United States Department of Agriculture

69 Agric. Dec. 798

UNITED STATES DEPARTMENT OF AGRICULTURE

2010 USDA LEXIS 57 *; 69 Agric. Dec. 798

PACA Docket No. R-09-033

PERISHABLE AGRICULTURAL COMMODITIES ACT

JAMES C. CONNER AND ALICIA ISAIS v. MCBRYDE PRODUCE, LLC D/B/A FARMERS SELECT

JAMES C. CONNER AND ALICIA ISAIS

January 13, 2010

Core Terms

watermelon, cabbage, ship, inspect, invoice, buyer, bin, shipment, load, customer, unpaid balance, pound, truck, seller, breach of contract, agreed price, destination, grade, bill of lading, degrees Fahrenheit, temperature, carton, interstate commerce, commodity, trailer, check number, license plate number, time of inspection, purchase order, corresponding

Counsel:

Patrice H. Harps, Presiding Officer

Earl E. Elliott, Examiner

Complainant, pro se

Respondent, pro se

Headnotes

PACA-R -- Breach of Contract - Breach of warranty of merchantability - Cabbage.

A timely inspection of green cabbage, showing 35% quality defects (ranging 15% - 61%), and 3% yellowing, and 2% insect damage, for a checksum of 40% damage by quality and condition defects, including 8% serious damage by quality defects, was held to show a breach of the implied warranty of merchantability (U.C.C. § 2314).

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

Opinion

Decision and Order.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended *(7 U.S.C. §499aet 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 $ 13,839.02 in connection with eight truckloads of perishable agricultural commodities, consisting of cabbage and watermelon, shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the Complaint was served upon the Respondent, which filed an Answer thereto denying liability to Complainant, and asserting the loads in dispute did not all cross state lines in the course of interstate commerce.

The amount claimed in the Complaint does not exceed $ 30,000.00. Therefore, the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation (ROI).

In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file Briefs. Neither party filed any additional evidence or Briefs.

Findings of Fact

1. Complainant is a partnership comprised of James C. Conner and Alicia Isais doing business as Farmers Select, whose post office address is 34123 FM 490, Edinburg, Texas, 78541-6995. At the time of the transactions involved herein, Complainant was licensed under the Act.

2. Respondent, McBryde Produce, LLC, is a limited liability company, whose post office address is P.O. Box 1483, Uvalde, Texas, 78802-1483. At the time of the transactions involved herein, Respondent was licensed under the Act.

3. On or about April 10, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 175 (14-16 count) sacks of cabbage at $ 4.00 per sack f.o.b., or $ 700.00, plus $ 25.00 for pallets, for a total agreed price of $ 725.00, billed on invoice number 07-3005 in accordance with Respondent's purchase order number 07-572. (ROI, Ex. A, p. 4) Respondent paid Complainant $ 725.00 in full for the cabbage with its check number 1605, dated December 13, 2007. (ROI, Ex. G, p. 1-2)

4. On or about April 26, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 200 sacks of jumbo cabbage at $ 4.00 per sack f.o.b., or $ 800.00, plus $ 25.00 for pallets, for a total agreed price of $ 825.00, billed on invoice number 07-3034 in accordance with Respondent's purchase order number 07-605. (ROI, Ex. A, p. 5) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows

Complainant shipped the cabbage on April 26, 2007, with instructions to maintain temperature of 34 degrees Fahrenheit. (Complaint, Ex. 27) Respondent paid Complainant $ 800.00 with its check number 1426, dated July 16, 2007, leaving an unpaid balance of $ 25.00. (ROI, Ex. A, p. 6)

5. On or about May 2, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 120 sacks of jumbo cabbage at $ 4.50 per sack f.o.b., or $ 540.00, plus $ 15.00 for pallets, for a total agreed price of $ 555.00, billed on invoice number 07-3044 in accordance with Respondent's purchase order number 07-611. (Complaint, Ex. 2-3) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the cabbage on May 2, 2007, with instructions to maintain temperature between 32 to 34 degrees Fahrenheit. (Complaint, Ex. 3) Respondent resold the truckload of cabbage and diverted it to a customer in Denver, Colorado. Respondent paid Complainant $ 495.00 with its check number 1448, dated August 8, 2007, leaving an unpaid balance of $ 60.00. (Complaint, Ex. 4-5)

6. On or about May 10, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 753 cartons of red cabbage at $ 10.00 per carton f.o.b., for a total agreed price of $ 7,530.00, billed on invoice number 07-3063 in accordance with Respondent's purchase order number 07-623A. (Complaint, Ex. 6) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the cabbage on May 10, 2007, with instructions to maintain temperature at 34 degrees Fahrenheit. (Complaint, Ex. 7) Respondent paid Complainant $ 3,738.25 with its check number 1448, dated August 8, 2007, leaving an unpaid balance of $ 3,791.75. (Complaint, Ex. 8)

7. On or about May 21, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 35 cartons of red cabbage at $ 9.75 per carton f.o.b., or $ 341.25, plus $ 5.00 for pallets, for a total agreed price of $ 346.25, billed on invoice number 07-3091A in accordance with Respondent's purchase order number 07-658. (Complaint, Ex. 1, and ROI, Ex. A, p. 14) Respondent paid Complainant $ 341.25 with its check number 1606, dated December 13, 2007. Though Respondent's check was short $ 5.00, Complainant accepted the check as payment in full for the red cabbage. (Complaint, Ex. 1, and ROI Ex. G, p. 3) Complainant also sold and shipped 350 cartons of green cabbage to Respondent in the same shipment, number 07-3091A, in accordance with Respondent's purchase order number 07-658. Complainant did not bill Respondent for the 350 cartons of green cabbage, which were rejected by Respondent's customer. (Answer, Ex. 34-38)

8. On May 24, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business in Oklahoma City, Oklahoma, on the 350 cartons of green cabbage mentioned in Finding of Fact number 7. The cabbage was loaded at the time of the inspection and the inspector verified the carton count. The pulp temperatures ranged from 45 to 46 degrees Fahrenheit at the time of the inspection. The inspection revealed the cabbage was affected by 35% quality defects (15% to 61% thrips injury or edema, insect), 3% yellowing, and 2% insect damage, for a total of 40% damage by quality and condition defects, including 8% serious damage by quality defects. (Answer, Ex. 35)

