount of \$726,829.00.¹

Respondent made it clear in its argument that the dispute over this claim involved whether the claim was secured or unsecured as opposed to the fact of the debt.

Complainant asked that I take official notice of schedules filed in connection with Respondent's bankruptcy petition. Administrative Law Judges presiding over hearings in matters initiated by the Secretary of the Department of Agriculture shall take official notice "of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, commercial fact of established character. . ." 7 C.F.R. § 1.141(h)(6). Documents filed in bankruptcy proceedings by debtors that are involved in PACA disciplinary proceedings may be officially noticed. *KDLO Enterprises, Inc. v. U.S. Dep't of Agric.*, 2011 WL 3503526, at *4 (9th Cir. 2011) (affirming Decision and Order of Judicial Officer for USDA); *In re: KDLO Enterprises, Inc.*, 70 Agric. Dec. 1098 (U.S.D.A. 2011).

¹ Respondent made it clear in its argument that the dispute over this claim involved whether the claim was secured or unsecured as opposed to the fact of the debt.

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Respondent attached copies of its bankruptcy schedules to its Response to Complainant's Motion and referred to the documents in its argument, thereby obviating the need for official notice. However, since Complainant did not have the benefit of Respondent's endorsement of its bankruptcy documents when the motion was filed, I hereby grant Complainant's motion for official notice of Respondent's bankruptcy filings.

PACA requires "full payment promptly" for produce purchases and where "respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a no-pay case." *In re: Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998). In order to reach "full compliance" with PACA, the respondent would have to have paid all produce sellers and within 120 days of being served with a complaint. *Id.* at 549. Failure to meet this obligation results in a "no-pay" case. *Id.*

A comparison of the transactions allegedly not paid that were listed in the appendices to the Complaint with the transactions listed in Respondent's bankruptcy filings demonstrate that, as of the date the schedules were filed in March and April of 2012, transactions remained unpaid.

Respondent argued that it did not willfully fail to pay sellers, and explained that it experienced a liquidity crisis because its customers defaulted on accounts receivable. *See* Tr. of Test. of Resp't's Representative at a Meeting of Creditors, attached to Respondent's Response to Motion at Exhibit 2. Respondent reported that the thirteen (13) creditors identified in the complaint brought an action against Respondent in the United States District Court for the Northern District of Illinois² in which the total amount of the outstanding claims reported to the court in a PACA Trust Chart, \$2,107,091.00, was the equivalent of Respondent's unpaid accounts receivable. *See* PACA Trust Fund Chart, Exhibit 3, attached to Resp't's Resp. to Complainant's Motion.

² Anthony Marano Company v. J & S Produce Corp., Case No. 12-cv-01906.

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Respondent also asserted that the characterization of a debt as disputed or undisputed in bankruptcy filings has no legal bearing on the outcome of the instant matter. In addition, Respondent demonstrated that it had paid some of its produce creditors large sums in advance of filing bankruptcy, and further showed that Respondent's principals deferred wages to do so.

I find that Respondent's arguments are supported by the record. However, the actions of Respondent's creditors do not present a valid defense in a PACA disciplinary action involving the failure to make full payment promptly to its produce supplier. The evidence supports Respondent's contention that uncollected accounts receivable led to its inability to pay produce suppliers. However, Respondent's financial predicament cannot represent a valid defense to potentially causing similar problems to suppliers. Congress enacted PACA in 1930 "to assure business integrity in an industry thought to be unusually prone to fraud and to unfair practices." *Tri-County Whole-Sale Produce Co. v. U.S. Dep't of Agric.*, 822 F.2d 162, 163 (D.C. Cir. 1987). The law was designed primarily to protect the producers of perishable agricultural products and to protect consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for. S. REP. NO. 84-2507, at 3 (1956).

A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). A violation is repeated whenever there is more than one (1) violation of the Act, and is flagrant whenever the total amount due to sellers exceeds \$5,000.00. *Id.*

Respondent's contention that its actions were not willful or flagrant is refuted by the fact that Respondent failed to make prompt payment in many instances over a long period of time. Complainant need not establish that Respondent deliberately intended not to make prompt payment for produce purchases. It is enough to show that Respondent made purchases with full knowledge that its customers were defaulting on accounts, and cash flow was insufficient to meet payment obligations. That burden has been admittedly met. There is no evidence demonstrating that Respondent sought to avoid the consequences of

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violating PACA by seeking written agreements from providers to establish payment periods in excess of ten days, pursuant to 7 C.F.R. § 46.2(aa)(11). See *Norinsberg Corp.*, 52 Agric. Dec. 1617, 1625 (U.S.D.A. 1993), *aff'd*, *Norinsberg Corp. v. U.S. Dep't of Agric.*, 47 F.3d 1224 (D.C. Cir. 1995). It has long been held that payment violations similar to those established herein are willful violations of PACA because they represent gross neglect of PACA's mandate to make prompt payment. See *Five Star Food Distributor, Inc.*, 56 Agric. Dec. 880, at 896-97 (U.S.D.A. 1997).

In addition, on Schedule D of the bankruptcy filings, Respondent listed eleven (11) of the produce suppliers identified in the complaint as undisputed debts in the aggregate of \$602,650.59. Respondent also reported a disputed secured claim to one (1) produce supplier in the amount of \$726,829.003

¹. Therefore, Respondent's own records show that sellers remained unpaid after Respondent had knowledge of its violations of PACA.

In the instant matter, it is clear that Respondents knew or should have known that they would be unable to promptly pay the full amount due for the perishable produce that they ordered and accepted, yet they continued to make purchases for which they failed to pay. Respondents' actions were willful and represent repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

I have considered whether Respondent's unfortunate financial circumstances may serve as a factor that would mitigate sanctions. I find no persuasive argument in favor of Respondent's position. I accept that Respondent would have promptly paid all of its providers if Respondent's own customers had met their payment obligations. I further acknowledge that Respondent made efforts to make payments when it was able, to the detriment of its principals and perhaps at the risk of the company's viability. Nevertheless, Respondent continued to order and accept produce despite its inability to pay within the constraints of the Act and regulations. Accordingly, publication of the facts and circumstances of Respondents' violations is an appropriate sanction. See *Norinsberg Corp.*, 52 Agric. Dec. at 6125.

¹ Respondent made it clear in its argument that it disputed the nature of the claim ("secured") as opposed to the fact of the debt.

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B. Findings of Fact

1. J & S Produce Corp. ("Respondent") is a corporation organized and existing under the laws of the state of Illinois and at all times material herein its business address was 2300 W. Lake Street, Unit A, Chicago, Illinois 60612.
2. Respondent is not currently operating.
3. At all times material hereto, Respondent was licensed under and operated subject to the provisions of the PACA, under license number No. 1977 0152, issued on October 29, 1976.
4. Respondent's license terminated on October 29, 2012 when Respondent failed to pay the required annual fee.
5. During the period from December 31, 2009, through April 10, 2012, Respondent failed to make full payment promptly to at least 11 or more sellers of the agreed purchase prices, or balances thereof, in the aggregate of \$602,650.59 for perishable agricultural commodities purchased, received, and accepted by Respondent in interstate and foreign commerce.
6. On March 26, 2012, Respondent filed a petition in bankruptcy, designated Petition #12-12063, with the United States Bankruptcy Court for the Northern District of Illinois.
7. Respondent filed schedules with the court that listed unpaid balances of \$602,650.59 due on the agreed purchase prices of produce to 11 sellers.
8. Respondent also listed a debt to a produce seller in the amount of \$726,829.00, and disputed the creditor's claim that the debt was secured.
9. Respondent's President testified that the information provided by Respondent as debtor was true and correct.

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10. On March 28, 2013, Respondent filed an Answer in the instant proceeding admitting that Respondent had failed to promptly pay produce providers.

C. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's admissions provide reason to dispense with a formal hearing in this matter.
3. The unpaid balances due to produce sellers represent more than *de minimis* amounts.
4. Because the unpaid balances are more than *de minimis*, and because there are no disputes of material fact regarding the issue of payment due to Respondent's admissions, a hearing in this matter is not necessary.
5. Respondents' failure to promptly make full payment of the agreed purchase prices for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
6. The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy period of time during which the violations occurred.
7. The violations are repeated because there was more than one (1) violation.
8. The violations were willful because Respondent failed to make prompt payments or otherwise arrange for payments in compliance with the Act and regulations despite knowledge of its inability to make payments due to insufficient cash flow.

ORDER

Respondent J & S Produce Corp. has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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The facts and circumstances underlying Respondent's violations shall be published.

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

Pursuant to the Rules of Practice Governing Proceedings Under the Act, this Decision and Order shall become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

In re: GEORGE FINCH & JOHN DENNIS HONEYCUTT.
Docket Nos. 13-0068, 13-0069.
Decision and Order.
Filed November 20, 2013.

PACA.

Michael A. Hirsch, Esq. for Petitioners.

Christopher Young, Esq. for Respondent.

Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a, *et seq.*) (Act) by the petitions for review filed by the Petitioners George Finch and John Dennis Honeycutt of the determinations made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that the two Petitioners were "responsibly connected" (as that term is defined in Section 1(b)(9) of the

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Act (7 U.S.C. § 499a(b)(9))) to Third Coast Produce Company, Ltd. (Third Coast), during the period of time that Third Coast violated Section 2 of the Act (7 U.S.C. § 499b).

Third Coast, a PACA licensee, was the subject of a disciplinary complaint that was filed on February 15, 2012. On March 8, 2012, Third Coast filed an Answer in which the material allegations of the Complaint were admitted and on April 27, 2012 a Decision and Order was entered finding that Third Coast willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 21 sellers of the agreed purchase prices in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities which Third Coast purchased, received, and accepted in the course of interstate commerce during the period February 5, 2010 through July 16, 2010 and ordering the circumstances of the violations published.¹

The two actions instituted by the Petitioners were consolidated for the purposes of hearing and were set for hearing in Washington, D.C. on August 13, 2013, with the Petitioners being represented by Michael A. Hirsch, Esquire, Schlanger, Silver, Barq & Paine, Houston, Texas and the Respondent represented by Christopher Young, Esquire and Shelton Smallwood, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. At the hearing, both Petitioners testified and one witness testified for the Respondent. Twelve (12) exhibits were introduced and admitted into evidence on behalf of the Petitioners.² The certified Agency Records containing 16 exhibits relating to George Finch and eleven (11) exhibits relating to John Dennis Honeycutt were admitted on behalf of the Respondent.³ The parties have submitted post-hearing briefs and the matter is now ripe for disposition.

Background

The Perishable Agricultural Commodities Act, 1930,⁴ was enacted to suppress unfair and fraudulent practices in the marketing of perishable

¹ Third Coast Produce Company, Ltd., Docket No. 12-0234, 71 Agric. Dec. 633 (U.S.D.A. 2012).

² Petitioners' exhibits are indicated as PX 1-12.

³ Respondent's Exhibits are indicated as GFRX 1-16 and JHRX 1-11.

⁴ 7 U.S.C. § 499a-499s.

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agricultural commodities in interstate or foreign commerce.⁵ When enacted, the legislation had the approval of the entire organized fruit and vegetable trade, including commission merchants, dealers and brokers, all of whom benefit from the Act's protections.⁶ The Act has been characterized as intentionally a "tough" law enacted for the purpose of providing a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.⁷ *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 693 (D.C. Cir. 2007).

Under the Act, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), and 499d(a). The Act makes it unlawful for a licensee to engage in certain types of unfair conduct and requires regulated merchants, dealers, and brokers to "truly and correctly...account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C. § 499b(4).

Orders suspending or revoking a license, or a finding that an entity has committed a flagrant or repeated violation of Section 2 of the Act have significant collateral consequences in the form of employment restrictions for persons found to be "responsibly connected" with the violator.⁸ Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator "in any

⁵ H.R. REP. NO. 1041, 71st Cong, 2d Session 1 (1930).

⁶ *Id.* at 2, 4. In 1949, both the House and Senate found that the PACA regulatory program had "become an integral part of the marketing of fruit and vegetables and it has the unanimous support of both producers and handlers in the fruit and vegetable industry." H.R. REP. NO. 1194, 81st Cong, 1st Session 1 (1949); *accord*, S. REP. NO. 1122, 1st Session 2 (1949).

⁷ S. REP. NO. 2507, 84th Cong, 2d Session 3-4 (1956), *reprinted in* 1956 U.S.C.A.N. 3699, 3701; H.R. REP. NO. 1196, 84th Cong, 1st Session 2 (1955).

⁸ 7 U.S.C. § 499h(b) (1958). Under the Act, PACA licensees may not employ, for at least one year, any person found "responsibly connected to any person whose license has been revoked or suspended, or who has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b.

responsible position.”⁹ 1962 amendments replaced the “in any responsible position” language with a “responsibly connected” provision. The term “responsibly connected” is currently defined as follows:

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(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.

7 U.S.C. § 499a(b)(9).

The second sentence was added to the provision by a 1995 amendment¹⁰ and affords those who would otherwise fall within the statutory definition of “responsibly connected” an opportunity to demonstrate that they were not responsible for the violation. Extensive analysis of and comment upon the amendment has been made in a number of decisions, including *Norinsberg v. U.S. Dep’t of Agric.*, 162

⁹ 7 U.S.C. § 499h(b) (1958).

¹⁰ Prior to the amendment, the circuits were divided as to whether the presumption of § 499a(b)(9) was irrebutable. Most adopted a per se rule. *See, e.g., Faour v. United States Dep’t of Agric.*, 985 F. 2d 217, 220 (5th Cir. 1993); *Pupillo v. United States*, 755 F. 2d 638, 643-644 (8th Cir. 1985); *Birkenfield v. United States*, 369 F.2d 491, 494 (3rd Cir. 1966); *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). The D.C. Circuit however had adopted a rebuttable presumption test. *See Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), 34 Agric. Dec. 7 (1975).

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F.3d 1194, 1196-97 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-1467 (U.S.D.A. 1998); *In re Salins*, 57 Agric. Dec. 1474, 1482-87 (U.S.D.A. 1998); and *In re Mendenhall*, 57 Agric. Dec. 1607, 1615-19 (U.S.D.A. 1998).

The amendment created a two prong test for rebutting the statutory presumption of the first sentence:

...the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (“and”), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner must meet at least one of two alternatives: that a petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to license which was the alter ego of its owners.

Salins, 57 Agric. Dec. at 1487-88.

Norinsberg articulated the standard for the first prong as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to performance of ministerial functions only. Thus, if a petitioner demonstrates that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Norinsberg, 58 Agric. Dec. at 610-611.

The parameters of the second prong of the test were recently revisited by the Circuit Court of Appeals for the District of Columbia in the case of *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). In that case, the Court found that the Judicial Officer erroneously rejected Ms. Taylor and Mr. Finberg's claims that they were merely nominal officers of the violating entity. Citing *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir. 1975) and *Bell v. Dep't of Agric.*, 39 F. 3d 1199, 1202 (D.C. Cir. 1994), the Court indicated that under 7 U.S.C. § 499a(b)(9), an "officer" of the offending company is not considered to be "responsibly connected" to a violating licensee if that person was not actively involved in the PACA violation and was "powerless to curb it." *Taylor*, 636 F.3d at 610. The Court went on to emphasize that under the "actual, significant nexus" test, the crucial inquiry in determining whether a person is merely a nominal officer is whether the person who holds the title of officer has the power and authority to direct and affect a company's operations:

Under the "actual, significant nexus" test, "the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority." *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987)(internal quotation marks omitted). Although we have consistently applied the 'actual, significant nexus' test, our cases make clear that what is really important is whether the person who holds the title of an officer had actual and significant power and authority to direct and affect company operations.

* * *

As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry.

Taylor, 636 F.3d at 615, 617.

In *Taylor*, the Departmental Judicial Officer had found the board of directors, with Arthur Hollingsworth as chairman, ran Fresh America and Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at lower levels of authority. *Taylor v. U.S. Dep't*

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of Agric., 636 F.3d at 617 (citing *Taylor*, 68 Agric. Dec. 1210, 1220-21 (U.S.D.A. 2009)). A preponderance of the evidence indicated that the board of directors made the decisions governing Fresh America's bills, capital expenditures, and personnel and that neither Ms. Taylor nor Mr. Finberg had any measurable power or authority in board deliberations. Moreover, AMS conceded that Ms. Taylor and Mr. Finberg "ultimately proved powerless to save Fresh America or to see that produce sellers were fully repaid." Applying the "actual, significant nexus" test, as explained in *Taylor*, on remand the Judicial Officer concluded that Ms. Taylor and Mr. Finberg demonstrated by a preponderance of the evidence that the Board of Directors made the decisions governing Fresh America's bills, capital expenditures, and personnel and that neither Ms. Taylor nor Mr. Finberg had any measurable power of authority in board deliberations. Thus, using the "actual, significant nexus" test, the two would be considered merely nominal officers of Fresh America, who were powerless to curb the PACA violations and who lacked the power and authority to direct and affect Fresh America's operations as they related to payment of produce sellers. *In re Taylor*, 71 Agric. Dec. 612, 617-18 (U.S.D.A. 2012).

The "actual, significant nexus" test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9) wherein Congress amended the definition of the term "responsibly connected" specifically to provide partners, officers, directors, and shareholders who would otherwise fall within the statutory definition of "responsibly connected" a two-prong test allowing them to rebut the statutory presumption of responsible connection. While Congress could have explicitly adopted the "actual, significant nexus" test, the two-prong test in the 1995 amendment to 7 U.S.C. § 499a(b)(9) contains no reference to "actual, significant nexus," power to curb PACA violations, or power to direct and affect operations. Instead, Congress provided that a partner, officer, director, or shareholder, for the second prong of the two-prong test, could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was "only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license" (7 U.S.C. § 499a(b)(9)).

The Judicial Officer then concluded that continued application of the "actual, significant nexus" test, as described in the Court of Appeals

decision in *Taylor* could result in persons who Congress intended to include within the definition of the term “responsibly connected” avoiding that status. As examples, he noted that a minority shareholder, who is not merely a shareholder in name only, generally would not have the power to prevent the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Similarly, a real director, who is a member of a three-person board of directors, generally would not have the power to prevent the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Similarly, a partner with a forty percent (40%) interest in a partnership, who fully participates in the partnership as a partner, generally would not have the power to prevent the partnership’s PACA violations or the power to direct and affect the partnership’s operations. Should the minority shareholder, the director on the three-person board of directors, and the partner with a forty percent (40%) interest in the partnership demonstrate the requisite lack of power, application of the “actual, significant nexus” test, as described in the Court of Appeals decision in *Taylor* would result in each of these persons being designated “nominal.”

Opining that he had been remiss in failing to abandon the “actual, significant nexus” test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the “actual significant nexus” test, the Judicial Officer announced that in future cases that come before him, he would not apply the “actual, significant nexus” test and would instead substitute a “nominal inquiry” limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder “in name only.” Thus, while the power to curb PACA violations or to direct and affect the operations may, in certain circumstances be a factor to be considered under the “nominal inquiry,” it will no longer be the *sine qua non* of responsible connection to a PACA-violating entity.¹¹ The Judicial

¹¹ It will be noted that the May 22, 2012 Decision on Remand in *Taylor* was remanded upon a joint motion in the DC Circuit Court of Appeals. The May 22, 2012 Decision and Order was vacated and a Modified Decision and Order on Remand was entered which without affecting the JO’s adoption of the “nominal inquiry” test reversed the finding as to Ms. Taylor’s responsible connection to the violating entity. (Modified Decision and Order on Remand, December 18, 2012). Language substantially identical to that found in *Taylor* concerning adoption of the “nominal inquiry” test is also contained in the Judicial Officer’s Order Denying Petition to Reconsider Decision as to Bryan Herr and the

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Officer, using the “nominal inquiry” test, then found Taylor responsibly connected and Finberg not responsibly connected. *In re Taylor*, 71 Agric. Dec. 612, 621-22 (U.S.D.A. 2012).

Discussion

Petitioners contest the Chief of the PACA Branch’s determination that they were “responsibly connected” to Third Coast on three grounds:

1. The Act [PACA] is unconstitutionally overbroad in that it penalizes virtuous non-culpable conduct as if it were the contrary;¹²
2. The Act [PACA] violated fundamental principles of due process and is an unconstitutional forfeiture in violation of U.S.C.A. Title 18, Chapter 46, §§ 981, *et seq.*; and
3. The Petitioners have each proven, by uncontroverted evidence, that the circumstances and events causing and resulting in the default of payment under the Act as amended, to be concluded by the Court to be the sole, independent act of a third-party officer/director of the company from which Petitioners did not profit or benefit, and in which Petitioners did not participate, where the conduct of Petitioners was not culpable within the declared intent of the Act, as amended; these principals could only have been nominal officers or directors, vis-à-vis the transaction causing the default in payment under PACA.

Pet’rs’ Br. in Trial of Pet. for Review of PACA Division Determination at 5, 12, & 16.¹³

As is conceded in Petitioners’ Brief, granting relief on any of the three grounds set forth above would require “a departure from case precedent.” Pet’rs’ Brief at 1. The constitutionality of the PACA is well established as challenges to it have been repeatedly rejected. *Bama*

“nominal inquiry” test remains the current Departmental policy. *Petro*, 71 Agric. Dec. 1259, 1264 (U.S.D.A. 2012).

¹² While noting that acceptance of such an argument would require a departure from case precedent, Petitioners’ Counsel failed to cite the adverse cases concerning the constitutionality of the PACA.

¹³ Docket Entry No. 18.

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Tomato Co. v. U.S. Dep't of Agric., 112 F.3d 1542 (11th Cir. 1997); *Krueger v. Acme Fruit Co.*, 75 F. 2d 67 (5th Cir. 1935); *see also George Steinberg & Son v. Butz*, 491 F.2d 988 (2d Cir. 1974), *application denied*, 419 U.S. 904, *cert. denied*, 419 U.S. 830. Accordingly, the first argument will be rejected summarily as being without merit.

The second argument which suggests that civil forfeitures of real or personal property involved in transactions, attempted transactions, or proceeds derived from violations of enumerated criminal statutes can somehow be equated with the disqualification sanction found in the PACA for individuals who are found to be “responsibly connected.” As Petitioners not only have a statutory avenue for contesting the determination of being responsibly connected, but also are doing so in this proceeding, it is difficult at best to conceive of any valid basis for asserting a lack of due process. Moreover, finding no appropriate nexus cited in 18 U.S.C. § 981 to the PACA, while acknowledging the unique anapopism of the argument, it similarly will be summarily rejected.

The third argument will be considered in the following analysis. Both Finch and Honeycutt have significant experience in the produce industry.¹⁴ Finch described his involvement as having “been in the food business all of [his] life” and has been working in the produce business for over 25 years. Tr. 40. During the hearing, he acknowledged being thoroughly aware of the PACA and the responsibilities imposed by it, stating that “we understand our obligations to PACA” and that “PACA was the number one payment we need to make.” Tr. 55, 76. Honeycutt also had extensive experience as an officer, owner and PACA licensee in the produce industry and expressed pride in the good standing that Third Coast had in the Blue Book. Tr. 79-82, 90-91.

George Finch testified that he, John Dennis Honeycutt and Artemio Bueno started Third Coast in May of 1992. Tr. 40. The company started with a very humble beginning, literally with just a van and sublet space. *Id.* With the passage of time and the investment of substantial time and

¹⁴ The Petitioners’ extensive experience forecloses any argument that they lacked training or experience and thus should be considered only nominal officers or directors. *Cf. Minotto v. U.S. Dep’t of Agric.*, 711 F. 2d 406, 409 (D.C. Cir. 1983); *Maldonado v. U.S. Dep’t of Agric.*, 154 F.3d 1086, 1088-89 (9th Cir. 1998); *Thomas*, 59 Agric. Dec. 367, 387 (U.S.D.A. 2000).

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energy on the part of the three founders, the company grew substantially to an operation considered one of the major distributors in the Houston metropolitan area with about 170 employees, 40 trucks, a new 60,000 square foot warehouse, and approximately a million dollars in sales weekly. Tr. 40-42, 55, 66.

Prior to discovering that there were serious financial problems within the company, both Finch and Honeycutt indicated that their responsibilities “mainly revolved around sales, and the administration around sales, to generate business for the company.” Tr. 38, 82, 84. Artemio Bueno functioned as the company’s buyer and was responsible for company operations. Tr. 65, 84-85. As the company grew from its small family-run origins, the financial responsibilities of the company became entrusted to Artemio Bueno’s oldest son, Javier Bueno, who had graduated from the University of Houston with a degree in accounting and business management and who was working toward a master’s degree at Rice University. The founding Petitioners possessed an unfortunately misplaced but high degree of trust in the Bueno family as they had all started together from scratch and the Petitioners had watched the Bueno children graduate, get married and have children.¹⁵ Tr. 41. Consistent with that trust, the younger Bueno was in time named the CFO of Third Coast and given oversight of all of the financial aspects of the business. Tr. 41, 53.

Following completion of the new warehouse, Finch and Honeycutt started seeing cash flow challenges in 2009 and in early 2010 and directed that the company’s financial information be sent to the CPA firm in Houston that monitored their books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Finch and Honeycutt returned their focus to the sales operation. *Id.* Still blissfully unaware of the impending financial disaster facing the company until being informed that certain of their suppliers had “cut them off” and ceased selling to them and their bank raised its own concerns,¹⁶ the decision to call in Tatum & Tatum, LLC., an outside accounting firm, was not made until the end of January of 2010. Tr. 70. In the course of

¹⁵ Honeycutt testified that he had known Javier Bueno since about the time he was 10 years old and was employed sweeping the floors at Southern Produce, prior to the time that Third Coast was formed. Tr. 83.

¹⁶ The company owed their banks about ten million in bank loans at the time. Tr. 54.

the resulting audit and monitoring of the receivables, a systematic diversion of company receivables to previously unknown and unauthorized multiple bank accounts established by Javier Bueno was detected. Tr. 46-47. To further conceal the diversions, the younger Bueno had been making fraudulent General Ledger entries making it appear that suppliers were being paid when in fact they were not. Tr. 47-49.¹⁷ After discovering that all was not well and that sellers were not being paid, Petitioners confronted Javier Bueno, removed him from his position with the company, and assumed control of the company. Tr. 54-59, 73-74, 89. Accordingly, the first prong of the statutory test in § 499a(b)(9) is met in this case as their actions went far beyond the performance of “ministerial functions only” as both Petitioners exercised judgment, discretion and control of the company’s as officers and directors activities from their discovery of the defalcation until the company’s ultimate demise. Tr. 6, 37. *See Norinsberg*, 58 Agric. Dec. at 610-611. Both Petitioners stipulated at the hearing that they were officers and directors of Third Coast and acted as officers and directors of the company during the violation period and despite their knowledge of their inability to pay all suppliers promptly continued to purchase produce from sellers until Third Coast ceased operation. Tr. 37, 75-77.

Thus, although the defalcation that was the proximate cause of the serious cash shortage that led to the company’s ultimate demise predated their assumption of control of the company, the Petitioners’ period of control of the company occurred during the greatest portion of the violation period, specifically from sometime in February of 2010 through July 16, 2010. During that period of time, the company struggled to keep its doors open so as to pay many people as it possibly could, maintaining payments to the bank, pro-rating the amounts paid to suppliers and still attempting to collect the money owed to it.¹⁸ Tr. 54-57, 61-63, 75-76. In explaining why they continued to operate, George Finch testified:

¹⁷ The Wells Fargo accounts reflected that about \$360,000 was diverted between September of 2009 until January of 2010; however, a more in depth investigation revealed that over a period of three years the amount embezzled was well over one million dollars. Tr. 49- 53.

¹⁸ During the violation period, Petitioners attempted to salvage the company’s existence; bank payments were made and the company’s employees were being paid. Tr. 54-57, 61-63, 75-76. Over a period of three or four months, one PACA claimant was paid approximately \$2.2 million. Tr. 59.

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....We had contractual agreements with customers that we needed to fulfill. If we close that door, then those customers would have gone without product. In business, in this business, if you don't have products, you don't have a business, you close the doors. I'm looking at the obligations of customers that helped us get to where we were over a prolonged period of time. Some of these relationships we had had for a long period of time. Unfortunately, those relationships are gone now, but that's business. I've lost those-- I still know those people, but I've lost their business, because of what happened. There's another situation, obviously we had a very, we understand our obligations to PACA, but as I looked around, I looked at my employees, who had been with us, some of them, for a long time. We shut the business down, they're without work. It's a bigger picture, and it's an awesome responsibility—

Tr. 75-76.

To take care of everyone. And we did the best we could within the constraints of what we had to do that....

Tr. 76-77.

Indeed, even after significant infusions of their own funds from savings and their personal retirement accounts¹⁹, Finch and Honeycutt's efforts ultimately proved unsuccessful in preserving the company. With the bank's "blessing," first the processing portion of the business was

¹⁹ Tr. 57, 99. Finch testified that the funds he contributed were "[a]nything I had at the time" and were from savings and his 401k. Tr. 57. Honeycutt borrowed \$25,000 from his mother-in-law. Tr. 99. Unlike the Petitioners, despite his son's involvement, Artemio Bueno did not contribute funds to attempt to maintain the company's existence. Tr. 99.

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sold²⁰ and later the assets of the distribution portion²¹ were sold to another entity. Tr. 57-58. The sale proceeds went to the bank. Tr. 57.

