AGRICULTURE DECISIONS

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

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COURT DECISIONS

MISSION PRODUCE, INC. v. ORGANIC ALLIANCE, INC.
No. 15-CV-01951-LHK.
Court Order.
Filed March 24, 2016.

PACA-R – Attorney's fees – Contract, breach of – Conversion – Dealer – Default judgment – Failure to account – Fiduciary duty, breach of – Prejudgment interest – Prompt payment – Reparation award, enforcement of – Unpaid produce.

[Cite as: No. 15-CV-01951-LHK, 2016 WL 1161988 (N.D. Cal. March 24, 2016)].

Instituted under the Perishable Agricultural Commodities Act [PACA], this is a case for enforcement of a reparation award, PACA violations, breach of contract, and conversion. The Court used the *Eitel* factors to analyze Plaintiff's claims and ultimately granted Plaintiff's motion for default judgment against Defendants for unpaid invoice value of produce. The Court ordered Defendants to pay pre-judgment interest, attorney's fees, and costs. Additionally, the Court ordered Defendants to pay post-judgment interest to accrue until the outstanding balance is paid.

United States District Court,
Northern District of California.

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

LUCY H. KOH, UNITED STATES DISTRICT JUDGE, DELIVERED THE ORDER OF THE COURT.

Before the Court is Plaintiff Mission Produce, Inc.'s ("Plaintiff") renewed motion for default judgment against Defendants Organic Alliance, Inc. ("Organic Alliance") and Parker Booth ("Booth"). Having considered Plaintiff's motion, the relevant law, and the record in this case, the Court hereby GRANTS Plaintiff's motion for default judgment.

I. BACKGROUND

A. Factual Background

Plaintiff brings this case to enforce a reparation award by the U.S.

Department of Agriculture ("USDA") as provided under the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499g; for underlying violations of PACA, including PACA's trust provisions, under 7 U.S.C. § 499e; for breach of contract; and for conversion.

Plaintiff is a California corporation based in Oxnard, California and is in the business of selling wholesale produce. ECF No. 1 ("Compl.") ¶¶ 3, 16. Plaintiff alleges that Organic Alliance is a Nevada corporation with a principal place of business in Salinas, California and that Booth "was an officer, director, and/or shareholder of" Organic Alliance. *Id.* ¶¶ 4-5. Plaintiff alleges that Organic Alliance "was engaged in the handling of produce in interstate and/or foreign commerce as a commission merchant, dealer and/or retailer in wholesale and jobbing quantities and was therefore subject to the provisions of the" PACA. *Id.* ¶ 15. Plaintiff further alleges that Organic Alliance operated under PACA license number 20090314. *Id.*

Plaintiff alleges that in early 2013, in a series of transactions, Plaintiff sold and shipped perishable agricultural commodities to Organic Alliance for which Organic Alliance agreed to pay Plaintiff at least $79,306.00. *Id.* ¶ 16. For each transaction, Plaintiff allegedly forwarded Organic Alliance an invoice setting forth the amount owed. Compl. ¶ 17. According to Plaintiff, each such invoice indicated that Organic Alliance is obligated to pay Plaintiff a finance charge of 1.5% per month (18% annually) on all past due accounts. *Id.* ¶ 69; ECF No. 41-4 Ex. 1. Each invoice also stated that "[s]hould any action be commenced between the parties to this contract concerning the sums due...the prevailing party in such action shall be entitled to...the actual attorney's fees and costs in bringing such action." ECF No. 41-4 Ex. 1; *see also* Compl. ¶ 70.

In November 2013, Plaintiff filed an administrative complaint against Organic Alliance with the USDA seeking an award of the balance due to Plaintiff.[1] Compl. ¶ 20, Ex. 1 (ECF No. 1-1). Organic Alliance defaulted

[1] Plaintiff based its USDA claim on four invoices: (1) Invoice No. 535460 for $35,699.25; (2) Invoice No. 537175 for $33,782.00; (3) Invoice No. 540011 for $3,577.25; and (4) Invoice No. 536132 for $6,247.50. *See* ECF No. 1-1 (USDA Compl.) Ex. 5 (summary of claims). The total value of these invoices was $79,306.00. At the time Plaintiff filed its USDA complaint, Organic Alliance had made a partial payment of $6,000 towards Invoice No. 536132, so $73,306.00 remained due. *See id.*; ECF No. 41-3 (Albers Decl.) ¶¶ 8–9.

in the USDA action, Compl. ¶ 21, and on January 14, 2014, the USDA issued a reparation order in favor of Plaintiff. *Id.* ¶ 22, Ex. 2 (ECF No. 1-2). The USDA awarded Plaintiff $73,306.00, plus interest at the rate of 0.13% per annum from March 1, 2013 until paid, plus the $500.00 filing fee. *Id.*

After the USDA issued its reparation order, Organic Alliance paid Plaintiff $247.50 to fulfill Organic Alliance's obligations under Invoice No. 536132, one of the four invoices that were before the USDA. *See* ECF No. 41-3 (Alders Decl.) ¶¶ 8-9. Defendants still owe Plaintiff a principal amount of $73,058.50. *Id.* ¶ 10.

B. Procedural History

Plaintiff filed this PACA action against Defendants Organic Alliance, Booth, Carmen Grillo, Mark Klein, Alicia Kriese, Michael Rosenthal, and Barry Brookstein on April 30, 2015. ECF No. 1. Plaintiff voluntarily dismissed its claims against Defendants Rosenthal and Brookstein without prejudice on June 1, 2015. ECF No. 15. Plaintiff voluntarily dismissed its claims against Grillo, Klein, and Kriese without prejudice on July 9, 2015. ECF No. 26. Thus, the only Defendants remaining in this case are Organic Alliance and Booth.

On June 23, 2015, Plaintiff moved for entry of default against Organic Alliance and Booth. ECF No. 18. The Clerk of the Court entered default against these Defendants on July 9, 2015. ECF No. 25.

Plaintiff filed a motion for default judgment against Organic Alliance and Booth on August 27, 2015. ECF No. 27. This Court denied Plaintiff's motion for default judgment on November 25, 2015 because Plaintiff had not adequately shown that Plaintiff served Organic Alliance and Booth with the summons and complaint in this matter. ECF No. 35. Specifically, Plaintiff had submitted proofs of service that erroneously indicated that the same process server had served both Organic Alliance and Booth in different cities in different states at the exact same time. *Id.* at 2. The Court's November 25, 2015 order also requested supplemental briefing regarding jurisdiction and support for the amount of money

owed to Plaintiff. *Id.* at 2-3.

On December 2, 2015, Plaintiff submitted an amended proof of service for Organic Alliance and a declaration from the process server. ECF Nos. 37-38. The declaration states that on May 18, 2015, the process server effected service of process on (1) Booth in his individual capacity; and (2) Organic Alliance, by serving Booth—president of Organic Alliance—at Booth's address in Shelton, Washington. ECF No. 38 at 2. The declaration explains that the original proof of service for Organic Alliance, ECF No. 17, incorrectly indicated that Booth was served in his capacity as president of Organic Alliance at an address in Salinas, California. ECF No. 38 at 2. Plaintiff did not submit an amended proof of service for Booth. *See* ECF No. 16.

On December 14, 2015, Plaintiff filed the instant renewed motion for default judgment against Defendants Organic Alliance and Booth. ECF No. 41. No opposition was filed, and the time to do so has now passed.

II. LEGAL STANDARD

Pursuant to Rule 55(b)(2), the court may enter a default judgment when the clerk, under Rule 55(a), has previously entered the party's default. Fed. R. Civ. P. 55(b). "The district court's decision whether to enter a default judgment is a discretionary one." *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Once the Clerk of Court enters default, all well-pleaded allegations regarding liability are taken as true, except with respect to damages. *See Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002); *TeleVideo Sys. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987); *Philip Morris USA v. Castworld Prods.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003) ("[B]y defaulting, Defendant is deemed to have admitted the truth of Plaintiff's averments."). "In applying this discretionary standard, default judgments are more often granted than denied." *Philip Morris*, 219 F.R.D. at 498 (citation omitted).

"Factors which may be considered by courts in exercising discretion as to the entry of a default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6)

whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986).

III. DISCUSSION

A. Jurisdiction

"When entry of judgment is sought against a party who has failed to plead or otherwise defend, a district court has an affirmative duty to look into its jurisdiction over both the subject matter and the parties. A judgment entered without personal jurisdiction over the parties is void." *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) (citations omitted). The Court thus begins by evaluating subject matter jurisdiction and personal jurisdiction.

1. Subject Matter Jurisdiction

The Court finds that the exercise of subject matter jurisdiction over this case is proper. "[A] federal court may exercise federal-question jurisdiction if a federal right or immunity is an element, and an essential one, of the plaintiff's cause of action." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1086 (9th Cir. 2009) (citation omitted); *see also* 28 U.S.C. § 1331. Plaintiff asserts claims under PACA and California state law. *See* Compl. ¶¶ 19–70. As the PACA causes of action raise federal questions, the Court may properly exercise subject matter jurisdiction over the PACA causes of action. Because the state law claims arise out of the same factual allegations as the PACA causes of action, the Court exercises supplemental jurisdiction over those claims. *See* 28 U.S.C. § 1367(a).

2. Personal Jurisdiction

To determine the propriety of asserting personal jurisdiction over a nonresident defendant, the Court examines whether such jurisdiction is permitted by the applicable state's long-arm statute and comports with the demands of federal due process. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements, Ltd.*, 328 F.3d 1122, 1128–29 (9th Cir. 2003).

Because California's long-arm statute, Cal. Civ. Proc. Code § 410.10, is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same. *See* Cal. Civ. Proc. Code § 410.10 ("[A] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); *Mavrix Photo, Inc. v. 0Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). For a court to exercise personal jurisdiction over a nonresident defendant consistent with due process, that defendant must have "certain minimum contacts" with the relevant forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In addition, "the defendant's 'conduct and connection with the forum State' must be such that the defendant 'should reasonably anticipate being haled into court there.'" *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

A court may exercise either general or specific jurisdiction over a nonresident defendant. *Ziegler v. Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995). General jurisdiction exists where a nonresident defendant's activities in the state are "continuous and systematic" such that said contacts approximate physical presence in the forum state. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (citation omitted). Where general jurisdiction is inappropriate, a court may still exercise specific jurisdiction where the nonresident defendant's "contacts with the forum give rise to the cause of action before the court." *Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001).

Additionally, for the Court to exercise personal jurisdiction over a defendant, the defendant must have been served in accordance with Federal Rule of Civil Procedure 4. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) ("Defendants must be served in accordance with Rule 4(d) of the Federal Rules of Civil Procedure, or there is no personal jurisdiction." (footnote omitted)).

a. *Organic Alliance*

As to Organic Alliance, the Court concludes that the exercise of general jurisdiction is appropriate. Plaintiff has alleged that Organic Alliance has its principal place of business in Salinas, California. Compl. ¶ 4. Plaintiff further alleges that it delivered the produce at issue to Organic Alliance in Salinas, California. ECF No. 41-3 Ex. 1 (invoices). Organic Alliance not only "[did] business with California," but in fact "[did] business in California." *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (contacts approximating physical presence in California, such as doing business in California, support the exercise of general jurisdiction). As such, Organic Alliance has "substantial" and "continuous and systematic" contacts with California as well as a "physical presence" in California that support the Court's exercise of general jurisdiction. *See Schwarzgenner*, 374 F.3d at 801 (general jurisdiction exists where a defendant has "continuous and systematic general business contacts...that approximate physical presence in the forum state" (citations omitted)). Additionally, Plaintiff effected service of process upon Organic Alliance by having the summons and the complaint served upon Organic Alliance's president, Booth. *See* ECF No. 37 (amended proof of service upon Organic Alliance); ECF No. 38 (declaration from process server); ECF No. 41-2 Ex. 4 (Cal. Sec. of State web page listing Parker Booth as agent for service of process for Organic Alliance); Fed. R. Civ. P. 4(h)(1)(B) (permitting service on a corporation by delivering a copy of the summons and of the complaint to an officer, a managing or general agent). Based on the amended proof of service and declaration from the process server, there is no indication in the record that this service was improper.

b. *Parker Booth*

The Court also concludes that the exercise of at least specific personal jurisdiction over Booth is appropriate. Plaintiff alleges that Booth was a shareholder, officer, and/or director of Organic Alliance, and in that capacity, Booth was responsible for the daily management and control of Organic Alliance. Compl. ¶¶ 5, 11. Furthermore, Plaintiff alleges that Booth controlled or was in a position to control the disposition of Organic Alliance's assets so as to ensure that there were sufficient assets to satisfy all outstanding PACA trust obligations such as the obligation

allegedly owed to Plaintiff. *See id.* ¶¶ 45–49. Furthermore, Booth was registered with the California Secretary of State as the agent for service of process for Organic Alliance at an address in Salinas, California in this District. ECF No. 41-2 Ex. 4. While it is true that Booth's "contacts with California are not to be judged according to [his] employer's activities there," the Ninth Circuit has "reject[ed] the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity." *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 521 (9th Cir. 1989). Here, Booth was registered as Organic Alliance's agent in this District. Finally, Booth was personally served with process in this case pursuant to Federal Rule of Civil Procedure 4(e)(2)(A). ECF No. 16 (proof of service upon Booth); ECF No. 38 (declaration from process server). As with Organic Alliance, there is no indication in the record that service on Booth was improper.

B. Whether Default Judgment is Proper

Having determined that the exercise of subject matter jurisdiction and personal jurisdiction over Defendants Organic Alliance and Booth is appropriate, the Court now turns to the *Eitel* factors to determine whether entry of default judgment against Organic Alliance and Booth is warranted.

1. First *Eitel* Factor: Possibility of Prejudice

Under the first *Eitel* factor, the Court considers the possibility of prejudice to a plaintiff if default judgment is not entered against a defendant. Absent a default judgment, Plaintiff in this case will not obtain payment to which it is entitled for produce Plaintiff has already provided to Defendants. Thus, the first factor weighs in favor of granting default judgment.

2. Second and Third *Eitel* Factors: Merits of Plaintiff's Substantive Claims and the Sufficiency of the Complaint

The second and third *Eitel* factors address the merits and sufficiency of Plaintiff's claims as pleaded in the Complaint. These two factors are often analyzed together. *See Dr. JKL Ltd. v. HPC IT Educ. Ctr.*, 749 F. Supp. 2d 1038, 1048 (N.D. Cal. 2010). In its analysis of the second and

third *Eitel* factors, the Court will accept as true all well-pleaded allegations regarding liability. *See Fair Hous. of Marin*, 285 F.3d at 906. The Court will therefore consider the merits of Plaintiff's claims and the sufficiency of the Complaint together.

Plaintiff brings four claims arising out of PACA, a claim for breach of contract, and a claim for conversion.[2] The Court first addresses the merits and sufficiency of Plaintiff's PACA claims and then turns to the merits and sufficiency of the breach of contract and conversion claims.

a. *PACA Claims*

The first, third, fourth, and fifth causes of action in the complaint arise under PACA. The first cause of action is a claim against Organic Alliance for enforcement of the reparation award issued by the U.S. Secretary of Agriculture on January 14, 2014. Compl. ¶¶ 19–29. The third cause of action is a claim against all Defendants for enforcement of the statutory trust provisions of PACA. *Id.* ¶¶ 33–40. The fourth cause of action is a claim against all Defendants for failure to account and pay promptly under PACA. *Id.* ¶¶ 41–43. The fifth cause of action is a claim against Booth for breach of fiduciary duty with regard to assets in the PACA trust. *Id.* ¶¶ 44–51.

PACA protects sellers of perishable agricultural goods by requiring a merchant, dealer, or retailer of perishable produce to hold in trust proceeds from the sale of the perishable produce, and food derived from that produce, for the benefit of all unpaid suppliers. 7 U.S.C. § 499e(c)(2); *Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1104–05 (9th Cir. 2001). District courts have the power to enforce PACA reparation awards by the U.S. Secretary of Agriculture:

> If any commission merchant, dealer, or broker does not pay the reparation award within the time specified in the

[2] Plaintiff also asserts claims for unjust enrichment; declaratory relief; and recovery of fees, costs, and interest. In the context of the Complaint, these last three claims appear to be requests for particular forms of relief and not independent causes of action, notwithstanding the fact that Plaintiff labeled them as causes of action. Accordingly, the Court does not analyze these three claims separately.

> Secretary's order, the complainant...may within three years of the date of the order file in the district court of the United States for the district...in which is located the principal place of business of the commission merchant, dealer, or broker...a petition setting forth briefly the causes for which he claims damages.

7 U.S.C. § 499g(b). Enforcement proceedings in district court "shall proceed in all respects like other civil suits for damages, except that the findings and orders of the Secretary shall be prima-facie evidence of the facts therein stated." *Id.*; *see also Sierra Kiwi, Inc. v. Rui Wen, Inc.*, No. 2:13-CV-1334-LKK, 2013 WL 5955066, at *5 (E.D. Cal. Nov. 7, 2013) (recommending that court enter default judgment for damages in the amount ordered by the Secretary of Agriculture).

Under PACA, "a produce dealer holds produce-related assets as a fiduciary" in the statutory trust "until full payment is made to the produce seller." *In re San Joaquin Food Serv., Inc.*, 958 F.2d 938, 939 (9th Cir. 1992). "The trust automatically arises in favor of a produce seller upon delivery of produce and is for the benefit of all unpaid suppliers or sellers involved in the transaction until full payment of the sums owing has been received." *Id.* (citation omitted); *see also* 7 U.S.C. § 499e(c)(2). There are five elements to a PACA cause of action:

> (1) the commodities sold were perishable agricultural commodities, (2) the purchaser was a commission merchant, dealer, or broker, (3) the transaction occurred in contemplation of interstate or foreign commerce, (4) the seller has not received full payment on the transaction, and (5) the seller preserved its trust rights by including statutory language referencing the trust on their invoices.

Beachside Produce, LLC v. Flemming Enters., LLC, No. C-06-04957 JW, 2007 WL 1655554, at *2 (N.D. Cal. June 6, 2007) (citing 7 U.S.C. § 499e(c)(3), (4); 7 C.F.R. § 46.46(c), (f)).

Plaintiff satisfies the first PACA element because Plaintiff alleges that it sold perishable agricultural commodities to Defendants. Compl. ¶ 16.

For the second element, PACA defines a "dealer" as "any person engaged in the business of buying or selling in wholesale or jobbing quantities...any perishable agricultural commodity in interstate or foreign commerce." 7 U.S.C. § 499a(b)(6). Furthermore, "individuals associated with corporate defendants may be liable under a PACA trust theory." *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280, 282 (9th Cir. 1997). "[I]ndividual shareholders, officers, or directors of a corporation who are in a position to control PACA trust assets...may be held personally liable under the Act." *Id.* at 283. "If deemed a PACA 'dealer,' an individual is liable for his own acts, omissions, or failures while acting for or employed by any other dealer." *Id.* (citing 7 U.S.C. § 499e(a)).

Plaintiff satisfies the second element as to Organic Alliance and Booth. Plaintiff alleges that both Organic Alliance and Booth were dealers or retailers under PACA. Compl. ¶ 13. Plaintiff alleges that Organic Alliance "was engaged in the handling of produce in interstate and/or foreign commerce as a commission merchant, dealer and/or retailer in wholesale and jobbing quantities...operating under PACA license no. 20090314." *Id.* ¶ 15. Plaintiff also alleges that Organic Alliance purchased produce from Plaintiff. *Id.* ¶¶ 16–18. Finally, the Secretary of Agriculture found that Organic Alliance "was licensed or was subject to license under the PACA at the time of the transaction or transactions involved in" the reparation proceeding. ECF No. 1-2.

As to Booth, Plaintiff alleges that Booth was an officer, director, and/or shareholder of Organic Alliance and was in a position to control Organic Alliance at the time that Organic Alliance purchased produce from Plaintiff. *See* Compl. ¶¶ 5, 45–49. These allegations are sufficient to establish that Booth exercised control over Organic Alliance and its assets, such that Booth may be held personally liable for the PACA violations. *See Sunkist Growers*, 104 F.3d at 283 ("[I]ndividual shareholders, officers, or directors of a corporation who are in a position to control PACA trust assets...may be held personally liable under the Act.").

Courts have held that the third PACA element is satisfied where "the commodities involved are the type typically sold in interstate commerce" and where the seller involved is "the type that Congress intended to

protect by implementing PACA." *Greenfield Fresh, Inc. v. Berti Produce-Oakland, Inc.*, No. 14-cv-01096-JSC, 2014 WL 5700695, at *3 (N.D. Cal. Nov. 3, 2014) (quoting *Oregon Potato Co. v. Seven Stars Fruit Co., LLC*, No. C12-0931JLR, 2013 WL 230984, at *5 (W.D. Wash. Jan. 22, 2013)). Here, Plaintiff has alleged that all perishable agricultural commodities that are the subject of this action were purchased and sold in or in contemplation of the course of interstate and/or foreign commerce. Compl. ¶ 35. The Secretary of Agriculture also found (by adopting Plaintiff's allegations as factual findings) that Plaintiff sold Organic Alliance four truck shipments of Mexican grown avocadoes in the course of interstate commerce. *See* ECF No. 1-2 (Default Order); ECF No. 1-1 (Complaint for Reparations) ¶ 4. In a declaration, Plaintiff's credit manager also stated that at all times relevant to the Complaint, Plaintiff was licensed by the USDA under PACA license number 19831164. ECF No. 41-4 ¶ 7. Plaintiff has satisfied the third element.

Plaintiff alleges that Plaintiff did not receive prompt and full payment from Defendants for the produce sold to Defendants. Compl. ¶¶ 18, 42. This allegation satisfies the fourth element of a PACA cause of action. Plaintiff further alleges that despite the fact that the USDA reparation award required payment to Plaintiff by February 13, 2014, Organic Alliance still has not paid Plaintiff the amount owed. Compl. ¶¶ 23–25.

