AGRICULTURE DECISIONS

Volume 74

Book One

Part Three (PACA)

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

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PERISHABLE AGRICULTURAL COMMODITIES ACT

DEPARTMENTAL DECISIONS

In re: AL HARRISON COMPANY DISTRIBUTORS.
Docket No. D-14-0050.
Decision and Order.
Filed March 24, 2015.

PACA-D.

Christopher Young, Esq. for Complainant.
Jeffrey M. Chebot, Esq. for Respondent.
Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER

In this disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA), a Complaint was filed on December 13, 2013, alleging that Respondent had committed willful, flagrant, and repeated violations of section 2(4) of the PACA by failing to make full payment promptly to twelve (12) sellers of the agreed purchase prices in the total amount of $690,537.93 for 104 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate commerce during the period of April 2012 through April 2013. The Complaint sought the issuance of an order finding that Respondent had committed willful, flagrant, and repeated violations of section 2(4) of the PACA and revocation of Respondent's PACA license pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

A Consent Decision and Order was issued on August 21, 2014, pursuant to the consent decision provisions (7 C.F.R. § 1.138) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*) (Rules of Practice) applicable to this proceeding.

The Consent Decision concluded that Respondent's failure to make full payment promptly to twelve (12) sellers of the agreed purchase prices of

the perishable agricultural commodities constituted willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The Consent Decision issued a finding that Respondent engaged in willful, flagrant, and repeated violations of the PACA, and ordered that Respondent's PACA license be revoked. The finding and the revocation of the license were held in abeyance so long as Respondent paid the produce sellers listed in Appendix A to the Complaint and satisfied the amounts owed to each, as stated in the Complaint and Consent Decision, in full, within six (6) months (180 days) of the effective date of the Consent Decision and Order.

The Consent Decisions stated that the PACA Branch of the Agricultural Marketing Service shall be the final arbiter of whether full payment to the produce sellers in the amounts listed in the Complaint had been paid, and further, that it would be Respondent's obligation to demonstrate that full payment as described above had been made.

The Consent Decision further stated, *inter alia*, that if full payment of the sellers and amounts listed in the Appendix A to the Complaint was not made within 180 days of the effective date of the Consent Decision and Order, then the finding of willful, flagrant, and repeated violations and the revocation of Respondent's PACA license would no longer be held in abeyance and would be issued without further proceeding, **other** than a filing by Complainant informing the Administrative Law Judge of Respondent's failure to comply with the terms of the Consent Decision and Order, and requesting that the finding of violation and order of revocation no longer be held in abeyance, and that Respondent's PACA license be immediately revoked. Respondent expressly waived all further procedure in the matter following the Consent Decision and Order.

On or about March 19, 2015, Complainant informed this forum that as of March 6, 2015, more than 180 days following the effective date of the Consent Decision and Order, Complainant has determined and Respondent has acknowledged that full payment of the sellers listed in the Complaint had not been made. Complainant requested the issuance of an order. Therefore, pursuant to the Consent Decision issued on August 21, 2015, this Decision and Order is entered without further procedure or hearing pursuant to the consent decision provisions (7 C.F.R. § 1.138) of

the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*) (Rules of Practice) applicable to this proceeding.

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of Arizona. Respondent's business and mailing address is 561 W. Gold Hills Road, Nogales, Arizona 85621.

2. At all times material herein, Respondent was licensed and operating subject to the provisions of the PACA. License number 19175522 was issued to Respondent on April 14, 1958. The license has been renewed annually and is next subject to renewal on April 14, 2015.

3. During the period April 2012 through April 2013, Respondent purchased, received, and accepted, in interstate and foreign commerce, from twelve (12) sellers, 104 lots of perishable agricultural commodities, and failed to make full payment promptly of the agreed purchase prices in the total amount of $690,537.393.

Conclusions

Respondent's failure to make full payment promptly to twelve (12) sellers of the agreed purchase prices of the perishable agricultural commodities described in paragraph 3 of the Findings of Fact above constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

ORDER

Respondent has engaged in willful, flagrant, and repeated violations of the PACA, and Respondent's PACA license is hereby revoked pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

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PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: PANGEA PRODUCE DISTIBUTORS, INC.
Docket No. 15-0014.
Decision and Order.
Filed June 23, 2015.

PACA-D.

Shelton S. Smallwood, Esq. for Complainant.
Scott Alan Orth, Esq. for Respondent.
Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

Decision Summary

Pangea Produce Distributors, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) during October 8, 2010 through December 7, 2013 by failing to make full payment promptly of the purchase prices, or balances thereof, for $217,544.07 in fruits and vegetables [being $142,716.79 to De Bruyn Produce Company; $20,017.34 to G.W. Palmer & Co. Inc.; and $54,809.94 to Premier Trading LLC], all being perishable agricultural commodities that Pangea Produce Distributors, Inc. purchased, received, and accepted in the course of interstate or foreign commerce.

Parties and Allegations

1. The Complainant is the Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture ("AMS" or "Complainant").

2. The Respondent is Pangea Produce Distributors, Inc., a corporation existing under the laws of the state of Florida ("Pangea Produce" or "Respondent").

3. AMS alleges in the Complaint filed on October 23, 2014 that Respondent Pangea Produce violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to pay three produce sellers for $262,199.48 in produce purchases during 2010 to 2013, as more particularly described in Appendix A to the Complaint. The

Complaint alleges that Pangea Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) and asks the judge so to find and to order the facts and circumstances of the violations published, pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

4. AMS's "Motion for Decision Without Hearing by Reason of Admissions," filed December 17, 2014 ("Motion for Decision Without Hearing by Reason of Admissions"), asks me to issue a decision based on the requirements of the PACA in light of Pangea Produce's admissions. AMS's Motion asserts that there is no need for a hearing. Following careful review of all documents filed, I agree that there is no need for an oral hearing and that I will issue this Decision and Order based on the written record.

5. Pangea Produce timely filed its Answer on December 5, 2014 and timely filed its Response to the Motion for Decision on February 26, 2015 ("Pangea Produce's Response"). Pangea Produce explains and documents certain of Pangea Produce's transactions with the three produce sellers:

   a. De Bruyn Produce Company, Weslaco, Texas;

   b. G.W. Palmer & Co., Inc., Memphis, Tennessee; and

   c. Premier Trading LLC, Greenwood Village, Colorado.

These three produce sellers are all of the produce sellers described in Appendix A to the Complaint, which provided that Pangea Produce allegedly owed $262,199.48, past due and unpaid, for produce purchases during the period of 2010 to 2013.

De Bruyn Produce Company, Weslaco, Texas

1. According to Appendix A of the Complaint, the amount past due and unpaid by Pangea Produce to De Bruyn Produce Company, Wesalco, Texas, was $142,716.79, due October 8, 2010 through December 10, 2011.

2. According to Appendix A of the Complaint, the amount past due and unpaid by Pangea Produce to G.W. Palmer & Co., Inc., Memphis, Tennessee was $24,179.34, due March 29, 2013 through April 27, 2013.

3. A "Stipulation for Judgment" signed April 5, 2012 was entered in the U.S. District Court for the Southern District of Florida, Miami Division (Case No. 1:12-cv-20120-JEM), in the amount of $142,716.79, against Pangea Produce and in favor of De Bruyn Produce. *See* Exhibit A to AMS's "Motion for Decision Without Hearing by Reason of Admissions." Of the $142,716.79, Pangea Produce asserts in its Response filed February 26, 2015 that it no longer owes anything to De Bruyn Produce. While laudable if true, that would not negate the requirement to pay promptly under the PACA. *See* 7 C.F.R. § 46.2(aa) regarding making full payment promptly, especially 7 C.F.R. § 46.2(aa)(5) and (11).

G.W. Palmer & Co., Inc., Memphis, Tennessee

1. According to Appendix A of the Complaint, the amount past due and unpaid by Pangea Produce to G.W. Palmer & Co., Inc., Memphis, Tennessee was $24,179.34, due March 29, 2013 through April 27, 2013.

2. Pangea Produce claimed the pending balance to be $20,017.34 in its letter to AMS/ PACA dated October 10, 2013 (a copy of which is attached to Pangea Produce's Response). Earlier, Pangea Produce had written that it owed G.W. Palmer $25,017.33 in its email to Stan Paluszewski at G.W. Palmer & Co. Inc., dated July 16, 2013 (a copy of which is attached to Pangea Produce's Response).

3. Pangea Produce states in its Response filed February 26, 2015 that "(t)here were a total of 13 loads and the final adjustments amount to only one load being in dispute."

4. For purposes of this Decision and Order, I will accept Pangea Produce's admission in its Response, that Pangea Produce owed, past due and unpaid, $20,017.34 to G.W. Palmer & Co. Inc. as of October 10, 2013. Whether Pangea Produce owed G.W. Palmer more than

$20,017.34, or at an earlier time owed G.W. Palmer more than $20,017.34, is not material for purposes of this Decision and Order, because the precise past due dollar amount that Pangea Produce failed to pay promptly to G.W. Palmer does not affect the outcome.

Premier Trading LLC, Greenwood Village, Colorado

1. The amount past due and unpaid by Pangea Produce to Premier Trading LLC, Greenwood Village, Colorado, according to the Complaint, Appendix A, was $95,303.35, due November 1, 2013, through December 7, 2013. A reparation order in the amount of $95,303.35 was entered by default against Pangea Produce, in favor of Premier Trading LLC.

2. The reparation Complaint that Premier Trading LLC prepared on March 6, 2014, and filed with the PACA Branch on March 10, 2014, contained a correct address in paragraph 2 for Pangea Produce, 751 N.E. 75th Street, Miami, Florida 33138. Inexplicably, the AMS letter dated March 24, 2014 that was intended to provide notice of the Complaint to Pangea Produce was mistakenly addressed to a "Padilla" (misspelling) and mistakenly addressed to "NE1 NE 75th Street."

3. Consequently, any reparation order in the amount of $95,303.35 entered by default is disregarded for purposes of this Decision and Order. Instead, for this Decision and Order, I will accept Pangea Produce's admission in its Response filed February 26, 2015, at page 3, that Pangea Produce owes $54,809.94 to Premier Trading LLC. Pangea Produce attached to its Response copies of numerous complaints it made to Premier Trading regarding the quality of the product, especially when shipments were not kept cool enough. For example, Pangea Produce lodged complaints regarding cantaloupes that arrived over-ripe and soft, bell peppers that were not the prescribed size and had some decay, and concerns regarding avocados, jalapenos and pineapples that had not been kept cool enough during shipping. Whether Pangea Produce owes Premier Trading LLC more than $54,809.94, or at an earlier time owed Premier Trading LLC more than $54,809.94, is not material for purposes of this Decision and Order because the precise past-due dollar amount that Pangea Produce failed to pay promptly to Premier Trading LLC does not affect the

outcome.

Discussion

1. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires licensed produce dealers to make "full payment promptly" for fruit and vegetable purchases, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase. *See* 7 C.F.R. § 46.2(aa)(5) and (11) (defining "full payment promptly").

2. 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. *H. Schnell & Company, Inc.*, 57 Agric. Dec. 1722, 1729 (U.S.D.A. 1998). *See also Five Star Food Distributors*, *Inc.*, 56 Agric. Dec. 880, 894 (U.S.D.A. 1997) (Decision Without H'rg by Reason of Admis.).

3. The policy of the U.S. Department of Agriculture in cases where PACA licensees have failed to make full or prompt payment for produce is straightforward:

> In any PACA disciplinary proceeding in which it is alleged that a respondent has failed to pay in accordance with the PACA and respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved full compliance or will achieve full compliance with the PACA within 120 days after the complaint was served on the respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a "no-pay" case. In any "no-pay" case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

Scamcorp, Inc., 57 Agric. Dec. 527, 549 (U.S.D.A. 1998).

4. The Complaint was served October 29, 2014 (USPS tracking number 7012 3460 0003 3833 9455). More than 120 days later, Pangea Produce still had failed to pay past due amounts (at minimum, the

$54,809.94 still owed to fruit and vegetable seller Premier Trading LLC, Greenwood Village, Colorado). Pangea Produce's inability to assert that it had achieved full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case. "Full compliance" requires not only that the respondent have paid all produce sellers in accordance with the PACA but also that the respondent have no credit agreements with produce sellers for more than thirty (30) days. *Scamcorp, Inc.*, 57 Agric. Dec. 527, 549 (U.S.D.A. 1998); *Carpentino Bros., Inc.*, 46 Agric. Dec. 486, 505-06 (U.S.D.A. 1987), aff'd, 851 F.2d 1500 (D.C. Cir. 1988).

5. The appropriate sanction in a "no-pay" case where the violations are flagrant and repeated is license revocation. A civil penalty is not appropriate because "limiting participation in the perishable agricultural commodities industry to financially responsible persons is one of the primary goals of the PACA", and it would not be consistent with the Congressional intent to require a PACA violator to pay the Government while produce sellers are left unpaid. *Scamcorp*, *Inc.*, 57 Agric. Dec. 527, 570-71 (U.S.D.A. 1998).

6. Pangea's Produce "shifted the risk of nonpayment to sellers of the perishable agricultural commodities", intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA. *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998).

7. Where there is no longer a valid license to revoke, the appropriate sanction in lieu of revocation is a finding of willful, flagrant and repeated violations of the PACA and publication of the facts and circumstances of the violations. *Furr's Supermarkets Inc.*, 62 Agric. Dec. 385, 386-87 (U.S.D.A. 2003).

8. Pangea Produce stated in its Answer and provided documentation to show that it was owed (as of November 19, 2014) a total of $268,996.46 in overdue receivables; that Pangea Produce was a victim of buyers that did not pay for commodities. Such mitigating circumstances do not negate findings of "willful, flagrant and repeated violations" in disciplinary cases such as this. Here, buying perishable agricultural commodities without sufficient funds to comply with the prompt payment provision of the PACA is regarded as an intentional

violation of the PACA or, at the least, careless disregard of the statutory requirements.

Findings of Fact

1. Pangea Produce Distributors, Inc., the Respondent, is a corporation existing under the laws of the state of Florida. Pangea Produce has ceased operations, but Pangea Produce's address was 751 N.E. 75th Street, Miami, Florida 33138-5275.

2. Pangea Produce was licensed for two years under the provisions of the PACA: license number 2012 0658 was issued to Pangea Produce Distributors, Inc. on February 24, 2012 and terminated on February 24, 2014, after Respondent Pangea Produce failed to pay the annual renewal fee. Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. Pangea Produce owed, past due and unpaid, $142,716.79 to De Bruyn Produce Company, Weslaco, Texas. *See* "Stipulation for Judgment," signed April 5, 2012, entered in the U.S. District Court for the Southern District of Florida, Miami, Division (Case No. 1:12-cv-20120-JEM).