9. On or about June 8, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 56-35 count bins (42,859 pounds) of seeded watermelons at $ .095 per pound f.o.b., for a total agreed price of $ 4,071.61, billed on invoice number 07-3113 in accordance with Respondent's purchase order number 1005. (Complaint, Ex. 9) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 8, 2007, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 10) Respondent resold the watermelons to a customer in Chicago, Illinois. (Answer, Ex. 5) Respondent paid Complainant $ 3,594.25 with its check number 1283, dated September 18, 2007, leaving an unpaid balance of $ 477.36. (Complaint, Ex. 11)

10.On or about June 9, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 40,886 pounds of seedless watermelons (45 count bins) at $ .128 per pound f.o.b., for a total agreed price of $ 5,233.41, billed on invoice number 07-3115 in accordance with Respondent's purchase order number 1007. (Complaint, Ex.12) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 9, 2007, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 13) Respondent resold the watermelons to a customer in San Antonio, Texas, who rejected the watermelons to Respondent. Respondent then sold the watermelons to another customer in San Antonio, Texas. (Answer, Ex. 7-8) Respondent paid Complainant $ 825.00 with its check number 1283, dated September 18, 2007, leaving an unpaid balance of $ 4,408.41. (Complaint, Ex. 14)

11.On or about June 13, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 58-45 count bins (41,843 pounds) of seeded watermelons at $ .095 per pound f.o.b., for a total agreed price of $ 3,975.09, billed on invoice number 07-3117, in accordance with Respondent's purchase order number 1020. (Complaint, Ex. 15) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons to "AS PER BUYER" on June 13, 2007, in a trailer with license plate number 197445, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint, Ex. 16) On or about June 14, 2007, Respondent sold 58 bins of small red watermelons, to a customer in North Kansas City, Missouri, and shipped the watermelons to a destination in Overland Park, Kansas, in a trailer with license plate number 361587, which was pulled by a tractor with license plate number 361018. (Answer, Ex. 10 and 13) The customer in Overland Park, Kansas, had the watermelons weighed (Answer, Ex. 9-15), and Respondent alleges the weight was 4,000 pounds short. 1 Respondent paid Complainant $ 3,524.59 with its check number 1283, dated September 18, 2007, leaving an unpaid balance of $ 450.50. (Complaint, Ex. 17)

12.On or about June 15, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 58-35 count bins (41,984 pounds) of seeded watermelons at $ .11 per pound, f.o.b., for a total agreed price of $ 4,618.24, billed on invoice number 07-3194 in accordance with Respondent's purchase order number 1038. (Complaint,

Ex. 18) The corresponding bill of lading is signed by the truck driver, "Roldan R Gonzalez Rolgon Corp," as agent of Respondent and shows Complainant shipped the watermelons on June 15, 2007, in a trailer with license plates number C1434wFL, and with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (Complaint Ex. 19) On or about June 17, 2007, Respondent sold 58 bins of watermelons, to Wal-Mart, New Caney, Texas, which rejected the watermelons to Respondent on June 18, 2007. (Answer, Ex. 19, and ROI, Ex. C, p. 29) Respondent then resold the 58 bins of watermelons to Roger Ramos Produce, Houston, Texas. Respondent's invoice number 07-1039 shows it used the same trucking company, Rolgon, as shown on Complainant's original invoice. (Answer, Ex. 17) Respondent paid Complainant $ 1,932.58 with its check number 1132, dated August 9, 2007, leaving an unpaid balance of $ 2,685.66. (Complaint, Ex. 20)

13.On June 18, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business, Roger Ramos Produce, Houston, Texas, on 58 bins of watermelons. The inspector verified the bin count of the watermelons, which were loaded at the time of the inspection in a trailer with identification number 2141CB FL, which does not match the truck identification shown on the bill of lading. (Finding of Fact 12) In addition, the weight of the watermelons shown on the inspection report (39,150 pounds) does not match the (41,984 pounds) invoiced weight. 2 (Finding of Fact 12) The inspection was restricted to the 25 bins nearest the rear door of the trailer. The pulp temperatures ranged from 60 to 62 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by an average of 16% quality defects (scars and rind worm injury), 4% transit rubs, and 2% decay, for a total of 22% damage by quality and condition defects, including 5% serious damage by quality and condition defects. (Complaint, Ex. 22)

14.On or about June 16, 2007, Complainant, by oral contract, sold to Respondent, and agreed to ship from a loading point in the state of Texas to Respondent, "AS PER BUYER," 54-45 count bins (38,294 pounds) of seeded watermelons at $ .095 per pound f.o.b., for a total agreed price of $ 3,637.93, billed on invoice number 07-3164 in accordance with Respondent's purchase order number 1022. (Complaint, Ex. 23) The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 16, 2007, in a trailer with license plate number 78810/465085, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. (ROI, Ex. A, p. 26) On or about June 16, 2007, Respondent sold 54 bins of red seeded watermelons, to a customer in Overland Park, Kansas, in the same trailer used by Complainant with license plate numbers 78810/465085. (Answer, Ex. 30) Respondent paid Complainant $ 1,697.59 with its check number 11283, dated September 18, 2007, leaving an unpaid balance of $ 1,940.34. (Complaint, Ex. 25)

15.On June 18, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business in Overland Park, Kansas, on 54 bins (38,450 pounds) of seeded watermelons. This weight does not match the (38,294pounds) invoiced weight of the watermelons. 3 (Fact number 14) The watermelons were unloaded at the 1 There is no U.S.D.A. inspection report in the case file and no other evidence in the case file to account for the 4,000 pound discrepancy in the weight of the watermelons.

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2 There is no evidence in the case file to account for the discrepancy in the Truck identification number or the weight of the

truckload of watermelons.

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3 There is no evidence in the case file to account for the discrepancy in the weight of the truckload of watermelons. time of the inspection and the inspector verified the bin count. The pulp temperatures ranged from 62 to 64 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by an average of 19% quality defects (rind worm injury), 3% bruising, and 3% decay, for a total of 25% damage by quality and condition defects, including 3% serious damage by condition defects. (Answer, Ex. 27) 16.The informal complaint was filed on October 20, 2007, which is within nine months from the accrual of the cause of action.