Plaintiff additionally attaches to the motion for default judgment the invoices Plaintiff sent to Organic Alliance. *See* ECF No. 41-3 Ex. 1. These invoices include the statutory language regarding the PACA trust, *see id.*, thus satisfying the fifth PACA element.

The findings above are consistent with the Secretary of Agriculture's conclusion that Organic Alliance violated 7 U.S.C. § 499b. *See* ECF No. 1-2.

Furthermore, Plaintiff's claim against Booth for breach of fiduciary duty is cognizable under PACA because "[a]n individual who is in the position to control the trust assets and who does not preserve them for the beneficiaries has breached a fiduciary duty, and is personally liable for that tortious act." *Sunkist Growers*, 104 F.3d at 283. Thus, a PACA trust "imposes liability on a trustee, whether a corporation or a controlling person of that corporation, who uses the trust assets for any

purpose other than repayment of the supplier." *Id.* Here, Plaintiff has alleged that Booth had a fiduciary duty to maintain sufficient PACA trust assets to pay all PACA trust claims as they became due and that Booth instead transferred or diverted the trust assets to his own use and/or to unknown third parties. Compl. ¶¶ 39, 49.

Because Plaintiff has sufficiently alleged the elements for Plaintiff's four PACA causes of action, the Court concludes that Plaintiff has sufficiently stated claims against Organic Alliance for enforcement of the USDA's reparation award, against Organic Alliance and Booth for enforcement of the PACA trust and for violation of PACA by failing to pay promptly, and against Booth for PACA violations for breach of fiduciary duty related to the PACA trust assets.

b. *Breach of Contract*

Plaintiff's second cause of action is for breach of contract against Organic Alliance. Compl. ¶¶ 30–32. The elements of breach of contract under California law are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Reichert v. Gen'l Ins. Co. of Am.*, 68 Cal. 2d 822, 830 (1968). Plaintiff alleges that Plaintiff had a contract with Organic Alliance for the purchase of produce, that Plaintiff performed by delivering the produce to Organic Alliance, that Organic Alliance breached the contract by not paying for the produce, and that Plaintiff has been damaged by Organic Alliance's failure to pay. *See* Compl. ¶¶ 16–18, 32. This is sufficient to state a claim for breach of contract.

c. *Conversion*

Plaintiff's eighth cause of action is for conversion against Organic Alliance and Booth. Compl. ¶¶ 60–63. Under California law, "[t]he elements of a conversion claim are (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 601 (9th Cir. 2010) (citing *Oakdale Vill. Grp. v. Fong*, 43 Cal. App. 4th 539, 543-44 (1996)). Plaintiff alleges that Plaintiff was and currently is entitled to possession of a specific principal sum, Compl. ¶ 61, of

which $73,058.50 remains due, ECF No. 42 at 1. Plaintiff further alleges that Defendants Organic Alliance and Booth have failed to turn over the amount due to Plaintiff and that Defendants have "diverted the accounts receivable, assets of the PACA trust, and monies due and owing to Plaintiff to themselves and to other third parties." Compl. ¶ 62. Plaintiff alleges that Plaintiff has suffered damages from this conduct. Plaintiff's allegations are sufficient to state a claim for conversion.

Because Plaintiff has sufficiently stated claims for violations of PACA, for breach of contract, and for conversion, the second and third *Eitel* factors weigh in favor default judgment.

3. Fourth *Eitel* Factor

Under the fourth *Eitel* factor, "the court must consider the amount of money at stake in relation to the seriousness of Defendant's conduct." *PepsiCo Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002); *see also Eitel*, 782 F.2d at 1471–72. "The Court considers Plaintiff's declarations, calculations, and other documentation of damages in determining if the amount at stake is reasonable." *Truong Giang Corp. v. Twinstar Tea Corp.*, No. 06-CV-03594-JSW, 2007 U.S. Dist. LEXIS 100237, at *33, 2007 WL 1545173 (N.D. Cal. Mar. 22, 2007), *adopted by* 2007 WL 1545173 (N.D. Cal. May 29, 2007). Default judgment is disfavored when a large amount of money is involved or unreasonable in light of the potential loss caused by the defendant's actions. *See id.*

Plaintiff seeks to recover $73,058.50 for unpaid produce,[3] at least $37,072.23 in interest, $10,436.50 in attorney's fees, and $2,586.25 in costs. Although not insubstantial sums, the amount that Plaintiff requests is reasonable in light of the fact that Plaintiff shipped produce to Defendants more than three years ago for which Plaintiff still has not received full payment.

[3] As noted above, the USDA awarded $73,306.00, but after the USDA issued its reparation order, Organic Alliance paid Plaintiff $247.50 to fulfill Organic Alliance's obligations under one of the four invoices that were before the USDA. *See* ECF No. 41-3 (Alders Decl.) ¶¶ 8-9.

4. Fifth and Sixth *Eitel* Factors: Potential Disputes of Material Fact and Excusable Neglect

The fifth *Eitel* factor considers the possibility of disputes as to any material facts in the case. Organic Alliance and Booth have failed to make appearances in this case. The Court therefore takes the allegations in the complaint as true. *Fair Hous.*, 285 F.3d at 906. Given that posture, the Court finds that disputes of material facts are unlikely.

The sixth *Eitel* factor considers whether failure to appear was the result of excusable neglect. A summons was issued to Booth on April 30, 2015, ECF No. 8, and a proof of service was filed on June 3, 2015, ECF No. 16. A summons was issued to Organic Alliance on April 30, 2015, ECF No. 7, and an amended proof of service was filed on December 2, 2015, ECF No. 37. *See also* ECF No. 38 (declaration from process server explaining that Booth and Organic Alliance were served on May 18, 2015). Nothing in the record before the Court indicates that the service as to Organic Alliance or Booth was improper. Organic Alliance and Booth, however, have not appeared in this case. Nothing before the Court suggests that Defendants' failure to appear was the result of excusable neglect.

The fifth and sixth *Eitel* factors thus favor entry of default judgment.

5. Seventh *Eitel* Factor: Policy Favoring Decision on the Merits

While the policy favoring decision on the merits generally weighs strongly against awarding default judgment, district courts have regularly held that this policy, standing alone, is not dispositive, especially where a defendant fails to appear or defend itself. *See, e.g.*, *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1061 (N.D. Cal. 2010); *Hernandez v. Martinez*, No. 12-CV-06133-LHK, 2014 WL 3962647, at *9 (N.D. Cal. Aug. 13, 2014). Although Organic Alliance and Booth were served over 10 months ago, Organic Alliance and Booth have never made appearances nor challenged the entry of default against them. The likelihood of the case proceeding to a resolution on the merits is unlikely. The Court finds that the seventh *Eitel* factor is outweighed by the other six factors that favor default judgment. *See Hernandez*, 2014 WL 3962647, at *9 (seventh *Eitel* factor outweighed by remaining six factors

where defendants failed to appear for over a year and a half prior to the default judgment). The Court therefore finds that default judgment is appropriate in this case.

C. Damages

A plaintiff seeking default judgment "must also prove all damages sought in the complaint." *Dr. JKL Ltd.*, 749 F. Supp. 2d at 1046 (citing *Philip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 498 (C.D. Cal. 2003)). Federal Rule of Civil Procedure 55 does not require the Court to conduct a hearing on damages, as long as it ensures that there is an evidentiary basis for the damages awarded in the default judgment. *See Action SA v. Marc Rich & Co.*, 951 F.2d 504, 508 (2d Cir. 1991), *abrogated on other grounds as recognized by Day Spring Enters., Inc. v. LMC Int'l, Inc.*, No. 98-CV-0658A(F), 2004 WL 2191568 (W.D.N.Y. Sept. 24, 2004). Plaintiff has provided supporting declarations and an amortization schedule detailing Plaintiff's requested damages, along with invoices showing the original amounts due for the produce shipped by Plaintiff. *See* ECF No. 41-2 (Monroe Decl.) ¶¶ 7–9, Ex. 1 (amortization schedule); ECF No. 41-3 (Albers Decl.), Ex. 1 (invoices); ECF No. 41-4 (Whitehead Decl.). Plaintiff also submitted with Plaintiff's complaint a copy of the USDA's January 14, 2014 order that awarded reparations to Plaintiff. ECF No. 1-2. Plaintiff has provided an additional declaration and timesheets supporting Plaintiff's request for attorney's fees and costs. *See* ECF No. 41-2 (Monroe Decl.) ¶¶ 10–15, Ex. 2 (timesheets).

Plaintiff requests damages for the invoice value of the unpaid produce, interest on the invoice value of the unpaid produce, and attorney's fees and costs.

1. Unpaid Produce

Under PACA, a dealer who violates its provisions "shall be liable to the person or persons injured thereby for the full amount of damages...sustained in consequence of such violation." 7 U.S.C. § 499e(a). Plaintiff has submitted three invoices showing that Plaintiff shipped produce with an invoice value of $73,058.50 to Organic Alliance: (1) Invoice No. 535460 for $35,699.25; (2) Invoice No. 537175

for $33,782.00; and (3) Invoice No. 540011 for $3,577.25. ECF No. 41-3 Ex. 1. Plaintiff's chief financial officer Tim Albers submitted a declaration indicating that Plaintiff has not received the $73,058.50 due for these invoices.[4] ECF No. 41-3 (Albers Decl.) ¶ 10. The Court finds that Plaintiff's invoices and declaration are sufficient to establish Plaintiff's entitlement to $73,058.50 for the remaining invoice value of the unpaid produce.

2. Interest, Attorney's Fees, and Costs

The Ninth Circuit has held that, in addition to the invoice value of unpaid produce, PACA permits a plaintiff to recover prejudgment interest as well as attorney's fees and costs if the contract between the plaintiff and the defendant stated that the defendant would be liable for interest, attorney's fees, and costs. *Middle Mountain Land & Produce Inc. v. Sound Commodities Inc.*, 307 F.3d 1220, 1224–25 (9th Cir. 2002); *see also Greenfield Fresh*, 2014 WL 5700695, at *4-5 (holding that a PACA plaintiff was entitled to prejudgment interest, attorney's fees, and costs based on the contract between the plaintiff and the defendant). The statute that allows a plaintiff to enforce a USDA reparation award in district court also allows the prevailing plaintiff to collect "a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit." 7 U.S.C. § 499g(b).

In this case, Plaintiff alleges that its contract with Organic Alliance provided that Organic Alliance would be liable for interest at 18% per year on any overdue payments as well as for attorney's fees and costs associated with recovering any overdue payments. To support Plaintiff's allegation, Plaintiff points to the invoices Plaintiff sent to Organic Alliance, all of which include the following language:

> Should any action be commenced between the parties to this contract concerning the sums due hereunder or the rights and duties of any party hereto or the interpretation

[4] Mr. Albers explains that a fourth invoice, number 536132, which was attached to Plaintiff's complaint to the USDA, was eventually paid by Organic Alliance. ECF No. 41-3 ¶¶ 8–9. Accordingly, invoice number 536132 plays no role in the damages calculations in this order.

> of this contract, the prevailing party in such action shall be entitled to, in addition to other relief as may be granted, an award as and for the actual attorney's fees and costs in bringing such action and/or enforcing any judgement granted therein.
>
> A FINANCE CHARGE CALCULATED AT THE RATE OF 1.5% PER MONTH (18% ANNUALLY) WILL BE APPLIED TO ALL PAST DUE ACCOUNTS.

ECF No. 41-3 Ex. 1. The Ninth Circuit in *Middle Mountain* declined to reach the issue of whether invoices were sufficient to establish a contractual right to interest, attorney's fees, and costs and instead remanded the issue to the district court. *See* 307 F.3d at 1225. In other contexts, however, the Ninth Circuit has held that terms in an invoice for the sale of goods are included in the parties' contract. *See United States ex rel. Hawaiian Rock Prods. Corp. v. A.E. Lopez Enters.*, 74 F.3d 972, 976 (9th Cir. 1996) (awarding concrete suppliers prejudgment interest based on the terms in the supplier's invoices). Other courts in this District have determined that contractual language on invoices is sufficient in PACA cases to establish contractual obligations, including obligations to pay prejudgment interest, attorney's fees, and costs. *See, e.g.*, *Greenfield Fresh*, 2014 WL 5700695, at *4–*5 (language on invoices sufficient to establish contractual right to collect prejudgment interest, attorney's fees, and costs); *C.H. Robinson Co. v. Marina Produce Co.*, No. C 05-04032-WHA, 2007 WL 39311, at *4 (N.D. Cal. Jan. 4, 2007) (same). The Court concludes that Plaintiff's invoices are sufficient to establish that Plaintiff is entitled to collect prejudgment interest, attorney's fees, and costs from Defendants.

a. *Interest*

Plaintiff requests $37,072.23 in prejudgment interest through December 14, 2015, plus $36.03 per day from December 14, 2015 through the date of judgment. ECF No. 42 at 10–11. Plaintiff also requests post-judgment interest at the rate of 18% per year on all unpaid principal sums due. *Id.* In support of this request, Plaintiff provides an amortization schedule calculating interest at 18% per year as provided

for in Plaintiff's invoices, which, when divided by 365 days in a year amounts to 0.04932% per day. *See* ECF No. 41-2 (Monroe Decl.) ¶¶ 8-9, Ex. 1. Plaintiff's amortization schedule shows that as of December 15, 2015—the day *after* Plaintiff filed its renewed motion for default judgment—Defendants would have had to pay $110,130.73 to fully repay the debt to Plaintiff. Of this amount, $73,058.50 represents unpaid principal and $37,072.23 represents accrued finance charges. *See* ECF No. 41-2 ¶ 9, Ex. 1.[5] Moreover, applying the 0.04932% daily rate to the principal amount of $73,058.50 yields $36.03 per day, as Plaintiff has requested. The Court finds that Plaintiff's calculations are sufficient to establish Plaintiff's entitlement to $37,072.23 for prejudgment interest on the invoice value of the unpaid produce through December 15, 2015.[6] Moreover, Plaintiff has shown that Plaintiff is entitled to an additional $3,603.00 in prejudgment interest, calculated as $36.03 per day for each of the 100 days between December 15, 2015 and the date of this order, March 24, 2016. Thus, Plaintiff is entitled to $40,675.23 in prejudgment interest. Furthermore, the Court finds it appropriate to award post-judgment interest at the contractual rate of 18% per annum on all unpaid principal sums due until fully paid.

The fact that the USDA awarded a lower interest rate does not compel this Court to reduce the amount of interest awarded to Plaintiff. In the January 14, 2014 reparation award that Plaintiff now seeks to enforce, the Secretary of Agriculture awarded only 0.13% annual interest to Plaintiff, not the 18% annual rate that Plaintiff now requests. ECF No. 1-2. The Secretary of Agriculture used the rate equal to the weekly average 1-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. ECF No. 1-2 (citing 28 U.S.C. § 1961). Plaintiff points out that in at least one decision, the USDA awarded an 18% interest rate, which was higher than the interest rate available under

[5] While Paragraph 9 of the Monroe declaration, which explains these calculations, appears to have errors regarding the total amount due ($106,167.56 vs. $110,130.73) and the date of calculation (Dec. 14, 2015 vs. Dec. 15, 2015), the Court was able to replicate the calculations on Plaintiff's amortization schedule, ECF No. 41-2 Ex. 1, using a date of December 15, 2015.

[6] As noted above, Plaintiff's amortization schedule ran through December 15, 2015, not the December 14, 2015 date recited in Plaintiff's motion.

28 U.S.C. § 1961, based on a contract between the parties. *See* ECF No. 42 at 13 (citing ECF No. 42-1, Decision and Order, *H.P. Skolnick, Inc. v. California Fruit Markets, Inc.*, PACA Dkt. No. R-07-105 (Apr. 9, 2008)). In the instant case, it appears that Plaintiff simply did not seek 18% interest from the Secretary of Agriculture, even though Plaintiff may have been entitled to do so.

While Plaintiff has not cited any authority for the proposition that a district court can award interest at a rate higher than the rate awarded by the USDA, the Ninth Circuit has ruled that "a district court has broad discretion to award prejudgment interest to PACA claimants." *Middle Mountain*, 307 F.3d at 1225–26. Moreover, this Court and other courts in this District have awarded 18% annual interest in similar PACA cases. *See, e.g.*, *Tom Ver LLC v. Organic All., Inc*, No. 13-CV-03506-LHK, 2015 WL 6957483, at *12 (N.D. Cal. Nov. 11, 2015) (finding that the plaintiff was entitled to 18% interest against Organic Alliance); *Church Bros., LLC v. Garden of Eden Produce, LLC*, No. 5:11-CV-04114 EJD, 2012 WL 1155656, at *3 (N.D. Cal. Apr. 5, 2012) (finding that "[a]lthough interest normally accrues at the legal rate, the interest rate of 18% on unpaid accounts agreed to by the parties in the contract created by the invoices is the correct rate to apply to these transactions"). *See also Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1108 (9th Cir.1998) (in real estate context, "affirm[ing] the district court's grant of post-judgment interest based upon the mutually agreed upon contract rate"). Accordingly, the Court finds that Plaintiff here is entitled to an 18% annual rate for prejudgment and post-judgment interest, as calculated above.

b. *Attorney's Fees and Costs*

As previously discussed, Plaintiff has a contractual right to recover attorney's fees from Organic Alliance and Booth. Where a plaintiff has a contractual right to attorney's fees, the plaintiff has a right under PACA to enforce the right to attorney's fees as part of the perishable agricultural commodities contract. *Middle Mountain Land*, 307 F.3d at 1224–25.

Courts in the Ninth Circuit calculate attorney's fees using the lodestar method, whereby a court multiplies "the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate."

Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 978 (9th Cir. 2008) (citation omitted). A party seeking attorney's fees bears the burden of demonstrating that the rates requested are "in line with the prevailing market rate of the relevant community." *Carson v. Billings Police Dep't*, 470 F.3d 889, 891 (9th Cir. 2006) (citation omitted). Generally, "the relevant community is the forum in which the district court sits." *Camacho*, 523 F.3d at 979 (citing *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997)). Typically, "[a]ffidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases...are satisfactory evidence of the prevailing market rate." *U. Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

Here, Plaintiff submitted a declaration from Plaintiff's attorney June Monroe as well as timesheets for Ms. Monroe and for Bart M. Botta, the senior partner at the firm where Ms. Monroe works. ECF No. 41-2 (Monroe Decl.) and Ex. 2 (timesheet). Ms. Monroe's hourly rate was $295.00 per hour until August 2015, when it was raised to $335.00 per hour. ECF No. 41-2 ¶ 11. Ms. Monroe states in her declaration that other attorneys specializing in PACA litigation with comparable levels of experience bill their time at or above $350.00 per hour. *Id.* Mr. Botta's hourly billing rate was $395.00 per hour. *Id.* Ms. Monroe and Mr. Botta were the only timekeepers listed on Plaintiff's timesheets.

Courts have held that rates of $250 per hour to $370 per hour were reasonable for attorney's fees in similar PACA cases. *See Greenfield Fresh*, 2015 WL 1160584, at *4 (N.D. Cal. March 13, 2015) (finding that attorney's fees ranging from $275 per hour to $370 per hour were reasonable in a PACA case); *C.H. Robinson Co.*, 2007 WL 39311, at *4 (finding that $250 per hour was reasonable for attorney's fees in a PACA case); *Sequoia Sales, Inc. v. P.Y. Produce, LLC*, No. CV 10-575 CW (NJV), 2011 WL 3607242, at *9 (N.D. Cal. July 29, 2011) (finding attorney's fees of $285 per hour to $350 per hour were reasonable in a PACA case). In breach of contract cases, courts in this District have approved hourly rates of $500 or more. *See, e.g.*, *Cataphora Inc. v. Parker*, 848 F. Supp. 2d 1064, 1069 (N.D. Cal. 2012) (finding an hourly rate of $500 per hour reasonable in a breach of contract case). In light of these cases and the declaration submitted by Ms. Monroe, the Court concludes that Plaintiff's requested rates for Plaintiff's attorneys are

reasonable.

The Court has reviewed counsel's declarations and timesheets, which contain descriptions of each activity performed and list time worked in increments of hundredths of an hour. The Court finds Plaintiff's timesheets adequately detailed and related to the work required for this litigation, but only up to a point. On November 25, 2015, this Court identified several deficiencies in Plaintiff's first motion for default judgment and denied that motion without prejudice. ECF No. 35. The deficiencies identified in the Court's November 25, 2015 order should not have been present in Plaintiff's initial motion, and the fact that Plaintiff had to file the instant, renewed motion does not entitle Plaintiff to *additional* attorney's fees. Accordingly, the Court will only allow Plaintiff to recover attorney's fees for time spent on the case up to and including November 24, 2015.

According to Plaintiff's records, from the time of pre-filing investigation in late 2014 through November 24, 2015, Mr. Botta billed 5.0 hours to this matter, and Ms. Monroe billed 20.2 hours. It appears that Ms. Monroe did not bill her client for several time entries and that unbilled time was not included in Plaintiff's request for attorney's fees. *See, e.g.*, ECF No. 41-2 Ex. 2 at 1 (noting "no charge" next to 1/29/2015 entry worth $442.50). Based on the amount counsel billed through November 24, 2015, the court awards Plaintiff $7,321.00 in attorney's fees, corresponding to $1,975 for Mr. Botta and $5,346.00 for Ms. Monroe.