4. Pangea Produce owed, past due and unpaid, $20,017.34 to G.W. Palmer & Co., Inc., Memphis, Tennessee. *See* Pangea Produce's letter to AMS/ PACA dated October 10, 2013 (a copy of which is attached to Pangea Produce's Response).

5. Pangea Produce owes, past due and unpaid, $54,809.94 to Premier Trading LLC, Greenwood Village, Colorado. *See* Pangea Produce's Response filed February 26, 2015, at page 3.

6. Respondent Pangea Produce was not in full compliance with the PACA within 120 days after having been served with the Complaint. The Complaint was served on October 29, 2014; the $54,809.94 past due amount owed to Premier Trading LLC remained unpaid more than 120 days after the Complaint was served. Respondent Pangea Produce's inability to show full compliance with the PACA within 120 days of having been served with the Complaint makes this a "no-pay" case.

7. Respondent Pangea Produce Distributors, Inc. failed, during October 8, 2010 through December 7, 2013, to make full payment promptly of the purchase prices, or balances thereof, for $217,544.07 in fruits and vegetables, all being perishable agricultural commodities, that Pangea Produce Distributors, Inc. purchased, received, and accepted in the course of interstate or foreign commerce.

8. Pangea Produce's violations of the PACA are willful, as that term is used in the Administrative Procedure Act (5 U.S.C. § 558(c)), because of "the length of time during which the violations occurred and the number and dollar amount of the violative transactions involved." *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998); *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

9. Willfulness under the PACA does not require evil intent. Willfulness requires intentional actions or actions undertaken with careless disregard of the statutory requirements. *See*, *e.g.*, *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *Ocean View Produce, Inc.*, 2009 WL 218027, 68 Agric. Dec. 594, 599 (U.S.D.A. 2009).

10. Respondent Pangea Produce intentionally, or with careless disregard for the payment requirements in section 2(4) of the PACA, "shifted the risk of nonpayment to sellers of the perishable agricultural commodities." *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553 (U.S.D.A. 1998).

11. Pangea Produce's violations are "repeated" (repeated means more than one); and Pangea Produce's violations are "flagrant." Whether violations are "flagrant" under the PACA is a function of the number of violations, the amount of money involved, and the time period during which the violations occurred. *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *Five Star Food Distributors, Inc*., 56 Agric. Dec. 880, 894-95

(U.S.D.A. 1997); *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

Conclusions

1. The Secretary of Agriculture has jurisdiction over Pangea Produce Distributors, Inc. and the subject matter involved herein.

2. Pangea Produce Distributors, Inc. failed to comply with 7 C.F.R. § 46.2(aa) regarding making full payment promptly.

3. Pangea Produce Distributors, Inc. willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, or balances thereof, during October 8, 2010 through December 7, 2013, for $217,544.07 in fruits and vegetables, all being perishable agricultural commodities that Pangea Produce Distributors, Inc. purchased, received, and accepted in the course of interstate or foreign commerce.

ORDER

Pangea Produce Distributors, Inc. is found to have committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4). The facts and circumstances of the violations shall be published pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

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

Finality

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

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties (to Respondent's counsel by certified mail; to

AMS's counsel by in-person delivery to an Office of the General Counsel representative).

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PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

MAIN STREET PRODUCE, INC. v. WESTERN VEG. PRODUCE, INC.; AND MAIN STREET PRODUCE, INC. v. FLORANCE DISTRIBUTING CO.

Docket Nos. W-R-2012-228; W-R-2012-463.
Reparation Decision.
Filed May 7, 2015.

PACA-R.

F.o.b., "no grade" sale
In an f.o.b. "no grade" contract, it is a Respondent's obligation to load subject produce at shipping point which conforms to the contract, and which is in suitable shipping condition.

Good delivery
The maximum allowance for f.o.b. no grade strawberries to make good delivery after five days in transit is 15% total damage, 8% serious damage and 3% decay.

Inspection, time between arrival and inspection
In cases where the condition on arrival is in such poor condition that we can be reasonably certain that the suitable shipping warranty would have been breached even under different conditions (in this case, storage temperatures and time of inspection are the relevant conditions), we can allow more time between arrival and inspection and still rely upon the inspection.

Rejection, seller's duty
A seller always has the duty of accepting a procedurally effective rejection, whether the rejection is rightful or wrongful.

Rejection, buyer's duty
A buyer, post-rejection, is only to act in good faith in an attempt at reworking. A buyer assuming the duty acts as the seller's agent for disposition. However, the type of agency here enforced upon a buyer is restricted, and the buyer is only required to act in good faith. Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Christopher Young, Presiding Officer.
Terrence R. O'Connor, for Complainant in W-R-2012-228 and W-R-2012-463
Elizabeth Estrada, for Respondent in W-R-2012-228
Daniel A. McDaniel, for Respondent in W-R-2012-463
Decision and Order issued by William G. Jenson, Judicial Officer.

Main Street Produce, Inc. v. Western Veg. Produce, Inc.
Main Street Produce, Inc. v. Florance Distributors Co.
74 Agric. Dec. 192

DECISION AND ORDER

Preliminary Statement

These are two related reparation proceedings under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (PACA). A timely Complaint in the case docketed W-R-2012-228 was filed with the Department on September 12, 2012 in which Complainant Main Street Produce, Inc. (Complainant or Main Street) sought a reparation award against Respondent Western Veg. Produce, Inc., (Respondent Western Veg.) in the amount of $34,474.67 (plus applicable interest), which was alleged to be past due and owing in connection with three (3) shipments of the perishable agricultural commodity strawberries sold to Respondent in the course of interstate commerce.[1] A Report of Investigation (ROI) was prepared by the Department and served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto on December 21, 2012, denying liability in part[2], lodging a counterclaim for its own damages in the amount of $51,865.00, and requesting an oral hearing.

A timely Complaint in the case docketed W-R-2012-463 was filed with the Department on October 9, 2012 in which Complainant sought a reparation award against Respondent Florance Distributing Co., Inc., (Respondent Florance) in the amount of $77,011.00 (plus applicable interest, filing fees and costs)[3], which was alleged to be past due and owing

[1] Complainant later appeared to modify its W-R-2012-228 damage claims during the course of the hearing and in Brief and Reply Brief. In Brief and Reply, Complainant asks for $19,524.75 plus interest, and any damages, fees, and costs that Complainant might bear in the event that it loses its reparation against Respondent Florance Distributing in W-R-2012-463. *See* discussion *infra* at 47-48, 51.

[2] Respondent, in its Answer, appears to admit the majority of the allegations of the complaint, with the following exceptions: Respondent denies that the terms of the sale for the three loads were f.o.b, no grade (*see infra* at 9) for definition and further discussion of the term f.o.b), and states that the terms were f.o.b acceptance final (*see infra* at 20-22). Further, Respondent denies that Complainant incurred any loss on these three loads, and takes issue with the ultimate handling and disposition of the loads.

[3] Here again, as in W-R-2012-228, Complainant later appeared to modify its damage claims during the course of the hearing and in Brief and Reply Brief. In W-R-2012-463, Complainant appears to claim no damages against Respondent Florance in its Brief or Reply Brief.

in connection with three (3) shipments of the perishable agricultural commodity strawberries sold to Respondent in the course of interstate commerce. A Report of Investigation was prepared by the Department and served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto on January 7, 2013, denying liability, lodging a counterclaim for its own damages in the amount of $14,889.87[4], and requesting an oral hearing.

A consolidated oral hearing was held in Bakersfield, California, on July 16-17, 2014. At the hearing, Complainant was represented by Terrence O'Connor, Esq., of Noland, Hamerly, Etienne and Hoss in Salinas, California. Respondent Western Veg. was represented by Elizabeth Estrada, Esq., of Alexander and Associates in Bakersfield, California, and Respondent Florance was represented by Daniel McDaniel, Esq., of Nomellini, Grilli, and McDaniel in Stockton, California . Christopher Young, Esq., attorney with the Office of the General Counsel, Department of Agriculture, served as the Presiding Officer. Complainant submitted Exhibits 1-61 (CX) in both W-R-2012-228 and W-R-2012-463. Respondent Western Veg. submitted Exhibits 1-9 (RXWV) in W-R-2012-228, and Respondent Florance submitted Exhibits 1-10 (RXF) in W-R-2012-463. Additional evidence in both W-R-2012-228 and W-R-2012-463 is contained in the Department's Report of Investigation .

At the hearing, two witnesses testified for Complainant, one witness testified for Respondent Western Veg., and two witnesses testified for Respondent Florance. A transcript of the hearing was prepared (Tr.). The parties filed post-hearing briefs, reply briefs, claims for fees and expenses, and objections to the claims.

Findings of Fact

1. Complainant in both W-R-2012-228 and W-R-2012-463, Main Street Produce, Inc., is a corporation whose business mailing address is 2165 West Main Street, Santa Maria, California, 90058-2207. At the time of the transactions alleged in the Complaint, Complainant was licensed under the PACA.[5] (Complainant's Compl. at 1.).

[4] Respondent Florance also modified its damage claim in Brief and Reply Brief, to $12,978.11, plus fees and expenses (*see* Resp't Florance's Reply Br. at 13).

[5] PACA license number 19940550 (PACA license records and information).

2. Respondent in W-R-2012-228, Respondent Western Veg., is a corporation whose business address is 2020 Eye Street, Bakersfield, California 93301 (PACA license records and information) and whose mailing address is P.O. Box 82217, Bakersfield, CA 93380. (Resp't Western Veg.'s Answer). At the time of the transactions alleged in the Complaint, Respondent Western Veg. was licensed under the PACA.[6] (Complainant's Compl. at 1).

3. Respondent in W-R-2012-463, Respondent Florance, is a corporation whose business address is 4555 Pacific Blvd., Vernon, California 90058-2207. (Resp't Florance's Answer at 1). At the time of the transactions alleged in the Complaint, Respondent Florance was licensed under the PACA.[7] (Resp't Florance's Answer at 1).

Contract(s) in W-R-2012-228, Main Street v. Western Veg.

4. In W-R-2012-228, on November 19, 2011, by oral contract, Complainant purchased from Respondent 756 trays of strawberries at the agreed upon f.o.b price of $17.50 per tray.[8] (Complainant's Compl. at 1; Resp't's Answer at 1). Upon delivery in Winnipeg, Canada, on November 22, 2011 (CX 5), the strawberries were inspected by the Canadian Food Inspection Agency (CFIA) and had total defects of 34% including 18% decay. (*Id.*; CX 18, RXF 1). The product was rejected. [9] (Complainant's Compl. at 1; CX 4-19; Tr. 66-69, 79-80, 116, 129, 166, 398, 432-433, 436).

5. In W-R-2012-228, on November 19, 2011, by oral contract, Complainant purchased from Respondent 1296 trays of strawberries at the agreed upon f.o.b price of $17.50 per tray.[10] (Complainant's Compl.

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6 PACA license number 19940988 (PACA license records and information.)

7 PACA license number 19162270 (PACA license records and information.)

8 The terms of the sale, whether "f.o.b. no grade contract" or "f.o.b. acceptance final" are in dispute, and have significant bearing upon this decision. They will be addressed *infra*, as will the definitions of the terms.

9 Respondent Western Veg. provides arguments surrounding the rejection of the loads, which is addressed *infra*.

10 The terms of the sale, whether "f.o.b. no grade contract" or "f.o.b. acceptance final" are in dispute, and have significant bearing upon this decision. They will be addressed *infra*, as will the definitions of the terms.

at 1; Resp't Western Veg.'s Answer at 1). Upon delivery in Calgary, Canada, on November 23, 2011 (CX 23), the strawberries were inspected by the Canadian Food Inspection Agency (CFIA) and had total defects of 22% including 12% decay. (*Id.*; CX 36, RXF 2). The product was rejected. (Complainant's Compl. at 1; CX 22-36; Tr. 66-69, 79-80, 116, 129, 166, 398, 432-433, 436).

6. In W-R-2012-228, on November 22, 2011, by oral contract, Complainant purchased from Respondent 2160 trays of strawberries at the agreed upon f.o.b price of $17.50 per tray.[11] (Complainant's Compl. at 1; Resp't's Answer at 1). Upon delivery in Winnipeg, Canada, on November 24, 2011 (CX 42, 43), the strawberries were inspected by the Canadian Food Inspection Agency (CFIA) in a two part inspection: the first lot of 529 trays out of the entire 2160 had total defects of 22% including 20% decay (Id.; CX 55, RXF 3), and the second lot of 1631 trays out of the entire 2160 had total defects of 21% including 7% decay. (*Id.*; CX 55, RXF 3). The product in both lots was rejected. (Complainant's Complaint, pg. 1; CX 40-58; Tr. 66-69, 79-80, 116, 129, 166, 398, 432-433, 436).

7. The oral contract(s) in W-R-2012-228 were reached between Scott Allen, sales manager for Complainant, and Dave Johnson, salesman for Respondent Western Veg.[12] (Tr. 8-15, 18, 28-31, 49, 51-54, 57, 62, 66-69, 100, 112, 146, 207, 299-300, 529-530, 604-605). Both Complainant and Respondent were aware that the destination of the three loads was western Canada. (Tr. 18, 75, 111).

8. After the strawberries in the three loads were rejected upon arrival in Canada, Complainant and Respondent Western Veg. agreed to have Respondent Florance handle the three loads of strawberries and to attempt to find buyers for them in Western Canada. (Tr. 79-81, 309, 313-315).

9. Respondent Florance contacted Phil Dixon of Sun Fresh, who had experience handling distressed loads in Western Canada. (Tr. 644, 646-647, 654.) There is a limited market and limited number of outlets for distressed strawberries in Western Canada. (Tr. 80, 90, 251-253, 309, 314-

[11] *Id.*

[12] Dave Johnson was not employed with Western Veg. at the time of the hearing. Throughout, in cases where the witness is referred to as "Dave Johnson of Western Veg.," that reference is at the time of the transactions.

315, 511, 545-560, 606-607, 644, 652-668). At the time Phil Dixon was contacted, despite his attempts, the strawberries could not be re-worked or re-sold because of their poor condition, and they had to be discarded in their entirety. Sun Fresh charged Respondent Florance standard charges for dumping and disposal. (Tr. 306, 559-561, 654-665; RXF 1 at 16; RXF 2 at 21; RXF 3 at 26).