While having a great deal of empathy for the Petitioners, both of whom demonstrated themselves to be honest and well intentioned men who were victims themselves and who did not personally gain from the situation they found themselves in, I must nonetheless hold that by virtue of having controlled the operation of the company from sometime in February of 2010 until its assets were liquidated in July of 2010 neither individual can be said to be only nominally officers and directors of the violating entity. *See* 7 U.S.C. § 499(a)(9); *Taylor*, 636 F.3d at 615, 617.

Accordingly, on the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Petitioner George Finch is an individual residing in Friendswood, Texas. By his account, he has been in the food business all of his life, with over 25 years of experience in the produce industry. Tr. 40. Finch acknowledged being aware of the PACA and the responsibilities it imposed, specifically, the number one obligation being to the PACA. Tr. 55, 76-77.
2. Petitioner John Dennis Honeycutt is an individual residing in Katy, Texas. He began his involvement in the produce industry at college age and for the six years prior to forming Third Coast worked for a produce company that he termed “the best in town.” Tr. 79-82.
3. Petitioner Finch, Petitioner Honeycutt and Artemio Bueno started Third Coast in May of 1992 and built the enterprise from one with a single van and leased space into an operation in 2010 with 40 trucks,

²⁰ The processing operation consisted of taking fresh fruits and vegetables and processing them for the end user. “It’s a value-added product, mixed salads and varied commodities that go to our customers.” Tr. 56.

²¹ The distribution business was an asset purchase, involving the real estate, trucks and other equipment used in handling the produce delivered to the company customers. Tr. 57-58.

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about 170 employees, a new 60,000 square foot warehouse, and a volume of a million dollars per week in sales. Tr. 40-42, 55, 65-66, 82-84.

4. As a result of defalcations by the CFO of the company and the resulting cash flow shortage, Third Coast willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 21 sellers of the agreed purchase prices in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities which Third Coast purchased, received, and accepted in the course of interstate commerce during the period February 5, 2010 through July 16, 2010. Tr. 6; *Third Coast Produce Company, Ltd.*, 71 Agric. Dec. 633 (U.S.D.A. 2012).

5. Petitioner Finch and Petitioner Honeycutt each owned 32.333 percent of Third Coast and were officers and directors of Third Coast during the violation period. Tr. 6; GFRX 5 at 25; JHRX 5 at 25.

6. Petitioners Finch and Honeycutt first started seeing cash flow challenges in 2009 and in early 2010 and directed that the company's financial information be sent to the CPA firm in Houston that monitored their books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Finch and Honeycutt returned their focus to the sales operation until additional information came to them that suppliers were not being paid. Tr. 41.

7. After being informed that certain of their suppliers had "cut them off" and ceased selling to them and their bank raised its own concerns, Petitioners retained an outside accounting firm near the end of January of 2010. The resulting audit and monitoring of the receivables detected a systematic diversion of company receivables to previously unknown and unauthorized multiple bank accounts established by Javier Bueno. Tr. 46-47. To further conceal the diversions, the younger Bueno had been making fraudulent General Ledger entries making it appear that suppliers were being paid when in fact they were not. Tr. 47-49, 54, 69, 74, 95.

8. Although the preliminary computation of the defalcation amounted to \$360,000 during the period of September of 2009 to January of 2010; a

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more thorough and comprehensive investigation revealed shortages well in excess of a million dollars. Tr. 49-53.

8. In February of 2010, Petitioners removed Javier Bueno from his position with the company and assumed control of the company. Tr. 37, 54-59, 72-74, 89.

9. Despite the Petitioners' best efforts to honor contractual obligations to provide produce, to keep the doors open so as to pay many people as it possibly could, maintain payments to the bank, and pro-rate the amounts paid to suppliers while still attempting to collect the money owed to it, and despite infusing the company with personal funds and obtaining concessions from their bank, it was necessary to first sell the processing portion of the business and finally the liquidate the assets of the distribution operation and cease operation. Tr. 55-57, 75-76.

10. While under the control of Petitioners Finch and Honeycutt, despite knowledge that the company had failed to pay suppliers in a timely manner, the company continued to purchase produce from produce sellers, and purchased produce during the violation period. Tr. 69, 75-77, 89, 95-96.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. George Finch is an individual responsibly connected to Third Coast Produce Company, Ltd. by virtue of his active participation in corporate operations and his status as an officer and director of the entity.
3. By virtue of being responsibly connected to a violating corporation, Petitioner George Finch is subject to the employment restrictions of the Act.
4. John Dennis Honeycutt is an individual responsibly connected to Third Coast Produce Company, Ltd. by virtue of his active participation in corporate operations and his status as an officer and director of the entity.

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5. By virtue of being responsibly connected to a violating corporation, Petitioner John Dennis Honeycutt is subject to the employment restrictions of the Act.

ORDER

1. The determination of the Chief of the PACA Branch that George Finch and John Dennis Honeycutt were responsibly connected to Third Coast Produce Company, Ltd. during the period between February 5, 2010 through July 16, 2010 when the entity was committing willful, flagrant and repeated violations of the Act is **AFFIRMED**.

2. Petitioners George Finch and John Dennis Honeycutt are accordingly subject to the licensing restrictions and employment sanctions contained in Section 4(b) and 8(b) of the Act (7 U.S.C. § 499d(b) and § 499h(b)).

3. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Petitioner, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

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REPARATIONS DECISIONS

**CLASSIC FRUIT COMPANY, INC. v. AYCO FARMS, INC. &
AYCO FARMS, INC. v. CLASSIC FRUIT COMPANY, INC.**
PACA Docket Nos. S-R-2012-387, S-R-2012-0420.
Decision and Order.
Filed August 9, 2013.

PACA-R.

**Procedure – Prejudgment interest granted to Respondent in a
Counterclaim**

Where Respondent filed a Counterclaim, it was awarded the full amount of its Counterclaim less damages, which amount was offset against the amount awarded to Complainant. A Decision and Order was issued in favor of Complainant ordering Respondent to pay the offset amount plus prejudgment interest on that amount.

Shelton S. Smallwood, Presiding Officer.

Donna M. Ennis, Examiner.

Complainant, pro se.

Respondent, pro se.

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

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as “the Act.” In PACA Docket No. S-R-2012-387, a timely Complaint was filed with the Department in which Complainant Classic Fruit Company, Inc. seeks a reparation award against Respondent Ayco Farms, Inc. in the amount of \$6,630.40 in connection with one (1) truckload of cantaloupes shipped in the course of interstate commerce.

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In PACA Docket No. S-R-2012-420, a timely informal Complaint was filed with the Department in which Complainant Ayco Farms, Inc. seeks \$5,958.40 from Respondent Classic Fruit Company, Inc. in connection with one (1) truckload of cantaloupes shipped in 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 Respondent Ayco Farms, Inc., which filed an Answer thereto, denying liability to Complainant Classic Fruit Company, Inc. and asserting a Counterclaim in the amount of \$5,958.40 in connection with one (1) truckload of cantaloupes sold to Complainant Classic Fruit Company, Inc. in interstate commerce. Complainant Classic Fruit Company, Inc. filed a Reply to the Counterclaim denying liability to Respondent Ayco Farms, Inc.

Neither the amount claimed in the Complaint nor the Counterclaim exceeds \$30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice Under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Neither party filed additional evidence or a brief.

Findings of Fact

1. Complainant in PACA Docket No. S-R-2012-387, and Respondent in PACA Docket No. S-R-2012-420, Classic Fruit Company, Inc. (hereafter "Classic Fruit"), is a corporation whose post office address is 2801 Airport Drive, Suite 101, Madera, CA 93637. At the time of the transactions involved herein, Classic Fruit was licensed under the Act.

2. Respondent in PACA Docket No. S-R-2012-387, and Complainant in PACA Docket No. S-R-2012-420, Ayco Farms, Inc. (hereafter "Ayco Farms"), is a corporation whose post office address is 730 South Powerline Road, Suite G, Deerfield Beach, FL 33442. At the time of the transactions involved herein, Ayco Farms was licensed under the Act.

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3. On or about March 23, 2012, Classic Fruit, by oral contract, sold to Ayco Farms, and agreed to ship from loading point in the state of California, to Ayco Farms, in Deerfield Beach, Florida, one (1) truckload of cantaloupes. Classic Fruit issued invoice number 116510 billing Ayco Farms for 512 cartons of twelve (12)-count Guatemalan cantaloupes at \$12.95 per carton, for a total f.o.b. invoice price of \$6,630.40. (Compl. Ex. 2.) Ayco Farms has not paid Classic Fruit for the cantaloupes billed on invoice number 116510.

4. The informal Complaint was filed on June 15, 2012 (ROI Ex. A at 1), which is within nine months from the date the cause of action accrued.

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5. On or about December 30, 2011, Ayco Farms, by oral contract, sold to Classic Fruit, and agreed to ship from loading point in the state of Florida, to Classic Fruit's customer, in Las Vegas, Nevada, one (1) truckload of cantaloupes. Ayco Farms issued invoice number 79056 billing Classic Fruit for 1,064 cartons of nine (9)-count Guatemalan cantaloupes at \$8.00 per carton, or \$8,512.00, plus \$23.50 for a temperature recorder, for a total delivered invoice price of \$8,535.50. Ayco Farms's salesman was Mr. Fran Torigian (ROI Ex. A at 3-4, 7). Classic Fruit's salesman was Mr. Troy Harman (ROI Ex. A at 7; C at 1).

6. On January 4, 2012, at 11:30 a.m., a Nevada State inspection was performed on the cantaloupes mentioned in Finding of Fact 5 at the facility of Get Fresh, in Las Vegas, Nevada (Reply to Countercl. Ex. 1). The inspection disclosed a total of seventy-four percent (74%) condition defects, including twenty-seven percent (27%) internal damage affecting eight percent (8%) or more of edible flesh, fifteen percent (15%) serious damage accompanied by fermentation, and thirty-two percent (32%) internal damage affecting twenty percent (20%) or more of edible flesh (Reply to Countercl. Ex. 1). The pulp temperature at the time of the inspection was forty (40) degrees Fahrenheit (Reply to Countercl. Ex. 1).

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7. Complainant subsequently issued a revised invoice number 79056 billing Classic Fruit for 1,064 cartons of nine (9)-count Guatemalan cantaloupes on a delivered PAS basis (ROI Ex. A at 4). On April 10, 2012, Classic Fruit issued check number 008668 made payable to Ayco Farms in the amount of \$3,035.65, which amount includes \$2,577.10 for the cantaloupes billed on invoice number 79056, and \$458.55 for an invoice not involved in this dispute (ROI Ex. C at 7).

8. The informal complaint was filed on July 10, 2012 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

In PACA Docket No. S-R-2012-387, Classic Fruit seeks to recover the invoice price for one (1) truckload of cantaloupes sold to Ayco Farms. Complainant states Respondent accepted the cantaloupes in compliance with the contract of sale, but that it has since failed, neglected, and refused to pay Complainant the agreed purchase price of \$6,630.40 (Compl. ¶ 6, 8).

In PACA Docket No. S-R-2012-420, Ayco Farms seeks to recover the invoice price of \$8,535.50 for one (1) truckload of cantaloupes sold to Classic Fruit, less a payment of \$2,577.10, or a balance of \$5,958.40 (ROI Ex. A at 1; Countercl. ¶ A).

As there are different circumstances surrounding each of the transactions in question, we will address each transaction individually by invoice number below:

Classic Fruit Invoice Number 116510

In response to the Complaint, Ayco Farms submitted a sworn Answer wherein it admits owing Classic Fruit \$6,630.40 for the truckload of cantaloupes in question, but asserts in its Counterclaim that it has been withholding payment until Classic Fruit remits payment to Ayco Farms for a truckload of cantaloupes purchased by Classic Fruit (Answer ¶ 8; Countercl. ¶ A). As Ayco Farms does not dispute its liability to Classic Fruit for the agreed purchase price of the cantaloupes in this shipment,

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we find that Ayco Farms is liable to Classic Fruit for the cantaloupes it accepted at the agreed purchase price of \$6,630.40.

Ayco Farms Invoice Number 79056

Ayco Farms asserts in its Counterclaim that there is an outstanding balance of \$5,958.40 due Ayco Farms from Classic Fruit for a load of cantaloupes Ayco Farms sold to Classic Fruit on December 30, 2011 (Countercl. ¶ A; Ex. 7). In response to Ayco Farms' Counterclaim, Classic Fruit submitted an unverified reply wherein it asserts that after the cantaloupes were inspected by the Nevada State Inspection Service, Ayco Farms requested that Classic Fruit handle the shipment on a PAS basis with full protection (Reply to Countercl. at 1).

Classic Fruit's acceptance of the cantaloupes is not in dispute. A buyer who accepts produce becomes liable to the seller for the full purchase thereof, less any damages resulting from any breach of contract by the seller. *Fresh W. Mktg., Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971). The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4); *see also W.T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1705, 1710 (U.S.D.A. 1993); *Salinas Mktg. Coop. v. Tom Lange Co.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

The cantaloupes were sold under delivered terms, which means, "that the produce is to be delivered by the seller ... at the market in which the buyer is located ... free of any and all charges for transportation or protective service. The seller assumes all risks of loss and damage in transit not caused by the buyer." *See* 7 C.F.R. § 46.43(p). Under a delivered contract, the goods are required to meet contract requirements at the time and place specified in the contract for delivery. The warranty of suitable shipping condition has no relevance in a delivered sale contract. *Villalobos v. Am. Banana Co.*, 56 Agric. Dec. 1969, 1978-79 (U.S.D.A. 1997); *Sidney Newman & Co. v. Wallace Fruit & Vegetable Co.*, 21 Agric. Dec. 1048, 1050 (U.S.D.A. 1962).

Ayco Farms states it is seeking full payment of the agreed purchase price for the cantaloupes because the inspection did not cover the total

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number of cartons shipped (ROI Ex. A at 1). The record discloses that sixteen (16) pallets, or 896 cartons (56 cartons per pallet), were available for inspection on January 4, 2012 (Reply to Countercl. Ex. 1). The inspector took nine (9) samples out of the sixteen (16) pallets, a sampling rate of approximately one percent (1%) (Reply to Countercl. Ex. 1). We find that the sample size used by the surveyor is sufficient.

The United States Standards for Grades of Cantaloupes (7 C.F.R. §§ 51.475-94)¹ provide a destination tolerance for cantaloupes designated as U.S. No. 1 grade of twelve percent (12%) for average defects, including therein not more than six percent (6%) for defects causing serious damage and two percent (2%) for decay. Although there is no indication that the cantaloupes in question were sold with a grade specification, these tolerances may be applied to the condition defects disclosed by the inspection. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 456 (U.S.D.A. 2000).

The inspection disclosed a total of seventy-four percent (74%) condition defects, including twenty-seven percent (27%) internal damage affecting eight percent (8%) or more of edible flesh, fifteen percent (15%) serious damage accompanied by fermentation, and thirty-two percent (32%) internal damage affecting twenty percent (20%) or more of edible flesh, in the 896 cartons of cantaloupes inspected (Reply to Countercl. Ex. 1). Absent evidence to the contrary, we must presume that the remaining 168 cartons of cantaloupes that were not inspected were free of defects and otherwise conformed to the contract requirements. *M.J. Duer & Co. v. J.F. Sanson & Sons Co.*, 49 Agric. Dec. 620, 624 (U.S.D.A. 1990). When we average the inspection results pertinent to the 896 cartons of cantaloupes that were inspected over the 1,064 cartons of cantaloupes shipped, the total condition defects for the shipment as a whole average sixty-two percent (62%), including twenty-three percent (23%) internal damage affecting eight percent (8%) or more of edible flesh, thirteen percent (13%) serious damage accompanied by fermentation, and twenty-seven percent (27%) internal damage affecting twenty percent (20%) or more of edible flesh.

¹ The United States Standards for Grades of Cantaloupes are also available via the Internet at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5050255>.

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There are essentially two (2) defects disclosed by the inspection, internal damage and fermentation. The Nevada State inspector found that twenty-six percent (26%) of the cantaloupes showed good internal quality, fifty-nine percent (59%) showed internal damage and the remaining fifteen percent (15%) showed fermentation. The U.S. No 1 grade for cantaloupes specifies that the cantaloupes should have “good internal quality.” See 7 C.F.R. § 51.476. This is normally ascertained by determining the percentage of soluble solids using a hand refractometer. See 7 C.F.R. § 51.485. There is no indication that the inspector performed this test to ascertain the percentage of the cantaloupes having good internal quality, nor does the inspector identify the actual defects that were scored as internal damage. Absent more detail, we must disregard the internal damage noted on the inspection report.

With respect to the fermentation disclosed by the inspection, the Shipping Point and Market Inspection Instructions² applicable to cantaloupes state that cantaloupes with fermented flesh are scored against the decay tolerance. Therefore, the thirteen percent (13%) serious damage accompanied by fermentation disclosed by the inspection is subject to the two percent (2%) decay tolerance set forth in the U.S. Grade Standards for Cantaloupes. Given that the percentage of fermentation exceeds the decay tolerance by eleven percent (11%), we conclude that Classic Fruit has sustained its burden to prove a breach of contract by Ayco Farms for which Classic Fruit is entitled to recover provable damages.

Classic Fruit asserts, however, that the price terms of the contract were changed to PAS following the inspection. Specifically, Mr. Paul Raggio, President of Classic Fruit, asserts in his unverified reply to the Counterclaim that following the inspection, Ayco Farms’s Mr. Torigian requested that Classic Fruit “. . . handle this shipment on a PAS basis with full protection from Ayco Fruit.” (Reply to Countercl. at 1). The party that claims the contract was modified has the burden of proof. *Garren-Teed Co. v. Mo-Bo Enter., Inc.*, 51 Agric. Dec. 811, 813

² The Shipping Point and Market Inspection Instructions are also available via the Internet at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5102779>.

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(U.S.D.A. 1992); *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506, 508 (U.S.D.A. 1975).

The record reflects that Ayco Farms's salesman, Mr. Fran Torigian, and Classic Fruit's salesman, Mr. Troy Harman, were the individuals personally involved in the transaction (ROI A at 3-4, 7; C at 1). Notably, neither party submitted a sworn statement from these individuals regarding the transaction at issue. The record does, however, include two copies of invoice number 79056 billing Classic Fruit for the cantaloupes at issue (ROI Ex. A at 3-4). One copy of the invoice shows Ayco Farms billing Classic Fruit for the cantaloupes at a fixed price of \$8.00 per carton, while the other copy shows Ayco Farms billing Classic Fruit for the cantaloupes on a PAS basis. Nowhere in the record does Ayco Farms address the evidence showing that it billed Classic Fruit for the cantaloupes on a PAS basis. Accordingly, we find that the preponderance of the evidence supports Respondent's contention that the parties agreed to modify the price terms of the contract to PAS (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)),³ 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 (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.

Mr. Raggio asserts that Mr. Torigian verbally accepted a return of \$2.40 per carton for the cantaloupes (Reply to Countercl. at 2). Mr. Raggio's statement is, however, not sworn. Therefore, it cannot be afforded any evidentiary value. *C.H. Robinson Co. v. ARC Fresh Food Sys., Inc.*, 50 Agric. Dec. 950, 952 (U.S.D.A. 1991); *Prillwitz v. Sheehan Produce*, 19 Agric. Dec. 1213, 1215 (U.S.D.A. 1960). Moreover, as we already noted, the transaction was negotiated by Ayco Farms's Fran

³ 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."

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Torigian and Classic Fruit's Troy Harman, so there is no indication that Mr. Raggio had any firsthand knowledge of the transaction in question.

The record also includes a copy of the PAS invoice with "2.40" handwritten in the price column (ROI Ex. A at 4); however, there is no indication that Ayco Farms agreed to accept this return. As the evidence therefore fails to establish that the parties agreed on a price for the cantaloupes, a reasonable price must be determined.

To determine a reasonable price for goods sold price after sale, we normally consult relevant USDA Market News reports; however, we will also consider the results of a prompt and proper resale if the circumstances indicate that the use of such results will enable us to arrive at a more accurate figure. See *M. Offutt Co. v. Caruso Produce, Inc.*, 49 Agric. Dec. 594, 603 (U.S.D.A. 1990). In the instant case, Respondent has not submitted an account of sales for the cantaloupes. Accordingly, we will refer to relevant USDA Market News reports to determine the reasonable value of the cantaloupes. The closest destination market to Las Vegas, Nevada, is Los Angeles, California, which is approximately 270 miles away. We find that this market is too remote to accurately represent the market value of the subject cantaloupes in Las Vegas.

Where relevant market prices are not available, we often use the delivered price of the commodity as a substitute measure of its market value. *C.J. Prettyman, Jr., Inc. v. Am. Growers, Inc.*, 55 Agric Dec. 1352, 1372-73 (U.S.D.A. 1996); *Sardina v. Caamano Bros.*, 42 Agric. Dec. 1275, 1278-79 (U.S.D.A. 1983). Ayco Farms invoiced Classic Fruit for the 1,064 cartons of cantaloupes in question at a delivered price of \$8.00 per crate, or \$8,512.00, plus \$23.50 for a temperature recorder, for a total delivered price of \$8,535.50 (Answer/Countercl. Ex. 2).

When this amount is reduced by thirteen percent (13%), or \$1,109.62, to account for the condition defects disclosed by the inspection, we arrive at a reasonable value for the cantaloupes of \$7,425.88. From this amount, Respondent is entitled to deduct twenty percent (20%), or \$1,485.18, for profit and handling, and \$90.00 for the Nevada State inspection fee. *A.P.S. Mktg., Inc. v. R.S. Hanline & Co.*, 59 Agric. Dec. 407, 410-11 (U.S.D.A. 2000); *C.J. Prettyman, Jr., Inc. v. Am. Growers, Inc.*, 55 Agric Dec. 1352, 1374-75 (U.S.D.A. 1996). After making these

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deductions, the net amount due Ayco Farms from Classic Fruit for the 1,064 cartons of in question is \$5,850.70. Classic Fruit paid Ayco Farms \$2,577.10 for the cantaloupes. Therefore, there remains a balance due Ayco Farms from Classic Fruit of \$3,273.60.

For the transaction involved in PACA Docket No. S-R-2012-387, we have found a total amount due Classic Fruit from Ayco Farms of \$6,630.40. Ayco Farms's failure to pay Classic Fruit \$6,630.40 is a violation of section 2 of the Act for which reparation should be awarded to Classic Fruit.

For the transaction involved in PACA Docket No. S-R-2012-420, we have found a total amount due Ayco Farms from Classic Fruit of \$3,273.60. Classic Fruit's failure to pay Ayco Farms \$3,273.60 is a violation of section 2 of the Act for which reparation should be awarded to Ayco Farms. When the amount due Ayco Farms from Classic Fruit is offset against the amount due Classic Fruit from Ayco Farms, there is a net amount due Classic Fruit from Ayco Farms of \$3,356.80.

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, 239 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978, 979 (U.S.D.A. 1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 339 (U.S.D.A. 1970); *Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963).

Classic Fruit seeks interest on the unpaid amount due for the cantaloupes at a rate of one and one-half percent (1.5%) per month. Classic Fruit's claim is based on its invoice to Ayco Farms which bears the statement: "Past due accounts are subjected to an interest charge of 1.5% per month both on prejudgment and post-judgment debt." See Compl. Ex. 2. There is nothing to indicate that Ayco Farms objected to the interest charge provision stated on Classic Fruit's invoice. In the

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absence of a timely objection by Ayco Farms, the interest charge provision stated on Classic Fruit's invoice becomes incorporated into the sales contract. *See, e.g., Johnston v. AG Growers Sales LLC*, 69 Agric. Dec. 1569, 1583-86 (U.S.D.A. 2010) (applying section 2-207(2) of the Uniform Commercial Code).

The one and one-half percent (1.5%) per month, eighteen percent (18%) per annum rate of interest set by Classic Fruit's invoice to Ayco Farms is not unreasonable. Numerous courts have awarded interest at a rate of eighteen percent (18%) based on similar contract provisions. *See, e.g., Palmareal Produce Corp. v. Direct Produce #1, Inc.*, 2008 WL 905041, at *3 (E.D.N.Y. 2008) (awarding interest at 18 percent set by invoice clause); *John Georgallas Banana Dist. of New York, Inc. v. N&S Tropical Produce, Inc.*, 2008 WL 2788410, at * 5 (E.D.N.Y. 2008) (same); *AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Services Inc.*, 2007 WL 4302514, at **7-8 (S.D.N.Y. 2007) (same); *Dayoub Marketing, Inc. v. S.K. Produce Corp.*, 2005 WL 3006032, at *4 (S.D.N.Y. 2005) (same). Accordingly, interest will be awarded to Classic Fruit at the rate of eighteen percent (18%) per annum.

In PACA Docket No. S-R-2012-387, Classic Fruit paid \$500.00 to file its formal Complaint. Likewise, in PACA Docket No. S-R-2012-420, Ayco Farms paid \$500.00 to file its Counterclaim. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party. Since the handling fees paid by the parties offset one another, neither party is liable for the handling fee paid by the other.

ORDER

Within thirty (30) days from the date of this Order, Ayco Farms shall pay Classic Fruit as reparation \$3,356.80, with interest thereon at the rate of eighteen percent (18%) per annum from May 1, 2012, up to the date of this Order.

Ayco Farms shall pay Classic Fruit interest at the rate of 0.11 percent per annum on the sum of \$3,356.80 from the date of this Order, until paid.

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Copies of this Order shall be served upon the parties.

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PACA Docket No. E-R-2011-259.

Decision and Order.

Filed September 12, 2013.

PACA-R.

Breach of Contract – Inspections – Appeal

Where the seller made a timely request for an appeal inspection, but the buyer denied the product was available and the buyer subsequently issued account of sales or other evidence which established that the product was, in fact, available for the requested appeal inspection, the original inspection shall be disallowed.

Shelton S. Smallwood, Presiding Officer.

Donna M. Ennis, Examiner.

Lawrence H. Meuers for Complainant

Craig A. Stokes for Respondent

Decision and Order entered by William G. Jensen, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as “the Act.” A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of \$52,447.10 in connection with four (4) truckloads of cantaloupes and honeydew melons shipped in the course of interstate commerce.

Copies of the Report of Investigation (“ROI”) 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.

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Although the amount claimed in the Complaint exceeds \$30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties also submitted briefs.

Findings of Fact

1. Complainant is a limited liability company whose post office address is 23150 Fashion Drive, Suite #235, Estero, FL 33928. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent is a corporation whose post office address is 145 Hamilton Avenue, Brooklyn, NY 11231. At the time of the transactions involved herein, Respondent was licensed under the Act.

Invoice No. 16931

3. On or about February 23, 2011, Complainant, by written contract, sold to Respondent one (1) truckload of Costa Rican cantaloupes (Compl. Ex. 6-7, 9). Complainant issued invoice number 16931 billing Respondent for 1,152 cartons of cantaloupes (12's) at \$10.35 per carton, or \$11,923.20, plus \$26.00 for a temperature recorder, for a total invoice price of \$11,949.20 (Compl. Ex. 2). The cantaloupes were shipped on February 23, 2011, from loading point in Glassboro, New Jersey, to Respondent, in Brooklyn, New York, where they were received on February 24, 2011 (Compl. Ex. 3).
4. On February 24, 2011, at 12:05 p.m., Respondent requested a USDA inspection of the cantaloupes. The inspection was performed on the same date, between 4:02 p.m. and 5:30 p.m., at Respondent's cooler in Brooklyn, New York (Compl. Ex. 14). The inspection disclosed

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twenty-two percent (22%) damage by sunken area (Compl. Ex. 14). Pulp temperatures at the time of the inspection ranged from forty-three (43) to forty-four (44) degrees Fahrenheit (Compl. Ex. 14).

5. On May 26, 2011, Respondent prepared an account of sales for the cantaloupes billed on invoice number 16931 that reads, in pertinent part, as follows:

Quantity Sold	Date	Item Description	Case	Extended
150	2/25/2011	Cantaloupe 12's	\$4.60	\$ 690.00
125	2/25/2011	Cantaloupe 12's	\$4.40	\$ 550.00
110	2/25/2011	Cantaloupe 12's	\$4.25	\$ 467.50
100	2/28/2011	Cantaloupe 12's	\$3.60	\$ 360.00
145	2/28/2011	Cantaloupe 12's	\$3.40	\$ 493.00
120	3/01/2011	Cantaloupe 12's	\$3.25	\$ 390.00
155	3/01/2011	Cantaloupe 12's	\$3.00	\$ 465.00
135	3/02/2011	Cantaloupe 12's	\$2.75	\$ 371.25
112	3/02/2011	Cantaloupe 12's	\$2.50	\$280.00
1152	Total Sales Before Charges			\$4,066.75
		Inspection	\$220.00	
		Commission 15%	\$610.01	
				\$ 830.01
	Return			\$3,236.74

(ROI Ex. E at 2).

6. Respondent has not paid Complainant for the cantaloupes billed on invoice number 16931.

Invoice No. 16932

7. On or about February 23, 2011, Complainant, by written contract, sold to Respondent one (1) truckload of Costa Rican cantaloupes (Compl. Ex. 6-7, 10). Complainant issued invoice number 16932 billing Respondent for 1,280 cartons of cantaloupes (9's) at \$10.35 per carton, for a total invoice price of \$13,248.00 (Compl. Ex. 4). The cantaloupes

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were shipped on February 23, 2011, from loading point in Pittsgrove, New Jersey, to Respondent, in Brooklyn, New York, where they were received on February 24, 2011 (Compl. Ex. 5).