Conclusions

Complainant brings this action to recover the unpaid balance of the agreed purchase price for eight truckloads of perishable agricultural commodities, consisting of cabbage and watermelon, allegedly sold and shipped f.o.b. to Respondent in the course of interstate commerce. Complainant states Respondent accepted all of the vegetables in compliance with the contracts of sale. Complainant originally filed its informal complaint with the Department claiming $ 14,910.27 was due on ten truckloads of fruits and vegetables, 4 but Complainant has since accepted $1,071.25 from Respondent as payment for two of the truckloads and has thereby reduced the amount of its Complaint to $ 13,839.02. 5 In support of its allegations, Complainant submitted copies of its receivables report, invoices, and bills of lading. 6

In response to Complainant's allegations, Respondent submitted a sworn Answer generally denying the allegations and asserting the following:

The loads in dispute did not all cross state lines in the course of interstate commerce. McBryde load # 07-0623A, 07-1007 and 07-1030 were all loaded at a loading point in the state of Texas and delivered to a delivery point in the state of Texas. There fore [sic] these loads were not in the course of interstate commerce. 7

We will first consider the jurisdictional defense asserted by Respondent, because Respondent's success or failure in proving this defense will determine whether we are able to consider all of the matters in dispute. Goods must be sold in or in contemplation of interstate commerce for this forum to have jurisdiction. Miller Farms & Orchards v. C.B. Overby, 26 Agric. Dec. 299 (1967). Complainant has the burden of establishing that the Department has jurisdiction over the disputed transactions. This burden can be met by proving that the shipments were sold in or in contemplation of interstate commerce by providing adequate evidence that: (1) the shipments actually moved from a state to any place outside that state; 8 (2) the shipments moved between points within the same state but through any place outside that state; 9 (3) the transactions were negotiated by parties located in different states; 10 (4)

the parties entered into the transactions contemplating that the shipments would travel in interstate commerce; 11 or (5)

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4 ROI, Ex. A, p. 1-3.

5 Complaint, PP4-10, and Ex. 1.

6 Complaint, Ex. 1-28, and ROI, Ex. A, p. 4-27.

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7 Answer, P7.

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8 See, *7 U.S.C. 499a*(b)(3).

9 *Id.*

10 *Steve Almquist d/b/a Steve Almquist Sales & Brokerage v. Mountain High Potatoes & Onion, Inc., 65 Agric. Dec. 1418 (2006).*

11 *Tulelake Potato Distributors, Inc. V. John M. Giustino d/b/a Grand Slam Produce, 52 Agric Dec. 752 (1993).*

"the shipments are of a type of produce that commonly moves in interstate commerce and were shipped for resale to or by a produce dealer that does a substantial portion of its business in interstate commerce." 12

Copies of invoices, bills of lading, and inspection reports attached by Respondent to its Answer show it sells and ships produce to numerous destinations outside of the state of Texas, including the states of Colorado, Illinois, Kansas, Missouri, and Oklahoma. 13 Similar evidence showing Respondent sells and ships produce to numerous destinations outside of the state of Texas, including the states of Colorado, Illinois, Kansas, Missouri, and Oklahoma was submitted by the parties in the course of the Department's informal proceedings and is contained in the ROI. 14

Based on the evidence submitted by the parties, we conclude that Respondent conducts a substantial portion of its business in interstate commerce. Cabbage and watermelons are produce items commonly shipped in interstate commerce and these particular produce items were purchased for resale by a produce dealer doing a substantial portion of its business in interstate commerce. Therefore, all of the shipments in question were in interstate commerce. The Department has jurisdiction in this matter and may properly resolve the pending dispute between Complainant and Respondent.

Complainant's invoices and bills of lading in evidence show Uvalde, Texas, as Respondent's billing address, but show the contract destinations were, "AS PER BUYER," which indicates Complainant was

aware Respondent would resell the vegetables and the ultimate destinations would not be Respondent's address in Uvalde, Texas. On this basis, we conclude the warranty of suitable shipping condition was applicable for all of the shipments in question to the ultimate destinations assigned by Respondent, which could be a greater distance than Uvalde, Texas. *Bud Antle, Inc. v. Pacific Shore Marketing Corp., 50 Agric. Dec. 954 (1991).*

In f.o.b. sales the warranty of suitable shipping condition is applicable. 15 Suitable shipping condition is defined in the Regulations (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. 16

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12 The Produce Place v. United States Department of Agriculture, 91 F.3d 173 (1996), cert. den., 519 U.S. 1116 (1997).

----------End Footnotes----------

13 Answer, Ex. 1-6, 9-15, 27-30, and 31-38.

14 ROI, Ex. C, p. 8-15, 21-28, 41-47, and 51-53.

----------End Footnotes----------

15 See, 7 C.F.R. § 46.43(i), which defined f.o.b. as meaning ". . . the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition . . . , and the buyer assumes all risk of damage and delay in transit not caused by the seller irrespective of how the shipment is billed."

16 The suitable shipping condition provisions of the Regulations (7 C.F.R. § 46.43(j)) require delivery to contract destination "without *abnormal* deterioration", or what is elsewhere called "good delivery" (7 C.F.R. § 46.44), are based upon case law predating the adoption of the Regulations. See, Williston, *Sales §* 245 (rev. ed. 1948). Under the rule it is not enough that a commodity sold f.o.b., U. S. No. 1, actually be U. S. No. 1 at time of shipment. It must also be in such a condition at the time of shipment that it will make good delivery at contract destination. It is, of course, possible for a commodity that grades U. S. No. 1 at the time of shipment, and is shipped under normal transportation service and conditions, to fail to make good delivery at destination due to age or other inherent defects which were not present, or were not present in sufficient degree to be cognizable by the federal inspector, at shipping point. Conversely, since the inherently perishable nature of commodities subject to the Act dictates that a commodity cannot remain forever in the same condition, the application of the good delivery concept requires that we allow for a "normal" amount of deterioration. This means that it is entirely possible for a commodity sold f.o.b. under a U. S. grade description to fail, at destination, to meet the published tolerances of that grade, and thus fail to grade at destination, and nevertheless make good delivery. This

is true because under the f.o.b. terms the grade description applies only having resolved the interstate commerce issue and the applicability of the warranty of suitable shipping condition to all of the shipments in question, we will now consider the testimony and evidence submitted by the parties in relation to the ten invoices originally submitted by Complainant for our consideration, as follows:

Complainant's invoice number 07-3005

This shipment involves 175 (14-16 count) sacks of cabbage purchased by Respondent for a total agreed price of $725.00 f.o.b. 17 Respondent paid Complainant $ 725.00 in full. 18 Therefore this invoice has been resolved in full.