Plaintiff also requests costs totaling $2,586.25, calculated as $400.00 for the civil filing fee, plus $500.00 for the U.S. Department of Agriculture filing fee, plus $1,686.25 in process server fees. ECF No. 41-2 (Monroe Decl.) ¶ 15. The Court finds that the requested filing fees totaling $900.00 are allowable under 28 U.S.C. § 1920. The Ninth Circuit has held that "private process servers' fees are properly taxed as costs." *Alflex Corp. v. Underwriters Labs., Inc.*, 914 F.2d 175, 178 (9th Cir. 1990) (per curiam). In this case, however, Plaintiff has not submitted any invoices or other explanation for how Plaintiff spent $1,686.25 in process server fees. Accordingly, the court limits Plaintiff's recoverable costs to $900.00 for Plaintiff's filing fees paid to the Court and to the USDA.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff's motion for default judgment as to Organic Alliance and Parker Booth. The Court enters judgment against Organic Alliance and Parker Booth for $121,954.73, corresponding to $73,058.50 for the unpaid invoice value of the produce, $40,675.23 in prejudgment interest, $7,321.00 in attorney's fees, and $900.00 in costs. Post-judgment interest on the principal amount of $73,058.50 shall accrue at a rate of 18% per annum until paid.

IT IS SO ORDERED.

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S & S PACKING, INC. v. SPRING LAKE RATITE RANCH, INC.
No. 5:13-cv-386-Oc-10PRK.
Court Decision.
Filed May 31, 2016.

PACA – Commission – Contracts – Invoicing – Market news prices – Purchase orders.

[Cite as: No. 5:13-cv-386-Oc-10PRK, 2016 WL 3049606 (M.D. Fla. May 31, 2016)].

The Court affirmed the Decision and Order of the Judicial Officer in all respects, granting summary judgment in favor of Defendant. In so affirming, the Court found that: (1) Plaintiff failed to obtain invoices from Defendant, as required by contract between the parties; (2) the Judicial Officer was proper in relying on pricing information from the USDA Market News Service to determine an appropriate sales price for Defendant's produce; (3) Plaintiff violated the Perishable Agricultural Commodities Act by failing to obtain specific authorization from Defendant for double commissions; and (4) Plaintiff improperly charged "pooled losses" to Defendant. The Court also declined to consider six additional claims by Plaintiff, holding that it would not rule on claims that had not been considered by the Judicial Officer.

United States District Court,
Middle District of Florida, Ocala Division.

PERISHABLE AGRICULTURAL COMMODITIES ACT

OPINION AND ORDER

WILLIAM TERRELL HODGES, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

The Perishable Agriculture Commodities Act, 7 U.S.C. § 499a, *et seq.,* ("PACA"), "regulates the sale of perishable agricultural commodities to protect produce sellers from unscrupulous or insolvent dealers, brokers, and commission merchants." *Country Best v. Christopher Ranch, LLC*, 361 F.3d 629, 631 (11th Cir. 2004). *See also In re Lombardo Fruit & Produce Co.,* 12 F. 3d 806, 808 (8th Cir. 1993) ("PACA was designed to protect small farmers and growers from the sharp practices of financially irresponsible and unscrupulous brokers in perishable commodities.") (quotation and citations omitted); *Harry Klein Produce Corp. v. U.S. Department of Agric.*, 831 F. 2d 403, 405 (2d Cir. 1987) ("The PACA is a remedial statute designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility.").

The Act specifically covers sellers, dealers, brokers, and commission merchants who are licensed under the statute, or operating subject to PACA licensing, and who engage in transactions involving interstate or foreign commerce. *See* 7 U.S.C. §§ 499a, 499c. Among other things, section 499b of PACA deems it to be unlawful for any commission merchant, dealer or broker

> to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction....

7 U.S.C. § 499b(4). A violation of any portion of § 499b renders the commission merchant, dealer, or broker liable to the person or persons injured "for the full amount of damages...sustained in consequence of

such violation." 7 U.S.C. § 499e(a).

In the present case, a grower, Spring Lake Ratite Ranch, Inc., ("Spring Lake") filed a claim with the United States Department of Agriculture ("USDA") under PACA, claiming that S & S Packing, Inc., ("S & S Packing") a growers agent, mishandled Spring Lake's 2010 blueberry crop, and overcharged Spring Lake for various expenses and commissions. On November 27, 2012, a Judicial Officer with the USDA issued a reparation award in favor of Spring Lake and against S & S Packing in the amount of $109,295.65 plus interest and costs. The case is now before this Court on an appeal from that reparations award.

Under section 499g(c) of PACA, this appeal is tried *de novo* in this Court, "and shall proceed in all other respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima facie evidence of the facts stated therein." The parties engaged in discovery, and the appeal was tried before the Court without a jury on December 8, 2014. The parties have since submitted their proposed findings and conclusions (Docs. 45-46), and the case is ready for decision without the need for further hearings or oral argument.

For the reasons discussed below, the Court finds that the November 17, 2012 Decision and Order of the Secretary of Agriculture is due to be affirmed.

I. FACTUAL BACKGROUND

A. The Parties

Spring Lake is a corporation in the business of growing blueberries, and is located at 25688 Powell Road, Brooksville, Florida 34602. The company is owned by Ruth and Larry Davis. Mrs. Davis helped in the field and handled the bookkeeping and payroll; Mr. Davis was in charge of growing the blueberries. Spring Lake originally operated as an ostrich and emu farm, but started growing blueberries in 1999. Most years, Spring Lake would harvest about 100,000 pounds of blueberries. In 2010, Spring Lake's farm consisted of 20 acres, and produced approximately 90,000 pounds of fruit.

S & S Packing was incorporated in 2009 and is a licensed "grower's agent" under PACA, *see* 7 U.S.C. § 499c.[1] A "grower's agent" is defined as "any person operating at shipping point who sells or distributes produce in commerce for or on behalf of growers or others and whose operations may include the planting, harvesting, grading, packing, and furnishing containers, supplies, or other services." 7 C.F.R. § 46.2(q). S & S Packing is owned and operated by Sam Mills.

Mr. Mills also owns a separate nursery, Foliage Farms, Inc., which originally operated as an orchid grower, but eventually transitioned into a blueberry grower in 2000 or 2001. Foliage Farms' blueberry business started out quite small, but by the 2009 harvest year, the company had two separate blueberry farms, and a sufficiently large crop to sell on the open market. In February 2009, Foliage Farms entered into a written contract with an entity known as SunBelle (a marketer and grower), through which SunBelle would market and sell all of Foliage Farms' blueberry crops.

At trial, Mr. Mills testified that S & S Packing was formed for the purpose of packing Foliage Farms' blueberries and, ultimately, "to create a business where we could pack other people's fruit." (Doc. 43, p. 22). By 2010, S & S Packing had contracts with 14 other growers, including Foliage Farms and Spring Lake. SunBelle and S & S Packing did not have any written agreement between them, and S & S Packing did not have any partnership or equity interest in SunBelle. The only relevant contract that existed involving SunBelle was between Foliage Farm and SunBelle.

B. The Contract

2009, S & S Packing, through its owner Sam Mills, reached out to Spring Lake, and offered to pack, market, and sell their blueberries at a better price than Spring Lake's current grower's agent had obtained. S & S Packing also offered to help with Spring Lake's harvest, and to better deal with the farm's "red berries."[2]

[1] At the time of the transactions at issue in this case, S & S Packing was not licensed under PACA. S & S Packing's license was processed and issued on January 13, 2011, retroactive to April 2010.

[2] "Red berries" are fruit that has not yet ripened. Some grower's agents simply dispose of

On November 19, 2009, Spring Lake and S & S Packing entered into a written contract whereby S & S Packing would act as a grower's agent, to market, distribute, and sell Spring Lake's 2010 blueberry crop. The contract provides, in relevant part:

AGREEMENT

> This describes an agreement between S & S Packing, Inc. ("S&S") and Spring Lake Blueberry Farm ("Grower") on the following terms:
>
> The purpose of this agreement is to enable Grower to grow, harvest and deliver high quality fresh blueberries to S&& for the purpose of packing, handling, shipping and selling under any brand S&S deems appropriate to obtain the best return for both S&S and Grower.
>
> 1. PRODUCT: Beginning with the 2010 season, S&S will pack and ship the entire US Grade # 1 blueberry production grown by Grower. Grower is responsible for all aspects of growing, harvesting and pre-cooling product resulting in delivery to S&S facilities in a manner consistent with recognized industry standards as to condition and temperature. The attached Exhibit A contains further information on acceptable conditions and methods of delivery, and is a part of this Agreement. S&S will be available at all reasonable times to consult with Grower on any method, process, or procedure necessary for the growing, harvesting and handling of the product.
>
> Grower agrees to be inspected and provide information to any third party S&S selects to facilitate the sale of the product. Grower agrees to grow, harvest and handle all product in accordance with all applicable Governmental

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red berries or return them to the grower. S & S Packing offered to retain the berries for a few days until they ripened, and then pack, market, and sell them.

Agencies and Regulations. All parties will work together to ensure all product meets any identification requirements of Government or parties marketing the product.

2. SALES: S&S shall with the help of its marketing partners determine the price at which product is sold and to whom it is sold. S&S shall invoice, collect and mediate any necessary matters concerning said sales.

3. COMMISSIONS: The product net sales price received by S&S, less eight percent (8%) sales commission, shall be paid by S&S to Grower on all Grower's fruit sold and delivered by S&S. The sales price shall be determined by an average of ALL fruit sold in the week delivered. This shall be known as the POOL PERIOD and the starting and ending of each POOL PERIOD shall be determined by S&S before the 2010 harvest begins. GROWER WILL BE PAID IN 30 DAYS OF DELIVERY OF FRUIT TO S&S.[3]

4. PACKING: S&S will pack, label and arrange for shipping all fruit deemed Grade #1 delivered to its facility. Grower will have the right to inspect all processing and handling of its product in any part of the packing chain contained in the S&S facility. S&S will charge a fee of One Dollar ($1.00) per pound for finished product. This will include ALL PACKING MATERIALS needed to pack, handle and distribute product. S&S will NOT charge a handling fee but will accept and inspect fruit and test for temperature and fitness of product at its own expense. S&S WILL FURNISH A REFRIGERATED TRAILER AT NO

[3] A "pool period" is a period of time, usually 7 days, during which fruit received from participating growers is intermingled by the packer and prepared for marketing. S & S Packing's "pool period" typically ran from Thursday to the following Wednesday. It normally takes S & S Packing 48 hours after receipt of fruit to process, cool, and pack it for shipment.

> CHARGE.
>
> 5. CULLS: Grower will own the fruit deemed cull and shall NOT be charged a fee for removing promptly the culls from the S&S packing facility. At Grower's request S&S will attempt to sell culls.
>
> * * * * * * * * * *
>
> 8. ENTIRE UNDERSTANDING: This agreement contains the entire agreement between the parties. No oral understandings or statements contrary to or modifying the terms of this agreement exist now or shall have any effect in the future unless reduced to writing and signed by both parties.

(Pltf. Ex. 1-A, 1-B).

The Parties operated under the contract for the 2010 growing season. The blueberry season in 2010 ran from approximately April 14th through May 25th. Spring Lake delivered blueberries to S & S Packing over a five week period (documented as "Week 15 – Week 19" in S & S Packing's paperwork). Sam Mills was "pleased" with his arrangement between Foliage Farms and SunBelle, so he decided, in his role as owner and officer of S & S Packing, to simply deliver all of its 14 growers' berries for the 2010 season, including Spring Lake's berries, to SunBelle for marketing and sale. (Doc. 43, p. 28). S & S Packing did not negotiate any prices with SunBelle, or make any inquiries with other marketers or sellers to ascertain whether the prices SunBelle obtained for the berries were higher or lower than the rest of the market.

SunBelle charged S & S Packing an 8% commission plus costs and fees for selling and marketing the berries. S & S Packing passed all of these charges and commissions onto its growers, including Foliage Farms and Spring Lake. Pursuant to the contract with Spring Lake, S & S Packing also charged Spring Lake an additional 8% commission for S & S Packing's own services, as well as a packing fee of $1.00 per pound of fruit.

S & S Packing used three pack sizes for blueberries – a 4.4 ounce "clamshell," a 6 ounce "clamshell," and a dry pint. These packages were then placed into units or flats. USDA regulations provide that the flats which contain 4.4 ounce clamshells should weigh in total between 3.4-3.8 pounds; the flats containing 6 ounce clamshells should weigh between 4.8-5 pounds, and the flats containing dry pints should weigh 9 pounds. Growers had no control over the size of the units in which their fruit was packed day to day – it depended on the orders S & S Packing received from SunBelle.

When fruit was sold, S & S Packing paid all of its growers (including Foliage Farms and Spring Lake) using a pro rata basis known as "pools." At the end of a pool week, growers were credited with proceeds on a pro rata basis based upon the number of units (aka flats) packed by S & S Packing in that pool week. In a given pool week, the total proceeds received for all fruit sold in the pool period was divided by the total number of units (regardless of size) shipped during that week. The net proceeds, divided by the total number of units shipped, equaled the average price per unit. Each grower was then compensated for the number of units it packed based upon the average price per unit in the pool period. Growers were <u>not</u> paid by the pound.

Under this pooling method, a flat containing 4.4 ounce clamshells and weighing only 3.4-3.6 pounds, would therefore receive the same price as a flat containing dry pints and weighing 9 pounds. As a result, it was possible that a grower using the larger packing containers (dry pints) would receive a lower amount of sales revenue for the same pounds of fruit sold as a grower using smaller packing containers (who accordingly filled up more flats).

Spring Lake delivered 80,520.10 pounds of blueberries to S & S Packing (additional berries weighing approximately 10,000 pounds were sold through a different grower's agent). S & S Packing paid to Spring Lake a total of $212,268.72 for the 2010 growing season.

C. S & S Packing's Records

S & S Packing's records, at least for the 2010 season, were rather informal and confusing. When a grower delivered fruit to S & S Packing,

the company recorded the number of containers (called "lugs"), and the pounds of fruit received, on handwritten documents (Plaintiff's Exhs. 2A-2AB). The same document would also note the temperature of the fruit and the number of finished boxes. However, these records were incomplete, as some of them did not include any weights at all. *See* Plaintiff's Exhs. 2C-2D.

When S & S Packing shipped the packaged fruit to SunBelle, S & S Packing used another handwritten document, entitled "Load and Shipping Ticket." *See* Plaintiff's Exhs. 3A, 3C, 4A, 4C, 4E, 4G, 5A, 5C, 5E, 5G, 5I, 5L, 5N, 5P, 5R, 6A, 6C, 6E, 6G, 6I, 6L, 6N, 6P, 6R, 6T, 6V, 6X, 6Z, 6AA, 6AB, 6AC, 6AE, 7A, 7C, 7E, 7G, 7I, 7K-7M, 7O, 7Q, 7S, 7U-7X, 7Z, 7AB, 7AD, 7AF, 7AH, 8A, 8C, 8F, 8H, 8J. These documents list the load date, the pick up and shipping address, the size of the packing containers (4.4 ounce, 6 ounce, or pints), the number of cases, and the carrier information (including temperature of the refrigerated trucks). These documents do not list any sales price (either per pound or per unit), do not list commissions or other expenses, and do not identify the grower of the blueberries being shipped.

In contrast, SunBelle prepared more detailed records that it submitted to S & S Packing after the fruit was sold. These documents identify the number of cases received, any cases lost (due to spoilage), cases sold, the average price per case, the total sales, the 8% marketing fee charged by SunBelle, net sales, freight and handling costs, and the total revenues returned to S & S Packing. *See* Plaintiff's Exhs. 3B, 3D, 4B, 4D, 4F, 4H, 5B, 5D, 5F, 5H, 5J, 5M, 5O, 5Q, 5S, 6B, 6D, 6F, 6H, 6J, 6M, 6O, 6Q, 6S, 6U, 6W, 6Y, 6AD, 6AF, 7B, 7D, 7F, 7H, 7J, 7N, 7P, 7R, 7T, 7Y, 7AA, 7AC, 7AE, 7AG, 7AI, 8B, 8D, 8G, 8I, 8K. However, these documents again did not identify the fruit by grower, and there is no evidence that any records exist that identify the blueberries by grower that were sold in the 2010 season.

It appears that the only records that S & S Packing ever submitted to Spring Lake are entitled "S & S Packing Settlement." Those records list, for each week that Spring Lake delivered blueberries to S & S Packing, the total number of units, the average price for each unit, the packing and other fees charged (including the SunBelle commission), the 8% commission also charged by S & S Packing, and the "total settlement"

paid to Spring Lake. *See* Plaintiff's Exhs. 9A-9G. These documents were prepared well after the blueberries were sold and S & S Packing received its documentation from SunBelle.

For Week 15, S & S Packing paid to Spring Lake $11,300.91; for Week 16, Spring Lake was paid $14,845.54; for Week 17, $87,136.66; for Week 18, $43,914.16, and for Week 19, $15,250.18. (Plaintiff's Exhs. 9A-9E).[4] S & S Packing later issued corrected settlement sheets for Week 16 stating that Spring Lake was owed an additional $10,361.75 (Plaintiff's Exhs. 9F-9G; *see also* Plaintiff's Exh. 12). The settlement sheets state that a check in this amount was issued, and S & S Packing has submitted a copy of the check (Plaintiff's Exh. 24), but there is no evidence that Spring Lake ever received or cashed the check. In addition, while S & S Packing conceded that this amount was due and owing to Spring Lake due to calculation errors, (*see* Joint Pretrial Statement, Doc. 31, pp. 5-6), at trial, S & S Packing stated that the actual amount due and owing to Spring Lake for these miscalculations is now only $3,942.54 (which S & S Packing has not yet paid to Spring Lake) (Doc. 43, pp. 93-95).

D. The Dispute Before the USDA

Spring Lake was not happy with the amount of revenue it received from S & S Packing, and on July 21, 2010, it filed an informal complaint for reparation under PACA with the USDA. *See* 7 U.S.C. § 499f(a)(1), (2); 7 C.F.R. § 47.39(a)(2). The informal complaint alleged that S & S Packing was not properly licensed under PACA; charged double commissions; charged Spring Lake for "pooled losses;" paid different growers at different prices; refused to help Spring Lake hire manpower to harvest the fruit; did not send reports to Spring Lake in a timely fashion, if at all; and miscounted pallets of blueberries.

PACA investigated Spring Lake's complaints, and conducted an audit. On June 9, 2011, PACA issued its findings, which stated that: (1) the written contract between S & S Packing and Spring Lake authorized S & S Packing to charge a packing fee of $1.00 per pound, not $1.00 per

[4] S & S Packing also gave Spring Lake a $50,000 advance at the beginning of the growing season to assist with harvesting costs.

flat; (2) the fees charged by S & S Packing for the US Highbush Blueberry Council (USHBC) are required to be paid and therefore were not inappropriate or illegal; (3) Spring Lake was paid the same price per pound before expenses as at least one other grower; (4) S & S Packing failed to invoice Spring Lake's fruit, and failed to disclose the additional 8% commission charged by SunBelle; (5) S & S Packing was not responsible for providing Spring Lake with manpower to harvest fruit; (6) S & S Packing's deduction of $2,889.36 for pooled losses in Weeks 17-19 was not mentioned in the contract between S & S Packing and Spring Lake, and therefore was not a proper expense; and (7) Spring Lake had not yet provided evidence that S & S Packing miscounted the number of pallets on the loading tickets. The bottom line results of the audit was a finding that S & S Packing owed Spring Lake $31,929.16.

PACA recommended that Spring Lake attempt to mediate or settle the dispute. Any such attempts were unsuccessful, and on September 13, 2011, Spring Lake filed a formal complaint with the USDA, which laid out in more detail the claims asserted in the informal complaint. *See* 7 C.F.R. § 47.6(a)(1). The formal complaint also alleged that S & S Packing charged a packing fee of $1.00 per pound (as stated in the contract), when it orally agreed to charge only $1.00 per flat; that S & S Packing was not properly certified under GLOBAL GAP; and that S & S Packing miscalculated Spring Lake's revenues for Weeks 18, 19, and 20. Spring Lake sought recovery of $109,295.65.

S & S Packing filed an answer to the formal complaint, and both parties submitted the dispute to the USDA pursuant to the documentary procedures set forth in 7 C.F.R. § 47.20. The parties were given the opportunity to submit evidence and to file briefs. They waived oral argument or a hearing.

On November 17, 2012, the USDA Judicial Officer issued a Decision and Order (Doc. 12-1). The Judicial Officer relied on the parties' pleadings, the PACA audit, the contract between Spring Lake and S & S Packing, and evidence submitted by both parties, including Load and Shipping Tickets, settlement sheets, canceled checks, the handwritten documents listing the weight of the fruit delivered from Spring Lake to S & S Packing, and several spreadsheets S & S Packing prepared for the USDA. The Judicial Officer also relied on S & S Packing's attorney's

response to the PACA audit, in which the attorney stated, in part:

> While S&S does not submit to Sunbelle a document labeled "invoice," S&S uses a "purchase order" and a "load and shipping ticket" which serves as an invoice....The commission S&S pays to its customer Sunbelle is for a separate service governed by a separate contract, and is thus not germane to the contract relationship between S&S [Respondent] and Spring Lake Blueberry [Complainant]....

(Doc. 12-1, p. 7). The attorney also agreed not to challenge the $2,889.36 charged for pooled losses, and stated that S & S Packing would reimburse Spring Lake for this amount.

The Judicial Officer determined that S & S Packing admitted "to breaching its contract with Complainant by failing to invoice or obtain invoices from its customer or agent, Sunbelle, Miami, Florida, as required by paragraph 2 of the contract." (Doc. 12-1, p. 7). The Judicial Officer cited to 7 C.F.R. § 46.14, which requires that records be kept "in sufficient detail as to be readily understood and audited" and to 7 C.F.R. § 46.19, which requires that sales tickets "shall bear printed serial numbers running consecutively and shall be used in numerical order so far as practicable....The sales tickets shall be prepared and all details of the sale shall be entered on the tickets in a legible manner in order that an audit can be readily made." The Judicial Officer then stated that "[t]he fact that Respondent did not produce numbered invoices to Sunbelle or obtain numbered invoices from Sunbelle would be reason enough to shed serious doubt upon the accuracy of Respondent's reported sales, making an accurate audit impossible." (*Id.*, pp. 7-8).