8. On February 24, 2011, at 12:05 p.m., Respondent requested a USDA inspection of the cantaloupes. The inspection was performed on the same date, between 2:14 p.m. and 4:02 p.m., at Respondent's cooler in Brooklyn, New York (Compl. Ex. 12). The inspection disclosed twenty-six percent (26%) damage by sunken areas (Compl. Ex. 12). Pulp temperatures at the time of the inspection ranged from forty-three (43) to forty-four (44) degrees Fahrenheit (Compl. Ex. 12).

9. On May 26, 2011, Respondent prepared an account of sales for the cantaloupes billed on invoice number 16932 that reads, in pertinent part, as follows:

Quantity Sold	Date	Item Description	Case	Extended
175	2/25/2011	Cantaloupe 9's	\$4.50	\$ 787.50
142	2/25/2011	Cantaloupe 9's	\$4.25	\$ 603.50
135	2/25/2011	Cantaloupe 9's	\$4.00	\$ 540.00
125	2/28/2011	Cantaloupe 9's	\$3.75	\$ 468.75
150	2/28/2011	Cantaloupe 9's	\$3.50	\$ 525.00
142	3/01/2011	Cantaloupe 9's	\$3.25	\$ 461.50
136	3/01/2011	Cantaloupe 9's	\$3.00	\$ 408.00
150	3/02/2011	Cantaloupe 9's	\$2.75	\$ 412.50
125	3/02/2011	Cantaloupe 9's	\$2.50	\$ 312.50
1152	Total Sales Before Charges			\$4,066.75
		Inspection	\$220.00	
		Commission 15%	\$610.01	
				\$ 830.01
Return				\$3,236.74

(ROI Ex. E at 3).

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10. Respondent has not paid Complainant for the cantaloupes billed on invoice number 16932.

Invoice No. 16934

11. On or about February 23, 2011, Complainant, by written contract, sold to Respondent one truckload consisting of 1,729 cartons of Honduran honeydew melons at \$15.00 per carton (Compl. Ex. 53, 56). The honeydew melons were shipped on or about February 23, 2011, from loading point in Pittsgrove, New Jersey, to Respondent, in Brooklyn, New York, where they were received on February 25, 2011, and subsequently rejected by Respondent (Compl. Ex. 60). The shipping manifest includes a handwritten notation:

Truck missed Delivery
Time Missed orders was
One day late Rejected
2/25/2011 5:15 pm Friday
x Hector Roman / Hector Roman
Driver

(Compl. Ex. 60).

12. Complainant resold the load to Delmonte Fresh Produce N.A., Inc. [hereafter "Delmonte"], in Canton, Massachusetts (Compl. Ex. 74 at 2).

13. On February 23, 2011, Complainant issued invoice number 16934 billing Respondent for 1,729 cartons of honeydew melons (5's) at \$2.42 per carton, or \$4,184.18, plus \$9.32 for an unexplained charge, for a total invoice price of \$4,193.50 (Compl. Ex. 71). Respondent has not paid Complainant for the honeydew melons billed on invoice number 16934.

14. On February 24, 2011, Complainant issued a second invoice number 16934 billing Delmonte for 1,729 cartons of honeydew melons (6's) at \$13.50 per carton, for a total invoice price of \$23,341.50 (Compl. Ex. 73).

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Invoice No. 16935

15. On or about February 24, 2011, Complainant, by written contract, sold to Respondent one truckload of Costa Rican honeydew melons (Compl. Ex. 6-7, 41). Complainant issued invoice number 16935 billing Respondent for 1,504 cartons of honeydew melons (5's) at \$15.35 per carton, for a total invoice price of \$23,086.40 (Compl. Ex. 40). The honeydew melons were shipped on February 24, 2011, from loading point in the State of Florida, to Respondent, in Brooklyn, New York, where they were received on February 26, 2011 (Compl. Ex. 43).

16. On February 28, 2011, at 6:00 a.m., Respondent requested a USDA inspection of the honeydew melons (ROI Ex. D at 10). The inspection was performed on the same date, between 8:22 a.m. and 9:38 a.m., at Respondent's cooler in Brooklyn, New York (ROI Ex. D at 10). The inspection disclosed twelve percent (12%) damage by sunken discolored areas (ROI Ex. D at 10). Pulp temperatures at the time of the inspection ranged from forty-three (43) to forty-five (45) degrees Fahrenheit (ROI Ex. D at 10).

17. On May 26, 2011, Respondent prepared an account of sales for the honeydew melons billed on invoice number 16935 that reads, in pertinent part, as follows:

Quantity Sold	Date	Item Description	Case	Extended
225	2/28/2011	Honeydews 5's	\$16.25	\$ 3,656.25
202	2/28/2011	Honeydews 5's	\$16.15	\$ 3,262.30
175	2/28/2011	Honeydews 5's	\$16.00	\$ 2,800.00
125	3/01/2011	Honeydews 5's	\$15.75	\$ 1,968.75
110	3/01/2011	Honeydews 5's	\$15.60	\$ 1,716.00
150	3/02/2011	Honeydews 5's	\$15.55	\$ 2,332.50
125	3/02/2011	Honeydews 5's	\$15.50	\$ 1,937.50
225	3/03/2011	Honeydews 5's	\$15.25	\$ 3,431.25
167	3/03/2011	Honeydews 5's	\$15.00	\$ 2,505.00
1504	Total Sales Before Charges			\$23,609.55
Inspection			\$161.96	
Commission 15%			\$3,541.43	

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\$ 3,703.39

Return

\$19,906.16

(ROI Ex. E at 4).

18. Respondent has not paid Complainant for the honeydew melons billed on invoice number 16935.

19. The informal complaint was filed on April 15, 2011 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for four (4) truckloads of cantaloupes and honeydew melons purchased from Complainant. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling \$52,447.10 (Compl. ¶ 7). In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it admits purchasing the four truckloads of cantaloupes and honeydew melons, but disputes the terms of sale (Answer ¶ 4). Respondent also asserts as an affirmative defense that it performed its obligations to Complainant or was excused from performance by impossibility, frustration or impracticability in each instance; and that Complainant's alleged injuries and damages were the result of the fault and/or negligence of Complainant (Answer Affirm. Defenses ¶¶ 1-3).

With respect to its dispute concerning the terms of sale for the cantaloupes and honeydew melons, Respondent asserts specifically that it purchased the melons from Complainant on a delivered basis, but that Complainant changed the terms when it shipped the melons (ROI Ex. D at 3). In response, Complainant contends that the cantaloupes and honeydew melons were sold to Respondent under the terms "delivered as to price, F.O.B. as to quality and condition," and that the parties never agreed to change those terms (ROI Ex. G at 1).

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Where the parties put forth affirmative but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish its allegation by a preponderance of the evidence. *Stake Tomatoes of Ruskin, Inc. v. World Wide Consultants, Inc.*, 52 Agric. Dec. 770, 771-72 (U.S.D.A. 1993); *Lookout Mountain Tomato & Banana Co. v. Case Produce, Inc.*, 51 Agric. Dec. 1471, 1475 (U.S.D.A. 1992). To support its contention that the sale terms were delivered with respect to price only, and f.o.b. in all other respects, Complainant submitted copies of its invoices and passings, which include a printed statement that reads:

Delivered As to Price
F.O.B. as to Quality & Condition
No Grade Contract
Good Delivery Standards Apply
Sales Confirmation

(ROI Ex. A at 2-5; C at 13, 47, 76-77). Complainant also submitted a copy of its quote sheet that it e-mailed to Respondent on February 23, 2011, which bears a statement at the bottom that reads:

Delivered As To Price - F O B To Quality & Condition
-No Grade Contract
Good Delivery Standards Apply - Prices Subject to
Change

(ROI Ex. G at 6-7).

To support its contrary assertion that the sales of the cantaloupes and honeydew melons were contracted on a delivered basis, Respondent submitted a copy of an e-mail message that it received from Complainant on February 23, 2011, which confirms the purchase of the melons and states, in pertinent part:

My po #16932
Load 9 ct @ 10.35 Delivered
Mikes melon
Origin Honduras
Approx Deliver 2/23/11-2/24/11

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My po # 196931 corrected
Load 12ct @ 10.35 delivered
Origin Costa Rica
Approx Deliver 2/23/11-2/24/11

My po # 16935
Load honeydew 5ct @ 15.35
Origin Costa Rica
Delmonte label
Approx Deliver 2/27/11

My po # 16934
Load 6ct honeydews 6 ct @ 15.00
Mikes melon
Origin Honduras
Approx Deliver 2/25/11

(ROI Ex. D at 4). Notably, where the term “delivered” appears in the e-mail message set forth above, it is next to the purchase price of the melons. This may be viewed as supporting Complainant’s contention that the delivered term referred to the price of the melons only. Moreover, Complainant has submitted invoices and passings which plainly state that the terms of sale were delivered as to price, but f.o.b. as to quality and condition. Respondent does not deny receiving these documents, nor has it shown that it took prompt exception to the terms stated on these documents upon their receipt. When documents containing terms of sale are not objected to in a timely manner, such documents are evidence of a contract containing the terms set forth therein. *Action Produce v. Ward’s Fruit & Produce, Inc.*, 46 Agric. Dec. 1845, 1847 (U.S.D.A. 1987); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (U.S.D.A. 1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218, 224-25 (U.S.D.A. 1960). We therefore find that the preponderance of the evidence supports Complainant’s contention that the terms of sale were delivered as to price only, and that the sales were otherwise contracted on an f.o.b. basis.

The Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(i)) define f.o.b. as meaning:

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that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.

Suitable shipping condition is defined in the Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j)) as meaning:

that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.¹

Under the warranty of suitable shipping condition, a receiver may establish that the produce did not comply with the contract requirements

¹ 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. Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. 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. *Harvest Fresh Produce Inc. v. Clarke-Ehre Produce Co.*, 39 Agric. Dec. 703, 708-09 (U.S.D.A. 1980).

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at the time of shipment by providing independent evidence, such as a USDA inspection, showing that the produce was abnormally deteriorated when it was received at the contract destination.

We will first consider the two shipments of cantaloupes identified by Complainant's invoice numbers 16931 and 16932, as the circumstances and evidence presented with respect to these transactions are very similar. The 1,152 cartons of cantaloupes billed on invoice number 16931 and the 1,280 cartons of cantaloupes billed on invoice number 16932 were delivered to Respondent on February 24, 2011 (Compl. Ex. 3, 5). While Respondent denies accepting the cantaloupes in these shipments (Answer ¶ 7), the record shows that the cantaloupes were unloaded before they were subjected to USDA inspection (Compl. Ex. 12, 14). We have held many times that the unloading of product constitutes an acceptance thereof. *Fresh W. Mktg., Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971). We therefore find that Respondent accepted the two (2) truckloads of cantaloupes in question.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Company v. Ben Gatz Company*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971). The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4); *see also W.T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1705, 1710 (U.S.D.A. 1993); *Salinas Mktg. Coop. v. Tom Lange Co.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

For the cantaloupes billed on invoice number 16931, the USDA inspection performed on February 24, 2011, disclosed 26 percent average damage by sunken areas (Compl. Ex. 14); and for the cantaloupes billed on invoice number 16932, the USDA inspection performed on the same date disclosed 22 percent average damage by sunken areas (Compl. Ex. 12). The United States Standards for Grades of Cantaloupes (7 C.F.R.

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§§ 51.475-94)² provide a tolerance at shipping point for cantaloupes designated as U.S. No. 1 grade of twelve percent (12%) for average defects, including therein not more than six percent (6%) for defects causing serious damage and two percent (2%) for decay. Although there is no indication that the cantaloupes in question were sold with a grade specification, these tolerances may be applied to the condition defects disclosed by the inspections. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 456 (U.S.D.A. 2000).

In addition, for produce sold f.o.b., we apply an additional allowance to the tolerances just mentioned to account for normal deterioration in transit.³ In the instant case, both truckloads of cantaloupes were shipped on February 23, 2011, and received on the following day. As the cantaloupes were therefore in transit for only one day, no additional allowance for normal deterioration in transit is warranted. When comparing the inspection results to the applicable allowances just mentioned, the USDA inspection results indicate that the cantaloupes in question were not in suitable shipping condition.

However, Complainant's Mr. Greg Holzhausen asserts that Complainant is entitled to full payment for the cantaloupes because Respondent failed to provide Complainant with proper notice of any problems with the cantaloupes, and also because Complainant was denied the opportunity to appeal the USDA inspection results (ROI Ex. G at 1-2; Opening Stmt. ¶¶ 12, 14). The Uniform Commercial Code states that where a tender has been accepted "the buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller..." See U.C.C. § 2-607(3)(a). The burden to prove that prompt notice of a breach was given rests with the buyer of accepted goods. *Diazteca Co. v. Players Sales, Inc.*, 53 Agric. Dec. 909, 915 (U.S.D.A. 1994).

In support of its assertion that Complainant was timely notified of trouble with the cantaloupes, Respondent submitted a series of e-mail messages exchanged with Complainant, two of which show that Respondent's Mr. Marc Greenberg e-mailed Complainant's Mr.

² The United States Standards for Grades of Cantaloupes are also available via the Internet at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5050255>.

³ *Supra* note 1.

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Holzhausen copies of the USDA inspections pertaining to the cantaloupes billed in invoice numbers 16931 and 16932 the morning following the inspections, February 25, 2011, at 7:05 a.m. EST. (Answering Stmt. Ex. A; ROI Ex. C at 78). We conclude that this notice is prompt.

Following receipt of the USDA inspections e-mailed by Mr. Greenberg, Complainant's Mr. Greg Holzhausen sent an e-mail message to Mr. Greenberg at 7:14 a.m. EST stating:⁴

Marc please do not touch the load of mikes until I talk to the shipper. Do not sell any of that fruit for he will probably want to move the load. This is the first problem I have had on there [sic] fruit this year. Not how I wanted to start with you. Two loads two inspections.

(Compl. Ex. 15). Mr. Greenberg sent a response to Mr. Holzhausen at 7:16 a.m. EST, advising Mr. Holzhausen: "They saw lots of problems after unloading. Most of them shipped out to the stores last night." (Compl. Ex. 17). Mr. Holzhausen replied first at 9:30 a.m. EST stating, "Marc please be advised I wish to appeal this inspection taken 1280 mikes melons" (Compl. Ex. 22); and again at 9:34 a.m. EST stating, "Marc please be advised we are calling for an appeal inspection. 1152 12ct loupes Dulicia brand. Do not sell any of the fruit." (Compl. Ex. 23-25). At 3:53 p.m. EST, Mr. Greenberg sent an e-mail message to Mr. Holzhausen stating, "As I told u earlier. The melons were sent out to the stores." (Compl. Ex. 24-25).

The record also includes an unverified statement from Mr. Jagarnauth Persaud, the USDA inspector who performed the inspections on the subject cantaloupes (Compl. Ex. 31). Mr. Persaud's statement reads, in pertinent part, as follows:

⁴ Although the "Subject" line of the e-mail references only inspection certificate number T-072-0253-06734, which covers the cantaloupes billed on Complainant's invoice number 16932, Complainant refers to "[t]wo loads two inspection" in the body of its e-mail. It is therefore reasonable to presume that the e-mail message also refers to the cantaloupes billed on invoice number 16931.

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Approximately 9:42am Friday Feb. 25, 2011 an appeal inspection was requested by: New Era Produce for 2 loads of cantaloupes that were inspected yesterday Feb. 24, 2011. Approximately 10:50am today I called Circus Fruits to let them know about the appeal. I spoke to Ronnie Yamni and I was told that the product was sold and there was no product available for inspection.

(Compl. Ex. 31). Based on the e-mail messages from Mr. Holzhausen and the statement of Mr. Persaud, we conclude that Complainant's appeal inspection request, which was made within several hours of its receipt of the inspection results, was sufficiently prompt.

As Complainant points out in correspondence submitted to the Eastern Regional PACA office during the informal handling of this dispute, the account of sales prepared by Respondent for the cantaloupes billed on invoice number 16931 shows that Respondent resold 385 cartons of the cantaloupes on February 25, 2011, and the remaining 767 cartons of cantaloupes were resold between February 28, 2011, and March 2, 2011 (ROI Ex. E at 2); and the account of sales prepared for the cantaloupes billed on invoice number 16932 shows that Respondent resold 452 cartons of the cantaloupes on February 25, 2011, and the remaining 828 cartons of cantaloupes were resold between February 28, 2011, and March 2, 2011 (ROI Ex. E at 3). The majority of the cantaloupes in each shipment were, therefore, resold after Mr. Greenberg advised Mr. Holzhausen by e-mail that there were no cantaloupes available for an appeal inspection.

As the transactions in question were delivered as to price, f.o.b. as to quality and condition and not consignment transactions, there was no requirement for Respondent to submit accounts of sale. However, Respondent chose to do so at the request of the Eastern Regional PACA office (ROI Ex. E at 1-4). In so doing, Respondent implied that it kept records such as would enable it to render an accurate accounting. For this reason, we presume that Respondent's accounts of sale accurately reflect its resale of the cantaloupes.

As we mentioned, Respondent's accounts of sale show the majority of its sales of the cantaloupes took place after Complainant requested an

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appeal inspection. Respondent therefore deprived Complainant of its right to secure an appeal inspection by advising Complainant and the USDA inspector that no cantaloupes were available for the appeal. As a result, we are unable to accept the original inspections as evidence of the condition of the cantaloupes Respondent accepted. Without these inspections, the record is absent any proof that the cantaloupes did not comply with the contract requirements. Absent a breach, Respondent is liable to Complainant for the full purchase price of the cantaloupes, or \$25,197.20 (\$11,949.20 + \$13,248.00).

Turning next to the 1,729 cartons of honeydew melons billed on Complainant's invoice number 16934, the melons in this shipment were sold and delivered to Respondent on February 25, 2011 (ROI Ex. A at 4; D at 11). Complainant is claiming damages totaling \$4,193.50 allegedly resulting from Respondent's unlawful rejection of the melons. This amount is based on the difference between the agreed upon contract price with Respondent (1,729 cartons at \$15.00 per carton, or \$25,935.00) and the amount it received from its resale to Delmonte (1,729 cartons at \$13.50 per carton, or \$23,341.50), or \$2,593.50, plus redelivery charges of \$1,600.00 (Opening Stmt. ¶ 44).

Since Complainant's claim for damages is based on Respondent's rejection of the honeydew melons in this shipment, we must first determine whether Respondent accomplished an effective rejection. It has consistently been held that for a rejection to be effective, it must be made in clear and unmistakable terms. *Teixeira Farms, Inc. v. Community-Suffolk, Inc.*, 52 Agric. Dec. 1700, 1702 (U.S.D.A. 1993); *Norden Fruit Co. v. C & D Fruit & Vegetable Co.*, 46 Agric. Dec. 1582, 1584 (U.S.D.A. 1987). Complainant submitted a copy of the shipping manifest for the honeydew melons in question, which includes a handwritten notation that reads:

Truck missed Delivery
Time Missed orders was
One day late Rejected
2/25/2011 5:15 pm Friday
x Hector Roman / Hector Roman
Driver

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(ROI Ex. C at 18; Comp. Ex. 60). As the truck driver was the agent of the seller, not Respondent, his handwritten rejection notice on the bill of lading holds no evidentiary value in establishing an effective rejection by Respondent. However, in a letter submitted to the Eastern Regional PACA office during the informal handling of this dispute, Complainant states, “. . . on February 25, 2011 Citrus Fruits faxed me a copy of the bill of lading where they are stating rejection of this load.” (ROI Ex. G at 3). Therefore, it appears that even though the rejection notice was written by the truck driver, Complainant accepted the rejection and proceeded to have the honeydew melons moved to another receiver. Accordingly, we conclude that Respondent clearly and promptly communicated its rejection of the melons to Complainant.

We must now determine whether Respondent's rejection of the honeydew melons was wrongful. Complainant asserts that Respondent's rejection was unlawful since it had no cause to reject the load. (Compl. ¶ 7). Specifically, in affidavit testimony submitted as Complainant's Opening Statement, Mr. Greg Holzhausen, managing member, asserts that Respondent's rejection of the honeydew melons was not based upon condition or visual inspection; rather, Respondent rejected the load because it purportedly arrived one day late (Opening Stmt. ¶ 38). Mr. Holzhausen asserts that the shipment arrived timely (Opening Stmt. ¶ 39), and in support of this assertion, Mr. Holzhausen references an e-mail message he sent to Respondent's Mr. Greenberg on February 23, 2011, at 1:22 p.m. EST, confirming Respondent's purchase of the four truckloads of cantaloupes and honeydew melons in this proceeding (Opening Stmt. Ex. 53). The e-mail message states, in pertinent part:

My po # 16934
Load 6ct honeydews 6ct @ 15.00
Mikes melon
Origin Honduras
Approx Deliver 2/25/11

(Opening Stmt. Ex. 53). Mr. Holzhausen also submitted a copy of the passing sent to Respondent which does not mention a delivery date (Opening Stmt. Ex. 58).

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Mr. Greenberg, in his sworn Answering Statement, does not specifically address Complainant's allegations concerning the rejection or the contract delivery date (Answering Stmt. ¶ 2). Instead, Mr. Greenberg simply refers to the documentation attached to the Answering Statement (Answering Stmt. ¶ 2). This documentation includes a copy of an Entry/Immediate Delivery form issued by the U.S. Department of Homeland Security, a copy of the above-mentioned shipping manifest, and a copy of Complainant's invoice number 16934 billing Respondent for damages due to its rejection of the load (Answering Stmt. Ex. B at 1-3). Absent a statement from Mr. Greenberg as to the relevance of this documentation to the issue at hand, we find that the preponderance of the evidence supports Complainant's contention that it did not guarantee delivery of the melons to Respondent on a specific date.⁵ As the notation on the shipping manifest plainly identifies untimely delivery of the honeydew melons as the reason for the rejection, we conclude Respondent's rejection of the honeydew melons was wrongful. Complainant is entitled to recover damages resulting from Respondent's wrongful rejection of the honeydew melons.

The Uniform Commercial Code, section 2-703, provides in relevant part, "where the buyer wrongfully rejects..., then with respect to any goods directly affected..., the aggrieved seller may... (d) resell and recover damages as hereafter provided (Section 2-706)." U.C.C. § 2-703(d). Section 2-706 provides, in relevant part, "[w]here the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach." U.C.C. § 2-706(1).

Respondent has not contended that Complainant's resale of the honeydew melons in this shipment was other than proper. We therefore find that Complainant is entitled to recover as damages resulting from the wrongful rejection by Respondent the difference between the resale proceeds collected from Delmonte and the contract price of honeydew melons. Complainant submitted a copy of its invoice number 16934 billing Delmonte for the 1,729 cartons of honeydew melons at \$13.50 per

⁵ We should also note that under the f.o.b. terms of the sale, Respondent bore the risk of any damage or delay in transit not caused by Complainant.

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carton, or \$23,341.50. The difference between this amount and the \$25,935.00 (1,729 cartons at \$15.00 per carton) f.o.b. contract price of the honeydew melons is \$1.50 per carton, or \$2,593.50. In addition, Complainant may recover the cost to redeliver the honeydew melons to Delmonte, or \$1,600.00 (Compl. Ex. 75). Complainant's total damages therefore amount to \$4,193.50. Complainant is entitled to recover this sum from Respondent as damages resulting from Respondent's wrongful rejection of the melons.

The fourth and final transaction at issue in this dispute involves the sale by Complainant to Respondent of the 1,504 cartons of honeydew melons billed on invoice number 16935. The melons were shipped on February 24, 2011, and delivered to Respondent on February 26, 2011 (ROI Ex. C at 48; Compl. Ex. 43). Complainant's Mr. Greg Holzhausen asserts that the USDA inspection of the honeydew melons in this shipment fails to establish a breach of contract by Complainant, and that he nevertheless was not given timely notice of the inspection results (Opening Stmt. ¶ 54). For these reasons, Complainant is seeking payment in full from Respondent of the agreed purchase price of the melons (Compl. ¶ 7).

Mr. Greenberg, in his sworn Answering Statement, does not specifically address Complainant's allegations concerning the USDA inspection or the timeliness of Respondent's notice to Complainant of the inspection results (Answering Stmt. ¶ 3). Instead, Mr. Greenberg simply refers to the documentation attached to the Answering Statement (Answering Stmt. ¶ 3). This documentation includes a copy of an e-mail message that Mr. Greenberg sent to Mr. Holzhausen on February 27, 2011, at 3:20 p.m. EST, a copy of the USDA inspection of the melons, and a copy of the request for the USDA inspection (Answering Stmt. Ex. C at 1-3).

We will first determine whether Respondent accepted the melons. Complainant's Mr. Holzhausen states that Mr. Greenberg's e-mail message does not constitute an effective rejection of the melons since the melons were unloaded from the truck at the time of the inspection, and the notice of rejection was not communicated within the eight-hour time limitation set out by the PACA Regulations (Opening Stmt. ¶ 50). In support of his assertion, Mr. Holzhausen submitted a copy of an e-mail

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message that he received from Respondent's Mr. Greenberg on February 27, 2011, at 3:10 p.m. EST, stating, "i called a usda on the honeydew." (Opening Stmt. Ex. 42).

Inexplicably, Respondent's e-mail to Complainant does not reference a rejection of the load in question. In addition, we find no evidence in the record indicating that Respondent intended to reject the load. Therefore, Complainant's assertion of a possible rejection by Respondent is unwarranted. Moreover, the record nevertheless shows that Respondent accepted the honeydew melons, as the melons were unloaded at the time of the inspection (Compl. Ex. 47B).

The USDA inspection of the honeydew melons, which took place two days following arrival, disclosed 12 percent average damage by sunken discolored areas (Compl. Ex. 47B). The United States Standards for Grades of Honeydew and Honey Ball Type Melons (7 C.F.R. §§ 51.3740-49)⁶ provide a tolerance for honeydews and honey ball type melons designated as U.S. No. 1 grade of ten percent (10%) for average defects, including therein not more than five percent (5%) for defects causing serious damage and 1 percent for decay. Although there is no indication that the honeydew melons in question were sold with a grade specification, these tolerances may be applied to the condition defects disclosed by the inspection. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 456 (U.S.D.A. 2000).

In addition, for produce sold f.o.b., we apply an additional allowance to the tolerances just mentioned to account for normal deterioration in transit.⁷ The amount of the allowance depends on the time in transit. The subject load of honeydew melons was in transit for approximately two days, in which case a reasonable allowance is eleven percent (11%) for average defects, including therein not more than six percent (6%) for defects causing serious damage and one percent (1%) for decay.

The record shows that the honeydew melons were shipped from Tampa Bay, Florida, on Thursday, February 24, 2011, and arrived in

⁶ The United States Standards for Grades of Honeydew and Honey Ball Type Melons are also available via the Internet at: <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5050271>.

⁷ *Supra* note 1.

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Brooklyn, New York, on Saturday, February 26, 2011 (ROI Ex. C at 48; Compl. Ex. 43). The inspection was performed at the earliest opportunity following arrival, on Monday, February 28, 2011, between 8:22 a.m. and 9:38 a.m. (Compl. Ex. 47B). Nevertheless, we find that the percentage of damage disclosed by the inspection is not sufficient to allow us to conclude with reasonable certainty that the melons would have exceeded the suitable shipping condition allowance had the load been inspected on the date of arrival. We therefore find that Respondent has failed to sustain its burden to prove that Complainant breached the contract by shipping honeydew melons that were not in suitable shipping condition. Absent a breach, Respondent is liable to Complainant for the full purchase price of the honeydew melons it accepted, or \$23,068.40.

The total amount due Complainant from Respondent for the four (4) shipments of cantaloupes and honeydew melons at issue in the Complaint is \$52,477.10. In defense of its failure to pay Complainant this sum, Respondent has asserted that it performed or was excused from performance by impossibility, frustration or impracticability, and that Complainant's alleged injuries and damages resulted from its own fault, negligence or wrongdoing (Answer at 2). Respondent fails to direct us to any specific circumstance where it performed or was excused from performance, or where the damages claimed herein resulted from the fault, negligence or wrongdoing of Complainant. Absent more detail, we conclude that the affirmative defenses raised by Respondent are without merit.

Respondent's failure to pay Complainant \$52,477.10 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such 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

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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).

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

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation \$52,477.10, with interest thereon at the rate of 0.15 percent per annum from April 1, 2011, until paid, plus the amount of \$500.00.

Copies of this Order shall be served upon the parties.

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**CLASSIC FRUIT COMPANY, INC. v. AYCO FARMS, INC. &
AYCO FARMS, INC. v. CLASSIC FRUIT COMPANY, INC.
PACA Docket Nos. S-R-2012-387, S-R-2012-420.
Miscellaneous Order.
Filed December 17, 2013.**

PACA-R.

**Procedure – Prejudgment interest granted to Respondent in a
Counterclaim**

Respondent filed a Petition for Reconsideration seeking payment of prejudgment interest on the amount found due Respondent from Complainant under the Counterclaim. After reconsideration, an Order on Reconsideration was issued awarding prejudgment interest to Respondent. In order to be equitable in the distribution of the prejudgment interest, the prejudgment interest was applied to the amount due each party prior to the application of an offset.

Shelton S. Smallwood, Presiding Officer.
Donna M. Ennis, Examiner.
Complainant, pro se.
Respondent, pro se.
Ruling by William G. Jenson, Judicial Officer

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on August 9, 2013, in which Ayco Farms, Inc. (“Ayco Farms”), was ordered to pay Classic Fruit Company, Inc. (“Classic Fruit”), as reparation \$3,356.80, with interest thereon at the rate of eighteen percent (18%) per annum from May 1, 2012, up to the date of the Order, and 0.11 percent per annum from the date of the Order, until paid.

