UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

[redacted]	)	PACA Docket No. [redacted]
	)	
Complainant	)	
	)	
v.	)	
	)	
[redacted]	)	
	)	
Respondent	)	Decision and Order

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the Act. A timely Complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $5,726.00 in connection with one truckload of broccoli crowns shipped in the course of interstate commerce.

A copy of the Complaint was served upon the Respondent, who was afforded twenty days from receipt of the Complaint to file his Answer. Respondent failed to submit an Answer and a Default Order was issued on September 13, 2012, awarding Complainant the full amount of its claim plus interest and filing fees. The Department subsequently received from Respondent a Petition to Reopen the Complaint. Respondent, in his Petition, offered a defense that could at least mitigate the award requested by Complainant. While the Department initially issued an order denying Respondent's Petition,[1] upon reconsideration it was determined that the proceeding should be reopened in order to properly determine the validity of the allegations made by

[1] An Order Denying Respondent's Petition to Reopen was issued on December 18, 2012.

the parties, and to weigh all the facts on the merits. Accordingly, an Order on Reconsideration reopening the proceeding was issued on March 14, 2013.

The amount claimed in the Complaint does not exceed $30,000.00. Therefore, the documentary procedure provided in section 47.20 of the Rules of Practice under the Act (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI); however, no ROI was prepared in this case.[2] In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an Opening Statement. Respondent did not elect to file any additional evidence. Neither party submitted a brief.

Findings of Fact

1. Complainant is a limited liability company whose post office address is [redacted]. At the time of the transaction involved herein, Complainant was licensed under the Act.

2. Respondent is an individual doing business as [redacted], whose post office address is [redacted]. At the time of the transaction involved herein, Respondent was licensed under the Act.

3. On November 1, 2011, Complainant, by oral and written contract, sold to Respondent one truckload of broccoli crowns. (Compl. Ex. 1 at 10.) Complainant issued invoice number 524075 billing Respondent for 290 cartons of Mexico-grown Stock broccoli crowns at $7.00 per carton, or $2,030.00, and 818 cartons of Mexico-grown

[2] Where the informal handling of the claim by a P.A.C.A. Branch office generates correspondence and other documents pertinent to the dispute, a Report of Investigation is prepared by the Department. These documents become a part of the record considered by the Presiding Officer in deciding the case. In the instant case, Respondent did not respond to the informal complaint submitted by Complainant, so no Report of Investigation was prepared.

[redacted] broccoli crowns at $7.00 per carton, or $5,726.00, plus $138.00 for pallets (23 at $6.00 each) and $23.50 for a temperature recorder, for a total f.o.b. invoice price of $7,917.50. (Compl. Ex. 1 at 7.)

4. The broccoli crowns were shipped on November 3, 2011, at 3:36 p.m., from loading point at [redacted] of Texas, in [redacted], Texas, to Respondent's customer, [redacted]. (Compl. Ex. 1 at 8.)

5. On November 8, 2011, at 9:00 a.m., a USDA inspection was performed on 816 cartons of Mexico-grown [redacted] broccoli crowns at [redacted] in [redacted] (Compl. Ex. 1 at 11.) The inspection disclosed 37 percent average defects, including 35 percent yellow to brown discolored bud clusters and 2 percent decay. (Compl. Ex. 1 at 11.) Pulp temperatures at the time of the inspection ranged from 34 to 36 degrees Fahrenheit. (Compl. Ex. 1 at 11.)

6. Complainant issued a second invoice number 524075 billing Respondent for 290 cartons of Mexico-grown Stock broccoli crowns at $7.00 per carton, or $2,030.00, and 818 cartons of Mexico-grown [redacted] broccoli crowns at $0.00, plus $138.00 for pallets (23 at $6.00 each) and $23.50 for a temperature recorder, for a total f.o.b. invoice price of $2,191.50. (Answer Ex. 5.)