Contract(s) in W-R-2012-463, *Main Street v. Florance*

10. Complainant and Respondent Florance agree on the terms of their contract. On November 19 through November 22, 2011, Complainant, by oral contract, sold the three loads identified in Finding of Fact 4-6, above, to Respondent Florance, to be shipped f.o.b. "no grade" from Western Veg.'s cooling facility affiliate in Santa Maria, California. (Complainant's Compl. at 1; Resp't Florance's Answer at 1; Tr. 109, 112, 530).[13]

11. Complainant and Respondent Florance agree that f.o.b. "no grade" were the contract terms (*see* previous Finding of Fact ¶ 10) and that "some softness and bruising was acceptable so long as there was no 'decay or leakers'" (Tr. 111-112), and the fruit arrived "otherwise sound." (Tr. 603-604). Both Complaint and Respondent Florance agree that their contract contemplated that the three strawberry loads would make good delivery at their destination in Western Canada. (Tr. 69, 111-112, 146, 299, 605).

12. Complainant and Respondent Florance agree that inspections were taken on all three loads, and agree on the results of the inspections of all three loads. Both Complainant and Respondent Florance agree that the product did not make good delivery. (Tr. 299, 573-626.)

13. As to the first load, upon delivery in Winnipeg, Canada, on November 22, 2011 (CX 5), the strawberries were inspected by the Canadian Food Inspection Agency (CFIA) and had total defects of 34% including 18% decay. (*Id.*; CX 18, RXF 1). The product was rejected by Respondent

[13] Complainant's representative at hearing, Scott Allen, testified that to form the contract with Respondent Florance, he relayed to David Diener, representative of Respondent Florance, "the exact same terms as they were expressed to me by Dave Johnson." As stated in footnotes 10 and 11 of this Decision, the definition of f.o.b. will be addressed *infra*.

Florance. (Complainant's Compl. at 1; CX 4-19; Tr. 66-69, 116, 129, 166, 398, 432-433, 436).

14. As to the second load, upon delivery in Calgary, Canada, on November 23, 2011 (CX 23), the strawberries were inspected by the Canadian Food Inspection Agency (CFIA) and had total defects of 22% including 12% decay. (*Id.*; CX 36, RXF 2.) The product was rejected by Respondent Florance. (Complainant's Compl. at 1; CX 22-36; Tr. 66-69, 116, 129, 166, 398, 432-433, 436).

15. As to the third load, upon delivery in Winnipeg, Canada, on November 24, 2011 (CX 42, 43), the strawberries were inspected by the Canadian Food Inspection Agency (CFIA) in a two part inspection: the first lot of 529 trays out of the entire 2160 had total defects of 22% including 20% decay (*Id.*; CX 55, RXF 3), and the second lot of 1631 trays out of the entire 2160 had total defects of 21% including 7% decay (*Id.*; CX 55, RXF 3.) The product in both lots was rejected by Respondent Florance. (Complainant's Compl. at 1; CX 40-58; Tr. 66-69, 116, 129, 166, 398, 432-433, 436).

16. After the strawberries in the three loads were rejected upon arrival in Canada, Complainant and Respondent Western Veg. agreed to have Respondent Florance handle the three loads of strawberries and to attempt to find buyers for them in Western Canada. (Tr. 79-81, 309, 313-315). Complainant asked Respondent Florance to handle the strawberries and to attempt to find a buyer in Western Canada. (Tr. 309, 313-315).

17. Respondent Florance contacted Phil Dixon of Sun Fresh, who had experience handling distressed loads in Western Canada. (Tr. 644, 646-647, 654). There is a limited market and limited number of outlets for distressed strawberries in Western Canada. (Tr. 80, 90, 251-253, 309, 314-315, 511, 545-560, 606-7, 644, 652-668). At the time Phil Dixon was contacted, despite his attempts, the strawberries could not be re-worked or re-sold because of their poor condition, and they had to be discarded in their entirety (either dumped or donated). (RXF 1 at 16; RXF 2 at 21; RXF 3 at 26). Sun Fresh charged Respondent Florance standard charges for dumping and disposal. (Tr. 306, 559-561, 654-665; RXF 1 at16; RXF 2 at 21; RXF 3 at 26).

18. Complainant and Respondent Florance agree that Respondent Florance "did all it could" with attempted resale of the three loads of strawberries, (Tr. 250), that there were limited options for resale after rejection (Tr. 251-253), and that no return from any of the three loads was "not surprising." (Tr. 306-308).

Discussion and Conclusions in W-R-2012-463

The conclusions in this case will be addressed first, since they involve less dispute and require less explanation (because the parties now appear to agree on the entirety of the issues in the case). As to the actual terms of the contract, Complainant and Respondent Florance, as noted *supra*, are in agreement as to that issue: f.o.b. "no grade" were the contract terms (*see* Finding of Fact ¶ 10), and "some softness and bruising was acceptable so long as there was no 'decay or leakers'" (Tr. 111-112), and the fruit arrived " otherwise sound." (Tr. 603-604.) The contract contemplated that the three strawberry loads would make good delivery at their destination in Western Canada. (Tr. 111-112, 146, 299, 605). F.o.b. means that "the produce quoted or sold is to be placed free on board the boat, car, or other agency of the [buyer] through land transportation at shipping point, in suitable condition . . . and that the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed." 7 C.F.R. § 46.43(i); *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 975-76 (U.S.D.A. 1997). "The buyer shall have the right of inspection at destination before the goods are paid for to determine if the produce shipped complied with the terms of the contract at the time of shipment . . . ." 7 C.F.R. § 46.43(i).

A "no grade" contract simply means that no grade was specified in the contract, and all that is necessary for such a contract to exist is for the parties to fail to mention a grade. *Ta-De Distributing Company, Inc. v. R.S. Hanline & Co., Inc.*, 58 Agric. Dec. 658, 673 (U.S.D.A. 1999); *Supreme Berries, Inc. v. McEntire*, 49 Aric. Dec. 1210, 1215-17 (U.S.D.A. 1990) (the suitable shipping condition provisions require delivery to contract destination "without abnormal deterioration," or good delivery). *See also* 7 C.F.R. §§ 46.43, 46.44.

As stated *supra*, page 2, in the formal Complaint, Complainant claimed it was due the full unpaid amount of the invoice prices for the three strawberry loads. However, as is also stated *supra*, at hearing and thereafter (in Brief and Reply), Complainant's position as to the loads and the amounts they were worth changed significantly.

While Complainant gives a "nod" to its formal Complaint claim in its brief-- "[Main Street] claims the full invoice price of the three loads" (Complainant's Br. at 2)… "[i]f the Hearing Officer concludes that any of the loads were of suitable shipping condition at the shipping point, [Main Street] would be entitled to the fair market value of good product at destination less the condition defects shown on the inspection" (Complainant's Brief, pg. 16) --throughout the hearing and in the majority of its brief and reply brief, Complainant appeared to concentrate on proving that the three loads were *not* of suitable shipping condition. Based on the inspections of the loads (CX 18, CX 36, CX 55, RXF 1, RXF2, RXF3, CX 36, RXF 2 CX 55, RXF 3), and on the testimony of *every* witness who testified at hearing (for Complainant- Tr. 66-69, 116, 129, 166, for Respondent Western Veg.- Tr. 398, and for Respondent Florance- Tr. 432-433, 436, 573-626), we agree, and find that the three loads of strawberries did not make good delivery (*see infra* pages 11-12 for further discussion), and were not of suitable shipping condition upon arrival (*see* CX 4-19 as to the first load; *see* CX 22-36 as to the second load; *see* CX 40-58 as to the third load) or at the time of inspection. (CX 18, CX 36, CX 55, RXF 1, RXF2, RXF3).

It is generally expected within the industry that strawberries sold without reference to grade will meet the condition requirements for U.S. No.1, but not the quality requirements.[14] When quality requirements are discounted, the tolerances allowed for condition defects for U.S. No.1 strawberries are 10% for total defects, including not more than 5% for serious defects, including not more than 2% for decay. 7 C.F.R. § 51.3115 (b) (*see also* PACA GOOD DELIVERY GUIDELINES, www. ams.usda.gov). Under the suitable shipping condition warranty, assuming good transportation and prompt inspection on arrival, good delivery could be

[14] "Quality and "condition" are terms of art as used in inspection certificates, in U.S. Grade Standards, and within the produce industry. "Grade" is often, but not always, used as a synonym for "quality." *See* NEIL E. HARL, 10 AGRICULTURAL LAW § 72.10[4][b] n.8 (2013).

achieved on a coast to coast (or several day) shipment with up to 15% total defects/damage, including 8% serious damage, including 3% decay. (*Id.*). Applying these criteria to the inspections at destination outlined in Findings of Fact numbers 13-15 (*and* because the parties agree), all three strawberry loads failed to make good delivery.

We find that Respondent Florance properly rejected the three loads of strawberries, and communicated this in timely manner to Complainant. (CX 4-19, CX 22-36, CX 40-58; Tr. 66-69, 116, 129, 166, 398, 432-433, 436). After the strawberries in the three loads were rejected upon arrival in Canada, Complainant asked Respondent Florance to handle the strawberries and to attempt to find a buyer in Western Canada. (Tr. 309, 313-315).

Respondent Florance contacted Phil Dixon of Sun Fresh, who had experience handling distressed loads in Western Canada, to handle the product. (Tr. 644, 646-647, 654). Because there is a limited market and limited number of outlets for distressed strawberries in Western Canada (Tr. 80, 90, 251-253, 309, 314-315, 511, 545-560, 606-7, 644, 652-668), at the time Phil Dixon was contacted, despite his attempts, the strawberries could not be re-worked or re-sold because of their poor condition, and they had to be discarded in their entirety. Two of the three loads were donated, and one was dumped. Sun Fresh charged Respondent Florance standard charges for dumping and disposal. (Tr. 306, 559-561, 654-665; RXF 1 at 16; RXF 2 at 21; RXF 3 at 26).

Complainant and Respondent Florance agreed at hearing and in Reply Brief on the terms of the contract, on the timeliness and the results of the inspections (*see* Complainant's Reply Br.; *see also* Resp't Florance's Reply Br.; CX 18, CX 36, CX 55, RXF 1, RXF2, RXF3, CX 36, RXF 2 CX 55, RXF 3), and that the three loads of strawberries were not in suitable shipping condition and did not make good delivery. Complainant and Respondent Florance further agreed at hearing and in Reply Brief that Respondent Florance rejected the strawberries (*see* Complainant's Br. and Reply Br.), and that "did all it could" with attempted resale of the three loads of strawberries (Tr. 250), that there were limited options for resale after rejection (Tr. 251-253), and that no return from any of the three loads was "not surprising." (Tr. 306-308). Since Complainant and Respondent

appear to be, at least post- Complaint and Answer, in total agreement on all of these above-mentioned issues, and since the documentary evidence further supports the findings, we find as such now. If there was any breach of contract between Complainant and Respondent Florance, it was on the part of Complainant. A contract for three loads of strawberries between Complainant as Respondent Florance was reached, as stated above, and each load was properly and promptly rejected by Respondent Florance because they did not make good delivery, based on inspections, as also stated above. At this point, it was the duty of Complainant (and possibly in turn Respondent Western Veg.; *see infra* at pages 33-40 for further discussion and conclusions on that issue), to take possession of the loads.

Upon a rejection, a buyer such as Respondent Florance "has no duties relative to the rejected goods (except to hold them for a sufficient time for the seller to remove them) unless the seller has no agent or place of business at the market of rejection, and if such agent or place of business does not exist, then the obligation of the buyer is to follow whatever reasonable instructions for the disposition of goods may be given by the owner of the goods (the seller)…" *Ta-De Distributing Company, Inc. v. R.S. Hanline & Co., Inc.*, 58 Agric. Dec. 658, 672 n.2 (U.S.D.A. 1999). "A request by the seller that goods be salvaged by reworking would be considered unreasonable, unless the buyer's business is set up to do reworking, and if not, it would clearly be only within the province of the seller to arrange for reworking of what, by rejection, would now be the seller's goods." *Id.* In any case, it appears that whether the buyers business is or is not set up to rework, a buyer in a position such as Respondent Florance, post-rejection, is only to act in good faith in an attempt at reworking. *Cowley v. Calflo Produce, Inc.*, 55 Agric. Dec. 674, 681 (U.S.D.A. 1996). A buyer assuming the duty acts as the seller's agent for disposition. However, the type of agency here enforced upon [a buyer] is restricted, and the buyer is only required to act in good faith. Good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. *Id*.

Here, after proper rejection, Complainant asked Respondent Florance to attempt to handle the loads, which it did in good faith, to an inevitable (based on the record) and proper conclusion. (*See supra* at 10-12.) Based on the foregoing, Complainant breached the contract(s) and the Complaint against Respondent Florance should be dismissed. Further, because

Complainant breached the contract(s), Respondent Florance is entitled to damages.

Respondent Florance's claimed damages in the Answer to the Complaint are somewhat confusing. First, Respondent Florance claims the amount of $14,889.87 for all three loads, which appears to include expenses such as border crossing, freight, inspection and lost profits, *minus* some amount invoiced (and purportedly paid for) by Complainant. In the breakdown and explanation of expenses, provided later in the Answer, Respondent Florance mentions the f.o.b. price of the strawberries, but does *not* appear to include the amounts in the $14,889.87 claim. (See Resp't Florance's Answer at 1-3). Then, on the last page of the Answer, Respondent Florance makes mention of a $7,7011.80 amount for the "f.o.b invoices" from Complainant, and "additional charges related to the product in the amount of $10,382.31," stating that the total losses to Respondent Florance were $87,394.11. Finally, however, in the last paragraph of the Answer, Respondent Florance again asks that it be awarded the sum total of $14,889.87 for Complainant's breach of contract. (*See* Resp't Florance's Answer at 4-5).

Respondent Florance's damage claim was modified in its Brief and Reply Brief to an amount of $12,978.11 for freight, border crossing fee, inspection, disposal fees, and lost profit on all three loads of strawberries. Respondent Florance calculates lost profits for each load as follows: the amount of the agreed upon selling price to its own customer, Sobey's (had the product made good delivery and been accepted by Sobeys), minus the amount of the agreed upon selling price in the contract between Complainant and Respondent Florance (had the product made good delivery and been accepted by Sobeys).

Upon proper rejection, a buyer is allowed its damages. Where the buyer rightfully rejects or revokes acceptance such buyer has the options of "cover," or recovering damages for non-delivery under *Uniform Commercial Code* (U.C.C.) § 2-713. *See* U.C.C. § 2-711(1)(b). (Cover is not an issue in this case.). The measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in U.C.C. § 2-

715, but less expenses saved in consequence of the seller's breach. U.C.C. § 2-713(1). Market price is to be determined… in cases of rejection after arrival or revocation of acceptance, as of the place of arrival. U.C.C. § 2-713(1). Incidental damages resulting from the seller's breach include expenses reasonable incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses, or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach. U.C.C. § 2-715(1).