The Judicial Officer also noted that S & S Packing had an undisclosed side contract with Sunbelle, and that S & S Packing failed to account truly and correctly for pooled blueberry losses in Weeks 17-19, in violation of 7 C.F.R. § 46.32(b). Based on the failure to produce invoices as required by PACA and the contract between Spring Lake and S & S Packing, the failure to account for pooled losses, and the undisclosed side contract, the Judicial Officer concluded that he was "unable to rely on any of Respondent's sales figures." (*Id.*, p. 8).

Thus, the Judicial Officer relied instead on USDA Market News Reports –in particular the average terminal market prices reported by USDA Market News Service in Miami, Florida. (Doc. 12-1, pp. 8-9). Using the total USDA Market News price, less S & S Packing's documented and allowed expenses (no pooled losses and no commissions charged by SunBelle), the Judicial Officer determined that the Gross Sales for Spring Lake's blueberries was $524,854.05, Total Allowable Expenses were $122,992.54, and S & S Packing's Net Sales were $401,861.51. S & S Packing paid to Spring Lake $212,268.72. Therefore, S & S Packing still owed to Spring Lake $189,592.79. (Id., p. 9). However, because Spring Lake only demanded $109,295.65 in its formal complaint, the Judicial Officer limited his award to Spring Lake to that lower amount, plus interest at a rate of .17% per annum, and $500 in costs. (Doc. 12-1, pp. 9-10, 12). The Judicial Officer did not consider or rule on any of the other claims asserted by Spring Lake in its formal complaint.

S & S Packing filed a petition for reconsideration, and on July 17, 2013, the USDA issued its order granting the petition in part and denying it in part. The USDA rejected all of S & S Packing's arguments save one, that $6,047.04 for freight charges should have been allowable expenses charged to Spring Lake. This lowered the amount the USDA found S & S Packing to have underpaid Spring Lake to $183,545.75. However, since Spring Lake only sought to recover $109,295.65, the reconsideration order again limited the award to that amount, plus interest and costs. In particular, the reconsideration order again recognized that S & S Packing failed to properly invoice, failed to keep appropriate records, and improperly charged SunBelle's commission to Spring Lake. The reparation award was affirmed.

S & S Packing then filed its appeal and request for a trial *de novo* in this Court, pursuant to 7 U.S.C. § 499g(c).[5]

[5] On September 12, 2013, Spring Lake filed a counterclaim in this Court, for the first time arguing that it should be awarded the full amount of damages stated by the Judicial Officer, $189,592.79 (Doc. 12). S & S Packing moved to dismiss the counterclaim (Doc. 14), which the Court granted on September 11, 2014 (Doc. 29).

II. STANDARD OF REVIEW

The standard of review before this Court is stated in 7 U.S.C. § 499g(c):

> Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs. Such petition and pleadings certified by the Secretary upon which decision was made by him shall upon filing in the district court constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court.

The Eleventh Circuit has previously determined in a *de novo* appeal of a PACA decision, where the decision and order cites explicit grounds for its determination of a reparations award, it is only those grounds that may be considered on appeal. *Georgia Vegetable Co., Inc. v. Relan*, 731 F.2d 798, 801 (11th Cir. 1984). Thus, the Court will limit its review to the issues resolved by the Judicial Officer: (1) S & S Packing's lack of proper invoicing and the Judicial Officer's reliance upon the USDA Market News Prices; (2) the charging of SunBelle's commissions to Spring Lake; and (3) the charging of pooled losses to Spring Lake.[6]

However, because this is a trial *de novo*, the Court allowed evidence in addition to that introduced before the USDA, in accordance with the applicable Federal Rules of Civil Procedure, and the rules of this Court.[7]

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[6] The Judicial Officer also determined that S & S Packing was either licensed or subject to license by PACA at the time of the events in question. (Doc. 12-1, p. 5). The Parties do not appear to be challenging this finding and it is undisputed that S & S Packing obtained a PACA license, retroactive to April 2010.

[7] Nearly five months after the close of discovery, S & S Packing moved to amend its exhibit list to add newly discovered evidence (Doc. 38). S & S Packing provided no explanation for the late addition of this evidence; the majority, if not all of the evidence appears to have been created by S & S Packing and in its possession for several years;

See Relan, 731 F.2d at 802. *See also G & T Terminal Packaging Co., Inc. v. Hawman*, 122 F.3d 1056 (2d Cir. 1995).

The findings of fact in the USDA's Decision and Order will be considered *prima facie* evidence of the facts stated therein; meaning that "they shall stand as the established facts until sufficient evidence is produced on the trial to overcome them." *Spano v. Western Fruit Growers*, 83 F.2d 150, 152 (10th Cir. 1936). The statute creates a rebuttable presumption, with the burden of proof resting on the party who initiates the appeal (in this case S & S Packing). *Id. See also Frito-Lay v. Willoughby*, 863 F.2d 1029, 1033 (D.C. Cir. 1988) ("The Act merely creates a rebuttable presumption. It establishes a rule of evidence and does not prevent any defense."); *Wesco Foods Co. v. De Mase*, 194 F. 2d 918, 919 (3rd Cir. 1952) ("Under the act of Congress, the findings in the hearing before the Department of Agriculture are prima facie correct."); *Barker-Miller Distrib. Co. v. Berman*, 8 F. Sup. 60, 62 (W.D.N.Y. 1934) ("The present proceeding is not in the nature of an appeal from or a review of that determination. It is a proceeding de novo, but, by virtue of the statute, the prima facie case made out by the findings and order of the Secretary of Agriculture will prevail unless overcome by evidence submitted by defendant.").

S & S Packing argues that the Court need not afford any deference or presumption of correctness to the findings of the USDA's Judicial Officer's findings of fact and Decision and Order. However, there must be some degree of deference afforded to these findings and orders by virtue of the statue itself directing the Court to consider them *prima facie* evidence. Any other interpretation would require the Court to completely ignore the entire administrative process, ignore the statute, and put the burden back on the grower to prove up the very claim that it already presented in the administrative proceedings before the USDA. The Court will thus look to the evidence and arguments presented by S & S Packing in this case, to see if they sufficiently rebut the Decision and Order of the USDA.

III. DISCUSSION

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and S & S Packing has not provided any legal basis to support its request. The motion will therefore be denied.

A. Inadequate Invoicing

S & S Packing first challenges the Judicial Officer's determination that S & S Packing failed to invoice or obtain invoices from SunBelle for Spring Lake's fruit, as required by the contract between S & S Packing and Spring Lake. PACA mandates that a growers agent or broker "truly and correctly account" for all transactions. 7 U.S.C. § 499b(4). The applicable regulations define "truly and correctly account" to mean "rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce, and the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof." 7 C.F.R. § 46.2(y)(1). In addition, "sales tickets" must bear printed serial numbers running consecutively, used in numerical order, and all sales tickets "shall be prepared and all details of the sale shall be entered on the tickets in a legible manner in order that an audit can be readily made." 7 C.F.R. § 46.19. Each sales ticket must show "the date of sale, the purchaser's name (so far as practicable), the kind, quantity, unit price, and the total selling price of the produce. Each sales ticket shall show the lot number of the shipment if the produce is being handled on consignment or on joint account." *Id.* Moreover, 7 C.F.R. § 46.32(a) mandates that a grower's agent "shall prepare and maintain complete records on all transactions in sufficient detail as to be readily understood and audited." The Judicial Officer found that S & S Packing violated each of these legal requirements.

S & S Packing argues that its Load and Shipping Tickets, coupled with "Purchase Orders" received from SunBelle served as the numbered invoices to SunBelle and comply with PACA regulations. There are two fatal problems with S & S Packing's argument. First, the Load and Shipping Tickets are the same documents S & S Packing provided to the Judicial Officer, and which the Judicial Officer found to be deficient. To be sure, S & S Packing only provided a sampling of those documents, whereas at trial, S & S Packing provided all of the Load and Shipping Tickets for the entire 2010 growing season. However, whether S & S Packing submits one or 50 of these documents, it does not change the fact that they are deficient and were found to be so by the Judicial Officer. They do not list any sales prices, prices per units, and more

importantly, do not identify in any way the grower of the berries, or the specific volumes or weights of blueberries shipped to SunBelle for a particular grower. In other words, these documents cannot act as invoices for Spring Lake's fruit delivered to SunBelle.

Secondly, S & S Packing has not submitted any "Purchase Orders" from SunBelle – either to the Judicial Officer or to this Court. What S & S Packing has submitted to the Court (which was not before the Judicial Officer) are copies of documents prepared by SunBelle that identify the number of cases received, any cases lost (due to spoilage), cases sold, the average price per case, the total sales, the 8% marketing fee charged by SunBelle to S & S Packing, net sales, freight and handling costs, and the total revenues returned to S & S Packing. *See* Plaintiff's Exhs. 3B, 3D, 4B, 4D, 4F, 4H, 5B, 5D, 5F, 5H, 5J, 5M, 5O, 5Q, 5S, 6B, 6D, 6F, 6H, 6J, 6M, 6O, 6Q, 6S, 6U, 6W, 6Y, 6AD, 6AF, 7B, 7D, 7F, 7H, 7J, 7N, 7P, 7R, 7T, 7Y, 7AA, 7AC, 7AE, 7AG, 7AI, 8B, 8D, 8G, 8I, 8K. However, these documents only show the number of cases of blueberries shipped by S & S Packing in total. They again do not identify whether (or how much of) the fruit came from Spring Lake or some other grower. Thus, the Judicial Officer correctly determined that these documents do not constitute invoices for Spring Lake's blueberries, and S & S Packing has failed to present sufficient evidence to rebut the Judicial Officer's findings.[8]

S & S Packing further argues that it was permitted under its contract with Spring Lake to pool Spring Lake's fruit with that of other growers, and therefore was not required to itemize any expenses or sales prices specifically for Spring Lake's crop. *See Combined Professional Resources, Inc. v. Limeco, Inc.*, 801 F. Supp. 664, 673 (S.D. Fla. 1992) ("Because Limeco pools limes, it is not required to itemize actual expenses for the disposition of produce received."). *See also* 7 C.F.R. § 46.32(b) ("Unless there is a specific agreement with the growers to pool all various growers' produce, the accounting to each of the growers shall itemize the actual expenses incurred...and all the details of the disposition of the produce received from each grower...."). While the

[8] It is not entirely clear, but it appears that S & S Packing is also arguing that the settlement sheets it prepared for Spring Lake also constitute invoices. These documents (see Plaintiff's Exhs. 9A-9G), which were also before the Judicial Officer, are clearly not invoices and do not comply with the requirements of 7 C.F.R. §§ 46.14 and 46.19.

Court does not disagree with these statements, they do not cure the deficiencies in S & S Packing's invoices. Even without itemizing actual expenses, the plain and simple fact is that the documentation S & S Packing claims are its invoices do not provide the information required by the PACA regulations and by the written contract between S & S Packing and Spring Lake, and the Judicial Officer properly deemed them to be inadequate. Moreover, as Spring Lake points out, the contract between it and S & S Packing permits "pooled pricing" of Spring Lake's berries, but does not mention "pooled weighing" which appears to be S & S Packing's practice (combining all berries into one weight). In other words, the contract permits S & S Packing to determine its sales price by using the average of all fruit sold in the week delivered. (Plaintiff's Exh. 1A). It does not mention anywhere that all of the grower's berries will be combined and packed together before being weighed.

In sum, S & S Packing's rebuttal on this point has focused in large part on materials previously provided to the Judicial Officer, and documentation from SunBelle that does not identify in any way the Spring Lake blueberry crop. These materials are incomplete, confusing, and are insufficient to rebut the Judicial Officer's findings.[9]

B. USDA Market News Prices

S & S Packing next challenges the Judicial Officer's use of the average terminal market prices reported by USDA Market News Service in Miami, Florida, to determine an appropriate price for Spring Lake's berries. To be sure, the contract between the parties gave S & S Packing the authority "with the help of its marketing partners [to] determine the price at which product is sold" (Plaintiff's Exh. 1A, 1B, ¶ 2), but this provision did not relieve S & S Packing of its duty under the statute and governing regulations to properly identify, and account by invoice for, the correct sales price. And, having already determined that S & S Packing's records were inadequate, the Judicial Officer was within its authority to rely on such pricing information. *See James Macchiaroli*

[9] The Court is further persuaded by the fact that Mr. Mills himself could not clearly explain these various documents, his testimony was frequently confusing, and he could not properly explain the rationale behind the $10,361.75 vs. $3,942.54 that remains due and owing to Spring Lake.

Fruit Co. v. Ben Gatz Co., 38 Agric. Dec. 1477, 1484 (1979) (noting that it is in keeping with USDA practice to turn to the Market News prices "in order to make a reasonable assessment of damages in conformity with the actual contract that existed between the parties."). *See also* U.C.C. § 2-723 (providing that pricing can be determined by utilizing reported market pricing data).

S & S Packing has not presented any evidence to rebut the Judicial Officer's findings other than the same documentation it presented before the Judicial Officer concerning the prices it received from SunBelle, including checks between SunBelle and S & S Packing and between S & S Packing and Spring Lake. These documents do not even suggest that the prices calculated by the Judicial Officer were incorrect, and as discussed above, do not establish proper and adequate invoicing. Moreover, Mr. Mills admitted at trial that he did not make any attempt to ascertain whether the prices he received from SunBelle were lower than the average market price, or comparable to prices received from other buyers, and did not negotiate with SunBelle to determine the prices. S & S Packing simply accepted whatever SunBelle paid it. This clearly does not rebut the Judicial Officer's findings, and the use of average terminal market prices will stand.

C. The Double Commissions

S & S Packing's third point of contention challenges the Judicial Officer's finding that S & S Packing had an undisclosed "side contract" with SunBelle, and that any fees or commissions charged by SunBelle could not be assessed to Spring Lake.

PACA regulation 7 C.F.R. § 46.32(c) provides that

> Unless a growers' agent is specifically authorized in his contract with the growers to use the services of brokers, commission merchants, joint partners, or auctions, he is not entitled to use these methods of marketing the growers' produce. Any expense incurred for such services, without the growers' permission, cannot be charged to the growers.

The contract between S & S Packing and Spring Lake makes mention of S & S Packing's "marketing partners," but it does not mention or authorize the payment of other commissions to be passed on to Spring Lake. Yet, S & S Packing delivered the entirety of Spring Lake's blueberry crop to SunBelle, who charged an additional 8% commission (Doc. 43, pp. 101, 121, 139). This was not permitted under the regulation without Spring Lake's permissions, and the Judicial Officer accordingly found that the commissions and fees charged by SunBelle that were passed onto Spring Lake were not allowed. It is one thing to use a "marketing partner" to fix the price of a crop of fruit (which is specifically permitted in the contract). It is another matter entirely to agree pay a commission chargeable to the grower – and as 7 C.F.R. § 46.32(c) expressly states, such commissions may not be charged to the grower absent express authorization. There is nothing in the contract that provides such authorization.

S & S Packing has not presented any evidence to rebut the Judicial Officer's findings, other than to point to the contract between itself and Spring Lake. That is insufficient to rebut the Judicial Officer's conclusions.

It is clear that S & S Packing violated 7 C.F.R. § 46.32(c) by failing to obtain specific authorization from Spring Lake to pay an additional commission to SunBelle. The Judicial Officer determined that all expenses and commissions charged by SunBelle could not be passed on to Spring Lake, and S & S Packing has failed to sufficiently rebut this finding.[10]

D. Pooled Losses

The Judicial Officers' final finding was that S & S Packing

[10] S & S Packing's argument in its post-trial brief that "[W]ithout contracting with third party buyers, S & S Packing *could not fulfill* its contractual duties to Spring Lake to sell its fruit." (Doc. 45, p. 19) (emphasis in original), is disingenuous. Neither the Judicial Officer nor this Court is holding that S & S Packing is prohibited from contracting with third party buyers. What has been held (and which the PACA regulations mandate) is that if any third party services are to be utilized they must be specifically authorized by the grower. Otherwise, any expenses relating to those third party entities may not be passed on to the grower.

improperly charged "pooled losses" to Spring Lake in the amount of $2,889.36. S & S Packing does not challenge this finding, (Doc. 45, p. 19), and has presented no evidence to rebut it. It will therefore be affirmed.

E. Remaining Claims By Spring Lake

Spring Lake raised several other claims in its formal complaint: (1) that S & S Packing overpacked containers; (2) that S & S Packing assessed packing charges by the pound instead of by the flat; (3) that S & S Packing miscalculated its own commission fees; (4) the lack of Global GAP certification; (5) S & S Packing's failure to provide harvest labor assistance; (5) that S & S Packing delayed issuing its reports to Spring Lake; and (6) that S & S Packing paid different prices per pound to different growers. These claims were not considered by the Judicial Officer, and therefore will not be considered in this proceeding. *See Relan*, 731 F.2d at 801. Moreover, even if the Court were to consider them they would not change the outcome as the Court has determined that the Judicial Officer's findings shall be affirmed in all respects.

IV. CONCLUSION

Accordingly, upon due consideration and pursuant to 7 U.S.C. § 499g, it is hereby ORDERED that the November 27, 2012 Decision and Order of the USDA Judicial Officer is AFFIRMED in all respects. The Clerk is directed to enter judgment in favor of Spring Lake Ratite Ranch, Inc., d/b/a Spring Lake Blueberry Farm and against S & S Packing, Inc., in the amount of $109,295.65, plus interest at the rate of .17% per annum from July 1, 2010 until paid, plus costs in the amount of $500.00

Within 14 days from the date of entry of judgment, and in accordance with 7 U.S.C. § 499g(c), and Fed. R. Civ. P. 54(d), Spring Lake may file a properly supported motion for attorney's fees and costs.

S & S Packing's motion in limine (Doc. 32) and motion to amend to add newly discovered evidence (Doc. 38) are both DENIED.

IT IS SO ORDERED.

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PERISHABLE AGRICULTURAL COMMODITIES ACT

PERISHABLE AGRICULTURAL COMMODITIES ACT

DISCIPLINARY DECISIONS

In re: OLD FASHION HONEY, d/b/a U.S. FOOD LOGISTICS.
Docket No. 14-0173.
Decision and Order.
Filed April 11, 2016.

PACA.

Christopher P. Young, Esq., for Complainant.
Stephen P. McCarron, Esq., and Blake A. Surbey, Esq., for Respondent.
Initial Decision and Order by Janice K. Bullard, Acting Chief Administrative Law Judge.

DECISION AND ORDER ON THE RECORD

The instant matter involves a complaint filed by the United States Department of Agriculture [Complainant; USDA] against Old Fashion Honey, d/b/a U.S. Food Logistics [Respondent] alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. §499a *et seq*. [PACA; the Act]. The complaint alleged that Respondent failed to make full payment promptly in the aggregate amount of alleged that Respondent, during the period November 2013 through February 2014, failed to make full payment promptly of the agreed purchase prices, or balances thereof, for thirty lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce from five sellers, in the total amount of $1,239,751.64.

I. PROCEDURAL HISTORY

On August 20, 2014, Complainant filed a Complaint against Respondent alleging violations of the PACA. Respondent filed an Answer with the Hearing Clerk for the Office of Administrative Law Judges [OALJ] for USDA [Hearing Clerk] on October 6, 2014, through

counsel. Respondent admitted the Secretary's jurisdiction over this matter and generally denied the allegations of violations of the Act.

On December 17, 2014, counsel for Respondent filed a motion to withdraw, which I granted by order issued January 30, 2015, upon no objection by Complainant. With no further action taken in the case, on January 21, 2016, I directed Respondent to show cause why a decision and order should not be entered on the record and set deadlines for the submission of evidence. On February 11, 2016, Complainant responded by filing the affidavit of PACA employee Antonio Velasquez and a brief in support of the entry of a decision and order on the record. The affidavit is hereby identified as Complainant's exhibit (CX-1) and entered into the record.

This Decision and Order is issued on unopposed motion of Complainant, and incorporates all of the pleadings of the parties and all other evidence of record.

II. FINDINGS OF FACT & CONCLUSIONS OF LAW

A. Discussion

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [Rules of Practice], set forth at 7 C.F.R. § 1.130 *et seq.*, apply to the adjudication of the instant matter. The Rules allow for a Decision Without Hearing by Reason of Admissions. C.F.R. §1.139. In addition, the Secretary has recognized that "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).

Respondent has failed to file evidence, and the general denials in Respondent's Answer establish that there is no material issue of fact requiring a hearing. There is no evidence to contradict Complainant's allegations that Respondent's transactions under the Act resulted in an outstanding balance due to sellers is in excess of $5,000.00, which represents more than a *de minimis* amount. *See Fava & Co*., 46 Agric.

Dec. 798, 81 (U.S.D.A. 1984); 44 Agric. Dec. 879 (U.S.D.A. 1985). "[U]nless the amount admittedly owed is de minimis, there is no basis for a hearing merely to determine the precise amount owed." *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984); 46 Agric. Dec. 83 (U.S.D.A. 1985). I find that a hearing is not necessary in this matter, as there is no genuine issue of material fact, and because the amount remaining unpaid to growers exceeds $5,000.00.

PACA requires payment by a buyer within ten days after the date on which produce is accepted. 7 C.F.R. § 46.2(aa)(5). The regulations allow the use of different payment terms so long as those terms are reduced to writing prior to entering into the transaction. 7 C.F.R. § 46.2(aa)(11). PACA requires "full payment promptly" for produce purchases, and where

> respondent admits the material allegations in the complaint and makes no assertion that the respondent has achieved or will achieve full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the [matter] will be treated as a no-pay case.

Scamcorp, Inc., 57 Agric. Dec. 527, 547 -49 (U.S.D.A. 1998).