7. Respondent paid Complainant $2,191.50 for the broccoli crowns billed on invoice number 524075 with check number 23392, dated February 23, 2012. (Compl. Ex. 1 at 13.)

8. The informal complaint was filed on February 17, 2012, which is within nine months from the date the cause of action accrued.

Conclusions

This dispute concerns Respondent's liability for one truckload of broccoli crowns purchased and accepted from Complainant. Complainant states Respondent accepted the broccoli crowns in compliance with the contract of sale, but that it has since failed, neglected and refused to pay the full amount of the invoice, leaving a balance due Complainant of $5,726.00. (Compl. ¶¶ 8, 10.) In response to Complainant's allegations, Respondent asserts that the broccoli crowns were not the quality requested, and that a revised purchase price of $2,191.50 was agreed upon between the parties. (Answer ¶ 4, 7.)

Turning first to Respondent's allegation that the broccoli crowns were not of the quality requested, the record shows a USDA inspection was performed on 816 cartons of the broccoli crowns at [redacted], in [redacted], on November 8, 2011. (Compl. Ex. 1 at 11.) The inspection disclosed 37 percent average defects, including 35 percent yellow to brown discolored bud clusters and 2 percent decay. (Compl. Ex. 1 at 11.) The remaining broccoli crowns in the shipment were not inspected.

While the defects disclosed by this inspection are extensive, Complainant asserts that the inspection results do not establish a breach of contract for several reasons. First, Complainant states the inspection was conducted on Tuesday, November 8, 2011, three days after arrival, and is therefore too remote in time from the November 5, 2011 delivery date to establish a breach of contract. (Opening Stmt. ¶ 10a.) Complainant points out that under the terms of its written sales confirmation, no claims are allowed unless they are accompanied by a USDA inspection taken within "24 hours from delivery." (Opening Stmt. ¶ 10a.) Complainant states further that pursuant to the written terms agreed upon

between the parties discoloration is expressly excluded, so the discoloration defects listed on the inspection certificate must be excluded, thereby leaving only 2 percent decay, which makes good arrival. (Opening Stmt. ¶ 10b.)

The record shows Respondent received a copy of Complainant's Sale Confirmation, which bears a statement on its face that reads:

> Hollow stem, enlarged or open bud clusters, water soaked areas, bruising, and discoloration are excluded and will be disallowed from grade defects on Broccoli. No claim will be considered unless (1) reported by the buyer within 8 hours after delivery, (2) USDA Inspection taken within 24 hrs from delivery and (3) presents satisfactory evidence of proper in transit temperatures maintained by the carrier. Any payment for less than the original invoice amount or authorized amount will not constitute payment in full regardless of wording to the contrary on check or any accompanying statement.

There is no indication that Respondent ever objected to these terms. When documents containing terms of sale are not objected to in a timely manner, such documents are evidence of a contract containing those terms. *Pac. Fruit, Inc. v. Bonafede*, 45 Agric. Dec. 371, 373 (1986); *Pac. Valley Produce Co. v. Garin Co.*, 44 Agric. Dec. 414, 415 (1985); *Casey Woodwyk, Inc. v. Albanese Farms*, 31 Agric. Dec. 311, 317 (1972); *Frank's Packing Co. v. Landow-Gordon Grape Co.*, 19 Agric. Dec. 859, 863 (1960). Accordingly, we find that the terms set forth on Complainant's Sale Confirmation were incorporated into the subject contract.

Respondent admittedly did not notify Complainant of a problem with the broccoli crowns until November 7, 2011, which was more than 24 hours following their arrival on November 5, 2011. (Answer Ex. 5-6.) Moreover, the inspection was not performed until the following day, which was three days following arrival. (Answer Ex. 8.)

Furthermore, the primary defect disclosed by the inspection was yellow to brown discolored bud clusters, and "discoloration" is one of the defects expressly excluded in the contract of sale for the broccoli crowns. (Answer Ex. 5, 8.) We therefore find that Respondent is unable to assert a breach of contract claim against Complainant due to its failure to timely give notice and secure an inspection, and that even if a claim were asserted, the USDA inspection does not establish a breach under the terms of the contract.