Case law, as well as U.C.C. § 2-603, specifically provide that in a post-rejection agency situation such as that in this case between Respondent Florance and Complainant, Respondent is entitled to all expenses as well as damages as specified in U.C.C. § 2-713(1) and U.C.C. § 2-715(1). *Cowley v. Calflo Produce, Inc.*, 55 Agric. Dec. at 682 (After rejection…the berries belonged to Complainant, and Respondent was not purchasing the berries but acting as Complainant's agent in effectuating their sale).

Accordingly, for each of the three loads, we allow Respondent Florance's claim of freight, border crossing fee, inspection, disposal fees, and "lost profit." Lost profit, as the term is used by Respondent Florance, actually appears to be the measure of damages specified in U.C.C. § 2-713(1), as stated above: the amount of the "market price"-- here estimated by Respondent Florance's agreed upon selling price to its own customer, Sobey's (had the product made good delivery and been accepted by Sobeys) minus the amount of the "contract price"-- the agreed upon selling price in the contract between Complainant and Respondent Florance (had the product made good delivery and been accepted by Sobeys). *See Cowley v. Calflo Produce, Inc.,* 55 Agric. Dec. at 682; U.C.C. §§ 2-603, 2-713(1), 2-715(1). Complainant, in its Reply Brief, did not object to the calculations of damages put forth by Respondent Florance in its Brief.

The breakdown for each load, as stated in Respondent Florance's Brief, is as follows:

Load 1-	Freight	$1,573.63
	Border Crossing Fee	$75.60
	Inspection	$125.22
	Lost Profit	$470.40

	Total	$2,244.85
Load 2-	Freight	$2,697.66
	Border Crossing Fee	$129.60
	Inspection	$175.30
	Disposal Fee	$622.08
	Lost Profit	$806.40
	Total	$4,431.04
Load 3-	Freight	$4,468.54
	Border Crossing Fee	$216.00
	Inspection	$298.68
	Lost Profit	$1,319.00
	Total	$6,302.22

Respondent Florance is awarded its claimed damages in the amount of $12,978.11, plus applicable interest.[15]

Fees and Expenses in W-R-2012-463

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853, 864 (U.S.D.A. 2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc*., 48 Agric. Dec. 707, 715 (U.S.D.A. 1989). The question of which party is the prevailing party is one that depends upon the facts of the case. *Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric Dec. 343 (U.S.D.A. 2003). In hearing cases, it is the province of the Secretary to determine what are reasonable fees and expenses. *Mountain Tomatoes,* 48 Agric. Dec. at 707.

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

> (i) reasonable fees of an attorney or

[15] Respondent Florance includes its own calculation of interest in its claim, however, no explanation of the interest rate used is offered. The interest rate will therefore be determined in accordance with 28 U.S.C. § 1961 (*see infra* page 52 for further discussion).

authorized representative for appearance at the hearing and for the taking of depositions necessary for introduction at the hearing;

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

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

(iv) fees for serving subpoenas; and

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

Each party made claims for fees and expenses in this case. Since Complainant failed to carry its burden of proof, for which its Complaint should be dismissed, it is not the prevailing party. Therefore, any fees and expenses claimed by Complainant in connection with case W-R-2012-463 are disallowed.

As Respondent is the prevailing party here it is entitled to reasonable fees and expenses. Respondent claimed $23,512.50 in attorney's fees at $250.00 per hour (*see* Resp't Florance's Claim for Fees and Expenses). The fees and expenses provision under section 7(a) of the PACA has been interpreted to exclude any fees or expenses which would have been incurred in connection with the case if that case had been heard by documentary procedure. *Mountain Tomatoes, Inc., v. Patapanian & Son*, 48 Agric. Dec. 707 (U.S.D.A. 1989); *Pinto Bros. v. F.J. Bolestrieir Co.*, 38 Agric. Dec. 269 (U.S.D.A. 1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 24 (U.S.D.A. 1977); *East Produce, Inc., v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (U.S.D.A. 2000) (claim for fees

incurred in connection with the preparation of answer, response to cross-claim, preparation of brief, and proposed findings of fact disallowed).

Included in Respondent Florance's claim for attorney's fees are items specifically for preparation of the briefs and trial briefs in this case (*see* Resp't Florance's Claim for Fees and Expenses, Exhibit "A," itemized dates 7/3/14 through 9/2014),[16] in the amount of $7,512.50. We deny the claim of Respondent Florance for attorney hours expended on the post-hearing brief and reply brief, and find that such activity is not connected to the oral hearing. This activity takes place entirely after the hearing is completed, and briefs and reply briefs are eventualities that routinely take place in documentary procedure cases. *See Pinto Bros., Inc. v. Frank J. Balestrieri Co.*, 38 Agric. Dec. 269; *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243; *Mahns v. A. M. Fruit Purveyors*, 34 Agric. Dec. 1950 (U.S.D.A. 1975). We find the remainder of Respondent Florance's claim for attorney fees reasonable, and allow them in the amount of $16,000.00.

Respondent Florance also claims the expense of the transcript, in the amount of $975.00, which is awarded. *See Progreso Limited, L.LP v. The Fresh Group, LTD.*, 66 Agric. Dec. 1492 (U.S.D.A. 2007); *Mayoll, Inc. v. Weis-Buy Services, Inc.*, 65 Agric. Dec. 648 (U.S.D.A. 2006). Finally, Respondent Florance claims the following expenses: hotel expenses for witness/party representative David Diener in the amount of $512.07, hotel expenses for Respondent Florance's counsel in the amount of $512.07, hotel expenses for witness Phil Dixon in the amount of $524.61, air travel for witness Phil Dixon in the amount of $712.79, taxi and "miscellaneous" for witness Phil Dixon in the amount of $81.25, automobile mileage for Respondent Florance's counsel in the amount of $272.90 (at the rate of $.045 per mile), and overnight mail/UPS in the amount of $148.40. These expenses related to the oral hearing, although not documented with receipts and/or proof of payments, are allowed, since Complainant did not

[16] Specifically, we deny the following entries: 7/3/14 in the amount of $175.00, 8/11/14 in the amount of 675.00,8/12/14 in the amount of $125.00, 8/14/14 in the amount of $175.00, 8/18/14 in the amount of $125.00, 8/19/14 in the amount of $62.50, 8/21/14 in the amount of $100.00, 8/22/14 in the amount of $125.00, 8/22/14 in the amount of $125.00, 8/26/14 in the amount of $750.00, 8/29/14 in the amount of $200.00, and 9/14 in the amount of $5000.00.

object to these expenses. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (U.S.D.A. 2000). Respondent Florance also claimed the expenses of meals for witness Phil Dixon in the amount of $121.19 and for witness/representative David Diener and counsel for Respondent Florance combined in the amount of $221.07. Complainant did not object to these expenses, and they are allowed. *Watson Distributing v. Fruit Unlimited, Inc.*, 42 Agric. Dec. 1613, 1618 (U.S.D.A. 1983); *Patterson Produce Co. v. John Lowe Produce Co., Inc.,* 39 Agric. Dec. 1006 (U.S.D.A. 1980); *Tenneco West, Inc. v. Gilbert Dist. Co., Inc.*, 38 Agric. Dec. 488 (U.S.D.A. 1979).

Based on the foregoing, the allowable amount of expenses claimed by Respondent Florance 's is $16,000.00 for attorney's fees and $3,106.35 for expenses.

Discussion and Conclusions in W-R-2012-228

Complainant alleged in the formal Complaint that Respondent Western Veg. is liable for $34,474.67 (plus applicable interest), in connection with three (3) shipments of strawberries purchased from Respondent Western Veg. in the course of interstate commerce. This amount included a full invoice amount of $23,040.00 that Complainant mistakenly paid to Respondent Western Veg. for one of the three loads, plus $11,434.67 for damages "incurred upon arrival" of the three loads. (Complainant's Compl. at 1).[17] Respondent Western Veg. counterclaimed for damages on the three loads in the amount of $51,865.00.

Substantively, in the Complaint and Answer, Complainant and Respondent Western Veg. differ on only a few points. Respondent Western Veg. admits in its Answer that between November 19, 2011 and November 22, 2011, it agreed to sell the three loads of strawberries to Complainant. (*See* Resp't Western Veg.'s Answer at 1-2.) Respondent

[17] During the course of the formal reparation case, hearing and briefs, Complainant appeared to modify its claim in W-R-2012-228 to: 1) a balance claimed by Complainant in the amount of $19,524.75 for a mistaken payment for "load 2", See Complainant's Reply Brief, pg. 5; and 2) inspection fees, freight, border crossing fee, and dump/disposition fees for all three loads. Complainant, in its brief and reply, does not identify a specific amount for these damages (*See* Complainant's Br. at 2, 16; Complainant's Reply Br. at 5). *See* infra at pgs. 47-48 for further discussion on this issue.

Western Veg. also admits in its Answer that the three loads arrived in Western Canada with the defects stated in Finding of Fact 4-6, *supra*, at 4-5. Respondent Western Veg.'s main argument in the Answer is that the terms of the contract were f.o.b. "acceptance final," and that the losses claimed on the strawberries were inflated; the strawberries should have been reworked to a much greater yield than they were. (*See* Respondent Western Veg.'s Answer at 1-2). In brief and reply, however, Complainant and Respondent differ greatly on several issues (including those that were contested in the Answer). Each will be addressed in turn, below.

In its Brief, Respondent Western Veg. reiterates that the terms of the contract were f.o.b. "acceptance final," and that good delivery standards did not apply to the three loads of strawberries. (Resp't Western Veg.'s Br. at 13-14). In its Response Brief, Respondent Western Veg. appears to argue that *only* the second load was acceptance final. (Resp't Western Veg.'s Reply Br. at 4-5). There was some testimony at hearing that salesman Dave Johnson, who negotiated the contract(s) for the three loads, noticed that Julio Partida, part owner of Respondent Western Veg. had "inserted" the phrase "acceptance final" on all three bills of ladings, and thought he deleted the phrase on the passings. (Tr. 42-45, 53-54). Despite his efforts, the language remained on the passing for the third load, which was faxed to Complainant on November 21, 2011. (Tr. 44-45). While Complainant does not appear to have objected at that time to the fax (Tr. 44), which was purportedly received (according to the fax transmission notation on the document), Scott Allen, salesman for Complainant, testified that he did not personally receive or view the passing at the time of the transactions, and that in all past instances where he agreed to the terms f.o.b. "acceptance final" (one in 18 years), he agreed to the terms in writing (the seller faxed him a passing, which he signed/initialed and sent back). (Tr. 184, 276, 283, 495- 497).

In any case, regardless of whether Complainant saw the term inserted on any document after the oral contract was reached, based on the testimony of the only two individuals who negotiated the contract(s)[18] and

[18] Julio Partido, part owner of Respondent Western Veg. (and part owner of the grower who purportedly supplied the strawberries), presumably inserted the "acceptance final" term himself. (Tr. 34-36, 72, 149, 238). However, he did not testify at hearing, for any party. (*See* Tr. 36). In any case, Mr. Partido never dealt with Complainant in forming the

who reached a "meeting of the minds" as to the three loads here (*Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 980 n.18 (U.S.D.A. 1997); *A. Sam & Sons Produce Company, Inc. v. Sol Salins, Inc.*, 50 Agric. Dec. 1044, 1064 n.39 (U.S.D.A. 1991); *Griffin-Holder Co. v. Joseph Mercurio Produce Corp.*, 40 Agric. Dec. 1002 (U.S.D.A. 1981); *Blase v. Keegan, Inc.,* 36 Agric. Dec. 709; *Independent Grayse Distributors v. Barbera Packing Corp.*, 25 Agric. Dec. 1144 (U.S.D.A. 1966)), Complainant's Scott Allen and Respondent Western Veg.'s Dave Johnson, the record does not support that the terms were "acceptance final."

Both Scott Allen and Dave Johnson testified in no uncertain terms that the contract terms for all three loads were f.o.b. no grade, and that "some softness and bruising was acceptable so long as there was no 'decay or leakers,' and *not* "acceptance final." (Tr. 14-15, 28- 29, 42, 52, 54, 56-57, 62, 77-79, 100,111-112, 146-147, 184). Based also on this testimony, we find that the contract contemplated that the three strawberry loads would make good delivery at their destination in Western Canada. (Tr. 18-19, 69, 111-112, 146, 299, 605). *See Georgia Vegetable Co., Inc. v. Battaglia Produce Sales,* Inc., 41 Agric. Dec. 969 (U.S.D.A. 1982); *see also Joseph F. Byrnes Produce, Inc. v. Kaleck Distributing Co.*, 40 Agric. Dec. 997 (U.S.D.A. 1981); *Florance Distributing Co., Inc. v. M. Offutt Brokerage Company, Inc.*, 35 Agric. Dec. 1276 (U.S.D.A. 1976).

As stated *supra*, a "no grade" contract simply means that no grade was specified in the contract, and all that is necessary for such a contract to exist is for the parties to fail to mention a grade. *Ta-De Distributing Company, Inc. v. R.S. Hanline & Co., Inc.*, 58 Agric. Dec. 658, 673 (U.S.D.A. 1999); *Supreme Berries, Inc. v. McEntire*, 49 Ariz. Dec. 1210, 1215-17 (U.S.D.A. 1990) (the suitable shipping condition provisions require delivery to contract destination "without abnormal deterioration", or good delivery); *see also* 7 C.F.R. §§ 46.43, 46.44. The term "acceptance final," on the other hand, which contemplates a contract where suitable shipping condition or good delivery does not apply and where a buyer has no right of rejection (*see* 7 C.F.R. § 46.43), must be very clearly established due to "the harshness of the conditions imposed. . ., as well as. . .the rarity of its use in the trade. . . ." *Morgan Products Corporation v.*

contract or agreeing on any changes. (Tr. 49, 238-239).

United Produce Co., Inc., 25 Agric. Dec. 1484 (U.S.D.A. 1966.) That term was *not* so established by the evidence in this case, and there was no clear assent by Complainant in the record that f.o.b acceptance final were the terms of the contract. (Tr. 14-15, 28- 29, 42, 52, 54, 56-57, 62, 77-79, 100,111-112, 146-147, 184). We find, rather, that the contract terms were f.o.b. no grade, and that good delivery standards applied.

Respondent Western Veg. states in its Brief that, "[a]lthough [Western Veg.] originally believed that the strawberries arrived with the defects noted in the Canadian Inspection Certificates, and responded accordingly in its Answer, upon introduction of the evidence at the hearing, it is apparent that Sobey's allowed the strawberries to sit for great lengths of time at extreme temperatures, thereby accelerating the decay of already soft berries." (Resp't Western Veg.'s Br. at 2).[19]

The inspections for all three loads showed significant defects such that none of the three loads made good delivery upon arrival. The maximum allowance for f.o.b. no grade strawberries to make good delivery after five days in transit is 15% total damage, 8% serious damage and 3% decay. *Supreme Berries, Inc. v. McIntire*, 49 Agric. Dec. 1210 (U.S.D.A. 1990). According to the inspections, the defects for every load far exceeded these limits, after less than five days in transit, and therefore, did not make good delivery. (CX 18, CX 36, CX 55, RXF 1, RXF2, RXF3).