In an attachment to its Complaint, Complainant identified thirty lots of perishable agricultural commodities that Respondent purchased, received, and accepted in the course of interstate and foreign commerce from five sellers, in the total amount of $1,239,751.64, during the period November 2013 through February 2014, for which Respondent failed to make full payment promptly of the agreed purchase prices (Appx. A).

In his declaration signed on February 5, 2016, PACA employee Jose Antonio Velasquez described the findings of his investigation into Respondent's activities under the Act and concluded that Respondent did not make any payments to the sellers identified in Appendix A (CX-1). Mr. Velasquez found that one of the sellers received partial payment from its insurance company but no additional payment from Respondent. The General Manager for seller Carsol Fruit Export S.A [Carsol] advised that Respondent owes Carsol $800,000, which includes the $525,941.00

listed as past due and unpaid in Appendix A. Mr. Velasquez could not locate other sellers, but there is no evidence to demonstrate that the unpaid balances were paid by Respondent.

The record further establishes that Respondent did not renew its PACA license since the Complaint was filed, and on September 20, 2014, the PACA Division of the Agricultural Marketing Service terminated Respondent's license pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)). Accordingly, I find that Respondent has not achieved full compliance with the PACA within 120 days after the Complaint was served in August 2014.

A violation is repeated whenever there is more than one violation of the Act, and is flagrant whenever the total amount due to sellers exceeds $5,000.00. *D.W. Produce, Inc*., 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994). A violation is willful if a person intentionally performs an act prohibited by statute or carelessly disregards the requirements of a statute, irrespective of motive or erroneous advice. *Id.* at 1678. In the instant matter, Respondent has not provided any evidence to demonstrate that produce growers were paid for purchases it made. Respondent's failure to pay sellers promptly for the purchase of products covered by section 2(4) of the PACA is willful, and the violations are repeated and flagrant. *See* 7 U.S.C. § 499b(4).

As stated in *Scamcorp*, *supra.*, the appropriate sanction in this case is revocation of Respondent's PACA license. Since Respondent's PACA license was terminated on September 20, 2014, publication in lieu of revocation is the appropriate sanction in the case.

B. Findings of Fact

1. Respondent is a corporation existing under the laws of the state of Florida.

2. Respondent's business address is in Delray Beach, Florida 33484.

3. At all times material herein, Respondent was licensed under and operating subject to the provisions of the PACA. License number 20111421 was issued to Respondent on September 20, 2011.

4. Respondent's license was terminated by the PACA Division of the Agricultural Marketing Service on September 20, 2014, pursuant to section 4(a) of the PACA (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.

5. Respondent, during the period November 2013 through February 2014, on or about the dates and in the transactions set forth in Appendix A to the Complaint in this case, failed to make full payment promptly of the agreed purchase prices, or balances thereof, for thirty lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in the course of interstate and foreign commerce from five sellers, in the total amount of $1,239,751.64.

C. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. Respondent willfully violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the agreed purchase prices, or balances thereof, for the perishable agricultural commodities that it purchased, received, and accepted in interstate and foreign commerce.

3. Respondent's repeated violations constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4), and sanctions are appropriate.

ORDER

Respondent committed willful, flagrant, and repeated violations of section 2(4) of the PACA. The facts and circumstances of Respondent's violations shall be published.

This Order shall take effect on the day that this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary

by a party to the proceeding within thirty (30) days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties by the Hearing Clerk.

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In re: THE SQUARE GROUP, LLC.
Docket No. 15-0102.
Decision and Order.
Filed April 28, 2016.

PACA-D.

Shelton S. Smallwood, Esq. for Complainant.[1]
Steven E. Nurenberg, Esq. for Respondent.[2]
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

I. DECISION SUMMARY

1. The Square Group, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, or balances thereof, during February 22, 2014 through August 19, 2014, totaling more than $767,000.00 for fruits and vegetables from twenty-three produce sellers, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce.

II. PARTIES AND ALLEGATIONS

2. The Complainant is the Deputy Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture [herein frequently "AMS" or "Complainant"].

[1] The Complainant is the Administrator, Fruit and Vegetable Program, Agricultural Marketing Service, United States Department of Agriculture ["AMS" or "Complainant"].
[2] The Respondent is The Square Group, LLC, a limited liability corporation formed and existing under the laws of the state of California ["Square Group" or "Respondent"].

3. The Respondent is The Square Group, LLC, a limited liability corporation formed and existing under the laws of the state of California [herein occasionally "Square Group" or "Respondent"].

4. AMS alleges in the Complaint, filed on April 28, 2015, that the Respondent Square Group violated section 2(4) of the PACA (7 U.S.C. § 499b(4))[3] by failing to pay thirty-two produce sellers for $1,190,177.70 in produce purchases during 2013-2014, as more particularly described in Appendix A to the Complaint. The Complaint alleges that those violations by The Square Group, LLC were willful, flagrant, and repeated and asks the judge to revoke The Square Group, LLC's PACA license pursuant to section 8(a) of the PACA (7 U.S.C. § 499h(a)).

5. The Square Group, LLC operates a full service grocery store (a supermarket) and protests any finding that it has violated the PACA. The Square Group LLC timely filed its Answer and Affirmative Defenses on June 30, 2015.

6. AMS's "Motion for Decision Without Hearing by Reason of Admissions," filed July 24, 2015, asks me to issue a decision based on the requirements of the PACA in light of The Square Group, LLC's admissions. AMS's Motion asserts that there is no need for a hearing.

7. The Square Group, LLC timely filed its Opposition on September 10, 2015, asserting that there are material issues of fact in dispute, and that The Square Group, LLC wants the oral hearing it requested in its Answer and again in its Opposition.

8. Following careful review of all documents filed, I agree with AMS that there is no need for an oral hearing. I issue this Decision and Order based on the written record, finding that The Square Group, LLC has committed willful, repeated, and flagrant violations of section 2(4) of the PACA, 7 U.S.C. § 499b(4).

III. DISCUSSION

[3] The PACA is the Perishable Agricultural Commodities Act, 1930, as amended, 7 U.S.C. § 499a *et seq.* [PACA].

9. Section 2(4) of the PACA (7 U.S.C. § 499b(4)) requires produce licensees such as The Square Group, LLC 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").

10. 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).

11. 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 purposes of the PACA to require a PACA violator to pay a civil penalty rather than pay produce sellers to whom the PACA violator owes money. *Scamcorp, Inc.*, 57 Agric. Dec. 527, 570-71 (U.S.D.A. 1998).

12. Here, The Square Group, LLC "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 (7 U.S.C. § 499b(4)). *Scamcorp, Inc.*, 57 Agric. Dec. 527, 553

(U.S.D.A. 1998). 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.

13. 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).

IV. FINDINGS OF FACT

14. The Square Group, LLC, the Respondent, is a limited liability corporation formed and existing under the laws of the state of California, with an address in Rosemead, California.

15. The Square Group, LLC was licensed under the provisions of the Perishable Agricultural Commodities Act [the PACA] on February 4, 2014, license number 20140406.

16. The Square Group, LLC filed Case No.: 2:14-bk-23806-DS under Chapter 11 in the United States Bankruptcy Court in the Central District of California - Los Angeles Division, including its Schedule F listing of creditors filed August 19, 2014.

17. Schedule F (Attachment A to the Complaint), on the first sheet, shows $73,415.92 claimed by ABC Produce, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to ABC Produce, Inc., during March 24, 2014 through August 9, 2014, for $72,474.92 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **31** in Appendix A to the Complaint.

18. Schedule F (Attachment A to the Complaint), on the first sheet, shows $12,484.75 claimed by Advantage Produce, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Advantage Produce, Inc., during May 14, 2014 through June 17, 2014, for $12,484.75 in fruits, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **9** in Appendix A to the Complaint.

19. Schedule F (Attachment A to the Complaint), on attachment sheet 1 of 28, shows $16,300.00 claimed by Benito Turrubiartes (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Benito Turrubiartes, during May 23, 2014 through July 15, 2014, for $16,300.00 in oranges, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **17** in Appendix A to the Complaint.

20. Schedule F (Attachment A to the Complaint), on attachment sheet 5 of 28, shows $42,623.00 claimed by E&DA Farm (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to E & DA Farm, during February 22, 2014 through July 10, 2014, for $42,623.00 in vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **15** in Appendix A to the Complaint.

21. Schedule F (Attachment A to the Complaint), on attachment sheet 6 of 28, shows $22,945.20 claimed by ETR Merchandises Co. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to ETR Merchandise Co., during May 24, 2014 through June 23, 2014, for $22,837.20 in fruits and

vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **11** in Appendix A to the Complaint.

22. Schedule F (Attachment A to the Complaint), on attachment sheet 8 of 28, shows $645.00 claimed by Green West Farm, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Green West Farm, Inc., by May 29, 2014, for $645.00 in fruits, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **7** in Appendix A to the Complaint.

23. Schedule F (Attachment A to the Complaint), on attachment sheet 9 of 28, shows $15,140.00 claimed by Harmoni International Spice, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Harmoni International Spice, Inc., during March 7, 2014 through July 11, 2014, for $15,115.00 in vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **16** in Appendix A to the Complaint.

24. Schedule F (Attachment A to the Complaint), on attachment sheet 10 of 28, shows $28,498.50 claimed by House of Produce (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Joscott, Inc. d/b/a House of Produce, during June 17, 2014 through August 2, 2014, for $12,800.50 in vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **28** in Appendix A to the Complaint.

25. Schedule F (Attachment A to the Complaint), on attachment sheet 12 of 28, shows $15,879.58 claimed by JML Produce, Inc. (described as

"Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to JML Produce, Inc., during March 15, 2014 through May 31, 2014, for $15,879.58 in vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **8** in Appendix A to the Complaint.

26. Schedule F (Attachment A to the Complaint), on attachment sheet 14 of 28, shows $10,263.00 claimed by L&C Distributing, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to L & C Distributing, Inc., during May 8, 2014 through June 25, 2014, for $10,263.00 in vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **13** in Appendix A to the Complaint.

27. Schedule F (Attachment A to the Complaint), on attachment sheet 15 of 28, shows $48,979.00 claimed by Lucky Hong Farm, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Lucky Hong Farm, Inc., during February 24, 2014 through July 28, 2014, for $48,979.00 in vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **19** in Appendix A to the Complaint.

28. Schedule F (Attachment A to the Complaint), on attachment sheet 15 of 28, shows $18,564.35 claimed by Lucky Taro (described as "Trade Debt") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Lucky Taro, Inc., during July 14, 2014 through August 6, 2014, for $18,124.35 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as

shown in the Complaint and identified by number **29** in Appendix A to the Complaint.

29. Schedule F (Attachment A to the Complaint), on attachment sheet 16 of 28, shows $83,001.40 claimed by Maui Fresh International (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Maui Fresh International, during July 8, 2014 through August 8, 2014, for $82,886.40 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **30** in Appendix A to the Complaint.

30. Schedule F (Attachment A to the Complaint), on attachment sheet 19 of 28, shows $43,980.00 claimed by QSI (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to QSI, during June 7, 2014 through July 29, 2014, for $43,788.00 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **24** in Appendix A to the Complaint.

31. Schedule F (Attachment A to the Complaint), on attachment sheet 19 of 28, shows $99,990.40 claimed by Quality 1st Produce, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Quality 1st Produce, Inc., during April 1, 2014 through July 28, 2014, for $95,179.40 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **20** in Appendix A to the Complaint.

32. Schedule F (Attachment A to the Complaint), on attachment sheet 23 of 28, shows $84,196.30 claimed by T Fresh Company (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the

purchase prices, or balances thereof, to T Fresh Company d/b/a Yes Produce, during April 10, 2014 through June 21, 2014, for $81,161.30 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **10** in Appendix A to the Complaint.

33. Schedule F (Attachment A to the Complaint), on attachment sheet 23 of 28, shows $7,204.00 claimed by T&C Company (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to T & C Company, during August 4, 2014 through August 19, 2014, for $7,204.00 in vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **32** in Appendix A to the Complaint.

34. Schedule F (Attachment A to the Complaint), on attachment sheet 23 of 28, shows $53,420.50 claimed by TAC Produce, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to TAC Produce, Inc., during April 12, 2014 through July 29, 2014, for $53,262.50 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **24** in Appendix A to the Complaint.

35. Schedule F (Attachment A to the Complaint), on attachment sheet 24 of 28, shows $24,739.30 claimed by The Choice Produce (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to The Choice Produce, during June 14, 2014 through July 29, 2014, for $17,893.50 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **26** in Appendix A to the Complaint.

36. Schedule F (Attachment A to the Complaint), on attachment sheet 24 of 28, shows $23,906.50 claimed by Times Produce, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Times Produce, Inc., during June 12, 2014 through June 28, 2014, for $23,906.50 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **14** in Appendix A to the Complaint.

37. Schedule F (Attachment A to the Complaint), on attachment sheet 24 of 28, shows $17,287.10 claimed by Two HK, Inc. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Two HK, Inc., during June 28, 2014 through July 28, 2014, for $17,251.10 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **22** in Appendix A to the Complaint.

38. Schedule F (Attachment A to the Complaint), on attachment sheet 25 of 28, shows $47,857.75 claimed by Valley Fruit & Produce Co. (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to Valley Fruit and Produce, Inc., during April 5, 2014 through May 6, 2014, for $47,857.75 in fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **6** in Appendix A to the Complaint.

39. Schedule F (Attachment A to the Complaint), on attachment sheet 26 of 28, shows $8,892.00 claimed by WF Produce Trading (described as "Potential PACA Claimant") and NOT disputed, confirming that The Square Group, LLC failed to make full payment promptly of the purchase prices, or balances thereof, to WF Produce Trading, during February 14, 2014 through June 25, 2014, for $8,892.00 in vegetables,

all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce, as shown in the Complaint and identified by number **12** in Appendix A to the Complaint.

V. CONCLUSIONS

40. The Secretary of Agriculture has jurisdiction over The Square Group, LLC and the subject matter involved herein.

41. The Square Group, LLC made admissions in its Schedule F listing of creditors filed August 19, 2014 (Case No.: 2:14-bk-23806-DS) that certain produce sellers had not been paid by The Square Group, LLC.

42. The Square Group, LLC showed that it knew how to use the "DISPUTED" column of Schedule F, which it did regarding Moo Gung International, Inc. $358,927.15 [attachment sheet 16 Schedule F]. The "DISPUTED" column was NOT used for the other produce sellers listed in Schedule F.

43. The Square Group, LLC failed to comply with 7 C.F.R. § 46.2(aa) regarding making full payment promptly.

44. Even if The Square Group, LLC were eventually to complete payment in full, 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).

45. The Square Group, LLC was served with the Complaint on May 6, 2015. September 3, 2015 was the 120th day after the Complaint was served. More than 120 days after the Complaint was served, when The Square Group, LLC's Opposition was filed (September 10, 2015), The Square Group LLC could not show full payment to any of the twenty-three produce sellers enumerated in paragraphs 17 - 39.

46. The grounds for revocation of a PACA license are found in 7 U.S.C. § 499h and include flagrant or repeated failures to comply with 7 U.S.C. § 499b(4), which requires full payment promptly.

47. The Square Group, LLC's violations detailed above in the Findings of Fact are willful within the meaning of the Administrative Procedure Act (*see* 5 U.S.C. § 558(c)).

48. The Square Group, LLC willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly of the purchase prices, or balances thereof, during February 22, 2014 (*see* paragraph 20) through August 19, 2014 (*see* paragraph 33), totaling more than $767,000.00 for fruits and vegetables, all being perishable agricultural commodities that The Square Group, LLC purchased, received, and accepted in the course of interstate or foreign commerce from twenty-three produce sellers, identified below by the same number shown for them in Appendix A to Complaint, and listed in the order in which they appear in paragraphs 17 - 39 (in the Findings of Fact):

> **31**. ABC Produce, Inc. $72,474.92 [and *see* first sheet Schedule F]
>
> **9**. Advantage Produce, Inc. $12,484.75 [and *see* first sheet Schedule F]
>
> **17**. Benito Turrubiartes $16,300.00 [and *see* attachment sheet 1 of 28 Schedule F]
>
> **15**. E & DA Farm $42,623.00 [and *see* attachment sheet 5 of 28 Schedule F]
>
> **11**. ETR Merchandise Co. $22,837.20 [and *see* attachment sheet 6 of 28 Schedule F]
>
> **7**. Green West Farm, Inc. $645.00 [and *see* attachment sheet 8 of 28 Schedule F]
>
> **16**. Harmoni International Spice, Inc. $15,115.00 [and *see* attachment sheet 9 of 28 Schedule F]
>
> **28**. Joscott, Inc. d/b/a House of Produce $12,800.50 [and *see* attachment sheet 10 of 28 Schedule F]

8. JML Produce, Inc. $15,879.58 [and *see* attachment sheet 10 of 28 Schedule F]
13. L & C Distributing, Inc. $10,263.00 [and *see* attachment sheet 14 of 28 Schedule F]

19. Lucky Hong Farm, Inc. $48,979.00 [and *see* attachment sheet 15 of 28 Schedule F]

29. Lucky Taro, Inc. $18,124.35 [and *see* attachment sheet 15 of 28 Schedule F]

30. Maui Fresh International $82,886.40 [and *see* attachment sheet 16 of 28 Schedule F]

24. QSI $43,788.00 [and *see* attachment sheet 19 of 28 Schedule F]

20. Quality 1st Produce, Inc. $95,179.40 [and *see* attachment sheet 19 of 28 Schedule F]

10. T Fresh Company d/b/a Yes Produce $81,161.30 [and *see* attachment sheet 23 of 28 Schedule F]

32. T & C Company $7,204.00 [and *see* attachment sheet 23 of 28 Schedule F]

24. TAC Produce, Inc. $53,262.50 [and *see* attachment sheet 23 of 28 Schedule F]

26. The Choice Produce $17,893.50 [and *see* attachment sheet 24 of 28 Schedule F]

14. Times Produce, Inc. $23,906.50 [and *see* attachment sheet 24 of 28 Schedule F]

22. Two HK, Inc. $17,251.10 [and *see* attachment sheet 24 of 28 Schedule F]

6. Valley Fruit and Produce, Inc. $47,857.75 [and *see* attachment sheet 25 of 28 Schedule F]

12. WF Produce Trading $8,892.00 [and *see* attachment sheet 26 of 28 Schedule F]

49. For the foregoing reasons, the following Order is issued.

ORDER

50. The Square Group, LLC's PACA license is **revoked**, pursuant to section 8(a) of the PACA, 7 U.S.C. § 499h(a).

51. The portions of the Complaint are **dismissed**, relating to whether The Square Group, LLC paid, in accordance with the PACA, the following 9 produce sellers identified by the same number shown for them in Appendix A to the Complaint:

1. Moo Gung International, Inc. $358,927.15 [DISPUTED, attachment sheet 16 Schedule F]

2. Morita Produce $4,750.00 [not found in Schedule F]

3. Brizo's Citrus, Inc. $5,020.00 [not found in Schedule F]

4. Giumarra Bros. Fruit Co., Inc. $3,941.00 [not found in Schedule F]

5. Aramburro Produce, Inc. $4,614.40 [not found in Schedule F]

18. Guy Taghavi $13,998.00 [not found in Schedule F]

21. Spring Land, Inc. $5,869.00 [not found in Schedule F]

23. D.P. Farms, Inc. $16,671.50 [not found in Schedule F]

27. Fuji Natural Foods, Inc. $8,577.90 [not found in Schedule F].

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

53. Any employment sanctions attendant to this Decision and Order pursuant to section 8(b) of the PACA, 7 U.S.C. § 499h(b), shall take effect on the 11th day after this Decision and Order becomes final.

54. See next paragraph for when this Decision and Order becomes final.

FINALITY

55. 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* Appx. 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

REPARATIONS DECISIONS

IPR Solutions, LLC v. STAR PRODUCE US LP.
Docket No. S-R-2015-131
Decision and Order.
Filed February 4, 2016.

PACA-R.

Suspension Agreement – Contract Destination

Imported Mexican tomatoes were diverted from the original contract destination specified by the first buyer and inspected by USDA in New York City, New York. The tomatoes were subject to the 2013 Suspension Agreement for Fresh Tomatoes from Mexico (Suspension Agreement). The contract price could not be adjusted, because the shipment was not inspected at the destination contracted by the first buyer as required by the Suspension Agreement.

Complainant, pro se.
Respondent, pro se.
Leslie S. Wowk, Examiner.
Shelton S. Smallwood, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

I. PRELIMINARY STATEMENT

Complainant instituted this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [PACA]; and the Rules of Practice under the PACA (7 C.F.R. §§ 47.1-47.49) [Rules of Practice], by filing a timely Complaint. Complainant seeks a reparation award against Respondent in the amount of $46,644.00 in connection with one truckload of tomatoes shipped in the course of interstate and foreign commerce.

Copies of the Report of Investigation [ROI] prepared by the Department were served upon the parties. A copy of the Complaint was

served upon the Respondent, which filed an Answer thereto, denying liability to Complainant.

Although the amount claimed in the Complaint exceeds $30,000.00, the parties waived oral hearing. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Neither party elected to file any additional evidence or a brief.

II. FINDINGS OF FACT

1. Complainant is a limited liability company whose post office address is P.O. Box 4617, Rio Rico, AZ 85648. At the time of the transaction involved herein, Complainant was licensed under the PACA.

2. Respondent is a limited partnership whose post office address is 3380 Woods Edge Circle, Suite 1, Bonita Springs, FL 34134. At the time of the transaction involved herein, Respondent was licensed under the PACA.

3. On or about November 14, 2014, Complainant, by oral contract, sold to Respondent one truckload of tomatoes. Complainant issued invoice number 20707 billing Respondent for 3,120 cartons of Garden Classic label on-the-vine tomatoes at $14.95 per carton, for a total f.o.b. invoice price of $46,644.00 (ROI Ex. A at 3).