Complainant's invoice number 07-3034

This shipment involves 200 sacks of jumbo cabbage Respondent purchased for a total agreed price of $825.00 f.o.b. 19 Respondent paid Complainant $ 800.00, leaving an unpaid balance of $ 25.00, 20 which Complainant seeks to recover in this proceeding. Respondent does not deny accepting the cabbage.

In defense of its failure to make payment in full, Respondent asserts in its Answer that it was not aware of the $25.00 pallet charge until it received Complainant's invoice. 21 We note, Respondent does not allege it promptly objected to the $ 25.00 charge. Failure to promptly complain as to the terms set forth on an invoice is considered strong evidence such terms were correctly stated. Pemberton Produce, Inc. v. Tom Lange Co., Inc., 42 Agric. Dec. 1630 (1983). On this basis, we find Respondent liable to Complainant for the unpaid balance of $ 25.00.

Complainant's invoice number 07-3044

This shipment involves 120 sacks of jumbo cabbage Respondent purchased for a total agreed price of $ 555.00 f.o.b. 22 Respondent alleges the cabbage had brown and yellow leaves, and looked old on arrival in Denver, Colorado. 23 Respondent, however, has not provided any evidence it attempted to reject any of the cabbage to Complainant. Failure to reject produce is an act of acceptance. 24 A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. *Ocean Breeze Export, Inc. v. Rialto Distributing, Inc., 60 Agric. Dec. 840 (2001); World Wide Imp-Ex, Inc. v. Jerome*

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. ***Pinnacle Produce, Ltd. v. Produce Products, Inc., 46 Agric. Dec. 1155 (1987);*** G & S Produce v. Morris Produce, 31 Agric. Dec. 1167 (1972); Lake Fruit Co. v. Jackson, 18 Agric. Dec. 140 (1959); and Haines Assn. v. Robinson & Gentile, 10 Agric. Dec. 968 (1951).

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17 ROI, Ex. A, p. 4.

18 Complaint, Ex. 1, and ROI, Ex. G, p. 1-2.

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19 Complaint, P4a, and ROI, Ex. A, p. 5.

20 Complaint, P4a, and ROI, Ex. A, p. 6.

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21 Answer, P4a.

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22 Complaint, P4b, and Ex. 2.

23 Answer, P4b, and Ex. 1.

24 See, 7 C.F.R. § 46.2 (dd)(3).

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Brokerage Dist. Co., 47 Agric. Dec. 353 (1988). The burden to prove a breach of contract rests with the buyer of accepted goods. See, U.C.C. § 2-607(4). See, also, The Grower-Shipper Potato Co. v. Southwestern Produce Co., 28 Agric. Dec. 511 (1969).

Respondent paid Complainant $ 495.00, leaving an unpaid balance of $ 60.00, 25 which Complainant seeks to recover in this proceeding. Respondent did not submit any evidence to establish a breach of contract by Complainant, but asserts in its Answer:

This load had some tipburn in the cabbage. This was reported to Mr. Conner at 9:00AM on May 5, 2007. It was agreed between me and Mr. Conner not to take an inspection on the 120 bags and let the customer handle the cabbage on an open basis. . . 26

The party who claims the contract was modified has the burden of proof. Regency Packing Co., Inc. v. The Auster Company, Inc., 42 Agric. Dec. 2042 (1983); F. H. Hogue Prod. Co. v. Singer's Sons, 33 Agric. Dec. 451 (1974). Finding no evidence that Complainant breached the contract or that Complainant agreed to modify the contract to open terms, we find Respondent liable to Complainant for the unpaid balance of $ 60.00.

Complainant's invoice number 07-3063

This shipment involves 753 cartons of red cabbage Respondent purchased for a total agreed price of $ 7,530.00 f.o.b. 27 Respondent paid Complainant $ 3,738.25, with check number 1448, leaving an unpaid balance of $3,791.75, 28 which Complainant seeks to recover in this proceeding. Respondent does not deny accepting the cabbage, but asserts the following defense in its Answer, "This load was originally

billed at $ 10.00 per box I told Mr. Conner that I could only pay $ 8.00 and he agreed to the $ 8.00 price." 29 The party who claims the contract was modified has the burden of proof. 30

Respondent has not provided any evidence Complainant breached the contract or that Complainant agreed to modify the contract but deducted the amount of the alleged contract modification, $ 2.00 x 753 cartons = $ 1,506.00, plus $ 2,285.75 in alleged damages arising from green cabbage purchased in transaction number 07-3091A discussed below, for a total deduction of $ 3,791.75. On this basis we find Respondent liable to Complainant for the unpaid balance of $ 3,791.75.

Complainant's invoice number 07-3091A

This shipment involves 35 cartons of red cabbage Respondent purchased for a total agreed price of $ 346.25 f.o.b. 31 Respondent paid Complainant $ 341.25, which Complainant accepted as payment in full for the red cabbage. 32

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25 Complaint, P4b, and Ex. 4-5.

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26 Answer, P4b.

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27 Complaint, P4c, and Ex. 6.

28 Complaint, P4c, and Ex. 8.

29 Answer, P4c.

30 Regency Packing Co., Inc., 42 Agric. Dec. 2042; F.H. Hogue Prod. Co., 33 Agric. Dec. 457.

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31 Complaint, Ex. 1, and ROI, Ex. A, p. 14.