On August 20, 2013, the Department received from Ayco Farms, a Petition for Reconsideration of the Order. Additionally, on August 25, 2013, the Department received from Classic Fruit, a Petition for Reconsideration of the Order. Copies of the petitions were cross-served upon the parties. Classic Fruit filed a response in opposition to Ayco Farms’ petition. Ayco Farms did not submit a reply to Classic Fruit’s petition.

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In its Petition, Classic Fruit requests reconsideration of the conclusions reached with respect to the transaction in PACA Docket S-R-2012-420 and raises a number of issues with our findings. Classic Fruit's first two (2) arguments concern the Nevada state inspection performed on the cantaloupes. Classic Fruit first asserts that the Department disregarded the fifty-nine percent (59%) internal damage disclosed by the Nevada state inspection even though Ayco Farms requested the inspection and accepted the ensuing results of the inspection as evidenced by its issuance of a second invoice billing Classic Fruit on a PAS (price after sale) basis (Classic Pet. ¶ 1). Classic Fruit also finds fault with the Department's determination deeming "all product absent of the fermented description on this inspection to contain good internal quality solely because soluble solids of the shipment were not ascertained by the state inspector and/or different terminology was utilized by the state inspector to describe internal quality damage on the state inspection." (Classic Pet. ¶ 2).

Classic Fruit, having accepted the cantaloupes, had the burden to prove that the cantaloupes it accepted did not conform to the contract requirements. In the decision, we found that Classic Fruit met that burden and was entitled to recover provable damages (Decision at 8). However, Classic Fruit's arguments suggest that it was not satisfied with the percentage of defects that we used when calculating the reasonable value of the cantaloupes. Although Classic Fruit states that Ayco Farms requested the state inspection in lieu of a USDA inspection (Classic Pet. ¶ 1), there was nothing preventing Classic Fruit from securing a USDA inspection of the cantaloupes, which results would most likely have been more detailed and therefore allowed the Department to use the percentage of internal defects in our calculations. Accordingly, we find no merit in Classic Fruit's arguments.

We also hasten to point out that we accepted the results of the Nevada state inspection as evidence of a breach of contract by Ayco Farms, and we only resorted to the use of the percentage of defects reported on that inspection to establish the reasonable value of the cantaloupes because Classic Fruit did not submit a detailed account of sales to establish this value. While the Regulations do not place a duty to account upon a buyer who purchases on an open or price after sale basis, a buyer who fails to

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account accurately and in detail does so at his own risk, as a properly prepared account of sales may be useful in determining the reasonable value of the goods in the event the parties fail to agree upon a price. *A.P.S. Mktg. v. R.S. Hanline & Co.*, 59 Agric. Dec. 407, 411 (U.S.D.A. 2000); *Carmack v. Selvidge*, 51 Agric. Dec. 892, 898 (U.S.D.A. 1992). In the instant case, the value of the subject cantaloupes would not have been dependent upon the percentage of defects shown on the inspection if Classic Fruit had submitted a detailed account of sales showing a timely resale of the cantaloupes to establish their reasonable value.

Classic Fruit next asserts that the Department erred in its finding that “Ayco Farms sold and invoiced Classic Fruit \$8.00 delivered Las Vegas for this fruit when in fact these cantaloupes were purchased by Classic Fruit from Ayco at \$8.00 FOB Pompano.” (Classic Pet. ¶ 3). Classic Fruit states further that the cantaloupes were rejected and that Ayco Farms accepted the rejection thereby becoming responsible for the freight charges from Pompano Beach to Las Vegas (Classic Pet. ¶ 3). On the basis that the transaction was an f.o.b. sale and that the cantaloupes were rejected, Classic Fruit states it should not be required to remit to Ayco Farms more than its resales of \$1.20 per carton f.o.b. (Classic Pet. ¶ 3).

The record includes a copy of Ayco Farms’s invoice number 79056 reflecting that the sale terms were delivered (ROI Ex. A at 3). During the proceeding, Classic Fruit did not mention any objection to Ayco Farms’s invoice, nor did it submit any evidence indicating that the freight terms were other than delivered. When documents containing terms of sale are not objected to in a timely manner, such documents are evidence of a contract containing the terms set forth therein. *Action Produce v. Ward’s Fruit & Produce, Inc.*, 46 Agric. Dec. 1845, 1847 (U.S.D.A. 1987); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (U.S.D.A. 1972). Given Classic Fruit’s failure to object to the invoice received from Ayco Farms, we find that the preponderance of the evidence establishes that the truckload of cantaloupes in question was sold to Classic Fruit with delivered freight terms.

Regarding Classic Fruit’s assertion of a rejection, we do not find any evidence in the record showing that Classic Fruit raised this issue during the proceeding. Rather, Classic Fruit waited until the filing of its

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Petition to do so. Nevertheless, we do not find any evidence in the record indicating that the cantaloupes were rejected. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2(dd)(3). Therefore, this argument is without merit.

Finally, Classic Fruit states, “[t]he request to Classic from Ayco regarding this shipment’s rejection was ‘please do the best you can and then we will price’.” (Classic Pet. ¶ 4). In the decision, we found the parties agreed to modify the price terms of the contract to PAS (Decision at 9), which 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 (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. As the evidence failed to establish that the parties agreed on a price for the cantaloupes, a reasonable price was determined (Decision at 10).

In its Petition, Classic Fruit calculates the reasonable value of the cantaloupes and its subsequent damages based on a total of forty-six percent (46%) internal damage, and arrives at an amount of \$1,027.20 due Ayco Farms from Classic Fruit (Classic Pet. ¶ 4). Classic Fruit requests that this amount be offset against the amount found due Classic Fruit from Ayco Farms in Docket S-R-2012-387 (Classic Pet. ¶ 4). We have already addressed the internal damage issue and explained why this defect was not considered in the calculation of the reasonable value of the cantaloupes.¹ Therefore, based on our prior discussion, this argument is without merit.

We now turn to Ayco Farms’s Petition. In the Decision, we found that Ayco Farms was liable to Classic Fruit in the amount of \$6,630.40² and that Classic Fruit was liable to Ayco Farms in the amount of \$3,273.60³ (Decision at 3, 11). When the amount due Ayco Farms from Classic Fruit was offset against the amount due Classic Fruit from Ayco Farms, the net amount due Classic Fruit from Ayco Farms was \$3,356.80 (\$6,630.40 - \$3,273.60) (Decision at 12). The Decision and Order issued on August 9, 2013 ordered Ayco Farms to pay Classic Fruit

¹ See *supra* 2-3.

² PACA Docket No. S-R-2012-387.

³ PACA Docket No. S-R-2012-420.

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as reparation \$3,356.80, with interest thereon at the rate of eighteen percent (18%) per annum from May 1, 2012, up to the date of the Order, and 0.11 percent per annum from the date of the Order, until paid.

In its Petition, Ayco Farms states that while it agrees with the Department's findings that Classic Fruit is liable to Ayco Farms in the amount of \$3,273.60, it seeks to recover prejudgment interest of one and one-half percent (1.5%) per month, or eighteen percent (18%) per annum, on the amount of \$3,273.60 (Ayco Pet. at 1). Paragraph A of Ayco Farms' Counterclaim states, in pertinent part:

Ayco Farms Inc. is not denying payment on 512 cartons of Guatemalan Cantaloupes at \$ 12.95 FOB/carton. We've been holding payment until Classic Fruit Company pays Ayco Farms Inc. the outstanding balance of \$ 5,958.40 + 1.5% monthly interest on past due balances still owed since December 30, 2011 and stated under claim PACA S 12 420.

(Countercl. ¶ A). Ayco Farms's claim for interest at the rate of one and one-half percent (1.5%) per month, or eighteen percent (18%) per annum, is based on its invoice to Classic Fruit which expressly states: "Past Due accounts are subject to interest charge of 1 ½ % per month, maximum 18% per annum." (Countercl. Ex. 7).

There is nothing to indicate that Classic Fruit objected to the interest charge provision stated on Ayco Farms's invoice. In the absence of a timely objection by Classic Fruit, the interest charge provision on Ayco Farms's invoices was incorporated into each sales contract. *See, e.g., Johnston v. AG Growers Sales LLC*, 69 Agric. Dec. 1569, 1583-86 (U.S.D.A. 2010) (applying section 2-207(2) of the Uniform Commercial Code).

Upon reconsideration, we are granting Ayco Farms's Petition and awarding prejudgment interest to Ayco Farms. In order to be equitable in the award of prejudgment interest, the prejudgment interest should be applied to the amount due each party prior to the application of an offset. Ayco Farms admittedly withheld payment from Classic Fruit in the amount of \$6,630.40. Accordingly, Classic Fruit is entitled to recover

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prejudgment interest on this sum based on its invoice to Ayco Farms which reads: Past due accounts are subjected to an interest charge of 1.5% per month both on prejudgment and post-judgment debt. Similarly, we determined that Classic Fruit owes Ayco Farms \$3,273.60 for the cantaloupes that Classic Fruit purchased from Ayco Farms. Ayco Farms is therefore entitled to recover prejudgment interest on this sum.

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

ORDER

Within thirty (30) days from the date of this Order, Ayco Farms shall pay Classic Fruit, as reparation, interest at the rate of eighteen percent (18%) per annum on the sum of \$6,630.40 from May 1, 2012, up to the date of this Order.

Within thirty (30) days from the date of this Order, Classic Fruit shall pay Ayco Farms, as reparation, interest at the rate of eighteen percent (18%) per annum on the sum of \$3,273.60 from February 1, 2011, up to the date of this Order.

Within thirty (30) days from the date of this Order, Ayco Farms shall pay Classic Fruit as reparation \$3,356.80, with interest thereon at the rate of 0.11 of one percent per annum on the sum of \$3,356.80, until paid.

Copies of this Order shall be served upon the parties.

Miscellaneous Orders
72 Agric. Dec. 905 – 905

MISCELLANEOUS ORDERS

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: www.dm.usda.gov/oaljdecisions/.

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PATSY L. SCRUM.
Docket No. 13-0234.
Order of Dismissal.
Filed September 12, 2013.

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.dn.usda.gov/oaljdecisions/.

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Docket No. 13-0213.

Default Decision and Order.

Filed August 21, 2013.

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Filed August 21, 2013.

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COURT DECISION

SUN PACIFIC MARKETING COOPERATIVE, INC. v. DiMARE FRESH, INC.

No. 1:06 – CV – 1404 AWI GSA.

Court Order.

Filed December 17, 2013.

[Cite as: No. 1:06 – CV – 1404 AWI GSA, 2013 WL 6633988, at *1 (E.D. Cal. Dec. 17, 2013)].

PACA – Appeal bond – Letter of credit – Reparations.

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

Court granted Appellant’s motion to change the form of its appeal bond, holding that the Court had the discretion to permit a letter of credit to be substituted for Appellant’s existing surety bond. The Court found that it, as a district court, had jurisdiction to modify, disallow, or release the Appellant from bond as the case was pending on appeal.

**ANTHONY W. ISHII, Senior District Judge, delivered the opinion
of the court.**

ORDER RE: MOTION TO MODIFY APPEAL BOND

I. History

Both Appellant Sun Pacific Marketing Cooperative, Inc. (“Sun Pacific”) and Appellee DiMare Fresh, Inc. (“DiMare”) are companies engaged in buying and selling wholesale quantities of produce. Both parties are licensed commission merchants and dealers under 7 U.S.C. § 499a(b)(5) and (6) of the Perishable Agricultural Commodities Act (“PACA”). By contract dated June 5, 2006 (“Original Contract”), DiMare agreed to buy from Sun Pacific a set quantity of various types of

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tomatoes at set prices every week from July 17, 2006 through October 31, 2006. The Original Contract specified that “In the event of a product shortage caused by an Act of God, Natural disaster or other incident that could not be foreseen and is beyond the control of Sun Pacific, then performance under this contract shall be excused.” Starting in July the San Joaquin Valley of California, where Sun Pacific’s growing facilities were located, experienced a heat wave that negatively affected tomato crops. On August 31, 2006, Sun Pacific invoked the Act of God clause. The parties thereafter came to an impasse. DiMare purchased tomatoes from other companies on the open market for the remainder of the Original Contract term.

DiMare first brought suit on September 14, 2006 against Sun Pacific, alleging breach of the Original Contract and seeking specific performance (*DiMare v. Sun Pacific*, CIV 06–1265 AWI). This court denied DiMare’s request for a temporary restraining order. On September 25, 2006, DiMare voluntarily dismissed the suit without prejudice. On October 11, 2006, Sun Pacific filed suit against DiMare (the origin of the present case). On January 8, 2007, DiMare filed a formal reparation complaint with the United States Department of Agriculture pursuant to PACA provision 7 U.S.C. § 499f(a) (“Reparation Proceeding”) for hearing and decision by an Administrative Law Judge. On April 19, 2007, this court stayed this case pending the resolution of the Reparation Proceeding. The Reparation Proceeding resulted in a decision in favor of DiMare, awarding that party \$1,136,599 plus interest, fees, and costs.

On September 19, 2008, Sun Pacific appealed that decision to this court. Under PACA, the district court rules on USDA reparations decisions on a de novo basis except that the prior findings of fact constitute prima facie evidence. Sun Pacific posted an appeal bond which followed the requirements of 7 U.S.C. § 499g(c): it took the form of an undertaking by International Fidelity Insurance Company (“International Fidelity”), a surety, in the amount of \$2.5 million, double the amount awarded under the Reparation Proceeding. A bench trial was held on November 9 and 10, 2010. On August 15, 2011, the court issued findings of fact and conclusions of law in favor of DiMare, awarding that party \$980,289 plus interest, fees, and costs. The award was later modified to be \$1,132,562 plus interest, fees, and costs. Sun Pacific appealed to the

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Ninth Circuit. The appeal bond, furnished by International Fidelity in the amount of \$2.5 million, remains in place.

Sun Pacific now seeks permission to change the form of the bond (but not the amount). DiMare opposes the request to change the form of the bond. The matter was taken under submission without oral argument.

II. Discussion

Sun Pacific's appeal bond is provided by International Fidelity. In order to retain International Fidelity's services, Sun Pacific has obtained an irrevocable letter of credit, issued by Wells Fargo Bank N.A. ("Wells Fargo") in the amount of \$2.5 million for the benefit of International Fidelity. "A letter of credit creates an absolute, independent obligation and payment must be made upon presentation of the proper documents regardless of any dispute between the buyer and seller concerning their agreement. Like a Travelers Check (which is a letter of credit), it enables international business to be done safely and securely because the vendor need only rely on the financial strength of the issuing bank, and not on the financial strength and willingness to pay of the vendee." *Warner Bros. Int'l TV. Distrib. v. Golden Channels & Co.*, 522 F.3d 1060, 1062–63 (9th Cir. 2008), citations omitted. The specific letter of credit in question indicates that Wells Fargo will provide International Fidelity \$2.5 million upon demand "not subject to any condition, or qualification. The obligation of Wells Fargo Bank N.A. under this letter of Credit shall be the individual obligation of Wells Fargo Bank N.A., in no way contingent upon reimbursement with respect thereto." Doc. 186, Ex. A. Sun Pacific wishes to modify the appeal bond to allow Sun Pacific to obtain a \$2.5 million irrevocable letter of credit for the benefit of DiMare directly instead of using International Fidelity as surety; this change would save \$18,750 a year in fees. Doc. 186, Brief, 2:16–3:2. Apart from a surety or letter of credit, Sun Pacific's chief financial officer has provided an affidavit stating that Sun Pacific's net worth at the end of 2012 was over \$220 million. Doc. 188, Part 1, Maitland–Lewis Declaration, 2:14–16. Apart from a surety or letter of credit, the demonstrated assets of Sun Pacific would guarantee recovery should DiMare have execute a monetary judgment against Sun Pacific directly.

DiMare first argues that the district court lacks jurisdiction to

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entertain this motion to modify the bond. Doc. 187, Opposition, 2:22–23. Fed. Rule Civ. Proc. 62(c) states “While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party’s rights.” A district court has clear jurisdiction to modify the terms of a bond while the case is before an appellate court. *See Sun–Tek Industries, Inc. v. Kennedy Sky Lites, Inc.*, 856 F.2d 173, 174 (Fed. Cir. 1988) (changing the monetary amount of bond); *Natural Res. Def. Council v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. Cal. 2001) (changing terms of injunction). This court retains authority to modify, disallow, or release appellant from bond during the pendency of appeal.

The parties disagree as to what law applies. Sun Pacific asserts that Fed. Rule Civ. Proc. 62(d) governs: “If an appeal is taken, the appellant may obtain a stay by supersedeas bond.... The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.” DiMare notes that this court has stated “The heart of the case is a breach of contract claim. The substantive law applied is California commercial law; PACA provides for the forum and procedure.” Doc. 165, Findings of Fact and Conclusions of Law, 10:26–27. The Federal Rules of Civil Procedure explicitly provides for certain statutes to provide superseding procedures, stating “These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: (A) 7 U.S.C. §§ 292, 499g(c), for reviewing an order of the Secretary of Agriculture.” Fed. Rule Civ. Proc. 81(a) (6). PACA provides for specific procedures in appealing a reparation order issued by an ALJ:

Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held.... Such appeal shall not be effective unless within thirty days from and after the date of the reparation order the appellant also files with the clerk a bond in double the amount of the reparation awarded against the appellant conditioned upon the

payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. ***Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States....*** Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated.

7 U.S.C. § 499g(c), emphasis added. DiMare argues that this specific language governs. DiMare's argument is sound. The Federal Rules of Civil Procedure explicitly defer to this specific PACA provision.

Sun Pacific argues that an irrevocable letter of credit constitutes a negotiable security, satisfying the PACA provision. Doc. 188, Reply, 5:17–23. There does not appear to be a working definition of “negotiable security.” Black's Law Dictionary defines “negotiable” as “1. (Of a written instrument) capable of being transferred by delivery or indorsement when the transferee takes the instrument for value, in good faith, and without notice of conflicting title claims or defenses.” BLACK'S LAW DICTIONARY 1064 (8th ed. 2004). There is no indication that the letter of credit may be transferred by DiMare to anyone else; it does not appear to fit into the definition. While there is only limited case law on the subject, courts seem to consider letters of credit and negotiable securities to constitute separate categories of assets. *See Cronin v. Executive House Realty*, 1981 U.S. Dist. LEXIS 11164, *2 (S.D.N.Y. Feb. 27, 1981) (defendant sought injunction barring plaintiff from “collecting, disposing of or realizing upon the letters of credit, negotiable securities or other security”); *In re G. Heileman Brewing Co.*, 128 B.R. 876 (Bankr. S.D.N.Y. 1991) (appending statutory text, specifically Oregon Revised Statutes 471.210(b) which asks for a surety bond substitute in the form of “the equivalent value in cash, bank letters of credit recognized by the State Treasurer or negotiable securities of a character approved by the State Treasurer”). Sun Pacific has not

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demonstrated that an irrevocable letter of credit is a negotiable security.

Sun Pacific then argues that the court should exercise its inherent authority to modify the bond condition. “District courts have inherent discretionary authority in setting supersedeas bonds. This includes the discretion to allow other forms of judgment guarantee and broad discretionary power to waive the bond requirement if it sees fit.” *Cotton v. City of Eureka*, 860 F. Supp.2d 999, 1028 (N.D. Cal. 2012), citations and quotations omitted. Courts have accepted letters of credit lieu of supersedeas bonds (or have considered them roughly equivalent). *See, e.g., Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1472 (9th Cir. 1992); *FTC v. Kykendall*, 466 F.3d 1149, 1154 (10th Cir. 2006); *Lindquist Ford, Inc. v. Middleton Motors, Inc.*, 2008 WL 4690515, *1 (W.D. Wis. 2008); *Cooper v. B & L, Inc.*, 66 F.3d 1390, 1393 n.3 (4th Cir. 1995); *Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173, 177 (2nd Cir. 1975). In this instance, the court will exercise the discretion to allow a letter of credit to be substituted for the existing surety bond. Sun Pacific has provided adequate evidence to demonstrate that DiMare’s interests will be adequately protected by an irrevocable letter of credit issued by Wells Fargo (in addition to Sun Pacific’s assets). DiMare does not argue, or suggest in any way, that they fear the proffered letter of credit from Wells Fargo would not be honored.

III. Order

Sun Pacific’s motion is GRANTED. International Fidelity Insurance Company is released from any obligation pursuant to the Appeal Bond on file in this action, effective and final as of the date of entry of this order. The release of International Fidelity Insurance Company is absolute and not dependent upon Sun Pacific’s compliance with this Order. Sun Pacific shall obtain and file with this Court an irrevocable letter of credit in the amount of \$2.5 million, naming DiMare as the beneficiary by 2:00 PM, Monday, January 6, 2014. If the letter of credit is not filed by that deadline, the stay on monetary judgment pending appeal may be lifted.

IT IS SO ORDERED.

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DEPARTMENTAL DECISIONS

In re: RDM International, Inc.
Docket Nos. 12-0458, 12-0601.
Decision and Order.
Filed July 23, 2013.

PACA.

Charles L. Kendall, Esq. for Complainant.
Robert Moore for Respondent.
Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matters involve whether RDM International, Inc. (“Respondent”) is fit to be licensed under the Perishable Agricultural Commodities Act (“PACA”).

I. Procedural History

This action was initiated by a Notice to Show Cause and Request for Expedited Hearing (assigned Docket No. 12-0458) filed with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) on June 4, 2012 by the Associate Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States of Agriculture (“AMS”; “USDA”; “Complainant”). The Notice was issued in response Respondent’s application for a license. The Notice alleged that Respondent had failed to make full payment promptly of the agreed purchase prices, or balances thereof, for perishable agricultural commodities which Respondent purchased, received, and accepted in the course of interstate and foreign commerce, thereby making Respondent unfit to be granted a license under PACA.

Complainant also moved to consolidate the matter filed on June 4, 2012 with another matter that was not yet filed. The second complaint was filed on August 27, 2012 and alleged that Respondent had

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committed willful, flagrant and repeated violations of PACA by failing to make full payment promptly to eight (8) sellers for purchases of 74 lots of perishable agricultural commodities in the course of interstate and foreign commerce during the period November 13, 2008 through June 17, 2011, in the total amount of \$832,934.95. Respondent failed to file an Answer to the Complaint assigned Docket No. 12-0601, but submitted additional filings with the first case. By Order issued January 23, 2013, I consolidated cases No. 12-0458 and 12-0601. I also directed Respondent to Show Cause Why a Decision Without Hearing Should Not Be Issued, allowing Respondent thirty (30) days from the date of service of the Order to demonstrate that it made full payment by February 15, 2013, of the \$832,934.95, which Complainant alleged was owed by Respondent to eight (8) produce sellers. Respondent failed to respond to the Order.

On May 13, 2013, Complainant moved to renew its Order directing Respondent to show cause why a Decision and Order on the record should not be issued. On June 14, 2013, Respondent requested an extension of time to respond. By Order issued June 24, 2013, I allowed Respondent until July 1, 2013 to answer the motion. By correspondence dated July 2, 2013, Respondent asked for clarification that it would be allowed twenty (20) days from the date of service of the motion on June 28, 2013 to respond. By email addressed to both the representative for Respondent and counsel for Complainant, I confirmed that Respondent had twenty days to respond, or until July 18, 2013, pursuant to 7 C.F.R. § 1.139.

As of the date of this Decision and Order, Respondent has failed to respond to Complainant's motion. Considering the age of these consolidated actions, and the many opportunities afforded to Respondent to defend Complainant's allegations, I find it appropriate to GRANT Complainant's Order. This Decision and Order is based upon the evidence of record, associated with Complainant's motions and complaints, as well as all of Respondent's submissions and the arguments of the parties.

II. Discussion

The record establishes that on March 27, 2012, the United States

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District Court for the Central District of California ordered default judgment in favor of plaintiff Newland North America Foods, Inc., against Respondent for a valid PACA Trust debt in the amount of \$400,013.37, including interest at the statutory rate of 7% per annum. *Newland North America Foods, Inc. v. RDM International*, Docket 12-cv-00323, U.S. D.C for Central District of California. I take official notice of this finding and conclude that Respondent failed to pay a PACA debt in the amount of \$400,013.37, due to Newland North America Foods, Inc.

USDA conducted an investigation into Respondent's PACA related activities, and established that as of May 9, 2013, an additional amount of \$404,243.67 was due to six (6) of the remaining seven (7) sellers identified in Complainant's complaint. Complainant's investigation failed to establish that \$32,370.23 of the total of \$832,934.95 allegedly unpaid by Respondent was owed to the seventh remaining seller.

In its submissions, Respondent did not contest the allegations that it had failed to make full payment promptly. Respondent discussed actions that it intended to pursue against some of the produce suppliers listed in the Complaint. Respondent failed to specifically address the evidence demonstrating lack of payment.

All of the evidence of record demonstrates that Respondent failed to make payment to at least eight (8) produce sellers within the time provided by law. When a complaint alleges the failure to make full payment promptly under PACA, if Respondent fails to completely comply with the Act within the first of either 120 days after the complaint is served upon Respondent, or the date of the hearing, then the case shall be considered a "no pay" case that merits the sanction of license revocation. *Scamcorp, Inc.*, 57 Agric. Dec., 527, 548-49 (U.S.D.A. 1998).

As Respondent has failed to respond to Orders and Notices with proof of payment within the time frame consistent with *Scamcorp, supra*, it is appropriate to consider the instant actions as a "no pay" case. The record establishes that Respondent failed to make full and prompt payment for produce purchases in willful, flagrant and repeated violation of section 2(4) of the PACA, 7 U.S.C. § 499b(4).

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III. Findings of Fact

1. RDM International, Inc. is a corporation organized and existing under the laws of the State of California, with a business and mailing address of 11643 Otsego Street, N. Hollywood, California 91601.
2. Respondent is not currently licensed under PACA, but is subject to the licensing requirements of PACA.
3. On March 5, 2007, Respondent was issued PACA License Number 20070534, which terminated on March 5, 2012.
4. Since the date its license terminated, Respondent continued to conduct business subject to PACA.
5. Respondent's PACA license records list Robert D. Moore as the sole principal and 100% shareholder of Respondent.
6. At all times material to the instant actions, Respondent has operated under the management, direction and control of Robert D. Moore.
7. During the period from November 13, 2008 through June 17, 2011, Respondent failed to make full payment promptly to eight (8) sellers for purchases of 74 lots of perishable agricultural commodities in the course of interstate and foreign commerce, in the amount of \$832,934.95, of which \$804,257.04 remained unpaid as of May 19, 2013.
8. Respondent submitted an application to USDA for a PACA license on May 7, 2012.

IV. Conclusions of Law

1. The Secretary has jurisdiction over Respondent and the subject matter of these actions.
2. Respondent's PACA License Number 20070534 terminated on March 5, 2012, when Respondent failed to pay the required annual fee. See, section 4(a) of PACA, 7 U.S.C. § 499d(a).

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3. Respondent's failure to make full payment promptly to eight (8) sellers in the total of \$832,934.95 for 74 lots of perishable agricultural commodities constitutes willful, repeated and flagrant violations of section 2(4) of the Act.

4. Respondent is unfit to be licensed under PACA, as Respondent's willful, repeated and flagrant violations of section 2(4) of the Act under the management, direction and control of its sole principal and 100% shareholder Robert D. Moore, are practices of a character prohibited by PACA.

ORDER

Respondent has committed willful, repeated and flagrant violations of section 2(4) of the Act, and the facts and circumstance of the violations shall be published.

Pursuant to sections 4 and 8 of PACA, 7 U.S.C. §§ 499d and 499h, the Secretary's refusal to issue a PACA license to Respondent is affirmed.

This Order shall take effect on the eleventh (11th) day after this Decision become final.

Pursuant to the Rules of Practice, this Decision shall become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in 7 C.F.R. §§ 1.139 and 1.145.

Copies of this Decision Order shall be served upon the parties by the Hearing Clerk.

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: J & S PRODUCE CORP.

Docket No. 13-0177.

Decision and Order.

Filed August 8, 2013.

PACA.

Charles Kendall, Esq. for Complainant.

Ariel Weissberg, Esq. for Respondent.

Decision and Order entered by Janice K. Bullard, Administrative Law Judge.

DECISION AND ORDER

The instant matter involves a Complaint filed by the United States Department of Agriculture (“Complainant”) against J & S Produce Corp. (“Respondent”), alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. § 499a *et seq.* (“PACA”; “the Act”). The Complaint alleged that Respondent failed to make full payment promptly to sellers of the agreed purchase prices of perishable agricultural commodities during the period from December 1975 through February 2012.

This Decision and Order is issued pursuant to Complainant’s Motion for a Decision Without Hearing by Reason of Admissions, which I hereby GRANT.

I. Procedural History

On February 11, 2013, Complainant filed a Complaint against Respondent alleging violations of PACA. Respondent’s Motion for an Extension of Time to File an Answer was granted, and on March 28, 2013, Respondent filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges (“OALJ”) for the United States Department of Agriculture (“Hearing Clerk”).

By Order issued April 4, 2013, I set a schedule for pre-hearing submissions. On April 28, 2013, Complainant moved for a Decision on the Record by Reason of Admissions. Respondent filed Motions for Extensions to Respond, which were granted. On June 7, 2013,

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Respondent filed an objection to Complainant's motion. Respondent also filed lists of witnesses and exhibits pursuant to my pre-hearing Order.