4. The tomatoes mentioned in Finding of Fact 3 were shipped on November 14, 2014, from loading point in McAllen, Texas, to Elite Farms, Inc., in Brooklyn, New York.

5. On November 18, 2014, the following email messages were exchanged between Respondent's Mr. Ron Boche and Complainant's Mr. Francisco Obregon:

> From Mr. Boche to Mr. Obregon:
>
> The customer complained that there was a lot of soft on arrival to him. He is requesting an inspection. Per our conversation, you said go ahead and get the inspection. We will also be looking at the temp recorder that was put on as well.
>
> From Mr. Obregon to Mr. Boche:
>
> Can you confirm the location these toms are in?
>
> From Mr. Boche to Mr. Obregon:
>
> According to our Florida offices, it was suppose [sic] to go to Birmingham AL, but instead the customer sent them to New York.

(ROI Ex. A at 5).

6. The receiver of the tomatoes, Elite Farms, Inc., requested a USDA inspection of the tomatoes at 7:30 a.m. on November 18, 2014, and the inspection was performed at 10:47 a.m. on the same date (ROI Ex. A at 4, 6). The inspection disclosed twenty-eight percent (28%) average defects, including: twenty percent (20%) damage and serious damage by soft; four percent (4%) damage (one percent serious damage) by shriveled; three percent (3%) damage by sunken discolored areas; and one percent (1%) decay (ROI Ex. A at 6). Pulp temperatures at the time of the inspection ranged from fifty-five (55) to fifty-six (56) degrees Fahrenheit (ROI Ex. A at 6).

7. Respondent has not paid Complainant for the tomatoes billed on invoice number 20707.

8. The informal complaint was filed on January 20, 2015 (ROI Ex. A at 1), which is within nine months from the date the cause of action accrued.

III. CONCLUSIONS

Complainant brings this action to recover the agreed purchase price for one truckload of tomatoes sold to Respondent. Complainant states the shipment of tomatoes in question was diverted to New York City from its original intended destination of Nashville, Tennessee or Birmingham, Alabama[1] without Complainant's authorization (Compl. ¶ 5). Complainant states further that under the 2013 Suspension Agreement for Fresh Tomatoes from Mexico, any inspection of the tomatoes should take place at the destination of delivery specified prior to shipment, and no adjustment will be granted for a USDA inspection taken at a different destination from the first destination specified (Compl. ¶ 5). Since the USDA inspection of the subject tomatoes was performed in New York City, Complainant states the total agreed purchase price of $46,644.00 is due from Respondent (Compl. ¶ 6).

As evidence to substantiate its contention that the tomatoes were diverted from the original destination specified in the contract, Complainant references an email message sent by Respondent's Mr. Ron Boche to Complainant's Mr. Francisco Obregon on November 18, 2014, wherein Mr. Boche states the load of tomatoes "was suppose [sic] to go to Birmingham AL, but instead the customer sent them to New York." (Compl. Ex. 3). Respondent, in its sworn Answer, acknowledges that the load was diverted to New York City but asserts that this occurred without Respondent's knowledge (Answer ¶ 5). We therefore find that the preponderance of the evidence supports Complainant's contention that the load was diverted from the original destination specified in the contract to New York City.

As we mentioned, Complainant asserts that under the 2013 Suspension Agreement for Fresh Tomatoes from Mexico (Suspension Agreement),[2] no adjustment will be granted for a USDA inspection taken

[1] Complainant's invoice to Respondent indicates that the tomatoes were destined for Nashville, Tennessee (ROI Ex. A at 3), but Respondent's invoice to its customer shows the destination of the tomatoes as Birmingham, Alabama (Answer Ex. 3).

[2] This reference is to an agreement between the Department of Commerce and the producers/exporters accounting for substantially all imports of fresh tomatoes from Mexico, whereby each signatory producer/exporter agreed to revise its prices to eliminate completely the injurious effects of exports of this merchandise to the United States. *See* Fresh Tomatoes From Mexico: Suspension of Antidumping Investigation, 78 Fed. Reg.

at a different destination from the first destination specified. Complainant has not, however, submitted any evidence establishing that the terms of the Suspension Agreement were incorporated into the subject contract. Appendix G to the Suspension Agreement provides,

> … if, prior to making the sale, the signatory, of the Selling Agent acting on behalf of the signatory through a contractual arrangement, informs the customer that the sale is subject to the terms of the Agreement and identifies those terms, PACA will recognize the identified terms of the Agreement as integral to the sales contract.

Some examples of ways in which the signatory or selling agent could provide evidence that a sale was made subject to the Suspension Agreement include (1) a signed contract, (2) a purchase made by the customer after it is made aware of the relevance of the Suspension Agreement, or (3) proof that a letter was sent to the customer prior to the transaction advising that all sales are subject to the Suspension Agreement. There should also be a statement on the order confirmation or sales contract mentioning that the sale is subject to the Suspension Agreement.

The only mention of the Suspension Agreement in the documents prepared in connection with the subject tomatoes is a statement on the bill of lading prepared by the firm that sold the tomatoes to Complainant (ROI Ex. A at 4). This document was prepared after Respondent agreed to purchase the tomatoes, and was prepared by the supplier of the tomatoes, not Complainant. As such, it fails as evidence that Respondent was informed of the relevance of the Suspension Agreement prior to its agreement to purchase the tomatoes. Consequently, we conclude that the terms of the Suspension Agreement were not incorporated into the sales contract between Complainant and Respondent.

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46 (Mar. 8, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-03-08/html/2013-05483.htm. The minimum prices specified in the Suspension Agreement are subject to adjustment for changes in condition that occur after the tomatoes are shipped. To qualify for an adjustment, the purchaser of the tomatoes must meet all of the conditions set forth in the Suspension Agreement, one of which is the requirement that the inspection be performed at the destination specified by the first receiver of the product.

The record shows the tomatoes were, nevertheless, sold under f.o.b. terms, which means the warranty of suitable shipping condition is applicable. Suitable shipping condition is defined in the Regulations (Other Than Rules of Practice) Under the Act (7 C.F.R. § 46.43(j)) as meaning, "that the commodity, at time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the contract destination agreed upon between the parties."[3] The warranty of suitable shipping condition is made applicable only when transportation services and conditions are normal.

It is well established that where the question of abnormality of transportation service is raised, either by a party or on the face of the record, a buyer who has accepted a commodity has the burden of proving that transportation service and conditions were normal. *Admiral Packing Company v. Sam Viviano & Sons*, 40 Agric. Dec. 1993 (U.S.D.A. 1981); *Dave Walsh v. Rozak's*, 39 Agric. Dec. 281 (U.S.D.A. 1980). We have already determined that the load was diverted from the original

[3] The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) which require delivery to contract destination "without *abnormal* deterioration," or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. Under the rule it is not enough that a commodity sold f.o.b., U.S. No. 1, actually be U.S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U.S. No. 1 at time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U.S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This is true because under the f.o.b. terms the grade description applies only at shipping point, and the applicable warranty is only that the commodity thus sold will reach contract destination without abnormal deterioration, not that it will meet the grade description at destination. If the latter result is desired then the parties should effect a delivered sale rather than an f.o.b. sale. For all commodities other than lettuce (for which specific good delivery standards have been promulgated) what is "normal" or abnormal deterioration is judicially determined. Harvest Fresh Produce Inc. v. Clarke-Ehre Produce Co., 39 Agric. Dec. 703, 708-09 (U.S.D.A. 1980).

destination specified in the contract to New York City. The diversion of a shipment by the buyer while the shipment is in transit constitutes acceptance thereof. *Salinas Mktg. Coop. v. Tom Lange Co.*, 46 Agric. Dec. 1593, 1597 (U.S.D.A. 1987); *Magic Valley Potato Shippers, Inc. v. C.B. Marchant & Co.*, 42 Agric. Dec. 1602, 1606 (U.S.D.A. 1983). While Respondent states it was unaware of the diversion, the acceptance by its customer through the act of diversion precludes any subsequent rejection and thereby establishes acceptance by Respondent. *Phoenix Vegetable Distrib. v. Randy Wilson Co.,* 55 Agric. Dec. 1345, 1348-49 (U.S.D.A. 1996). Having accepted the tomatoes, Respondent has the burden to prove that the transportation service and conditions were normal.

The bill of lading mentioned above indicates that a temperature recorder was placed on the truck, and the record shows that following arrival of the tomatoes Respondent informed Complainant that it would be looking at the temperature recorder that was put on the truck (ROI Ex. A at 4-5). Respondent did not, however, submit the tape from the recorder into evidence. Complainant complained in its initial letter of complaint that Respondent had failed to provide the temperature recorder to verify that the temperatures recommended on the bill of lading were maintained in transit (ROI Ex. A at 2). Throughout the course of this proceeding, Respondent made no attempt to rectify this failure. We have stated that:

> . . . the failure of a receiver who should have access to temperature tapes to offer the tapes in evidence is a factor to be considered in determining whether such receiver has met its burden of proving, after acceptance, that transportation services and conditions were normal.

Louis Caric & Sons v. Ben Gatz Co., 38 Agric. Dec. 1486 at 1500-01 (U.S.D.A. 1979). *See also Monc's Consolidated Produce Inc. v. A. J. Produce Corp.*, 43 Agric. Dec. 563 (U.S.D.A. 1984).

The bill of lading for the shipment shows the tomatoes were shipped from McAllen, Texas, on November 14, 2014, at 9:02 p.m., with instructions to maintain temperatures in the range of fifty (50) to fifty-three (53) degrees Fahrenheit (ROI Ex. A at 4). The USDA inspection

performed on the tomatoes in Brooklyn, New York, on November 18, 2014, at 10:47 a.m., disclosed pulp temperatures ranging from fifty-five (55) to fifty-six (56) degrees Fahrenheit (ROI Ex. A at 6). While these temperatures are only slightly above the temperature range stated on the bill of lading, the inspection was performed in the applicant's cooler after the tomatoes were unloaded, and the amount of time that elapsed between the time of unloading and the time of inspection is not disclosed in the record. Therefore, the temperatures on the inspection provide no indication of the temperatures in transit.

Absent a recorder tape or other evidence of the temperatures maintained in transit, we find that Respondent has failed to sustain its burden to prove that the transportation service and conditions were normal. As a result, the warranty of suitable shipping condition is void. Respondent is, therefore, liable to Complainant for full purchase price of the subject load of tomatoes, or $46,644.00.

Respondent's failure to pay Complainant $46,644.00 is a violation of section 2 of the PACA (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the PACA (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the PACA (7 U.S.C. § 499b) "the full amount of damages sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Louisville & Nashville R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (U.S.D.A. 1963). The interest to be applied

> shall be determined in accordance with 28 U.S.C. § 1961, i.e., the interest rate shall be calculated . . . at a rate equal to the weekly average one-year constant maturity treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the Order.

PGB Int'l, LLC v. Bayche Cos., 65 Agric. Dec. 669, 672-73 (U.S.D.A. 2006); Notice of Change in Interest Rate Awarded in Reparation

Proceedings Under the Perishable Agricultural Commodities Act, 71 Fed. Reg. 25,133 (Apr. 28, 2006).

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

ORDER

Within thirty (30) days from the date of this Order, Respondent shall pay Complainant as reparation $46,644.00, with interest thereon at the rate of 0.47 of one percent (1%) per annum from December 1, 2014, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

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Errata

The Editor regrets having overlooked in the inclusion of a Reparation Decision in Volume 67, specifically:

> *DiMare Fresh, Inc. v. Sun Pacific Marketing Coop.*, PACA Docket No. R-07-054, Decision and Order, filed August 22, 2008.

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

* * *

REPARATIONS DECISIONS

[ERRATA]

67 Agric. Dec.
July – Dec. 2008

DIMARE FRESH, INC. v. SUN PACIFIC MARKETING COOPERATIVE, INC.
Docket No. R-07-054.
Decision and Order.
Filed August 22, 2008.

[Cite as: 67 Agric. Dec. A (U.S.D.A. 2008), *amended*, No. CIV-F-06-1404 AWI, 2011 WL 3568539 123 (E.D. Cal. Aug. 15, 2011), *amended*, No. CIV-F-06-1404 AWI, 2012 WL 4482013 (E.D. Cal. Sept. 28, 2012), *aff'd*, 592 F. App'x 564 (9th Cir. 2015)].

PACA-R.
Under the PACA, an Act of God clause may be invoked when the contract designates the land upon which the produce is to be grown. In cases where the contract designates the land where the crops are to be grown, the party seeking protection of the Act of God clause must demonstrate that performance under the contract has been made impracticable by the occurrence of an unforeseen contingency.

Cover Damages-
Under the UCC, when a seller fails to deliver, the buyer may cover by purchasing substitute goods in good faith and without unreasonable delay. Product purchased as cover need not be identical to the substituted goods, but such purchases must be commercially reasonable. If the buyer, without justification, purchases goods superior to those specified in the contract, the purchase amount used to calculate cover damages will be reduced to an amount equal to the market price of the kind and quality of product specified in the contract.

SYLLABUS:

Complainant and Respondent had a contract for the sale of tomatoes from July 2006 through October 2006. Approximately two months into the contract performance period, Complainant notified Respondent that it was invoking a clause in the contract that excused Respondent's performance in the event of a product "shortage." During the summer of 2006, Respondent produced fewer tomatoes than it had anticipated. Respondent's tomato production for the season was approximately thirty to thirty-five percent less than expected. Respondent

ERRATA

attributed this reduction to a heat wave in the San Joaquin Valley during the summer of 2006.

Because it was not possible to ascribe a plain-language meaning the term "shortage," extrinsic evidence was examined to give meaning to this contract term. Complainant's sales representative testified at the oral hearing that, under his interpretation of the contract, the "shortage" clause could only be invoked if Respondent did not have enough tomatoes to meet its obligations under the contract. Respondent's salesperson involved in negotiating the disputed contractual term did not testify at the oral hearing. Respondent's performance was neither excused through the application of the "shortage" clause as written, nor through the application of "Act of God" or force majeure jurisprudence to this dispute. Respondent was found to have breached the contract by failing to deliver tomatoes under the terms of the contract. Complainant was awarded cover damages for costs incurred in purchasing replacement product.

Stephen P. McCarron, Esq. for Complainant.
Katy Koestner, Esq. and Lawrence H. Meuers, Esq. for Respondent.
Gary Ball, Presiding Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

DECISION AND ORDER

I. PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely complaint was filed with the Department on November 8, 2006, within nine months of the accrual of the cause of action, in which Complainant seeks an award of reparation in the amount of $1,231,338.04 in connection with a contract for the sale of tomatoes [hereinafter "Contract"] entered into by the parties in July 2006.[1]

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal Complaint and Request for Oral Hearing was served upon Respondent which filed an Answer thereto, denying liability to Complainant. Respondent, in both its response to the informal complaint and its Answer to the formal complaint argued that it was not proper for the Department to hear this matter since this dispute

[1] At the oral hearing, Complainant amended its claim for cover damages to $1,225,362.00 and its claim for condition-defect damages to $5,976.04, without objection from Respondent (TR 11-12, 178).

was also the subject of a civil action in the United States District Court for the Eastern District of California. On April 18, 2007, U.S. District Court Judge Anthony W. Ishii issued an Order staying the District Court proceeding (docket No. CIV-F-06-1404 AWI), thereby allowing this PACA reparation matter to proceed.

The amount claimed in the formal Complaint exceeds $30,000.00, and Complainant requested an oral hearing. An oral hearing was held before Gary F. Ball of the Office of the General Counsel on December 11-12, 2007, in Los Angeles, California. At the hearing, the parties were given an opportunity to present testimony and submit evidence. Stephen P. McCarron, Esq., of McCarron & Diess, Washington, DC, has represented Complainant throughout this proceeding. At the hearing, Complainant presented testimony from Paul Dimare and Sam Licato of Dimare Fresh, Inc. Complainant introduced 19 exhibits into evidence (CX 1-19). Katy Koestner Esquivel, Esq. and Lawrence H. Meuers, Esq. of Meuers Law Firm, Naples, FL, have represented Respondent throughout this proceeding.

At the hearing, Respondent presented testimony from Gerard Odell of Six L's Packing Company, Tom Gilardi of Six L's Packing Company and Sun Pacific Marketing Cooperative, Inc., and Al Bates and Steve Fortner of Sun Pacific Marketing Cooperative, Inc. Respondent introduced twenty-three exhibits into evidence (RX 1-9, 12-24, 30). In accordance with 7 C.F.R. § 47.7, the Department's Report of Investigation (ROI) is also considered part of the evidence in this proceeding. Both parties filed briefs, reply briefs, and claims for fees and expenses in connection with the oral hearing. Complainant filed an objection to Respondent's fees and expenses claim.

II. FINDINGS OF FACT

1. In July 2006, Complainant and Respondent entered into a contract for the sale of tomatoes to be delivered by Sun Pacific Marketing Cooperative, Inc. to Dimare Fresh, Inc. from July 17 through October

31, 2006[2] (CX-1). The Contract called for Respondent to deliver fourteen loads of tomatoes per week at prices ranging from $4.35 to $7.95 per carton (CX-1).

2. The terms of the Contract were negotiated between Complainant's sales representative, Sam Licato, and Respondent's sales representative, Tom Valenzuela (Hearing Transcript (TR) 52-53, 128, 382-383). While Mr. Licato negotiated the terms of the Contract with Mr. Valenzuela, another of Respondent's sales representatives, Tom Gilardi, was Mr. Licato's primary point of contact during the Contract performance period (TR 132, 135, 382-383).

3. The Contract was signed by Sam Licato, for Complainant, and Al Bates, for Respondent. Though he signed the Contract, Mr. Bates was not involved in negotiating the Contract terms with Complainant (CX-1; TR 375-376, 382-383).

1. For the first six weeks of the Contract term, Respondent delivered tomatoes, per the Contract, to Complainant. Complainant paid for these shipments at the Contract price. During this time, Mr. Licato faxed weekly delivery order sheets to Respondent for Contract deliveries to be made the following week (TR 132-139).

2. During the first six weeks of Contract performance, the market price of tomatoes fluctuated. There were times when the market price for tomatoes was below the Contract price and there were times when the market price was above the Contract price (CX-5; TR 138).

3. At times during the first six weeks of performance, Complainant permitted Respondent to substitute slightly smaller, 5x6 tomatoes for the larger, 5x5 tomatoes specified in the Contract. Complainant also permitted some flexibility as to the quantities of tomatoes shipped from week to week (TR 131-132, 227).

4. In July 2006, the San Joaquin Valley of California experienced a heat

[2] The Contract actually indicates that the shipping period extends "through October 31, 2005." This is assumed to be a typographical error and is interpreted to mean October 31, 2006.

wave. The recorded daytime high temperatures, the nighttime low temperatures, and soil temperatures were above average and frequently above the normal range for this time of year (RX-7, 8, 9; TR 474, 487).

5. The heat wave during the summer of 2006 resulted in an approximately thirty-three percent (33%) reduction in Respondent's expected round and Roma tomato production for the 2006 summer growing season. Other growers in the San Joaquin Valley experienced similar losses due to unusually high temperatures (TR 398-400, 416, 484).

6. Beginning in mid to late August, Respondent's sales representative, Tom Gilardi, began to indicate to Complainant's sales representative, Sam Licato, that due to the severe weather, Respondent was considering invoking the Act of God clause in the Contract (TR 137-138).

7. On August 31, 2006, Tom Gilardi sent a copy of an email to Mr. Licato indicating that a company called "Custom Pak" was abandoning its existing contracts due to product shortages resulting from extreme heat in Virginia and California. The contracts referenced in the email were between Custom Pak and its customers and were not related to the Contract between Complainant and Respondent. Mr. Licato interpreted this email as an indication that Respondent was preparing to invoke the Act of God clause in its Contract with Complainant (RX-2; CX-4; TR 140-141, 345-350).

8. On August 31, 2006, Respondent's representative, Tom Gilardi, orally notified Sam Licato that Respondent was going to invoke the Act of God clause in the Contract and would no longer supply Complainant with tomatoes at Contract prices. Mr. Licato requested an explanation in writing as to Respondent's position and justification for invoking the Act of God clause (TR 141, 350).

9. On August 31, 2006, Mr. Licato sent Respondent a weekly delivery order sheet for delivery of tomatoes under the Contract for the week of September 4th. Mr. Gilardi returned this order sheet to Complainant on September 1, 2006, with the prices on the sheet lined

out and "market price" written in at the top of the page (CX-3, TR 352-353).

10. On September 1, 2006, Mr. Licato sent a letter to Mr. Gilardi requesting additional information regarding Respondent's invoking the Act of God clause in the Contract (RX-2).

11. On or about September 1, 2006, Tom Gilardi informed Sam Licato that Respondent would only supply tomatoes to Complainant at market prices, not Contract prices (TR 142).

12. On September 4, 2006, Al Bates of Sun Pacific sent Mr. Licato a letter stating that Respondent was invoking the Act of God clause in the Contract and would no longer supply tomatoes at Contract prices. The letter indicated that Respondent would attempt to continue to supply Complainant with tomatoes in a "short market" (CX-5).

13. From September 6-11, 2006, Respondent supplied tomatoes to Complainant under the August 31st order faxed by Sam Licato. The invoices accompanying these shipments indicated that Respondent was billing Complainant at market prices. Without notifying Respondent, Complainant remitted payment to Respondent at the lower Contract pricing levels (CX-3, CX-3; TR 144, 355-359).

14. On September 8, 2006, Sam Licato sent a delivery order sheet for the week of September 11, 2006, to Respondent listing "market" prices as the cost of the tomatoes in this order (CX-7).