32 Complaint, Ex. 1, and ROI, Ex. G, p. 1 and 3.

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Respondent also purchased 350 cartons of green cabbage in the same transaction, which Complainant did not include on the invoice because Respondent's customer rejected the green cabbage, and Respondent rejected the cabbage back to Complainant. In its Answer, Respondent alleges Complainant breached the contract due to the condition of the green cabbage upon arrival. 33

On May 24, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business in Oklahoma City, Oklahoma, on the 350 cartons of green cabbage. The green cabbage was loaded at the

time of the inspection and the inspector verified the carton count. The pulp temperatures ranged from 45 to 46 degrees Fahrenheit at the time of the inspection. The inspection revealed the green cabbage was affected by an average of 35% quality defects (ranging 15% - 61% thrips injury or edema, insect), 3% yellowing, and 2% insect, for a total of 40% damage by quality and condition defects, including 8% serious damage by quality defects. 34

To determine whether a commodity was in suitable shipping condition based on a federal inspection at destination, we normally look at the shipping point tolerances for defects set forth in the U.S. grade standards for the commodity, and we apply an additional allowance to the tolerances set forth in the standards to allow for normal deterioration in transit. We consulted the *United States Standards for Grades of Cabbage*, 35 which specifies defect tolerance at shipping point for cabbage sold under the U.S. No. 1 Grade, as follows:

. . . not more than a total of 10 percent, by weight, of the heads in any lot may fail to meet the requirements of this grade, but not more than one-fifth of this amount, or 2 percent, shall be allowed for soft decay. The green cabbage in question was affected by 5% condition defects. Finding no evidence that the green cabbage was sold with a grade designation, only the tolerances for condition defects set forth in the U.S. Grade Standards are relevant to determining whether the green cabbage was in suitable shipping condition. We need not consider the suitable shipping allowance, since the 5% condition defects revealed by the federal inspection fall within the shipping point tolerances specified in the standards. However, the inspection also disclosed the green cabbage was affected by 35% quality defects (ranging 15% - 61% thrips injury or edema, insect), which are permanent defects not normally relevant to produce sold without a grade specification. 36 There are, however, instances where permanent defects are sufficiently extensive to cause the product to be unmerchantable, which would be a breach of the implied warranty of merchantability. For goods to be merchantable they must pass without objection in the trade under the contract description. 37

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33 Answer, P10, and Ex. 34-38, and ROI, Ex. G, p. 1 and 3.

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34 Answer, Ex. 35.

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35 See, 7 C.F.R. §§ 51.450 - 51.464 the *United States Standards for Grades of Cabbage* available on the Internet at:

http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5050254.

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36 Permanent or quality defects may be relevant to the determination of whether there is a breach of contract for produce sold without a grade specification where the defects are sufficiently extensive to establish that the produce is not merchantable. *Martori Bros. Distributors v. Olympic Wholesale Produce*

& Foods, Inc., 53 Agric. Dec. 887 (1994), where a timely inspection showing 37% quality defects in broccoli in the form of hollow stem, ranging 7% to 79%, was held to show a breach of the warranty of merchantability where the broccoli was sold f.o.b. without reference to any grade. See, also, *Teixeira Farms, Inc. v.Community-Suffolk, Inc., 52 Agric. Dec. 1700 (1993).*

37 See, U.C.C. § 2-314(2)(a).

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The common law warranty of merchantability is applicable only at shipping point. North American Produce Distributors, Inc. v. Eddie Arakelian, 41 Agric. Dec. 759 (1982); and J. D. Bearden Produce Company v. Pat's Produce Company, 12 Agric. Dec. 682 (1953). Therefore, when we look at a destination inspection to establish a breach of the warranty of merchantability, the defects disclosed by the inspection must be sufficiently severe so as to allow us to conclude with reasonable certainty that the produce was non-conforming at shipping point. 38

In *Martori Bros. Distributors v. Olympic Wholesale Produce & Foods, Inc., 53 Agric. Dec. 887 (1994)* a timely inspection showing 37% quality defects in broccoli in the form of hollow stem, with a range of 7 to 79%, was held to show a breach of the warranty of merchantability where the broccoli was sold f.o.b. without reference to any grade.

Similarly, here, where the green cabbage was sold f.o.b. without reference to any grade and a timely inspection revealed 35% quality defects (ranging 15% - 61% thrips injury or edema, insect), and 3% yellowing, and 2% insect, for a total of 40% damage by quality and condition defects, including 8% serious damage by quality defects, 39 we find the defects are sufficiently severe for us to conclude with reasonable certainty the cabbage was nonconforming at shipping point, and to find that Complainant breached the warranty of merchantability. 40 Rejection of the green cabbage by Respondent's customer was justified. Where a load of produce is effectively rejected the seller has the burden of proving it complied with the contract. Bud Antle v. Bohack, 32 Agric. Dec. 1589 (1973). We assume Complainant agrees the green cabbage did not comply with the contract since Complainant did not bill Respondent for the green cabbage.

Respondent is claiming damages from incidental expenses resulting from Complainant's breach of contract. 41 We find Respondent is entitled to deduct such damages, including $ 125.00 for the cost of the federal inspection, 42 and $ 1,260.00 for inbound freight for the 350 cartons of cabbage at $ 3.60 per carton, 43 for total damages of $ 1,385.00. Since Respondent's customer rejected the green cabbage, we do not understand Respondent's deduction for expenses relating to truck detention and layover, unloading and reloading, and extra drops. We find that these expenses are not sufficiently explained and documented, and we find no evidence that Complainant agreed to be liable for these expenses. Therefore, these expenses should be disallowed. 44

A party may offset losses from one transaction by deducting them from payment due on another. Phillip Richard

Weller d/b/a Richard Weller v. William P. George d/b/a William King George, 41 Agric. Dec. 294 (1982);McMillan

Brokerage Co. v. Bushman Growers Sales, Inc., 32 Agric. Dec. 950 (1973). However, as previously discussed,

Respondent deducted its total alleged damages of $ 2,285.75 from a payment made to Complainant with its check

number 1448, dated August 8, 2007, 45 for Complainant's invoice number 07-3063. We find Respondent's allowable

deduction for damages is only $ 1,385.00.

38 *Martori Bros. Distributors v. Houston Fruitland, Inc., 55 Agric. Dec. 1331 (1996).*

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39 Complaint, Ex. 8, and Answer, P10, and Ex. 35.

40 See, U.C.C. § 2-314.

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41 See, U.C.C. § 2-715(1).

42 Answer, Ex. 35.

43 Answer, Ex. 36.

44 Answer, Ex. 34-38.

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45 Complaint, P4c, and Ex. 8, and Answer, Ex. 34.