Upon review of the documents and arguments submitted by both parties, I conclude that a hearing in this matter is not necessary and that Complainant's motion is fully supported by the record. I hereby admit to the record the Attachments to Complainant's motion and the Appendices to Complainant's Complaint and the Attachments to Respondent's Response to Complainant's motion.

II. Findings of Fact & Conclusions of Law

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("Rules of Practice"), set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. Pursuant to 7 C.F.R. § 1.139, the Rules allow for a Decision Without Hearing by Reason of Admissions. "...[A] respondent in an administrative proceeding does not have a right to an oral hearing under all circumstances, and an agency may dispense with a hearing when there is no material issue of fact on which a meaningful hearing can be held." *In re: H. Schnell & Co., Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998).

Respondent's admissions and the filed documentary evidence establish that there is no material issue of fact requiring a hearing. Additionally, it is uncontested that the outstanding balance due to sellers is in excess of \$5,000.00, which represents more than a *de minimis* amount. *See In re: Fava & Co.*, 46 Agric. Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (U.S.D.A. 1985). "[U]nless the amount admittedly owed is *de minimis*, there is no basis for a hearing merely to determine the precise amount owed". *In re: Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (U.S.D.A. 1985). Ergo, I find that a hearing is not necessary in this matter.

PACA requires payment by a buyer within ten (10) days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are

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reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11). In its Answer to the Complaint, Respondent admitted that it had failed to timely pay sellers for perishable agricultural commodities. However, Respondent denied that it willfully violated PACA and further challenged the dates of transactions and amounts due to the thirteen (13) sellers identified by Complainant.

The documentary evidence filed by both parties reflects that on March 26, 2012, Respondent filed a petition in bankruptcy with the United States Bankruptcy Court for the Northern District of Illinois. (Petition # 12-12063). Respondent's Schedule F filed in that matter listed undisputed debts in the aggregate amount of \$602,650.59 due to eleven (11) of the twelve (12) produce suppliers listed in Appendix A to Complainant's Complaint. *See also* Attachments to Respondent's Response to Complainant's Motion. In its Schedule D filed with the bankruptcy court, Respondent reported a disputed secured claim to another of the identified produce suppliers in the amount of \$726,829.00.¹

Respondent made it clear in its argument that the dispute over this claim involved whether the claim was secured or unsecured as opposed to the fact of the debt.

Complainant asked that I take official notice of schedules filed in connection with Respondent's bankruptcy petition. Administrative Law Judges presiding over hearings in matters initiated by the Secretary of the Department of Agriculture shall take official notice "of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, commercial fact of established character. . ." 7 C.F.R. § 1.141(h)(6). Documents filed in bankruptcy proceedings by debtors that are involved in PACA disciplinary proceedings may be officially noticed. *KDLO Enterprises, Inc. v. U.S. Dep't of Agric.*, 2011 WL 3503526, at *4 (9th Cir. 2011) (affirming Decision and Order of Judicial Officer for USDA); *In re: KDLO Enterprises, Inc.*, 70 Agric. Dec. 1098 (U.S.D.A. 2011).

¹ Respondent made it clear in its argument that the dispute over this claim involved whether the claim was secured or unsecured as opposed to the fact of the debt.

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Respondent attached copies of its bankruptcy schedules to its Response to Complainant's Motion and referred to the documents in its argument, thereby obviating the need for official notice. However, since Complainant did not have the benefit of Respondent's endorsement of its bankruptcy documents when the motion was filed, I hereby grant Complainant's motion for official notice of Respondent's bankruptcy filings.

PACA requires "full payment promptly" for produce purchases and where "respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a no-pay case." *In re: Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998). In order to reach "full compliance" with PACA, the respondent would have to have paid all produce sellers and within 120 days of being served with a complaint. *Id.* at 549. Failure to meet this obligation results in a "no-pay" case. *Id.*

A comparison of the transactions allegedly not paid that were listed in the appendices to the Complaint with the transactions listed in Respondent's bankruptcy filings demonstrate that, as of the date the schedules were filed in March and April of 2012, transactions remained unpaid.

Respondent argued that it did not willfully fail to pay sellers, and explained that it experienced a liquidity crisis because its customers defaulted on accounts receivable. *See* Tr. of Test. of Resp't's Representative at a Meeting of Creditors, attached to Respondent's Response to Motion at Exhibit 2. Respondent reported that the thirteen (13) creditors identified in the complaint brought an action against Respondent in the United States District Court for the Northern District of Illinois² in which the total amount of the outstanding claims reported to the court in a PACA Trust Chart, \$2,107,091.00, was the equivalent of Respondent's unpaid accounts receivable. *See* PACA Trust Fund Chart, Exhibit 3, attached to Resp't's Resp. to Complainant's Motion.

² Anthony Marano Company v. J & S Produce Corp., Case No. 12-cv-01906.

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Respondent also asserted that the characterization of a debt as disputed or undisputed in bankruptcy filings has no legal bearing on the outcome of the instant matter. In addition, Respondent demonstrated that it had paid some of its produce creditors large sums in advance of filing bankruptcy, and further showed that Respondent's principals deferred wages to do so.

I find that Respondent's arguments are supported by the record. However, the actions of Respondent's creditors do not present a valid defense in a PACA disciplinary action involving the failure to make full payment promptly to its produce supplier. The evidence supports Respondent's contention that uncollected accounts receivable led to its inability to pay produce suppliers. However, Respondent's financial predicament cannot represent a valid defense to potentially causing similar problems to suppliers. Congress enacted PACA in 1930 "to assure business integrity in an industry thought to be unusually prone to fraud and to unfair practices." *Tri-County Whole-Sale Produce Co. v. U.S. Dep't of Agric.*, 822 F.2d 162, 163 (D.C. Cir. 1987). The law was designed primarily to protect the producers of perishable agricultural products and to protect consumers who frequently have no more than the oral representation of the dealer that the product they buy is of the grade and quality they are paying for. S. REP. NO. 84-2507, at 3 (1956).

A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). A violation is repeated whenever there is more than one (1) violation of the Act, and is flagrant whenever the total amount due to sellers exceeds \$5,000.00. *Id.*

Respondent's contention that its actions were not willful or flagrant is refuted by the fact that Respondent failed to make prompt payment in many instances over a long period of time. Complainant need not establish that Respondent deliberately intended not to make prompt payment for produce purchases. It is enough to show that Respondent made purchases with full knowledge that its customers were defaulting on accounts, and cash flow was insufficient to meet payment obligations. That burden has been admittedly met. There is no evidence demonstrating that Respondent sought to avoid the consequences of

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violating PACA by seeking written agreements from providers to establish payment periods in excess of ten days, pursuant to 7 C.F.R. § 46.2(aa)(11). See *Norinsberg Corp.*, 52 Agric. Dec. 1617, 1625 (U.S.D.A. 1993), *aff'd*, *Norinsberg Corp. v. U.S. Dep't of Agric.*, 47 F.3d 1224 (D.C. Cir. 1995). It has long been held that payment violations similar to those established herein are willful violations of PACA because they represent gross neglect of PACA's mandate to make prompt payment. See *Five Star Food Distributor, Inc.*, 56 Agric. Dec. 880, at 896-97 (U.S.D.A. 1997).

In addition, on Schedule D of the bankruptcy filings, Respondent listed eleven (11) of the produce suppliers identified in the complaint as undisputed debts in the aggregate of \$602,650.59. Respondent also reported a disputed secured claim to one (1) produce supplier in the amount of \$726,829.003

¹. Therefore, Respondent's own records show that sellers remained unpaid after Respondent had knowledge of its violations of PACA.

In the instant matter, it is clear that Respondents knew or should have known that they would be unable to promptly pay the full amount due for the perishable produce that they ordered and accepted, yet they continued to make purchases for which they failed to pay. Respondents' actions were willful and represent repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

I have considered whether Respondent's unfortunate financial circumstances may serve as a factor that would mitigate sanctions. I find no persuasive argument in favor of Respondent's position. I accept that Respondent would have promptly paid all of its providers if Respondent's own customers had met their payment obligations. I further acknowledge that Respondent made efforts to make payments when it was able, to the detriment of its principals and perhaps at the risk of the company's viability. Nevertheless, Respondent continued to order and accept produce despite its inability to pay within the constraints of the Act and regulations. Accordingly, publication of the facts and circumstances of Respondents' violations is an appropriate sanction. See *Norinsberg Corp.*, 52 Agric. Dec. at 6125.

¹ Respondent made it clear in its argument that it disputed the nature of the claim ("secured") as opposed to the fact of the debt.

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B. Findings of Fact

1. J & S Produce Corp. ("Respondent") is a corporation organized and existing under the laws of the state of Illinois and at all times material herein its business address was 2300 W. Lake Street, Unit A, Chicago, Illinois 60612.
2. Respondent is not currently operating.
3. At all times material hereto, Respondent was licensed under and operated subject to the provisions of the PACA, under license number No. 1977 0152, issued on October 29, 1976.
4. Respondent's license terminated on October 29, 2012 when Respondent failed to pay the required annual fee.
5. During the period from December 31, 2009, through April 10, 2012, Respondent failed to make full payment promptly to at least 11 or more sellers of the agreed purchase prices, or balances thereof, in the aggregate of \$602,650.59 for perishable agricultural commodities purchased, received, and accepted by Respondent in interstate and foreign commerce.
6. On March 26, 2012, Respondent filed a petition in bankruptcy, designated Petition #12-12063, with the United States Bankruptcy Court for the Northern District of Illinois.
7. Respondent filed schedules with the court that listed unpaid balances of \$602,650.59 due on the agreed purchase prices of produce to 11 sellers.
8. Respondent also listed a debt to a produce seller in the amount of \$726,829.00, and disputed the creditor's claim that the debt was secured.
9. Respondent's President testified that the information provided by Respondent as debtor was true and correct.

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10. On March 28, 2013, Respondent filed an Answer in the instant proceeding admitting that Respondent had failed to promptly pay produce providers.

C. Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent's admissions provide reason to dispense with a formal hearing in this matter.
3. The unpaid balances due to produce sellers represent more than *de minimis* amounts.
4. Because the unpaid balances are more than *de minimis*, and because there are no disputes of material fact regarding the issue of payment due to Respondent's admissions, a hearing in this matter is not necessary.
5. Respondents' failure to promptly make full payment of the agreed purchase prices for perishable agricultural commodities purchased, received, and accepted in interstate and foreign commerce constitutes willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)).
6. The violations are flagrant because of the number of violations, the amount of money involved, and the lengthy period of time during which the violations occurred.
7. The violations are repeated because there was more than one (1) violation.
8. The violations were willful because Respondent failed to make prompt payments or otherwise arrange for payments in compliance with the Act and regulations despite knowledge of its inability to make payments due to insufficient cash flow.

ORDER

Respondent J & S Produce Corp. has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

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The facts and circumstances underlying Respondent's violations shall be published.

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

Pursuant to the Rules of Practice Governing Proceedings Under the Act, this Decision and Order shall become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

In re: GEORGE FINCH & JOHN DENNIS HONEYCUTT.
Docket Nos. 13-0068, 13-0069.
Decision and Order.
Filed November 20, 2013.

PACA.

Michael A. Hirsch, Esq. for Petitioners.

Christopher Young, Esq. for Respondent.

Decision and Order entered by Peter M. Davenport, Chief Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This proceeding was initiated under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a, *et seq.*) (Act) by the petitions for review filed by the Petitioners George Finch and John Dennis Honeycutt of the determinations made by Karla D. Whalen, Chief of the PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service (Respondent) that the two Petitioners were "responsibly connected" (as that term is defined in Section 1(b)(9) of the

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Act (7 U.S.C. § 499a(b)(9))) to Third Coast Produce Company, Ltd. (Third Coast), during the period of time that Third Coast violated Section 2 of the Act (7 U.S.C. § 499b).

Third Coast, a PACA licensee, was the subject of a disciplinary complaint that was filed on February 15, 2012. On March 8, 2012, Third Coast filed an Answer in which the material allegations of the Complaint were admitted and on April 27, 2012 a Decision and Order was entered finding that Third Coast willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 21 sellers of the agreed purchase prices in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities which Third Coast purchased, received, and accepted in the course of interstate commerce during the period February 5, 2010 through July 16, 2010 and ordering the circumstances of the violations published.¹

The two actions instituted by the Petitioners were consolidated for the purposes of hearing and were set for hearing in Washington, D.C. on August 13, 2013, with the Petitioners being represented by Michael A. Hirsch, Esquire, Schlanger, Silver, Barq & Paine, Houston, Texas and the Respondent represented by Christopher Young, Esquire and Shelton Smallwood, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. At the hearing, both Petitioners testified and one witness testified for the Respondent. Twelve (12) exhibits were introduced and admitted into evidence on behalf of the Petitioners.² The certified Agency Records containing 16 exhibits relating to George Finch and eleven (11) exhibits relating to John Dennis Honeycutt were admitted on behalf of the Respondent.³ The parties have submitted post-hearing briefs and the matter is now ripe for disposition.

Background

The Perishable Agricultural Commodities Act, 1930,⁴ was enacted to suppress unfair and fraudulent practices in the marketing of perishable

¹ Third Coast Produce Company, Ltd., Docket No. 12-0234, 71 Agric. Dec. 633 (U.S.D.A. 2012).

² Petitioners' exhibits are indicated as PX 1-12.

³ Respondent's Exhibits are indicated as GFRX 1-16 and JHRX 1-11.

⁴ 7 U.S.C. § 499a-499s.

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agricultural commodities in interstate or foreign commerce.⁵ When enacted, the legislation had the approval of the entire organized fruit and vegetable trade, including commission merchants, dealers and brokers, all of whom benefit from the Act's protections.⁶ The Act has been characterized as intentionally a "tough" law enacted for the purpose of providing a measure of control over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous.⁷ *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 693 (D.C. Cir. 2007).

Under the Act, persons who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate commerce are required to have a license issued by the Secretary of Agriculture. 7 U.S.C. §§ 499a(b)(5)-(7), 499c(a), and 499d(a). The Act makes it unlawful for a licensee to engage in certain types of unfair conduct and requires regulated merchants, dealers, and brokers to "truly and correctly...account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had." 7 U.S.C. § 499b(4).

Orders suspending or revoking a license, or a finding that an entity has committed a flagrant or repeated violation of Section 2 of the Act have significant collateral consequences in the form of employment restrictions for persons found to be "responsibly connected" with the violator.⁸ Prior to 1962, the employment restrictions found in the Act were imposed on individuals connected with the violator "in any

⁵ H.R. REP. NO. 1041, 71st Cong, 2d Session 1 (1930).

⁶ *Id.* at 2, 4. In 1949, both the House and Senate found that the PACA regulatory program had "become an integral part of the marketing of fruit and vegetables and it has the unanimous support of both producers and handlers in the fruit and vegetable industry." H.R. REP. NO. 1194, 81st Cong, 1st Session 1 (1949); *accord*, S. REP. NO. 1122, 1st Session 2 (1949).

⁷ S. REP. NO. 2507, 84th Cong, 2d Session 3-4 (1956), *reprinted in* 1956 U.S.C.A.N. 3699, 3701; H.R. REP. NO. 1196, 84th Cong, 1st Session 2 (1955).

⁸ 7 U.S.C. § 499h(b) (1958). Under the Act, PACA licensees may not employ, for at least one year, any person found "responsibly connected to any person whose license has been revoked or suspended, or who has been found to have committed any flagrant or repeated violation of 7 U.S.C. § 499b.

responsible position.”⁹ 1962 amendments replaced the “in any responsible position” language with a “responsibly connected” provision. The term “responsibly connected” is currently defined as follows:

§ 499a. Short title and definitions

....

(b) Definitions

For purposes of this chapter:

....

(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.

7 U.S.C. § 499a(b)(9).

The second sentence was added to the provision by a 1995 amendment¹⁰ and affords those who would otherwise fall within the statutory definition of “responsibly connected” an opportunity to demonstrate that they were not responsible for the violation. Extensive analysis of and comment upon the amendment has been made in a number of decisions, including *Norinsberg v. U.S. Dep’t of Agric.*, 162

⁹ 7 U.S.C. § 499h(b) (1958).

¹⁰ Prior to the amendment, the circuits were divided as to whether the presumption of § 499a(b)(9) was irrebutable. Most adopted a per se rule. *See, e.g., Faour v. United States Dep’t of Agric.*, 985 F. 2d 217, 220 (5th Cir. 1993); *Pupillo v. United States*, 755 F. 2d 638, 643-644 (8th Cir. 1985); *Birkenfield v. United States*, 369 F.2d 491, 494 (3rd Cir. 1966); *Zwick v. Freeman*, 373 F.2d 110, 119 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1967). The D.C. Circuit however had adopted a rebuttable presumption test. *See Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975), 34 Agric. Dec. 7 (1975).

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F.3d 1194, 1196-97 (D.C. Cir. 1998), 57 Agric. Dec. 1465, 1465-1467 (U.S.D.A. 1998); *In re Salins*, 57 Agric. Dec. 1474, 1482-87 (U.S.D.A. 1998); and *In re Mendenhall*, 57 Agric. Dec. 1607, 1615-19 (U.S.D.A. 1998).

The amendment created a two prong test for rebutting the statutory presumption of the first sentence:

...the first prong is that a petitioner must demonstrate by a preponderance of the evidence that petitioner was not actively involved in the activities resulting in a violation of the PACA. Since the statutory test is in the conjunctive (“and”), a failure to meet the first prong of the statutory test ends the test without recourse to the second prong. However, if a petitioner satisfies the first prong, then a petitioner must meet at least one of two alternatives: that a petitioner was only nominally a partner, officer or director, or shareholder of a violating licensee or entity subject to license which was the alter ego of its owners.

Salins, 57 Agric. Dec. at 1487-88.

Norinsberg articulated the standard for the first prong as follows:

The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to performance of ministerial functions only. Thus, if a petitioner demonstrates that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

Norinsberg, 58 Agric. Dec. at 610-611.

The parameters of the second prong of the test were recently revisited by the Circuit Court of Appeals for the District of Columbia in the case of *Taylor v. U.S. Dep't of Agric.*, 636 F.3d 608 (D.C. Cir. 2011). In that case, the Court found that the Judicial Officer erroneously rejected Ms. Taylor and Mr. Finberg's claims that they were merely nominal officers of the violating entity. Citing *Quinn v. Butz*, 510 F.2d 743, 755 (D.C. Cir. 1975) and *Bell v. Dep't of Agric.*, 39 F. 3d 1199, 1202 (D.C. Cir. 1994), the Court indicated that under 7 U.S.C. § 499a(b)(9), an "officer" of the offending company is not considered to be "responsibly connected" to a violating licensee if that person was not actively involved in the PACA violation and was "powerless to curb it." *Taylor*, 636 F.3d at 610. The Court went on to emphasize that under the "actual, significant nexus" test, the crucial inquiry in determining whether a person is merely a nominal officer is whether the person who holds the title of officer has the power and authority to direct and affect a company's operations:

Under the "actual, significant nexus" test, "the crucial inquiry is whether an individual has an actual, significant nexus with the violating company, rather than whether the individual has exercised real authority." *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987)(internal quotation marks omitted). Although we have consistently applied the 'actual, significant nexus' test, our cases make clear that what is really important is whether the person who holds the title of an officer had actual and significant power and authority to direct and affect company operations.

* * *

As our decisions have made clear, actual power and authority are the crux of the nominal officer inquiry.

Taylor, 636 F.3d at 615, 617.

In *Taylor*, the Departmental Judicial Officer had found the board of directors, with Arthur Hollingsworth as chairman, ran Fresh America and Mr. Hollingsworth and the board of directors made decisions usually reserved for individuals at lower levels of authority. *Taylor v. U.S. Dep't*

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of Agric., 636 F.3d at 617 (citing *Taylor*, 68 Agric. Dec. 1210, 1220-21 (U.S.D.A. 2009)). A preponderance of the evidence indicated that the board of directors made the decisions governing Fresh America's bills, capital expenditures, and personnel and that neither Ms. Taylor nor Mr. Finberg had any measurable power or authority in board deliberations. Moreover, AMS conceded that Ms. Taylor and Mr. Finberg "ultimately proved powerless to save Fresh America or to see that produce sellers were fully repaid." Applying the "actual, significant nexus" test, as explained in *Taylor*, on remand the Judicial Officer concluded that Ms. Taylor and Mr. Finberg demonstrated by a preponderance of the evidence that the Board of Directors made the decisions governing Fresh America's bills, capital expenditures, and personnel and that neither Ms. Taylor nor Mr. Finberg had any measurable power of authority in board deliberations. Thus, using the "actual, significant nexus" test, the two would be considered merely nominal officers of Fresh America, who were powerless to curb the PACA violations and who lacked the power and authority to direct and affect Fresh America's operations as they related to payment of produce sellers. *In re Taylor*, 71 Agric. Dec. 612, 617-18 (U.S.D.A. 2012).

The "actual, significant nexus" test predates the November 15, 1995, amendment to 7 U.S.C. § 499a(b)(9) wherein Congress amended the definition of the term "responsibly connected" specifically to provide partners, officers, directors, and shareholders who would otherwise fall within the statutory definition of "responsibly connected" a two-prong test allowing them to rebut the statutory presumption of responsible connection. While Congress could have explicitly adopted the "actual, significant nexus" test, the two-prong test in the 1995 amendment to 7 U.S.C. § 499a(b)(9) contains no reference to "actual, significant nexus," power to curb PACA violations, or power to direct and affect operations. Instead, Congress provided that a partner, officer, director, or shareholder, for the second prong of the two-prong test, could rebut the statutory presumption by demonstrating by a preponderance of the evidence that he or she was "only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license" (7 U.S.C. § 499a(b)(9)).

The Judicial Officer then concluded that continued application of the "actual, significant nexus" test, as described in the Court of Appeals

decision in *Taylor* could result in persons who Congress intended to include within the definition of the term “responsibly connected” avoiding that status. As examples, he noted that a minority shareholder, who is not merely a shareholder in name only, generally would not have the power to prevent the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Similarly, a real director, who is a member of a three-person board of directors, generally would not have the power to prevent the corporation’s PACA violations or the power to direct and affect the corporation’s operations. Similarly, a partner with a forty percent (40%) interest in a partnership, who fully participates in the partnership as a partner, generally would not have the power to prevent the partnership’s PACA violations or the power to direct and affect the partnership’s operations. Should the minority shareholder, the director on the three-person board of directors, and the partner with a forty percent (40%) interest in the partnership demonstrate the requisite lack of power, application of the “actual, significant nexus” test, as described in the Court of Appeals decision in *Taylor* would result in each of these persons being designated “nominal.”

Opining that he had been remiss in failing to abandon the “actual, significant nexus” test in November 1995, when Congress amended 7 U.S.C. § 499a(b)(9) to add a two-prong test for rebutting responsible connection without reference to the “actual significant nexus” test, the Judicial Officer announced that in future cases that come before him, he would not apply the “actual, significant nexus” test and would instead substitute a “nominal inquiry” limited to whether a petitioner has demonstrated by a preponderance of the evidence that he or she was merely a partner, officer, director, or shareholder “in name only.” Thus, while the power to curb PACA violations or to direct and affect the operations may, in certain circumstances be a factor to be considered under the “nominal inquiry,” it will no longer be the *sine qua non* of responsible connection to a PACA-violating entity.¹¹ The Judicial

¹¹ It will be noted that the May 22, 2012 Decision on Remand in *Taylor* was remanded upon a joint motion in the DC Circuit Court of Appeals. The May 22, 2012 Decision and Order was vacated and a Modified Decision and Order on Remand was entered which without affecting the JO’s adoption of the “nominal inquiry” test reversed the finding as to Ms. Taylor’s responsible connection to the violating entity. (Modified Decision and Order on Remand, December 18, 2012). Language substantially identical to that found in *Taylor* concerning adoption of the “nominal inquiry” test is also contained in the Judicial Officer’s Order Denying Petition to Reconsider Decision as to Bryan Herr and the

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Officer, using the “nominal inquiry” test, then found Taylor responsibly connected and Finberg not responsibly connected. *In re Taylor*, 71 Agric. Dec. 612, 621-22 (U.S.D.A. 2012).

Discussion

Petitioners contest the Chief of the PACA Branch’s determination that they were “responsibly connected” to Third Coast on three grounds:

1. The Act [PACA] is unconstitutionally overbroad in that it penalizes virtuous non-culpable conduct as if it were the contrary;¹²
2. The Act [PACA] violated fundamental principles of due process and is an unconstitutional forfeiture in violation of U.S.C.A. Title 18, Chapter 46, §§ 981, *et seq.*; and
3. The Petitioners have each proven, by uncontroverted evidence, that the circumstances and events causing and resulting in the default of payment under the Act as amended, to be concluded by the Court to be the sole, independent act of a third-party officer/director of the company from which Petitioners did not profit or benefit, and in which Petitioners did not participate, where the conduct of Petitioners was not culpable within the declared intent of the Act, as amended; these principals could only have been nominal officers or directors, vis-à-vis the transaction causing the default in payment under PACA.

Pet’rs’ Br. in Trial of Pet. for Review of PACA Division Determination at 5, 12, & 16.¹³

As is conceded in Petitioners’ Brief, granting relief on any of the three grounds set forth above would require “a departure from case precedent.” Pet’rs’ Brief at 1. The constitutionality of the PACA is well established as challenges to it have been repeatedly rejected. *Bama*

“nominal inquiry” test remains the current Departmental policy. *Petro*, 71 Agric. Dec. 1259, 1264 (U.S.D.A. 2012).

¹² While noting that acceptance of such an argument would require a departure from case precedent, Petitioners’ Counsel failed to cite the adverse cases concerning the constitutionality of the PACA.

¹³ Docket Entry No. 18.

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Tomato Co. v. U.S. Dep't of Agric., 112 F.3d 1542 (11th Cir. 1997); *Krueger v. Acme Fruit Co.*, 75 F. 2d 67 (5th Cir. 1935); *see also George Steinberg & Son v. Butz*, 491 F.2d 988 (2d Cir. 1974), *application denied*, 419 U.S. 904, *cert. denied*, 419 U.S. 830. Accordingly, the first argument will be rejected summarily as being without merit.

The second argument which suggests that civil forfeitures of real or personal property involved in transactions, attempted transactions, or proceeds derived from violations of enumerated criminal statutes can somehow be equated with the disqualification sanction found in the PACA for individuals who are found to be “responsibly connected.” As Petitioners not only have a statutory avenue for contesting the determination of being responsibly connected, but also are doing so in this proceeding, it is difficult at best to conceive of any valid basis for asserting a lack of due process. Moreover, finding no appropriate nexus cited in 18 U.S.C. § 981 to the PACA, while acknowledging the unique anatopism of the argument, it similarly will be summarily rejected.

The third argument will be considered in the following analysis. Both Finch and Honeycutt have significant experience in the produce industry.¹⁴ Finch described his involvement as having “been in the food business all of [his] life” and has been working in the produce business for over 25 years. Tr. 40. During the hearing, he acknowledged being thoroughly aware of the PACA and the responsibilities imposed by it, stating that “we understand our obligations to PACA” and that “PACA was the number one payment we need to make.” Tr. 55, 76. Honeycutt also had extensive experience as an officer, owner and PACA licensee in the produce industry and expressed pride in the good standing that Third Coast had in the Blue Book. Tr. 79-82, 90-91.

George Finch testified that he, John Dennis Honeycutt and Artemio Bueno started Third Coast in May of 1992. Tr. 40. The company started with a very humble beginning, literally with just a van and sublet space. *Id.* With the passage of time and the investment of substantial time and

¹⁴ The Petitioners’ extensive experience forecloses any argument that they lacked training or experience and thus should be considered only nominal officers or directors. *Cf. Minotto v. U.S. Dep’t of Agric.*, 711 F. 2d 406, 409 (D.C. Cir. 1983); *Maldonado v. U.S. Dep’t of Agric.*, 154 F.3d 1086, 1088-89 (9th Cir. 1998); *Thomas*, 59 Agric. Dec. 367, 387 (U.S.D.A. 2000).

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energy on the part of the three founders, the company grew substantially to an operation considered one of the major distributors in the Houston metropolitan area with about 170 employees, 40 trucks, a new 60,000 square foot warehouse, and approximately a million dollars in sales weekly. Tr. 40-42, 55, 66.

Prior to discovering that there were serious financial problems within the company, both Finch and Honeycutt indicated that their responsibilities “mainly revolved around sales, and the administration around sales, to generate business for the company.” Tr. 38, 82, 84. Artemio Bueno functioned as the company’s buyer and was responsible for company operations. Tr. 65, 84-85. As the company grew from its small family-run origins, the financial responsibilities of the company became entrusted to Artemio Bueno’s oldest son, Javier Bueno, who had graduated from the University of Houston with a degree in accounting and business management and who was working toward a master’s degree at Rice University. The founding Petitioners possessed an unfortunately misplaced but high degree of trust in the Bueno family as they had all started together from scratch and the Petitioners had watched the Bueno children graduate, get married and have children.¹⁵ Tr. 41. Consistent with that trust, the younger Bueno was in time named the CFO of Third Coast and given oversight of all of the financial aspects of the business. Tr. 41, 53.