Nevertheless, there remains for our consideration Respondent's assertion that the contract price of the broccoli crowns was reduced to $2,191.50. The party that claims the contract was modified has the burden of proof. *Garren-Teed Co., Inc. v. Mo-Bo Enterprises, Inc.*, 51 Agric. Dec. 811, 813 (1992); *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506, 508 (1975); *Regency Packing Co., Inc. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042, 2045 (1983). Respondent submitted a sworn statement wherein he asserts that the new price agreement was orally negotiated with Complainant's salesman, Mr. [redacted] (Answer ¶ 4.) Respondent further asserts that the agreement is evidenced by the revised invoice issued by Complainant billing Respondent $2,191.50 for the broccoli crowns. (Answer ¶ 4.)

The invoice referenced by Respondent lists the original sales price of $7.00 per carton, or a total of $2,030.00, for the 290 cartons of Mexico-grown Stock broccoli crowns in the shipment, and a revised price of $0.00 for the 818 cartons of Mexico-grown [redacted] broccoli crowns, plus $138.00 for pallets (23 at $6.00 each) and $23.50 for a temperature recorder, for a total f.o.b. invoice price of $2,191.50. (Answer Ex. 5.)

In response to Respondent's allegations, Complainant submitted a sworn statement from Mr. [redacted], president of Complainant, wherein Mr. [redacted]

asserts that on November 8, 2011, Complainant received a copy of the USDA inspection certificate whereon Respondent handwrote: "Buyer working for shipper's Acct on the 8lb Brocc. Crowns." (Opening Stmt. ¶ 6; Compl. Ex. 1 at 11.) Mr. [redacted] states Complainant immediately notified Respondent that Complainant did not agree that the broccoli crowns failed to make good arrival and requested full payment. (Opening Stmt. ¶ 7.) Upon receipt of Respondent's partial payment in the amount of $2,191.50, Mr. [redacted] states Complainant issued and delivered to Respondent a revised invoice number 524075, which expressly states: "Paid w/check 23392, $2,191.50. **Still Due: $5,276.00**." (Opening Stmt. ¶ 7.) A copy of this invoice was submitted with the Complaint. (Compl. Ex. 1 at 7.)

With respect to the invoice issued by Complainant showing a $0.00 price for 818 cartons of the broccoli crowns that were inspected, Mr. [redacted] explains that "Complainant reflects a zero balance on loads where a claim has been received in order to make certain that growers are advised of a potential adjustment." (Opening Stmt. ¶ 8.) Mr. [redacted] states that if an adjusted price agreement is thereafter reached, a final invoice will be issued with the agreed adjusted price. (Opening Stmt. ¶ 8.) Mr. [redacted] states this did not occur in the instant case. (Opening Stmt. ¶ 8.)

Respondent did not submit any additional evidence to refute the testimony of Mr. [redacted]. Although we are puzzled as to why the invoice showing a $0.00 price for the inspected broccoli crowns was sent to Respondent, Mr. [redacted]'s assertion that the invoice was prepared to notify the grower of a potential adjustment is credible given Respondent's complaint concerning the quality of the broccoli crowns. It is not unusual in the commercial trade of fruits and vegetables for a seller to "flag" a file after a problem

is reported so they know that full payment may not be forthcoming. This does not necessarily mean that the seller is willing to accept less than full payment for the produce, only that the file needs to be "watched." Complainant "flagged" the subject file by preparing a $0.00 invoice for the broccoli crowns that were inspected.

We should also note that Respondent's notation on the USDA inspection certificate stating that it was handling the broccoli crowns for the shipper's account gives no indication that Respondent intended to pay Complainant nothing for the inspected broccoli crowns. On the contrary, this notation indicates that Respondent intended to resell the broccoli crowns and remit the net proceeds to Complainant. Therefore, absent any indication that the parties actually negotiated and agreed upon a $0.00 price for the inspected broccoli crowns, we find that the evidence fails to support this contention.