While Respondent Western Veg.'s claim the strawberries sat upon arrival for an unreasonable time at unreasonable temperatures, if true, could serve to negate the inspections taken and call into question Complainant's claim that the strawberries did not make good delivery, the claim is not borne out by the facts.

For the first load of 756 strawberries shipped on November 19, 2011, Respondent Western Veg.'s bill of lading shows that the strawberries were shipped from Respondent Western Veg.'s loading facility at 11:31 am. (RXWV 1). A temperature recorder was placed on the truck with this load. (Tr. 515). The temperature tape for that load shows when the truck doors

[19] We note here that none of the parties in either W-R-2012-463 or W-R-2012-228 make any claims that the transportation was abnormal, or that the strawberries were not kept at proper temperature during transportation.

were closed after loading, and then when they were opened on arrival at approximately 5:00 am on November 22 in Western Canada, after the approximately 2 ¾ day trip. (RXF 1 at 4; CX 6.) Emails sent by employees of the customer at destination, Sobeys, to Florance Distributing (Respondent in W-R-2012-463), show that a pre-inspection was performed, showing 30 percent to 50 percent decay (RXF 1 at 5), and that they had a problem with the load ("on hold," "called for inspection") as of at least 7:48 am on November 22, and called for an inspection (RXF 1, pg. 10.) An inspection was performed on the 756 flats of strawberries at 10:00am on November 22, showing total defects of 34% including 18% decay. (CX 18, RXF 1 at 11). From the evidence of record, we conclude that the inspection was performed approximately 5 hours after arrival, and that it was timely.

For the second load of 1296 flats of strawberries shipped on November 19, 2011, Respondent Western Veg.'s bill of lading shows that the strawberries were shipped from Respondent Western Veg.'s loading facility at 1:01 pm. (RXWV 2). A temperature recorder was placed on the truck with this load. (Tr. 515). The temperature tape for that load shows when the truck doors were closed after loading, and then when they were opened on arrival at approximately 10:00 pm on November 21 in Western Canada, after the approximately 2 ½ day trip. (RXF 2 at 4; CX 24.) Emails sent by employees of the customer at destination, Sobey's, to Florance Distributing (Respondent in W-R-2012-463), show that a pre-inspection was performed, showing 25 percent to 30 percent decay (RXF 2, pg. 5), and that they had a problem with the load ("mold/wet/decay/bruising", " CFIA inspection called") as of at least 8:43 am on November 22, and called for an inspection at 11:04 am on that date. (RXF 2, pg. 13). An inspection was performed on the 1296 flats of strawberries at 9:30am on November 23, showing total defects of 22% including 12% decay. (CX 36, RXF 2). From the evidence of record, we conclude that the inspection was performed approximately 36 hours after arrival, and that it was timely.

For the third load of 2160 flats of strawberries shipped on November 21, 2011, Respondent Western Veg.'s bill of lading shows that the strawberries were shipped from Respondent Western Veg.'s loading facility at 9:37 pm. (RXWV 7-2). A temperature recorder was placed on the truck with this load. (Tr. 515). The temperature tape appears to have been activated earlier, before actual departure (RXF 3 pg. 4; RXWV 7-2),

and the temperature tape for that load shows that the doors were opened on arrival at approximately 12:51 pm in Western Canada, after the approximately 3 day trip. (RXF 3 at 4). (The temperature recorder time in and time out here appear to be inaccurate, since the times do not coincide with arrival emails; however, no party has raised this, hence I will attribute the discrepancy no meaning). Emails sent by employees of the customer at destination, Sobey's, to Florance Distributing (Respondent in W-R-2012-463), show that a pre-inspection was performed, showing 30 percent "plus" decay (RXF 3 at 5), and that they had a problem with the load ("[f]inding 1-4 berries with mold and decay in almost every case checked", " [h]ave them picked and removed from warehouse") as of at least 10:56 am on November 24, and called for an inspection. (RXF 3 at 14-18). An inspection of 529 trays was performed at 7:15 am on November 25, showing total defects of 22% including 20% decay (CX 55, RXF 3), and another inspection of the second lot of 1631 flats trays out of the entire 2160 was also performed at 7:15am on November 25 and had total defects of 21% including 7% decay. (CX 55, RXF 3). From the evidence of record, we conclude that the inspection was performed approximately 20 hours after arrival, and that it was timely.

Respondent Western Veg. argues that the strawberries in the three loads were left "to decay in elevated temperatures" anywhere from 12 to 36 hours before the inspections were performed (Resp't Western Veg.'s Br. at 10). As to the time frame within which the inspections were completed in this case, Department precedent suggests that the time that elapsed between arrival and inspection here (between 5 and 36 hours) is entirely acceptable. *Bruce Newlon Co., Inc. v. Richardson Produce Co.*, 34 Agric. Dec. 897 (U.S.D.A. 1975); *D.L. Piazza Co. v. Stacy Distr. Co.*, 18 Agric. Dec. 307 (U.S.D.A. 1959).

Moreover, in cases where the condition on arrival is in such poor condition that we can be reasonably certain that the suitable shipping warranty would have been breached even under different conditions (in this case, storage temperatures and time of inspection are the relevant conditions), we can allow more time between arrival and inspection and still rely upon the inspection. *See Midwest Marketing Co., v. Ralph & Cono Communale Produce Co.*, 46 Agric. Dec. 179 (U.S.D.A. 1987) (inspections made on two truckloads of watermelons four days after arrival

showing 31% and 23% decay respectively were held to show a breach of contract by the supplier); *see also SEL International Corp. v. Brown*, 52 Agric. Dec. 740 (U.S.D.A. 1993).[20] We find that such is the case here, and that the results of the inspections, performed 5 hours, 20 hours, and 36 hours after arrival, can be relied upon.

As to Respondent Western Veg.'s argument that the three loads were kept at elevated temperatures between actual arrival and inspection, Respondent Western Veg. points to (1) the pulp temperatures of the loads upon pre-inspection by Sobeys versus the pulp temperatures of the fruit upon inspection; and (2) the warehouse temperature and/or the cooler temperature as noted on the inspection. We find that Respondent Western Veg. provides no reliable evidence of improper storage temperatures between arrival and inspection.

First, with respect to the pulp temperature argument, while the inspection shows, in each case, elevated temperatures between pre-inspection and inspection (roughly rises between 0 and 7 degrees Fahrenheit), several witnesses testified at hearing, *including* Respondent Western Veg,'s witness, David Ollivier (Tr. 394-396), that pulp temperatures of strawberries continue to rise over time and as they inevitably decay, whether or not they are properly cooled. (Tr. 546, 674.) David Ollivier also testified that there are "so many factors that affect" progression of decay, and that "the more decay [a berry has], obviously the more [internal] heat it's going to generate." (Tr. 396.) Moreover, the arrival that had the *highest* pulp temperature (37.5 degrees Fahrenheit, see RXF 3 at 5), had the *least* amount of decay upon inspection (RXF 3 at 20). We therefore find that the pulp temperature alone cannot be used as a reasonable or reliable measure as to the condition of the strawberries on arrival, or to speculate as to whether the fruit was "kept at elevated

[20] We also note that foreign shipments are often allowed more time between arrival and inspection to show the condition of the produce, particularly where the percentage of defects and decay is high. *Trans-West Fruit Co., Inc. v. Ameri-Cal Produce, Inc.,* 42 Agric. Dec. 1955, 2008 (U.S.D.A. 1983) (where, as to foreign shipments of containers of citrus, approximately 5 percent as to decay was the amount allowed for good delivery, and containers were not surveyed until 5 days after arrival. The buyer was found not to have met its burden of proving abnormal deterioration as to containers showing 7.55% to 8.58% decay due to the length of time between arrival and inspection, but was found to have met such burden as to containers showing 12.42% to 16.26% decay, even though the length of time between arrival and survey was the same).

temperatures" awaiting inspection, as is claimed by Respondent Western Veg.

Second, Respondent Western Veg. argues that the inspections themselves reveal improper handling upon arrival and until the inspections were performed (because of the warehouse and/or cooler temperature notations on the inspections) (Resp't Western Veg.'s Br. at 10-12). There are several problems with this argument. We cannot reasonably glean the temperatures at which the berries were actually kept and stored prior to inspection solely from the warehouse temperatures noted on the inspection, and to say the berries were not properly cooled and "left to rot" (Resp't Western Veg.'s Br. at 10-11) based on the warehouse temperature notations alone is pure speculation.[21] There was no testimony from any witness as to the temperatures at which the berries were kept between arrival and inspection, other than when David Diener of Respondent Florance, who deals regularly with the customer Sobeys, stated that "they know their responsibility to maintain temperatures." (Tr. 624, 629).

On the third load, there *is* a notation for both warehouse temperatures (46.4 degrees Fahrenheit) and "cooler" temperatures of 42.8 degrees Fahrenheit for the first lot, and cooler temperatures only (37.4 degrees Fahrenheit) for the second lot. (RXF 3 at 19-20). Neither of the other inspections on the first two loads contain a recorded cooler temperature (*see* RXF 1 and RXF 2). However, it is unclear as to what this means on the inspection: why the first lot has a notation for both warehouse and cooler, what cooler facility is being referenced on either lot, and what data the CFIA uses to measure and record the temperature. Further, on this inspection (in contrast to the cooler notation on the document), there is also a notation of "where inspected" which states "applicant warehouse" (which further calls into question the meaning of the cooler notation). (RXF 3 at 19-20).

[21] Moreover, it appears that the warehouse temperatures had little bearing on the pulp temperatures of the berries. For example, the highest measure of warehouse temperatures (64 degrees Fahrenheit for load 2, *see* RXF 2, pg. 5) yielded strawberries with pulp temperatures of 38.28 degrees Fahrenheit after approximately 36 hours, by Respondent Western Veg.'s own account (Resp't Western Veg.'s Br. at 6.). This was a 4-6 degree increase of pulp temperatures, which was less than that of other loads kept at cooler warehouse temperatures for *less* time. (*Id.*).

Without more evidence on the meaning of the warehouse and cooler notations on the inspections and how they were derived, we are left to speculate, without any real basis, as to any bearing it may have in this case, and as to exactly where the strawberries were kept between arrival and inspection (or at what temperature). There was no testimony on the subject of whether the strawberries were kept in a cooler after arrival, other than when David Diener of Respondent Florance opined that "you want to cool [strawberries] in a 34-36 degree" Fahrenheit cooler. (Tr. 631). He also observed that they were not cooled at that temperature in the "particular cooler" noted on the inspection (the cooler temperature noted on the inspection for the second lot of the third load was 37.4 degrees Fahrenheit). (*Id*.). The "particular cooler" remark, and its meaning, was not further explored at hearing.

It is unclear from the evidence exactly where the strawberries were kept prior to inspection, and there is a myriad of possibilities. It is possible they were all kept on a cooled truck and unloaded only to the degree that samples could be pre-inspected and then later inspected, possible they were all kept in a cooler until inspection and then removed and inspected in the warehouse, possible they were all kept in a cooler until inspection and actually inspected in the cooler, and possible they were all kept in a warehouse and then inspected. (This does not purport to be an exhaustive list of the possibilities, there may be others.). It is also possible that some portions of each load were kept in one or more of the above mentioned locations, and that other portions were kept in one or more of the above mentioned locations. We decline to engage in speculation on the issue; suffice it to say that we cannot find, as Respondent Western Veg. urges us to do, that the strawberries were kept at improper temperatures between arrival and inspection, and that this was the cause of the strawberries' failure to make good delivery.[22]

[22] We note that Respondent Western Veg. makes an argument that the second portion of the third load was kept in a cooler after arrival as opposed to being left in the warehouse. (Resp't Western Veg.'s Br. at 10-11; RXF 3 at 20), and that those strawberries showed the least damage/decay/defects; however, even assuming, *arguendo*, that this portion of the load was properly cooled between arrival and inspection, they *still* had total defects of 21% including 7% decay, and did not make good delivery. (RXF 3 at 20). *See* Supreme Berries, Inc. v. McIntire, Jr., 49 Agric. Dec. 1210 (U.S.D.A. 1990).

Finally, on the issue of whether the strawberries were properly cooled between arrival and inspection, and in support of our declination to find that they were not properly cooled (*and* our declination to find that improper storage after arrival was the cause of the strawberries to failure to make good delivery), we note that the pre-inspection reports, presumably taken almost immediately after arrival, showed that the examined samples of the first load had 30%-50% decay and "soft, mold, wet" (RXF 1 at 5), the second load had 25%-30% decay and "mold, wet, decay, and bruising" (RXF 2 at 5), and the third load had 30% "plus" problems, with "1-4 berries with mold and decay in almost every case checked." (RXF 3 at 5). The aggregate of the evidence of record does not support that storage and handling conditions prior to the inspection contributed significantly to the three loads' failure to make good delivery in this case.

Respondent Western Veg. also claims that upon arrival in Western Canada, Sobeys confused the "merely soft berries" with decayed berries, and that the evidence was not adequate to conclusively establish that the berries in question were decayed rather than soft upon delivery. We disagree. The evidence, the pre-inspection reports, the emails, the attached pictures, and the inspections themselves establish the condition of the strawberries in the three loads upon arrival, and that they did not make good delivery. Perhaps *some* strawberries in the three loads were soft rather than actually decayed, but even if so, that is not relevant to the outcome of this case. The proper and non-subjective measure of the condition of produce at contract destination in an f.o.b contract, such as we have here, is a neutral inspection. *Tantum v. Phillip R. Weller*, 41 Agric. Dec. 2456 (U.S.D.A. 1982)*; O. D. Huff, Jr., Inc. v. Pagano & Sons*, 21 Agric. Dec. 385 (U.S.D.A. 1962). We have three Canadian Federal Inspections (CX 18, CX 36, and CX 55; *see also* RXF1, RXF 2, and RXF 3) in this case; hence, there is no need to speculate as to whether some strawberries were merely soft, and some were decayed—the inspections show that the three loads did not make good delivery because of their high levels of defects and decay. (*Supra* at 22-25). *See* 7 U.S.C. § 499n(a); *see also Fruit Distributing Corp. v. Gary D. Harney Company,* 44 Agric. Dec. 1331 (U.S.D.A. 1985) (federal inspections of produce are *prima facie* evidence of the accuracy of the information set forth in the inspection report).