Following completion of the new warehouse, Finch and Honeycutt started seeing cash flow challenges in 2009 and in early 2010 and directed that the company’s financial information be sent to the CPA firm in Houston that monitored their books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Finch and Honeycutt returned their focus to the sales operation. *Id.* Still blissfully unaware of the impending financial disaster facing the company until being informed that certain of their suppliers had “cut them off” and ceased selling to them and their bank raised its own concerns,¹⁶ the decision to call in Tatum & Tatum, LLC., an outside accounting firm, was not made until the end of January of 2010. Tr. 70. In the course of

¹⁵ Honeycutt testified that he had known Javier Bueno since about the time he was 10 years old and was employed sweeping the floors at Southern Produce, prior to the time that Third Coast was formed. Tr. 83.

¹⁶ The company owed their banks about ten million in bank loans at the time. Tr. 54.

the resulting audit and monitoring of the receivables, a systematic diversion of company receivables to previously unknown and unauthorized multiple bank accounts established by Javier Bueno was detected. Tr. 46-47. To further conceal the diversions, the younger Bueno had been making fraudulent General Ledger entries making it appear that suppliers were being paid when in fact they were not. Tr. 47-49.¹⁷ After discovering that all was not well and that sellers were not being paid, Petitioners confronted Javier Bueno, removed him from his position with the company, and assumed control of the company. Tr. 54-59, 73-74, 89. Accordingly, the first prong of the statutory test in § 499a(b)(9) is met in this case as their actions went far beyond the performance of “ministerial functions only” as both Petitioners exercised judgment, discretion and control of the company’s as officers and directors activities from their discovery of the defalcation until the company’s ultimate demise. Tr. 6, 37. *See Norinsberg*, 58 Agric. Dec. at 610-611. Both Petitioners stipulated at the hearing that they were officers and directors of Third Coast and acted as officers and directors of the company during the violation period and despite their knowledge of their inability to pay all suppliers promptly continued to purchase produce from sellers until Third Coast ceased operation. Tr. 37, 75-77.

Thus, although the defalcation that was the proximate cause of the serious cash shortage that led to the company’s ultimate demise predated their assumption of control of the company, the Petitioners’ period of control of the company occurred during the greatest portion of the violation period, specifically from sometime in February of 2010 through July 16, 2010. During that period of time, the company struggled to keep its doors open so as to pay many people as it possibly could, maintaining payments to the bank, pro-rating the amounts paid to suppliers and still attempting to collect the money owed to it.¹⁸ Tr. 54-57, 61-63, 75-76. In explaining why they continued to operate, George Finch testified:

¹⁷ The Wells Fargo accounts reflected that about \$360,000 was diverted between September of 2009 until January of 2010; however, a more in depth investigation revealed that over a period of three years the amount embezzled was well over one million dollars. Tr. 49- 53.

¹⁸ During the violation period, Petitioners attempted to salvage the company’s existence; bank payments were made and the company’s employees were being paid. Tr. 54-57, 61-63, 75-76. Over a period of three or four months, one PACA claimant was paid approximately \$2.2 million. Tr. 59.

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....We had contractual agreements with customers that we needed to fulfill. If we close that door, then those customers would have gone without product. In business, in this business, if you don't have products, you don't have a business, you close the doors. I'm looking at the obligations of customers that helped us get to where we were over a prolonged period of time. Some of these relationships we had had for a long period of time. Unfortunately, those relationships are gone now, but that's business. I've lost those-- I still know those people, but I've lost their business, because of what happened. There's another situation, obviously we had a very, we understand our obligations to PACA, but as I looked around, I looked at my employees, who had been with us, some of them, for a long time. We shut the business down, they're without work. It's a bigger picture, and it's an awesome responsibility—

Tr. 75-76.

To take care of everyone. And we did the best we could within the constraints of what we had to do that....

Tr. 76-77.

Indeed, even after significant infusions of their own funds from savings and their personal retirement accounts¹⁹, Finch and Honeycutt's efforts ultimately proved unsuccessful in preserving the company. With the bank's "blessing," first the processing portion of the business was

¹⁹ Tr. 57, 99. Finch testified that the funds he contributed were "[a]nything I had at the time" and were from savings and his 401k. Tr. 57. Honeycutt borrowed \$25,000 from his mother-in-law. Tr. 99. Unlike the Petitioners, despite his son's involvement, Artemio Bueno did not contribute funds to attempt to maintain the company's existence. Tr. 99.

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sold²⁰ and later the assets of the distribution portion²¹ were sold to another entity. Tr. 57-58. The sale proceeds went to the bank. Tr. 57.

While having a great deal of empathy for the Petitioners, both of whom demonstrated themselves to be honest and well intentioned men who were victims themselves and who did not personally gain from the situation they found themselves in, I must nonetheless hold that by virtue of having controlled the operation of the company from sometime in February of 2010 until its assets were liquidated in July of 2010 neither individual can be said to be only nominally officers and directors of the violating entity. *See* 7 U.S.C. § 499(a)(9); *Taylor*, 636 F.3d at 615, 617.

Accordingly, on the basis of all of the evidence before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

Findings of Fact

1. Petitioner George Finch is an individual residing in Friendswood, Texas. By his account, he has been in the food business all of his life, with over 25 years of experience in the produce industry. Tr. 40. Finch acknowledged being aware of the PACA and the responsibilities it imposed, specifically, the number one obligation being to the PACA. Tr. 55, 76-77.
2. Petitioner John Dennis Honeycutt is an individual residing in Katy, Texas. He began his involvement in the produce industry at college age and for the six years prior to forming Third Coast worked for a produce company that he termed “the best in town.” Tr. 79-82.
3. Petitioner Finch, Petitioner Honeycutt and Artemio Bueno started Third Coast in May of 1992 and built the enterprise from one with a single van and leased space into an operation in 2010 with 40 trucks,

²⁰ The processing operation consisted of taking fresh fruits and vegetables and processing them for the end user. “It’s a value-added product, mixed salads and varied commodities that go to our customers.” Tr. 56.

²¹ The distribution business was an asset purchase, involving the real estate, trucks and other equipment used in handling the produce delivered to the company customers. Tr. 57-58.

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about 170 employees, a new 60,000 square foot warehouse, and a volume of a million dollars per week in sales. Tr. 40-42, 55, 65-66, 82-84.

4. As a result of defalcations by the CFO of the company and the resulting cash flow shortage, Third Coast willfully, flagrantly, and repeatedly violated Section 2 of the Act (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 21 sellers of the agreed purchase prices in the amount of \$514,943.40 for 207 lots of perishable agricultural commodities which Third Coast purchased, received, and accepted in the course of interstate commerce during the period February 5, 2010 through July 16, 2010. Tr. 6; *Third Coast Produce Company, Ltd.*, 71 Agric. Dec. 633 (U.S.D.A. 2012).

5. Petitioner Finch and Petitioner Honeycutt each owned 32.333 percent of Third Coast and were officers and directors of Third Coast during the violation period. Tr. 6; GFRX 5 at 25; JHRX 5 at 25.

6. Petitioners Finch and Honeycutt first started seeing cash flow challenges in 2009 and in early 2010 and directed that the company's financial information be sent to the CPA firm in Houston that monitored their books on an annual basis. Reassured by that firm that everything appeared to be as it should be, Finch and Honeycutt returned their focus to the sales operation until additional information came to them that suppliers were not being paid. Tr. 41.

7. After being informed that certain of their suppliers had "cut them off" and ceased selling to them and their bank raised its own concerns, Petitioners retained an outside accounting firm near the end of January of 2010. The resulting audit and monitoring of the receivables detected a systematic diversion of company receivables to previously unknown and unauthorized multiple bank accounts established by Javier Bueno. Tr. 46-47. To further conceal the diversions, the younger Bueno had been making fraudulent General Ledger entries making it appear that suppliers were being paid when in fact they were not. Tr. 47-49, 54, 69, 74, 95.

8. Although the preliminary computation of the defalcation amounted to \$360,000 during the period of September of 2009 to January of 2010; a

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more thorough and comprehensive investigation revealed shortages well in excess of a million dollars. Tr. 49-53.

8. In February of 2010, Petitioners removed Javier Bueno from his position with the company and assumed control of the company. Tr. 37, 54-59, 72-74, 89.

9. Despite the Petitioners' best efforts to honor contractual obligations to provide produce, to keep the doors open so as to pay many people as it possibly could, maintain payments to the bank, and pro-rate the amounts paid to suppliers while still attempting to collect the money owed to it, and despite infusing the company with personal funds and obtaining concessions from their bank, it was necessary to first sell the processing portion of the business and finally the liquidate the assets of the distribution operation and cease operation. Tr. 55-57, 75-76.

10. While under the control of Petitioners Finch and Honeycutt, despite knowledge that the company had failed to pay suppliers in a timely manner, the company continued to purchase produce from produce sellers, and purchased produce during the violation period. Tr. 69, 75-77, 89, 95-96.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. George Finch is an individual responsibly connected to Third Coast Produce Company, Ltd. by virtue of his active participation in corporate operations and his status as an officer and director of the entity.
3. By virtue of being responsibly connected to a violating corporation, Petitioner George Finch is subject to the employment restrictions of the Act.
4. John Dennis Honeycutt is an individual responsibly connected to Third Coast Produce Company, Ltd. by virtue of his active participation in corporate operations and his status as an officer and director of the entity.

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5. By virtue of being responsibly connected to a violating corporation, Petitioner John Dennis Honeycutt is subject to the employment restrictions of the Act.

ORDER

1. The determination of the Chief of the PACA Branch that George Finch and John Dennis Honeycutt were responsibly connected to Third Coast Produce Company, Ltd. during the period between February 5, 2010 through July 16, 2010 when the entity was committing willful, flagrant and repeated violations of the Act is **AFFIRMED**.

2. Petitioners George Finch and John Dennis Honeycutt are accordingly subject to the licensing restrictions and employment sanctions contained in Section 4(b) and 8(b) of the Act (7 U.S.C. § 499d(b) and § 499h(b)).

3. This Decision and Order shall become final and effective without further proceedings thirty-five days (35) after service on Petitioner, unless appealed to the Judicial Officer by a party to the proceeding within thirty (30) days, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

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REPARATIONS DECISIONS

**CLASSIC FRUIT COMPANY, INC. v. AYCO FARMS, INC. &
AYCO FARMS, INC. v. CLASSIC FRUIT COMPANY, INC.**
PACA Docket Nos. S-R-2012-387, S-R-2012-0420.
Decision and Order.
Filed August 9, 2013.

PACA-R.

**Procedure – Prejudgment interest granted to Respondent in a
Counterclaim**

Where Respondent filed a Counterclaim, it was awarded the full amount of its Counterclaim less damages, which amount was offset against the amount awarded to Complainant. A Decision and Order was issued in favor of Complainant ordering Respondent to pay the offset amount plus prejudgment interest on that amount.

Shelton S. Smallwood, Presiding Officer.

Donna M. Ennis, Examiner.

Complainant, pro se.

Respondent, pro se.

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

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as “the Act.” In PACA Docket No. S-R-2012-387, a timely Complaint was filed with the Department in which Complainant Classic Fruit Company, Inc. seeks a reparation award against Respondent Ayco Farms, Inc. in the amount of \$6,630.40 in connection with one (1) truckload of cantaloupes shipped in the course of interstate commerce.

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In PACA Docket No. S-R-2012-420, a timely informal Complaint was filed with the Department in which Complainant Ayco Farms, Inc. seeks \$5,958.40 from Respondent Classic Fruit Company, Inc. in connection with one (1) truckload of cantaloupes shipped in 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 Respondent Ayco Farms, Inc., which filed an Answer thereto, denying liability to Complainant Classic Fruit Company, Inc. and asserting a Counterclaim in the amount of \$5,958.40 in connection with one (1) truckload of cantaloupes sold to Complainant Classic Fruit Company, Inc. in interstate commerce. Complainant Classic Fruit Company, Inc. filed a Reply to the Counterclaim denying liability to Respondent Ayco Farms, Inc.

Neither the amount claimed in the Complaint nor the Counterclaim exceeds \$30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice Under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Neither party filed additional evidence or a brief.

Findings of Fact

1. Complainant in PACA Docket No. S-R-2012-387, and Respondent in PACA Docket No. S-R-2012-420, Classic Fruit Company, Inc. (hereafter "Classic Fruit"), is a corporation whose post office address is 2801 Airport Drive, Suite 101, Madera, CA 93637. At the time of the transactions involved herein, Classic Fruit was licensed under the Act.

2. Respondent in PACA Docket No. S-R-2012-387, and Complainant in PACA Docket No. S-R-2012-420, Ayco Farms, Inc. (hereafter "Ayco Farms"), is a corporation whose post office address is 730 South Powerline Road, Suite G, Deerfield Beach, FL 33442. At the time of the transactions involved herein, Ayco Farms was licensed under the Act.

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3. On or about March 23, 2012, Classic Fruit, by oral contract, sold to Ayco Farms, and agreed to ship from loading point in the state of California, to Ayco Farms, in Deerfield Beach, Florida, one (1) truckload of cantaloupes. Classic Fruit issued invoice number 116510 billing Ayco Farms for 512 cartons of twelve (12)-count Guatemalan cantaloupes at \$12.95 per carton, for a total f.o.b. invoice price of \$6,630.40. (Compl. Ex. 2.) Ayco Farms has not paid Classic Fruit for the cantaloupes billed on invoice number 116510.

4. The informal Complaint was filed on June 15, 2012 (ROI Ex. A at 1), which is within nine months from the date the cause of action accrued.

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5. On or about December 30, 2011, Ayco Farms, by oral contract, sold to Classic Fruit, and agreed to ship from loading point in the state of Florida, to Classic Fruit's customer, in Las Vegas, Nevada, one (1) truckload of cantaloupes. Ayco Farms issued invoice number 79056 billing Classic Fruit for 1,064 cartons of nine (9)-count Guatemalan cantaloupes at \$8.00 per carton, or \$8,512.00, plus \$23.50 for a temperature recorder, for a total delivered invoice price of \$8,535.50. Ayco Farms's salesman was Mr. Fran Torigian (ROI Ex. A at 3-4, 7). Classic Fruit's salesman was Mr. Troy Harman (ROI Ex. A at 7; C at 1).

6. On January 4, 2012, at 11:30 a.m., a Nevada State inspection was performed on the cantaloupes mentioned in Finding of Fact 5 at the facility of Get Fresh, in Las Vegas, Nevada (Reply to Countercl. Ex. 1). The inspection disclosed a total of seventy-four percent (74%) condition defects, including twenty-seven percent (27%) internal damage affecting eight percent (8%) or more of edible flesh, fifteen percent (15%) serious damage accompanied by fermentation, and thirty-two percent (32%) internal damage affecting twenty percent (20%) or more of edible flesh (Reply to Countercl. Ex. 1). The pulp temperature at the time of the inspection was forty (40) degrees Fahrenheit (Reply to Countercl. Ex. 1).

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7. Complainant subsequently issued a revised invoice number 79056 billing Classic Fruit for 1,064 cartons of nine (9)-count Guatemalan cantaloupes on a delivered PAS basis (ROI Ex. A at 4). On April 10, 2012, Classic Fruit issued check number 008668 made payable to Ayco Farms in the amount of \$3,035.65, which amount includes \$2,577.10 for the cantaloupes billed on invoice number 79056, and \$458.55 for an invoice not involved in this dispute (ROI Ex. C at 7).

8. The informal complaint was filed on July 10, 2012 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

In PACA Docket No. S-R-2012-387, Classic Fruit seeks to recover the invoice price for one (1) truckload of cantaloupes sold to Ayco Farms. Complainant states Respondent accepted the cantaloupes in compliance with the contract of sale, but that it has since failed, neglected, and refused to pay Complainant the agreed purchase price of \$6,630.40 (Compl. ¶ 6, 8).

In PACA Docket No. S-R-2012-420, Ayco Farms seeks to recover the invoice price of \$8,535.50 for one (1) truckload of cantaloupes sold to Classic Fruit, less a payment of \$2,577.10, or a balance of \$5,958.40 (ROI Ex. A at 1; Countercl. ¶ A).

As there are different circumstances surrounding each of the transactions in question, we will address each transaction individually by invoice number below:

Classic Fruit Invoice Number 116510

In response to the Complaint, Ayco Farms submitted a sworn Answer wherein it admits owing Classic Fruit \$6,630.40 for the truckload of cantaloupes in question, but asserts in its Counterclaim that it has been withholding payment until Classic Fruit remits payment to Ayco Farms for a truckload of cantaloupes purchased by Classic Fruit (Answer ¶ 8; Countercl. ¶ A). As Ayco Farms does not dispute its liability to Classic Fruit for the agreed purchase price of the cantaloupes in this shipment,

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we find that Ayco Farms is liable to Classic Fruit for the cantaloupes it accepted at the agreed purchase price of \$6,630.40.

Ayco Farms Invoice Number 79056

Ayco Farms asserts in its Counterclaim that there is an outstanding balance of \$5,958.40 due Ayco Farms from Classic Fruit for a load of cantaloupes Ayco Farms sold to Classic Fruit on December 30, 2011 (Countercl. ¶ A; Ex. 7). In response to Ayco Farms' Counterclaim, Classic Fruit submitted an unverified reply wherein it asserts that after the cantaloupes were inspected by the Nevada State Inspection Service, Ayco Farms requested that Classic Fruit handle the shipment on a PAS basis with full protection (Reply to Countercl. at 1).

Classic Fruit's acceptance of the cantaloupes is not in dispute. A buyer who accepts produce becomes liable to the seller for the full purchase thereof, less any damages resulting from any breach of contract by the seller. *Fresh W. Mktg., Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971). The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4); *see also W.T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1705, 1710 (U.S.D.A. 1993); *Salinas Mktg. Coop. v. Tom Lange Co.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

The cantaloupes were sold under delivered terms, which means, "that the produce is to be delivered by the seller ... at the market in which the buyer is located ... free of any and all charges for transportation or protective service. The seller assumes all risks of loss and damage in transit not caused by the buyer." *See* 7 C.F.R. § 46.43(p). Under a delivered contract, the goods are required to meet contract requirements at the time and place specified in the contract for delivery. The warranty of suitable shipping condition has no relevance in a delivered sale contract. *Villalobos v. Am. Banana Co.*, 56 Agric. Dec. 1969, 1978-79 (U.S.D.A. 1997); *Sidney Newman & Co. v. Wallace Fruit & Vegetable Co.*, 21 Agric. Dec. 1048, 1050 (U.S.D.A. 1962).

Ayco Farms states it is seeking full payment of the agreed purchase price for the cantaloupes because the inspection did not cover the total

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number of cartons shipped (ROI Ex. A at 1). The record discloses that sixteen (16) pallets, or 896 cartons (56 cartons per pallet), were available for inspection on January 4, 2012 (Reply to Countercl. Ex. 1). The inspector took nine (9) samples out of the sixteen (16) pallets, a sampling rate of approximately one percent (1%) (Reply to Countercl. Ex. 1). We find that the sample size used by the surveyor is sufficient.

The United States Standards for Grades of Cantaloupes (7 C.F.R. §§ 51.475-94)¹ provide a destination tolerance for cantaloupes designated as U.S. No. 1 grade of twelve percent (12%) for average defects, including therein not more than six percent (6%) for defects causing serious damage and two percent (2%) for decay. Although there is no indication that the cantaloupes in question were sold with a grade specification, these tolerances may be applied to the condition defects disclosed by the inspection. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 456 (U.S.D.A. 2000).

The inspection disclosed a total of seventy-four percent (74%) condition defects, including twenty-seven percent (27%) internal damage affecting eight percent (8%) or more of edible flesh, fifteen percent (15%) serious damage accompanied by fermentation, and thirty-two percent (32%) internal damage affecting twenty percent (20%) or more of edible flesh, in the 896 cartons of cantaloupes inspected (Reply to Countercl. Ex. 1). Absent evidence to the contrary, we must presume that the remaining 168 cartons of cantaloupes that were not inspected were free of defects and otherwise conformed to the contract requirements. *M.J. Duer & Co. v. J.F. Sanson & Sons Co.*, 49 Agric. Dec. 620, 624 (U.S.D.A. 1990). When we average the inspection results pertinent to the 896 cartons of cantaloupes that were inspected over the 1,064 cartons of cantaloupes shipped, the total condition defects for the shipment as a whole average sixty-two percent (62%), including twenty-three percent (23%) internal damage affecting eight percent (8%) or more of edible flesh, thirteen percent (13%) serious damage accompanied by fermentation, and twenty-seven percent (27%) internal damage affecting twenty percent (20%) or more of edible flesh.

¹ The United States Standards for Grades of Cantaloupes are also available via the Internet at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5050255>.

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There are essentially two (2) defects disclosed by the inspection, internal damage and fermentation. The Nevada State inspector found that twenty-six percent (26%) of the cantaloupes showed good internal quality, fifty-nine percent (59%) showed internal damage and the remaining fifteen percent (15%) showed fermentation. The U.S. No 1 grade for cantaloupes specifies that the cantaloupes should have "good internal quality." See 7 C.F.R. § 51.476. This is normally ascertained by determining the percentage of soluble solids using a hand refractometer. See 7 C.F.R. § 51.485. There is no indication that the inspector performed this test to ascertain the percentage of the cantaloupes having good internal quality, nor does the inspector identify the actual defects that were scored as internal damage. Absent more detail, we must disregard the internal damage noted on the inspection report.

With respect to the fermentation disclosed by the inspection, the Shipping Point and Market Inspection Instructions² applicable to cantaloupes state that cantaloupes with fermented flesh are scored against the decay tolerance. Therefore, the thirteen percent (13%) serious damage accompanied by fermentation disclosed by the inspection is subject to the two percent (2%) decay tolerance set forth in the U.S. Grade Standards for Cantaloupes. Given that the percentage of fermentation exceeds the decay tolerance by eleven percent (11%), we conclude that Classic Fruit has sustained its burden to prove a breach of contract by Ayco Farms for which Classic Fruit is entitled to recover provable damages.

Classic Fruit asserts, however, that the price terms of the contract were changed to PAS following the inspection. Specifically, Mr. Paul Raggio, President of Classic Fruit, asserts in his unverified reply to the Counterclaim that following the inspection, Ayco Farms's Mr. Torigian requested that Classic Fruit "... handle this shipment on a PAS basis with full protection from Ayco Fruit." (Reply to Countercl. at 1). The party that claims the contract was modified has the burden of proof. *Garren-Teed Co. v. Mo-Bo Enter., Inc.*, 51 Agric. Dec. 811, 813

² The Shipping Point and Market Inspection Instructions are also available via the Internet at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5102779>.

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(U.S.D.A. 1992); *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506, 508 (U.S.D.A. 1975).

The record reflects that Ayco Farms's salesman, Mr. Fran Torigian, and Classic Fruit's salesman, Mr. Troy Harman, were the individuals personally involved in the transaction (ROI A at 3-4, 7; C at 1). Notably, neither party submitted a sworn statement from these individuals regarding the transaction at issue. The record does, however, include two copies of invoice number 79056 billing Classic Fruit for the cantaloupes at issue (ROI Ex. A at 3-4). One copy of the invoice shows Ayco Farms billing Classic Fruit for the cantaloupes at a fixed price of \$8.00 per carton, while the other copy shows Ayco Farms billing Classic Fruit for the cantaloupes on a PAS basis. Nowhere in the record does Ayco Farms address the evidence showing that it billed Classic Fruit for the cantaloupes on a PAS basis. Accordingly, we find that the preponderance of the evidence supports Respondent's contention that the parties agreed to modify the price terms of the contract to PAS (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)),³ 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 (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.

Mr. Raggio asserts that Mr. Torigian verbally accepted a return of \$2.40 per carton for the cantaloupes (Reply to Countercl. at 2). Mr. Raggio's statement is, however, not sworn. Therefore, it cannot be afforded any evidentiary value. *C.H. Robinson Co. v. ARC Fresh Food Sys., Inc.*, 50 Agric. Dec. 950, 952 (U.S.D.A. 1991); *Prillwitz v. Sheehan Produce*, 19 Agric. Dec. 1213, 1215 (U.S.D.A. 1960). Moreover, as we already noted, the transaction was negotiated by Ayco Farms's Fran

³ 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."

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Torigian and Classic Fruit's Troy Harman, so there is no indication that Mr. Raggio had any firsthand knowledge of the transaction in question.

The record also includes a copy of the PAS invoice with "2.40" handwritten in the price column (ROI Ex. A at 4); however, there is no indication that Ayco Farms agreed to accept this return. As the evidence therefore fails to establish that the parties agreed on a price for the cantaloupes, a reasonable price must be determined.

To determine a reasonable price for goods sold price after sale, we normally consult relevant USDA Market News reports; however, we will also consider the results of a prompt and proper resale if the circumstances indicate that the use of such results will enable us to arrive at a more accurate figure. See *M. Offutt Co. v. Caruso Produce, Inc.*, 49 Agric. Dec. 594, 603 (U.S.D.A. 1990). In the instant case, Respondent has not submitted an account of sales for the cantaloupes. Accordingly, we will refer to relevant USDA Market News reports to determine the reasonable value of the cantaloupes. The closest destination market to Las Vegas, Nevada, is Los Angeles, California, which is approximately 270 miles away. We find that this market is too remote to accurately represent the market value of the subject cantaloupes in Las Vegas.

Where relevant market prices are not available, we often use the delivered price of the commodity as a substitute measure of its market value. *C.J. Prettyman, Jr., Inc. v. Am. Growers, Inc.*, 55 Agric Dec. 1352, 1372-73 (U.S.D.A. 1996); *Sardina v. Caamano Bros.*, 42 Agric. Dec. 1275, 1278-79 (U.S.D.A. 1983). Ayco Farms invoiced Classic Fruit for the 1,064 cartons of cantaloupes in question at a delivered price of \$8.00 per crate, or \$8,512.00, plus \$23.50 for a temperature recorder, for a total delivered price of \$8,535.50 (Answer/Countercl. Ex. 2).

When this amount is reduced by thirteen percent (13%), or \$1,109.62, to account for the condition defects disclosed by the inspection, we arrive at a reasonable value for the cantaloupes of \$7,425.88. From this amount, Respondent is entitled to deduct twenty percent (20%), or \$1,485.18, for profit and handling, and \$90.00 for the Nevada State inspection fee. *A.P.S. Mktg., Inc. v. R.S. Hanline & Co.*, 59 Agric. Dec. 407, 410-11 (U.S.D.A. 2000); *C.J. Prettyman, Jr., Inc. v. Am. Growers, Inc.*, 55 Agric Dec. 1352, 1374-75 (U.S.D.A. 1996). After making these

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deductions, the net amount due Ayco Farms from Classic Fruit for the 1,064 cartons of in question is \$5,850.70. Classic Fruit paid Ayco Farms \$2,577.10 for the cantaloupes. Therefore, there remains a balance due Ayco Farms from Classic Fruit of \$3,273.60.

For the transaction involved in PACA Docket No. S-R-2012-387, we have found a total amount due Classic Fruit from Ayco Farms of \$6,630.40. Ayco Farms's failure to pay Classic Fruit \$6,630.40 is a violation of section 2 of the Act for which reparation should be awarded to Classic Fruit.

For the transaction involved in PACA Docket No. S-R-2012-420, we have found a total amount due Ayco Farms from Classic Fruit of \$3,273.60. Classic Fruit's failure to pay Ayco Farms \$3,273.60 is a violation of section 2 of the Act for which reparation should be awarded to Ayco Farms. When the amount due Ayco Farms from Classic Fruit is offset against the amount due Classic Fruit from Ayco Farms, there is a net amount due Classic Fruit from Ayco Farms of \$3,356.80.

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, 239 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916). Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest. See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978, 979 (U.S.D.A. 1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335, 339 (U.S.D.A. 1970); *Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963).

Classic Fruit seeks interest on the unpaid amount due for the cantaloupes at a rate of one and one-half percent (1.5%) per month. Classic Fruit's claim is based on its invoice to Ayco Farms which bears the statement: "Past due accounts are subjected to an interest charge of 1.5% per month both on prejudgment and post-judgment debt." See Compl. Ex. 2. There is nothing to indicate that Ayco Farms objected to the interest charge provision stated on Classic Fruit's invoice. In the

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absence of a timely objection by Ayco Farms, the interest charge provision stated on Classic Fruit's invoice becomes incorporated into the sales contract. *See, e.g., Johnston v. AG Growers Sales LLC*, 69 Agric. Dec. 1569, 1583-86 (U.S.D.A. 2010) (applying section 2-207(2) of the Uniform Commercial Code).

The one and one-half percent (1.5%) per month, eighteen percent (18%) per annum rate of interest set by Classic Fruit's invoice to Ayco Farms is not unreasonable. Numerous courts have awarded interest at a rate of eighteen percent (18%) based on similar contract provisions. *See, e.g., Palmareal Produce Corp. v. Direct Produce #1, Inc.*, 2008 WL 905041, at *3 (E.D.N.Y. 2008) (awarding interest at 18 percent set by invoice clause); *John Georgallas Banana Dist. of New York, Inc. v. N&S Tropical Produce, Inc.*, 2008 WL 2788410, at * 5 (E.D.N.Y. 2008) (same); *AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Services Inc.*, 2007 WL 4302514, at **7-8 (S.D.N.Y. 2007) (same); *Dayoub Marketing, Inc. v. S.K. Produce Corp.*, 2005 WL 3006032, at *4 (S.D.N.Y. 2005) (same). Accordingly, interest will be awarded to Classic Fruit at the rate of eighteen percent (18%) per annum.