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Complainant's invoice number 07-3113

This shipment involves 56-35 count bins (42,859 pounds) of seeded watermelons Respondent purchased for a total agreed price of $ 4,071.61 f.o.b. 46 Respondent paid Complainant $ 3,594.25, leaving an unpaid balance of $ 477.36, 47 which Complainant seeks to recover in this proceeding.

In defense of its failure to pay Complainant in full, Respondent alleges in its Answer that four bins of watermelons were leaking upon arrival in Chicago, Illinois, and were lost due to shrinkage during repacking, which it alleges Complainant acknowledged. 48 Respondent has not provided any evidence to support this allegation and has not provided any evidence it attempted to reject any of the watermelons

to Complainant. Failure to reject produce in a reasonable time is an act of acceptance. 49 We conclude Respondent accepted the truckload of watermelons. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. 50 The burden to prove a breach of contract rests with the buyer of accepted goods. 51

Respondent has not provided any evidence Complainant breached the contract or agreed to be liable for any watermelons lost due to shrinkage in repacking. On this basis, we find Respondent liable to Complainant for the unpaid balance of $ 477.36.

Complainant's invoice number 07-3115

This shipment involves 40,886 pounds of seedless watermelons (45 count bins) Respondent purchased for a total agreed price of $ 5,233.41 f.o.b. 52 Respondent resold the watermelons to a customer in San Antonio, Texas, who rejected the watermelons to Respondent. Following its customer's rejection, Respondent sold the watermelons to another customer in San Antonio, Texas. 53 Respondent paid Complainant $ 825.00, leaving an unpaid balance of $ 4,408.41, 54 which Complainant seeks to recover in this proceeding. Respondent has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce is an act of acceptance. 55 We conclude Respondent accepted the truckload of watermelons.

A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. 56 The burden to prove a breach of contract rests with the buyer

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46 Complaint, P4d, and Ex. 9.

47 Complaint, P4d, and Ex. 11.

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48 Answer, P4d, and Ex. 2.

49 See, 7 C.F.R. § 46.2 (dd)(3).

50 *Ocean Breeze Export, Inc., 60 Agric. Dec. 840; World Wide Imp-Ex, Inc., 47 Agric. Dec. 353.*

51 See, U.C.C. § 2-607(4). *See, also,* The Grower-Shipper Potato Co., 28 Agric. Dec. 511.

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52 Complaint, P4e, and Ex. 12.

53 Answer, P4e, and Ex. 7-8.

54 Complaint, P4e, and Ex. 14.

55 See, 7 C.F.R. § 46.2 (dd)(3).

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56 *Ocean Breeze Export, Inc., 60 Agric. Dec. 840; World Wide Imp-Ex, Inc., 47 Agric. Dec. 353.*

of accepted goods. 57 Respondent has not provided any evidence to establish Complainant breached the contract. On this basis, we find Respondent liable to Complainant for the unpaid balance of $ 4,408.41.

Complainant's invoice number 07-3117

This shipment involves 58-45 count bins (41,843 pounds) of seeded watermelons Respondent purchased for a total agreed price of $ 3,975.09 f.o.b. 58 The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons to a final destination "AS PER BUYER" on June 13, 2007, in a trailer with license plate number 197445. 59

On June 14, 2007, Respondent sold 58 bins of red watermelons, to a customer in North Kansas City, Missouri, with a final destination of Overland Park, Kansas, which Respondent shipped in a trailer with license plate number 361587, and pulled by a tractor with license plate number 361018. 60 Respondent's customer had the watermelons weighed, 61 and Respondent alleges the weight was 4,000 pounds short. 62 No U.S.DA. inspection report is contained in the case file. Respondent paid Complainant $ 3,524.59, leaving an unpaid balance of $ 450.50, 63 which Complainant seeks to recover in this proceeding.

Respondent has not provided any evidence it attempted to reject any of the watermelons on the original shipment to Complainant. Failure to reject produce in a reasonable time is an act of acceptance. 64 We therefore conclude Respondent accepted the original truckload of watermelons. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. 65 The burden to prove a breach of contract rests with the buyer of accepted goods. 66

We note the carrier's license plate numbers recorded on Respondent's scale tickets do not match the license plates recorded on Complainant's bill of lading. On this basis, we are unable to conclude with reasonable certainty that the identity of the bins of watermelons Respondent's customer had weighed matches the identity of the bins of watermelons Complainant shipped on a different truck. Furthermore, Complainant states the following in its Complaint, ". . . unauthorized deductions were made without any notification. . ." 67

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57 See, U.C.C. § 2-607(4). *See, also,* The Grower-Shipper Potato Co., 28 Agric. Dec. 511.

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58 Complaint, P4f, and Ex. 15.

59 Complaint, Ex. 16.

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60 Answer, Ex. 10 and 13.

61 Answer, P4f, and Ex. 9-15.

62 See, n. 1.

63 Complaint, P4f and Ex. 17.

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64 See, 7 C.F.R. § 46.2 (dd)(3).

65 *Ocean Breeze Export, Inc., 60 Agric. Dec. 840; World Wide Imp-Ex, Inc., 47 Agric. Dec. 353.*

66 See, U.C.C. § 2-607(4). *See, also,* The Grower-Shipper Potato Co., 28 Agric. Dec. 511.

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67 Complaint,

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Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach of contract notify the seller of the breach or be barred from any remedy. Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc., 42 Agric. Dec. 1194 (1985);Granada Marketing Co. v. Ben Gatz Co., 37 Agric. Dec. 448 (1978).

The purpose of the requirement is to defeat commercial bad faith; i.e., if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the breach by taking advantage of U.C.C. § 2-515, which gives either party upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence. *A. C. Carpenter, Inc. v. Boyer Potato Chips, 28 Agric. Dec. 1557, 1560 (1969).*

In the instant case, Complainant denies it was notified and Respondent has not furnished any evidence that it provided timely notification to Complainant and is thereby barred from any remedy. Finding no evidence Complainant breached the contract, we find Respondent is liable to Complainant for the unpaid balance of $ 450.50.