Respondent Western Veg. argues that "upon receipt of the berries, some clamshells had no decay and were otherwise marketable, and some clamshells could be easily repackaged. Nevertheless, Sobeys rejected every single clamshell, thereby causing additional potential damage to Western." (Resp't Western Veg.'s Br. at 3, 12). There are a number of problems with this argument. First, Respondent Western Veg. appears to blame the alleged wrongdoing on Sobeys, which is not a party to this reparation case. Second, Respondent Western Veg.'s argument is speculative, and cites "potential damage." As stated *supra*, whether *some* strawberries in *some* clamshells were not decayed is not the issue; all three loads failed the Canadian Federal Inspections and were rejected by Sobeys. Once the loads failed inspection, Sobeys rejected the loads, which was within its rights.

Respondent Western Veg. appears to argue that Sobeys had some obligation upon arrival of the loads to accept them and make the best of them, no matter their condition, and to repack, parceling out any "good" strawberries.[23] (Resp't Western Veg.'s Br. at 12). Such is not the case. Upon arrival, the strawberries in the three loads were pre-inspected, inspected, and rejected. At that point, Sobeys' obligation was to communicate the rejection in timely fashion, which they did, to Florance. *Jen Sales, Inc. v. S. Friedman & Sons, Inc*., 53 Agric. Dec. 810 (U.S.D.A. 1994); *G. Tanaka Farms v. Garden State Farms, Inc.,* 48 Agric. Dec. 729 (U.S.D.A. 1989). A seller always has the duty of accepting a procedurally effective rejection, whether the rejection is rightful or wrongful. *Cal/Mex Distributors Inc. v. Tom Lange Co., Inc.*, 46 Agric. Dec. 1113 (U.S.D.A. 1987); *Yokoyama Bros. v. Cal-Veg. Sales*, 41 Agric. Dec. 535 (U.S.D.A. 1982); *Pope Packing & Sales v. Sante Fe Veg. Growers Coop. Ass'n.,* 38 Agric. Dec. 101 (U.S.D.A. 1979); *Produce Brokers & Distrs. v. Monsour's,* 36 Agric. Dec. 2002 (U.S.D.A. 1977); and *Bruce Church, Inc., v. Tested Best Foods Division*, 28 Agric. Dec. 337 (1969). And in this case, the rejection was rightful, as evidenced by the inspections.[24]

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[23] Respondent Western Veg. also argues that Sobeys rejected in bad faith. There is no evidence of this.

[24] It is possible that Respondent Western Veg. predicates its argument on the claim that one or more of the three loads were sold on f.o.b. acceptance final terms and that Complainant had no right of rejection; however, we have already found that the contract terms on the three loads were not "acceptance final." (*Supra* at 20-22). Even had we found that those terms applied in the contract between Complainant and Respondent Western

Moreover, there was testimony at hearing from several witnesses who deal extensively with the sale and purchase of strawberries, that upon arrival of the strawberries in this case, re-sorting and re-packing, and parceling out the strawberries with decay, was not a reasonable possibility, because of the highly perishable nature of the fruit. (Tr. 90, 251-253, 548-555, 570, 573, 585-600).

Respondent Western Veg. further argues that Sobeys was responsible for arranging transportation for the three loads, and that they delayed in picking them up, "thereby causing the strawberries to age in cold storage." Respondent Western Veg. goes on to argue that "Scott Allen [of Complainant] testified that he would not have purchased 2-3 day old fruit…the fruit was not 2-3 days old when [Complainant] Main Street purchased it. The fact that the fruit was 2-3 days old time of shipment[25] was the result of Sobeys' delay in picking up the fruit."

Again, as noted above, this appears to be an alleged claim against Sobeys, which is not a party to the reparation in either W-R-2012-228 or W-R-2012-463. Irrespective of that, the testimony of Respondent Western Veg.'s own witness, David Ollivier, belies the argument. David Ollivier testified that his recollection was that each of the three loads of strawberries were shipped within 24 hours of the harvest, and that the strawberries were put into cooling tunnels and then cold storage, maintained at 33 to 34 degrees prior to shipment. (Tr. 363-365; 368-369, 435). He also testified that it appeared to him that the three loads were "handled almost to perfection" prior to loading onto the trucks to western Canada. (Tr. 425).[26] Testimony of other witnesses further supports that there was no delay in the pick-up of the three loads; David Johnson (see Tr. 13-39), who negotiated the contract(s) with Scott Allen, Mr. Allen (Tr. 487-488), and David Diener of Florance (Tr. 518) all testified that the fruit was picked up one day or less after the contracts were formed, and none mentioned any delay in their testimony.

Veg., those terms would not apply to Florance's customer, Sobeys.

[25] We will not explore the issue of whether Respondent Western Veg. concedes in its Brief that it loaded 2-3 day old fruit.

[26] Incidentally, there was also testimony from David Ollivier that some of the berries for the three loads were picked up to two days before shipment. (Tr. 459, 466-467).

Moreover, in an f.o.b. no grade contract, destination Western Canada, such as the contract(s) in this case were (*supra* at 20-22), it was Respondent Western Veg.'s obligation to load fruit at shipping point that conformed to the contract. If any of the three loads were loaded that were not in suitable shipping condition, then that was the fault and responsibility of Respondent Western Veg. *Primary Export International v. Blue Anchor, Inc.*, 56 Agric. Dec. 969, 975-976 (U.S.D.A. 1997); 7 C.F.R. § 46.43(i). We therefore give no weight to Respondent Western Veg.'s argument that there was a delay in picking up the fruit, and that this somehow contributed to the condition of the three loads of strawberries at destination in Western Canada.

The fruit was picked up timely, properly cooled in transportation (as noted *supra*, there were no claims of improper or abnormal transportation by any party), it was pre-inspected upon arrival with noted problems, mold and decay, and timely inspected, upon which it failed to make good delivery and was not in suitable shipping condition.

The three loads were also properly and timely rejected by Sobeys to Florance, Florance properly and timely rejected to Main Street, and Main Street in turn properly and timely rejected to Respondent Western Veg. Western Veg. argues, however, that Complainant did not notify it of the rejection of until February, 2012. (Respondent Western Veg.'s Brief, pgs. 3, 9.) The UCC, section 2-602, provides that rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer reasonably notifies the seller. An ineffective rejection has the same legal consequence as acceptance. *Dew-Grow, Inc., a/t/a Central West Produce v. First National Supermarkets, Inc.,* 42 Agric. Dec. 2020 (1983). The burden of proof regarding seasonable notice rests upon the buyer. *San Tan Tillage Co., Inc. v. Kaps Foods, Inc.,* 38 Agric. Dec. 867 (1979; *Sun World Marketing v. Bayshore Perishable Distributors,* 38 Agric. Dec. 480 (1979).

Here, as noted *supra* at pgs. 12-13, there is no dispute between Complainant and Respondent Florance in W-R-2012-463 that the produce was properly rejected shortly after arrival by Sobeys, and that it in turn was timely rejected by Respondent Florance and communicated to

Complainant Main Street. The aggregate of evidence of record supports that there was *also* a proper and timely rejection by Complainant which was communicated to Respondent Western Veg in this case.

Rejection of load 1

As to the rejection for the first load, while the emails (with attachment pictures and documents) introduced as evidence (CX 4- CX 19, RXF 1) indicate that there was a problem, that inspections would be called, and the results of the inspections, they do not clearly state that there was a rejection by Sobeys, Florance, or Main Street. *See Firman Pinkerton Co., Inc. v. Casey*, 55 Agric. Dec. 1287 (U.S.D.A. 1996); *Beamon Brothers v. California Sweet Potato Growers*, 38 Agric. Dec. 71 (U.S.D.A. 1979) (mere complaint or expression of displeasure may communicate breach but insufficient for rejection).

However, CX 19 also contains an email from David Diener of Florance to Scott Allen of Complainant Main Street that states: "I am having Sunfresh pick up fruit and work it. Will Advise." David Diener of Florance testified that he forwarded all documentation to Complainant Main Street from Sobeys, including emails, the pre-inspection, pictures, and the inspections. (Tr. 556-558). Mr. Diener also testified that he had conversations with Scott Allen of Complainant that the load was rejected immediately after inspection, and that his email stating Sunfresh would pick up the fruit was following a discussion with Scott Allen wherein David Diener stated Florance's verbal rejection of the load. (*Id.*; Tr. 556-559 585, 588-593).

Scott Allen testified that he immediately forwarded all of the above-mentioned documentation to Dave Johnson at Western Veg. (Tr. 136) (typically the same day, or at most, the following day, Tr. 262), and he confirmed that David Diener rejected the three loads. (Tr. 136-138). He also testified that there was "no doubt" that he communicated Florance's rejection (by email and verbally), and in turn Main Street's, to Dave Johnson. (*Id.*; *see also* Tr. 261-262, 300). Scott Allen also indicated in his testimony that he had discussion(s) with Dave Johnson regarding rejection and the agreement to ask Florance to handle the three loads. (Tr. 250, 262, 314-315).

Dave Johnson testified somewhat vaguely that he got paperwork suggesting there was a problem several days after the load shipped (possibly up to a week later) (Tr. 38-39), that sometime prior to that he heard verbally from Scott Allen that an inspection was being called for, and the load was "being asked to be removed." (Tr. 39). He also stated that Scott Allen told him that the load was either "inspected or rejected" (Tr. 75). His testimony indicates that this was when the "third load hit" on November 24. (Id.) Dave Johnson also testified that he had discussions internally at Western Veg. about how load 1 was "being inspected, and that they were being consigned." (Tr. 78). However, Dave Johnson agreed during his testimony that the load was rejected and that Complainant and Western Veg. agreed to have Florance handle the loads. (Tr. 79-80, 87).

Finally, David Ollivier of Respondent Western Veg. testified that there was a rejection of the loads communicated to David Johnson of Western Veg. by Complainant. He stated that as to the returns of the three shipments, "there were several conversations that had happened and there was…[Dave Johnson] would just say, well, the market is really good up there, so we're probably not going to have a problem. You know, these loads have been rejected… ." His testimony indicates that there was a timely rejection of all three loads. (Tr. 413).

Rejection of load 2

As to the rejection of the second load, there are again emails (with attachment pictures and documents) introduced as evidence of rejection. (CX 22-CX 36, RXF 2.) These alone, more than in the first load, at least serve to communicate a rejection by Sobeys to Florance (*see* CX 35, email from Sobeys to Florance: "Please advise on your removal arrangements.") There is again an email from David Diener to Scott Allen stating: "Again having Sun Fresh pick fruit up and work. (CX 35). As was the case in load 1, David Deiner testified that he forwarded all documentation on to Scott Allen of Complainant Main Street, and that he verbally communicated Florance's rejection to Main Street "without a doubt within 24 hours." (Tr. 566-580).

Scott Allen's testimony as to the rejection of the second load was somewhat equivocal. While Scott Allen testified that he had several

discussions regarding rejections with David Diener of Florance, it is not clear from the testimony exactly what discussions he had regarding rejection with Respondent Western Veg. (Tr. 150, 171, 181). However, Scott Allen did testify that he forwarded along the inspection and possibly other information from David Diener (presumably the pre-inspection report, pictures, and emails) to Dave Johnson at Western Veg. (Tr. 181) (typically the same day, or at most, the following day, Tr. 262), and that he received notice of rejection from Florance, and passed on that notice of rejection to Western Veg. (Tr. 300-301). Scott Allen also indicated that *some* rejection discussion between Complainant and Respondent Western Veg. and subsequent agreement to have Florance handle the loads was had. (Tr. 250, 262, 314-315).

In any case, Dave Johnson, who handled the contract(s) for Western Veg., agreed during his testimony that the product in the three loads was rejected and it was agreed to have Florance handle the loads. (*Supra* at 33-34). David Ollivier of Respondent Western Veg. corroborated this testimony. (Tr. 413.)

Rejection of load 3

As to the rejection of the third load, there are again emails (with attachment pictures and documents) introduced as evidence of rejection (CX 40-CX 55, RXF 3). Once again, these alone, more than in the first load, at least serve to communicate a rejection by Sobeys to Florance (*see* CX 40-41, email from Sobeys to Florance: "Please advise on your removal arrangements."). Also, for this load, both the pre-inspection report and inspection itself contain the notation "Have them picked up and removed from warehouse." (CX 42, CX 55). There is again an email from David Diener to Scott Allen stating: "Will have them picked up and worked by Sun Fresh." (CX 41). As was the case in loads 1 and 2, David Deiner testified that he forwarded all documentation on to Scott Allen of Complainant Main Street, and that he verbally communicated Florance's rejection to Main Street. (Tr. 582-589, 591-593).

Scott Allen's testimony as to the rejection of the third load was again somewhat equivocal. While Scott Allen testified that he had several discussions regarding rejections with David Diener of Florance, it is not

clear from the testimony exactly what discussions he had regarding rejection with Respondent Western Veg. (Tr. 150, 171, 181). However, Scott Allen did testify that he forwarded along the inspection, emails, pre-inspection reports (which all indicate at least a rejection between Sobeys and Florance), and pictures to Dave Johnson at Western Veg. (Tr. 228-233). He stated this was done typically the same day, or at most, the following day. (Tr. 262). Scott Allen further testified that he received notice of rejection from Florance, and passed on that notice of rejection to Western Veg. (Tr. 300-301). Scott Allen also indicated in his testimony that he had *some* discussion(s) with Dave Johnson regarding rejection and the agreement to ask Florance to handle the three loads. (Tr. 250, 262, 314-315).

In any case, Dave Johnson, who handled the contract(s) for Western Veg., agreed during his testimony that the product in the three loads was rejected and it was agreed to have Florance handle the loads. (*Supra* at 33-34). David Ollivier of Respondent Western Veg. corroborated this testimony. (Tr. 413).

Respondent Western Veg. points out, correctly, that while Complainant's Scott Allen testified that he forwarded to Dave Johnson of Western Veg. all of the emails between Florance and Main Street regarding the loads, including their condition and rejection, Complainant did not produce the forwarded emails and proof they were received by Dave Johnson or anyone else at Western Veg. (Respondent Western Veg.'s Br. at 13). When questioned on that issue at hearing, Scott Allen testified that he was only asked (purportedly by his attorney) to do a search on his computer for email exchanges between himself and David Diener. (Tr. 261). While the absence of proof of the forwarded emails in document form *is* troubling, and providing them as evidence seems the obvious choice on the part of Complainant to support its case in W-R-2012-228, we will not invoke the negative inference rule as to their existence (or lack thereof) in this case. *See Mattes Livestock Co.*, 42 Agric. Dec. 81, 96 (U.S.D.A. 1982); *Speight*, 33 Agric. Dec. 280, 300 (U.S.D.A. 1974); *SEC v. Scott*, 565 F. Supp. 1513 (S.D. N.Y. 1983).