In PACA Docket No. S-R-2012-387, Classic Fruit paid \$500.00 to file its formal Complaint. Likewise, in PACA Docket No. S-R-2012-420, Ayco Farms paid \$500.00 to file its Counterclaim. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party. Since the handling fees paid by the parties offset one another, neither party is liable for the handling fee paid by the other.

ORDER

Within thirty (30) days from the date of this Order, Ayco Farms shall pay Classic Fruit as reparation \$3,356.80, with interest thereon at the rate of eighteen percent (18%) per annum from May 1, 2012, up to the date of this Order.

Ayco Farms shall pay Classic Fruit interest at the rate of 0.11 percent per annum on the sum of \$3,356.80 from the date of this Order, until paid.

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Copies of this Order shall be served upon the parties.

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PACA Docket No. E-R-2011-259.

Decision and Order.

Filed September 12, 2013.

PACA-R.

Breach of Contract – Inspections – Appeal

Where the seller made a timely request for an appeal inspection, but the buyer denied the product was available and the buyer subsequently issued account of sales or other evidence which established that the product was, in fact, available for the requested appeal inspection, the original inspection shall be disallowed.

Shelton S. Smallwood, Presiding Officer.

Donna M. Ennis, Examiner.

Lawrence H. Meuers for Complainant

Craig A. Stokes for Respondent

Decision and Order entered by William G. Jensen, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as “the Act.” A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of \$52,447.10 in connection with four (4) truckloads of cantaloupes and honeydew melons shipped in the course of interstate commerce.

Copies of the Report of Investigation (“ROI”) 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.

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Although the amount claimed in the Complaint exceeds \$30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation ("ROI"). In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement and a Statement in Reply. Respondent filed an Answering Statement. Both parties also submitted briefs.

Findings of Fact

1. Complainant is a limited liability company whose post office address is 23150 Fashion Drive, Suite #235, Estero, FL 33928. At the time of the transactions involved herein, Complainant was licensed under the Act.
2. Respondent is a corporation whose post office address is 145 Hamilton Avenue, Brooklyn, NY 11231. At the time of the transactions involved herein, Respondent was licensed under the Act.

Invoice No. 16931

3. On or about February 23, 2011, Complainant, by written contract, sold to Respondent one (1) truckload of Costa Rican cantaloupes (Compl. Ex. 6-7, 9). Complainant issued invoice number 16931 billing Respondent for 1,152 cartons of cantaloupes (12's) at \$10.35 per carton, or \$11,923.20, plus \$26.00 for a temperature recorder, for a total invoice price of \$11,949.20 (Compl. Ex. 2). The cantaloupes were shipped on February 23, 2011, from loading point in Glassboro, New Jersey, to Respondent, in Brooklyn, New York, where they were received on February 24, 2011 (Compl. Ex. 3).
4. On February 24, 2011, at 12:05 p.m., Respondent requested a USDA inspection of the cantaloupes. The inspection was performed on the same date, between 4:02 p.m. and 5:30 p.m., at Respondent's cooler in Brooklyn, New York (Compl. Ex. 14). The inspection disclosed

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twenty-two percent (22%) damage by sunken area (Compl. Ex. 14). Pulp temperatures at the time of the inspection ranged from forty-three (43) to forty-four (44) degrees Fahrenheit (Compl. Ex. 14).

5. On May 26, 2011, Respondent prepared an account of sales for the cantaloupes billed on invoice number 16931 that reads, in pertinent part, as follows:

Quantity Sold	Date	Item Description	Case	Extended
150	2/25/2011	Cantaloupe 12's	\$4.60	\$ 690.00
125	2/25/2011	Cantaloupe 12's	\$4.40	\$ 550.00
110	2/25/2011	Cantaloupe 12's	\$4.25	\$ 467.50
100	2/28/2011	Cantaloupe 12's	\$3.60	\$ 360.00
145	2/28/2011	Cantaloupe 12's	\$3.40	\$ 493.00
120	3/01/2011	Cantaloupe 12's	\$3.25	\$ 390.00
155	3/01/2011	Cantaloupe 12's	\$3.00	\$ 465.00
135	3/02/2011	Cantaloupe 12's	\$2.75	\$ 371.25
112	3/02/2011	Cantaloupe 12's	\$2.50	\$280.00
1152	Total Sales Before Charges			\$4,066.75
		Inspection	\$220.00	
		Commission 15%	\$610.01	
				\$ 830.01
	Return			\$3,236.74

(ROI Ex. E at 2).

6. Respondent has not paid Complainant for the cantaloupes billed on invoice number 16931.

Invoice No. 16932

7. On or about February 23, 2011, Complainant, by written contract, sold to Respondent one (1) truckload of Costa Rican cantaloupes (Compl. Ex. 6-7, 10). Complainant issued invoice number 16932 billing Respondent for 1,280 cartons of cantaloupes (9's) at \$10.35 per carton, for a total invoice price of \$13,248.00 (Compl. Ex. 4). The cantaloupes

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were shipped on February 23, 2011, from loading point in Pittsgrove, New Jersey, to Respondent, in Brooklyn, New York, where they were received on February 24, 2011 (Compl. Ex. 5).

8. On February 24, 2011, at 12:05 p.m., Respondent requested a USDA inspection of the cantaloupes. The inspection was performed on the same date, between 2:14 p.m. and 4:02 p.m., at Respondent's cooler in Brooklyn, New York (Compl. Ex. 12). The inspection disclosed twenty-six percent (26%) damage by sunken areas (Compl. Ex. 12). Pulp temperatures at the time of the inspection ranged from forty-three (43) to forty-four (44) degrees Fahrenheit (Compl. Ex. 12).

9. On May 26, 2011, Respondent prepared an account of sales for the cantaloupes billed on invoice number 16932 that reads, in pertinent part, as follows:

Quantity Sold	Date	Item Description	Case	Extended
175	2/25/2011	Cantaloupe 9's	\$4.50	\$ 787.50
142	2/25/2011	Cantaloupe 9's	\$4.25	\$ 603.50
135	2/25/2011	Cantaloupe 9's	\$4.00	\$ 540.00
125	2/28/2011	Cantaloupe 9's	\$3.75	\$ 468.75
150	2/28/2011	Cantaloupe 9's	\$3.50	\$ 525.00
142	3/01/2011	Cantaloupe 9's	\$3.25	\$ 461.50
136	3/01/2011	Cantaloupe 9's	\$3.00	\$ 408.00
150	3/02/2011	Cantaloupe 9's	\$2.75	\$ 412.50
125	3/02/2011	Cantaloupe 9's	\$2.50	\$ 312.50
1152	Total Sales Before Charges			\$4,066.75
		Inspection	\$220.00	
		Commission 15%	\$610.01	
				\$ 830.01
Return				\$3,236.74

(ROI Ex. E at 3).

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10. Respondent has not paid Complainant for the cantaloupes billed on invoice number 16932.

Invoice No. 16934

11. On or about February 23, 2011, Complainant, by written contract, sold to Respondent one truckload consisting of 1,729 cartons of Honduran honeydew melons at \$15.00 per carton (Compl. Ex. 53, 56). The honeydew melons were shipped on or about February 23, 2011, from loading point in Pittsgrove, New Jersey, to Respondent, in Brooklyn, New York, where they were received on February 25, 2011, and subsequently rejected by Respondent (Compl. Ex. 60). The shipping manifest includes a handwritten notation:

Truck missed Delivery
Time Missed orders was
One day late Rejected
2/25/2011 5:15 pm Friday
x Hector Roman / Hector Roman
Driver

(Compl. Ex. 60).

12. Complainant resold the load to Delmonte Fresh Produce N.A., Inc. [hereafter "Delmonte"], in Canton, Massachusetts (Compl. Ex. 74 at 2).

13. On February 23, 2011, Complainant issued invoice number 16934 billing Respondent for 1,729 cartons of honeydew melons (5's) at \$2.42 per carton, or \$4,184.18, plus \$9.32 for an unexplained charge, for a total invoice price of \$4,193.50 (Compl. Ex. 71). Respondent has not paid Complainant for the honeydew melons billed on invoice number 16934.

14. On February 24, 2011, Complainant issued a second invoice number 16934 billing Delmonte for 1,729 cartons of honeydew melons (6's) at \$13.50 per carton, for a total invoice price of \$23,341.50 (Compl. Ex. 73).

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Invoice No. 16935

15. On or about February 24, 2011, Complainant, by written contract, sold to Respondent one truckload of Costa Rican honeydew melons (Compl. Ex. 6-7, 41). Complainant issued invoice number 16935 billing Respondent for 1,504 cartons of honeydew melons (5's) at \$15.35 per carton, for a total invoice price of \$23,086.40 (Compl. Ex. 40). The honeydew melons were shipped on February 24, 2011, from loading point in the State of Florida, to Respondent, in Brooklyn, New York, where they were received on February 26, 2011 (Compl. Ex. 43).

16. On February 28, 2011, at 6:00 a.m., Respondent requested a USDA inspection of the honeydew melons (ROI Ex. D at 10). The inspection was performed on the same date, between 8:22 a.m. and 9:38 a.m., at Respondent's cooler in Brooklyn, New York (ROI Ex. D at 10). The inspection disclosed twelve percent (12%) damage by sunken discolored areas (ROI Ex. D at 10). Pulp temperatures at the time of the inspection ranged from forty-three (43) to forty-five (45) degrees Fahrenheit (ROI Ex. D at 10).

17. On May 26, 2011, Respondent prepared an account of sales for the honeydew melons billed on invoice number 16935 that reads, in pertinent part, as follows:

Quantity Sold	Date	Item Description	Case	Extended
225	2/28/2011	Honeydews 5's	\$16.25	\$ 3,656.25
202	2/28/2011	Honeydews 5's	\$16.15	\$ 3,262.30
175	2/28/2011	Honeydews 5's	\$16.00	\$ 2,800.00
125	3/01/2011	Honeydews 5's	\$15.75	\$ 1,968.75
110	3/01/2011	Honeydews 5's	\$15.60	\$ 1,716.00
150	3/02/2011	Honeydews 5's	\$15.55	\$ 2,332.50
125	3/02/2011	Honeydews 5's	\$15.50	\$ 1,937.50
225	3/03/2011	Honeydews 5's	\$15.25	\$ 3,431.25
167	3/03/2011	Honeydews 5's	\$15.00	\$ 2,505.00
1504	Total Sales Before Charges			\$23,609.55
Inspection			\$161.96	
Commission 15%			\$3,541.43	

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\$ 3,703.39

Return

\$19,906.16

(ROI Ex. E at 4).

18. Respondent has not paid Complainant for the honeydew melons billed on invoice number 16935.

19. The informal complaint was filed on April 15, 2011 (ROI Ex. A at 1), which is within nine (9) months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for four (4) truckloads of cantaloupes and honeydew melons purchased from Complainant. Complainant states Respondent accepted the commodities in compliance with the contracts of sale, but that it has since failed, neglected and refused to pay Complainant the agreed purchase prices thereof, totaling \$52,447.10 (Compl. ¶ 7). In response to Complainant's allegations, Respondent submitted a sworn Answer wherein it admits purchasing the four truckloads of cantaloupes and honeydew melons, but disputes the terms of sale (Answer ¶ 4). Respondent also asserts as an affirmative defense that it performed its obligations to Complainant or was excused from performance by impossibility, frustration or impracticability in each instance; and that Complainant's alleged injuries and damages were the result of the fault and/or negligence of Complainant (Answer Affirm. Defenses ¶¶ 1-3).

With respect to its dispute concerning the terms of sale for the cantaloupes and honeydew melons, Respondent asserts specifically that it purchased the melons from Complainant on a delivered basis, but that Complainant changed the terms when it shipped the melons (ROI Ex. D at 3). In response, Complainant contends that the cantaloupes and honeydew melons were sold to Respondent under the terms "delivered as to price, F.O.B. as to quality and condition," and that the parties never agreed to change those terms (ROI Ex. G at 1).

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Where the parties put forth affirmative but conflicting allegations with respect to the terms of the contract, the burden rests upon each to establish its allegation by a preponderance of the evidence. *Stake Tomatoes of Ruskin, Inc. v. World Wide Consultants, Inc.*, 52 Agric. Dec. 770, 771-72 (U.S.D.A. 1993); *Lookout Mountain Tomato & Banana Co. v. Case Produce, Inc.*, 51 Agric. Dec. 1471, 1475 (U.S.D.A. 1992). To support its contention that the sale terms were delivered with respect to price only, and f.o.b. in all other respects, Complainant submitted copies of its invoices and passings, which include a printed statement that reads:

Delivered As to Price
F.O.B. as to Quality & Condition
No Grade Contract
Good Delivery Standards Apply
Sales Confirmation

(ROI Ex. A at 2-5; C at 13, 47, 76-77). Complainant also submitted a copy of its quote sheet that it e-mailed to Respondent on February 23, 2011, which bears a statement at the bottom that reads:

Delivered As To Price - F O B To Quality & Condition
-No Grade Contract
Good Delivery Standards Apply - Prices Subject to
Change

(ROI Ex. G at 6-7).

To support its contrary assertion that the sales of the cantaloupes and honeydew melons were contracted on a delivered basis, Respondent submitted a copy of an e-mail message that it received from Complainant on February 23, 2011, which confirms the purchase of the melons and states, in pertinent part:

My po #16932
Load 9 ct @ 10.35 Delivered
Mikes melon
Origin Honduras
Approx Deliver 2/23/11-2/24/11

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My po # 196931 corrected
Load 12ct @ 10.35 delivered
Origin Costa Rica
Approx Deliver 2/23/11-2/24/11

My po # 16935
Load honeydew 5ct @ 15.35
Origin Costa Rica
Delmonte label
Approx Deliver 2/27/11

My po # 16934
Load 6ct honeydews 6 ct @ 15.00
Mikes melon
Origin Honduras
Approx Deliver 2/25/11

(ROI Ex. D at 4). Notably, where the term “delivered” appears in the e-mail message set forth above, it is next to the purchase price of the melons. This may be viewed as supporting Complainant’s contention that the delivered term referred to the price of the melons only. Moreover, Complainant has submitted invoices and passings which plainly state that the terms of sale were delivered as to price, but f.o.b. as to quality and condition. Respondent does not deny receiving these documents, nor has it shown that it took prompt exception to the terms stated on these documents upon their receipt. When documents containing terms of sale are not objected to in a timely manner, such documents are evidence of a contract containing the terms set forth therein. *Action Produce v. Ward’s Fruit & Produce, Inc.*, 46 Agric. Dec. 1845, 1847 (U.S.D.A. 1987); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (U.S.D.A. 1972); *George W. Haxton & Son, Inc. v. Adler Egg Co.*, 19 Agric. Dec. 218, 224-25 (U.S.D.A. 1960). We therefore find that the preponderance of the evidence supports Complainant’s contention that the terms of sale were delivered as to price only, and that the sales were otherwise contracted on an f.o.b. basis.

The Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(i)) define f.o.b. as meaning:

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that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed.

Suitable shipping condition is defined in the Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j)) as meaning:

that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties.¹

Under the warranty of suitable shipping condition, a receiver may establish that the produce did not comply with the contract requirements

¹ 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. Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a “normal” amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. 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. *Harvest Fresh Produce Inc. v. Clarke-Ehre Produce Co.*, 39 Agric. Dec. 703, 708-09 (U.S.D.A. 1980).

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at the time of shipment by providing independent evidence, such as a USDA inspection, showing that the produce was abnormally deteriorated when it was received at the contract destination.

We will first consider the two shipments of cantaloupes identified by Complainant's invoice numbers 16931 and 16932, as the circumstances and evidence presented with respect to these transactions are very similar. The 1,152 cartons of cantaloupes billed on invoice number 16931 and the 1,280 cartons of cantaloupes billed on invoice number 16932 were delivered to Respondent on February 24, 2011 (Compl. Ex. 3, 5). While Respondent denies accepting the cantaloupes in these shipments (Answer ¶ 7), the record shows that the cantaloupes were unloaded before they were subjected to USDA inspection (Compl. Ex. 12, 14). We have held many times that the unloading of product constitutes an acceptance thereof. *Fresh W. Mktg., Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971). We therefore find that Respondent accepted the two (2) truckloads of cantaloupes in question.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Fresh Western Marketing, Inc. v. McDonnell & Blankfard, Inc.*, 53 Agric. Dec. 1869, 1875 (U.S.D.A. 1994); *Theron Hooker Company v. Ben Gatz Company*, 30 Agric. Dec. 1109, 1112 (U.S.D.A. 1971). The burden to prove a breach of contract rests with the buyer of accepted goods. U.C.C. § 2-607(4); *see also W.T. Holland & Sons, Inc. v. Sensenig*, 52 Agric. Dec. 1705, 1710 (U.S.D.A. 1993); *Salinas Mktg. Coop. v. Tom Lange Co.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987).

For the cantaloupes billed on invoice number 16931, the USDA inspection performed on February 24, 2011, disclosed 26 percent average damage by sunken areas (Compl. Ex. 14); and for the cantaloupes billed on invoice number 16932, the USDA inspection performed on the same date disclosed 22 percent average damage by sunken areas (Compl. Ex. 12). The United States Standards for Grades of Cantaloupes (7 C.F.R.

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§§ 51.475-94)² provide a tolerance at shipping point for cantaloupes designated as U.S. No. 1 grade of twelve percent (12%) for average defects, including therein not more than six percent (6%) for defects causing serious damage and two percent (2%) for decay. Although there is no indication that the cantaloupes in question were sold with a grade specification, these tolerances may be applied to the condition defects disclosed by the inspections. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 456 (U.S.D.A. 2000).

In addition, for produce sold f.o.b., we apply an additional allowance to the tolerances just mentioned to account for normal deterioration in transit.³ In the instant case, both truckloads of cantaloupes were shipped on February 23, 2011, and received on the following day. As the cantaloupes were therefore in transit for only one day, no additional allowance for normal deterioration in transit is warranted. When comparing the inspection results to the applicable allowances just mentioned, the USDA inspection results indicate that the cantaloupes in question were not in suitable shipping condition.

However, Complainant's Mr. Greg Holzhausen asserts that Complainant is entitled to full payment for the cantaloupes because Respondent failed to provide Complainant with proper notice of any problems with the cantaloupes, and also because Complainant was denied the opportunity to appeal the USDA inspection results (ROI Ex. G at 1-2; Opening Stmt. ¶¶ 12, 14). The Uniform Commercial Code states that where a tender has been accepted "the buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller..." See U.C.C. § 2-607(3)(a). The burden to prove that prompt notice of a breach was given rests with the buyer of accepted goods. *Diazteca Co. v. Players Sales, Inc.*, 53 Agric. Dec. 909, 915 (U.S.D.A. 1994).

In support of its assertion that Complainant was timely notified of trouble with the cantaloupes, Respondent submitted a series of e-mail messages exchanged with Complainant, two of which show that Respondent's Mr. Marc Greenberg e-mailed Complainant's Mr.

² The United States Standards for Grades of Cantaloupes are also available via the Internet at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5050255>.

³ *Supra* note 1.

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Holzhausen copies of the USDA inspections pertaining to the cantaloupes billed in invoice numbers 16931 and 16932 the morning following the inspections, February 25, 2011, at 7:05 a.m. EST. (Answering Stmt. Ex. A; ROI Ex. C at 78). We conclude that this notice is prompt.

Following receipt of the USDA inspections e-mailed by Mr. Greenberg, Complainant's Mr. Greg Holzhausen sent an e-mail message to Mr. Greenberg at 7:14 a.m. EST stating:⁴

Marc please do not touch the load of mikes until I talk to the shipper. Do not sell any of that fruit for he will probably want to move the load. This is the first problem I have had on there [sic] fruit this year. Not how I wanted to start with you. Two loads two inspections.

(Compl. Ex. 15). Mr. Greenberg sent a response to Mr. Holzhausen at 7:16 a.m. EST, advising Mr. Holzhausen: "They saw lots of problems after unloading. Most of them shipped out to the stores last night." (Compl. Ex. 17). Mr. Holzhausen replied first at 9:30 a.m. EST stating, "Marc please be advised I wish to appeal this inspection taken 1280 mikes melons" (Compl. Ex. 22); and again at 9:34 a.m. EST stating, "Marc please be advised we are calling for an appeal inspection. 1152 12ct loupes Dulicia brand. Do not sell any of the fruit." (Compl. Ex. 23-25). At 3:53 p.m. EST, Mr. Greenberg sent an e-mail message to Mr. Holzhausen stating, "As I told u earlier. The melons were sent out to the stores." (Compl. Ex. 24-25).

The record also includes an unverified statement from Mr. Jagarnauth Persaud, the USDA inspector who performed the inspections on the subject cantaloupes (Compl. Ex. 31). Mr. Persaud's statement reads, in pertinent part, as follows:

⁴ Although the "Subject" line of the e-mail references only inspection certificate number T-072-0253-06734, which covers the cantaloupes billed on Complainant's invoice number 16932, Complainant refers to "[t]wo loads two inspection" in the body of its e-mail. It is therefore reasonable to presume that the e-mail message also refers to the cantaloupes billed on invoice number 16931.

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Approximately 9:42am Friday Feb. 25, 2011 an appeal inspection was requested by: New Era Produce for 2 loads of cantaloupes that were inspected yesterday Feb. 24, 2011. Approximately 10:50am today I called Circus Fruits to let them know about the appeal. I spoke to Ronnie Yamni and I was told that the product was sold and there was no product available for inspection.

(Compl. Ex. 31). Based on the e-mail messages from Mr. Holzhausen and the statement of Mr. Persaud, we conclude that Complainant's appeal inspection request, which was made within several hours of its receipt of the inspection results, was sufficiently prompt.

As Complainant points out in correspondence submitted to the Eastern Regional PACA office during the informal handling of this dispute, the account of sales prepared by Respondent for the cantaloupes billed on invoice number 16931 shows that Respondent resold 385 cartons of the cantaloupes on February 25, 2011, and the remaining 767 cartons of cantaloupes were resold between February 28, 2011, and March 2, 2011 (ROI Ex. E at 2); and the account of sales prepared for the cantaloupes billed on invoice number 16932 shows that Respondent resold 452 cartons of the cantaloupes on February 25, 2011, and the remaining 828 cartons of cantaloupes were resold between February 28, 2011, and March 2, 2011 (ROI Ex. E at 3). The majority of the cantaloupes in each shipment were, therefore, resold after Mr. Greenberg advised Mr. Holzhausen by e-mail that there were no cantaloupes available for an appeal inspection.

As the transactions in question were delivered as to price, f.o.b. as to quality and condition and not consignment transactions, there was no requirement for Respondent to submit accounts of sale. However, Respondent chose to do so at the request of the Eastern Regional PACA office (ROI Ex. E at 1-4). In so doing, Respondent implied that it kept records such as would enable it to render an accurate accounting. For this reason, we presume that Respondent's accounts of sale accurately reflect its resale of the cantaloupes.

As we mentioned, Respondent's accounts of sale show the majority of its sales of the cantaloupes took place after Complainant requested an

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appeal inspection. Respondent therefore deprived Complainant of its right to secure an appeal inspection by advising Complainant and the USDA inspector that no cantaloupes were available for the appeal. As a result, we are unable to accept the original inspections as evidence of the condition of the cantaloupes Respondent accepted. Without these inspections, the record is absent any proof that the cantaloupes did not comply with the contract requirements. Absent a breach, Respondent is liable to Complainant for the full purchase price of the cantaloupes, or \$25,197.20 (\$11,949.20 + \$13,248.00).

Turning next to the 1,729 cartons of honeydew melons billed on Complainant's invoice number 16934, the melons in this shipment were sold and delivered to Respondent on February 25, 2011 (ROI Ex. A at 4; D at 11). Complainant is claiming damages totaling \$4,193.50 allegedly resulting from Respondent's unlawful rejection of the melons. This amount is based on the difference between the agreed upon contract price with Respondent (1,729 cartons at \$15.00 per carton, or \$25,935.00) and the amount it received from its resale to Delmonte (1,729 cartons at \$13.50 per carton, or \$23,341.50), or \$2,593.50, plus redelivery charges of \$1,600.00 (Opening Stmt. ¶ 44).

Since Complainant's claim for damages is based on Respondent's rejection of the honeydew melons in this shipment, we must first determine whether Respondent accomplished an effective rejection. It has consistently been held that for a rejection to be effective, it must be made in clear and unmistakable terms. *Teixeira Farms, Inc. v. Community-Suffolk, Inc.*, 52 Agric. Dec. 1700, 1702 (U.S.D.A. 1993); *Norden Fruit Co. v. C & D Fruit & Vegetable Co.*, 46 Agric. Dec. 1582, 1584 (U.S.D.A. 1987). Complainant submitted a copy of the shipping manifest for the honeydew melons in question, which includes a handwritten notation that reads:

Truck missed Delivery
Time Missed orders was
One day late Rejected
2/25/2011 5:15 pm Friday
x Hector Roman / Hector Roman
Driver

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(ROI Ex. C at 18; Comp. Ex. 60). As the truck driver was the agent of the seller, not Respondent, his handwritten rejection notice on the bill of lading holds no evidentiary value in establishing an effective rejection by Respondent. However, in a letter submitted to the Eastern Regional PACA office during the informal handling of this dispute, Complainant states, “. . . on February 25, 2011 Citrus Fruits faxed me a copy of the bill of lading where they are stating rejection of this load.” (ROI Ex. G at 3). Therefore, it appears that even though the rejection notice was written by the truck driver, Complainant accepted the rejection and proceeded to have the honeydew melons moved to another receiver. Accordingly, we conclude that Respondent clearly and promptly communicated its rejection of the melons to Complainant.

We must now determine whether Respondent's rejection of the honeydew melons was wrongful. Complainant asserts that Respondent's rejection was unlawful since it had no cause to reject the load. (Compl. ¶ 7). Specifically, in affidavit testimony submitted as Complainant's Opening Statement, Mr. Greg Holzhausen, managing member, asserts that Respondent's rejection of the honeydew melons was not based upon condition or visual inspection; rather, Respondent rejected the load because it purportedly arrived one day late (Opening Stmt. ¶ 38). Mr. Holzhausen asserts that the shipment arrived timely (Opening Stmt. ¶ 39), and in support of this assertion, Mr. Holzhausen references an e-mail message he sent to Respondent's Mr. Greenberg on February 23, 2011, at 1:22 p.m. EST, confirming Respondent's purchase of the four truckloads of cantaloupes and honeydew melons in this proceeding (Opening Stmt. Ex. 53). The e-mail message states, in pertinent part:

My po # 16934
Load 6ct honeydews 6ct @ 15.00
Mikes melon
Origin Honduras
Approx Deliver 2/25/11

(Opening Stmt. Ex. 53). Mr. Holzhausen also submitted a copy of the passing sent to Respondent which does not mention a delivery date (Opening Stmt. Ex. 58).

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Mr. Greenberg, in his sworn Answering Statement, does not specifically address Complainant's allegations concerning the rejection or the contract delivery date (Answering Stmt. ¶ 2). Instead, Mr. Greenberg simply refers to the documentation attached to the Answering Statement (Answering Stmt. ¶ 2). This documentation includes a copy of an Entry/Immediate Delivery form issued by the U.S. Department of Homeland Security, a copy of the above-mentioned shipping manifest, and a copy of Complainant's invoice number 16934 billing Respondent for damages due to its rejection of the load (Answering Stmt. Ex. B at 1-3). Absent a statement from Mr. Greenberg as to the relevance of this documentation to the issue at hand, we find that the preponderance of the evidence supports Complainant's contention that it did not guarantee delivery of the melons to Respondent on a specific date.⁵ As the notation on the shipping manifest plainly identifies untimely delivery of the honeydew melons as the reason for the rejection, we conclude Respondent's rejection of the honeydew melons was wrongful. Complainant is entitled to recover damages resulting from Respondent's wrongful rejection of the honeydew melons.

The Uniform Commercial Code, section 2-703, provides in relevant part, "where the buyer wrongfully rejects..., then with respect to any goods directly affected..., the aggrieved seller may... (d) resell and recover damages as hereafter provided (Section 2-706)." U.C.C. § 2-703(d). Section 2-706 provides, in relevant part, "[w]here the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach." U.C.C. § 2-706(1).

Respondent has not contended that Complainant's resale of the honeydew melons in this shipment was other than proper. We therefore find that Complainant is entitled to recover as damages resulting from the wrongful rejection by Respondent the difference between the resale proceeds collected from Delmonte and the contract price of honeydew melons. Complainant submitted a copy of its invoice number 16934 billing Delmonte for the 1,729 cartons of honeydew melons at \$13.50 per

⁵ We should also note that under the f.o.b. terms of the sale, Respondent bore the risk of any damage or delay in transit not caused by Complainant.

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carton, or \$23,341.50. The difference between this amount and the \$25,935.00 (1,729 cartons at \$15.00 per carton) f.o.b. contract price of the honeydew melons is \$1.50 per carton, or \$2,593.50. In addition, Complainant may recover the cost to redeliver the honeydew melons to Delmonte, or \$1,600.00 (Compl. Ex. 75). Complainant's total damages therefore amount to \$4,193.50. Complainant is entitled to recover this sum from Respondent as damages resulting from Respondent's wrongful rejection of the melons.

The fourth and final transaction at issue in this dispute involves the sale by Complainant to Respondent of the 1,504 cartons of honeydew melons billed on invoice number 16935. The melons were shipped on February 24, 2011, and delivered to Respondent on February 26, 2011 (ROI Ex. C at 48; Compl. Ex. 43). Complainant's Mr. Greg Holzhausen asserts that the USDA inspection of the honeydew melons in this shipment fails to establish a breach of contract by Complainant, and that he nevertheless was not given timely notice of the inspection results (Opening Stmt. ¶ 54). For these reasons, Complainant is seeking payment in full from Respondent of the agreed purchase price of the melons (Compl. ¶ 7).