Complainant's invoice number 07-3194

This shipment involves 58-35 count bins (41,984 pounds) of seeded watermelons Respondent purchased for a total agreed price of $ 4,618.24 f.o.b. 68 The corresponding bill of lading is signed by the truck driver, "Roldan R Gonzalez Rolgon Corp, as agent of Respondent and shows Complainant shipped the

watermelons on June 15, 2007, in a trailer with license plates number C1434wFL, and with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. 69 On or about June 17, 2007, Respondent sold 58 bins of watermelons, to Wal-Mart, New Caney, Texas, which rejected the watermelons to Respondent on June 18, 2007. 70 Respondent resold the truckload of watermelons to Roger Ramos Produce, Houston, Texas. Respondent's invoice number 07-1039 shows it used the same trucking company, Rolgon, as shown on Complainant's original invoice. 71 Respondent paid Complainant $ 1,932.58 with its check number 1132, dated August 9, 2007, leaving an unpaid balance of $ 2,685.66, 72 which Complainant seeks to recover in this proceeding.

On June 18, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business, Roger Ramos Produce, Houston, Texas, on 58 bins of watermelons. The inspector verified the bin count of the watermelons, which were loaded at the time of the inspection in a trailer with identification number 2141CB FL, which does not match the truck identification number shown on the bill of lading. In addition, the weight of the watermelons shown on the inspection report (39,150 pounds) does not match the (41,984 pounds) invoiced weight. 73 The inspection was restricted to the 25 bins nearest the rear door of the trailer. The pulp temperatures ranged from 60 to 62 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by a total of 22% damage by quality and condition defects, including 5% serious damage by quality and condition defects. 74

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68 Complaint, P4g, and Ex. 18.

69 Complaint, Ex. 19.

70 Answer, Ex. 19, and ROI, Ex. C, p. 29.

71 Answer, Ex. 17.

72 Complaint, Ex. 20.

----------End Footnotes----------

73 See, n. 2.

74 Complaint, Ex. 22.

----------End Footnotes----------

Respondent has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce is an act of acceptance. 75 A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. 76 The burden to prove a breach of contract rests with the buyer of accepted goods. 77

Before we can consider whether the evidence supports a breach of contract by Complainant, we must consider the following statement by Complainant in its Complaint:

No trouble was reported on this file, . . . federal inspection provided does not match our load's identification . . . please note that inspection DOES NOT match our load's license plates and/or weight shipped; therefore, leaving us skeptical about this inspection . . . 78

In its defense, Respondent asserts the following in its sworn Answer: The inspection taken on Farmers Select 07- 3194 on the said commodity. Was taken in a timely manner and Famers Select was notified of the actions. The license plate number was written down incorrectly at the loading dock. Enclosed in (Exhibit 19-22) you will notice that the same carrier name is on all the bill and rejection notice. 79

Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach of contract notify the seller of the breach or be barred from any remedy. Produce Specialists of Arizona, Inc. v. Gulfport Tomatoes, Inc., 42 Agric. Dec. 1194 (1985);Granada Marketing Co. v. Ben Gatz Co., 37 Agric. Dec. 448 (1978).

The purpose of the requirement is to defeat commercial bad faith; *i.e.*, if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the breach by taking advantage of U.C.C. § 2-515, which gives either party upon reasonable notification to the other, the right to inspect, test and sample the goods or have a third party perform similar functions for the purpose of ascertaining the facts and preserving evidence. *A. C. Carpenter, Inc. v. Boyer Potato Chips, 28 Agric. Dec. 1557, 1560 (1969).*

In *Quail Valley Marketing, Inc. v. John A. Cottle, d/b/a Valley Fresh Produce, 60 Agric. Dec. 318 (2000),* where the buyer knew how to contact the seller, and had the inspection results but delayed conveying them while sales were made, we found the buyer did not act in good faith, and notice of breach was not timely because the seller was prevented from procuring a U.S.D.A. appeal inspection. Similarly, here, Complainant denies it was notified and Respondent has not furnished any evidence that it provided timely notification to Complainant and is thereby barred from any remedy. We find Respondent is liable to Complainant for the unpaid balance of $ 2,685.66.

Complainant's invoice number 07-3164

This shipment involves 54-45 count bins (38,294 pounds) of seeded watermelons Respondent purchased for a total agreed price of $ 3,637.93 f.o.b. 80 The corresponding bill of lading is signed by the truck driver as agent of Respondent and shows Complainant shipped the watermelons on June 16, 2007, in a trailer with license plate

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75 See, 7 C.F.R. § 46.2 (dd)(3).

76 *Ocean Breeze Export, Inc., 60 Agric. Dec. 840; World Wide Imp-Ex, Inc., 47 Agric. Dec. 353.*

77 See, U.C.C. § 2-607(4). *See, also,* The Grower-Shipper Potato Co., 28 Agric. Dec. 511.

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78 Complaint, PP4(g) and 5.

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79 Answer, P5.

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80 Complaint, P4h, and Ex. 23.

number 78810KS/465085, with instructions to maintain temperature between 55 and 60 degrees Fahrenheit or if vented van, keep all vents open and truck moving at all times. 81 On or about June 16, 2007, Respondent sold 54 bins of red seeded watermelons, to a customer in Overland Park, Kansas, in the same trailer used by Complainant with license plate numbers 78810/465085. 82 Respondent alleges problems with the watermelons on arrival. 83 Respondent paid Complainant $ 1,697.59, leaving an unpaid balance of $ 1,940.34, 84 which Complainant seeks to recover in this proceeding.

On June 18, 2007, the U.S.D.A. issued an inspection report at Respondent's customer's place of business in Overland Park, Kansas, on 54 bins (38,450 pounds) of watermelons. This weight does not match the (38,294 pounds) invoiced weight of the watermelons. 85 The watermelons were unloaded at the time of the inspection and

the inspector verified the bin count. The pulp temperatures ranged from 62 to 64 degrees Fahrenheit at the time of the inspection. The inspection revealed the watermelons were affected by a total of 25% damage by quality and condition defects, including 3% serious damage by condition defects. 86

Respondent has not provided any evidence it attempted to reject any of the watermelons to Complainant. Failure to reject produce is an act of acceptance. 87 A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from any breach of contract by the seller. 88 The burden toprove a breach of contract rests with the buyer of accepted goods. 89 Before we can consider whether the evidence supports a breach of contract by Complainant, we must consider the following statement by Complainant in its Complaint:

> . . . (no trouble reported on this load, no federal inspection provided, unauthorized deduction). 90

In its defense, Respondent asserts the following in its sworn Answer:

Where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach of contract notify the seller of the breach or be barred from any remedy. 91 The purpose of the requirement is to defeat commercial bad faith; i.e., if the seller is notified of a breach within a reasonable time he has the opportunity to ascertain for himself the nature and extent of the

breach by taking advantage of U.C.C. § 2- 515, which gives either party upon reasonable notification to the other, the right to inspect, test and sample the

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81 ROI, Ex. A, p. 26.