We decline to do so, because as already stated, Dave Johnson acknowledged that he saw, at the least, the inspections for the three loads, and agreed during his testimony that the product in the three loads was

rejected and it was agreed to have Florance handle the loads. Moreover, David Ollivier, representative of Respondent Western Veg. at hearing, corroborated this testimony, and stated that the three loads were rejected. (Tr. 413-414). Therefore, based on the aggregate of evidence of record, as discussed above, we find that Complainant rejected the three loads, and that Complainant communicated the rejections to Respondent Western Veg. in timely fashion.[27] While Respondent Western Veg. claims that it was not notified of the rejection until February 2012, the record supports that this was merely when Respondent Western Veg. learned of the *return* for the three loads, and not when they learned of the rejection. (Tr. 413-414).

Respondent Western Veg. claims that the loads were inappropriately handled once the agreement was made to re-work the loads. (Respondent Western Veg.'s Br. at 7-8.). Respondent Western Veg. appears to lay blame on non-parties to either of the reparations at hand: on Sobeys, because the fruit further decayed while waiting for pick-up after rejection, and on SunFresh, for not repacking the clamshells and trays of strawberries in attempt to salvage them after pick-up from Sobeys. Aside from the clear flaw in the argument that the loads were handled improperly by non-parties (with no analysis as to how any liability claimed might attach to the actual parties in the case), we find that the evidence of record does not support that the loads were inappropriately handled after rejection.

Here, Complainant's duty after rejection was to act in good faith, meaning honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. *Cowley v. Calflo Produce, Inc.,* 55 Agric. Dec. at 681. (*See* discussion *supra*, at pages 12-13). We find that Complainant adhered to this duty. There is no dispute in the record that after the inspections on the three loads were performed, Complainant and Respondent Western Veg. agreed (because neither were familiar with nor had buyers in the area) to ask Florance to try to rework the produce and to attempt to find buyers for them in Western Canada. (Tr. 79-81, 309, 313-

[27] We note that in this case, whether Complainant accepted or rejected the three loads, since Respondent Western Veg. breached the contract because the loads did not make good delivery and their condition was supported by inspections, Complainant would be entitled to some measure of damages. *See* § 2-713(1); *see also* U.C.C. § 2 - 607(1).

315). Respondent Florance contacted Phil Dixon of SunFresh, who had experience handling distressed loads in Western Canada. (Tr. 644, 646-647, 654). SunFresh picked up each of the three loads within one day after the inspection was conducted. (*See* Resp't Western Veg.'s Br. at 8.) There is a limited market and limited number of outlets for distressed strawberries in Western Canada. (Tr. 80, 90, 251-253, 309, 314-315, 511, 545-560, 606-7, 644, 652-668.) At the time Phil Dixon was contacted, despite his attempts, the strawberries could not be re-worked or re-sold because of their poor condition, and they had to be discarded in their entirety. (Tr. 306, 559-561, 654-665; RXF 1 at 16; RXF 2 at 21; RXF 3 at 26). Re-sorting and re-packing the strawberries, and parceling out those with decay, was not a reasonable possibility, because of the highly perishable nature of the fruit. (Tr. 87, 90-91, 251-253, 548-555, 570, 573, 585-600).

To support its argument that produce decayed while waiting for pick-up after rejection, Respondent Western Veg. points to further decay the three loads underwent prior to pick-up by Sunfresh (Resp't Western Veg.'s Br. at 7) (Sunfresh was asked, per agreement between Complainant and Respondent Western Veg. and subsequent agreement between Complainant and Respondent Florance, to pick up the loads from Sobeys and to attempt to rework them) (Tr. 79-81, 309, 313-315, 644, 646-647, 654). Respondent Western Veg. bases its argument on the notations on the inspection versus the notations in a letter from Sunfresh to Florance sent upon dumping of the loads, which according to Respondent Western Veg., purport to show that the product of the three loads was "left to further decay." We find that it is not necessary to go through each notation and comment identified by Respondent Western Veg. Suffice it to say, for each of the three loads, the comments listed on the pre-inspection reports (CX 5, CX 23, CX 42; see *supra* at 22-25), the inspection reports (CX 18, CX 36, CX 55; see *supra* at 22-25), and the Sunfresh letters (RXF 1, pg. 16, RXF 2, pg. 21, RXF 3, pg. 26) all indicate decaying fruit *upon arrival* at destination in Western Canada that *continued* to decay over time. However, there is no evidence in the record to show that the reason for the continued decay was a result of improper handling or delay in pick-up.

Moreover, there was extensive testimony from witnesses, including Respondent Western Veg.'s witness, David Ollivier (Tr. 394-396 for David Ollivier's testimony), as to the highly perishable nature of

strawberries. There was further testimony from witnesses that strawberries will continue to decay rapidly over time, regardless of proper handling, and that re-sorting decaying strawberries to re-sell any good berries in a decaying load was a near impossibility. (Tr. 90, 251-253, 546-555, 570, 573, 585-600, 674). Moreover, Phil Dixon of SunFresh testified credibly and extensively that it was in his interest to make every effort to sell the fruit from these three loads, and that he did so. (Tr. 656-672, 674-675). He also testified as to his efforts at re-sale, and why they failed: because of the extremely limited market and number of re-sale outlets in Western Canada, and because of the poor condition of the strawberries. (*Id.*; *see* RXF 1 at 16, RXF 2 at 21, RXF 3 at 26.).[28] He further testified as to his methods of dumping and disposal: two out of three loads were donated to "Winnipeg Food Bank," at no cost (RXF 1 at16, RXF 3 at 26), and one was placed in Sunfresh's "garbage system," to save on "dumping costs." (RXF 2 at 21.) The record, if anything, supports that the strawberries were handled properly by all parties post-rejection, and that following the proper rejection of the three loads, Complainant fulfilled its duties in accordance with department law. *Ta-De Distributing Company, Inc. v. R.S. Hanline & Co., Inc.*, 58 Agric. Dec. at 672; *Cowley v. Calflo Produce, Inc.*, 55 Agric. Dec. at 681.

Finally, Respondent Western Veg. argues that Complainant's payment of the invoice for load 2 "precludes its recovery of the payment." (Resp't Western Veg.'s Br. at 14-15). Respondent Western Veg.'s argument is twofold.

First, Respondent Western Veg. argues that the terms of the contract as to load 2 were altered and that f.o.b. "acceptance final" was an "additional term" that became part of the contract[29], and that (purportedly) Complainant assented to the additional term, and this was the reason Complainant paid the invoice for load 2. In support of this argument,

[28] We note that Respondent Western Veg.'s witness, David Ollivier, testified that the zero return on the three loads was inappropriate, and that there should have been *some* return. (Tr. 372). However, David Ollivier also testified that he didn't know the market in Western Canada. (Tr. 473).

[29] This argument is somewhat contradictory to Respondent Western Veg.'s earlier argument that the original terms of the contract were always f.o.b. (Resp't Western Veg.'s Br. at 11).

Respondent Western Veg. explains that additional terms become part of the contract unless "(1) the additional term materially alters the contract; and (2) the parties do not expressly agree to the material term. Some examples of material alterations are clauses negating standard warranties in cases where a warranty normally attaches…" (Resp't Western Veg.'s Br. at 14; U.C.C. § 2-207).

Here, we have already found, *supra* pages 20-22, that no part of the contract(s) were "acceptance final." However, solely for the purpose of addressing Respondent Western Veg.'s particular argument on this issue, we find that the additional term is indeed a material alteration of the contract, since under an f.o.b. acceptance final scenario, the term is voiding any warranty of suitable shipping condition, and Complainant would have no right to reject. Moreover, we find that the parties did not expressly agree to the material term, as would be required under U.C.C. section 2-207. (Tr. 14-15, 18-19, 28- 29, 42, 52, 54, 56-57, 62, 77-79, 100,111-112, 146-147, 184, 299, 605). *Morgan Products Corporation v. United Produce Co., Inc.*, 25 Agric. Dec. 1484 (U.S.D.A. 1966.).

Second, in support of its argument that Complainant is precluded from recovering its payment for load 2, Respondent Western Veg. cites section 2-605(2) of the U.C.C., which provides that "[p]ayment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents." The only defects concerned in the present subsection are defects in the documents which are apparent on their face. (*Comment* to U.C.C. section 2-605(4).) Where payment is required against the documents they must be inspected before payment, and the payment then constitutes acceptance of the documents. Under the section dealing with this problem, such acceptance of the documents does not constitute an acceptance of the goods or impair any options or remedies of the buyer for their improper delivery. (*Id.*).

Here, while there is a preliminary passing document, referenced by Respondent Western Veg., that has a notation at the bottom ""type on bill f.o.b. acceptance final (no recourse),"[30] and a fax transmission notation

[30] We note that Dave Johnson, salesman for Western Veg., testified that he "believed" Julio Partido, who was not a party to the contract formation, typed this on the passing after the contract was formed. (Tr. 31, 35). We *also* note that there is a "terms" section of this document that states only "f.o.b.", and not "acceptance final." (RXF 2, at 3). Finally, we

indicates that this document was faxed to Scott Allen on November 21, there appears to be no actual invoice in the record that contains an f.o.b. "acceptance final" term. There *is* a document in Respondent Western Veg.'s Answer that states "Invoice" at the top, which again contains at the bottom a notation: " type on bill f.o.b. acceptance final (no recourse)" (Resp't Western Veg.'s Answer, Ex. D)-- however, when comparing this document to other invoices in the record, (WVX 8, Resp't Western Veg.'s Answer, Ex. E, K) it is substantially different from them (it lacks a Western Veg. letterhead and background logo, and information on the face of the document is arranged differently from the original invoices in the record—perhaps it is no more than coincidence, but load 2 is the *only* load that does not appear to include an original invoice), and it does not appear, in comparison with the others, to be the "actual" invoice for this load. Further, we conclude that the notation to " type on bill f.o.b. acceptance final (no recourse)" is somewhat ambiguous, and suggests that it is an instruction, of sorts, to someone to further type those terms on some actual invoice or bill (either a bill for payment, or a bill of lading) to follow.[31] Finally, the document from the Answer that pertains to load 2, is not shown by the evidence of record to have ever been received by Complainant (only the bill of lading was shown at hearing to have been faxed to Complainant, not an invoice regarding load 2). Hence, it does not appear from the record that the plain language of section 2-605(2) of the UCC applies with respect to Complainant's payment for load 2, as the record does not show that Complainant received an invoice document that had a defect "apparent on its face" (f.o.b. acceptance final in this case), accepted the document, and then paid in accordance with price terms (contract f.o.b. terms acceptance final, along with price) stated on that document. (*See Comment* to U.C.C. section 2-605(4).) Neither party, in dealing with the issue of the payment of load 2, produced a check that matched specifically to an original, or even revised, load 2 invoice (only a later account balance, generated by Respondent Western Veg. and contained in Complainant's records, was produced to show payment for load 2, *see* discussion immediately below).

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note that Scott Allen of Complainant claimed at hearing that he didn't see this document "at the time it was made up." (Tr. 245.)

[31] It also contains what appears to be a fax numeral "pg. 1" at the top, but there is no "page 2" in the exhibit.

Moreover, the record supports that both parties knew that the three loads, the contract terms, and the amounts owed for the three loads were in dispute shortly after the loads arrived in Western Canada, and that there were even settlement negotiations between Complainant and Respondent Western Veg. regarding the loads that took place even before an informal Complaint in this case was filed. (Tr. 83, 87-89, 374, 414-415). Presumably, based on those various negotiations, Respondent Western Veg. at some point reduced the original invoice price of $23,040.00 to $15,264.00, as is shown by a June 2012 account balance document of Western Veg. sent to Complainant. (CX 37). This document shows that the load was paid for after the original invoice price was reduced by Respondent Western Veg. (*Id.*). The load was paid for in full after the informal dispute was filed on March 9, 2012, paid on or about March 16, 2012. (ROI, Ex. C). According to Scott Allen of Complainant, the original load price of $23,040.00 was paid by someone at accounting by mistake, and he had no idea why the amount was paid. (Tr. 277).[32]

The fact that the full original invoice price was paid *after* the amount requested as due had been reduced by Respondent Western Veg. is strong evidence that the $23,040.00 amount was paid by mistake, and at the time, should have been an indication to Respondent Western Veg. that Complainant did not mean for the payment to be satisfaction of the debt in dispute.[33] *Louis Caric & Sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486 (U.S.D.A. 1979); *Mendelson-Zeller Co. v. Michael J. Navilio, Inc.,* 34 Agric. Dec. 903 (U.S.D.A. 1975); *Spada Distributors Co. v. Frank*

[32] While it is certainly possible that "someone" from accounting saw the preliminary passing that contained the "type on bill f.o.b. acceptance final (no recourse)" notation, (RXF 2, pg. 3) or perhaps saw the document that contained the same notation in Respondent Western Veg.'s Answer (Exhibit D), and paid the original contract amount on that basis, Scott Allen opined in testimony that it was the result of "the worst conceivable coincidence". (Tr. 277).

[33] Scott Allen testified only that "someone from accounting" called Respondent Western Veg. and asked for the payment back. (Tr. 277-278). David Ollivier of Western Veg. testified that Complainant typically pays for invoices within 30 days, and that this load was paid in "around 90." (Tr. 372-373). He stated that he believed that because load 2 was paid in "around 90 days", there were "obviously" discussions [by Complainant] on whether to pay the full amount, and that "it appears that there was a decision [by Complainant] to pay it. (*Id.*). David Ollivier did not explain the basis for his belief or his reasoning. The testimony from both witnesses is vague, and does not add to resolving the mystery of how or why the payment, in fact, was made, but based on the entire record, we find that it was indeed a mistake on Complainant's part.

Kenworthy Co., 17 Agric. Dec. 347 (1958); *Mendelson-Zeller Co. v. The Season Produce Co.,* 31 Agric. Dec. 1288 (U.S.D.A. 1972) (To constitute an accord and satisfaction it is necessary that the money be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction…).

Finally, Complainant gave Respondent Western Veg. further indication that it objected to or mistakenly paid for load two when Complainant amended its informal complaint in this case to ask for return of the $23,040.00 payment (ROI, Exs. F, G) and when it filed its formal Complaint, wherein it also sought as damages the return of the mistaken payment. (Complainant's Compl. at 2).[34] Based on the foregoing, we find that Complainant is not precluded from seeking the return of the payment for load 2 as part of any damages to which it may be entitled.