15. On September 12, 2006, Complainant sent a letter, through its counsel at the time, to Respondent indicating that Complainant considered Respondent's invoking the Act of God clause to be improper and that Complainant expected Respondent to resume performance under the Contract (CX-9).[3]

[3] Exhibit CX-9 was admitted at the hearing for the limited purpose of demonstrating that, on September 12, 2006, Complainant notified Respondent that it considered Respondent's invocation of the Act of God clause to be invalid and expected Respondent to abide by the terms of the Contract (TR 186-188).

16. On September 13, 2006, Respondent shipped two of the loads from the September 8th order sheet to Complainant. Both of these loads were invoiced by Respondent at market prices. As it had done previously, Complainant remitted payment to Respondent at the lower Contract pricing levels (CX-10; TR 152-154).

17. On or about September 14, 2006, Respondent became aware that Complainant was paying Contract prices for recent shipments, not the full invoice amounts, and stopped supplying tomatoes to Complainant (TR 151-153, 413).

18. For the remainder of the Contract period, Mr. Licato sent weekly delivery order sheets to Respondent. These order sheets requested weekly delivery of the contracted quantities of tomatoes at Contract prices. Respondent did not deliver any additional tomatoes to Complainant during the Contract period (CX-11; TR 154-158).

19. During the remainder of the Contract period, Complainant purchased tomato loads to replace the tomatoes specified in its Contract with Respondent (CX-12, CX-13; TR 156-159).

20. During the Contract period, Complainant received two shipments of tomatoes from Respondent on invoices dated July 28 and September 2, 2006. Federal inspection reports on these shipments indicated that, at the time of the inspections, these shipments had condition defects exceeding "good delivery" standards for tomatoes (CX-18; TR 178-184).

21. Complainant paid the entire invoice price for these shipments and did not provide timely notice to Respondent of the defects in these shipments (TR 294).

III. CONCLUSIONS

In this contract dispute, Complainant's and Respondent's versions of the facts are largely in agreement. Both sides agree that Respondent did not deliver the tomatoes as specified in the Contract. The disagreement in this matter arises out of Respondent's invocation of the "Act of God"

clause in the Contract. The Act of God clause is included as the sixth of seven paragraphs in a one-page contract between the parties and reads as follows:

> Shippers' obligation. In the event of a product shortage caused by an Act of God, Natural disaster or other incident that could not be foreseen and is beyond the control of Sun Pacific, then performance under this contract shall be excused.

CX-1.

The resolution of this matter rests on the interpretation of this clause. There are several approaches to interpreting a *force majeure* or Act of God clause. An Act of God clause in a contract may be interpreted generally under the broad common law principles governing *force majeure* or commercial impracticability whereby "elements of the common law *force majeure* defense are often read into the force majeure provision of a contract." *See Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc*., 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001); *see also Nissho-Iwai Co. v. Occidental Crude Sales, Inc*., 729 F.2d 1530, 1540 (5th Cir. 1984). An alternative approach is to give specific meaning to the terms of a *force majeure* clause, especially in circumstances where those terms are specifically bargained for and agreed upon by the parties. *See Perlman v. Pioneer Ltd. Partnership*, 918 F.2d 1244, 1248 (5th Cir. 1990) (holding that the court should interpret and apply the specific terms of a bargained-for clause in the contract even though the clause otherwise resembled an Act of God clause). A combination of these two approaches may also be used by interpreting and applying specific terms of a contract as written, while using common law rules to "merely fill in gaps left by the [contract]." *See Hydrocarbon Mgmt. v. Tracker Exploration*, 861 S.W.2d 427, 436 (Tex. App. 1993); *see also Texas City Refining v. Conoco, Inc.*, 767 S.W.2d 183, 186 (Tex. App. 1989). In the case before us we will, as the Respondent requests, examine the Act of God clause in an attempt to give it particularized meaning, but will also examine the impact of applying the common law doctrine of *force majeure* or commercial impracticability to the dispute between these parties.[4]

[4] The traditional doctrine of *force majeure* is analogous to the concept of commercial impracticability referred to in the Uniform Commercial Code. *See* Commonwealth Edison Co. v. Allied-General Nuclear Services, 731 F. Supp. 850, 855 (N.D. Ill. 1990).

The Act of God clause in the Contract is triggered by a "product shortage caused by an Act of God . . . ." [CX-1 (emphasis added)]. As an initial matter, determining the intended meaning of the term "shortage" in this context is critical. Respondent must prove there was a "product shortage" under the Contract before it would be permitted to make use of the protections afforded by this clause. If there was no shortage, Respondent could not have properly invoked the Act of God clause.

In interpreting a contract term, the overriding goal is to discern the mutual intention of the parties. *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1210 (9th Cir. 1998). This mutual intention is best determined by interpreting the written terms of the contract as used in their ordinary and popular sense. *Marder v. Lopez*, 450 F.3d 445, 449-51 (9th Cir. 2006). A shortage can be defined generally as "the property of being an amount by which something is less than expected or required."[5] By its very definition, and without further clarification, there are two equally reasonable meanings of the term "shortage." These two possible meanings are especially problematic in this case. On one hand, Respondent did, in fact, produce fewer tomatoes than it expected during the Contract period and, in that sense, did experience a shortage.[6] However, throughout the Contract period, Respondent produced a quantity of tomatoes in excess of the amount it required to meet the requirements of the Contract. From Complainant's perspective, if Respondent had the amount it needed to meet the terms of the Contract there was no shortage warranting invocation of the Act of God clause (TR 225-229). Because there are two equally reasonable interpretations of the same contract language, there is no way to give a definitive plain-language meaning to the term "shortage."

[5] *Shortage Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/shortage (last visited April 15, 2008) (emphasis added).

[6] While Respondent attempts to argue that the less than expected yields would relieve it of its contract obligations, Respondent's own "plain language" analysis at times appears to be contrary to this proposition. Respondent writes that "shortage is a deficiency in amount, or simply put, not enough." Resp't's Br. at p. 12 (emphasis added). Based on this definition, paragraph 6 of the Contract could be rewritten to read, "In the event [Sun Pacific has not enough product due to] an Act of God . . . ." In this context, one could easily conclude that this clause could be invoked only if Respondent did not produce enough tomatoes to meet the requirements of the Contract.

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Having found no obvious plain-language meaning of this contract term, we will next attempt to determine the mutual intention of the parties using extrinsic evidence. *See S. Pac. Transport. Co. v. Santa Fe Pac. Pipelines*, 74 Cal. App. 4th 1232, 1241 (Cal. Ct. App. 1999). Such extrinsic evidence includes the circumstances surrounding the negotiation of the contract. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith*, 68 Cal. App. 4th 445, 474 (Cal. Ct. App. 1998). In the case before us, the Contract was negotiated by Complainant's sales representative, Sam Licato, and Respondent's sales representative, Tom Valenzuela.[7] Mr. Licato gave unambiguous and credible testimony that under his interpretation of the Contract, provided Respondent produced tomatoes in excess of the Contract requirements, Respondent was required to ship the Contract amount to Complainant (TR 224-229). Under Mr. Licato's interpretation of the Contract, Respondent would experience "shortage" only when it did not have enough tomatoes to meet its contractual obligations.[8] Despite advancing the position that a "shortage" under the Contract should be defined as a general reduction in its supply, Respondent provided no evidence or testimony relating to Respondent's negotiation of the Contract. As the other party to the contract negotiations, Respondent's sales representative, Tom Valenzuela, is the only other person who could have provided information on the negotiation of the specific Contract terms. Respondent did not call Mr. Valenzuela as a witness at the oral hearing in this matter.

Having heard testimony from only one side of the contract negotiations, we cannot conclude that the Act of God clause was intended by the parties to allow Respondent to void the Contract in the event there was an unspecified general reduction in crop production.[9] Mr. Licato's

[7] The Contract was signed on behalf of Respondent by Mr. Al Bates. Though he approved the Contract, Mr. Bates had no involvement with the actual negotiation of the Contract terms (TR 382; 447).

[8] Though Respondent's counsel's questioning of Mr. Licato suggests that delivery to Complainant would result in Respondent being forced to "cut out" its other customers, during this period of time Respondent had no other fixed contracts for the sale of tomatoes (TR 226-227; 365-366). Even though Complainant had the only existing contract with Respondent, Mr. Licato appeared willing to work with Respondent on flexible delivery schedules to permit Respondent to continue to meet the needs of its other, non-contract customers during this time (TR 227).

[9] Mr. Bates indicated that, in his mind, a thirty percent or greater reduction in crop production would have permitted Respondent to invoke the Act of God clause. This thirty-percent threshold was never conveyed to Complainant (TR 468-469).

interpretation of the term "shortage" is not only reasonable, it is unrefuted. It is entirely possible that Mr. Valenzuela, too, believed that Respondent was obligated to supply Complainant with tomatoes under the Contract as long as it had enough tomatoes to supply the Contract amounts. We simply have no way of knowing.[10]

In addition to looking at the plain meaning, Respondent urges us to examine relevant case law to interpret to the term "shortage." Respondent's Br. at p. 13. In doing so, it cites to four cases. In the first, *G & H Sales Corp. v. C. J. Vitner Co*., 50 Agric. Dec. 1892 (U.S.D.A. 1991), the Judicial Officer of Department did not attempt to define the term "shortage," nor did he decide whether a shortage existed in that case.[11] Next, Respondent cites to *Cliffstar Corp. v. Riverbend Products, Inc*., 750 F. Supp. 81 (W.D.N.Y. 1990), to support the proposition that a forty-two percent to forty-four percent reduction in forecasted production is a shortage. In *Cliffstar*, the court uses the term "shortage" in referencing a general reduction in supply. The decision does not assist us in giving meaning to the term "shortage" in the matter before us now.[12] The third case cited by Respondent, *Alimenta (U.S.A.), Inc. v. Cargill, Inc*., 861 F.2d 650, 653 (11th Cir. 1988), also has nothing to do with the court attempting to define the term "shortage," as Respondent suggests, and is of no help in determining the meaning of the term. Lastly, Respondent cites to *Alimenta (U.S.A.), Inc. v. Gibbs Nathel (Canada), Ltd*., 802 F.2d 1362 (11th Cir. 1986), to support its interpretation of the term "shortage." Respondent also misapplies this case. In *Alimenta v. Gibbs*, the seller, Gibbs, had received only fifty-two percent of the amount it was due under its own purchase contracts and would have been forced to make market purchases costing $3.8 million to cover a contract involving $18,000.00 in profit. *Id.* at 1365. In *Gibbs*, under its existing purchase contracts, Gibbs did not

[10] Mr. Valenzuela was originally listed as a witness for Respondent, but was not called to appear by Respondent.

[11] In *G & H Sales Corp.*, the Judicial Officer was unable to ascertain the degree of shortage, largely due to the failure of the parties to define the applicable growing area. In the case before us, we know that Respondent's tomato crop production for the year was reduced by thirty percent (30%) to thirty-five percent (35%) (TR 402; Resp't's Br. at 9).

[12] *Cliffstar* is a ruling on summary judgment motions and is not an attempt by the court to define the meaning of the term "shortage" in a contract or any other context. Respondent's assertion that "the Court held that a 42-44% reduction in the growers' forecasted production was a shortage" is a mischaracterization of this case. Respondent's Br. at 14 (emphasis added); Cliffstar Corp., 750 F.Supp. at 82-83.

have enough product on hand to meet its contract obligations to its customer, Alimenta. Therefore, *Gibbs* would be useful to Respondent Sun Pacific only if Sun Pacific did not have enough product on hand to meet the requirements of the Contract. To the contrary, Sun Pacific's overall production, during even the leanest seven weeks of the Contract, was well above the amount required to meet its contractual obligations to DiMare[13] (*See* TR 392-393). Furthermore, Gibbs allocated its supplies, as is required under UCC § 2-615 and despite receiving only 52% of its expected amount, Gibbs delivered to Alimenta eight-seven percent of the product required under their contract. *Gibbs*, 802 F.2d at 1366. There is no support in the cases cited by Respondent for Respondent's professed meaning of the term "shortage."

Given that Respondent had enough product to adequately supply Complainant with tomatoes under the Contract, Respondent's last available argument would be to assert that given the high market prices at the time, delivery at the low Contract prices would be commercially impracticable under UCC § 2-615.[14] Under Department reparation case precedent, protection for crop failure under UCC § 2-615 is proper when a producer has designated the land upon which the particular crop is to be grown. *Bliss Produce Co. v. A. E. Albert & Sons, Inc.*, 35 Agric. Dec. 742 (U.S.D.A. 1976); *Harrell Bros. Canning Co. v. Olen Price Farm Supply*, 31 Agric. Dec. 331 (U.S.D.A. 1972); *Thomas J. Holt Co. v. Shipley Sales Service*, 25 Agric. Dec. 436 (U.S.D.A. 1966). The Contract in this case contained no reference to growing location for the tomatoes to be supplied

[13] While Respondent points out that it did not produce enough 5x5 tomatoes to meet the requirements of the Contract, Complainant's sales representative, Sam Licato, testified credibly that he permitted Respondent to substitute 5x6 tomatoes for 5x5s (TR at 131-132; 153-154; 225). Additionally, according to Respondent, its production of 5x5s first dropped below the contractually-required amount of 3,200 cartons beginning the week ending 9/17/06- well after Respondent invoked the Act of God clause on August 31st. *See* Resp't's Brief at p. 17. Respondent's invocation of the Act of God clause prior to its production of 5x5s dropping below Contract levels belies its contention that it relied on a inadequate supplies of 5x5s to avoid its obligations under the Contract. Based on Complainant's willingness to accept 5x6 tomatoes in lieu of 5x5 tomatoes and Respondent's abundance of round tomatoes throughout the Contract period, Respondent would not have had a valid basis to void the Contract even if it had waited until mid-September to notify Complainant of its intent to invoke the Act of God clause in the Contract.

[14] Respondent's primary argument focuses on interpretation and application of the Act of God clause, as written in the Contract. Respondent makes only limited references to UCC § 2-615 in its Brief and Reply Brief. Resp't's Br. at 23; Resp't's Reply Br. at 5.

by Respondent (CX-1). While Complainant may have known that Respondent generally shipped tomatoes grown in the San Joaquin Valley, we find that this general awareness would not meet the "designated land" requirement of the cases cited above.

Additionally, under UCC § 2-615, Respondent would have to demonstrate that delivery "has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made . . . ." UCC § 2-615. While the San Joaquin Valley did experience a heat wave during the summer of 2006, as noted above, Respondent had enough tomatoes to meet its obligations to Complainant (TR 450-451). There is no evidence that the parties based the Contract on any assumptions with respect to weather or Respondent's overall crop yield for the 2006 growing season. It appears that Respondent's desire to capitalize on the favorable market conditions, rather than its inability to perform, was the actual reason Respondent abandoned the Contract (*See* TR 448-449). Respondent knew that it could, and presumably did, sell the tomatoes it promised to Complainant to other buyers at prices well above the Contract rates. (*See* TR 426). Under the UCC, a rise or collapse in the market does not provide justification in itself for invoking UCC § 2-615, "for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover." UCC § 2-615 Official Comment 4.[15]

Lastly, under the UCC, when the performance-excusing contingency only partially affects the seller's ability to perform the seller is required to make a "fair and reasonable" allocation of product to its customers. Even assuming, arguendo, that Respondent were protected by UCC § 2-615, with an overall tomato crop reduction of approximately thirty-three percent, only part of Respondent's ability to perform would have been affected. Despite retaining roughly sixty-seven percent of its capacity to perform, Respondent allocated no product to Complainant at Contract prices after invoking the Act of God clause. In not complying with the

[15] UCC § 2-615 also provides protection to a seller when "a severe shortage of raw materials or of supplies due to a contingency such as . . . local crop failure . . . causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance . . . ." UCC § 2-615 Official Comment 4. Respondent neither experienced a severe shortage of raw materials nor incurred an increase in overall production costs during the Contract period (TR 467-468).

allocation provisions of the UCC, Respondent acted in a manner that was completely inconsistent with the actions of a merchant seeking protection under UCC § 2-615.

Based on the above considerations, we find that a "product shortage" under the Contract did not exist.[16] Over the course of the growing season, Respondent produced roughly five times the amount needed to fully perform under its Contract with Complainant (TR 397). When Respondent invoked the Act of God clause, it was producing tomatoes of the general kind and quantity to meet the Contract requirements (TR 392-393). While Respondent's production of 5x5 tomatoes did dip below the Contract levels in mid September, this could not have been Respondent's justification for invoking the Act of God clause over two weeks earlier.[17] There was no product shortage under the Contract that would have allowed Respondent to invoke the Act of God clause. Respondent was also not relieved of its contractual obligations under the protections afforded by UCC § 2-615. Accordingly, we find that Complainant has proved that Respondent breached the Contract entered into by the parties in July 2006. Respondent was in breach of the Contract as of August 31, 2006, when Tom Gilardi informed Sam Licato that Respondent would no longer supply Complainant tomatoes at the Contract price (*See* TR 350). [18]

Complainant also alleged that two shipments made under the Contract failed to make good delivery due to condition defects exceeding acceptable tolerances. The invoices for these shipments were dated July

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[16] Based on our finding that there was no product shortage, we need not consider the issue of whether the 2006 heat wave in the San Joaquin Valley was foreseeable or was an Act of God under the Contract.

[17] *See supra* note 13.

[18] On September 8, 2006, Complainant's sales representative, Sam Licato, faxed a weekly order sheet to Respondent indicating that Complainant would be paying "market prices." (CX-7) Complainant received two loads under this order sheet, reduced the invoice amounts, and remitted payment at the lower Contract rates. At this point, Respondent had already breached the Contract and placed Mr. Licato in a difficult position. Mr. Licato was faced with a Hobson's choice of either agreeing to pay market prices or not getting tomatoes. (TR 139-140, 142-143, 352-353) With respect to the situation at the time, Mr. Licato stated, "What else could I do? I needed tomatoes." (TR 245). Because Mr. Licato's actions occurred after Respondent's unequivocal breach, they are not material to this case. Additionally, even if Complainant had actually paid the market prices on these shipments, Complainant would now be entitled to the difference between the market and Contract prices as additional damages.

28 and September 2, 2006. (CX 18 pp. 2, 4) Despite its assertions, Complainant did not produce adequate evidence that it provided Respondent timely notification of breach of the suitable shipping condition warranty.[19] (TR 294) To claim damages, a receiver must give the shipper timely notice of a breach of contract. UCC § 2-607(3); *Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc.*, 42 Agric. Dec. 1194 (U.S.D.A. 1983); *Spudco, Inc. v. Yick Lung Co.*, 36 Agric. Dec. 715 (U.S.D.A. 1977). Because Complainant failed to prove that it provided timely notice of the alleged breach, Complainant cannot recover damages on these shipments.

A. Damages

Complainant is owed damages in this matter. Complainant has requested damages pursuant to section 2-712 of the UCC (UCC § 2-712), which provides:

> (a) If the seller wrongfully fails to deliver . . . the buyer may cover by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
>
> (b) The buyer may recover . . . the difference between the cost of cover and contract price together with any incidental or consequential damages . . . but less expenses saved in consequence of the seller's breach.

Complainant's Opening Br. at 13. Complainant requests cover damages in the amount of $1,225,362.00 (TR 11).

Respondent objects to $697,202.00 of Complainant's cover damages, primarily based on the assertion that Complainant purchased sizes or types

[19] Though Complainant's sales representative, Sam Licato testified that he was "sure" he notified Respondent of the condition defects, Complainant provided no specific testimony or documentation supporting this claim (TR 294). It is likely that Respondent was not made aware of problems with these shipments until after the informal PACA complaint was filed.

of tomatoes that were not specified in the Contract (Resp't's Br. at 25-27). When determining the reasonableness of cover purchases, it is appropriate for us to compare the cover purchase prices to the prevailing USDA Market News reported prices at the time the cover purchases were made. *See South Florida Growers Ass'n, Inc. v. Country Fresh Distributors, Inc.*, 52 Agric. Dec. 684, 698 (U.S.D.A. 1993). While the types, sizes, and growing locations of Complainant's cover purchases of round tomatoes were not identical to those specified in the Contract, the majority of these purchases were made at or below the prevailing market prices for the types of round tomatoes specified in the Contract. Respondent does not allege that Complainant overpaid for these tomatoes, only that they were impermissibly substituted (*See* Resp't's Br. at 25-27). Complainant is not required to procure identical product as cover, but its purchases must be commercially reasonable. *R & R Produce, Inc., v. Fresh Unlimited, Inc.*, 56 Agric. Dec. 997, 1010 (U.S.D.A. 1997). We find that Complainant's cover purchases of round tomatoes, totaling $1,277,084.00 as detailed in Appendix A, were similar enough to the Contract tomatoes to be deemed commercially reasonable and made in accordance with UCC § 2-712. If supplied under the Contract, these tomatoes would have cost Complainant $491,308.00. Complainant is entitled to recover the difference between the cover price and the Contract price, or $785,776.00.

Complainant also made cover purchases of Roma tomatoes. Many of these purchases were of large or extra large Roma tomatoes and were at prices above the prevailing market prices for the medium Roma tomatoes specified in the Contract. (CX 12, 13, 16) Under the UCC, Complainant, as the buyer of substitute goods, "may not utilize cover to put himself in a better position than it would have been had the contract been performed." *Martella v. Woods*, 715 F.2d 410, 413 (8th Cir. Mo. 1983). Complainant gave no indication that it was unable to obtain medium Roma tomatoes as specified in the Contract and gave no reason for substituting mediums with large and extra large.[20]

[20] In its cover purchase summary (CX-12), Complainant incorrectly lists "Lrge Roma" as the commodity to be substituted under the Contract. The Contract called for the delivery of "medium size" Roma tomatoes (CX-1).