82 Answer, Ex. 30.

83 Answer, Ex. 28-29.

84 Complaint, P4h, and Ex. 25.

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85 See, n. 3.

86 Answer, Ex. 27.

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87 See, 7 C.F.R. § 46.2 (dd)(3).

88 ***Ocean Breeze Export, Inc., 60 Agric. Dec. 840; World Wide Imp-Ex, Inc., 47 Agric. Dec. 353.***

89 See, U.C.C. § 2-607(4). ***See, also,*** **The Grower-Shipper Potato Co., 28 Agric. Dec. 511.**

90 Complaint, P4(h).

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91 Produce Specialists of Arizona, Inc., 42 Agric. Dec. 1194; Granada Marketing Co., 37 Agric. Dec. 448.

In ***Quail Valley Marketing, Inc. v. John A. Cottle, d/b/a Valley Fresh Produce, 60 Agric. Dec. 318 (2000),*** **where the buyer knew how to contact the seller, and had the inspection results but delayed conveying them while sales were made, we found the buyer did not act in good faith, and notice of breach was not timely because the seller was prevented from procuring a U.S.D.A. appeal inspection. Similarly, here, Complainant denies it was notified and Respondent has not furnished any evidence that it provided timely notification to Complainant and is thereby barred from any remedy. However, Respondent asserts in its sworn Answer that Complainant agreed to let its customer handle the watermelons on an open basis. 93 The party who claims the contract was modified has the burden of proof. 94 Respondent has not provided any evidence to prove Complainant agreed to amend any part of the contract. Finding no evidence Complainant breached the contract or agreed to amend the terms thereof, we find Respondent liable to Complainant for the unpaid balance of $ 1,940.34.**

The following table summarizes our findings, which were based upon the statements and evidence submitted by the parties for the ten transactions discussed above:

Shipment Number	Invoice or Contract	Respondent's Puchase	Agreed Contract

	Number	Order Number	Price
1	**07 3005**	**572**	**$ 725.00**
2	**07 3034**	**605**	**$ 825.00**
3	**07 3044**	**611**	**$ 555.00**
4	**07 3063**	**623A**	**$ 7,530.00**
5	**07 3091A**	**558**	**$ 346.25**
6	**07 3113**	**1005**	**$ 4,071.61**
7	**07 3115**	**1007**	**$ 5,233.41**
8	**07 3117**	**1020**	**$ 3,975.09**
9	**07 3194**	**1038**	**$ 4,618.24**
10	**07 3164**	**1022**	**$ 3,637.93**

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92 ***A. C. Carpenter, Inc., 28 Agric. Dec. 1557, 1560.***

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93 Answer, P4h.

94 Regency Packing Co., Inc., 42 Agric. Dec. 2042; F. H. Hogue Prod. Co., 33 Agric. Dec. 451.

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Shipment Number Number	**Invoice or Contract**	**Respondent's Puchase Order Number**	**Agreed Contract Price**
			$ 31,517.53

Shipment Number	**Amount Paid by Respondent**	**Respondent's Damages**	**Amount Rspondent owes to Complainant**
1	$ 725.00		$ 0.00
2	$ 800.00		$ 25.00

3	$ 495.00		$ 60.00
4	$ 3,738.25		$ 3,791.75
5	$ 346.25	$ 1,385.00	($ 1,385.00)
6	$ 3,594.25		$ 477.36
7	$ 825.00		$ 4,408.41
8	$ 3,524.59		$ 450.50
9	$ 1,932.58		$ 2,685.66
10	$ 1,697.59		$ 1,940.34
	$ 17,678.51	$ 1,385.00	$12,454.02

As shown on the table above, after we deducted Respondent's total payments of $ 17,678.51, and Respondent's damages of $ 1,385.00 from the total agreed contract price of $ 31,517.53, we find Respondent liable to Complainant in the amount of $ 12,454.02 for the mixed vegetables Respondent purchased from Complainant in the ten transactions.

Respondent, in further defense of its failure to pay this amount, asserts it is owed $ 3,876.48 by Complainant based upon a separate and unrelated transaction with Complainant that occurred on August 29, 2007, in accordance with its purchase order number 07-1575. 95 This transaction was not included by Complainant during the Department's informal or formal proceedings. Respondent is thereby asserting a Counterclaim, which must be accompanied by the required handling fee, 96 which Respondent did not submit. Therefore, we are unable to hear Respondent's Counterclaim for $ 3,876.48.

Respondent's failure to pay Complainant $ 12,454.02 is a violation of Section 2 of the Act for which reparation should be awarded to Complainant. Section 5(a) of the Act requires we award to the person or persons injured by a violation of Section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co., 269 U.S. 217 (1925); Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co., 242 U.S. 288 (1916).* Since the Secretary is charged with the duty of awarding damages, the Secretary also has the duty, where appropriate, to award interest. Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc., 29 Agric. Dec. 978 (1970)*;* John W. Scherer v. Manhattan Pickle Co., 29 Agric. Dec. 335 (1970); and W.D. Crockett v. Producers Marketing Association, Inc., 22 Agric. Dec. 66 (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 International, LLC v. Bayche Companies, Inc., PACA Docket No. R-05-118, Order on Reconsideration, 65 Agric. Dec. 669 (2006).*

Complainant in this action paid $ 300.00 to file its formal Complaint. Pursuant to *7 U.S.C. § 499e*(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent shall pay Complainant as reparation $ 12,454.02, with interest thereon at the rate of 0.41 % per annum from July 1, 2007, until paid, plus the amount of $ 300.00.

Copies of this Order shall be served upon the parties.