Mr. Greenberg, in his sworn Answering Statement, does not specifically address Complainant's allegations concerning the USDA inspection or the timeliness of Respondent's notice to Complainant of the inspection results (Answering Stmt. ¶ 3). Instead, Mr. Greenberg simply refers to the documentation attached to the Answering Statement (Answering Stmt. ¶ 3). This documentation includes a copy of an e-mail message that Mr. Greenberg sent to Mr. Holzhausen on February 27, 2011, at 3:20 p.m. EST, a copy of the USDA inspection of the melons, and a copy of the request for the USDA inspection (Answering Stmt. Ex. C at 1-3).

We will first determine whether Respondent accepted the melons. Complainant's Mr. Holzhausen states that Mr. Greenberg's e-mail message does not constitute an effective rejection of the melons since the melons were unloaded from the truck at the time of the inspection, and the notice of rejection was not communicated within the eight-hour time limitation set out by the PACA Regulations (Opening Stmt. ¶ 50). In support of his assertion, Mr. Holzhausen submitted a copy of an e-mail

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message that he received from Respondent's Mr. Greenberg on February 27, 2011, at 3:10 p.m. EST, stating, "i called a usda on the honeydew." (Opening Stmt. Ex. 42).

Inexplicably, Respondent's e-mail to Complainant does not reference a rejection of the load in question. In addition, we find no evidence in the record indicating that Respondent intended to reject the load. Therefore, Complainant's assertion of a possible rejection by Respondent is unwarranted. Moreover, the record nevertheless shows that Respondent accepted the honeydew melons, as the melons were unloaded at the time of the inspection (Compl. Ex. 47B).

The USDA inspection of the honeydew melons, which took place two days following arrival, disclosed 12 percent average damage by sunken discolored areas (Compl. Ex. 47B). The United States Standards for Grades of Honeydew and Honey Ball Type Melons (7 C.F.R. §§ 51.3740-49)⁶ provide a tolerance for honeydews and honey ball type melons designated as U.S. No. 1 grade of ten percent (10%) for average defects, including therein not more than five percent (5%) for defects causing serious damage and 1 percent for decay. Although there is no indication that the honeydew melons in question were sold with a grade specification, these tolerances may be applied to the condition defects disclosed by the inspection. *Lionheart Group, Inc. v. Sy Katz Produce, Inc.*, 59 Agric. Dec. 449, 456 (U.S.D.A. 2000).

In addition, for produce sold f.o.b., we apply an additional allowance to the tolerances just mentioned to account for normal deterioration in transit.⁷ The amount of the allowance depends on the time in transit. The subject load of honeydew melons was in transit for approximately two days, in which case a reasonable allowance is eleven percent (11%) for average defects, including therein not more than six percent (6%) for defects causing serious damage and one percent (1%) for decay.

The record shows that the honeydew melons were shipped from Tampa Bay, Florida, on Thursday, February 24, 2011, and arrived in

⁶ The United States Standards for Grades of Honeydew and Honey Ball Type Melons are also available via the Internet at: <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5050271>.

⁷ *Supra* note 1.

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Brooklyn, New York, on Saturday, February 26, 2011 (ROI Ex. C at 48; Compl. Ex. 43). The inspection was performed at the earliest opportunity following arrival, on Monday, February 28, 2011, between 8:22 a.m. and 9:38 a.m. (Compl. Ex. 47B). Nevertheless, we find that the percentage of damage disclosed by the inspection is not sufficient to allow us to conclude with reasonable certainty that the melons would have exceeded the suitable shipping condition allowance had the load been inspected on the date of arrival. We therefore find that Respondent has failed to sustain its burden to prove that Complainant breached the contract by shipping honeydew melons that were not in suitable shipping condition. Absent a breach, Respondent is liable to Complainant for the full purchase price of the honeydew melons it accepted, or \$23,068.40.

The total amount due Complainant from Respondent for the four (4) shipments of cantaloupes and honeydew melons at issue in the Complaint is \$52,477.10. In defense of its failure to pay Complainant this sum, Respondent has asserted that it performed or was excused from performance by impossibility, frustration or impracticability, and that Complainant's alleged injuries and damages resulted from its own fault, negligence or wrongdoing (Answer at 2). Respondent fails to direct us to any specific circumstance where it performed or was excused from performance, or where the damages claimed herein resulted from the fault, negligence or wrongdoing of Complainant. Absent more detail, we conclude that the affirmative defenses raised by Respondent are without merit.

Respondent's failure to pay Complainant \$52,477.10 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such 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

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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).

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

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation \$52,477.10, with interest thereon at the rate of 0.15 percent per annum from April 1, 2011, until paid, plus the amount of \$500.00.

Copies of this Order shall be served upon the parties.

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**CLASSIC FRUIT COMPANY, INC. v. AYCO FARMS, INC. &
AYCO FARMS, INC. v. CLASSIC FRUIT COMPANY, INC.
PACA Docket Nos. S-R-2012-387, S-R-2012-420.
Miscellaneous Order.
Filed December 17, 2013.**

PACA-R.

**Procedure – Prejudgment interest granted to Respondent in a
Counterclaim**

Respondent filed a Petition for Reconsideration seeking payment of prejudgment interest on the amount found due Respondent from Complainant under the Counterclaim. After reconsideration, an Order on Reconsideration was issued awarding prejudgment interest to Respondent. In order to be equitable in the distribution of the prejudgment interest, the prejudgment interest was applied to the amount due each party prior to the application of an offset.

Shelton S. Smallwood, Presiding Officer.
Donna M. Ennis, Examiner.
Complainant, pro se.
Respondent, pro se.
Ruling by William G. Jenson, Judicial Officer

ORDER ON RECONSIDERATION

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), a Decision and Order was issued on August 9, 2013, in which Ayco Farms, Inc. (“Ayco Farms”), was ordered to pay Classic Fruit Company, Inc. (“Classic Fruit”), as reparation \$3,356.80, with interest thereon at the rate of eighteen percent (18%) per annum from May 1, 2012, up to the date of the Order, and 0.11 percent per annum from the date of the Order, until paid.

On August 20, 2013, the Department received from Ayco Farms, a Petition for Reconsideration of the Order. Additionally, on August 25, 2013, the Department received from Classic Fruit, a Petition for Reconsideration of the Order. Copies of the petitions were cross-served upon the parties. Classic Fruit filed a response in opposition to Ayco Farms’ petition. Ayco Farms did not submit a reply to Classic Fruit’s petition.

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In its Petition, Classic Fruit requests reconsideration of the conclusions reached with respect to the transaction in PACA Docket S-R-2012-420 and raises a number of issues with our findings. Classic Fruit's first two (2) arguments concern the Nevada state inspection performed on the cantaloupes. Classic Fruit first asserts that the Department disregarded the fifty-nine percent (59%) internal damage disclosed by the Nevada state inspection even though Ayco Farms requested the inspection and accepted the ensuing results of the inspection as evidenced by its issuance of a second invoice billing Classic Fruit on a PAS (price after sale) basis (Classic Pet. ¶ 1). Classic Fruit also finds fault with the Department's determination deeming "all product absent of the fermented description on this inspection to contain good internal quality solely because soluble solids of the shipment were not ascertained by the state inspector and/or different terminology was utilized by the state inspector to describe internal quality damage on the state inspection." (Classic Pet. ¶ 2).

Classic Fruit, having accepted the cantaloupes, had the burden to prove that the cantaloupes it accepted did not conform to the contract requirements. In the decision, we found that Classic Fruit met that burden and was entitled to recover provable damages (Decision at 8). However, Classic Fruit's arguments suggest that it was not satisfied with the percentage of defects that we used when calculating the reasonable value of the cantaloupes. Although Classic Fruit states that Ayco Farms requested the state inspection in lieu of a USDA inspection (Classic Pet. ¶ 1), there was nothing preventing Classic Fruit from securing a USDA inspection of the cantaloupes, which results would most likely have been more detailed and therefore allowed the Department to use the percentage of internal defects in our calculations. Accordingly, we find no merit in Classic Fruit's arguments.

We also hasten to point out that we accepted the results of the Nevada state inspection as evidence of a breach of contract by Ayco Farms, and we only resorted to the use of the percentage of defects reported on that inspection to establish the reasonable value of the cantaloupes because Classic Fruit did not submit a detailed account of sales to establish this value. While the Regulations do not place a duty to account upon a buyer who purchases on an open or price after sale basis, a buyer who fails to

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account accurately and in detail does so at his own risk, as a properly prepared account of sales may be useful in determining the reasonable value of the goods in the event the parties fail to agree upon a price. *A.P.S. Mktg. v. R.S. Hanline & Co.*, 59 Agric. Dec. 407, 411 (U.S.D.A. 2000); *Carmack v. Selvidge*, 51 Agric. Dec. 892, 898 (U.S.D.A. 1992). In the instant case, the value of the subject cantaloupes would not have been dependent upon the percentage of defects shown on the inspection if Classic Fruit had submitted a detailed account of sales showing a timely resale of the cantaloupes to establish their reasonable value.

Classic Fruit next asserts that the Department erred in its finding that “Ayco Farms sold and invoiced Classic Fruit \$8.00 delivered Las Vegas for this fruit when in fact these cantaloupes were purchased by Classic Fruit from Ayco at \$8.00 FOB Pompano.” (Classic Pet. ¶ 3). Classic Fruit states further that the cantaloupes were rejected and that Ayco Farms accepted the rejection thereby becoming responsible for the freight charges from Pompano Beach to Las Vegas (Classic Pet. ¶ 3). On the basis that the transaction was an f.o.b. sale and that the cantaloupes were rejected, Classic Fruit states it should not be required to remit to Ayco Farms more than its resales of \$1.20 per carton f.o.b. (Classic Pet. ¶ 3).

The record includes a copy of Ayco Farms’s invoice number 79056 reflecting that the sale terms were delivered (ROI Ex. A at 3). During the proceeding, Classic Fruit did not mention any objection to Ayco Farms’s invoice, nor did it submit any evidence indicating that the freight terms were other than delivered. When documents containing terms of sale are not objected to in a timely manner, such documents are evidence of a contract containing the terms set forth therein. *Action Produce v. Ward’s Fruit & Produce, Inc.*, 46 Agric. Dec. 1845, 1847 (U.S.D.A. 1987); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (U.S.D.A. 1972). Given Classic Fruit’s failure to object to the invoice received from Ayco Farms, we find that the preponderance of the evidence establishes that the truckload of cantaloupes in question was sold to Classic Fruit with delivered freight terms.

Regarding Classic Fruit’s assertion of a rejection, we do not find any evidence in the record showing that Classic Fruit raised this issue during the proceeding. Rather, Classic Fruit waited until the filing of its

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Petition to do so. Nevertheless, we do not find any evidence in the record indicating that the cantaloupes were rejected. Failure to reject produce in a reasonable time is an act of acceptance. 7 C.F.R. § 46.2(dd)(3). Therefore, this argument is without merit.

Finally, Classic Fruit states, “[t]he request to Classic from Ayco regarding this shipment’s rejection was ‘please do the best you can and then we will price’.” (Classic Pet. ¶ 4). In the decision, we found the parties agreed to modify the price terms of the contract to PAS (Decision at 9), which 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 (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. As the evidence failed to establish that the parties agreed on a price for the cantaloupes, a reasonable price was determined (Decision at 10).

In its Petition, Classic Fruit calculates the reasonable value of the cantaloupes and its subsequent damages based on a total of forty-six percent (46%) internal damage, and arrives at an amount of \$1,027.20 due Ayco Farms from Classic Fruit (Classic Pet. ¶ 4). Classic Fruit requests that this amount be offset against the amount found due Classic Fruit from Ayco Farms in Docket S-R-2012-387 (Classic Pet. ¶ 4). We have already addressed the internal damage issue and explained why this defect was not considered in the calculation of the reasonable value of the cantaloupes.¹ Therefore, based on our prior discussion, this argument is without merit.

We now turn to Ayco Farms’s Petition. In the Decision, we found that Ayco Farms was liable to Classic Fruit in the amount of \$6,630.40² and that Classic Fruit was liable to Ayco Farms in the amount of \$3,273.60³ (Decision at 3, 11). When the amount due Ayco Farms from Classic Fruit was offset against the amount due Classic Fruit from Ayco Farms, the net amount due Classic Fruit from Ayco Farms was \$3,356.80 (\$6,630.40 - \$3,273.60) (Decision at 12). The Decision and Order issued on August 9, 2013 ordered Ayco Farms to pay Classic Fruit

¹ See *supra* 2-3.

² PACA Docket No. S-R-2012-387.

³ PACA Docket No. S-R-2012-420.

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as reparation \$3,356.80, with interest thereon at the rate of eighteen percent (18%) per annum from May 1, 2012, up to the date of the Order, and 0.11 percent per annum from the date of the Order, until paid.

In its Petition, Ayco Farms states that while it agrees with the Department's findings that Classic Fruit is liable to Ayco Farms in the amount of \$3,273.60, it seeks to recover prejudgment interest of one and one-half percent (1.5%) per month, or eighteen percent (18%) per annum, on the amount of \$3,273.60 (Ayco Pet. at 1). Paragraph A of Ayco Farms' Counterclaim states, in pertinent part:

Ayco Farms Inc. is not denying payment on 512 cartons of Guatemalan Cantaloupes at \$ 12.95 FOB/carton. We've been holding payment until Classic Fruit Company pays Ayco Farms Inc. the outstanding balance of \$ 5,958.40 + 1.5% monthly interest on past due balances still owed since December 30, 2011 and stated under claim PACA S 12 420.

(Countercl. ¶ A). Ayco Farms's claim for interest at the rate of one and one-half percent (1.5%) per month, or eighteen percent (18%) per annum, is based on its invoice to Classic Fruit which expressly states: "Past Due accounts are subject to interest charge of 1 ½ % per month, maximum 18% per annum." (Countercl. Ex. 7).

There is nothing to indicate that Classic Fruit objected to the interest charge provision stated on Ayco Farms's invoice. In the absence of a timely objection by Classic Fruit, the interest charge provision on Ayco Farms's invoices was incorporated into each sales contract. *See, e.g., Johnston v. AG Growers Sales LLC*, 69 Agric. Dec. 1569, 1583-86 (U.S.D.A. 2010) (applying section 2-207(2) of the Uniform Commercial Code).

Upon reconsideration, we are granting Ayco Farms's Petition and awarding prejudgment interest to Ayco Farms. In order to be equitable in the award of prejudgment interest, the prejudgment interest should be applied to the amount due each party prior to the application of an offset. Ayco Farms admittedly withheld payment from Classic Fruit in the amount of \$6,630.40. Accordingly, Classic Fruit is entitled to recover

PERISHABLE AGRICULTURAL COMMODITIES ACT

prejudgment interest on this sum based on its invoice to Ayco Farms which reads: Past due accounts are subjected to an interest charge of 1.5% per month both on prejudgment and post-judgment debt. Similarly, we determined that Classic Fruit owes Ayco Farms \$3,273.60 for the cantaloupes that Classic Fruit purchased from Ayco Farms. Ayco Farms is therefore entitled to recover prejudgment interest on this sum.

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

ORDER

Within thirty (30) days from the date of this Order, Ayco Farms shall pay Classic Fruit, as reparation, interest at the rate of eighteen percent (18%) per annum on the sum of \$6,630.40 from May 1, 2012, up to the date of this Order.

Within thirty (30) days from the date of this Order, Classic Fruit shall pay Ayco Farms, as reparation, interest at the rate of eighteen percent (18%) per annum on the sum of \$3,273.60 from February 1, 2011, up to the date of this Order.

Within thirty (30) days from the date of this Order, Ayco Farms shall pay Classic Fruit as reparation \$3,356.80, with interest thereon at the rate of 0.11 of one percent per annum on the sum of \$3,356.80, until paid.

Copies of this Order shall be served upon the parties.

Miscellaneous Orders
72 Agric. Dec. 905 – 905

MISCELLANEOUS ORDERS

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: www.dm.usda.gov/oaljdecisions/.

PERISHABLE AGRICULTURAL COMMODITIES ACT

PATSY L. SCRUM.
Docket No. 13-0234.
Order of Dismissal.
Filed September 12, 2013.

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/.

PERISHABLE AGRICULTURAL COMMODITIES ACT

LIBORIO MARKETS #9, INC.

Docket No. 13-0213.

Default Decision and Order.

Filed August 21, 2013.

LIBORIO MARKETS #10, INC.

Docket No. 13-0218.

Default Decision and Order.

Filed August 21, 2013.

LIBORIO MARKET, INC.

Docket No. 13-0222.

Default Decision and Order.

Filed August 22, 2013.

A & A ONTARIO MARKET, INC.

Docket No. 13-0221.

Default Decision and Order.

Filed October 28, 2013.

QUALITY PRODUCE SUPPLIERS, INC.

Docket No. 13-0164.

Default Decision and Order.

Filed November 25, 2013.

LIBORIO MARKETS #11, INC.

Docket No. 13-0216.

Default Decision and Order.

Filed November 25, 2013.

Default Decisions
72 Agric. Dec. 906 – 907

LIBORIO MARKETS #7, INC.
Docket No. 13-0217.
Default Decision and Order.
Filed November 25, 2013.

ALEJO MARKETS, INC.
Docket No. 13-0220.
Default Decision and Order.
Filed November 25, 2013.

ADAMS PRODUCE COMPANY, LLC.
Docket No. 13-0284.
Default Decision and Order.
Filed November 25, 2013.

TRIPLE A GROCERS, INC.
Docket No. 13-0212.
Default Decision and Order.
Filed December 17, 2013.

LIBORIO MARKETS #8, INC.
Docket No. 13-0214.
Default Decision and Order.
Filed December 18, 2013.

ALEJO GROCERS, INC.
Docket No. 13-0219.
Default Decision and Order.
Filed December 20, 2013.

LOMBARDO IMPORTS, INC.
Docket No. 13-0292.
Default Decision and Order.
Filed December 20, 2013.

CONSENT DECISIONS

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Del Monte Farms, LLC.

Docket No. 13-0268.

Filed August 16, 2013.

T and R Produce Wholesale and Trucking, Inc.

Docket No. 13-0291.

Filed August 21, 2013.

American Airlines, Inc.

Docket No. 12-0393.

Filed December 12, 2013.

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Errata

The Editor regrets have overlooked the inclusion of a Reparations Decision in Volume 72, specifically:

Datepac LLC, d/b/a Bard Valley Medjool Date Growers v. Trans Mid East Shipping & Trading Agency, Inc., PACA Docket No. E-R-2013-24, Decision and Order, filed October 25, 2013.

The decision follows this page with special pagination for citation guidance.

The decision was previously posted on the OALJ website via a link to the Agricultural Marketing Service (“AMS”) website.¹ The listing provided the case number and business entities involved in the decision.

¹ Recent Reparation Decisions, USDA.GOV, <http://www.oaljdecisions.dm.usda.gov/> (follow “Recent PACA Formal Reparation Decisions” hyperlink under “Other Related Links”; then follow “listing of Recent Decisions and Orders” hyperlink).

PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISION

**72 Agric. Dec.
July – Dec. 2013**

**DATEPAC LLC, d/b/a BARD VALLEY MEDJOOL DATE
GROWERS v. TRANS MID EAST SHIPPING & TRADING
AGENCY, INC.**

PACA Docket No. E-R-2013-24.

Decision and Order.

Filed October 25, 2013.

[Cite as: 72 Agric. Dec. A (U.S.D.A. 2013).]

PACA-R.

Jurisdiction - Commodities - Dates are covered under the Act

Oral Hearing – Request Denied - Admission of liability

Respondent questioned the Secretary's jurisdiction over hydrated dates and requested a hearing. Dates are berries that are the fruit of date palm trees. Hydration is used to soften the texture of some date cultivars and is part of the curing and ripening process. The Act defines "perishable agricultural commodity" as fresh fruits and fresh vegetables of every kind and character. The Regulations (Other than Rules of Practice) (7 C.F.R. § 46.1 et seq.) provide that fresh fruits and fresh vegetables include all produce in fresh form generally considered as perishable fruits and vegetables, that have not been manufactured into a food product of a different kind or character. (7 C.F.R. § 46.2(u)). The Regulations further state that the effects of curing and ripening operations are not actions that change the character of a perishable agricultural commodity. *Id.* Dates, whether or not requiring hydration, are therefore perishable fruit subject to the Act. Since the Secretary has jurisdiction over this proceeding and Respondent admits liability in the full amount of the claim (after deducting payment), there is no need for an oral hearing. Respondent's request for an oral hearing is therefore denied.

Shelton S. Smallwood, Presiding Officer.

Earl E. Elliott, Examiner.

Rynn and Janowsky, LLP, Counsel for Complainant.

Respondent, pro se.

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

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act 1930 (PACA), as amended (7 U.S.C. § 499a et seq.). A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of \$50,000.00, plus 18% per annum interest, in connection with one truckload of hydrated dates shipped in interstate commerce.

Copies of the Report of Investigation (ROI) prepared by the Department were served upon the parties. A copy of the Complaint was served upon Respondent, which filed an Answer admitting liability and requesting an oral hearing to question the Secretary's jurisdiction. The issue of whether the Secretary has jurisdiction to hear this dispute must be addressed before turning to the question of liability and how liability will be determined.

Findings of Fact

1. Complainant is a corporation whose post office address is 2575 East 23rd Lane, Yuma, AZ 85365. At the time of the transaction involved herein, Complainant was licensed under the Act.
2. Respondent is a corporation whose post office address is 2900 Hempstead Turnpike, Levittown, NY 11756. At the time of the transactions involved herein, Respondent was not licensed under the Act.
3. On or about July 11, 2012, Complainant, by oral contract, sold and agreed to ship one truckload of hydrated dates from a loading point in Yuma, Arizona, to Respondent in Farmingdale, New York. On the same day, Complainant billed Respondent with invoice number 18484 for 2060 11-pound cartons (22,660 pounds) of hydrated Medjool dates, product of USA, at \$35.50 per carton, or \$73,130.00, less 10% discount, or \$7,313.00, for a total agreed price of \$65,817.00. Complainant's invoice reflects the terms were "f.o.b. acceptance," and that payment was due in 30 days or a late charge of 18% per annum would be due. (ROI Ex. A at 3.)

4. The bill of lading is signed by the truck driver and the consignee (Respondent), and reflects that Complainant shipped the dates on July 11, 2012, and that Respondent accepted the dates. (ROI Ex. A at 4.)
5. Respondent paid Complainant \$15,817.00 with check number 3932, dated October 9, 2012 (Compl. Ex. 4), and \$1,000.00 with check number 4253, posted to Respondent's bank account on April 18, 2013. (Answer Ex. 1 unnumbered.)
6. The informal complaint was filed on October 15, 2012 (ROI Ex. A at 1), which is within nine months from the date the cause of action accrued.

Conclusions

Complainant brings this action to recover the sales price for one truckload of hydrated dates sold to Respondent, "f.o.b. acceptance," and shipped in interstate commerce from a loading point in Yuma, Arizona, to Respondent in Farmingdale, New York. Complainant states that Respondent accepted the dates in compliance with the sales contract for a total agreed price of \$65,817.00, but has since paid only \$15,817.00, leaving an unpaid balance of \$50,000.00, plus 18% per annum interest. (Compl. ¶¶ 3-8.)

In response to Complainant's allegations, Respondent submitted a sworn Answer in which Respondent admits purchasing and accepting the dates, but states it lacks the resources to pay Complainant in full. (Answer ¶ 6.) In addition, Respondent seeks an oral hearing to question the Secretary's jurisdiction over hydrated dates. The issue of whether the Secretary has jurisdiction to hear this dispute must be addressed before turning to the question of liability.

Four basic jurisdictional requirements under the PACA must be met for the Secretary to have jurisdiction over a reparation proceeding: (1) the transaction must involve perishable agricultural commodities (7 U.S.C. § 499a(4)); (2) the transaction must involve interstate or foreign commerce (7 U.S.C. § 499a(8)); (3) the person complaining must petition the Secretary within nine months after the cause of action accrues (7 U.S.C. § 499f(a)); and (4) the buyer (respondent) must be a licensee under the

PACA or operating subject to the licensing requirements of the PACA (7 U.S.C. § 499d(a)). See *East Produce, Inc. v. Seven Seas Trading Co.*, 59 Agric. Dec. 853, 864 (U.S.D.A. 2000); see also *Jebavy-Sorenson Orchard Co. v. Lynn Foods Corp.*, 32 Agric. Dec. 529, 531 (U.S.D.A. 1973).

Respondent asserts that the Secretary does not have jurisdiction to hear Complainant's claim because it believes hydrated dates are not a perishable agricultural commodity. In determining whether dates are a perishable agricultural commodity covered by the PACA, it must be noted that dates are berries that are the fruit of date palm trees. Hydration is used to soften the texture of some date cultivars and is part of the curing and ripening process.

The PACA defines "perishable agricultural commodity" as fresh fruits and fresh vegetables of every kind and character. 7 U.S.C. § 499a(b)(4)(A). The Regulations (Other than Rules of Practice) (7 C.F.R. § 46.1 *et seq.*) provide that fresh fruits and fresh vegetables include all produce in fresh form generally considered as perishable fruits and vegetables, that have not been manufactured into a food product of a different kind or character. (7 C.F.R. § 46.2(u)). The Regulations further state that the effects of curing and ripening operations are not actions that change the character of a perishable agricultural commodity. *Id.* Dates stored at 32°F will last for 6-12 months, depending on the cultivar. Semi-soft cultivars, such as Deglet Noor, and Halawy, have longer storage-lives than soft cultivars, such as Medjool and Barhee. We have long held that other perishable items with considerable shelf-lives, such as garlic and potatoes, are subject to the PACA. See *Regal Mktg., Inc. v. All Am. Farms, Inc.*, 58 Agric. Dec. 1133, 1134 (U.S.D.A. 1999). Therefore, we conclude that dates, whether or not requiring hydration, are a perishable fruit subject to the PACA.

Three of the four requirements for the Secretary to exercise jurisdiction over this dispute are clearly met. The subject of the dispute, a truckload of dates, is a (1) perishable agricultural commodity, (2) shipped in interstate commerce, and (3) Complainant's claim was filed with the Secretary within nine months after the cause of action accrued. As for the fourth requirement, Respondent was not licensed under the PACA at the time of its purchase from Complainant. However, Respondent was operating subject to the PACA as a dealer, which is

defined in section 46.2(m) of the Regulations as “any person engaged in the business of buying or selling in wholesale or jobbing quantities in commerce.” (7 C.F.R. § 46.2(m)). Wholesale or jobbing quantities means “aggregate quantities of all types of perishable agricultural commodities totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received.” (7 C.F.R. § 46.2(x)). The truckload of dates, which Respondent purchased and accepted from Complainant, exceeded 2000 pounds in weight. (ROI, Ex. A, at 3.) Respondent was acting subject to the PACA at the time of the disputed transaction. The fourth jurisdictional requirement is met. The Secretary, therefore, has jurisdiction to hear this matter.

As noted above, in its Answer, Respondent requests an oral hearing to address the issue of jurisdiction. The determination that the Secretary does have jurisdiction to adjudicate Complainant’s claim has been made, making a hearing on that issue unnecessary. Furthermore, in its Answer, Respondent admits liability to Complainant for the dates at issue. Although the amount in dispute is over \$30,000.00, there are no material issues of fact in dispute that would warrant an oral hearing. Therefore, Respondent’s request for an oral hearing is denied.

In its Answer, Respondent asserts that it paid \$1,000.00 to Complainant with check number 4253, dated April 11, 2013, and it thereby owes Complainant only \$49,000.00. (Answer ¶¶ 6, 8.) As evidence, Respondent furnished a confirmation from its bank’s online website, reflecting that on April 18, 2013, the bank posted Respondent’s check number 4253 to Complainant for \$1,000.00. (Answer, Ex. 1 unnumbered.) This payment was made after Complainant filed its formal Complaint. Subtracting Respondent’s payment of \$1,000.00, from the \$50,000.00 sought in the formal Complaint, Respondent is liable to Complainant in the amount of \$49,000.00, the amount it admits owing to Complainant.

In addition, Complainant seeks pre-judgment interest on the unpaid produce shipment listed in the Complaint at a rate of 18% per annum. Complainant’s claim is based on its invoice issued to Respondent which expressly states, “Past due Invoices are subject to late charge of 18% per Annum.” (Complaint, Ex. 1.) There is nothing to indicate that Respondent objected to the interest charge provisions on Complainant’s invoice. In the absence of a timely objection by Respondent, the interest charge provision

on Complainant's invoice was incorporated into the sales contract. *See, e.g., Johnston v. AG Growers Sales LLC*, 69 Agric. Dec. 1569, 1583-86 (U.S.D.A. 2010) (applying section 2-207(2) of the Uniform Commercial Code). Therefore, Complainant is entitled to pre-judgment interest.

Respondent's failure to pay Complainant \$49,000.00 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such 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).

Complainant in this action paid \$500.00 to file its formal Complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party.

ORDER

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation \$49,000.00, plus interest thereon at the rate of 18% per annum, from September 1, 2012, until the date of this Order, plus

interest thereon at the rate of 14% per annum, from the date of this Order until paid, plus the amount of \$500.00.

Copies of this Order shall be served on the parties.