We have found that an f.o.b. no grade contract was reached for the three loads of strawberries, wherein some bruising would be acceptable, but that the strawberries were expected to make good delivery in Western Canada. We have also found that due to the condition of the fruit upon arrival, the contract was breached by Respondent Western Veg., and Complainant properly rejected the three loads. Accordingly, Complainant is the prevailing party in this case, and is entitled to damages. *See Newbern Groves, Inc. v. C. H. Robinson Company*, 53 Agric. Dec. 1766 (U.S.D.A. 1994); *see also Mic Bruce, Inc.*, 45 Agric. Dec. 1215 (U.S.D.A. 1986); *V. V. Vogel & Sons Farms v. Continental Farms*, 44 Agric. Dec. 886 (U.S.D.A. 1985.)

[34] Respondent Western Veg. addressed the payment in its response to the informal complaint, wherein it stated that it assumed, upon receipt of the $23,040.00, that there was no further dispute as to that particular load. Curiously, there is no further correspondence in either the informal file (other than the amended informal complaint to which includes the "mistaken" payment as damages),or the formal Complaint (which does the same,) We believe that it is quite likely that the parties, who have continued to do regular business with one another since this dispute began in November 2011 (in 2012 through 2014, Complainant and Respondent Western Veg. did 2.7 million worth) (Tr. 373-374), communicated back and forth about this issue, but if there were such communications, no evidence to that effect by either side was produced, other than Scott Allen's vague testimony that "someone" from accounting at Complainant requested return of the payment from Respondent Western Veg. (Tr. 277-278).

Upon proper rejection, a buyer is allowed its damages. Where the buyer rightfully rejects or revokes acceptance such buyer has the options of "cover", or recovering damages for non-delivery under *Uniform Commercial Code* (U.C.C.) § 2-713. *See* U.C.C. § 2-711(1)(b). (Cover is not an issue in the case). The measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in (U.C.C. § 2-715), but less expenses saved in consequence of the seller's breach. *Uniform Commercial Code* (U.C.C.) § 2-713(1). Market price is to be determined . . . in cases of rejection after arrival or revocation of acceptance, as of the place of arrival. UCC § 2-713(1). Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses, or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach. U.C.C. § 2-715(1).

Case law, as well as U.C.C. § 2-603, specifically provide that in a post-rejection agency situation such as that in this case between Complainant and Respondent Western Veg., Complainant is entitled to all expenses as well as damages as specified in U.C.C. § 2-713(1) and U.C.C. § 2-715(1). *Cowley v. Calflo Produce, Inc.*, 55 Agric. Dec. at 682 (After rejection . . . the berries belonged to Complainant, and Respondent was not purchasing the berries but acting as Complainant's agent in effectuating their sale.).

Complainant, in its Reply Brief, does not appear to apply the above outlined measures of damages after rejection, and requests as damages only (1) the amount of $19,524.75 plus interest for the mistaken payment made to Respondent Western Veg. for load 2 (the reduction from $23,040, so far as we can tell from the record, is unexplained); and (2) "any damages, fees, and costs of Respondent Florance Distributing which are sustained in PACA case number W-R-2012-463."

Based on our discussion above, we award Complainant the requested $19,524.75 for the mistaken payment for load 2.[35] As to the damages,

[35] We note that the reduction from $23,040 is unexplained in the record, and it is a basic axiom of damages that they cannot be speculative. Anthony Brokerage, Inc. v. The Auster

fees, and costs of Respondent Florance Distributing which were sustained in PACA case number W-R-2012-463 (*see supra* at 15-16), Complainant claims that "because the cause of these expenses is attributable to the failure of Respondent Western Veg. to provide product in suitable shipping condition", Respondent Western Veg. should be required to reimburse Complainant for expenses proven by Respondent Florance in that case. (Complainant's Br. at 16-17). However, we have dismissed that case because Complainant failed to prove the breach alleged by Complainant, and awarded damages to Respondent Florance.

Complainant asserts that the damages sustained because of its failure to prove the Complaint against Respondent Florance (W-R-2012-463) should be "passed on" to Respondent Western Veg. in this case (W-R-2012-228), because Respondent Western Veg. in this case is the cause of Complainant's breach (and Complainant's failure to prove the case, and ultimate loss of the case) in the case against Respondent Florance. We disagree that the damages for which Complainant is liable in W-R-2012-463 should be "passed on" to Respondent Western Veg. in this case.

It was Complainant's choice to bring suit in this case against Respondent Western Veg., wherein it alleged breach of contract for failure of the three loads to conform to the contract, and it has prevailed. It was likewise Complainant's choice to bring suit in the against Respondent Florance in W-R-2012-463, wherein it alleged breach of contract for Respondent Florance's failure to pay the full contract price for the three loads, and in that case, it did not prevail.[36] There were two separate reparations filed, involving two separate contracts and parties. We will not pass on the expenses from one, where Complainant failed to prevail

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Company, Inc., 38 Agric. Dec. 1643 (U.S.D.A. 1979). Although there is no evidence to support the reduction itself, the payment of the $23,040.00 *was* proven and is supported by the record, and we found that Complainant could claim that mistaken payment to Respondent Western Veg. as damages. Therefore, since Complainant asks for a lesser amount, though inexplicably, we have no reservations in awarding that lesser amount. *See* Meyer Tomatoes v. Hardcastle Produce Co., 40 Agric. Dec. 1172 (U.S.D.A. 1981).

[36] Complainant also alleged as part of the formal Complaint in W-R-2012-463 that Respondent Florance accepted the produce for which it failed to pay, and that, apparently, the produce was in suitable shipping condition upon arrival. (Complainant's Compl. at 1-2). Complainant failed to carry its burden of proof. See *Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec 893, 894 (U.S.D.A. 1987).

and meet its burden of proof, to another, where it succeeded in doing so. *See Dimare Brothers, Inc. v. Wholesale Produce Supply, Inc.*, 39 Agric. Dec. 257 (U.S.D.A. 1980).

Fees and Expenses in W-R-2012-228

Fees and expenses will be awarded to the prevailing party to the extent that they are reasonable. *East Produce, Inc. v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853, 864 (2000); *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707, 715 (U.S.D.A. 1989). The question of which party is the prevailing party is one that depends upon the facts of the case. *Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric Dec. 343 (U.S.D.A. 2003). In hearing cases, it is the province of the Secretary to determine what are reasonable fees and expenses. *Mountain Tomatoes*, 48 Agric. Dec. at 707. *See supra*, pages 16-17 for a discussion of items included in the term fees and expenses under section 47.19(d)(2) of the regulations applicable to the PACA (7 C.F.R. § 47.19(d)(2)).

Each party made claims for fees and expenses in this case. Complainant, as the prevailing party here, is entitled to reasonable fees and expenses. Respondent failed to carry its burden of proof, is not the prevailing party, and any fees and expenses claimed by Respondent in connection with case W-R-2012-228 are disallowed.

Complainant claimed $19,520.50 in attorney's fees (at $295.00 per hour for its attorney and $140.00 per hour for its paralegal) (*see* Complainant's Claim for Fees and Expenses). The fees and expenses provision under section 7 (a) of the PACA has been interpreted to exclude any fees or expenses which would have been incurred in connection with the case if that case had been heard by documentary procedure. *Mountain Tomatoes, Inc., v. Patapanian & Son*, 48 Agric. Dec. 707 (U.S.D.A. 1989); *Pinto Bros. v. F.J. Bolestrieir Co.*, 38 Agric. Dec. 269 (U.S.D.A. 1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 24 (U.S.D.A. 1977); *East Produce, Inc., v. Seven Seas Trading Co., Inc.*, 59 Agric. Dec. 853 (U.S.D.A. 2000) (claim for fees incurred in connection with the preparation of answer, response to cross-claim, preparation of brief, and proposed findings of fact disallowed).

Included in Complainant's claim for attorney's fees are items specifically for preparation of the briefs and trial briefs in this case (*see* Complainant's Claim for Fees and Expenses, Exhibit "A," itemized dates 7/23/14 through 9/22/2014),[37]in the amount of $10,008.25. We deny the claim of Complainant for attorney hours expended on the post hearing brief and reply brief, and find that such activity is not connected to the oral hearing. This activity takes place entirely after the hearing is completed, and briefs and reply briefs are eventualities that routinely take place in documentary procedure cases. *See Pinto Bros., Inc. v. Frank J. Balestrieri Co.,* 38 Agric. Dec. 269; *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243; *Mahns v. A. M. Fruit Purveyors*, 34 Agric. Dec. 1950 (U.S.D.A. 1975). We also disallow Complainant's claim for a "phone conference with attorney for Florance" on 7/11/14, in the amount of $295.00, as we find that that item does not appear to be in connection with the oral hearing in case W-R-2012-228 against Respondent Western Veg., where Complainant was the prevailing party. We find the remainder of Respondent Florance's claim for attorney fees reasonable, and allow them in the amount of $9,217.25.

Complainant Florance claims the following expenses: hotel expenses for Complainant's counsel in the amount of $201.58, meals for Complainant's counsel in the amount of $40.92, and mileage for travel (at the rate of $.56 per mile) for Complainant's counsel in the amount of $234.08. These expenses, although not documented with receipts and/or proof of payments, are allowed, since Respondent did not object to these expenses. *East Produce, Inc. v. Seven Seas Trading Co., Inc*, 59 Agric. Dec. 853 (U.S.D.A. 2000); *Watson Distributing v. Fruit Unlimited, Inc.*, 42 Agric. Dec. 1613, 1618 (U.S.D.A. 1983); *Patterson Produce Co. v. John Lowe Produce Co., Inc.,* 39 Agric. Dec. 1006 (U.S.D.A. 1980);

[37] Specifically, we deny the following entries:7/23/14 in the amount of $59.00, 8/5/14 in the amount of $59.00,8/6/14 in the amount of $59, 8/7/14 in the amount of $1,180.00, 8/8/14 in the amount of $413, 8/11/14 in the amount of $42.00, 8/11/14 in the amount of $147.50, 8/12/14 in the amount of $236, 8/13/14 in the amount of $221.25, 8/14/14 in the amount of $177.00, 8/18/14 in the amount of $590, 8/19/14 in the amount of $885.00, 8/20/14 in the amount of $885.00, 8/21/14 in the amount of $1327.50, 8/22/14 in the amount of $885.00, 9/12/14 in the amount of $42.00, 9/15/14 in the amount of $590.00, 9/16/14 in the amount of $988.25, 9/18/14 in the amount of $826.00, 9/22/14 in the amount of $73.25, and 9/22/14 in the amount of $280.00.

Tenneco West, Inc. v. Gilbert Dist. Co., Inc., 38 Agric. Dec. 488 (U.S.D.A. 1979).

As with damages, Complainant claims that any fees and expenses for which it is liable in W-R-2012-463 should be "passed on" to Respondent Western Veg. in this case. Complainant argues that this is so "because [Complainant] was compelled to make a separate claim against Respondent Florance [in W-R-2012-463] to defend against Western Veg.'s counterclaim [in W-R-2012-228]." Complainant provides no rational explanation of exactly how it was "compelled" to file the reparation against Respondent Florance, and we disagree with the statement. Moreover, the fees and expenses awarded in W-R-2012-463 are not "in connection" with the oral hearing in W-R-2012-228. *See Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (U.S.D.A. 1989); *Pinto Bros. v. F.J. Bolestrieri Co.*, 38 Agric. Dec. 269 (U.S.D.A. 1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (U.S.D.A. 1977). For the reasons stated above, *see supra* pages 47-48, we decline to find that Respondent Western Veg. must pay the fees and expenses for which Complainant is liable in W-R-2012-463.

Based on the foregoing, the allowable amount of expenses claimed by Complainant is $9,217.25 for attorney's fees and $476.58 for expenses.

Interest in W-R-2012-463 and W-R-2012-228

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. *L & N Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award. *See Crokett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (U.S.D.A. 1963).

If parties contract for the payment of interest at a rate which is different than that normally awarded in reparation proceedings, this forum will award the percent of interest for which the parties contracted. *Seaquist v. Gro-Pro, Inc.*, 43 Agric. Dec. 161 (U.S.D.A. 1984); *Swanee Bee Acres,*

Inc. v. Gro-Pro, Inc., 42 Agric. Dec. 637 (U.S.D.A. 1983); *Grange v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (U.S.D.A. 1970); *Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (U.S.D.A. 1970). It is not evident from the record that either of the prevailing parties, Respondent Florance in W-R-2012-463, or Complainant in W-R-2012-228, did so in this case. The interest that is to be applied shall be determined in accordance with 28 U.S.C. § 1961, *i.e.*, the interest rate shall be calculated at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order. *PGB International, LLC v. Bayche Companies, Inc.*, PACA Docket No. R-05-118, 65 Agric. Dec. 669 (U.S.D.A. 2006) (Order on Recons.).

Pursuant to section 5(a) of the PACA (7 U.S.C. § 499e(a)), the party found to have violated section 2 of the PACA (7 U.S.C. § 499b) is liable for any handling fee paid by the injured party. Complainant in this action paid a $500.00 handling fee to file its Complaint.

Order in W-R-2012-463

The Complaint in this case is dismissed.

Within 30 days from the date of this Order, Complainant shall pay Respondent Florance as reparation $32,084.46 ($12,978.11 in damages plus $16,000.00 in attorney's fees plus $3,106.35 in fees and expenses), with interest thereon at the rate of 0.25 of 1% per annum from January 1, 2012 until paid; plus the amount of $500.00 filing of the reparation claim.

Copies of this Order shall be served upon the parties.

Order in W-R-2012-228

Within 30 days from the date of this Order, Respondent Western Veg. shall pay Complainant as reparation $29,218.58 ($19,524.75 in damages plus $9,217.25 in attorney's fees plus $476.58 in fees and expenses), with interest thereon at the rate of 0.25 of 1% per annum from January 1, 2012 until paid; plus the amount of $500.00 filing of the reparation claim.

Copies of this Order shall be served upon the parties.

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MISCELLANEOUS ORDERS & DISMISSALS

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

PERISHABLE AGRICULTURAL COMMODITIES ACT

In re: KRISTINA BAKES.
Docket No. 15-0078.
Order of Dismissal.
Filed March 13, 2015.

DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Decisions and Orders] with the sparse case citation but without the body of the order. Default Decisions and 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

PHOENIX PRODUCE COMPANY.
Docket No. D-15-0044.
Default Decision and Order.
Filed April 21, 2015.

TAYLOR PRODUCE, LLC.
Docket No. D-15-0045.
Default Decision and Order.
Filed May 29, 2015.

CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Farmers Processing, Inc.
Docket No. 15-0032.
Filed February 27, 2015.

Bissett Produce Company, Inc.
Docket No. 15-0022.
Filed March 31, 2015.

Pros Ranch Market CA, LLC.
Docket No. 15-0075.
Filed May 1, 2015.