We have already determined that Respondent failed to establish a breach of contract by Complainant with respect to the subject load of broccoli crowns. Respondent is, therefore, liable to Complainant for the broccoli crowns it accepted at the agreed purchase price of $7,917.00, less the $2,191.50 already paid, or a balance of $5,726.00.

Respondent's failure to pay Complainant $5,726.00 is a violation of section 2 of the Act (7 U.S.C. § 499b) for which reparation should be awarded to Complainant. Section 5(a) of the Act (7 U.S.C. § 499e(a)) requires that we award to the person or persons injured by a violation of section 2 of the Act (7 U.S.C. § 499b) "the full amount of damages . . . sustained in consequence of such violation." 7 U.S.C. § 499e(a). Such damages, where appropriate, include interest. *See Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 239-40 (1925); *see also Louisville & Nashville*

R.R. v. Ohio Valley Tie Co., 242 U.S. 288, 291 (1916); *Crockett v. Producers Mktg. Ass'n*, 22 Agric. Dec. 66, 67 (1963).

Complainant requests recovery of accrued interest "at the rate of 1.5% per month or 18% per annum." (Compl. ¶ 10.) Complainant's claim is based on its invoice to Respondent which expressly states: "Interest shall accrue on any past-due account balance at the rate of 1.5% per month (18% per annum)." There is nothing to indicate that Respondent objected to the interest charge provision on Complainant's invoice. In the absence of a timely objection by Respondent, the interest charge provision on Complainant's invoice was incorporated into the sales contract. *See, e.g., Dennis B. Johnston, et al. v. AG Growers Sales, LLC*, PACA Docket No. R-08-137, slip op. at 17 – 18 (USDA June 2, 2010) (applying section 2-207(2) of the Uniform Commercial Code ("UCC")).

The 1.5% per month, 18% per annum, rate of prejudgment interest set by Complainant's invoice to Respondent is not unreasonable. *See id.*, at 21 - 22. Numerous courts have awarded prejudgment interest at a rate of 18% based on similar contract provisions. *See, e.g., Palmareal Produce Corp. v. Direct Produce #1, Inc.*, 2008 WL 905041, at *3 (E.D.N.Y. 2008) (awarding interest at 18% set by invoice clause); *John Georgallas Banana Dist. of New York, Inc. v. N&S Tropical Produce, Inc.*, 2008 WL 2788410, at * 5 (E.D.N.Y. 2008) (same); *AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Services Inc.*, 2007 WL 4302514, at **7- 8 (S.D.N.Y. 2007) (same); *Dayoub Marketing, Inc. v. S.K. Produce Corp.*, 2005 WL 3006032, at *4 (S.D.N.Y. 2005) (same); *Vulcan Automotive Equipment, Ltd v. Global Marine Engine & Parts, Inc.*, 240 F.Supp.2d 156, 163 (D. Rhode Island 2003) (same). Accordingly, prejudgment

interest will be awarded to Complainant at the 18% rate. Post-judgment interest will be applied in accordance with 28 U.S.C. § 1961, 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 in the Order. *See PGB International, LLC, Co. v. Bayche Companies, Inc.*, 65 Agric. Dec. 669, 671 - 672 (2006).

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

Order

Respondent shall pay Complainant as reparation $5,726.00 with interest thereon at the rate of 18% per annum (1.5% per month) from December 1, 2011, up to the date of this Order.

Respondent shall pay Complainant interest on the sum of $5,276.00 at a rate of 0.13 per centum per annum from the date of this Order, until paid, plus the amount of $500.00.

Copies of this Order shall be served upon the parties.

Done at Washington, D.C.
[redacted] 2013
/s/ William G. Jenson

William G. Jenson
Judicial Officer
Office of the Secretary