CX-12 Row	Date*	Cover Qnty	Cover Price	Cover Total	Market Price Quantity	Market price	Market Price Total	Damages Reduction
23	9/13	1,296	$30.95	$40,111	1,296	$20.45	$26,503	$13,608
24	9/15	1,600	$30.95	$49,520	1,600	$20.45	$32,720	$16,800
35	9/18	1,600	$33.95	$54,320	1,600	$28.95	$46,320	$8,000
36	9/20	1,520	$29.45	$44,764	1,520	$28.95	$44,004	$760
83	10/16	1,600	$21.00	$33,600	1,600	$16.95	$27,120	$6,480
84	10/19	1,600	$18.95	$30,320	1,600	$16.95	$27,120	$3,200
95	10/27	1,351	$21.45	$28979	1,351	$12.45	$16820	$12,159
96	10/27	1,200**	$16.95	$20,340	1,200	$12.45	$14.94000	$5,400
**								$480

ERRATA

101	10/30	1,430	$17.95	$25,669	1,430	$11.45	$16,374	$9,295
102	10/31	800	$14.95	$11,960	800	$11.45	$9,160	$2,800
102	10/31	800	$12.95	$10,360	800	$11.45	$9,160	$1,200
								$80,182

As requested by Complainant, damages for the Roma tomatoes will be calculated as cover damages for the quantities it actually purchased to replace shipments Respondent failed to deliver. Complainant is entitled to damages amounting to the difference between the cost of cover and the Contract price. *See* UCC § 2-712. However, having determined that many of Complainant's cover purchases were for a larger Roma tomato than specified by the Contract, Complainant's recovery for large and extra-large Roma tomatoes will be limited. Complainant will be permitted cover costs not to exceed USDA Agricultural Marketing Service (AMS) reported market prices for medium Roma tomatoes at the time of each purchase. Cover purchases at or below the AMS market price for medium Roma tomatoes will not be adjusted. Complainant's cover purchases made at prices higher than the AMS price for medium Roma tomatoes will be reduced by an amount equal to the difference between the cover price paid by Complainant and the AMS-reported market price for medium Roma tomatoes. As a result of this reduction, damages for large and extra-large Roma tomatoes purchased in the transactions detailed below, as listed in CX-12, have been adjusted as follows: **Table 1**

* As indicated in CX-12.

** CX-12 lists cover quantity as 1,250; actual amount purchased at this price was 1,200 (CX-13 at 73). This error resulted in an additional $480.00 in erroneous cover damages being alleged in CX-12.

These adjustments result in a reduction of damages due Complainant of $80,182.00. Roma tomato cover purchases have been allowed as listed in Appendix B. Appendix B details all allowable cover damages for Roma tomatoes and incorporates the deductions noted in Table 1 above. Complainant's allowable Roma tomato cover purchases total $529,552.00. If supplied under the Contract, these tomatoes would have cost Complainant $178,729.00. Complainant is entitled to recover the difference between the cover price and the Contract price, or $350,823.00. The cover damages amount for the round and Roma tomatoes combined

is $1,136,599.00 (Appx. A and B).

Both parties in this matter have submitted claims for fees and expenses.[21] Under Section 7 of the Act, "[t]he Secretary shall order any commission merchant, dealer, or broker who is the losing party to pay the prevailing party, as reparation or additional reparation, reasonable fees and expenses incurred in connection with any such hearing." 7 U.S.C. 499g(a). Having succeeded on the vast majority of its claim, Complainant is deemed to be the prevailing party in this matter. *See Anthony Vineyards, Inc. v. Sun World International, Inc.*, 62 Agric. Dec. 342 (U.S.D.A. 2003).

As the prevailing party, Complainant is entitled to be compensated for its reasonable fees and expenses incurred in connection with the oral hearing. 7 U.S.C. 499g. Complainant filed a claim for fees and expenses in this matter in the amount of $61,109.98. *See* Claim of Complainant for Fees and Expenses in Connection with Oral Hr'g. Respondent did not file an objection to Complainant's claim. Fees and expenses deemed to be unreasonable are not recoverable. The following fees or expenses claimed by Complainant have been modified:

> 1. Fees in connection with preparation for hearing have been reduced from $45,860.00 to $35,705.00. Expenses Complainant would have incurred had the dispute been resolved through the Department's documentary procedures are not recoverable under section 7(a) of the Act. *Mountain Tomatoes, Inc. v. E. Patapanian & Sons, Inc*., 48 Agric. Dec. 707, 715 (1989). A review of Complainant's claim for fees and expenses revealed a number of expenses that would have been incurred if this matter had been resolved through the use of documentary procedures (e.g. telephone calls with client to review facts of case, research regarding Act of God case law, etc.). *See* Claim of Complainant for Fees and Expenses- exhibit A. The exclusion of these items results in the elimination of 34.1 billing hours and a total reduction of the amount recoverable for fees incurred in

[21] At the close of the hearing, the time for filing claims for fees and expenses was extended to allow for the simultaneous filing of post-hearing briefs and claims for fees and expenses.

preparation for oral hearing of $10,155.00.

2. Fees in connection with Complainant's attorney's appearance at the oral hearing have been reduced from $8,575.00 to $3,675.00. Complainant is not entitled to recover attorney fees for attorney travel to the hearing location. *East Produce, Inc. v. Seven Seas Trading Co.,* 59 Agric. Dec. 853, 865 (2000). This exclusion results in the elimination of 14 travel hours and a $4,900.00 reduction in allowable expenses.

3. Complainant claims expenses of $1,126.27 for meals for Complainant's three attendees at this two-day hearing. This amount is unreasonable and is reduced to the federal government's General Services Administration (GSA) meals and incidentals rate at the time of the hearing of $64.00 per day for each attendee.[22] The total amount requested for meals is reduced by $614.27 to $512.00.

4. Complainant's claim for parking and lodging expenses is reduced by $211.14 to $2,616.21. Miscellaneous expenses such as in-room movies and internet access fees have been disallowed.

5. Complainant's claim for transportation is reduced by $1,598.60 to $1098.90. The airfare claim for Paul DiMare of $1,878.20 is deemed unreasonable and has been reduced to $279.60.[23]

Based on the above, the total amount of fees and expenses awarded to Complainant is reduced by $17,479.01. The total amount of fees and expenses incurred in connection with the oral hearing due Complainant is

[22] Complainant's counsel: 3 days (12/10-12/13), Sam Licato 3 days: (12/10-12/13), Paul Dimare: 2 days (12/10-12/11). Total: 8 days X $64/day = $512.00.

[23] Mr. Dimare's airline flight was from Florida to Los Angeles. Respondent's attorneys' airfare from Florida to Los Angeles was $279.60. *See* Resp't's Application for Fees and Expenses.

$43,630.97.

Respondent's failure to perform under its Contract with Complainant is a violation of Section 2 of the Act. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of Section 2 of the Act Athe full amount of damages@ sustained in consequence of such violations. Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Because the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest at a reasonable rate as part of each reparation award. *See Thomas Produce Co. v. Lange Trading Co.*, 62 Agric. Dec. 331, 341-42 (U.S.D.A. 2003*); Pearl Grange Fruit Exchange, Inc. 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); *W.D. Crockett v. Producers Marketing Ass'n, Inc.*, 22 Agric. Dec. 66 (U.S.D.A. 1963). Interest will be determined in accordance with the method set forth in 28 U.S.C. § 1961, i.e., the rate of interest will equal 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 ending prior to the date of the Order. *See PGB International, LLC v. Bayche Companies*, 65 Agric. Dec. 669 (U.S.D.A. 2006) (Order on Recons.).

Pursuant to 7 U.S.C. § 499e(a), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party. Therefore, Complainant is also entitled to recoup the $300.00 handling fee that it paid to file its formal complaint.

ORDER

Within 30 days from the date of this Order Respondent shall pay to Complainant, as reparation, $1,136,599.00 with interest thereon at the rate of 2.18 per annum from November 1, 2006 until paid, plus the additional amount of $300.00.

Within 30 days from the date of this Order Respondent shall pay to Complainant, as additional reparation, $43,630.97 for fees and expenses incurred in connection with the oral hearing.

ERRATA

Copies of this Order shall be served upon the parties.

APPENDIX A

ROUND TOMATO COVER PURCHASES

CX-12 Row	Contract week	Quantity	Cover Price	Cover Total	Contract Price	Contract Total	Cover Damages
10	9/4-9/9	800	$15.45	$12,360	$5.45	$4,360	$8,000
10	9/4-9/9	800	$15.45	$12,360	$4.45	$3,560	$8,800
14*	9/11-9/16	1,600	$16.95	$27,120	$7.95	$12,720	$14,400
15	9/11-9/16	800	$15.45	$12,360	$6.45	$5,160	$7,200
15	9/11-9/16	720	$15.45	$11,124	$5.45	$3,924	$7,200
16	9/11-9/16	800	$21.45	$17,160	$6.45	$5,160	$12,000
16	9/11-9/16	800	$21.45	$17,160	$5.45	$4,360	$12,800
17	9/11-9/16	800	$21.45	$17,160	$6.45	$5,160	$12,000
17	9/11-9/16	800	$21.45	$17,160	$5.45	$4,360	$12,800
18	9/11-9/16	800	$18.45	$14,760	$5.45	$4,360	$10,400
18	9/11-9/16	800	$18.45	$14,760	$4.45	$3,560	$11,200
19	9/11-9/16	720	$21.45	$15,444	$5.45	$3,924	$11,520
19	9/11-9/16	880	$21.45	$18,876	$4.45	$3,916	$14,960
20	9/11-9/16	800	$21.45	$17,160	$5.45	$4,360	$12,800
20	9/11-9/16	800	$21.45	$17,160	$4.45	$3,560	$13,600
21**	9/11-9/16	800	$20.95	$16,760	$5.45	$4,360	$12,400
21**	9/11-9/16	800	$20.95	$16,760	$4.45	$3,560	$13,200
25	9/18-9/23	616	$28.95	$17,833	$7.95	$4,897	$12,936
25	9/18-9/23	984	$26.95	$26,519	$7.95	$7,823	$18,696
26	9/18-9/23	1,600	$28.95	$46,320	$7.95	$12,720	$33,600
27	9/18-9/23	800	$25.45	$20,360	$6.45	$5,160	$15,200
27	9/18-9/23	800	$25.45	$20,360	$5.45	$4,360	$16,000
28	9/18-9/23	800	$20.95	$16,760	$6.45	$5,160	$11,600
28	9/18-	720	$20.95	$15,084	$5.45	$3,924	$11,160

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CX-12 Row	Contract week	Quantity	Cover Price	Cover Total	Contract Price	Contract Total	Cover Damages
29	9/18-9/23	800	$22.45	$17,960	$6.45	$5,160	$12,800
29	9/18-9/23	800	$22.45	$17,960	$5.45	$4,360	$13,600
30	9/18-9/23	800	$20.95	$16,760	$5.45	$4,360	$12,400
30	9/18-9/23	720	$20.95	$15,084	$4.45	$3,204	$11,880
31	9/18-9/23	800	$20.95	$16,760	$5.45	$4,360	$12,400
31	9/18-9/23	720	$20.95	$15,084	$4.45	$3,204	$11,880
32	9/18-9/23	800	$21.45	$17,160	$5.45	$4,360	$12,800
32	9/18-9/23	800	$21.45	$17,160	$4.45	$3,560	$13,600
33	9/18-9/23	800	$21.45	$17,160	$5.45	$4,360	$12,800
33	9/18-9/23	752	$21.45	$16,130	$4.45	$3,346	$12,784
34	9/18-9/23	800	$25.45	$20,360	$5.45	$4,360	$16,000
34	9/18-9/23	800	$21.45	$17,160	$4.45	$3,560	$13,600
37	9/25-9/30	1,600	$21.45	$34,320	$7.95	$12,720	$21,600
38	9/25-9/30	1,600	$11.45	$18,320	$7.95	$12,720	$5,600
39	9/25-9/30	800	$19.45	$15,560	$6.45	$5,160	$10,400
39	9/25-9/30	800	$19.45	$15,560	$5.45	$4,360	$11,200
40	9/25-9/30	800	$19.45	$15,560	$6.45	$5,160	$10,400
40	9/25-9/30	800	$19.45	$15,560	$5.45	$4,360	$11,200
41	9/25-9/30	800	$17.45	$13,960	$6.45	$5,160	$8,800
41	9/25-9/30	800	$14.45	$11,560	$5.45	$4,360	$7,200
42	9/25-9/30	800	$13.45	$10,760	$5.45	$4,360	$6,400
42	9/25-9/30	800	$13.45	$10,760	$4.45	$3,560	$7,200
43	9/25-9/30	800	$13.45	$10,760	$5.45	$4,360	$6,400
43	9/25-9/30	800	$13.45	$10,760	$4.45	$3,560	$7,200
44	9/25-9/30	800	$19.45	$15,560	$5.45	$4,360	$11,200

CX-12 Row	Contract week	Quantity	Cover Price	Cover Total	Contract Price	Contract Total	Cover Damages
44	9/25-9/30	800	$15.45	$12,360	$4.45	$3,560	$8,800
45	9/25-9/30	800	$9.45	$7,560	$5.45	$4,360	$3,200
45	9/25-9/30	800	$9.45	$7,560	$4.45	$3,560	$4,000
46	9/25-9/30	800	$13.45	$10,760	$5.45	$4,360	$6,400
46	9/25-9/30	800	$13.45	$10,760	$4.45	$3,560	$7,200
49	10/2-10/7	1,600	$15.45	$24,720	$7.95	$12,720	$12,000
50	10/2-10/7	1,600	$21.45	$34,320	$7.95	$12,720	$21,600
51	10/2-10/7	800	$17.45	$13,960	$6.45	$5,160	$8,800
51	10/2-10/7	800	$17.45	$13,960	$5.45	$4,360	$9,600
52	10/2-10/7	800	$13.45	$10,760	$6.45	$5,160	$5,600
52	10/2-10/7	720	$10.45	$7,524	$5.45	$3,924	$3,600
53	10/2-10/7	800	$11.45	$9,160	$6.45	$5,160	$4,000
53	10/2-10/7	800	$11.45	$9,160	$5.45	$4,360	$4,800
54	10/2-10/7	800	$13.45	$10,760	$5.45	$4,360	$6,400
54	10/2-10/7	800	$13.45	$10,760	$4.45	$3,560	$7,200
55	10/2-10/7	800	$13.45	$10,760	$5.45	$4,360	$6,400
55	10/2-10/7	800	$13.45	$10,760	$4.45	$3,560	$7,200
56	10/2-10/7	800	$11.45	$9,160	$5.45	$4,360	$4,800
56	10/2-10/7	800	$11.45	$9,160	$4.45	$3,560	$5,600
57	10/2-10/7	800	$5.95	$4,760	$5.45	$4,360	$400
57	10/2-10/7	800	$5.95	$4,760	$4.45	$3,560	$1, 200
58	10/2-10/7	800	$11.45	$9,160	$5.45	$4,360	$4,800
58	10/2-10/7	800	$11.45	$9,160	$4.45	$3,560	$5,600
61	10/9-10/14	1,600	$13.45	$21,520	$7.95	$12,720	$8,800
62‡	10/9-10/14	1,600	$6.45	$10,320	$7.95	$12,720	-$2,400

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CX-12 Row	Contract week	Quantity	Cover Price	Cover Total	Contract Price	Contract Total	Cover Damages
63	10/9-10/14	800	$9.45	$7,560	$6.45	$5,160	$2,400
63	10/9-10/14	800	$9.45	$7,560	$5.45	$4,360	$3,200
64	10/9-10/14	800	$11.45	$9,160	$6.45	$5,160	$4,000
64	10/9-10/14	800	$9.45	$7,560	$5.45	$4,360	$3,200
65	10/9-10/14	800	$7.45	$5,960	$6.45	$5,160	$$800
65	10/9-10/14	800	$7.45	$5,960	$5.45	$4,360	$1,600
66	10/9-10/14	800	$5.45	$4,360	$4.45	$3,560	$800
67	10/9-10/14	800	$11.45	$9,160	$5.45	$4,360	$4,800
67	10/9-10/14	800	$11.45	$9,160	$4.45	$3,560	$5,600
70	10/9-10/14	800	$5.45	$4,360	$4.45	$3,560	$800
73	10/16-10/21	1,600	$9.45	$15,120	$7.95	$12,720	$2,400
74	10/16-10/21	1,600	$9.45	$15,120	$7.95	$12,720	$2,400
75	10/16-10/21	800	$7.45	$5,960	$6.45	$5,160	$800
75	10/16-10/21	800	$7.45	$5,960	$5.45	$4,360	$1,600
76	10/16-10/21	800	$6.45	$5,160	$5.45	$4,360	$800
77‡	10/16-10/21	800	$3.45	$2,760	$6.45	$5,160	-$2,400
77‡	10/16-10/21	800	$3.45	$2,760	$5.45	$4,360	-$1,600
78	10/16-10/21	800	$5.45	$4,360	$4.45	$3,560	$800
79+	10/16-10/21	760	$5.45	$4,142	$4.45	$3,382	$760
80	10/16-10/21	800	$5.45	$4,360	$4.45	$3,560	$800
81	10/16-10/21	800	$5.45	$4,360	$4.45	$3,560	$800
TOT		80,312		$1,277,084		$491,308	$785,776

* Quantity purchased exceeded the contract quantity and has been reduced.

** Invoices for these loads were missing from CX-13. CX-13 p.9 is purported to represent these loads but is actually a duplicate copy of CX-13 p. 48. Respondent did not object to this omission. The prices listed on CX-12 rows 21 are consistent with other cover purchases

made at the time and will be accepted as listed in CX-12.

‡ Replacement product was purchased at less than the contract price. CX-12 also indicates that 26 loads were replaced "at or below" contract prices during the last three weeks of the Contract performance period. Complainant does not indicate the actual cover prices paid for these loads. While any savings realized by Complainant in purchasing cover loads at less than Contract prices would be deducted from Complainant's damages total, Respondent neither raised this issue nor objected to Complainant's failure to provide actual cover prices paid for these loads. During the period of these cover purchases, market prices were very close to the Contract prices and the amount of offset, if any, due Respondent on these cover purchases would be minimal.

+ CX-12 indicates a quantity of 800. The correct cover quantity, as indicated by the invoice, is 760.

ERRATA

APPENDIX B

ROMA TOMATO COVER PURCHASES

CX-12 Row	Contract Week	Quantity	Cover Price	Cover Total[1]	Contract Price	Contract Total	Cover Damages
23	9/11-9/16	1,296	$20.45	$26,503	$7.35	$9,526	$16,977
24	9/11-9/16	1,600	$20.45	$32,720	$7.35	$11,760	$20,960
35	9/18-9/23	1,600	$28.95	$46,320	$7.35	$11,760	$34,560
36	9/18-9/23	1,520	$28.95	$44,004	$7.35	$11,172	$32,832
47	9/25-9/30	1,360	$34.95	$47,532	$7.35	$9,996	$37,536
48	9/25-9/30	160	$30.95	$4,952	$7.35	$1,176	$3,776
48	9/25-9/30	1,280	$34.95	$44,736	$7.35	$9,408	$35,328
59	10/2-10/7	960	$23.45	$22,512	$7.35	$7,056	$15,456
59	10/2-10/7	560	$29.00	$16,240	$7.35	$4,116	$12,124
60	10/2-10/7	400	$28.95	$11,580	$7.35	$2,940	$8,640
60	10/2-10/7	1,200	$26.95	$32,340	$7.35	$8,820	$23,520
71	10/9-10/14	1,600	$22.95	$36,720	$7.35	$11,760	$24,960
72	10/9-10/14	1,600	$22.95	$36,720	$7.35	$11,760	$24,960
83	10/16-10/21	1,600	$16.95	$27,120	$7.35	$11,760	$15,360
84	10/16-10/21	1,600	$16.95	$27,120	$7.35	$11,760	$15,360
95	10/23-10/28	1,351	$12.45	$16,820	$7.35	$9,929	$6,891
96	10/23-10/28	1,200	$12.45	$14,940	$7.35	$8,820	$6,120
96	10/23-10/28	400	$14.95	$5,980	$7.35	$2,940	$3,040
101	10/30-10/31	1,430	$11.45	$16,373	$7.35	$10,510	$5,863
102	10/30-10/31	800	$11.45	$9,160	$7.35	$5,880	$3,280
102	10/30-10/31	800	$11.45	$9,160	$7.35	$5,880	$3,280
TOT		24,317		$529,552		$178,729	$350,823

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

GOURMET EXPRESS, LLC.
Docket No. D-16-0084.
Miscellaneous Order.
Filed April 28, 2016.

GREGORY MELTON, d/b/a GM BROKERAGE.
Docket No. 16-0033.
Miscellaneous Order.
Filed May 27, 2016.

SANDIA DISTRIBUTORS, INC.
Docket No. 16-0092.
Miscellaneous Order.
Filed May 27, 2016.

M & M PRODUCE, INC.
Docket No. 16-0035.
Miscellaneous Order.
Filed June 15, 2016.

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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

OLD FASHION HONEY, d/b/a U.S. FOOD LOGISTICS.
Docket No. 14-0173.
Default Decision and Order.
Filed April 12, 2016.

CHIEFTAIN HARVESTING, INC.
Docket No. D-15-0166.
Default Decision and Order.
Filed April 12, 2016.

POPPELL'S PRODUCE, INC.
Docket No. D-16-0039.
Default Decision and Order.
Filed April 28, 2016.

JAMES H. PAXSON & SONS, INC.
Docket No. D-16-0021.
Default Decision and Order.
Filed June 1, 2016.

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CONSENT DECISIONS

PERISHABLE AGRICULTURAL COMMODITIES ACT

Shelley S. Harrison.
Docket No. 14-0131.
Filed January 14, 2016.

Sun Produce Specialties, LLC.
Docket No. 16-0020.
Filed January 28, 2016.

Ricardo Bombella.
Docket No. 16-0022.
Filed April 6, 2016.

Arrow Farms of New York, Inc.
Docket No. 16-0034.
Filed April 27, 2016.

Lonnie Martin.
Docket No. 16-0055.
Filed February 18, 2016.

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